THE POST-*ZELMAN* VOUCHER BATTLEGROUND: WHERE TO TURN AFTER FEDERAL CHALLENGES TO BLAINE AMENDMENTS FAIL

LUKE A. LANTTA*

I

INTRODUCTION

School voucher proponents who think that the Supreme Court's decision in *Zelman v. Simmons-Harris*[1] was the definitive victory in the decades-old fight over indirect funding for nonpublic schools are gravely mistaken. The U.S. Constitution's Establishment Clause[2] could prove to be a much smaller hurdle to the voucher movement than the clauses contained in most state constitutions. While these clauses vary, they are all more stringent than the Establishment Clause regarding public funding of nonpublic institutions. Some of these clauses explicitly prohibit both direct and indirect aid to sectarian schools.[3] Other states, while not explicitly prohibiting indirect aid, suggest that indirect aid is prohibited.[4] Still other states do not distinguish between sectarian and secular nonpublic schools; they instead prohibit public funding for any nonpublic school.[5] One state, Virgina, specifically allows funding only for nonsectarian nonpublic schools.[6] Finally, one state, Michigan, specifically prohibits vouch-

---

This Article is also available at http://www.law.duke.edu/journals/lcp.

* J.D., Duke University School of Law.

1. 536 U.S. 639 (2002) (upholding Cleveland voucher program because individuals chose where the voucher funds went and thus the funds flowed only indirectly to religious schools).

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

3. *See, e.g.*, GA. CONST. art. I, § 2, para. VII ("No money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect, cult, or religious denomination or of any sectarian institution.").

4. *See, e.g.*, COLO. CONST. art. IX, § 7:

> Neither the general assembly, nor any county, city, town, township, school district or other public corporation, shall ever make any appropriation, or pay from any public fund or moneys whatever, anything in aid of any church or sectarian society, or for any sectarian purpose, or to help support or sustain any school, academy, seminary, college, university or other literary or scientific institution, controlled by any church or sectarian denomination whatsoever; nor shall any grant or donation of land, money or other personal property, ever be made by the state, or any such public corporation to any church, or for any sectarian purpose.

5. *See, e.g.*, HAW. CONST. art. X, § 1 ("[N]or shall public funds be appropriated for the support or benefit of any sectarian or private educational institution.").

6. VA. CONST. art. 8, § 10:

> No appropriation of public funds shall be made to any school or institution of learning not owned or exclusively controlled by the State or some political subdivision thereof; provided,

ers.[7] These clauses are all commonly referred to as "Blaine amendments,"[8] and they are the next targets in the war over vouchers.

Recognizing the obstacles posed by state constitutions, voucher proponents—such as the Becket Fund for Religious Liberty[9] and the Institute for Justice—have filed or are planning to file suits in at least six states.[10] Inspired by *Zelman*, voucher advocates seek to create enough conflicting opinions in district and circuit courts that the Supreme Court will be forced to confront the issue and strike down Blaine amendments across the states.[11] These voucher advocates believe that "[t]he Blaine Amendments are vulnerable to challenge under the Free Exercise Clause[12] and the Equal Protection Clause,[13] both because of

---

first, that the General Assembly may, and the governing bodies of the several counties, cities and towns may, subject to such limitations as may be imposed by the General Assembly, appropriate funds for educational purposes which may be expended in furtherance of elementary, secondary, collegiate or graduate education of Virginia students in public and nonsectarian private schools and institutions of learning, in addition to those owned or exclusively controlled by the State or any such county, city or town; second, that the General Assembly may appropriate funds to an agency, or to a school or institution of learning owned or controlled by an agency, created and established by two or more States under a joint agreement to which this State is a party for the purpose of providing educational facilities for the citizens of the several States joining in such agreement; third, that counties, cities, towns, and districts may make appropriations to nonsectarian schools of manual, industrial, or technical training, and also to any school or institution of learning owned or exclusively controlled by such county, city, town, or school district.

7. MICH. CONST. art. 8, § 2:

No public monies or property shall be appropriated or paid or any public credit utilized, by the legislature or any other political subdivision or agency of the state directly or indirectly to aid or maintain any private, denominational or other nonpublic, pre-elementary, elementary, or secondary school. No payment, credit, tax benefit, exemption or deductions, tuition voucher, subsidy, grant or loan of public monies or property shall be provided, directly or indirectly, to support the attendance of any student or the employment of any person at any such nonpublic school or at any location or institution where instruction is offered in whole or in part to such nonpublic school students.

8. As will be made clearer after the brief historical review of the state Blaine amendments below, the name "Blaine amendment" is really a misnomer. The "original" Blaine amendment was defeated in the U.S. Senate, and the provisions that resemble it in the various state constitutions vary significantly in their terminology and in the eras in which they were passed. The reason that they are collectively referred to as "Blaine amendments" is that, though varying in their specific language, they all have the same intended effect the federal Blaine Amendment had—prohibition of public funds to support religious institutions. Hence, the phrase "Blaine amendments" here will refer to all of these state amendments.

9. For an example of the Becket Fund's activities, see Brief of Amicus Curiae Becket Fund for Religious Liberty, State *ex rel.* Gallwey v. Grimm, 48 P.3d 274 (Wash. 2002) (No. 68565-7) [hereinafter Becket Fund Brief].

10. Mary Leonard, *Proponents of Vouchers See Opening Planning Suits in Six States, Including Mass.*, BOSTON GLOBE, Nov. 18, 2002, at A1 (claiming that voucher proponents have targeted Massachusetts, Maine, and Vermont, and other states).

11. *Id.*

12. U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, *or prohibiting the free exercise thereof*.") (emphasis added).

13. *Id.* at amend. XIV, § 1 ("No state shall . . . deny to any person within its jurisdiction the equal protection of the laws.").

their discrimination against religious families and because of their sordid past."[14] In focusing solely on federal challenges to the state constitutions, however, these advocates ignore the very real possibility of failure at the federal level. While advocates liken the significance of the *Zelman* decision to that of *Brown v. Board of Education*,[15] they must remember that *Brown* has still not led to complete school desegregation[16]—the supposed intent of the decision. To fulfill their goals, voucher advocates must travel down a long road, one that will likely not end with a single Supreme Court victory that strikes down Blaine amendments. If the pro-voucher camp's efforts at the federal level turn out to be for naught, they will be forced to return to battle it out in the individual states, seeking victory by sculpting voucher programs that fit within existing state Blaine amendments—a potentially successful possibility.

This Note will briefly review the history of Blaine amendments, how voucher advocates believe the history of these amendments will, in part, lead them to victory on federal grounds, and ultimately how this strategy will fail them. Then this Note will examine how voucher programs could fit within the existing Blaine amendment structure in most states, leaving the remaining states—where a voucher program simply could not be interpreted to fit within a Blaine amendment framework—to be swayed by political processes.[17]

II

THE BIRTH OF BLAINE AMENDMENTS

A. The "Original" Blaine Amendment

Upon recognizing the overwhelming political value of, and public support for, President Ulysses S. Grant's 1875 proposal to eliminate direct and indirect support for sectarian schools,[18] Representative James G. Blaine introduced to

---

14. Eric W. Treene, *The Grand Finale is Just the Beginning: School Choice and the Coming Battle Over Blaine Amendments* 12, The Federalist Society White Papers, *at* http://fedsoc.org/pdf/FedSoc BlaineWP.html.pdf (last visited Jan. 27, 2004).

15. Avi Schick, *Veni, Vidi, Vouchers*, SLATE (Sept. 17, 2002), *at* http://slate.msn.com/id/2071085/ (noting that "President Bush characterized the decision as 'just as historic' as *Brown*").

16. *See, e.g.*, Edward Blum & Roger Clegg, *Chilling Suits: Denying Fees Will Allow Segregation*, FULTON COUNTY DAILY REP., Nov. 29, 2001, at 6 (noting that more than 400 school districts are still under judicial desegregation supervision).

17. The political process, up to this point, has been largely unsuccessful, as evidenced by the failed voucher ballot proposals in California and Michigan in 2000.

18. In at least two particular instances Grant gave public support for the objectives embodied in Blaine's amendment. First, at a convention of the Society of the Army of the Tennessee meeting in Des Moines, Iowa, Grant delivered a speech in which he stated:

> Encourage free schools, and resolve that not one dollar, appropriated for their support, shall be appropriated to the support of any sectarian schools. Resolve that neither the State nor Nation, nor both combined shall support institutions of learning other than those sufficient to afford to every child growing up in the land the opportunity of a good common school education, unmixed with sectarian, pagan, or atheistical dogmas.

Steven K. Green, *The Blaine Amendment Reconsidered*, 36 AM. J. LEGAL HIST. 38, 47 (1992) (quoting Ulysses S. Grant, Address at the Society of the Army of the Tennessee convention (Sept. 30, 1875), *in* THE INDEX, Oct. 28, 1875, at 513). Grant echoed these sentiments in his annual message to Congress:

the House of Representatives an amendment to the U.S. Constitution that provided:

> 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 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.[19]

Though the amendment overwhelmingly passed the House by a vote of 180 to 7,[20] it failed to garner the two-thirds supermajority required in the Senate.[21]

Two primary issues drove public and thus political, support for Blaine's amendment. The first issue was a concern over "public funding of sectarian education."[22] Once Catholics "comprised a majority or near-majority of the church-going population" in some northeastern cities, their "sectarian schools" started receiving indirect public funding.[23] This, in turn, led to the call by Protestants "for legislation prohibiting sectarian control over public schools and the diversion of public funds to religious institutions."[24] The second concern was the "issue of religious exercises in the public schools."[25] Catholics, largely unsuccessful in securing direct or indirect funding, redirected their attention to challenging the Protestant doctrines promoted in the public schools—Bible reading and other Protestant religious practices.[26] Exploiting these sentiments, Blaine hoped to catapult himself into the presidency.

> I suggest for your earnest consideration, and most earnestly recommend it, that a constitutional amendment be submitted to the legislatures of the several States for ratification . . . forbidding the teaching in said schools of religious, atheistic, or pagan tenets; and prohibiting the granting of any school funds or taxes, or any part thereof, either by the legislative, municipal, or other authority, for the benefit or in aid, directly or indirectly, of any religious sect or denomination, or in aid or for the benefit of any other object of any nature or kind whatever.

Id. at 52 (quoting from Ulysses S. Grant, Annual Address to Congress (Dec. 7, 1875), *in* THE INDEX, Dec. 16, 1875, at 593). Through these speeches, Grant was attempting to align the Republic Party with the Protestant cause. *Id.* at 48.

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

20. 4 CONG. REC. 5191 (1876).

21. The amendment passed the Senate by a vote of 28 to 16 but fell short of the supermajority by four votes. 4 CONG. REC. 5595 (1876). Twenty-seven Senators were absent from the vote, most notably then-Senator James G. Blaine. Green, *supra* note 18, at 67.

22. Green, *supra* note 18, at 42.

23. JOHN HIGHAM, STRANGERS IN THE LAND: PATTERNS OF AMERICAN NATIVISM 1860-1925, at 28 (1981).

24. Green, *supra* note 18, at 43.

25. *Id.* at 42.

26. *Id.* at 44 (citing Vincent P. Lannie, *Alienation in America: The Immigrant Catholic and Public Education in Pre-Civil War America*, 32 REV. POL. 503 (1970)). Again, like their efforts to seek funding for their schools, Catholics were largely unsuccessful in these pre-Civil War challenges. *See, e.g.*, Commonwealth v. Cooke, 7 AM. L. REG. 417, 419 (Mass. Police Ct. 1859) (allowing corporal punishment of a Catholic student who refused to recite the Ten Commandments from the King James Bible); Donahoe v. Richards, 38 Me. 376 (1854) (upholding a state statute under which a child was expelled from school for refusing to read from King James Bible); Ferriter v. Tyler, 48 Vt. 444 (1876) (allowing expulsion of Catholic students who missed classes to attend services on a Catholic holy day of obligation). For a more general discussion of Protestant control of education during this period, see Daniel J. Morrissey, *The Separation of Church and State: An American-Catholic Perspective*, 47 CATH. U. L. REV. 1 (1997).

Although there is much contention over the exact substance of the sentiments Blaine intended to exploit in his quest for the presidency, they indicated the rising nativism that was characteristic of the times.[27] Nativism of this period could best be defined as anti-Catholic sentiment fueled by the ever-increasing number of Irish immigrants and their subsequent increase in political power in northern cities and states.[28] Few disagree that anti-Catholic nativism characterized this period of history, for "[i]n America, anti-Catholicism is a cultural fact"[29] as it "was rooted in English culture and was part of the cultural baggage of British America."[30] Whether Blaine himself was anti-Catholic is irrelevant to the discussion,[31] for his use of the amendment was purely a political tool to gain the anti-Catholic vote. Blaine knew that his amendment would be perceived as anti-Catholic and supportive of nativism.[32] More importantly, the public perceived, supported, and rallied around the amendment the way Blaine intended.[33] *The Nation* was quick to point out that

> Mr. Blaine did, indeed, bring forward the opening of Congress a Constitutional amendment directed against the Catholics, but the anti-Catholic excitement was, as every one knows now, a mere flurry; and all that Mr. Blaine 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.[34]

Though the amendment's time on the national stage may have been brief and Blaine's personal attachment to it fleeting, the ideological bases—including anti-Catholicism—that fueled its appeal flourished on the state level and im-

---

27. It was no secret that the Republican Party of the late 1800s catered to such anti-Catholic organizations as the American Protective Association. In fact, its strength contributed to the elections of such politicians as William McKinley in his reelection as Ohio governor in 1893. HIGHAM, *supra* note 23, at 83-84.

28. *Id.* at 79. For a more in-depth analysis of the roots of anti-Catholic animus in the United States see RAY ALLEN BILLINGTON, THE PROTESTANT CRUSADE 1800-1860: A STUDY OF THE ORIGINS OF AMERICAN NATIVISM 1-25 (1938).

29. Michael deHaven Newsom, *The American Protestant Empire: A Historical Perspective*, 40 WASHBURN L.J. 187, 219 n.258 (2001).

30. George Dargo, *Religious Toleration and Its Limits in Early America*, 16 N. ILL. U. L. REV. 341, 354 (1996).

31. In fact, a review of Blaine's personal history might suggest that he was personally indifferent to Catholicism. Though Blaine's paternal ancestors "identified with the Presbyterian church," his mother was a "devoted Catholic." HENRY DAVENPORT NORTHROP, LIFE AND PUBLIC SERVICES OF HON. JAMES G. BLAINE 21 (Philadelphia, H.J. Smith & Co. 1893). Speaking of his mother's religion, Blaine said that he would not "speak a disrespectful word of my mother's religion, and no pressure will draw me into any avowal of hostility or unfriendliness to Catholics, though I have never received, and do not expect, any political support from them." *Id.* The Kennebec *Journal* identified Blaine as the equivalent of a Presbyterian. *Id.* at 22. Also, surprisingly, "Blaine did not take part in any of the debates surrounding the amendment, even though he had ample opportunity to influence the measure in both chambers." Green, *supra* note 18, at 54. Once Blaine lost the presidential nomination he effectively abandoned the proposed amendment. *Id.*

32. Green, *supra* note 18, at 51 n.84 (citing Steven K. Green, The National Reform Association and the Religious Amendments to the Constitution, 1864-1876 (1987) (unpublished master's thesis, University of North Carolina, Chapel Hill) (on file with the Library of the University of North Carolina at Chapel Hill)).

33. In fact, after the first of President Grant's speeches on the issue of school funding, "[t]he sole voice of protest came from the Catholic Church." *Id.* at 48.

34. *Id.* at 54 (quoting from *The Nation*, Mar. 16, 1876, at 173).

pressed its mark. Today we can still see its remnants—including the ill-motives—in a majority of the state constitutions.[35]

B. The Fight Moves to the States

New York became the first state to pass a state Blaine amendment[36] when, in 1894, it began prohibiting direct and indirect aid to sectarian schools.[37] Within five years, "fourteen states had joined New York in passing measures prohibiting the division of public school funds, often in the form of constitutional amendments. By 1890, the number of states with constitutional prohibitions against the transfer of public funds would rise to twenty-nine."[38] Adoption of Blaine amendments, however, was not wholly left up to the states themselves.

When Congress passed enabling legislation dividing the Dakotas into two states, it required them, as well as Montana and Washington, to incorporate language analogous to that of the Blaine amendment in their respective state constitutions as a precondition to admittance into the Union.[39] This experience was typical for the western states. New Mexico, Arizona, and Idaho were all required to adopt constitutional provisions prohibiting the use of public funds to support "sectarian" institutions as a prerequisite to statehood.[40] These amendments, as well as those of all other states that contain similar language, can be conveniently divided into four general categories that each require dis-

35. *See, e.g.*, Green, *supra* note 18, at 38, 41-67, 69; Douglas Laycock, *The Underlying Unity of Separation & Neutrality*, 46 EMORY L.J. 43, 50-53 (1997); Joseph P. Viteritti, *Blaine's Wake: School Choice, the First Amendment, & State Constitutional Law*, 21 HARV. J.L. & PUB POL'Y 657, 659, 669-75 (1998). This is not to say, however, that anti-Catholic, anti-immigrant animus was the *sole* motivating factor in the passage of state Blaine amendments. An analysis of *all* the factors that led to the passage of most of these amendments is beyond the scope of this Note. The focus on anti-Catholicism here is for two reasons: (1) while anti-Catholicism was not the sole motivating factor, it was a primary motivation in the passage of these amendments, *supra* Part II.A; and (2) anti-Catholicism is the focal point for voucher proponents when they point to the state amendments' nefarious histories, *infra* Part II.C.

36. More precisely, New York was the first in the post-federal Blaine Amendment era. A number of states had pre-federal Blaine Amendment prohibitions on public funds supporting religious institutions. *See, e.g.*, MASS. CONST. of 1780, amend. art. XVIII (1855), (*superseded by* MASS. CONST. amend. arts. XLVI, XCVI, CIII); MINN. CONST. art. XIII, § 2 (adopted 1857); OHIO CONST. art. VI, § 2 (adopted 1851).

37. The amendment provided that:

> Neither the state nor any subdivision thereof, shall use its property or credit or any public money . . . directly or indirectly, in aid or maintenance . . . of any school or institution of learning wholly or in part under the control or direction of any religious denomination, or in which any denomination tenet or doctrine is taught.

N.Y. CONST. art. IX, § 4 (as passed in 1894). It should be noted, however, that New York did have a similar law in effect since 1844. 1844 N.Y. Laws, ch. 320, § 12.

38. Green, *supra* note 18, at 43 (citing WILLIAM BLAKELY, AMERICAN STATE PAPERS 237-66 (1890)).

39. Act of Feb. 22, 1889, ch. 180, § 4, 25 Stat. 676. *See* Robert F. Utter & Edward J. Larson, *Church and State on the Frontier: The History of the Establishment Clauses in the Washington State Constitution*, 15 HASTINGS CONST. L.Q. 451, 458-69 (1988). Interestingly, the United States Supreme Court does not consider the enabling acts' requirements to adopt language markedly similar to the federal Blaine amendment to be Blaine amendments. Locke v. Davey, No. 02-1315, 2004 U.S. LEXIS 1626, at *20 n.7 (Feb. 25, 2004).

40. Act of June 20, 1910, ch. 310, § 26, 36 Stat. 557 (enabling act for New Mexico and Arizona); Act of July 3, 1890, ch. 656, § 8, 26 Stat. 215 (enabling act for Idaho).

tinctly different approaches for creating a voucher system.[41] Before we can categorize the various amendments, however, we must first examine why current voucher proponents think that the history of the federal Blaine Amendment and subsequent state Blaine amendments renders all Blaine amendments unconstitutional.

C. Why Voucher Advocates Argue State Amendments are Unconstitutional and Why These Challenges Might Fail

Based on the history of the federal Blaine amendment, and not necessarily the history of the individual state constitutional provisions, voucher advocates have initiated a multi-headed approach to challenging state Blaine amendments. This strategy includes urging a narrow interpretation of the respective state Blaine amendments, amending state constitutions, and challenging the amendments based on the U.S. Constitution.[42]

1. Narrow interpretation

Even though advocates admit that the first strategy—encouraging a narrow interpretation of the respective state constitutional provisions—was successful in Ohio and Wisconsin and employed in Washington, little elaboration of this strategy is given in subsequent discussion, though admittedly it could be successful "in states where the case law interpreting a state's Blaine amendment has been mixed."[43] This strategy, likely to be the most fruitful, is all but ignored by voucher advocates—even outside states where the case law interpreting a state's Blaine amendment is mixed.

2. Constitutional amendments

Despite the defeat of the 2000 voucher ballot proposals in Michigan and California by greater than a margin of two to one,[44] the Blaine amendment challengers contend that this was because the plans in those states were particularly complicated.[45] Yet, every statewide ballot proposal attempting to amend a state constitution to permit vouchers has failed. Although proponents contend that a "straightforward constitutional amendment to permit school choice would be much more likely to succeed,"[46] they must recognize that such populist appeals are unlikely to succeed given the current socio-political climate regarding public

41. Discussion of the actual crafting and appropriate components of a voucher system that will withstand federal constitutional analysis is beyond the scope of this Note.

42. TREENE, *supra* note 14, at 11-13.

43. *Id.* at 11.

44. Michigan's Proposal 1 was defeated sixty-nine percent to thirty-one percent. California's Proposition 38 was defeated seventy-one percent to twenty-nine percent. Darci McConnell, *Educators Seek Voucher Backers' Help*, DET. NEWS, Nov. 15, 2000, at D1.

45. TREENE, *supra* note 14, at 11-12.

46. *Id.* at 12.

schools.[47] even if the "nefarious history behind the Blaine Amendment" is highlighted in those states whose history is "nefarious."[48]

While the factors that drove the defeat of the most recent voucher proposals were numerous, two warrant special attention because neither was addressed by the voucher proponents' arguments concerning why the Michigan and California proposals failed. First, there is little doubt that part of the push to maintain "neighborhood schools" is motivated, at least in part, by the same forces that drove northern states to have some of the most segregated schools in the nation.[49] Second, the voucher opponents spent an estimated $6 million fighting Michigan's Proposal 1 and an estimated $30 million fighting California's Proposition 38.[50] Moreover, these figures do not present the full picture, but are drawn from campaign finance reports that fail to include resources—public tax dollars—spent by voucher opponents. The Michigan Department of State's Compliance and Rules Division initially determined such spending violated its state's campaign finance act, but a subsequent Ingham County court decision stripped the Department of State's determination of any legal significance.[51] The evidence relied on by the Compliance and Rules Division showed without a doubt that public tax dollars and public school resources were used as a second arm of the anti-voucher coalition.[52] The Department of State's Compliance and Rules Division wrote to one offending school district:

> The Department wishes to be absolutely clear in its position regarding the enforcement of Section 57: it is up to the people, and not public bodies, to decide elections. Even if a school district or its employees believe a candidate or ballot question is not in their best interest, they may not utilize public resources to oppose the candidate or ballot question. Public body employees must use their own time and own resources to create and fund ballot question and candidate committees to engage in the political process.[53]

---

47. Public schools currently have both a high level of political and populist support, thus the argument by voucher opponents that vouchers drain money from public schools resonates particularly well.

48. *Id.* at 12. This, of course, fails to distinguish between the history of the federal Blaine Amendment and the individual state amendments. Moreover, this only highlights the multiplicity of complex factors behind Blaine amendments. Michigan's amendment, for example, is a quite recent addition to the state constitution and cannot be said to share the same "nefarious history" as states that adopted similar amendments shortly after the defeat of the federal Blaine Amendment.

49. *See* Allen G. Breed, *Race Redivides Schools as Courts End Busing*, WASH. TIMES, Dec. 29, 2002, *available at* http://www.freerepublic.com/focus/news/813630/posts (noting both that the most segregated schools are in the North and that "it's not avowed Southern segregationists who are leading the court fights for neighborhood schools, but affluent transplants who have settled in the region's fast-growing suburbs").

50. Jessica Sandham, *Voters Deliver Verdict on Host of State Ballot Questions*, EDUC. WK., Nov. 8, 2000, *at* http://www.edweek.org/ew/ewstory.cfm?slug=10web_ballot.h20.

51. Mark Hornbeck, *Judge Clears School Districts*, DET. NEWS, Oct. 6, 2000, at 1C.

52. There were at least 29 complaints filed against public school districts for using public resources to oppose Proposal 1. Spreadsheet of Complaints Filed for Violations of Section 57 of Michigan Campaign Finance Act by Public School Districts During 2000 Campaign Cycle, faxed from David E. Murley, Michigan Dep't of State Compliance and Rules Division to author (Apr. 1, 2003) (on file with author).

53. Letter from David E. Murley, Michigan Dep't of State Compliance and Rules Division, to James Redmond, Superintendent, Oakland Intermediate School District 8 (July 24, 2000) (on file with author).

In reaching its conclusions, the prosecutorial arm of Michigan's Department of State based its determination on a partially factual, argumentative, and speculative PowerPoint presentation and on e-mails sent out to the district's network suggesting the district organize an anti-voucher training session for teachers, union officials, and parent groups.[54] Voucher proponents simply cannot overcome these entrenched obstacles even if a more simplified proposal were presented to the electorate.

3. Federal constitutional challenges

The final strategy suggested by those that hope to establish tuition voucher programs is to challenge the state amendments on U.S. constitutional grounds. They suggest that the "Blaine Amendments are vulnerable to challenge under the Free Exercise Clause and Equal Protection Clause, both because of their discrimination against religious families and because of their sordid past."[55] This strategy has been promoted by these advocates in the media, presumably because one Supreme Court ruling could theoretically strike down all state amendments more quickly and more effectively than individual challenges could. Notwithstanding its potential efficacy, voucher advocates must question whether this truly is an effective strategy or merely a waste of resources.

In April 2001, the Becket Fund for Religious Liberty filed a brief in Washington challenging Article IX, Section 4 of the Washington state constitution[56] as unconstitutional under the Free Exercise Clause and the Equal Protection Clause of the Fourteenth Amendment.[57] In line with strategic frameworks employed by voucher proponents who make challenges on these grounds, the Becket Fund argues that these state constitutional provisions fail the neutrality test set forth by the Supreme Court in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*.[58] The Becket Fund also claims that, because the state Blaine amendments "explicitly treat 'sectarian' schools differently and worse than similarly situated 'nonsectarian' schools," they facially run afoul of the Free Exercise Clause as defined by the Supreme Court.[59] If the reviewing court dismisses their facial claims, the Becket Fund argues in the alternative that, based on the nativist history of the *federal* Blaine Amendment, the state provision still runs

54. *Id.* at 2-3.

55. TREENE, *supra* note 14, at 12.

56. WASH. CONST. art. IX, § 4 ("All schools maintained or supported wholly or in part by the public funds shall be forever free from sectarian control or influence.").

57. Becket Fund Brief, *supra* note 9, at 11-12.

58. 508 U.S. 520 (1993). In particular, as evidenced by the Becket Fund Brief, *supra* note 9, at 12, the proponents rely on the following standard the Supreme Court set forth for evaluating state laws under the Free Exercise Clause:

> Although a law targeting religious beliefs as such is never permissible, if the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral, and it is invalid unless it is justified by a compelling interest and is narrowly tailored to advance that interest.

Lukumi, 508 U.S. at 533.

59. Becket Fund Brief, *supra* note 9, at 12-13.

afoul of the Free Exercise Clause because the clause protects against "covert suppression of particular religious beliefs."[60]

The equal protection claim is based on the belief that Article IX, Section 4 triggers strict scrutiny "because religion, like race, is a suspect classification."[61] Moreover, the voucher proponents claim that strict scrutiny is required "because the free exercise of religion is a fundamental right."[62] As strict scrutiny requires the enacting state to have a compelling interest to justify any discrimination that results, the state Blaine amendments will probably fail for want of a compelling interest justifying the "discrimination against religious educational activities."[63] Finally, if strict scrutiny does not apply in an evaluation of state Blaine amendments, the Becket Fund argues that the Blaine amendments still violate the Equal Protection Clause under rational basis scrutiny.[64]

4. Problems with the federal challenges

The problems with the federal constitutional challenges to state Blaine amendments are insurmountable because voucher proponents rely on unsupportable premises that are in irreconcilable tension with other federal provisions and case law and that ultimately devalue the Free Exercise Clause.

First, to succeed on this level would require a fairly substantial reversal of the trend of Supreme Court Free Exercise jurisprudence. Although a comprehensive discussion of current Free Exercise jurisprudence is beyond the scope of this Note, the modern trend of Supreme Court Free Exercise jurisprudence does not appear to be very supportive of the voucher advocates' positions.[65] While the Supreme Court might have stated that religion and nonreligion may not be treated differently and that a government must show that the regulation "is in furtherance of a compelling governmental interest" and "is the least restrictive means of furthering that compelling governmental interest,"[66] it will be exceedingly difficult to demonstrate that the state constitutional provisions *substantially burden* a person's exercise of religion. Furthermore, the U.S. Supreme Court has explicitly allowed states to consider the "'far stricter' dictates

60. *Id.* at 13 (citing *Lukumi*, 508 U.S. at 534).

61. *Id.* at 15 (citing the statement in *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) that lists "'race, religion [and] alienage' as suspect classifications that trigger heightened scrutiny").

62. *Id.* (citing Johnson v. Robinson, 415 U.S. 361, 375 n.14 (1974); Fellowship Baptist Church v. Benton, 815 F.2d 485, 497 (8th Cir. 1987)).

63. *Id.*

64. In particular, the voucher advocates cite the following passage of *Romer v. Evans*, 517 U.S. 620, 633-34 (1996):

> A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense . . . . [I]f the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest.

Becket Fund Brief, *supra* note 9, at 16.

65. *See generally* CATHARINE COOKSON, REGULATING RELIGION: THE COURTS AND THE FREE EXERCISE CLAUSE (2001) (examining current Supreme Court free exercise jurisprudence).

66. Boerne v. Flores, 521 U.S. 507, 516 (1997).

of . . . [their] state constitution[s],"[67] which are not overridden by the federal Establishment Clause. Thus, it would seem that a state's stricter establishment clause—Blaine amendment—would not necessarily facially violate the Free Exercise Clause. Finally, the U.S. Supreme Court's recent decision in *Locke v. Davey*[68] virtually closes the door on the Free Exercise challenges entirely. In holding that Washington's collegiate Promise Scholarship program did not have to be extended to devotional theology majors and thus did not violate the Free Exercise Clause,[69] the Court preemptively gutted Free Exercise challenges in the voucher context in three major respects. First, the Court explicitly stated that "there are some state actions permitted by the *Establishment Clause* but not required by the *Free Exercise Clause*."[70] The Court's reasoning focused on the "play in the joints" between the Free Exercise Clause and the Establishment Clause, which allows a state to rely on its more restrictive state establishment clause to prohibit activity that the federal Establishment Clause would allow but the Free Exercise Clause does not compel.[71] This, in turn, lays the basis for the constitutionality of state Blaine amendments in whose history religious animosity is absent. The Court addressed the constitutionality of the state Blaine amendment and, in doing so, dealt another blow to the voucher proponents' strategy based on Free Exercise challenges. The Court, in briefly addressing the Blaine amendment claims advanced by the religious scholarship proponents, determined that the Washington constitutional provision was not a Blaine amendment and stated that "[n]either Davey nor *amici* have established a credible connection between the Blaine Amendment and Article I, § 11, the relevant constitutional provision." Thus, "the Blaine Amendment's history is simply not before us."[72] As a result, neither the history nor the text of the Washington constitutional amendment at issue suggested animus toward religion.[73] The third way in which the Court undermined the voucher proponents' Free Exercise arguments was a suggestion that a Free Exercise violation requires a substantial burden to the practice of religion. In determining that no Free Exercise violation existed, the Court noted that Washington's disfavor of religion was of a "far milder kind" than exists where a criminal or civil sanction exists against the practice of religion or where individuals must "choose between their religious beliefs and receiving a government benefit."[74] Thus, it seems that "*de minimis*" burdens on religious exercise do not violate the Free Exercise Clause, nor, in practice, do Blaine amendments.

---

67. Witters v. Wash. Dep't of Servs. for the Blind, 474 U.S. 481, 489 (1986) (instructing the Washington Supreme Court that it may consider its Blaine amendment on remand). The Court, however, did not rule out the possibility that Washington's Blaine amendment might violate the Free Exercise Clause. *Id.*

68. 2004 U.S. LEXIS 1626, at *5-6.

69. *See id*.

70. *Id.* at *11.

71. *Id*. at *11-13.

72. *Id.* at *20 n.7.

73. *Id.* at *22.

74. *Id.* at *14.

Second, the passage of time between the initial enactments of the state amendments and their federal constitutional challenges today undermines the claims of voucher advocates. Voucher proponents are quick to cite *Hunter v. Underwood*,[75] in which the U.S. Supreme Court struck down an Alabama voting restriction almost one hundred years after the legislature enacted it, for the proposition that the "passage of time, and the fact that [a] law was not implemented in the modern day with similar motivation, [does] not purge the taint of the constitutional amendment's origins."[76] Voucher proponents, unlike the complainants in *Hunter*, however, do not have the luxury of an *explicitly* nefarious animus in the history of the state amendments. While anti-Catholic animus was no doubt the impetus for the federal amendment, "that sentiment is rarely evident in the legislative debates surrounding the enactments"[77] of the various state amendments.

As the Supreme Court remarked in a different context, when examining congressional intent,

> [a] court will look to statements by legislators for guidance as to the purpose of the legislature, [but] [i]t is an entirely different matter [when] asked to void a statute that is, under well-settled criteria, constitutional on its face, on the basis of what fewer than a handful of Congressmen said about it. What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for us to eschew guesswork.[78]

In the Supreme Court's analysis of the Alabama voting restriction at issue in *Hunter*, the discriminating foundation for the amendment was uncontroverted and explicit throughout the convention at which the amendment was adopted.[79] The type of animus directed toward blacks, present in the legislative history of the Alabama voting amendment, is seldom found directed toward Catholics in the legislative histories of state Blaine amendments.

That "many if not most state constitutions have been re-ratified since the inclusion of the Blaine amendments, which probably 'cleanses' them of any improper motivation that may have initially existed,"[80] further complicates the voucher proponents' federal challenges. Again, voucher proponents use *Hunter v. Underwood* for the proposition that the re-ratification of state constitutions does not compensate for the unconstitutional motivation for their passage.[81] Yet, even if re-ratification does not cleanse unconstitutional motivation, voucher advocates cannot unequivocally demonstrate that the anti-Catholic animus was present when these state constitutional provisions were adopted. There simply is not the kind of recorded evidence present in *Hunter*, in which

75. 471 U.S. 222 (1985) (striking down Alabama constitutional amendment that disenfranchised people convicted of crimes of "moral turpitude" based on its original intent to discriminate against blacks).

76. TREENE, *supra* note 14, at 13.

77. Schick, *supra* note 15.

78. United States v. O'Brien, 391 U.S. 367, 384 (1968).

79. *Hunter*, 471 U.S. at 228-29.

80. Schick, *supra* note 15.

81. *Hunter*, 471 U.S. 222; TREENE, *supra* note 14, at 13.

the bigotry behind the Alabama constitutional provision was prevalent throughout the constitutional convention. Moreover, evidence of anti-Catholic animus behind the federal Blaine amendment cannot necessarily be imputed to the states, for even those enacted immediately following Blaine's amendment lack the same animus.[82] This is not to say that the states did not harbor the animus, only that the anti-Catholic animus is not documented in legislative debate as the racial bigotry was in *Hunter*. By re-ratifying the state constitutions, the religious animus that may have been contained in their original ratification may very well have been washed away.

Finally, voucher proponents may be quite surprised at the results if their federal challenges prevail.[83] If their belief that religion should be treated the same as nonreligion[84] for federal constitutional purposes is adopted by the Supreme Court, the result may very well weaken the special treatment afforded religion and erode its protected sphere.[85] For example, if the notion that religion and nonreligion must be treated equally were carried out to its fullest, there could be no basis for affording tax-exempt status to religious organizations when nonreligious organizations have no such luxury.[86] Carried even further down this slippery slope, this notion would undermine the goals of the Free Exercise Clause because if religion were to be treated exactly the same as nonreligion, religion would no longer be entitled to protection. The consequences are virtually endless if this belief advanced by the voucher advocates in their briefs were actually adopted by the Court.[87]

Yet, in the end, it is highly unlikely a reviewing court would even reach the merits of the voucher proponents' federal constitutional claims, for the doctrine of limiting construction[88] should provide reviewing courts with a tool to ease their way around the constitutional issues. Courts will be more willing to construe a state establishment clause narrowly than to construe it in a way that cre-

---

82. *See*, *e.g.*, Kotterman v. Killian, 972 P.2d 606, 624 (Ariz. 1999) (refusing to conclude that the anti-Catholic animus in the federal Blaine Amendment could be imputed to the Arizona state Blaine amendment).

83. For an example of a federal appeals court rejecting Establishment Clause, Equal Protection Clause, Free Exercise Clause, Due Process Clause, and Free Speech Clause claims by parents whose children attended religious schools excluded from a voucher program that provided grants only to nonreligious nonpublic school students, see Strout v. Albanese, 178 F.3d 57 (1st Cir. 1999).

84. Becket Fund Brief, *supra* note 9, at 14 (citing *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968) ("The First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion.")).

85. *See generally* Laura S. Underkuffler, *The Price of Vouchers for Religious Freedom*, 78 U. DET. MERCY L. REV. 463 (2001) (arguing that the establishment of a voucher regime will ultimately undermine the unique role religion has in U.S. society).

86. Nor could there exist any religious exception from anti-discrimination laws; requirements that employees accommodate religious practice; and countless other examples. Any privilege of religion in any way would be unconstitutional. *See id.*

87. *See, e.g.*, Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. CHI. L. REV. 1245 (1994) (advocating precisely the kind of equality between the religious and the non-religious that the voucher advocates do not want).

88. As advanced by the Supreme Court in NLRB v. Catholic Bishop of Chicago, 440 U.S. 490 (1979).

ates the type of constitutional conflict the voucher proponents seek. Encouragement of a narrow construction by the courts is the avenue voucher proponents could pursue once the state legislature adopts voucher legislation or the state's citizenry adopts a voucher program through a ballot proposal. Then voucher proponents can set their sights on what promises to be the more fruitful route—encouraging a narrow construction of the state Blaine amendments.

D. Categorizing the State Blaine Amendments

The generally accepted taxonomy set forth by Professor Frank R. Kemerer divides state constitutions into three general categories with respect to Blaine amendments:[89] restrictive,[90] permissive[91] and uncertain.[92] These, in turn, are divided into subcategories. This Note concerns only the most restrictive states, so it is necessary to recite the subdivisions only of the restrictive category.[93] Within the restrictive category are those states that have a direct prohibition on vouchers;[94] prohibit direct or indirect aid to sectarian private schools;[95] place a variation on the direct/indirect distinction by "prohibit[ing] expenditure of public monies that 'support or benefit,' 'support or sustain,' 'support or assist,' or 'are used by or in aid of' any sectarian school;"[96] prohibit public monies from being spent in the support or benefit of any private school;[97] allow public financial assistance solely for nonsectarian private schools;[98] contain provisions requiring

89. Frank R. Kemerer, *The Constitutional Dimension of School Vouchers*, 3 TEX. F. ON C.L. & C.R. 137, 162-79 (1998).

90. Kemerer lists as the "restrictive" states: Alaska, California, Delaware, Florida, Hawaii, Idaho, Kansas, Kentucky, Massachusetts, Michigan, Missouri, North Dakota, Oklahoma, South Dakota, Virginia, Washington, and Wyoming. *Id.* at 181-82.

91. The "permissive" states are: Alabama, Arizona, Maine, Maryland, Mississippi, Nebraska, New York, Pennsylvania, Rhode Island, South Carolina, Utah, and West Virginia. *Id.* In light of *Jackson v. Benson*, 578 N.W.2d 602 (Wis. 1998), Wisconsin, which Kemerer lists as "uncertain" should be included in the permissive category. Ohio, as well, should be moved from the category "uncertain" to "permissive" in light of *Simmons-Harris v. Goff*, 711 N.E.2d 203 (Ohio 1999).

92. The "uncertain" states are: Arkansas, Colorado, Connecticut, Georgia, Illinois, Indiana, Iowa, Louisiana, Minnesota, Montana, Nevada, New Hampshire, New Jersey, New Mexico, Oregon, Tennessee, and Texas. *Id.* Though the litigation pending in Vermont at the time of Kemerer's article that rendered it "uncertain" has been resolved, it should remain in this category as a result of *Chittenden Town Sch. Dist. v. Dep't of Educ.*, 738 A.2d 539 (Vt. 1999) (holding that the program would violate a provision in the Vermont constitution that was analogous to the federal Establishment Clause even though Vermont has no Blaine amendment—a holding that may have been discredited by the ruling in *Zelman*). It is uncertain how a post-*Zelman* challenge would fair in Vermont. However, we shall soon find out as the program has now been challenged post-*Zelman*. Leonard, *supra* note 10.

93. While undoubtedly the voucher advocates will encounter obstacles in the "permissive states," these states are small in number and are not the states in which they are currently launching their court battles.

94. Michigan is the only state to fall within this category. Kemerer, *supra* note 89 at 162.

95. Florida, Georgia, Montana, New York, and Oklahoma fall within this category. *Id.* at 163.

96. California, Colorado, Delaware, Idaho, Illinois, Minnesota, Missouri, North Dakota, South Dakota, Wyoming compose this category. Kemerer claims that this essentially has the effect of prohibiting indirect aid. *Id*. at 163-64.

97. Hawaii and Kansas compose this category. *Id*. at 164.

98. Only Virginia has this type of constitutional provision. *Id*.

that public monies be spent solely on public schools;[99] have a "public purpose doctrine;"[100] and those whose courts have interpreted their constitutional provisions strictly to prohibit public funds from flowing to nonpublic schools.[101] In total,

> there are seventeen states where strict anti-establishment provisions in state constitutions and/or the disinclination of state supreme court judges to allow state funds to flow directly or indirectly to sectarian educational institutions create an unfavorable legal climate for state voucher programs that encompass sectarian private schools. Of the seventeen, nine are concentrated in the western section of the country where public schooling has been the norm since statehood.[102]

While Kemerer concludes that in these states a "constitutional amendment may be the only way for proponents of such programs to be successful,"[103] another avenue may exist outside of Kemerer's unlikely scenario—urging a narrow interpretation of the state constitutional provisions, under which a narrowly tailored voucher program would survive judicial scrutiny.

III

CHALLENGING BLAINE AMENDMENTS ON THE STATE LEVEL

Though voucher proponents' strategies have not emphasized adoption of a narrow interpretation of a state's Blaine amendment—presumably because a narrow interpretation would not strike down the amendment—voucher proponents admit that urging a narrow interpretation has been successful in the past.[104] In fact, it is their only strategy that has worked thus far, as no reviewing court has yet struck down a state Blaine amendment, nor has any state adopted a constitutional amendment either adopting a voucher program or eliminating the Blaine language from its constitution. If their federal challenges fail—and they probably will—voucher advocates will be forced to turn to narrow construction arguments to establish voucher programs. While adoption of a narrow interpretation by a reviewing court will not lay the foundation for voucher programs in all states, neither will success of their federal challenges.[105] Urging a

99. The constitutions of California, Colorado, Massachusetts, Nebraska, New Mexico, Virginia, and Wyoming all contain this type of provision. Alabama and Pennsylvania's provisions can be overridden by a two-thirds vote in each house. Connecticut, Delaware, and Texas have similar provisions in their constitutions; however, only certain sources of funding are required to be spent solely on the public schools. *Id.* at 168.

100. Most states have such a constitutional provision that requires public monies to be spent on a public purpose. While this should not prove fatal to a voucher program in most cases, there are exceptions to that rule. *Id.* at 169 (citing *Fannin v. Williams*, 655 S.W.2d 480 (Ky. 1983) (holding that a public purpose is not served when nonpublic schools receive funding because nonpublic schools are not open to everyone in the state (that is, they may have restrictive admission policies whereas the public schools presumably do not)).

101. *Id.* at 162-71.

102. *Id.* at 171.

103. *Id.*

104. TREENE, *supra* note 14, at 11.

105. Success on federal grounds based on the theory of nativism would not, for example, lead to the striking down of Michigan's amendment, which was enacted in 1970 after the era of nativist, anti-

narrow interpretation by a reviewing court is the voucher proponents' best chance for success. By reviewing a handful of the court cases in which a narrow interpretation was adopted, this Note will sketch a framework for future challenges that may be employed in virtually all Blaine states.

A. Wisconsin

Jackson v. Benson[106] might be considered the first modern voucher case and should stand out as a model for voucher proponents to follow when they are faced with a similar state constitutional prohibition that might be interpreted as precluding a voucher regime. Although the Wisconsin constitution did not erect a barrier to a voucher program as onerous as those of other states, its prohibitions[107] are similar to those of states in which the constitutionality of a voucher program may be questioned. The Wisconsin provision essentially prohibited the use of public funds to support religious organizations.[108] Despite this provision, the Wisconsin Supreme Court held that a program that provided parents with a tuition voucher redeemable at a religious or nonreligious nonpublic school[109] violated neither the federal Constitution nor the state constitution.[110]

When examining the state's constitutional provisions, the Wisconsin supreme court broke down the analysis into a two-part inquiry: (1) Did the program violate the "benefits clause"[111] portion of the state constitution?; and (2) Did the program violate the "compelled support"[112] portion of the state constitution?[113] In viewing the voucher program against the benefits clause, the court stated that, though the provision's wording was "'more specific than the terser' clauses of the First Amendment," the state's benefits clause "carries the same

---

Catholic sentiment that fueled other states' Blaine amendments. MICH. CONST. of 1963, art. 8, § 2 (amended by Proposal C on the November 1970 statewide ballot).

106. 578 N.W.2d 602 (Wis. 1998).

107. Though the challengers of the Wisconsin or, more appropriately, the Milwaukee voucher program claimed several state constitutional bases for striking down the program, we are most concerned with the provision that 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*."

WIS. CONST. art. I, § 18 (emphasis added).

108. *Id.*

109. For a greater description of the details of the voucher program, see *Jackson*, 578 N.W.2d at 607-10.

110. *Id.* at 607.

111. The Court indicated that the "benefits clause" read: "'nor shall any money be drawn from the treasury for the benefit of religious societies, or religious or theological seminaries.'" WIS. CONST. art. I, § 18.

112. The Court stated that the "compelled support clause" read: "'nor shall any person be compelled to attend, erect or support any place of worship or to maintain any ministry without consent.'" *Id.*

113. *Jackson*, 578 N.W.2d at 620.

import,"[114] as both provisions attempt to prevent the establishment of religion and protect the free exercise of religion.[115] Thus, the benefits clause should be interpreted and applied "in light of the United States Supreme Court cases interpreting the Establishment Clause of the First Amendment."[116] Only cases that "cannot be fully illuminated by the light of federal jurisprudence alone . . . may require examination according to the dictates of the more expansive protections envisioned by our state constitution."[117] Therefore, in Wisconsin, courts will end their analysis when federal First Amendment jurisprudence speaks clearly on an issue. As a result, any state whose establishment clause mirrors the federal Establishment Clause should end its analysis of a voucher program at *Zelman*, for the United States Supreme Court's answer definitively permits voucher programs—so long as they are structured like Cleveland's program.

Yet, states with compelled support provisions may need to go a step further than federal Establishment Clause jurisprudence and *Zelman*. The Wisconsin Supreme Court had little difficulty in maneuvering around its state- compelled support provision because it had previously determined that this provision prohibited "the state from forcing or requiring students to attend or participate in religious instruction."[118] The voucher program did not violate the compelled support clause:

> [The program did] not require a single student to attend class at a sectarian private school. A qualifying student only attends a sectarian private school under the program if the student's parent so chooses. Nor does the amended MPCP [the challenged voucher program] force participation in religious activities . . . . The choice to participate in religious activities is also left to the students' parents.[119]

Since students were not forced by the state to engage in worship, the program did not violate the compelled support provision of the state constitution. Furthermore, the court addressed the argument that taxpayers were being forced to support places of worship. The court reasoned that this argument was the same as that advanced under the benefits clause. Thus, the court would "not interpret the compelled support clause as prohibiting the same acts as those prohibited by the benefits clause. Rather we look for an interpretation of these two related provisions that avoids such redundancy."[120]

Thus, the Wisconsin supreme court's interpretation of its state constitution can serve as a model for those attempting to establish voucher programs in

---

114. *Id.* (citing in part *State* ex rel. *Holt v. Thompson*, 225 N.W.2d 678, 687 (Wis. 1975)).

115. *Id.*

116. *Id.*

117. *Id.* n.21 (citing *State v. Miller*, 549 N.W.2d 235, 239 (1996)).

118. *Id.* at 623 (citing *Holt*, 225 N.W.2d at 687).

119. *Id.* For a more in-depth discussion of this theory, which was ultimately relied upon by the Supreme Court in *Zelman* as the basis for the Cleveland program's escaping conflict with the Establishment Clause, see Laura S. Underkuffler, *Vouchers and Beyond: The Individual as Causative Agent In Establishment Clause Jurisprudence*, 75 IND. L.J. 167 (2000).

120. *Id.* at 622-23. In invalidating this argument under the benefits clause, the court determined that "for the benefit of" a religious institution meant that the "principal or primary effect" of the challenged program must be to advance religion. The court determined that any benefit to a religious institution was purely incidental. *Id.* at 621.

states with similar constitutional provisions. If a narrow interpretation of the state's Blaine amendment is used, as in this case, there is no need to reach the constitutionality of the state's Blaine amendment.

B. Ohio

The Ohio Supreme Court's decision in *Simmons-Harris v. Goff*[121] serves as a model for encouraging a narrow interpretation when the state constitutional provision is stricter than that at issue in Wisconsin.[122] Both the pertinent state constitutional provision and the reasoning used by the Ohio court strongly resemble the issue and the reasoning employed by the Wisconsin Supreme Court. The Ohio court stated that the state provision was "the approximate equivalent of the Establishment Clause of the First Amendment to the United States Constitution."[123]

Unlike the Wisconsin court in *Jackson*, Ohio state courts never developed a standard by which they would examine a statute challenged under the state establishment clause;[124] thus, no precedent existed for examining a potentially offending statute. Though the court claimed that there was "no reason to conclude that the religion clauses of the Ohio constitution are coextensive with those in the United States Constitution," it noted that they had been "discussed in tandem." The Ohio Supreme Court further claimed that it "reserve[d] the right to adopt a different constitutional standard pursuant to the Ohio [C]onstitution," but adopted the United States Supreme Court's "three-part *Lemon*[125] test."[126] Even though the court noted the language of the state and federal establishment clauses were "quite different," it adopted the federal standard until it sought fit to decide otherwise.[127] In doing so, the court adopted a narrow construction of its state constitutional provision but conveniently gave itself an escape hatch so that, in the future, it could diverge from Establishment Clause jurisprudence as enunciated by the United States Supreme Court.

In *Simmons-Harris*, the Ohio Supreme Court was also confronted with another provision of its state constitution that appeared to create a greater separation of church and state than was provided by the federal Establishment Clause. The Ohio Supreme Court relied on the theory subsequently advanced by the U.S. Supreme Court in *Zelman* to get around this provision that "no religious sect . . . shall ever have any exclusive right to, or control of, any part of the

121. 711 N.E.2d 203 (Ohio 1999).

122. Though several state constitutional provisions were implicated in the Ohio voucher case, the first challenged provision we will examine states that "[n]o person shall be compelled to attend, erect, or support any place of worship, or maintain any form of worship, against his consent; and no preference shall be given, by law, to any religious society; nor shall any interference with the rights of conscience be permitted." OHIO CONST. art. I, § 7.

123. *Simmons-Harris*, 711 N.E.2d at 211.

124. *Id.*

125. Lemon v. Kurtzman, 403 U.S. 602 (1971).

126. *Simmons-Harris*, 711 N.E.2d at 211-12.

127. *Id.* at 212.

school funds of this state."[128] Even though this would seem to preclude even an indirect benefit accruing to religious schools, the Ohio court held that "no money flows directly from the state to a sectarian school and no money can reach a sectarian school based solely on its efforts or the efforts of the state."[129] Thus, the theory of indirect aid and the individual as causative agent[130] saved the Cleveland voucher program from running afoul of the other Ohio constitutional provision.

For voucher advocates encouraging a narrow interpretation of state constitutional provisions, the most important lesson to be gleaned from the Ohio Supreme Court's analysis is to encourage the court to adopt an escape hatch and thus respect *stare decisis* if state court jurisprudence does not speak directly to the state's establishment clause. Though the Ohio court adopted the federal test in this situation, it also avoided being painted into a corner by wholeheartedly adopting federal jurisprudence that would bind it and its interpretation of its state constitution to federal court jurisprudence.

C. Arizona

The decision of the Arizona Supreme Court stands out among similar cases in which the state court was faced with interpreting its state Blaine amendment. The Arizona Supreme Court narrowly interpreted its state constitution, claiming that its state Blaine amendment was unrelated to the federal Blaine amendment.[131] Voucher proponents claim that, had a narrow construction not been available, the court might have struck down the amendment.[132] In Arizona, the Blaine amendment language is found in two provisions of the state constitution. The first clause states, "No public money or property shall be appropriated for or applied to any religious worship, exercise, or instruction, or to the support of any religious establishment."[133] The second clause states, "No tax shall be laid or appropriation of public money made in aid of any church, or private or sectarian school, or any public service corporation."[134] While the issue in Arizona was a statute that provided a tax credit for religious and nonreligious schools,[135] the analysis employed by the Arizona Supreme Court is relevant to the voucher debate.

---

128. OHIO CONST. art. VI, § 2.

129. *Simmons-Harris*, 711 N.E.2d at 212.

130. I will continue to use the phrase "theory of the individual as causative agent" because it is helpful shorthand for the theory adopted by the Supreme Court in *Zelman*—the belief that the individual or the market, not the state, decides where the public monies provided by the contested program shall go and that the voucher program is thus constitutional because the "particular religious uses or activities involved [are] the result of private choice." Underkuffler, *supra* note 119, at 168.

131. Kotterman v. Killian, 972 P.2d 606, 624 (Ariz. 1999).

132. *See* TREENE, *supra* note 14, at 10 (citing *Kotterman*, 972 P.2d at 624, for the proposition that "circumstantial evidence of [the Arizona constitutional provision's] connection to the original Blaine Amendment undermined its validity").

133. ARIZ. CONST. art. II, § 12.

134. *Id*. at art. IX, § 10.

135. *Kotterman*, 972 P.2d at 609-10.

Though the narrow interpretation led the court to determine that tax credits did not implicate the state's Blaine amendment because a credit is not public money,[136] the court also relied on the ability of religious institutions to claim tax-exempt status—a clear benefit to a religious organization.[137] The court went on to say that even if the constitutional provision was triggered by the use of public funds, the benefit to religious institutions based on those funds was too attenuated.[138]

The court's explicit discussion of the federal Blaine amendment, however, is particularly important to voucher proponents. The court stated that "[t]he [federal] 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.'"[139] The court went on to state that "[t]here is *no recorded history directly linking the amendment with Arizona's constitutional convention*. In our judgment, it requires *significant speculation* to discern such a connection."[140] While acknowledging the anti-Catholic animus behind the federal Blaine amendment, the court stated that such animus could not be imputed to the Arizona amendment. Thus, any contention that the Arizona court considered the potential suspect validity of its own state's constitutional provision based on the history of the federal Blaine amendment is misplaced. The Arizona court's ruling strongly suggests that state courts will be hesitant to impute the animus behind the failed federal Blaine amendment to their state's Blaine amendment.

Finally, the Arizona court held that, though the Blaine amendments of other states are similar in wording to its own,[141] such similarity in wording does not mean similarity in intent.[142] Thus, success or failure by voucher advocates in challenging one state's constitutional provision might have little bearing on the courts of another state, even if the state constitutional language is identical.

D. Illinois

The program challenged in Illinois was also a tax credit program that was equally available to parents of public and nonpublic school students.[143] Two separate cases considered the Illinois program in 2001; however, the second case relied almost exclusively on the reasoning given in the first.[144] The plaintiffs

136. *Id.* at 618.
137. *Id.* at 620.
138. *Id.*
139. *Id.* at 624.
140. *Id.* (emphasis added). Interestingly, the dissent takes a different view of the motivations behind the Arizona religion clauses yet comes to the conclusion that the tax credit plan violated those clauses. *Id.* at 633-38.
141. *Compare* ARIZ. CONST. art. II, § 12, *with* WASH. CONST. art. I, § 11.
142. *Kotterman*, 972 P.2d at 624-25.
143. For a description of the challenged statute, see *Griffith v. Bower*, 747 N.E.2d 423, 425-26 (Ill. App. Ct. 2001).
144. *Id.* at 426.

in *Toney v. Bower*,[145] the first of the two cases, challenged the tax credit program under several provisions of the Illinois Constitution that prohibited any state appropriation for sectarian purposes.[146] The primary state constitutional clause at issue prohibited any appropriation from any public fund to aid "any church or sectarian purpose, or to help support or sustain any school . . . controlled by any church."[147] Nonetheless, without evidence that the framers of the state constitution intended to give the words broad meanings that would invalidate the tax credit program, the court determined that they should be construed narrowly.[148] As such, "public fund" and "appropriation" were construed narrowly,[149] similar to the manner in which the Arizona court interpreted its tax credit program.

More importantly for voucher advocates, the reviewing court stated that the Illinois Supreme Court "has held that the restrictions in our constitution concerning the establishment of religion are identical to those contained in the federal establishment clause."[150] Therefore, even though the wording of the clauses is substantially different, their intent is the same and their interpretations should be the same because "the words 'aid,' 'support or sustain,' and 'sectarian purpose' yield the same results as the United States Supreme Court's interpretation of the word 'establish' in the federal first amendment."[151] Moreover, the court explicitly stated that "any program that is constitutional under the establishment clause is constitutional under section 3 of article X of the Illinois Constitution."[152] Even though this appears to be a "lockstep doctrine," the court has provided itself with an out, writing, "the court has looked to the intent behind our constitution to determine if its provisions should receive a similar interpretation to those given comparable federal constitutional provisions."[153] Thus, it appears that the Illinois court will follow the approach of the Ohio Supreme Court—namely, that they will follow federal Establishment Clause jurisprudence until it parts ways with what the court believes was the intent behind the provision in question.

---

145. 744 N.E.2d 351 (Ill. App. Ct. 2001).

146. The first clause states: "No person shall be required to attend or support any ministry or place of worship against his consent, nor shall any preference be given by law to any religious denomination or mode of worship." ILL. CONST. art. I, § 3. The second relevant clause states:

> Neither the General Assembly nor any county, city, town, township, school district, or other public corporation, shall ever make any appropriation or pay from any public fund whatever, anything in aid of any church or sectarian purpose, or to help support or sustain any school, academy, seminary, college, university, or other literary or scientific institution, controlled by any church or sectarian denomination whatever; nor shall any grant or donation of land, money, or other personal property ever be made by the State, or any such public corporation, to any church, or for any sectarian purpose.

Id. at art. X, § 3.

147. *Id.*

148. *Toney*, 744 N.E.2d at 357-58.

149. *Id.*

150. *Id.* at 358.

151. *Id.*

152. *Id.*

153. *Id.* at 359.

E. Washington

The situation in Washington is unique because both the state's highest court[154] and a federal appeals court[155] have interpreted the state's Blaine amendment.[156] Recently, however, the U.S. Supreme Court refused to pass judgment on this state constitutional amendment, saying that it was not a Blaine amendment at all.[157] The Washington suits are also unique in that it was not a voucher or tax credit for elementary or secondary education being challenged, but an "Educational Opportunity Grant,"[158] and a "Promise Scholarship,"[159] which both provided tuition assistance for higher education. The state supreme court and the Ninth Circuit Court of Appeals determined that the aid programs—the Educational Opportunity Grant and Promise Scholarship, respectively—did not violate the Washington state constitution, while the U.S. Supreme Court assumed that the Promise Scholarships did violate Washington's state constitution.

The Washington Supreme Court began its discussion of the Educational Opportunity Grant by conceding that public funds were going to support religious universities.[160] The court also acknowledged that the constitutional provision at issue was "far stricter than the more generalized prohibition of the first amendment to the United States Constitution."[161] Moreover, in acknowledging that its state constitution was stricter than the federal constitution, the court stated that "we long ago rejected the theory that 'indirect' or 'incidental' state support of a sectarian school is permissible."[162] Thus, the court rejected the theory of individual as causative agent—the theory relied on by the U. S. Supreme Court in *Zelman*—as a means to circumvent religion clauses of its state constitution. Nonetheless, after reviewing the history of the state constitution, the court determined that, even though the phrase "all schools" would seem to encompass higher education, the religion clauses of the state constitution do not apply to institutions of higher education.[163] Thus, universities are not "schools" under the Washington Constitution.

The court next addressed a second state constitutional challenge to the program involving a state constitutional provision that aims at creating a greater separation of church and state than the federal Establishment Clause: "No pub-

154. State *ex rel.* Gallwey v. Grimm, 48 P.3d 274 (Wash. 2002) (holding that state higher education grants that flowed indirectly to religious schools did not violate state constitution because, in part, they were disbursed in a manner analogous to the federal G.I. Bill).

155. Davey v. Locke, 299 F.3d 748 (9th Cir. 2002), *rev'd*, Locke v. Davey, No. 02-1315, 2004 U.S. LEXIS 1626, at *10 (Feb. 25, 2004).

156. The relevant language states: "All schools maintained or supported wholly or in part by the public funds shall be forever free from sectarian control or influence." WASH. CONST. art. IX, § 4.

157. *Locke*, 2004 U.S. LEXIS 1626, at *20 n.7.

158. For a more detailed description of the program, see *Gallwey*, 48 P.3d at 276-78.

159. For a more detailed description of the Promise Scholarships, see *Davey*, 299 F.3d at 750.

160. *Gallwey*, 48 P.3d at 279.

161. *Id.* at 280 (referring to WASH. CONST. art. IX, § 4).

162. *Id.*

163. *Id.* at 284.

lic money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment."[164] The Washington court determined that, since the program was not adopted with the "'objective' of aiding religious establishment," it did not violate the constitutional provision at issue.[165] Moreover, even after rejecting the theory of individual as causative agent with regard to elementary and secondary education, the court seemingly adopted the theory with regard to higher education and other non-early educational contexts.[166] Thus, indirect aid seems acceptable for higher education, just not for elementary and secondary education.

In *Davey*, the Ninth Circuit Court of Appeals had the opportunity to address Washington's section 11 of Article I, the second challenged constitutional provision, as it related to another type of state scholarship offered for higher education.[167] The court determined that the policy of the state agency that distributed the scholarships "lack[ed] neutrality of its face" because it made the scholarships "available to all students who meet generally applicable criteria, except for those who choose a religious major."[168] Moreover, the court determined that since it was religion that was being facially discriminated against, the policy must survive strict scrutiny.[169] The policy failed to do so because "Washington's interest in avoiding conflict with its own constitutional constraint against applying money to religious instruction is not a compelling reason to withhold scholarship funds for a college education from an eligible student just because he personally decides to pursue a degree in theology."[170] The question turned on the federal Free Exercise Clause.[171]

Even though "the Washington Supreme Court's view of the Washington establishment clause is less accommodating than the United States Supreme Court's view of the federal Establishment Clause," this prohibition "is limited by the Free Exercise Clause of the federal constitution."[172] Since the prohibition of the establishment of religion is already ensured by the federal Establishment Clause, the state's interest in promoting its own, stricter establishment clause has to be uniquely compelling so as not to trample the federal Free Exercise Clause.[173] To interpret the Washington Constitution as the state wanted it interpreted—providing a greater separation of church and state than provided by the federal Establishment Clause and thus providing a compelling interest for deny-

164. WASH. CONST. art. I, § 11.

165. *Gallwey*, 48 P.3d at 285.

166. *Id.* at 285-86. The court stated that the dissent's reasoning went "too far" because "[u]nder [that logic], the State could not provide medical coupons to an eligible Department of Social and Health Services client if the coupons were to be used at a hospital with religious affiliations simply because the funds might be used to advance the religious goals of the hospital." *Id.* at 286.

167. *Davey*, 299 F.3d at 750.

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.* at 758.

172. *Id.* at 758, 759.

173. *Id.* at 759.

ing theology majors scholarship funds—would have created a Free Exercise problem.[174] Therefore, the court determined that the Washington establishment clause could not be used as a basis for denying the state scholarship to a student pursuing theology.[175]

These two Washington cases provided false hope for voucher advocates. Independent of the Supreme Court's holding in *Locke v. Davey*, voucher advocates were misled by these two cases because their reasoning and holdings cannot be applied to the elementary and secondary school level. First, the Washington Supreme Court narrowly interpreted its state constitution to provide tuition grants to students, advancing a basis for encouraging a narrow interpretation of state Blaine amendments. Voucher proponents relying on *Gallwey* as a foundation for the legitimacy of elementary and secondary school vouchers are mistaken because the reliance ignores the state supreme court's dicta that even indirect aid to nonpublic elementary and secondary schools violates the state's constitution.[176] The court explicitly stated that nothing in the holding alters this prohibition against indirect aid to religious schools outside of higher education.[177]

Yet, by adopting a secular purpose test for education funding programs, the court still seems to have paved the way for future challenges to elementary and secondary school aid programs. Thus, it would seem that in education funding cases, the constitutionality of the program hinges on the intent of the legislature. If the legislature had the intent of supporting sectarianism, then it would be unconstitutional under the state constitution. If the legislature had a secular intent, then even if the legislation had the effect of supporting sectarianism, it would remain constitutional. An open question is how the Washington Supreme Court would deal with an elementary or secondary school funding program in the form of tax credits or vouchers that had a secular purpose but indirectly aided religion. The *Gallwey* court seemed to have foreseen this potential avenue opened to voucher proponents advocating a similarly narrow interpretation of the state's religion clauses, however, and barred it.

The Ninth Circuit's ruling seemed to be exactly the ruling hoped for by voucher advocates—interpreting the state's Blaine amendment as providing a greater separation of church and state than that ensured by the federal Establishment Clause, thus creating a free exercise violation. The federal appeals court suggested that because protection from the establishment of religion is already provided by the federal constitution, a stricter state establishment clause will be viewed under strict scrutiny to almost presumably violate the Free Exercise Clause. The suggestion is that the federal constitution has already struck the balance between prohibition of establishment of religion and protection of

174. *Id.* at 760.

175. *Id.*

176. State *ex rel*. Gallwey v. Grimm, 48 P.3d 274, 280 (Wash. 2002) (noting that the court "long ago" rejected the notion of indirect aid as permissible).

177. *Id.* at 284.

the free exercise of religion. Unless the state courts interpret their constitutional religion clauses virtually identically to the federal constitution, they will run afoul of one of the federal constitutional religion clauses. It is this reasoning of the Ninth Circuit, which resembled some of the state voucher case rulings, that seemed to present the greatest opportunity for voucher advocates pursuing federal challenges to state Blaine amendments.

The Ninth Circuit ruling, however, was deceptive. First, in *Gallwey*, the Washington Supreme Court relied on logic that allowed students to use their G.I. Bill at religious institutions while denying tuition grants to parents of elementary school children by drawing a line between elementary and secondary education, on the one hand, and higher education, on the other hand. Second, the nature of the free exercise right in *Davey* was different from that supposedly trampled upon in secondary and elementary education. In *Davey*, the student was denied a state-funded scholarship solely because of his sincerely held religious beliefs.[178] The state created an entitlement in the form of a scholarship program that used neutral criteria to determine eligibility, but then denied the scholarship to some students on the basis of religion.[179] Thus, in the Ninth Circuit's opinion, Washington violated the Free Exercise Clause.[180]

The same framework does not exist in the elementary and secondary school context. The students' religious beliefs are not their sole reason for being educated. Moreover, the education of elementary and secondary school students does not involve the same kind of entitlement as in *Davey*. Any reliance by voucher advocates on the higher education holding of *Davey* would be misplaced in the context of elementary and secondary education.

Finally, the U.S. Supreme Court's holding in *Locke v. Davey* seriously undermines any reliance voucher advocates could place in the Ninth Circuit's opinion. The Court rejected the notion relied on by voucher advocates that lack of facial neutrality toward religion by a state program will render it unconstitutional.[181] The disfavor of religion by the Washington Promise Scholarship program was "of a far milder kind" than when the state imposes a criminal or civil sanction on religious practice or when the state would require "students to choose between their religious beliefs and receiving a government benefit."[182] Disfavor of religion may not even be present in the Promise Scholarship program, according to the Court.[183]

The opinion suggests that even if the Promise Scholarship program failed the first prong of *Lukumi*—lack of neutrality—then the state would have a compelling interest for disfavoring religion, at least "deal[ing] differently with religious education for the ministry than with education for other callings," for

178. *Davey*, 299 F.3d at 751.
179. *Id.* at 754.
180. *Id.* at 759-60.
181. *Locke*, 2004 U.S. LEXIS 1626, at *14.
182. *Id.*
183. *Id.*

the Court could "think of few areas in which a State's antiestablishment interests come more into play."[184] There has always been tension between the religion clauses of the First Amendment but "play in the joints" exists between the Establishment Clause and the Free Exercise Clause, meaning that "there are some state actions permitted by the *Establishment Clause* but not required by the *Free Exercise Clause*."[185] Here, Washington acted within the space between the clauses.[186]

Through its opinion, the Court dealt two substantial blows to the voucher cause. First, any idea that religion and nonreligion must be treated equally[187] seems to be dismissed by the Court's reliance on criminal or civil sanctions and substantial burdens to demonstrate hostility toward religion. Treating religion and nonreligion differently, or a lack of facial neutrality in a state program, does not render the program unconstitutional absent overt hostility toward religion.[188] Second, the Court will not impute the history of the failed federal Blaine Amendment to similar state amendments absent a showing of a "credible connection" between the two.[189] Thus, even where, in the case of Washington, adoption of language analogous to the failed federal amendment—shortly after it was defeated—was forced upon the state as a precondition to statehood,[190] the connection is too tenuous to put the Blaine Amendment's history before the Court as a means of demonstrating hostility toward religion. These two portions of *Locke v. Davey* make voucher advocates' success in federal courts all the more unlikely.

Locke v. Davey did, however, leave litigation, and potentially success, in state courts as a plausible alternative to federal court litigation. The Supreme Court perhaps went too far in its opinion by neglecting the possibility that Washington's own interpretation of Article I, section 11 of the state constitution had changed since *Witters v. Commission for the Blind,*[191] citing *Witters* for the proposition that the Washington constitution "has been authoritatively interpreted as prohibiting even indirectly funding religious instruction that will prepare students for the ministry."[192] This blanket statement fails to take *Gallwey* into account, which allowed Washington to indirectly fund religious instruction by the creative interpretation of Article I, section 11 that universities are not schools under this section of the state constitution.[193] *Gallwey* arguably over-

184. *Id.* at *18.
185. *Id.* at *11.
186. *Id.* at *23.
187. *See supra* notes 83-87 and accompanying text; *supra* Part II.C.4.
188. *See Locke*, 2004 U.S. LEXIS 1626, at *14.
189. *Id*. at *20 n.7.
190. *See supra* note 39; *supra* Part II.B.
191. 771 P.2d 1119, 1122 (Wash. 1989) (holding that even indirect aid to fund religious instruction in higher education violated the strict tenets of the state constitution).
192. *Locke*, 2004 U.S. LEXIS 1626, at *12.
193. *Gallwey*, 48 P.3d at 284.

ruled *Witters*, making the U.S. Supreme Court's presumptuous statement about the Washington constitution doubtful if not altogether incorrect.

In the end, however, the Supreme Court's decision in *Locke v. Davey* dealt a serious blow to voucher advocates' hope in challenging state Blaine amendments on federal grounds in at least two respects. First, the Court's decision must make the voucher advocates stop to wonder what, if any, state constitutional amendment will be considered a Blaine amendment in the Court's eyes in order to have the "nefarious history" of the federal Blaine Amendment attach. Second, free exercise challenges to strict state establishment clauses—those in which voucher advocates placed most faith—appear unlikely to succeed at the federal level. The Court's decision, however, does nothing to undermine attempts by voucher advocates to convince their state courts that a well-crafted voucher program does not violate the state's establishment clause.

F. Getting States to Narrowly Interpret Their State Constitutional Religion Clauses

The reasoning used by state courts in narrowly interpreting state Blaine amendments should be incorporated by voucher advocates into their arguments for adopting voucher programs in restrictive, permissive, and uncertain states. Ultimately, their best argument may be to demonstrate that these Blaine amendments should be interpreted as nothing more than state establishment clauses, identical to the federal Establishment Clause in their objectives and thus ultimately identical in their interpretation. At least one convincing argument independent of individual state religion clause jurisprudence supports this notion.

Historically, the federal Blaine Amendment has been used to show that the Fourteenth Amendment did not incorporate the Establishment Clause.[194] In fact, "scholars and commentators have all but agreed on the significance of the Blaine Amendment" in that "the near passage of federal Blaine Amendment—with its provision applying the [F]irst [A]mendment religion clauses to the states—reveals that the members of the 44th Congress did not believe the [F]ourteenth [A]mendment already applied to the [F]irst [A]mendment."[195]

While this is now a moot point, this history shows that the original state Blaine amendments—those passed in the wake of the federal Blaine Amendment's defeat—were supposed to apply the First Amendment's religious clause guarantees to the states. *Zelman* should settle the voucher issue for these states that first enacted Blaine amendments or bar only direct aid, but this history does not resolve the problems presented by states whose constitutional religion clauses preclude the reasoning used in *Zelman* by prohibiting both direct *and* indirect aid to nonpublic institutions.

194. Green, *supra* note 18 at 38-39 (explaining that the 44th Congress did not believe that the Establishment Clause applied to the states even after passage of the Fourteenth Amendment).

195. *Id.*

Aside from Michigan's absolute prohibition on vouchers,[196] states that prohibit indirect aid are the most restrictive. Despite other state constitutions seeming to foreclose indirect avenues through strict language, they have circumvented the issues posed by explicit bans against indirect aid.[197] It is unlikely that courts will follow the jurisprudence of the South Carolina Supreme Court, which simply ignored its constitutional prohibition against indirect aid to religious schools.[198]

Instead, the reasoning employed by the Court of Appeals of New York may point the way forward. When handling the constitutionality of a textbook loan program in light of a constitutional provision that prohibited indirect aid to nonpublic institutions,[199] the court reversed an earlier case[200] heavily relied on for its direct/indirect distinction[201] to hold: "[I]t is our view that the words 'direct' and 'indirect' relate solely to the means of attaining the prohibited end of aiding religion as such."[202] By this logic, since the state was not attempting to indirectly establish religion, the textbook program was not indirect aid. Presumably then, as long as the state is not attempting to indirectly establish religion through a voucher program, the voucher program would not run afoul of the constitutional prohibition against indirect aid.

Florida would provide an excellent opportunity to test the theory adopted by the New York court, as its constitution prohibits indirect aid to religious institutions.[203] Although state appellate courts have held the Florida voucher program does not run afoul of other constitutional provisions,[204] a Leon County district court has concluded the program violates the provision forbidding indirect

196. MICH. CONST. art. VIII, § 2.

197. *See* discussion *infra* Part III.

198. Durham v. McLeod, 192 S.E.2d 202 (S.C. 1972). The provision at issue in *Durham* "prohibit[ed] the use of the 'property or credit' of the State, 'directly or indirectly' in aid of any church controlled college or school." *Id.* at 412. Another provision that only restricts direct aid ultimately replaced this provision. S.C. CONST. art. XI, § 4.

199. The provision reads:

> Neither the State nor any subdivision thereof, shall use its property or credit or any public money, or authorize or permit either to be used, directly or indirectly, in aid or maintenance, other than for examination or inspection, of any school or institution of learning wholly or in part under the control or direction of any religious denomination, or in which any denominational tenet or doctrine is taught.

N.Y. CONST. art. XI, § 3.

200. Judd v. Bd. of Educ., 15 N.E.2d 576 (N.Y. 1938).

201. *See, e.g.*, Matthews v. Quinton, 362 P.2d 932 (Alaska 1961).

202. Bd. of Educ. of Cent. Sch. Dist. No. 1 v. Allen, 228 N.E.2d 791, 794 (N.Y. 1967).

203. The provision reads:

> There shall be no law respecting the establishment of religion or prohibiting or penalizing the free exercise thereof. Religious freedom shall not justify practices inconsistent with public morals, peace or safety. 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.

204. *See* Bush v. Holmes, 767 So. 2d 668 (Fla. Dist. Ct. App. 2000) (finding voucher program not to violate a school uniformity provision of the Florida constitution).

aid to religious institutions.[205] While the case is on appeal, voucher advocates have the opportunity to encourage a narrow reading of the constitutional provision—one that recognizes and permits the religious schools to receive a benefit incidental to the primary purpose of the legislation. This was the understanding of the New York court, and it is a reasonable and potentially more successful tactic than trying to get the Blaine amendments struck down on federal constitutional grounds.

IV

CONCLUSION

In light of the Supreme Court's ruling in *Zelman*, voucher advocates have nearly a clean slate from which they may work in some states. States like Maine[206] and Vermont[207] that based their denial of funds to religious schools on interpretations of the federal Establishment Clause are again open to challenge. There are but a handful of these "uncertain" states, however, in which *Zelman* reopened the debate over the constitutionality of nonpublic school funding. The vast majority of states were left untouched by the Supreme Court's holding, aside from the public discourse and political debate arising from the decision.

Voucher advocates have recognized both the potential in the *Zelman* ruling—voucher opponents can no longer claim programs like Ohio's violate the federal Establishment Clause—and the limited mileage the decision has provided, as state Blaine amendments loom just as large as the hurdle just cleared in the Supreme Court. Voucher proponents have probably misplaced their energy and resources, thinking they will be again vindicated in the federal courts, with Blaine amendments, federal courts will likely not provide the sweeping victory voucher advocates seek. In fact, *Locke v. Davey*[208] significantly undermines the federal challenge on which voucher proponents had placed their greatest reliance—the Free Exercise Clause. The federal claims are weak and ultimately may do more toward undermining the religious freedom voucher advocates seek. Victory requires a different tactic, a tactic that will protect religious liberty both by not relying on a ruling declaring that religion and nonreligion must be treated equally and by providing greater choice for parents whose children are in failing school districts. That tactic is litigation in the state courts.

While the state Blaine amendments vary in their language and in the potential obstacles they place in the way of a voucher regime, the strategy of encouraging a narrow interpretation of state constitutions presents the greatest potential for overcoming the barriers posed by the restrictive constitutional provisions. Encouraging a narrow interpretation appears to overcome barriers

205. Tresa Baldas, *School Voucher Suits Hitting States: 'Zelman' Triggers State-By-State Fight*, NAT'L L.J., Jan. 13, 2003, at A1.

206. Bagley v. Raymond Sch. Dep't, 728 A.2d 127 (Me. 1999). The program was also examined by the First Circuit, which reached a similar conclusion. Strout v. Albanese, 178 F.3d 57 (1st Cir. 1999).

207. Chittenden Town Sch. Dist. v. Vermont Dep't of Educ., 738 A.2d 539 (Vt. 1999).

208. 2004 U.S. LEXIS 1626.

to all Blaine amendments except for direct prohibitions against vouchers. Most importantly, it is consistent with the history of the early state Blaine amendments—provisions to incorporate the federal Establishment Clause in the state constitutions.

In the end, the state courts are not likely to be a panacea, but they are a far more promising arena for success than the federal courts are. There will be no sweeping victory. Some state courts will follow narrow interpretations, allowing voucher regimes to be created in their states, while other state courts will rely on the strict language of their state constitutions as prohibiting voucher regimes. Of course, this presupposes that a voucher program is passed by the state legislature or by constitutional amendment. If lessons are to be taken from Michigan and California in 2000, the state legislatures will be the source of any new voucher programs. Only by state legislatures' creating voucher programs will public opinion change. Those states whose courts adopted narrow interpretations will reap the benefits, if any, of increased choices in education. The states whose courts followed a different path would then be left behind in educational progress, thus influencing the populace to support a constitutional amendment. Ultimately, the coming educational reform battle will likely prove to be much more of a political question to be resolved in the mind of the public than a legal question to be resolved in the courts. But where voucher programs are passed and challenged, state courts provide a much more plausible arena for success than federal courts and federal constitutional challenges.