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# Trinity Lutheran and the Future of Educational Choice: Implications for State Blaine Amendments

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**TRINITY LUTHERAN AND THE FUTURE OF  
EDUCATIONAL CHOICE: IMPLICATIONS FOR STATE  
BLAINE AMENDMENTS**

Richard D. Komer<sup>†</sup>

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I. INTRODUCTION

State constitutional Blaine Amendments,<sup>1</sup> which prohibit the expenditure of state funds on religious educational institutions, have

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1. *What is a Blaine Amendment?*, FINDLAW, <http://education.findlaw.com/curriculum-standards-school-funding/what-is-a-blaine-amendment.html> (last visited Nov. 17, 2017). The Blaine Amendments get their name from Congressman James Blaine, who attempted to pass a federal amendment to prohibit the funding of

for decades impeded educational choice programs<sup>2</sup> This may be changing. The United States Supreme Court's decision in *Trinity Lutheran v. Comer*<sup>3</sup> opened the door for school choice programs to survive challenge under state Blaine Amendments. Both the majority opinion of six justices<sup>4</sup> and the dissenting opinion of two justices<sup>5</sup> disclaim any conclusion concerning any programs beyond the particular program at issue in *Trinity Lutheran*. However, two concurring justices signal the broader implications of the decision,<sup>6</sup> as does the Court's action in vacating and remanding two pending decisions involving Blaine Amendments in the Colorado and New Mexico Constitutions.<sup>7</sup> Given the prevalence of Blaine Amendments in state constitutions<sup>8</sup> and the inhibiting effect given to some of

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religious schools in 1875. *Id.*

2. *What is School Choice?*, AM. SCH. CHOICE, <http://americanschoolchoice.com/what-is-school-choice/definition/> (last visited Mar. 31, 2018). "Educational choice programs" are programs that provide scholarships that allow parents to choose from an array of educational options for their children's education. *Id.* Typically, these programs are of two types: (1) those that provide scholarships directly from a government source, and (2) those that provide scholarships from private 501(c)(3) scholarship organizations that receive donations generated by state tax credits. Parents can use these scholarships to pay private school tuition and, sometimes, out-of-district public school tuition. *Id.* Recently, a new form of program has become popular, in which government funds or funds generated by state tax credits provide educational savings accounts to eligible families. *Id.*

3. *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017).

4. Chief Justice Roberts authored the majority opinion in which Justices Alito, Kagan, and Kennedy joined completely, and in which Justices Thomas and Gorsuch joined except for footnote 3. *Trinity Lutheran*, 137 S. Ct. at 2016. Footnote 3 addressed the implications of the majority's decision for other programs. *Id.* at 2024 n.3.

5. Justice Sotomayor wrote a dissent that was joined by Justice Ginsburg, which noted in footnote 2 that the majority's opinion did not address "indirect aid programs in which aid reaches religious institutions 'only as result of the genuine and independent choices of private individuals.'" *Trinity Lutheran*, 137 S. Ct. at 2029 n.2 (Sotomayor, J., dissenting) (quoting *Zelman v. Simmons-Harris*, 536 U.S. 639, 649 (2002)).

6. *See Trinity Lutheran*, 137 S. Ct. at 2025 (Thomas, J., concurring in part); *id.* at 2025–26 (Gorsuch, J., concurring in part).

7. *Moses v. Skandera*, 367 P.3d 838 (N.M. 2015), *vacated sub nom.* *New Mexico Ass'n of Non-Pub. Sch. v. Moses*, 137 S. Ct. 2325 (2017); *Taxpayers for Pub. Educ. v. Douglas Cnty. Sch. Dist.*, 351 P.3d 461 (Colo. 2015), *vacated sub nom.* *Doyle v. Taxpayers for Pub. Educ.*, 137 S. Ct. 2324 (2017).

8. Thirty-seven state constitutions have one or more Blaine Amendments. ALA. CONST. art. VII, § 1; ALASKA CONST. art. 7, § 1; ARIZ. CONST. art. II, § 12; *id.* art.

those provisions by their state supreme courts,<sup>9</sup> *Trinity Lutheran's* potential to lead to a limiting change in the interpretation of those Blaine Amendments could profoundly affect educational choice programs.

This article will first explain what state Blaine Amendments are and why they came to be in so many state constitutions.<sup>10</sup> Far from being a benign form of protection for secular public schools, Blaine Amendments were enacted to deny aid to Catholic schools at a time when public schools were generically Protestant.<sup>11</sup> Then, this article will discuss how differing interpretations of state Blaine Amendments affect educational choice programs.<sup>12</sup> In doing so, this article will categorize the current interpretations of those provisions into three types: (1) those that permit educational choice programs, (2) those that inhibit educational choice programs, and (3) those that give insufficient guidance to place the interpretation into either of the first two categories.<sup>13</sup> This article will next describe the efforts to get cases like *Trinity Lutheran* to the United States Supreme Court, including two prior cases addressing state Blaine Amendments from Missouri<sup>14</sup> and Washington<sup>15</sup> This will include a particular focus on

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IX, § 10; CAL. CONST. art. IX, § 8; *id.* art. XVI, § 5; COLO. CONST. art. V, § 34; *id.* art. IX, § 7; DEL. CONST. art. X, § 3; FLA CONST. art. I, § 3; GA. CONST. art. I, § II, ¶ I; HAW. CONST. art. X, § 1; IDAHO CONST. art. IX, § 5; ILL. CONST. art. X, § 3; IND. CONST. art. I, § 6; KAN. CONST. art. 6, § 6(c); KY. CONST. § 184; MASS. CONST. amend. art. XVIII, § 2; MICH. CONST. art. I, § 4; *id.* art. VIII, § 2; MINN. CONST. art. I, § 16; *id.* art. XIII, § 2; MISS. CONST. art. VIII § 208; MO. CONST. art. I, § 7; *id.* art. IX, § 8; MONT. CONST. art. X, § 6; NEB. CONST. art. VII, § 11; NEV. CONST. art. XI, § 2; N.H. CONST. pt. II, art. LXXXIII; N.M. CONST. art. XII, § 3; N.Y. CONST. art. XI, § 3; N.D. CONST. art. VIII, § 5; OKLA. CONST. art. II, § 5; OR. CONST. art. I § 5; PENN. CONST. art. 3, § 15; S.C. CONST. art. XI, § 4; S.D. CONST. art. VI, § 3; *id.* art. VIII, § 16; TEX. CONST. art. I, § 7; *id.* art. VII, § 5(c); UTAH CONST. art. I, § 4; *id.* art. X, § 9; VA. CONST. art. IV, § 16; WASH. CONST. art. I, § 11; *id.* art. IX, § 4; Wis. CONST. art. I, § 18; WYO. CONST. art. 1, § 19; *id.* art. 3, § 36. *See generally* RICHARD D. KOMER & CLARK NEILY, SCHOOL CHOICE AND STATE CONSTITUTIONS: A GUIDE TO DESIGNING SCHOOL CHOICE PROGRAMS (2007) (listing the relevant text of state constitutions' Blaine Amendments), [https://www.ij.org/images/pdf\\_folder/school\\_choice/50statereport/50stateSCreport.pdf](https://www.ij.org/images/pdf_folder/school_choice/50statereport/50stateSCreport.pdf).

9. *See infra* Part II.C.

10. *See infra* Part II.

11. *See id.*

12. *See infra* Part II.C.

13. *Id.*

14. *Widmar v. Vincent*, 454 U.S. 263 (1981).

15. *Witters v. Washington Dep't of Servs. for the Blind*, 474 U.S. 481 (1986).

2004's *Locke v. Davey*,<sup>16</sup> which involved an educational choice program.<sup>17</sup> This article will then provide detailed discussion of *Trinity Lutheran* itself, and end with a consideration of the decision's likely effect on future application of state Blaine Amendments.<sup>18</sup> This article concludes that *Trinity Lutheran* has the potential to eliminate state Blaine Amendments as impediments to educational choice programs.<sup>19</sup>

## II. STATE BLAINE AMENDMENTS

Thirty-seven state constitutions contain Blaine Amendments.<sup>20</sup> Although their language varies considerably, particularly in scope, they all share one essential characteristic: they prohibit units of state government from providing aid to “sectarian” or “denominational” schools.<sup>21</sup> Nowadays we think of “sectarian” and “denominational” schools as synonyms for “religious schools”; this is a critical mistake. At the time these provisions were adopted, virtually all schools—public as well as private—were “religious schools” as we use the term today.<sup>22</sup> Until quite recently, there was a consensus that religion and morality were an essential component of education because both promoted the virtues thought to be necessary for effective citizenship in a democratic republic.<sup>23</sup>

16. 540 U.S. 712 (2004).

17. See *infra* Part III.A.

18. See *infra* Part IV.

19. See *infra* Part V.

20. See *Trinity Lutheran*, 137 S. Ct. at 2037; see also KOMER & NEILY, *supra* note 8, at 4.

21. See *Trinity Lutheran*, 137 S. Ct. at 2038. Blaine Amendments arose in reaction to Catholic demands for government funding of their parochial schools, but Catholics also created other religious institutions, including hospitals and orphanages, and some Blaine Amendments also extend to those sorts of religious institutions. Richard G. Bacon, *Rum, Romanism and Romer: Equal Protection and the Blaine Amendment in State Constitutions*, 6 DEL. L. REV. 1, 2 (2003). For example, Nevada's Blaine Amendment, adopted in 1880, was passed in reaction to the state providing a grant to the state's first orphanage, which was Catholic. See *State v. Hallock*, 16 Nev. 373 (Nev. 1882) (applying NEV. CONST. art. 11, § 10). Many Blaine Amendments extend beyond prohibiting aid to religious schools by prohibiting aid to religious institutions in general. See, e.g., WASH. CONST. art. I, § 11 (“No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment . . .”).

22. See Steven K. Green, *The Blaine Amendment Reconsidered*, 36 AM. J. LEGAL HIST. 38, 45 (1992).

23. *Id.*

A. *The Protestant Public Schools and Proto-Blaines*

Protestant ministers played a leading role in the creation and supervision of public schools.<sup>24</sup> Educational historian David Tyack and his coauthors explain:

Protestant ministers and lay people were in the forefront of the public school crusade and took a proprietary interest in the institution they had helped to build. They assumed a congruence of purpose between the common school and the Protestant churches. They had trouble conceiving of moral education not grounded in religion . . . . To say the schools were “nonsectarian” was not to imply that they were without religion. Rather, it meant that the Protestant churches agreed to suspend their denominational quarrels within the public schoolhouse.<sup>25</sup>

For these advocates, public schools were essential to achieving a successful republic.<sup>26</sup> Even before the Constitution became effective in 1789, the Confederation Congress passed the Northwest Ordinance of 1787,<sup>27</sup> which contained the following language in article three: “Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged.”<sup>28</sup>

After the Constitution became effective, the First Congress reissued the Northwest Ordinance substantially unchanged.<sup>29</sup> The Northwest Ordinance, and the Land Ordinance of 1785, laid the foundation for federal support of education by setting aside one 640-

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24. See DAVID TYACK, THOMAS JAMES & AARON BENAVIDES, *LAW AND THE SHAPING OF AMERICAN PUBLIC EDUCATION, 1785-1954*, 162 (1987).

25. *Id.*

26. *Id.*

27. The formal name of the Northwest Ordinance is “An Ordinance for the Governance of the Territory of the United States, North-west of the River Ohio.” Five states (Ohio, Indiana, Illinois, Michigan, and Wisconsin) and part of a sixth (Minnesota) were formed from the Northwest Territory subject to the Ordinance, and their state constitutions reflect the language of the Ordinance to varying degrees. 2 FRANCIS NEWTON THORPE, *THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA* 957–62 (1909).

28. *Id.* at 961.

29. See Reginald Horsman, *The Northwest Ordinance and the Shaping of an Expanding American Republic*, 73 *WIS. MAG. HIST.* 21, 21–32 (1989).

acre section of every township for the support of schools.<sup>30</sup> The revenue generated from these lands became the “common school funds” that supported (and continue to support) the public schools in all states created after the date of the Northwest Ordinance.<sup>31</sup> Some of the original thirteen states created similar funds to support the common or public schools, such as the “state literary funds” of North Carolina<sup>32</sup> and Virginia.<sup>33</sup> Thus, the government was financially supporting schools in part because they promoted the “religion, morality, and knowledge . . . necessary to good government.”<sup>34</sup>

It is anachronistic thinking to believe that the early public or common schools were secular institutions.<sup>35</sup> While we are familiar with the thoroughly secular schools of today, the early proponents of public education would be horrified by these same secular schools. From Horace Mann and Henry Barnard through the beginnings of the twentieth century, religion—specifically a nondenominational Protestantism—was regarded as an essential component of a public education.<sup>36</sup> Bible reading in the public

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30. ELLWOOD PATTERSON CUBBERLEY, PUBLIC EDUCATION IN THE UNITED STATES: A STUDY AND INTERPRETATION OF AMERICAN EDUCATIONAL HISTORY 92 (1919).

31. *Id.* at 92–94. In dedicating public land to the support of schools and colleges, the Northwest Ordinance followed the longstanding practice of the colonial governments of the New England colonies, a practice that continued long after Independence. *Id.*; see also RICHARD GABEL, PUBLIC FUNDS FOR CHURCH AND PRIVATE SCHOOLS 174–75 (1937). Early governments were land rich and cash poor, and providing land grants allowed schools to capitalize their operations by selling off the land to build and maintain their structures. *Id.* To this day, Dartmouth College, which was founded to train Congregationalist ministers and missionaries to evangelize Native Americans, owns large swathes of land in northern New Hampshire and Vermont. *Id.*

32. North Carolina first created a fund for the support of common schools in the Literary Fund Law of 1825. See M.C.S. NOBLE, A HISTORY OF THE PUBLIC SCHOOLS OF NORTH CAROLINA 45–46 (1930). This law is now incorporated into the North Carolina Constitution in Article IX, section 6, entitled “State School Fund.” N.C. CONST. art. IX, § 6.

33. VA. CONST. art. VIII, § 8.

34. THORPE, *supra* note 27, at 961.

35. See, e.g., CUBBERLEY, *supra* note 30, at 73 (“[T]he school everywhere in America arose as a child of the Church.”).

36. See generally FREDERICK M. BINDER, THE AGE OF THE COMMON SCHOOLS: 1830–1865 (1974); CHARLES L. GLENN, THE MYTH OF THE COMMON SCHOOL (1988) (examining the notion that the state should sponsor and control the education of its citizens to mold a common community with common loyalties); STANLEY K. SCHULTZ, THE CULTURE FACTORY: BOSTON PUBLIC SCHOOLS, 1789–1860 (1973)

schools was commonplace, mandated by law in many states and by custom in others.<sup>37</sup> Indeed, after 1900, eleven states and the District of Columbia passed statutes requiring Bible reading in the public schools: Pennsylvania in 1913, Delaware and Tennessee in 1915, New Jersey in 1916, Alabama in 1919, Georgia in 1921, Maine in 1923, Kentucky in 1924, Florida and Idaho in 1925, the District of Columbia in 1926, and Arkansas in 1930.<sup>38</sup> Such enactments formalized the longstanding practices of the public schools and were themselves a reaction to pressure for secularization of the public schools.

The centrality of Bible reading to Protestant religious practice is captured by the phrase *sola Scriptura*, meaning “by scripture alone.” Norman Geisler and Ralph McKenzie state that:

By *sola Scriptura* Protestants mean that Scripture alone is the primary and absolute source for all doctrine and practice (faith and morals). *Sola Scriptura* implies several things. First, the Bible is a direct revelation from God. As such, it has divine authority. For what the Bible says, God says.<sup>39</sup>

This view of the singular authority of scripture motivates much of the Protestant effort to translate the Bible into vernacular languages (e.g., from Latin to English) and to distribute it widely.<sup>40</sup> Protestants generally believe all Christians should read the Bible for themselves and evaluate what they have been taught on the basis of it.<sup>41</sup>

Indeed, the earliest public school law in the United States, Massachusetts’ “Old Deluder Satan Act” of 1647, makes explicit the link between the need for education and the reading of the Bible.<sup>42</sup>

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(taking a pessimistic view of Boston’s early public schools, where children were “processed” and conditioned to promote the security and stability of a social order under the control of an urban elite).

37. See Michael D. Newsom, *Common School Religion: Judicial Narratives in a Protestant Empire*, 11 S. CAL. INTERDISC. L.J. 219, 243 (2002).

38. TYACK, ET AL., *supra* note 24, at 165.

39. NORMAN L. GEISLER & RALPH E. MACKENZIE, WHAT THINK YE OF ROME? (PART THREE): THE CATHOLIC-PROTESTANT DEBATE ON BIBLICAL AUTHORITY 2 (1994), <http://www.equip.org/PDF/DC170-3.pdf>.

40. See W. COLE DURHAM & ROBERT SMITH, INTRODUCTION TO PROTESTANTISM, 1 RELIGIOUS ORGANIZATIONS AND THE LAW § 1:12 (March 2017 Update).

41. See *id.*

42. The Old Deluder Satan Act (1647), in 2 RECORDS OF THE GOVERNOR AND COMPANY OF THE MASSACHUSETTS BAY IN NEW ENGLAND 203 (Nathaniel B. Shurtleff

The act reads in part: “It being one of the chief project[s] of that old deluder, Satan, to keep men from the knowledge of the Scriptures, as in former times keeping them in an unknown tongue.”<sup>43</sup> The act required townships with at least fifty households to appoint and pay a teacher to teach the local children to read and write, and all towns with at least one hundred households to set up and maintain a grammar school.<sup>44</sup> This Protestant orientation of the public schools continued well into the twentieth century<sup>45</sup> and spawned serious educational, political, and legal controversies with the growing Catholic minority.<sup>46</sup>

Many of these controversies were triggered by Protestant exercises in the public schools, particularly the requirements for reading the King James Bible.<sup>47</sup> For example, the earliest landmark decision on Bible reading came from the Maine Supreme Court in 1854.<sup>48</sup> The Ellsworth school committee expelled a fifteen-year-old Catholic girl, Amanda Donahoe, who refused to read from the King James Bible on the advice of her priest and the order of her father.<sup>49</sup>

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ed., 1853).

43. *Id.*

44. *Id.*; see also ELLWOOD P. CUBBERLEY, READINGS IN PUBLIC EDUCATION IN THE UNITED STATES: A COLLECTION OF SOURCES AND READINGS TO ILLUSTRATE THE HISTORY OF EDUCATIONAL PRACTICE AND PROGRESS IN THE UNITED STATES 18–19 (1934).

45. See KARL F. KAESTLE, PILLARS OF THE REPUBLIC: COMMON SCHOOLS AND THE AMERICAN REPUBLIC: 1780–1860, 98 (1983) (“Education officials, legislators, and essayists agreed on the propriety of Bible reading in the public schools. Predominantly Protestant themselves, they endorsed the notion that there was a common core of scripture and belief among Christians, and they had no qualms about supporting a common-school policy that was openly Christian, avowedly nonsectarian, and implicitly Protestant.”). See generally LLOYD P. JORGENSON, THE STATE AND THE NON-PUBLIC SCHOOL: 1825–1925 (1987) (tracing the evolution of public and non-public schools).

46. TYACKET AL., *supra* note 24, at 163 (“Throughout most of American History, local majorities seemed to have had their way with religious elements in the curriculum. These local majorities were typically Protestant, and the ‘compromise’ they most favored—teaching the King James Bible without comment—was hardly fair to Catholics, Jews, or non-believers.”).

47. See *id.* at 162–63. This book also notes that “[c]ases upholding bible reading outnumbered those declaring it sectarian and unconstitutional by roughly five to one.” *Id.* at 163.

48. *Donahoe v. Richards*, 38 Me. 379 (Me. 1854).

49. *Id.* The decision is marked in a lengthy discussion of the various versions of the Bible, but the Court’s mask slips when it states:

Large masses of foreign population are among us, weak in the midst of our strength. Mere citizenship is of no avail, unless they imbibe the

As a more deadly example, the anti-Catholic Bible Riots in Philadelphia in 1844 were triggered by rumors spread by nativists that Catholics were demanding the removal of the Bible from the public schools.<sup>50</sup> The riots left more than twenty dead and several Catholic churches in ashes.<sup>51</sup>

The hostility of the public schools to Catholics and Catholicism was not limited to reading the Protestant Bible and singing Protestant hymns. Professor Jorgenson writes:

[P]assages offensive to Catholics were liberally sprinkled throughout many of the most widely used schoolbooks of the period. Professor Elson, in her excellent study, makes (although she does not document) a sobering statement: “No theme in these schoolbooks before 1870 is more universal than anti-Catholicism.” That the Roman Church supported absolutist government to the detriment of the common people, that its policy was to keep the masses in ignorance, that it forbade its members to read the Bible, that the French and Spanish explorers were motivated by avarice and cruelty while the English sought to convert and civilize those whom they found in darkness—such assertions were common in antebellum textbooks, especially in readers, histories, and geographies.<sup>52</sup>

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liberal spirit of our laws and institutions, unless they become citizens in fact as well as in name. In no other way can the process of assimilation be so readily and thoroughly accomplished as through the medium of the public schools, which are alike open to the children of the rich and the poor, of the stranger and the citizen.

*Id.* at 413. After the decision, the Donahoe family’s priest, Father John Bapst, was tarred and feathered, run out of town on a rail, and threatened with being burned at the stake; the chapel he had officiated in was also set on fire. Fr. John Bapst Survives Tar & Feathers, Becomes 1st Boston College President, NEW ENGLAND HIST. SOC’Y, <http://www.newenglandhistoricalsociety.com/fr-john-bapst-survives-tar-fathers-becomes-1st-boston-college-president/> (last visited Apr. 2, 2018). A formerly Catholic high school in Bangor, Maine and the library at Boston College are named for him. Evangeline Hussey, John Bapst High School, MAINE HISTORY ONLINE <https://www.mainememory.net/sitebuilder/site/1390/page/2041/Display> (last accessed Apr. 2, 2018); Campus Guide, BOSTON COLLEGE, <https://www.bc.edu/offices/historian/resources/guide.html> (last visited Apr. 2, 2018).

50. See Newsom, *supra* note 37, at 242.

51. See MICHAEL FELDBERG, THE PHILADELPHIA BIBLE RIOTS OF 1844, 110, 156 (1975).

52. JORGENSON, *supra* note 45, at 60–61 (quoting RUTH MILLER ELSON, GUARDIANS OF TRADITION: AMERICAN SCHOOLBOOKS OF THE NINETEENTH CENTURY 53 (Lincoln: Univ. of Neb. Press, 1964)).

It is no small wonder that, faced with the hostility of the public schools to its faith, the Catholic Church was determined to create its own schools.<sup>53</sup> Professor Tyack and his co-authors summarize the development as follows:

Enraged by compulsory reading of the King James Bible and by textbooks that derogated Catholicism and often the lands from which Catholic immigrants had come, Catholics in many communities came to believe that they must build their own school system. It was only just, they said, that they receive public money to do so.<sup>54</sup>

The Catholic Church increasingly demanded equal treatment of its schools. This triggered a backlash that resulted in states enacting Blaine Amendments.<sup>55</sup> Many Catholic immigrants came from Ireland and Canada, where government-supported dual school systems for Protestants and Catholics were common.<sup>56</sup> Catholics sought similar accommodations in the United States, and the Protestant establishment responded to these demands in several different ways.

For instance, Protestants made efforts to require that all children attend public schools.<sup>57</sup> This would have effectively ended private education at the elementary and possibly secondary school level and forced all children of whatever faith to attend the nondenominational Protestant public schools. Jorgenson has detailed the efforts to achieve this result by statute in Massachusetts, Illinois, and Wisconsin.<sup>58</sup> Although public school advocates were initially successful in getting these laws passed, once their effects

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53. See Aisling Maloney, *Heroic Effort: The History of Catholic Schools in America*, HUMANUM (2015), <http://humanumreview.com/articles/heroic-effort-the-history-of-catholic-schools-in-america> (discussing that public schools “threaten[ed] to alienate Catholic children from their religious, cultural, and familial heritage,” which led to the creation of Catholic schools).

54. TYACK ET AL., *supra* note 24, at 163–64.

55. See Mark Edward DeForrest, *An Overview and Evaluation of State Blaine Amendments: Origins, Scope, and First Amendment Concerns*, 26 HARV. J.L. & PUB. POL’Y 551, 565 (2003); Marie-Claire Considère-Charon, *Protestant Schools in the Republic of Ireland*, 87 STUDIES: AN IRISH Q. REV. 345, 15–23 (1998).

56. See Brian Noonan, *Saskatchewan Separate Schools*, A HISTORY OF EDUCATION IN SASKATCHEWAN 21–23 (Noonan et al. eds., 2006). See generally Marie-Claire Considère-Charon, *Protestant Schools in the Republic of Ireland: Heritage, Image and Concerns*, 87 STUDIES: AN IRISH Q. REV. 345, 15–17 (1998).

57. See JORGENSON, *supra* note 45, at 20–30.

58. *Id.* at 162–204.

became known, political opposition resulted in their repeal.<sup>59</sup> Nonetheless, efforts to force all students to attend the generically Protestant public schools continued, ultimately culminating in passage of the Compulsory Education Act by referendum by the voters of Oregon in 1922.<sup>60</sup>

Among the primary backers of the Oregon referendum was the Ku Klux Klan.<sup>61</sup> Although most Americans today know that the KKK was anti-Black, few are aware that it was anti-Catholic and anti-Semitic as well.<sup>62</sup> It was its anti-Catholicism that led the KKK to oppose Catholic schools and support efforts to make attending them impossible.<sup>63</sup>

Two Oregon private schools immediately challenged in federal court the constitutionality of the law requiring all students to attend the public schools.<sup>64</sup> One of the plaintiffs was a Catholic school and the other was a private military school.<sup>65</sup> In 1925, in *Pierce v. Society of Sisters*,<sup>66</sup> the United States Supreme Court unanimously invalidated the law, stating that “we think it entirely plain that the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control.”<sup>67</sup> In a ringing endorsement of parental liberty, the Court continued:

59. *See id.* at 187–88.

60. *See* Michael J. Nove, *Deliver Us from Evil: The Ku Klux Klan in Oregon's Legal History*, 57 OR. ST. B. BULL. 37, 37 (Nov. 1996).

61. *See id.*

62. *See id.*; Encyclopedia Britannica, *Ku Klux Klan*, ENCYCLOPEDIA BRITANNICA (Jan. 19, 2018), <https://www.britannica.com/topic/Ku-Klux-Klan> (“To the old Klan’s hostility toward blacks the new Klan—which was strong in the Midwest as well as in the South—added bias against Roman Catholics, Jews, foreigners, and organized labour.”).

63. Nove, *supra* note 60 (“The national leadership of the KKK, spearheaded by Indiana’s Grand Dragon, David Stephenson, saw opportunity in the proposed school legislation: Oregon’s initiative process could be used to put the school bill on the ballot, and once law, it would serve as a model for identical legislation in other states. If successful, the KKK’s rabid anti-Catholic agenda would leap years ahead in progress.”).

64. *See Soc’y of Sisters v. Pierce*, 296 F. 928, 930–31 (D. Or. 1924). This case involved a Catholic School and a military academy challenging Pierce, the then-governor of Oregon, on the constitutionality of Oregon’s law requiring children ages eight to sixteen to attend public schools. *Id.*

65. *Id.*

66. 268 U.S. 510 (1925).

67. *Id.* at 534–35.

The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.<sup>68</sup>

Of course, the right to direct a child's destiny by choosing to educate the child in a private school or at home depends on having the financial resources to do so. As the cost of education has skyrocketed, financial circumstances have forced more and more families to use the "free" public schools.<sup>69</sup> One major factor of the increasing cost has been the increasing necessity of education, both in terms of years of schooling and extension of the school year itself.<sup>70</sup> For example, while the Colorado Constitution's education article requires that public school districts provide three months of education per year, Colorado state statute requires the standard nine months of schooling per year.<sup>71</sup>

*Pierce* ended the efforts to force all children to attend generically Protestant public schools,<sup>72</sup> but this total defeat can be contrasted with the total victory achieved in the second effort of the Protestant establishment—that of rebuffing Catholic demands for equal governmental aid for their schools.<sup>73</sup> The response to these demands was the state Blaine Amendments, which prevent states from

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68. *Id.* at 535.

69. See Jack Jennings, *Proportion of U.S. Students in Private Schools is 10 Percent and Declining*, HUFFINGTON POST BLOG (May 28, 2013, 12:31 PM), [https://www.huffingtonpost.com/jack-jennings/proportion-of-us-students\\_b\\_2950948.html](https://www.huffingtonpost.com/jack-jennings/proportion-of-us-students_b_2950948.html).

70. See, e.g., Catherine Rampell, *The College Degree Has Become the New High School Degree*, WASH. POST (Sept. 9, 2014), [https://www.washingtonpost.com/opinions/catherine-rampell-the-college-degree-has-become-the-new-high-school-degree/2014/09/08/e935b68c-378a-11e4-8601-97ba88884ffd\\_story.html?utm\\_term=.10a9b372a2a5](https://www.washingtonpost.com/opinions/catherine-rampell-the-college-degree-has-become-the-new-high-school-degree/2014/09/08/e935b68c-378a-11e4-8601-97ba88884ffd_story.html?utm_term=.10a9b372a2a5) (discussing the impact of graduation inflation on decisions to pursue higher education).

71. Compare COLO. CONST. art. IX, § 2 (providing in part, "[o]ne or more public schools shall be maintained in each school district within the state, at least three months in each year; and any school district failing to have such a school shall not be entitled to any portion of the school fund for that year"), with COLO. REV. STAT § 22-32-109(1)(n)(I) (2017).

72. *Pierce*, 268 U.S. at 532–33.

73. See DeForrest, *supra* note 55, at 562–63.

providing institutional aid to “sectarian” schools.<sup>74</sup> Effectively, Blaine Amendments ensured that the Protestant public schools retained a monopoly over institutional aid provided to schools.<sup>75</sup>

The state Blaine Amendments take their name from a failed attempt to amend the Federal Constitution, as sponsored by Congressman (and later Senator) James G. Blaine of Maine in 1875, and were modeled on earlier state statutes and amendments to a number of state constitutions.<sup>76</sup> For example, the earliest proto-Blaine Amendment is found in Michigan’s first state Constitution enacted in 1835, which provided that “[n]o money shall be drawn from the treasury for the benefit of religious societies or theological or religious seminaries.”<sup>77</sup> Wisconsin followed suit in 1840,<sup>78</sup> and Indiana in 1850.<sup>79</sup> Massachusetts, the birthplace of American public education, adopted a no-aid provision in 1855, at the height of the Know Nothing movement, which controlled the legislature and governorship in 1854.<sup>80</sup> That same year, Illinois enacted legislation prohibiting public aid to sectarian institutions.<sup>81</sup> In 1855, California did so as well.<sup>82</sup>

Blaine’s federal amendment would have imposed the no-institutional-aid rule on all states, had it been adopted and ratified.<sup>83</sup> With the federal amendment’s failure to achieve the requisite supermajority in the Senate, the action moved back to the states, with Congress encouraging, and sometimes requiring through

74. *See id.* at 559–561.

75. *Id.*

76. JORGENSEN, *supra* note 45, at 101. According to Jorgenson, the provision was repeated in expanded form in Michigan’s 1850 Constitution. *Id.*

77. MICH. CONST. art. I, § 5 (1835).

78. WIS. CONST. art. I, § 18 (“... [N]or shall any money be drawn from the treasury for the benefit of religious societies, or religious or theological seminaries.”).

79. IND. CONST. art. I, § 6 (“No money shall be drawn from the treasury, for the benefit of any religious or theological institution.”).

80. JORGENSEN, *supra* note 45, at 100.

81. *Id.* Jorgenson notes that the “immediate effect [of the legislation] was to deal a staggering blow to non-public schools of the state,” with the state superintendent of public instruction reporting “with obvious gratification,” that in just two years the Free School System “has nearly swept the entire field of the thousands of Private schools which then existed.” *Id.*

82. *Id.* at 106.

83. *See* 4 CONG. REC. 205 (1875), *as reprinted in* JORGENSEN, *supra* note 45, at 138–39.

legislation, new states to include provisions to this effect.<sup>84</sup> Indeed, all states entering the Union after the federal amendment's failure in 1876 have included Blaine Amendments in their state constitutions,<sup>85</sup> and have been joined by some of the older states as well<sup>86</sup>

The "proto-Blaines" (the state constitutional amendments that predate the failed federal Blaine Amendment), the federal Blaine Amendment, and the state Blaine Amendments incorporated after the federal Amendment failed, all share a common principle and a common motivation. All Blaines prevent institutional aid to sectarian schools and make it impossible for any state legislature (and usually any other governmental body in the state) to treat sectarian schools equally with public schools. In other words, they rebuff the demands of the Catholic Church for equal aid for its schools, take the matter out of the hands of the legislatures, and necessitate an amendment to the state constitution to permit such aid.<sup>87</sup>

The adoption of most of the proto-Blaines coincides with the arrival of substantial numbers of Catholic immigrants in the United States, beginning in the 1840s.<sup>88</sup> Until the Irish potato famines of the

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84. JOSEPH P. VITERITTI, CHOOSING EQUALITY: SCHOOL CHOICE, THE CONSTITUTION, AND CIVIL SOCIETY 153 (1999). According to Professor Viteritti, the enabling legislation under which Montana, New Mexico, North Dakota, South Dakota, and Washington became states required they include Blaine Amendments in their state constitutions. *Id.*

85. Those states are: Colorado, North Dakota, South Dakota, Montana, Washington, Idaho, Wyoming, Utah, Oklahoma, New Mexico, Arizona, Alaska, and Hawaii.

86. Among those states are New Hampshire, New York, and Pennsylvania from the original thirteen states.

87. To date, only Louisiana has removed a Blaine Amendment from its state constitution, which was done in the course of passage of a new constitution in 1973. *See KOMER & NEILY, supra* note 8, at 38. A number of other states have amended their Blaine Amendments to overrule restrictive decisions of their supreme courts. *See, e.g.,* DEL. CONST. art. X, § 5 (amended to provide transportation of private school students); IDAHO CONST. art. IX, § 5 (amended to allow financing of private health facilities); MASS. CONST. art. XVIII, § 2 (amended to allow higher education grants to students); N.Y. CONST. art. XI, § 3 (amended to allow transportation of private school students); S.D. CONST. art. VIII, § 20 (amended to allow loaning free textbooks to private school students); VA. CONST. art. VIII, § 11 (to allow grants to higher education students in private colleges). Michigan, in response to an advisory opinion of its supreme court justices, is the only state to tighten the restrictions of its Blaine Amendment. MICH. CONST. art. VIII, § 2.

88. JORGENSON, *supra* note 45, at 69–70. *See generally* MICHAEL BARONE, SHAPING OUR NATION: HOW SURGES OF MIGRATION TRANSFORMED AMERICA AND ITS POLITICS

1840s, Catholic immigration to the United States was modest.<sup>89</sup> During this decade, the Catholic population tripled following the arrival of more than 700,000 Catholics.<sup>90</sup>

This was not the beginning of anti-Catholicism. Anti-Catholicism in the United States predates the arrival of substantial numbers of Catholics, dating all the way back to the British colonies.<sup>91</sup> Indeed, due not only to the religious strife within England between Catholics and Protestants (resolved in favor of the Protestants), but also to the fact that Britain's primary competitors in the New World were Catholic France and Catholic Spain, hostility to Catholics ran deep.<sup>92</sup> The original constitutions of several states excluded Catholics from holding state office by requiring office holders to be Protestants.<sup>93</sup>

Nonetheless, Protestant influence in the public schools caused growing controversy as the Catholic population increased, which led to efforts to establish Catholic schools.<sup>94</sup> Professor Viteritti notes that by the middle of the nineteenth century, "[c]hurch leaders in Chicago, Philadelphia, Boston, Cincinnati, Baltimore, San Francisco, and St. Paul all began to lobby their state legislatures for public funds to create their own school systems."<sup>95</sup> This was in addition to New York City, where such efforts began in the early 1840s.<sup>96</sup> By 1852, the Catholics' patience had run out for efforts to

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106–15 (2013) (detailing Catholic immigration in the nineteenth century).

89. See BARONE, *supra* note 88, at 107.

90. JORGENSEN, *supra* note 45, at 69–70.

91. See Mark S. Massa, *The New and Old Anti-Catholicism and the Analogical Imagination*, 62 THEOLOGICAL STUD. 549, 558 (2001) (describing early fears of Catholic intrusion in Colonial America). Maryland, founded under a charter given to the Catholic Calvert family, is the principal exception to the rule that the colonies were Protestant in orientation. See Yale L. Sch., *The Charter of Maryland: 1632*, THE AVALON PROJECT, [https://avalon.law.yale.edu/17th\\_century/ma01.asp](https://avalon.law.yale.edu/17th_century/ma01.asp) (last visited Apr. 2, 2018) (making no mention of Protestant religion).

92. See D.G. PAZ, *POPULAR ANTI-CATHOLICISM IN MID-VICTORIAN ENGLAND* 299–300 (Stanford Univ. Press 1992).

93. For example, Part II of the New Hampshire Constitution of 1783 required that officeholders be of the Protestant religion. See SUSAN E. MARSHALL, *THE NEW HAMPSHIRE STATE CONSTITUTION: A REFERENCE GUIDE*, 227–46 (2004) (providing the text of the 1783 New Hampshire Constitution). These provisions were repealed in 1876, after being declared a dead letter by the New Hampshire Supreme Court in *Hale v. Everett*, the year the Fourteenth Amendment was ratified. 53 N.H. 9 (1868).

94. See, e.g., JORGENSEN, *supra* note 45, at 83–85.

95. VITERITTI, *supra* note 84, at 151.

96. *Id.*

achieve accommodation within the public schools, and the First Baltimore Plenary Council exhorted the Catholic bishops to establish schools connected to all the churches of their dioceses.<sup>97</sup> This energized Catholic efforts to obtain public aid for parochial schools, which in turn engendered an even more powerful response from the Protestant majority.<sup>98</sup>

Efforts to deny any aid to Catholic schools was part and parcel of a strong hostility towards immigrants in general and Catholics in particular.<sup>99</sup> A few years before education reformer Horace Mann opened his first public school in 1837, a Protestant mob, egged on by Reverend Lyman Beecher's inflammatory sermons, set fire to the Ursuline Convent in Charlestown, Massachusetts.<sup>100</sup> The mob declared the act was "because Catholics had dared to protest Bible reading and prayer recitals in the public schools."<sup>101</sup> Similar Protestant fears of rumored Catholic efforts to ban the Bible in Philadelphia public schools led to the deadly Bible Riots of 1844.<sup>102</sup>

The twin strands of nativism and anti-Catholicism spawned numerous political parties in the 1840s before coalescing into the Know Nothing movement of the 1850s.<sup>103</sup> Emerging from the ashes of the Whig party, the Know Nothings (officially the American Republican or American party),<sup>104</sup> became a powerful political force in the mid-1850s.<sup>105</sup> Professor Jorgenson notes that the Know

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97. See generally JORGENSON, *supra* note 45, at 83–145 (exploring the nature of and resistance to the "school question" in the major regions of the United States, as well as the implementation and effects of the establishment of Catholic parochial schools from 1852–1885).

98. *Id.* at 85. Jorgenson concludes that: "[t]he Catholic school campaign ushered in by the education decree of the 1852 Plenary Council . . . had a twofold objective: to expand markedly the numbers of schools attached to parishes, and to renew and intensify efforts to secure public funds for these schools. This was the Catholic response to the Protestant Common School Movement." *Id.*

99. See generally JOHN HIGHAM, *STRANGERS IN THE LAND: PATTERNS OF AMERICAN NATIVISM, 1860-1925* (1955) (detailing immigration patterns and nativist activity against foreign immigration); RAY BILLINGTON, *THE PROTESTANT CRUSADE, 1800–1860: A STUDY OF THE ORIGINS OF AMERICAN NATIVISM* (1938) (cataloging how anti-Catholicism developed in protest groups).

100. VITERITTI, *supra* note 84, at 149.

101. *Id.*

102. See FELDBERG *supra* note 51.

103. MICHAEL FELDBERG, *THE PHILADELPHIA RIOTS OF 1844: A STUDY OF ETHNIC CONFLICT* 173 (1975); JORGENSON, *supra* note 45, at 70.

104. JORGENSON, *supra* note 45, at 70.

105. See *id.*

Nothings were particularly strong in the Northern and border states, and sent about seventy-five Congressmen to Washington in 1854.<sup>106</sup> That same year, they carried Massachusetts, Delaware, and, in combination with the remaining Whigs, Pennsylvania.<sup>107</sup> The following year, Rhode Island, New Hampshire, Connecticut, Maryland, and Kentucky went for the Know Nothings, with Tennessee remaining Democratic by a narrow margin.<sup>108</sup> Many statewide officeholders in New York, Pennsylvania, and California belonged to the Know Nothing party, which also made tremendous inroads in Alabama, Georgia, Louisiana, and Virginia without capturing those states.<sup>109</sup>

According to Professor Anbinder, the two most important tenets of the Know Nothing movement were that “Protestantism defined American society” and that “Catholicism was not compatible with the basic values that Americans cherished most.”<sup>110</sup> A primary factor in the enormous growth of the Know Nothing movement in the early 1850s was the reemergence of controversies involving the public schools, which set off a new round of nativism and anti-Catholicism.<sup>111</sup> Anbinder notes that:

The First Plenary Council of American Catholic Bishops, which met in Baltimore in 1852, called American public schools irreligious and decreed that Catholics should instead educate their children in parochial schools. This led Catholic leaders to renew their demand, first made in the 1840’s, that the states finance Catholic schools.<sup>112</sup>

Bible reading in the public schools added fuel to the public school controversy, as epitomized by the *Donahoe* case in Maine where Catholics objected to reading the Protestant King James Bible.<sup>113</sup>

Once in office, the Know Nothings devoted a significant proportion of their legislative agenda to educational matters, believing that the “surest method of guaranteeing the supremacy of Protestant values lay in promoting Protestantism in the public

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106. *Id.* at 71.

107. *Id.*

108. *Id.*

109. *Id.*

110. TYLER ANBINDER, *NATIVISM AND SLAVERY: THE NORTHERN KNOW NOTHINGS & THE POLITICS OF THE 1850S*, 104–05 (1992) (footnotes omitted).

111. *Id.* at 24.

112. *Id.* (footnote omitted).

113. *Id.* at 25.

schools.”<sup>114</sup> In Massachusetts, for example, Know Nothing lawmakers addressed both Bible reading and aid to Catholic schools.<sup>115</sup> The Know Nothings passed statutes requiring that students read from the King James Bible daily, and forbidding by constitutional amendment the use of state funds in sectarian schools (the proto-Blaine amendment mentioned earlier).<sup>116</sup> Together, these provisions, the “Know Nothings hoped, would make parochial schools financially infeasible, forcing the children of Catholics to learn ‘American’ customs in the public schools.”<sup>117</sup>

Although the Know Nothing political movement fractured over the issue of slavery after 1855, most of its supporters were absorbed into another new political party: the Republicans.<sup>118</sup> The Civil War, precipitated by the election of Abraham Lincoln, saw a substantial reduction in nativism, as large numbers of immigrants served in the Northern armies.<sup>119</sup> The New York City draft riots, in which Irish rioters viciously attacked the city’s black inhabitants, triggered a renewal of anti-Irish sentiment, yet it was educational controversies that stoked anti-Catholicism.<sup>120</sup> In New York City, where “Boss” Tweed introduced legislation to allow public financing of parochial schools, he accomplished the same objective by “quietly amending” the city’s tax laws.<sup>121</sup> Protestants reacted with outrage when they discovered what he had done and the ensuing controversy continued until the 1870s.<sup>122</sup> Similar funding disputes broke out in New Jersey and Ohio in the mid-1870s.<sup>123</sup>

Simultaneously, the early 1870s saw continued Catholic protests against Protestant Bible reading in the public schools, which lead to the local school boards of Cincinnati, Chicago, and New York to vote to prohibit Bible reading and religious exercises in their public schools.<sup>124</sup> Professor Viteritti asserts that: “[t]he political ascent of the growing ‘Catholic menace’ in urban centers spurred Protestant

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114. *Id.* at 135.

115. *Id.* at 136.

116. *Id.*

117. *Id.* (footnotes omitted).

118. *Id.* at 244–45.

119. *Id.* at 270–71.

120. *Id.* at 271.

121. *Id.*

122. *Id.*

123. *Id.*

124. Joseph P. Viteritti, *Blaines’ Wake: School Choice, the First Amendment, and State Constitutional Law*, 21 HARV. J.L. & PUB. POL’Y 657, 670 (1998).

churches to join with newly formed nativist groups to launch a two-pronged campaign to preserve Bible study in public-school curricula and to deny government support to sectarian institutions.”<sup>125</sup>

*B. The Federal Blaine Amendment*

In September of 1875, President Ulysses S. Grant vowed in a speech to “[e]ncourage free [public] schools, and resolve that not one dollar . . . be appropriated to the support of any sectarian schools.”<sup>126</sup> Grant then sent a message to Congress requesting a proposal for a constitutional amendment to deny aid to religious institutions.<sup>127</sup> Grant was himself briefly a Know Nothing in the 1850s, before winning the presidency as a Republican.<sup>128</sup> Two of his vice presidents, former Speaker of the House of Representatives Schuyler Colfax of Indiana and former Senator Henry Wilson of Massachusetts, had been prominent Know Nothings.<sup>129</sup>

Grant was responding to growing political pressure from Protestant churches and nativist groups with a two-pronged agenda: “to preserve Bible study in public-school curricula and to deny government aid support to sectarian institutions.”<sup>130</sup> Former Speaker of the House of Representatives James G. Blaine, who aspired to the Republican presidential nomination to succeed Grant, proposed in December 1875 a constitutional amendment that read:

No state shall make any law respecting an establishment of religion, or prohibiting the free exercise thereof; and no money raised by taxation in any state for the support of public schools, or derived from any public fund therefor, nor any public lands devoted thereto, shall ever be under the control of any religious sect; nor shall any money so raised or lands so devoted be divided between religious sects or denominations.<sup>131</sup>

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125. *Id.* at 670 (footnote omitted).

126. Green, *supra* note 22, at 47.

127. Viteritti, *supra* note 124, at 670.

128. See Tyler Anbinder, *Ulysses S. Grant, Nativist*, 43 CIV. WAR HIST. 119, 120 (1997).

129. ANBINDER, *supra* note 110, at 274.

130. Viteritti, *supra* note 124, at 670.

131. 4 CONG. REC. 205 (1875), as reprinted in JORGENSON, *supra* note 45, at 138–39.

This version passed the House with 180 votes in favor and seven opposed, with slight modifications, and was sent to the Senate.<sup>132</sup> There the Judiciary Committee of the Republican-controlled Senate made two key changes. First, the Committee members added a provision stating that the bill was never to be interpreted to bar the Bible from the public schools; this preserved the Protestant-nativist coalition's objective of preserving bible study, which the house version failed to address.<sup>133</sup> Second, they expanded the proscription on use of school funds for sectarian schools to the proscription on use of any public funds.<sup>134</sup> Although a strong majority of the Senate voted for the Senate version—28 to 16—it failed to receive the requisite two-thirds majority vote needed for a constitutional amendment.<sup>135</sup>

Before turning to the after-life of the federal Blaine Amendment, it is necessary to discuss why anyone thought it was needed at all. Today we are used to virtually all of the Bill of Rights applying to the states because of the United States Supreme Court's incorporation of them through the Fourteenth Amendment's Due Process Clause.<sup>136</sup> But this was not the case in 1875–76 when Congress considered the federal Blaine Amendment. Indeed, the United States Supreme Court had recently rejected the most obvious means of applying the Bill of Rights to the states when it decided in the *Slaughterhouse Cases* that the Privileges or Immunities Clause of the Fourteenth Amendment had very limited application to the states.<sup>137</sup> The Supreme Court did not apply the Religion Clauses of the First Amendment to the states until 1940 for the Free Exercise Clause<sup>138</sup> and 1947 for the Establishment Clause.<sup>139</sup>

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132. PHILIP HAMBURGER, SEPARATION OF CHURCH AND STATE 298 n.28 (2002).

133. JORGENSON, *supra* note 45, at 139.

134. *Id.* at 139.

135. HAMBURGER, *supra* note 132, at 298 n.28.

136. Among the first rights to be applied to the states was the Free Speech clause, which like the Religion Clauses is textually addressed to Congress alone. See *Gitlow v. New York*, 268 U.S. 652, 666 (1925).

137. Kermit Roosevelt, III, *What if Slaughter-House had Been Decided Differently?*, 45 IND. L. REV. 61, 62 (2011) (“[T]he Court had adopted a reading of the Privileges or Immunities Clause that excluded the Bill of Rights liberties from its scope.”).

138. *Cantwell v. Connecticut*, 310 U.S. 296, 303–04 (1940).

139. *Everson v. Bd. of Educ.*, 330 U.S. 1, 14–15 (1947); see Russell A. Hilton, *The Case for the Selective Disincorporation of the Establishment Clause: Is Everson a Super-Precedent?*, 56 EMORY L.J. 1701, 1701–02 (2007); see also William P. Gray, *The Ten Commandments and the Ten Amendments: A Case Study of Religious Freedom in*

In fact, the debate over the Blaine Amendment contains no inkling that anyone in Congress in 1876, let alone the body as a whole, believed the recent ratification of the Fourteenth Amendment applied the First Amendment's Religion Clauses to the states.<sup>140</sup> Consequently, the House version of the federal Blaine Amendment's first two clauses repeated the language of the federal Religion Clauses while substituting "the states" for "Congress."<sup>141</sup> This version also added specific language providing that no public school funds be provided to or under the control of any religious sect or denomination.<sup>142</sup> There is no indication that either house of Congress viewed the specific language of its Blaine Amendment as inconsistent with either the Free Exercise or Establishment Clauses.<sup>143</sup>

Indeed, until the United States Supreme Court conclusively resolved the matter in 2002, advocates for an expansive reading of state Blaine Amendments as prohibiting educational choice programs that permit parental choice of religious schools always argued that such programs also violated the Establishment Clause. In 2000, the Supreme Court reiterated in *Mitchell v. Helms* its longstanding view that the Establishment Clause prohibited unrestricted aid to religious institutions *qua* institutions.<sup>144</sup> Two years later, however, in *Zelman v. Simmons-Harris*, the Court held that religiously-neutral programs driven by the genuine and independent choices of parents do not violate the Establishment Clause.<sup>145</sup> It is this development that has left opponents of educational choice programs relying only on the state Blaine Amendments.

Thus, from their founding until the United States Supreme Court's *Cantwell* and *Everson* decisions in 1940 and 1947, respectively, states were not subject to the federal Religion Clauses.<sup>146</sup> This was, of

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*Alabama*, 49 ALA. L. REV. 509, 530 (1998).

140. See Viteritti, *supra* note 124, at 671.

141. See *id.*

142. *Id.*

143. See Gray, *supra* note 139, at 426 ("Furthermore, since the Blaine Amendment was debated only seven years after the ratification of the Fourteenth Amendment, its mere introduction casts considerable doubt on the proposition that the Fourteenth Amendment was intended to incorporate the Establishment Clause.").

144. 530 U.S. 793, 842–44 (2000) (O'Connor, J., concurring). As the narrower opinion making up the majority, Justice O'Connor's decision is controlling.

145. 536 U.S. 639, 652 (2002).

146. See Russell A. Hilton, *The Case for the Selective Disincorporation of the*

course, deliberate, as the direction of the federal Religion Clauses to Congress served both to prevent the establishment of a national religion, and to leave alone any state establishments.<sup>147</sup> This reflected the fact that the New England colonies, and then states, had established Congregationalism for special support, while the southern colonies (and later states) had established Anglicanism.<sup>148</sup> The Establishment Clause thus prevented either Congregationalism or Anglicanism from being established as a national religion.<sup>149</sup>

Pennsylvania, and several other states located between the South and New England, had no established religion. Founded by Quakers who were persecuted by the other Protestant denominations,<sup>150</sup> Pennsylvania had secured in its “Laws Agreed Upon in England” in 1682 a “compelled support clause” prohibiting any religious establishment. This clause constituted article XXXV:

That all Persons living in this Province, who confess and acknowledge the One Almighty and Eternal God, to be the Creator, Upholder and Ruler of the World and that hold themselves obliged in Conscience to live peaceably and justly in *Civil Society*, shall, in no wayes be molested or prejudiced in their Religious Perswasion or Practice in matters of *Faith* and *Worship*, nor shall they be compelled, at any time, to frequent or maintain any Religious Worship, Place, or Ministry whatever.<sup>151</sup>

As the early states disestablished their state religions they often included compelled support clauses in their constitutions.<sup>152</sup>

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*Establishment Clause: Is Everson a Super-Precedent?*, 56 EMORY L.J. 1701, 1701–02 (2007).

147. *See id.* (“On the one hand, Congress could not establish religion or prohibit free exercise. On the other hand, the states were free to regulate religion according to their own constitutions.”).

148. HAMBURGER, *supra* note 132, at 84.

149. *See* Gray, *supra* note 139, at 518 (citing Note, *Rethinking the Incorporation of the Establishment Clause: A Federalist View*, 105 HARV. L. REV. 1700, 1703 (1992)).

150. EDWARD D. BALTZELL, *PURITAN BOSTON AND QUAKER PHILADELPHIA* 86 (1996) (“The mayor of the city ordered [a Quaker women] and her companion be stripped to the waist and whipped at the market cross till the blood ran down their bodies.” (internal quotations omitted)); CHARLES B. KINNEY, *CHURCH AND STATE: THE STRUGGLE FOR SEPARATION IN NEW HAMPSHIRE* 15 (1955) (“To sum up the law, the whole order was an effort to eliminate Quakers . . . and other persons who would in any conceivable way give aid and comfort to these people and their ‘blasphemous’ ideas.”).

151. 2 THE COMPLETE BILL OF RIGHTS: DRAFTS, DEBATES, SOURCES, AND ORIGINS 30 (Neil Cogan ed., 2015).

152. *See, e.g.*, VA. CONST. art. I, § 16 (“No man shall be compelled to frequent or

Alternatively, some states disestablished their religion by modifying the federal Religion Clauses to apply to their state.<sup>153</sup> Today, twenty-nine states have “compelled support clauses” in their state constitutions, including ten states that do not have Blaine Amendments,<sup>154</sup> and nineteen that do.<sup>155</sup> With the exception of Vermont,<sup>156</sup> the states with only compelled support clauses have not interpreted their clauses to prohibit educational choice programs.<sup>157</sup>

The failure of the federal Blaine Amendment did not end efforts to deny funds to sectarian schools. As Professor Viteritti notes, “by 1876 fourteen states had enacted legislation prohibiting the use of public funds for religious schools,”<sup>158</sup> with at least Michigan, Wisconsin, Indiana, and Massachusetts doing so by constitutional provision before the 1870s.<sup>159</sup> They were joined in the 1870s by Colorado, Illinois, Minnesota, Missouri, Nebraska, New Hampshire, Pennsylvania, and Texas.<sup>160</sup> Colorado adopted a Blaine Amendment

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support any religious worship, place or ministry whatsoever.”). Largely on the basis of Thomas Jefferson’s Act for Establishing Religious Freedom, which he wrote in 1777, introduced in 1779, and which was enacted in 1786, Virginia gets undeserved credit for its contributions to religious liberty. *See* Cogan, *supra* note 151, at 51–52 (providing the text of Jefferson’s statute). That statute’s operative language was later incorporated into Article 1, section 16 of the Virginia Constitution. *See id.* Pennsylvania’s 1776 Constitution already contained the following language by the time Jefferson drafted his bill:

That all men have a natural and unalienable right to worship Almighty God according to the dictates of their own consciences and understanding; And that no man ought to or of right can be compelled to attend any religious worship, or erect or support any place of worship, or maintain any ministry, contrary to, or against, his own free will and consent.

*Id.* at 31.

153. *See, e.g.*, ME. CONST. art. 1, § 3.

154. Arkansas, Connecticut, Iowa, Maryland, Missouri, New Jersey, Ohio, Rhode Island, Tennessee, Vermont, and West Virginia.

155. Alaska, Colorado, Delaware, Idaho, Illinois; Indiana, Kansas, Kentucky, Michigan, Minnesota, Montana; Nebraska, New Hampshire, New Mexico, Oklahoma, Pennsylvania, South Dakota, Texas, and Virginia.

156. *See* Chittenden Town Sch. Dist. v. Vermont, 738 A.2d 539 (Vt. 1999) (holding that its constitution’s compelled support clause prohibited parents from choosing religious schools in Vermont’s educational choice program).

157. *See* KOMER & NEILY, *supra* note 8 (providing the text of these provisions).

158. VITERITTI, *supra* note 124, at 673.

159. VITERITTI, *supra* note 84, at 153–54.

160. *Id.*

in its first Constitution in 1876,<sup>161</sup> as did New Hampshire in 1877.<sup>162</sup> By 1890, twenty-nine state constitutions had such provisions.<sup>163</sup> Eight more states added similar provisions after that, including all six states entering the Union after 1890: Utah (1896), Oklahoma (1906), New Mexico (1912), Arizona (1912), Alaska (1959), and Hawaii (1959).<sup>164</sup> With the exception of Alaska and Hawaii, all states with Blaine Amendments added them prior to the United States Supreme Court decision holding that the federal Religion Clauses applied to the states in 1940 (Free Exercise Clause)<sup>165</sup> and 1947 (Establishment Clause).<sup>166</sup>

C. *Interpretation of State Blaine Amendments: The Good, the Bad, and the Unknown*

Despite the incorporation of Blaine Amendments into the constitutions of thirty-seven states,<sup>167</sup> parents who use or desire to use religious schools to educate their children have never given up trying to obtain financial aid from state sources to reduce the financial burden of both paying to support public schools they do not want to use and paying the costs of buying a private education.<sup>168</sup> Although *Pierce* dashed public school advocates' hopes that they could force all students into public schools, *Pierce* did nothing to ameliorate the financial sacrifice involved in obtaining a private school education.<sup>169</sup> Public school advocates welcomed the application of the Establishment Clause to the states in *Everson* because it added a

161. DALE A. OESTERLE & RICHARD B. COLLINS, THE COLORADO STATE CONSTITUTION: A REFERENCE GUIDE 211 (2002).

162. See MARSHALL, *supra* note 92, at 17.

163. Green, *supra* note 22, at 43.

164. ALASKA CONST. art. VII, § 1; ARIZ. CONST. art. II, § 12; HAW. CONST. art. X, § 1; N.M. CONST. art. XII, § 3; OKLA. CONST. art. II, § 5; UTAH CONST. art. I, § 4, art. X, § 9.

165. *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

166. *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947).

167. The count would be 38 except that Louisiana repealed its Blaine Amendment when adopting a new constitution in 1973. See KOMER & NEILY, *supra* note 8, at 38.

168. See *Everson v. Bd. of Educ.*, 330 U.S. 1, 18 (1947) (Jackson, J., dissenting). In his dissent, Justice Jackson alluded to this double financial burden, stating "I have a sympathy, though it is not ideological, with Catholic citizens who are compelled by law to pay taxes for public schools, and also feel constrained by conscience to support other schools for their own children." *Id.*

169. See *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925).

second string to their bow in the quest to prevent state aid for private school families.<sup>170</sup> But, *Everson* also suggested that the Free Exercise Clause might be a concern by excluding families using religious schools from religiously-neutral public benefit programs.<sup>171</sup> Indeed, *Trinity Lutheran* is but the latest manifestation of this concern.<sup>172</sup>

Justice Black, in his opinion for the Court in *Everson*, spoke to the interaction between the Free Exercise Clause and the Establishment Clause:

We must consider the New Jersey statute in accordance with the foregoing limitations imposed by the First Amendment. . . . New Jersey cannot consistently with the “establishment of religion” clause of the First Amendment contribute tax-raised funds to the support of an institution which teaches the tenets and faith of any church. On the other hand, other language in the amendment commands that New Jersey cannot hamper its citizens in the free exercise of their own religion. Consequently, it cannot exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, because of their faith, or lack of it, from receiving the benefits of public welfare legislation.<sup>173</sup>

The New Jersey statute in *Everson* provided for reimbursement to private school parents for the costs of transporting their children to public or private schools, although in Ewing Township all the private school students happened to be attending Catholic schools.<sup>174</sup> The plaintiffs objected to this as aid to sectarian schools.<sup>175</sup> In his penultimate paragraph, Justice Black referenced *Pierce* and noted that the statute contributed no money to the schools the children attended:

This Court has said that parents may, in the discharge of their duty under state compulsory education laws, send their children to a religious rather than a public school if the school meets the secular education requirements which the state has power to impose. It appears that these

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170. See Viteritti, *supra* note 124.

171. See *id.* at 705–06; see also *Everson*, 330 U.S. at 1.

172. *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2039–40 (2017).

173. *Everson*, 330 U.S. at 16.

174. *Id.* at 20.

175. *Id.* at 32–33.

parochial schools meet New Jersey's requirements. The State contributes no money to the schools. It does not support them. Its legislation, as applied, does no more than provide a general program to help parents get their children, regardless of their religion, safely and expeditiously to and from accredited schools.<sup>176</sup>

The distinction drawn by advocates for educational choice programs between aid to schools as institutions (prohibited by both the Establishment Clause and state Blaine Amendments) and aid to families that empower them to select private schools, including religious ones, derives directly from this paragraph of *Everson*, and Justice Black's conclusion that the aid to parents "contributes no money to schools" and "does not support them."<sup>177</sup>

Moreover, application of the Religion Clauses to the states also led to the removal of religion from the public schools, as required by the United States Supreme Court post-*Everson*.<sup>178</sup> This further changed the dynamic by leading to the creation or expansion of Protestant private schools, once compulsory prayer and Bible reading were outlawed by the Supreme Court.<sup>179</sup> The secularization of the public schools was viewed by many Protestant and Catholic parents alike as actively hostile to religion, rather than neutral.<sup>180</sup>

176. *Id.* at 18 (citations omitted); see *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925).

177. *Everson*, 330 U.S. at 18.

178. See *Santa Fe Ind. Sch. Dist. v. Doe*, 530 U.S. 290 (2000) (prohibiting school-organized student-led prayer at high school football games); *Lee v. Weisman*, 505 U.S. 577 (1992) (banning the inclusion of invocations and benedictions in the form of prayer at graduation ceremonies); *Wallace v. Jaffree*, 472 U.S. 38 (1985) (prohibiting one minute for prayer or meditation); *Sch. Dist. Abington Twp. Pa. v. Schempp*, 374 U.S. 203 (1963) (outlawing compulsory Bible reading in public schools); *Engel v. Vitale*, 370 U.S. 421 (1962) (outlawing school-sponsored voluntary prayer in public schools). *Santa Fe* arose out of New Mexico, *Lee* out of Rhode Island, *Wallace* out of Alabama, *Schempp* out of Pennsylvania, and *Engel* out of New York. Four of these five states (all except Rhode Island) have Blaine Amendments in their state constitutions, indicating that Blaine Amendments continued to be viewed as compatible with Protestant religious elements in the public schools well into the 20<sup>th</sup> century. See KOMER & NEILY, *supra* note 8.

179. Newsom, *supra* note 37, at 277 ("It did not help that the Roman Catholic Church, having grown tired of the imposition of common school religion on its children, decided to establish its own separate parochial school system.")

180. See Brad J. Davidson, *Balancing Parental Choice, State Interest, and the Establishment Clause: Constitutional Guidelines for States*, 33 TEX. TECH L. REV. 435, 454 (2002) ("The cases dealing with topics such as religious expression in public schools, stopping the recitation or required prayers in public schools, or the elimination of

Indeed, the difficulties that public schools have in teaching moral values, and the incompatibility of the values they do teach with many parents' belief systems, have led even parents who are not particularly religious to look to religious schools of various denominations for their children's education.<sup>181</sup>

The efforts of Catholics, now reinforced by significant numbers of Protestants, shifted after the passage of the state Blaine Amendments from efforts to obtain a share of the public school funds to other means of aiding private school families.<sup>182</sup> Accordingly, programs like the transportation subsidies at issue in *Everson* were sought in several states, including New Jersey, as were other sorts of assistance such as the provision of free secular textbooks.<sup>183</sup> These efforts spawned a substantial number of cases in the state courts that were challenged under the state Blaine Amendments. When state supreme courts held that their respective Blaine Amendments prohibited the aid, advocates for educational aid to private school students sought to use the Free Exercise Clause and other federal constitutional provisions to get the United States Supreme Court to overrule the application of the state Blaine Amendments.<sup>184</sup>

Turning to the state interpretations first, it is possible to categorize the interpretations of the thirty-seven states with Blaine Amendments into three broad categories. The first category consists of states that broadly interpret their Blaine Amendments to reach beyond aid to religious schools as institutions and additionally encompass aid to families choosing such schools. These are states with "bad" Blaine law, from the perspective of persons and organizations advocating for more educational choice.<sup>185</sup> This

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Bible reading in public schools, are viewed by some as hostile rather than neutral toward religion.").

181. See *id.* at 437.

182. See Jonathan D. Boyer, *Education Tax Credits: School Choice Initiatives Capable of Surmounting Blaine Amendments*, 43 COLUM. J.L. & SOC. PROBS. 117, 122 (2009).

183. *Everson v. Bd. of Educ.*, 330 U.S. 1, 16 (1947); see Jason S. Marks, *Only A "Speed Bump" Separating Church and State?*, 57 J. MO. B. 36, 40 (2001) ("[T]he separationist position first advanced in *Everson*, retreating only so far as to allow loans of secular textbooks to nonpublic school students and to give state income tax deductions of educational expenses incurred by parents whose children attend a nonpublic school.").

184. See, e.g., *Locke v. Davey*, 540 U.S. 712 (2004).

185. See Clint Bolick, *The Constitutional Parameters of School Choice*, 2008 B.Y.U. L. REV. 335, 343 (2008) ("Blaine Amendments—particularly broadly written

category is comprised of fourteen states: Alaska, California, Delaware, Florida, Hawaii, Idaho, Kentucky, Massachusetts, Michigan, Missouri, New Mexico, South Dakota, Virginia, and Washington.<sup>186</sup>

The second category consists of those states that have given their Blaine Amendments a narrower construction, one that appears to permit aid to private school families. Advocates for educational choice regard these states as having “good” Blaine law.<sup>187</sup> This category is comprised of seventeen states: Alabama, Arizona, Georgia, Illinois, Indiana, Kansas, Minnesota, Mississippi, Montana, Nebraska, Nevada, New York, Oklahoma, Oregon, Pennsylvania, South Carolina, and Wisconsin. The third and final category consists of those states whose general dearth of interpretation regarding the Blaine Amendments leaves one unable to put the state in either of the first two categories because of the lack of a definitive interpretation. This last category is comprised of six states: Colorado, New Hampshire, North Dakota, Texas, Utah, and Wyoming.

Having “bad Blaine law” means that such states cannot enact educational choice programs *funded using state or local funds*, often referred to as scholarship or voucher programs.<sup>188</sup> Meanwhile, no

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versions—pose a stark threat to private school choice programs.”).

186. Of note is *Chittenden Town Sch. Dist. v. Vermont*, 738 A.2d 539 (Vt. 1999). Because the opinion involved Vermont’s compelled support provision, Vermont would likely be affected in the same way as the fourteen states that broadly interpret their Blaine Amendments. In addition, Maine, which has neither a Blaine nor compelled support clause, would also be affected, as overruling the decision in *Chittenden* would suggest that *Eulitt v. Maine Department of Education* was incorrectly decided. 386 F.3d 344 (1st Cir. 2004). *Eulitt* permitted the exclusion of all religious schools from an educational choice program that allows families to choose secular private schools. *Id.*

187. See Boyer, *supra* note 182, at 139 (“School-choice advocates have attempted to surmount Blaine Amendments by . . . urging all states to narrowly construe their Blaine Amendments.”).

188. Opponents of educational choice prefer to call these programs “voucher programs” because much of the American public does not understand what a voucher is, although many of the federal programs they are familiar with are voucher programs. Advocates prefer to use “scholarship programs” because most people understand what a scholarship program is and that it is based on choices made by the scholarship recipients. See, e.g., Jacob Blizzard, *Where Have All the Taxes Gone: Creating and Administering a Working Education System for Texas Through Universal Vouchers*, 13 TEX. TECH. ADMIN. L.J. 209, 211 (2012) (providing a brief overview of voucher systems and explaining Texas’ new plan for financing and funding education through its voucher system). See generally Martha McCarthy, Ph.D. *The Legal Status of School Vouchers: The Saga Continues*, 297 ED. L. REP. 655, 657–58 (2013)

such impediment exists for states with good Blaine law or those with no Blaine Amendment at all. Nonetheless—with the exception of Michigan and possibly Massachusetts—states with bad Blaine law can create scholarship programs *funded by private donations* incentivized by state tax credits.<sup>189</sup> Florida, South Dakota, and Virginia have bad Blaine law but also have tax credit-based scholarship programs. Notably, Florida's corporate tax credit program is the largest educational choice program in the country, serving over 100,000 students.<sup>190</sup> Michigan is unique in that it is the only state that has amended its Blaine to make it much more restrictive than it was previously. Michigan amended its constitution in 1972 in response to a 1970 advisory opinion of its supreme court that the previous version would allow some aid to religious schools.<sup>191</sup> Though less clear, an advisory opinion of Massachusetts' highest court also appears to preclude using tax benefits to incentivize educational choice programs.<sup>192</sup> This author categorizes these states' Blaine laws on the basis of previous appellate rulings of the state courts.

Over the years, various forms of educational assistance have been tried by state legislatures, with some courts allowing the programs to go forward and others halting them. Consider the issue of providing transportation to students of religious schools. In 1934,

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(offering comparative background on scholarship and educational voucher programs).

189. See *Manzara v. State*, 343 S.W.3d 656 (Mo. 2011); *Tax Equity All. for Mass., Inc. v. Comm'r*, 516 N.E.2d 152 (Mass. 1987); *State Bldg. & Constr. Trades Council*, 162 Cal. App. 4th 289 (Cal. Ct. App. 2008); *Olson v. State*, 742 N.W.2d 681 (Minn. Ct. App. 2007).

190. See *School Choice in America Dashboard*, EdCHOICE, <https://www.edchoice.org/school-choice/school-choice-in-america/> (last visited Apr. 2, 2017) (collecting and describing all school choice programs).

191. See Advisory Opinion re Constitutionality of P.A. 1970, No. 100, 180 N.W.2d 265 (Mich. 1970). Article VIII, section 2 of Michigan's Constitution now reads:

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.

192. *Op. of Justices to Senate*, 514 N.E.2d 353, 258 (Mass. 1987).

the Delaware Supreme Court held in *State ex rel. Traub v. Brown* that Delaware's program providing transportation to religious school students violated its Blaine Amendment, because the program "would help build up, strengthen and make successful" religious schools.<sup>193</sup> New York's highest court, the Court of Appeals, followed suit in 1938 in *Judd v. Board of Education*.<sup>194</sup> These cases were decided exclusively on state constitutional grounds. Both Delaware and New York amended their constitutions in response to *Brown* and *Judd*, respectively, to permit transportation of all private school students.<sup>195</sup>

In *Everson v. Board of Education*, another transportation case arising out of New Jersey, the Supreme Court for the first applied the Establishment Clause to the states.<sup>196</sup> The Court in *Everson* held that the New Jersey statute did not violate the Establishment Clause.<sup>197</sup>

Post-*Everson*, the same states that struck down program pre-*Everson*—Delaware and New York—reached conflicting conclusions on subsequent cases, which explains why this author classifies Delaware as interpreting its Blaine broadly to preclude educational choice programs and New York as interpreting its Blaine narrowly as permitting educational choice. In an advisory opinion issued in 1966, well after *Everson*, the Delaware Supreme Court justices opined that a bill for transporting private school students at public expense would violate its Blaine Amendment by providing "incidental" aid to religious schools.<sup>198</sup> Several other state supreme courts faced the same question after *Everson* and reached conflicting results.<sup>199</sup>

In *Board of Education v. Allen*,<sup>200</sup> the New York Court of Appeals addressed a different sort of aid to religious school students: the provision of free secular textbooks. The court went precisely the opposite way as the Delaware court, overruling *Judd* and declaring that its Blaine, which prohibits both direct and indirect aid to

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193. 172 A. 835, 837 (Del. 1934).

194. 15 N.E.2d 576 (N.Y. 1938).

195. See DEL. CONST. art. X, § 5; N.Y. CONST. art. XI, § 3.

196. *Everson v. Bd. of Educ.*, 330 U.S. 1, 3 (1947).

197. *Id.* at 18.

198. Op. of the Justices, 216 A.2d 668, 671 (Del. 1966).

199. Compare *Epeldi v. Engelking*, 488 P.2d 860 (Idaho 1971) (prohibiting transportation), with *Americans United v. Indep. Sch. Dist.*, 179 N.W.2d 146 (Minn. 1970) (permitting transportation).

200. 228 N.E.2d 791 (N.Y. 1967).

religious schools,<sup>201</sup> does not prohibit forms of student assistance that incidentally aid religious schools. After the court of appeals upheld the textbook program, the plaintiffs appealed to the United States Supreme Court, alleging that the program violated the Establishment Clause. The resulting 1968 Supreme Court decision, also named *Board of Education v. Allen*,<sup>202</sup> upheld the program as well, leading a number of other state legislatures to enact textbook aid programs, thereby generating more state court litigation involving state Blaine Amendments.

Some states reached a similar result to New York, upholding textbook programs from attacks based on Blaine Amendments.<sup>203</sup> But other states read their Blaine Amendments more broadly than the federal Establishment Clause. For example, California—despite upholding in 1946 under its Blaine Amendment a program that allowed for transporting religious school students<sup>204</sup>—held in 1981 that its textbook program violated its Blaine Amendment.<sup>205</sup> Other state supreme courts did so as well.<sup>206</sup>

Of particular interest for this article, because *Trinity Lutheran* involved Missouri's Blaine Amendments, is that Missouri interprets its Blaine Amendments broadly, at least with respect to elementary and secondary education programs. In *Paster v. Tussey*, in 1974, seven years after the United States Supreme Court's decision in *Board of Education v. Allen*, the Missouri Supreme Court ruled that providing textbooks to pupils in religious schools violated one of its Blaine

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201. N.Y. CONST. art. XI, § 3. Five other states' Blaine Amendments use similar "direct or indirect" language: FLA. CONST. art. I, § 3; GA. CONST. art. I, § 2, para. 7; MO. CONST. art. I, § 7; MONT. CONST. art. X, § 6; and OKLA. CONST. art. II, § 5.

202. 392 U.S. 236 (1968).

203. See, e.g., *Chance v. Miss. Textbook Rating & Purchasing Bd.*, 200 So. 706, 712–13 (Miss. 1941) (stating that the state had a duty to its public-school students "to have available to their use uniform textbooks").

204. See *Bowker v. Baker*, 167 P.2d 256, 263 (Cal. Ct. App. 1946).

205. See *Cal. Teachers Ass'n v. Riley*, 632 P.2d 953 (Cal. 1981) (holding that a statute authorizing the Superintendent of Public Schools to provide public school textbooks to students attending non-public and sectarian schools violated the California Constitution).

206. See, e.g., *Bloom v. Sch. Comm.*, 379 N.E.2d 578 (Mass. 1978); *Gaffney v. State Dep't of Educ.*, 220 N.W.2d 550 (Neb. 1974), *superseded by constitutional amendment*, NEB. CONS. art. VII, § 11.

Amendments.<sup>207</sup> Just two years later in *Americans United v. Rogers*,<sup>208</sup> the Missouri Supreme Court, in a dispute regarding state-provided higher education grants, held that the program did not violate the same Blaine Amendment because the public purpose of promoting higher education overrode any incidental benefit to private religious colleges.<sup>209</sup> *Rogers* is difficult to reconcile with *Paster*. But, until the 1970s, the United States Supreme Court also applied a looser Establishment Clause standard to higher education aid than to elementary and secondary education aid.<sup>210</sup>

Missouri's contrasting decisions involving higher and lower education epitomize why Blaine Amendments are significant to educational choice programs.<sup>211</sup> Such programs empower families and students to choose private schools if they so desire. However, with a substantial majority of those schools being religious, opportunities for educational choice are severely limited if courts truncate textbook programs by excluding students attending religious schools.<sup>212</sup> The United States Supreme Court no longer

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207. 512 S.W.2d 97, 104 (Mo. 1974) (holding that “[r]equiring public school boards to provide textbooks to pupils attending private schools” violates the Missouri Constitution).

208. 538 S.W.2d 711, 718 (Mo. 1976) (“Will implementation of the statutory program tend to entangle the state excessively in church affairs? We think the answer is ‘No.’”).

209. *See id.*

210. *See* *Roemer v. Bd. of Pub. Works*, 426 U.S. 736, 755 (1976) (stating that a state can subsidize secular projects at religious colleges); *Hunt v. McNair*, 413 U.S. 734, 748 (1973) (holding that a state agency can assist religious colleges with revenue bonds for construction); *Tilton v. Richardson*, 403 U.S. 672, 683 (1971) (stating that religious colleges can receive construction aid). The United States Supreme Court sought to justify this distinction in its treatment of higher and lower education on the basis that religious colleges were not “pervasively sectarian” the way religious elementary and secondary schools were. *Tilton*, 403 U.S. at 685–86. In 2000, the Court abandoned this rationale and permitted institutional aid to religious elementary and secondary schools restricted to secular activities, the same rule it applies to religious higher education institutions. *See Mitchell v. Helms*, 530 U.S. 793 (2000) (allowing federal funds to be distributed to private schools through state and local agencies).

211. *See, e.g.,* Mallory Nygard, *National School Choice Week: Blaine Amendments Still a Threat to Catholic Education*, CARDINAL NEWMAN SOC’Y (Jan. 23, 2017), <https://cardinalnewmansociety.org/national-school-choice-week-blaine-amendments-still-threat-catholic-education/> (“[O]pponents of school choice programs [are] claiming it is illegal for public funds to ever be received by religiously-affiliated schools even if given indirectly through parents.”).

212. *See Facts and Studies*, COUNCIL FOR AM. PRIVATE EDUC. (2017),

broadly interprets the Establishment Clause to equate aid empowering the choice to attend religious schools with the aid provided to religious schools themselves as institutional assistance.<sup>213</sup> With the evolution of Federal Establishment Clause jurisprudence, the Federal Constitution no longer supplies an impediment to properly-constructed educational choice programs.<sup>214</sup>

States with broad Blaine law interpretations (i.e., “bad” Blaine law) either decline to implement programs enhancing parents’ ability to use private schools or, if implemented, state courts strike down such programs under the state constitution.<sup>215</sup> Accordingly, states with a narrow interpretation of Blaine law—“good” Blaine law states—or those with no Blaine Amendment at all, have played a disproportionate role in the development of the United States Supreme Court’s Establishment Clause jurisprudence. For example, the United States Supreme Court decided *Everson v. Board of Education* on appeal from a New Jersey Supreme Court decision upholding the program. New Jersey has no Blaine Amendment. Similarly, the Court decided *Board of Education v. Allen* on an appeal from a decision of New York’s highest court, in which that court reversed its interpretation of its Blaine Amendment from bad to good.

In particular, the key United States Supreme Court decisions leading to *Zelman* (itself from Ohio, a state having no Blaine Amendment) besides *Everson* and *Allen*, have, with one exception, come from states with good Blaine law: Minnesota in *Mueller v. Allen*,<sup>216</sup> Arizona in *Zobrest v. Catalina Foothills School District*,<sup>217</sup> and

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<http://www.capenet.org/facts.html> (stating that in 2014, 93% of K–12 private school students attended religious schools).

213. *Zelman v. Simmons-Harris*, 536 U.S. 639, 650 (2002) (citing cases on either side of this distinction).

214. *See id.* at 640 (“[A] program is not readily subject to challenge under the Establishment Clause” if the program comports with two characteristics: the program must be religiously neutral, and must “provide[] assistance directly to a broad class of citizens who, in turn, direct government aid to religious schools wholly as a result of their own genuine and independent private choice.”).

215. *See* Dick Komer, *No Longer a Matter of Interpretation*, INST. FOR JUSTICE (Dec. 2002), <http://ij.org/11/december-2002-volume-11-number-6/targeting-state-constitutions-to-advance-choice/>.

216. 463 U.S. 388, 395 (1983) (upholding Minnesota state tax deductions for educational expenses, the vast majority of which were used for private religious school tuition).

217. 509 U.S. 1, 10 (1997) (upholding use of Arizona state funds to provide an interpreter to a deaf student in a religious school).

New York again in *Agostini v. Felton*.<sup>218</sup> The exception is *Witters v. Washington Department of Services for the Blind*,<sup>219</sup> where for reasons not apparently obvious the Washington Supreme Court decided the Federal Establishment Clause question without addressing the state's Blaine Amendments.<sup>220</sup> On remand, after the United States Supreme Court reversed the Establishment Clause holding, the Washington court held the program inconsistent with one of its Blaine Amendments, a decision the United States Supreme Court declined to review.<sup>221</sup> Taken together, these United States Supreme Court decisions led to the Court's recognition in *Zelman* of the difference between aid flowing to institutions as institutional assistance and aid flowing to parents and students as student assistance.<sup>222</sup>

Because of the dual coverage supplied by both the federal and state religion clauses, generally "good" Blaine laws are those that maintain a parallel interpretation between the state and federal interpretations. States with "bad" Blaine law are those that take a position that their state constitution clauses require a more rigid separation of church and state. Because this more rigid separation can infringe on federal rights under the First and Fourteenth Amendments, advocates for greater educational choice are intensely interested in cases from states with bad Blaine law like *Trinity Lutheran*.<sup>223</sup> Before turning to those United States Supreme Court cases, however, a bit more information is needed about the evolution of the Supreme Court's Establishment Clause jurisprudence on aiding religious schools and the families choosing them. It took the Supreme Court a long time to develop the distinction it now

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218. 521 U.S. 203, 232 (1997) (upholding a New York provision of remedial education services on site at religious schools).

219. 474 U.S. 481, 489–90 (1986) (upholding tuition for a blind student to attend a religious college in pursuit of a religious vocation).

220. *See id.*

221. *Witters v. Wash. Dep't of Servs. for the Blind*, 771 P.2d 1119, 1123–24 (Wash. 1989), *cert. denied*, 493 U.S. 850 (1989).

222. *See Zelman v. Simmons-Harris*, 536 U.S. 639, 653–54 (2002) (“[W]here a government aid program . . . provides assistance directly to a broad class of citizens who, in turn, direct government aid to religious schools wholly as a result of their own genuine and independent private choice, the program is not readily subject to challenge under the Establishment Clause.”).

223. *See, e.g., Erica Smith, Blaine Amendments and the Unconstitutionality of Excluding Religious Options from School Choice Programs*, 18 FEDERALIST SOC'Y REV. 90 (2017).

recognizes between institutional aid and student assistance programs.<sup>224</sup>

*D. Institutional Aid Versus Student Assistance Under the Establishment Clause*

In the fifty-five years between *Everson* in 1947 and *Zelman* in 2002, the Supreme Court's Establishment Clause jurisprudence was anything but clear.<sup>225</sup> The implication of *Everson* that the Free Exercise Clause constrained the proper interpretation of the Establishment Clause was largely buried in a stream of cases that resulted from state efforts to provide private school families some financial relief.<sup>226</sup> The Court failed to consistently recognize and apply a distinction between tuition aid provided to students and education-based aid provided to religious schools.<sup>227</sup> This was in part a failure to recognize that while public schools as state institutions receive virtually all of their funding from government sources,<sup>228</sup> private schools function in a marketplace in which families pay for their children's education. This failure allowed the Court to overlook the distinction between aid to private schools themselves and aid to families that might want to buy educational services from such schools.

Consider, for example, the transportation and textbook subsidies involved in *Everson* and *Allen*. In public schools, free bus transportation and free textbooks are the norm. But these are expenses typically paid by private school families, separate from tuition. As with school uniforms, these services often can be obtained from private vendors rather than the schools themselves. Subsidizing these services thus subsidizes the families using them. While these subsidies make it easier for families to use private schools, they are

224. *Id.* at 90–91 (explaining that Blaine Amendments were passed in the late 1800s and now the Supreme Court finally has an opportunity to resolve the issue).

225. Robert A. Sedler, *Understanding the Establishment Clause: The Perspective of Constitutional Litigation*, 43 WAYNE L. REV. 1317, 1318 (1997) (arguing that the main criticism is that the Supreme Court has never articulated an underlying theory toward the Establishment Clause).

226. *See, e.g., Wolman v. Walter*, 433 U.S. 229 (1977); *Comm. for Pub. Educ. v. Nyquist*, 413 U.S. 756 (1973); *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

227. *Everson v. Bd. of Educ.*, 330 U.S. 1, 24 (1947).

228. *See, e.g., STEPHEN Q. CORNMAN, NAT'L CTR. FOR EDUC. STAT., REVENUES AND EXPENDITURES FOR PUBLIC ELEMENTARY AND SECONDARY SCHOOL DISTRICTS: SCHOOL YEAR 2011–12*, 5 (2015).

different than subsidies provided to the schools themselves. This assistance to families can be contrasted with aid provided to private schools as institutions. Examples of such institutional aid to private schools are not hard to find—the land and cash grants provided by state legislatures to private schools and colleges like Harvard, Yale, and Dartmouth, and secondary schools (when all of them were religious institutions) are obvious examples.<sup>229</sup> Similarly, construction grants to build secular buildings at religious colleges, approved by the United States Supreme Court in *Tilton v. Richardson* (1971),<sup>230</sup> and cash subsidies for private, including religious, colleges, approved in *Roemer v. Board of Public Works of Maryland* (1976),<sup>231</sup> are more modern examples.

In its early Establishment Clause jurisprudence, the Supreme Court often assumed that aid to private school students or their families should be treated as aid to the schools themselves.<sup>232</sup> This, of course, is precisely what opponents of educational assistance programs continue to argue.<sup>233</sup> Ultimately the incoherence in the Supreme Court's case law led to the absurd situation where it appeared that states could supply free secular textbooks (approved in *Everson*) but not free maps (disapproved in *Meek v. Pittenger*).<sup>234</sup> This left unanswered the question of whether an atlas—a book of maps—could be provided without violating the Establishment Clause.

The Court's failure to distinguish between aid to students and aid to schools is epitomized by the 1973 decision in *Committee for Public Education v. Nyquist*,<sup>235</sup> in which the Court struck down three New York programs. The first provided maintenance grants directly to private schools, an obvious form of institutional assistance.<sup>236</sup> The

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229. See GABEL, *supra* note 31, at 70–86.

230. 403 U.S. 672 (1971).

231. 426 U.S. 736 (1976).

232. Steven K. Green, *Private School Vouchers and the Confusion over "Direct" Aid*, 10 GEO. MASON U. CIV. RTS. L.J. 47, 74 (2000) (“[T]he Court has consistently applied the term [direct] to . . . mean: impermissible direct aid is aid that results in a ‘substantial advancement of the sectarian enterprise,’ regardless of the form it takes.”).

233. *Id.* at 54 (“Tuition vouchers, being neither discrete nor restricted in their application, can and will be used to pay for the entire educational process, of which religion is an indispensable and inseparable part.”).

234. 421 U.S. 349 (1975).

235. 413 U.S. 756 (1973).

236. *Id.* at 756.

other two provided modest grants to families using private schools or modest tax benefits, depending on income.<sup>237</sup> The Court treated them all the same, characterizing them as yet another of the “ingenious plans for channeling state aid to sectarian schools that periodically reach th[is] Court.”<sup>238</sup> The Court concluded that “if the grants are offered as an incentive to parents to send their children to sectarian schools by making unrestricted cash payments to them, the Establishment Clause is violated whether or not the actual dollars given eventually find their way into the sectarian institutions.”<sup>239</sup> The Court thus treated all three programs as having the effect of supporting sectarian schools.<sup>240</sup>

Gradually, however, the Court began to recognize that aid to families should not automatically be equated with aid to schools. Thus, in its 1983 *Mueller v. Allen* decision, the Court upheld Minnesota’s education-expenses tax deduction, even though the plaintiffs alleged that more than 96% of the deductions were used by parents for religious school tuition.<sup>241</sup> The Court’s response was unambiguous: “We need not consider these contentions in detail. We would be loath to adopt a rule grounding the constitutionality of a facially neutral law on annual reports reciting the extent to which various classes of private citizens claimed benefits under the law.”<sup>242</sup> In 1986 in *Witters v. Washington Department of Services for the Blind*, the Court unanimously concluded that Washington could provide tuition aid to students pursuing a religious vocation at a religious college.<sup>243</sup> Five justices criticized the opinion of the Court for

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237. *Id.* at 756–57.

238. *Id.* at 785.

239. *Id.* at 786. Fortunately for the future of educational choice programs, in footnote 38 of its decision the Court refused to decide “whether the significantly religious character of the statute’s beneficiaries might differentiate the present cases from a case involving some form of public assistance (e.g., scholarships) made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited.” *Id.* at 782 n.38. The Court then specifically mentioned the G.I. Bill (38 U.S.C. § 1651) as a possible example of such a form of public assistance. *Id.* (citing 38 U.S.C. § 1651 (1970)). As a result, until *Zelman* ended the need to distinguish *Nyquist*, educational choice litigation involved an effort to fit the choice program into the confines of footnote 38. *See, e.g., Mitchell v. Helms*, 530 U.S. 793, 881 (2000); *Kotterman v. Killian*, 193 Ariz. 273, 279 (1999); *Jackson v. Benson*, 218 Wis. 2d 835, 855 (1998).

240. *Nyquist*, 413 U.S. at 794.

241. 463 U.S. 388, 401 (1983).

242. *Id.*

243. 474 U.S. 481 (1986).

focusing on how few students used the program for a religious education.<sup>244</sup> Justice Powell in his concurring opinion specifically relied on *Mueller* as making clear that “state programs that are wholly neutral in offering educational assistance to a class defined without reference to religion do not violate [the *Lemon* test by having a primary effect of advancing religion] because any aid to religion results from the private choices of individual beneficiaries.”<sup>245</sup>

Finally, in 2000 and 2002, the Court decided a pair of cases that crystallized the difference in treatment between institutional aid cases and educational choice cases. In *Mitchell v. Helms*, the Court upheld the state’s providing of institutional aid to religious schools if the aid was restricted to non-religious uses.<sup>246</sup> The instructional materials funded by the federal government and supplied by public school districts to private schools were indistinguishable from the instructional materials involved in *Meek*.<sup>247</sup> Thus, the *Mitchell* Court overruled *Meek* and upheld the program.<sup>248</sup> In doing so, it jettisoned the “pervasively sectarian” doctrine that asserted religious elementary and secondary schools had to be excluded from some assistance programs.<sup>249</sup>

*Mitchell* involved a program where private schools received aid based upon their proportion of enrolled students.<sup>250</sup> The plurality opinion of Justice Thomas, joined by Chief Justice Rehnquist and Justices Scalia and Kennedy, concluded that “[a]ny aid . . . that ultimately flows to religious institutions does so only as a result of the genuinely independent and private choices of aid recipients . . . means that the decision to support religious education is made by the individual, not by the State.”<sup>251</sup> In response to Justice Souter’s dissent emphasizing the “pervasively sectarian” nature of the Catholic schools participating in the program, the plurality linked that concept to the failed federal Blaine Amendment:

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244. *Id.* at 490 (White, J., concurring); *id.* at 490–93 (Powell and Rehnquist, JJ., Burger, C.J., concurring); *id.* at 493 (O’Connor, J., concurring).

245. *Id.* at 490–91 (footnote omitted).

246. 530 U.S. 793 (2000).

247. *Id.* at 797 (“To the extent that *Meek* and *Wolman* conflict with the foregoing analysis, they are overruled.”).

248. *Id.*

249. *Id.* at 829.

250. *Id.* at 798.

251. 530 U.S. at 811–12 (citing *Witters*, 474 U.S. at 487–88).

[H]ostility to aid to pervasively sectarian schools has a shameful pedigree that we do not hesitate to disavow. . . . Although the dissent professes concern for “the implied exclusion of the less favored,” . . . the exclusion of pervasively sectarian schools from government-aid programs is just that, particularly given the history of such exclusion. Opposition to aid to “sectarian” schools obtained prominence in the 1870’s with Congress’ consideration (and near passage) of the Blaine Amendment, which would have amended the Constitution to bar any aid to sectarian institutions. Consideration of the amendment arose at a time of pervasive hostility to the Catholic Church and Catholics in general, and it was an open secret that “sectarian” was code for “Catholic.”<sup>252</sup>

Noting that the Court’s subsequent coining of the term “pervasively sectarian” applied primarily to Catholic elementary and secondary schools, the plurality concluded by saying: “In short[,] nothing in the Establishment Clause requires the exclusion of pervasively sectarian schools from otherwise permissible aid programs, and other doctrines of this Court bar it. This doctrine, born of bigotry, should be buried now.”<sup>253</sup>

Justice O’Connor, joined by Justice Breyer, filed a concurring opinion in which she emphasized what she regarded as the plurality’s focus on the unitary criterion of religious neutrality.<sup>254</sup> In her view, for programs that provided institutional aid to schools, religious neutrality in distributing the benefits was insufficient, standing alone, to comply with the Establishment Clause—restriction of the aid to secular aspects of education was also required.<sup>255</sup> Thus, it remained to be seen how a majority of the Court would treat an actual educational choice program, in which the aid was provided to defray parents’ costs of sending their children to private schools, most of which would be religious.

In 2002, in *Zelman v. Simmons-Harris*, the Supreme Court answered that question by approving Ohio’s scholarship program for students attending Cleveland’s private schools.<sup>256</sup> Justice O’Connor joined the four justices from the *Mitchell* plurality in

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252. *Id.* at 828 (citations omitted).

253. *Id.* at 829.

254. *Id.* at 836–67 (O’Connor, J., concurring).

255. *Id.* at 839–40 (O’Connor, J., concurring).

256. 536 U.S. 639, 662–63 (2002).

upholding the program under the Establishment Clause.<sup>257</sup> The five-justice majority emphasized two criteria: first that the program was religiously-neutral, and second that it was a program of true private choice, with parents making independent decisions on where they wanted to use their children's scholarships.<sup>258</sup> Notwithstanding the facts that the tuition payments were not segregated between religious and secular education and that most parents chose religious schools, the Court held that it did not have a purpose or primary effect of advancing religion.<sup>259</sup>

### III. THE SUPREME COURT AND BLAINE AMENDMENTS

When the United States Supreme Court approved Ohio's educational choice program, the Ohio Supreme Court had already ruled that the program did not violate the federal Establishment Clause or Ohio's Compelled Support Clause.<sup>260</sup> Because the Ohio Constitution lacks a Blaine Amendment, neither supreme court had to decide the proper scope of a Blaine Amendment or the interaction between it and various federal protections for religious liberty.<sup>261</sup> But that interaction was present in several cases predating *Zelman*.<sup>262</sup> Cases after *Zelman* advocating for educational choice have sought to get the United States Supreme Court to consider whether broad interpretations of state Blaine Amendments trample on federally-protected rights.<sup>263</sup> These claims assert that denying religious school parents or students generally available benefits violates their Free Speech, Free Exercise, Establishment Clause,<sup>264</sup> and Equal Protection rights.<sup>265</sup>

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257. *Id.*

258. *Id.*

259. *Id.* at 645, 647, 662–63.

260. *Simmons-Harris v. Goff*, 711 N.E.2d 203, 211–12 (Ohio 1999).

261. See KOMER & NEILY, *supra* note 8, at 65.

262. See, e.g., *Locke v. Davey*, 540 U.S. 712, 723 n.7 (2004).

263. See Luke A. Lantta, *The Post-Zelman Voucher Battleground: Where to Turn after Federal Challenges to Blaine Amendments Fail*, 67 LAW & CONTEMP. PROBS. 214, 214, 221–22 (2004).

264. The test for an Establishment Clause violation considers whether a program has the purpose or effect of advancing or inhibiting religion. *Zelman*, 536 U.S. at 648–49. While Establishment Clause cases are usually focused on whether a program advances religion, the principle of religious neutrality prohibits programs designed to inhibit religion as well. See *Agostini v. Felton*, 521 U.S. 203, 222–23 (1997).

265. See Lantta, *supra* note 263, at 221–22, 225 n.83.

A. *The Supreme Court's Previous Blaine Cases*

The United States Supreme Court has decided three cases involving state Blaine Amendments,<sup>266</sup> although in the only one involving an educational choice program the Court denied the provision involved was a Blaine Amendment.<sup>267</sup> *Trinity Lutheran* is the third of those cases, and the second to hold that a state's broad interpretation of a Blaine Amendment infringed federally-protected rights.<sup>268</sup> Proper understanding of the significance of *Trinity Lutheran* for educational choice requires an understanding of its relationship to these earlier cases.

I. *Widmar v. Vincent*<sup>269</sup>

The first of these cases, *Widmar v. Vincent*, like *Trinity Lutheran*, arose in Missouri. In the early 1970s, private school parents sought to use *Pierce* to require Missouri to support private education.<sup>270</sup> In *Brusca v. Missouri*, a three-judge federal district court held that "a parent's right to choose a religious private school for his children . . . [did not mean] that the state [was] compelled to finance his child's [private school] education."<sup>271</sup> Nor did the parent "have a constitutional right to any credit for his taxes which support[ed] the public schools simply because he will not or cannot make use of them."<sup>272</sup> Similarly, in *Luetkemeyer v. Kaufmann*, another three-judge federal district court held that the state's refusal to provide free school bus transportation to private school students did not violate the students' equal protection rights because the exclusion was not irrational.<sup>273</sup> The United States Supreme Court summarily affirmed both decisions.<sup>274</sup>

266. *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017); *Locke*, 540 U.S. 712; *Widmar v. Vincent*, 454 U.S. 263 (1981).

267. *Locke*, 540 U.S. at 723 n.7 ("[T]he provision in question is not a Blaine Amendment.")

268. See *Trinity Lutheran*, 137 S. Ct. at 2024–25.

269. 454 U.S. 263 (1981).

270. See *Brusca v. Missouri*, 332 F. Supp. 275, 277 (D. Mo. 1972), *aff'd* 405 U.S. 1050 (1971) (citing *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925)).

271. *Id.*

272. *Id.* at 279.

273. 364 F. Supp. 376, 382 (D. Mo. 1974), *aff'd* 419 U.S. 888 (1974).

274. *Luetkemeyer v. Kaufmann*, 419 U.S. 888 (1974) (affirming *Luetkemeyer v. Kaufmann*, 364 F. Supp. 376 (D. Mo. 1973)); *Brusca v. State Bd. of Educ.*, 405 U.S. 1050 (1972) (affirming *sub nom. Brusca v. Missouri*, 332 F. Supp. 275 (D. Mo. 1971)).

The *Widmar* plaintiffs were more successful.<sup>275</sup> *Widmar* involved the University of Missouri, which, as a state agency, is subject to the federal First Amendment.<sup>276</sup> The University made its facilities generally available to registered student groups, but prohibited the use of its buildings for religious worship or religious teaching.<sup>277</sup> The Supreme Court held that the Free Speech Clause requires that regulation of speech be content-neutral.<sup>278</sup> The Court rejected the University's claim that the policy was justified by the compelling necessity of avoiding a violation of the Establishment Clause and of its Blaine Amendment.<sup>279</sup> Although the trial court held that the exclusion was not only justified but required by the Establishment Clause, the court of appeals and the Supreme Court held that a religiously-neutral equal access policy did not violate the Establishment Clause.<sup>280</sup> Further, the higher courts held that the state regulation of speech violated the Free Speech Clause because it was content-based.<sup>281</sup> The Court then rejected the state's argument that its interest in achieving greater separation of church and state than is ensured under the Establishment Clause was sufficiently compelling to justify content-based discrimination against religious speech.<sup>282</sup>

Missouri's argument for a greater separation of church and state was based on its Blaine Amendments, as interpreted in *Americans United v. Rogers*<sup>283</sup> and *Paster v. Tussey*.<sup>284</sup> These Missouri Supreme Court decisions, discussed previously, held that the Missouri Constitution<sup>285</sup> required a greater separation of church and state

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275. *Widmar*, 454 U.S. at 277.

276. *Id.*

277. *Id.* at 265.

278. *Id.* at 277.

279. *Id.* at 275 ("We agree that the interest of the University in complying with its constitutional obligations may be characterized as compelling. It does not follow, however, that an 'equal access' policy would be incompatible with this Court's Establishment Clause cases.").

280. *Id.*

281. *Id.*

282. *Id.* at 276.

283. 538 S.W.2d 713 (Mo. 1976).

284. 512 S.W.2d 97 (Mo. 1974).

285. MO. CONST. art. I, § 7 provides:

That no money shall ever be taken from the public treasury, directly or indirectly, to aid any church, sect or denomination of religion, or in aid of any priest, preacher, minister or teacher thereof, as such; and that no preference shall be given to nor any discrimination made against any

than that required by the Establishment Clause. The Court responded as follows:

[T]he state interest asserted here—in achieving greater separation of church and State than is already ensured under the Establishment Clause of the Federal Constitution—is limited by the Free Exercise Clause and in this case by the Free Speech Clause as well. In this constitutional context, we are unable to recognize the State’s interest as sufficiently “compelling” to justify content-based discrimination against respondents’ religious speech.<sup>286</sup>

In short, the Court relied on both the Free Exercise Clause and Free Speech Clause to limit the application of Missouri’s Blaine Amendments.<sup>287</sup>

## 2. *Zelman v. Simmons-Harris*<sup>288</sup>

Two years after it decided *Mitchell v. Helms*, in which the plurality discussed the anti-Catholic basis of the failed federal Blaine

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church, sect or creed of religion, or any form of religious faith or worship.

MO. CONST. art. IX, § 8 provides:

Neither the general assembly, nor any county, city, town, township, school district or any other municipal corporation, shall ever make an appropriation or pay from any public fund whatever, anything in aid of any religious creed, church or sectarian purpose, or to help to support or sustain any private or public school, academy, seminary, college, university or other institution of learning controlled by any religious creed, church or sectarian denomination whatever; nor shall any grant or donation of personal property or real estate ever be made by the state, or any county, city, town, or other municipal corporation, for any religious creed, church, or sectarian purpose whatever.

286. *Widmar*, 454 U.S. at 276. Justice Stevens, concurring in the result, said: “If school facilities may be used to discuss anticlerical doctrine, it seems to me that comparable use by a group desiring to express a belief in God must also be permitted.” *Id.* at 281.

287. In *Rosenberger v. Rector & Visitors of the Univ. of Va.*, the Supreme Court followed *Widmar* in another case involving a public university. 515 U.S. 819 (1995). The university defended its denial of publication subsidies to a student group whose publications reflected its religious perspective as necessary to avoid an Establishment Clause violation. *Id.* at 827–28. It did not rely on Virginia’s Blaine Amendment. The Court held that the university had violated the Free Speech Clause by discriminating against the organization based on its religious viewpoint. *Id.* at 829.

288. 536 U.S. 639 (2002).

Amendment,<sup>289</sup> the Supreme Court decided *Zelman v. Simmons-Harris*, a case in which it upheld a scholarship program against an Establishment Clause challenge.<sup>290</sup> The court in *Zelman* held that a religiously-neutral educational program in which the scholarship recipients choose where to use their benefits did not violate the Establishment Clause, regardless of how many students choose religious schools.<sup>291</sup> Although a Blaine Amendment was not at issue in *Zelman*,<sup>292</sup> educational choice advocates knew that opponents would continue to cite state Blaine Amendments to frustrate efforts to expand educational choice to other states, particularly those with bad Blaine law.<sup>293</sup> Accordingly, they were heartened when only two years after *Zelman* the Court decided *Locke v. Davey*, a case in which, like *Widmar*, the state relied on a Blaine Amendment to deny a student a college scholarship.<sup>294</sup>

### 3. *Locke v. Davey*<sup>295</sup>

In *Locke v. Davey*, the Supreme Court considered the question of whether the Federal Constitution was violated by application of the Washington Constitution's Blaine Amendment. *Locke* was in many ways quite similar to the *Witters* case from Washington in

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289. 530 U.S. 793, 828–29 (2000) (discussing a proposed constitutional amendment intended to bar aid to sectarian institutions, which “arose at a time of pervasive hostility to the Catholic Church and to Catholics in general, and [when] it was an open secret that ‘sectarian’ was code for ‘Catholic’”).

290. 536 U.S. at 662 (2002) (“[T]he Ohio program is entirely neutral with respect to religion. It provides benefits directly to a wide spectrum of individuals, defined only by financial need and residence in a particular school district. It permits such individuals to exercise genuine choice among options public and private, secular and religious.”).

291. *Id.*

292. Ohio’s Constitution does not include a Blaine Amendment.

293. The Court’s decision in *Zelman* did not prevent individual states from instituting their own stricter rules regarding distribution of voucher funding, and thereby ultimately left the question open to each state to decide. Michael Hansen, *Beyond Scraped Knees: The Implication of a Missouri Playground on State Voucher Programs*, BROWN CTR. CHALKBOARD (July 12, 2017), <https://www.brookings.edu/blog/brown-center-chalkboard/2017/07/12/beyond-scraped-knees-the-implications-of-a-missouri-playground-on-state-voucher-programs/>.

294. Joseph P. Viteritti, *Davey’s Plea: Blaine, Blair, Witters, and the Protection of Religious Freedom*, 27 HARV. J.L. & PUB. POL’Y 299, 299 (2003) (discussing the *Locke* case).

295. 540 U.S. 712 (2004).

1986.<sup>296</sup> *Locke* involved higher education and the denial of state aid to a student pursuing a religious vocation at a religious college.<sup>297</sup> And in both cases, the state justified its denial of assistance on the same provision of the Washington Constitution: article I, section 11.<sup>298</sup> This time, however, the plaintiff, Davey, filed his lawsuit in federal rather than state court.<sup>299</sup> He alleged that Washington's denial of a scholarship denied his rights to free speech, free exercise of his religion, and equal protection under federal and state laws.<sup>300</sup>

Although Davey prevailed at the Ninth Circuit on his Free Speech claim, the United States Supreme Court, in a 7-2 decision,<sup>301</sup> reversed that claim and rejected his other claims as well.<sup>302</sup> Acknowledging that "there is no doubt that the State could, consistent with the Federal Constitution, permit Promise Scholars to pursue a degree in devotional theology," the Court stated:

The question before us, however, is whether Washington, pursuant to its own constitution, which has been authoritatively interpreted as prohibiting even indirectly funding religious instruction that will prepare students for

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296. In *Witters v. Washington Department of Services for the Blind*, the United States Supreme Court unanimously held that Washington did not violate the Establishment Clause by paying for Witters to pursue a religious vocation at a religious college. 474 U.S. 481 (1986). The Supreme Court remanded the case back to the Washington Supreme Court because the Washington Supreme Court had ruled on the federal Establishment Clause question without ruling on the claim that paying for Witters' education separately violated Washington's Constitution, specifically article I, section 11. *Id.* at 489. That provision reads in part as follows: "[N]o public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment." *Id.* at 484. The Supreme Court stated that "[o]n remand, the state court is of course free to consider the applicability of the 'far stricter' dictates of the Washington State Constitution." *Id.* at 725. The Washington Supreme Court then held that article I, section 11 did prohibit paying for Mr. Witters' tuition at the religious college. *Witters v. Washington Comm. for the Blind*, 717 P.2d 1119 (Wash. 1989). Witters again appealed to the United States Supreme Court, which denied certiorari. 493 U.S. 850 (1989).

297. *Locke*, 540 U.S. at 717.

298. *Id.* at 716; *Witters*, 474 U.S. at 484.

299. *Locke*, 540 U.S. at 716.

300. See *Davey v. Locke*, 299 F.3d 748, 750 (9th Cir. 2002).

301. Chief Justice Rehnquist authored the opinion, and was joined by the four more liberal members of the Court, as well as two of the more conservative justices (Kennedy and O'Connor). Justices Scalia and Thomas dissented. *Locke*, 540 U.S. at 713.

302. *Locke*, 540 U.S. at 723-34.

the ministry [in *Witters* on remand from the U.S. Supreme Court] . . . can deny them such funding without violating the Free Exercise Clause.<sup>303</sup>

The Court found that Washington's action in denying the promise scholarship fell within the "play in the joints" between the Establishment and Free Exercise Clauses—that "there are some state actions permitted by the Establishment Clause but not required by the Free Exercise Clause."<sup>304</sup> The Court rejected the free speech claim, holding that "[o]ur cases dealing with speech forums are simply inapplicable,"<sup>305</sup> thereby rejecting Davey's claim that his exclusion was an unconstitutional viewpoint restriction under *Rosenberger*.<sup>306</sup> In the same footnote, the Court rejected Davey's Equal Protection claim, applying the rational basis test because it found no violation of the Free Exercise Clause.<sup>307</sup>

The Court's primary focus was on Davey's free exercise claim that denying him funding violated his right to free exercise of his religion. Characterizing the state's action as "merely [having] chosen not to fund a distinct category of instruction," the Court concluded that "training for religious professions and training for secular professions are not fungible," and that "[t]raining someone to lead a congregation is an essentially religious endeavor."<sup>308</sup> Noting that both the federal and state constitutions embody distinct views on religion that have "no counterpart with respect to other callings or professions," the Court stated that the fact that "a State would deal differently with religious education for the ministry than with education for other callings is a product of these views [of religion,] not evidence of hostility towards religion."<sup>309</sup>

The Court concluded that the fact that "early state constitutions saw no problem in explicitly excluding only the ministry from receiving state dollars reinforces our conclusion that religious instruction is of a different ilk."<sup>310</sup> In the footnote accompanying this conclusion, the Court rejected the argument of *amici* that "Washington's Constitution was born of religious bigotry because it

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303. *Id.* at 719 (alteration in original) (citations omitted).

304. *Id.* at 718–19

305. *Id.* at 720 n.3 (citations omitted).

306. *Id.*

307. *Id.*

308. *Id.* at 721.

309. *Id.*

310. *Id.* at 723.

contains a so-called ‘Blaine Amendment,’ which has been linked with anti-Catholicism.”<sup>311</sup> The “early state constitution[al]” provisions to which the Court then cites are all “compelled support” clauses from eight states (Georgia, Pennsylvania, New Jersey, Delaware, Kentucky, Vermont, Tennessee, and Ohio),<sup>312</sup> while the Washington provision at issue is most certainly not a compelled support clause, but a Blaine Amendment.<sup>313</sup> Professor Mark DeForrest of Washington’s Gonzaga University Law School has shown persuasively that “[t]he language of Washington’s Article I, section 11 closely parallels language that was included in the various versions of the [federal] Blaine Amendment.”<sup>314</sup> This inclusion was strongly supported by the Washington State Constitutional Convention, a convention dominated by Republicans loyal, both personally and ideologically, to the sponsor of the Blaine Amendment, James Blaine.<sup>315</sup>

As discussed previously, while the compelled support clauses cited by the *Locke* Court served to prevent states from establishing a state religion, the state Blaine Amendments served to preserve a Protestant monopoly over public school funding. One cannot escape a feeling that the Court’s majority deliberately avoided having to confront the state Blaine Amendments’ unsavory past in order to reach its desired result.

#### 4. *Post-Locke Developments*

In responding to Justice Scalia’s dissent, the *Locke* majority asserted that “the only interest at issue [was] the State’s interest in not funding the religious training of clergy.”<sup>316</sup> For those concerned with the decision’s application to educational choice programs, *Locke* fails to answer the obvious question of whether states with Blaine Amendments can more broadly ban religion from such programs, as states with bad Blaine law routinely interpret their Blaine

311. *Id.* at 723 n.7.

312. *Id.* at 723.

313. See Mark E. DeForrest, *Locke v. Davey: The Connection Between the Federal Blaine Amendment and Article I, § 11 of the Washington State Constitution*, 40 TULSA L. REV. 295, 320 (1974) (“Despite the U.S. Supreme Court’s dismissive footnote in *Locke v. Davey*, there are very good reasons indeed to consider Art. I, § 11 as a Blaine amendment provision contained within Washington’s state constitution.”).

314. *Id.*

315. *Id.*

316. *Locke*, 540 U.S. at 722 n.5.

Amendments to do.<sup>317</sup> Opponents of educational choice programs seek a broad reading of *Locke*, one that prohibits support for religious education generally, while supporters of educational choice point to the numerous references in *Locke* to religious vocational training. Opponents emphasize the religious elements in the education offered in religious elementary and secondary schools, while supporters emphasize that the education offered in religious schools satisfies all of the state's legitimate interests in requiring elementary and secondary education.<sup>318</sup>

Two cases epitomize the opposing readings of *Locke*. In *Eulitt v. Maine Department of Education*, the First Circuit upheld the exclusion of religious schools from participation in a Maine program.<sup>319</sup> The program required that school districts not operating elementary or secondary public schools pay tuition on behalf of their resident students to whatever public or private school the parents select.<sup>320</sup> This system was religiously neutral for nearly 100 years, until the legislature modified it to comply with a 1980 Maine Attorney General's opinion that concluded the Establishment Clause did not allow parents to use public funds for tuition at religious private schools.<sup>321</sup>

Despite the fact that Maine has no state Blaine Amendment and that the 1980 opinion is clearly wrong post-*Zelman*, the First Circuit found permissible the continued discrimination against families choosing a religious school under *Locke*. The court stated: "We read [*Locke v. Davey*] more broadly [than plaintiffs]: the decision there recognized that state entities, in choosing how to provide education, may act upon their legitimate concerns about excessive

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317. See *supra* notes 187–192 and accompanying text.

318. See, e.g., Silvia Durri, *Curtailing the First Amendment Protection to Discovery*, 29 TOURO L. REV. 1063, 1066 (2013) ("Thus, *Locke* illustrates that . . . the State [has] the ability to provide aid for religious studies without creating excessive entanglement with religious doctrine.").

319. 386 F.3d 344, 346 (1st Cir. 2004).

320. *Id.*

321. See Me. Att'y Gen. OP. No. 80-2 (Jan 7, 1980). See generally Pete Yost, *Supreme Court Rejects a Case Involving Maine School Vouchers*, DESERET NEWS (Nov. 28, 2006), <https://www.deseretnews.com/article/650210596/Supreme-Court-rejects-a-case-involving-Maine-school-vouchers.html> ("In 1980, the state attorney general said the program violated the U.S. Constitution's Establishment Clause. The Maine Legislature made it law in 1983.").

entanglement with religion, even though the Establishment Clause may not require them to do so.”<sup>322</sup>

In contrast, in *Colorado Christian University v. Weaver*, a case in which students at a pervasively religious college were denied state tuition assistance grants, the Tenth Circuit disagreed with *Eulitt*'s broad reading of *Locke*.<sup>323</sup> Despite the fact that the Colorado constitution has two Blaine Amendments<sup>324</sup> and a compelled support clause,<sup>325</sup> the case was brought in federal court because the Colorado Supreme Court previously interpreted those provisions to permit aid to students attending religious colleges that were not pervasively religious.<sup>326</sup> While both sides agreed that under *Zelman* the Establishment Clause did not require the exclusion, the state defendants argued that *Locke* definitively resolved the issue of whether the state may still choose to exclude such colleges.<sup>327</sup> The Tenth Circuit disagreed:

Although *Locke* precludes any sweeping argument that the State may never take the religious character of an activity into consideration when deciding whether to extend public funding, the decision does not imply that states are free to discriminate in funding against religious institutions however they wish, subject only to a rational basis test.<sup>328</sup>

The court emphasized several limiting aspects of the Supreme Court's decision, concluding that “[t]he opinion thus suggests, even if it does not hold, that the State's latitude to discriminate against religion is confined to certain ‘historic and substantial state interest[s],’ and does not extend to the wholesale exclusion of religious institutions and their students from otherwise neutral and generally available government support.”<sup>329</sup>

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322. *Eulitt*, 386 F.3d at 355.

323. 534 F.3d 1245, 1250 (10th Cir. 2008).

324. COLO. CONST. art. V, § 34; *Id.* art. IX, § 7.

325. *Id.* art. II, § 4.

326. *Colo. Christian Univ.*, 534 F.3d at 1267–68.

327. *Id.* at 1254.

328. *Id.* at 1256.

329. *Colo. Christian Univ.*, 534 F.3d at 1255 (citations omitted). Having rejected the defendants' reading of *Locke* the court invalidated the exclusion as discriminating among religions and requiring intrusive inquiries into religious matters protected by the Free Exercise Clause. *Id.* at 1256.

IV. *TRINITY LUTHERAN V. COMER*<sup>330</sup>

The significance of *Trinity Lutheran* for educational choice programs lies in the Court's treatment of *Locke* and its further elaboration on just how much play there is in the joint between the two federal Religion Clauses.<sup>331</sup> In *Trinity Lutheran*, the Court partially answered the question of whether the states' latitude to discriminate against religion extends to the wholesale exclusion of religious institutions from otherwise neutral and general government support.<sup>332</sup> The facts of the case were simple: Missouri denied a grant to a church that would have subsidized the church's purchase and installation of a rubberized surface on its playground, solely because the applicant was a church.<sup>333</sup> The program was a competitive one, and the state agency administering the program determined that the church's application would have been funded if the church had been eligible for the program.<sup>334</sup>

As it had in *Widmar*, Missouri based its decision on one of the Blaine Amendments in its state constitution that states "no money shall be taken from the state treasury . . . in aid of any church."<sup>335</sup> In response to the church's claim that the denial of the grant violated its rights under the Free Exercise Clause, the federal district court explained that the Free Exercise Clause "prohibits the government from outlawing or restricting the exercise of a religious practice, but it generally does not prohibit withholding an affirmative benefit on account of religion."<sup>336</sup> Although *Trinity Lutheran* was not an educational choice case, the trial court found the case "nearly indistinguishable from *Locke [v. Davey]*," an educational choice case, and held that the Free Exercise Clause was not violated.<sup>337</sup>

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330. *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017).

331. *See id.* at 2015.

332. *Id.*

333. *Id.* at 2014.

334. *Id.* at 2017.

335. MO. CONST. art. I, § 7 ("That no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect, or denomination of religion, or in aid of any priest, preacher, minister or teacher thereof, as such; and that no preference shall be given to nor any discrimination made against any church, sect, or creed of religion, or any form of religious faith or worship.").

336. *Trinity Lutheran*, 137 S. Ct. at 2014.

337. *Trinity Lutheran Church v. Pauley*, 976 F. Supp. 2d 1137, 1151 (W.D. Mo. 2013).

In affirming the trial court's decision, the Eighth Circuit also relied on *Locke*, concluding that while it was clear that the Establishment Clause did not bar the grant to the church, Missouri did not have to disregard the stricter antiestablishment concerns reflected in its state constitution.<sup>338</sup> Circuit Judge Gruender dissented to the panel majority, distinguishing *Locke* as concerning the narrow issue of funding the religious training of clergy, and "not leav[ing] states with unfettered discretion to exclude the religious from generally available public benefits."<sup>339</sup>

The Supreme Court reversed in a 7-2 decision, with the dissent written by Justice Sotomayor and joined by Justice Ginsburg.<sup>340</sup> Six justices joined Chief Justice Roberts' majority opinion, although two of those justices—Gorsuch and Thomas—refused to join one of his footnotes that disclaimed any implications for other programs, including those designed for educational choice.<sup>341</sup> Justice Breyer concurred in the judgment in a brief opinion that emphasized "the particular nature of the 'public benefit'" involved.<sup>342</sup> He harkened back to *Everson's* statement that the state cannot exclude individuals because of their faith from receiving the benefits of public welfare legislation, such as ordinary police and fire protection.<sup>343</sup> Characterizing the program at issue as one "designed to secure or improve the health or safety of children," he noted that "[p]ublic benefits come in many shapes and sizes" and concluded that he "would leave the application of the Free Exercise Clause to other kinds of public benefits for another day."<sup>344</sup> His opinion does not mention *Locke v. Davey*.<sup>345</sup>

338. *Trinity Lutheran Church v. Pauley*, 788 F.3d 779, 785 (8th Cir. 2015).

339. *Id.* at 791.

340. *Trinity Lutheran*, 137 S. Ct. at 2027.

341. *Id.* at 2016.

342. *Id.* at 2026 (explaining he saw no significant difference between cutting off church schools from general government services and participation in general programs designed to secure or improve children's health).

343. *Id.* at 2027 (Breyer, J., concurring).

344. *Id.*

345. *Id.* at 2026–27. In her lengthy dissent, Justice Sotomayor found: "The Establishment Clause does not allow Missouri to grant the Church's funding request because the Church uses the Learning Center, including its playground, in conjunction with its religious mission." *Id.* at 2028 (Sotomayor, J., dissenting). Sotomayor continued, "[t]he conclusion that the funding the Church seeks would impermissibly advance religion is inescapable." *Id.* at 2029. Consequently, she does not view the Missouri provision in question as more expansive than the Establishment Clause, as applied to the program in question. *Id.* at 2030. Sotomayor

Chief Justice Roberts' majority opinion takes a substantially broader approach than Breyer's concurrence and contains an extended discussion of *Locke*.<sup>346</sup> The majority decision noted that "[t]he parties agree that the Establishment Clause of [the First] Amendment does not prevent Missouri from including Trinity Lutheran in the Scrap Tire Program."<sup>347</sup> The Court then considered whether the denial fell into the "'play in the joints' between what the Establishment Clause permits and the Free Exercise Clause compels," in the words of *Locke*.<sup>348</sup> Relying on a line of Free Exercise cases, the Court emphasized language from *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, that "the Free Exercise Clause protects against laws that 'impos[e] special disabilities on the basis of . . . religious status.'"<sup>349</sup> The majority stated that the denial of a public benefit to an otherwise eligible recipient solely because of the recipients' religious character "imposes a penalty on the free exercise of religion that triggers the most exacting scrutiny."<sup>350</sup> The Court rejected the defendant's argument that the penalty is a denial of a subsidy and does not resolve the free exercise question. The Court stated that "[t]he express discrimination against religious exercise here is not the denial of a grant, but rather the refusal to allow the Church—solely because it is a Church—to compete with secular organizations for a grant."<sup>351</sup>

The majority then rejected the defendant's argument that the free exercise question is controlled by *Locke*, as the trial and appellate courts had found.<sup>352</sup> In discussing *Locke*, the *Trinity Lutheran* Court emphasized the narrowness of that decision, starting with the fact that the plaintiff in that case was discriminated against, not because of who he was, but because of what he proposed to do—use the funds

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does, however, distinguish *Zelman*: "Because Missouri decides which Scrap Tire Program applicants receive state funding, this case does not implicate a line of decisions about indirect aid programs in which aid reaches religious institutions 'only as a result of the genuine and independent choices of private individuals.'" *Id.* at 2029 n.2 (quoting *Zelman v. Simmons-Harris*, 536 U.S. 639, 649 (2002)).

346. *Id.* at 2023–25.

347. *Id.* at 2019.

348. *Id.* (quoting *Locke v. Davey*, 540 U.S. 712, 718 (2004)).

349. *Id.* (quoting *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993)).

350. *Id.* at 2021.

351. *Id.* at 2022.

352. *Id.* at 2023.

to prepare for the ministry.<sup>353</sup> The Court characterized this as “an essentially religious endeavor,” one “that lay at the historic core of the Religion Clauses.”<sup>354</sup> Moreover, the Court emphasized, “the [Locke] Court took account of Washington’s antiestablishment interest only after determining that the scholarship program did not ‘require students to choose between their religious beliefs and receiving a government benefit.’”<sup>355</sup> The Court elaborated on this point:

As the [Locke] Court put it, Washington’s scholarship program went “a long way toward including religion in its benefits.” Students in the program were free to use their scholarships at “pervasively religious schools.” Davey could use his scholarship to pursue a secular degree at one institution while studying devotional theology at another. He could also use his scholarship money to attend a religious college and take devotional theology courses there. The only thing he could not do was use the scholarship to pursue a degree in that subject.<sup>356</sup>

The *Trinity Lutheran* Court thus found express discrimination against religious exercise that put the applicant Church to a choice between its religious beliefs and receiving a government benefit. This triggered a requirement that it withstand “the strictest scrutiny,”<sup>357</sup> which the Court also called the “most exacting scrutiny”<sup>358</sup> and the “most rigorous scrutiny.”<sup>359</sup> The Court then evaluated whether the state had carried its burden, concluding that it had not done so:

Under that stringent standard, only a state interest “of the highest order” can justify the Department’s discriminatory policy. Yet the Department offers nothing more than Missouri’s policy preference for skating as far as possible from religious establishment concerns. In the face of the clear infringement on free exercise before us, that interest cannot qualify as compelling. As we said when considering Missouri’s same policy preference on a prior occasion, “the

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353. *Id.*

354. *Id.*

355. *Id.* at 2016 (quoting *Locke v. Davey*, 540 U.S. 712, 720–21 (2004)).

356. *Id.* at 2023–24 (quoting *Locke*, 540 U.S. at 724) (citations omitted).

357. *Id.* at 2022.

358. *Id.* at 2021.

359. *Id.* at 2024 (citing *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993)) (footnote omitted).

state interest asserted here—in achieving greater separation of church and State than is already ensured under the Establishment Clause of the Federal Constitution—is limited by the Free Exercise Clause.”<sup>360</sup>

Finally, the Court concluded that, despite the consequences of the exclusion being “in all likelihood, a few extra scraped knees . . . the exclusion of Trinity Lutheran from a public benefit for which it is otherwise qualified, solely because it is a church, is odious to our Constitution all the same, and cannot stand.”<sup>361</sup>

In a footnote, the Court stated, “this case involves express discrimination based on religious identity with respect to playground resurfacing. We do not address religious uses of funding or other forms of discrimination.”<sup>362</sup> Both Justice Gorsuch and Justice Thomas refused to join the footnote, based on concerns that the footnote might lead readers to mistake how narrowly the Court had read *Locke*. Justice Gorsuch expressed two concerns. First, he objected that “the Court leaves open the possibility” that “a useful distinction might be drawn between laws that discriminate on the basis of religious *status* and religious *use*.”<sup>363</sup> Here, he viewed the Free Exercise Clause as guaranteeing “the free *exercise* of religion, not just the right to inward belief (or status).”<sup>364</sup> He found that reliance on the status-use distinction was insufficient to distinguish *Locke*, stating, “[i]f that case can be correct and distinguished, it seems it might be only because of the opinion’s claim of a long tradition against the use of public funds for the training of the clergy.”<sup>365</sup>

Second, Justice Gorsuch criticized the footnote because he worried “that some might mistakenly read it to suggest that only ‘playground resurfacing’ cases, or only those with some association with children’s safety or health, or perhaps some other social good we find sufficiently worthy, are governed by the legal rules recounted in and faithfully applied by the Court’s opinion.”<sup>366</sup> He concluded that “the general principles here do not permit discrimination

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360. *Id.* (quoting *Widmar v. Vincent*, 454 U.S. 263, 276 (1981)) (citations omitted).

361. *Id.* at 2024–25.

362. *Id.* at 224 n.3.

363. *Id.* at 2025 (Gorsuch, J., concurring) (emphasis added).

364. *Id.* at 2026 (emphasis added).

365. *Id.*

366. *Id.*

against religious exercise—whether on the playground or anywhere else.”<sup>367</sup>

Justice Thomas, who dissented in *Locke* with Justice Scalia,<sup>368</sup> took issue with what he referred to as the “Court’s endorsement in *Locke* of even a ‘mild kind[]’ of discrimination against religion.”<sup>369</sup> Ultimately, “because the Court today appropriately construes *Locke* narrowly, and because no party has asked us to reconsider it,” Justice Thomas concurred in all of the Court’s opinion except for footnote three, for the reasons expressed in Justice Gorsuch’s opinion.<sup>370</sup>

In summary, *Trinity Lutheran* shows two justices discontented with *Locke* (Justices Gorsuch and Thomas) and potentially prepared to overrule it in a case involving an educational choice program.<sup>371</sup> A third justice (Justice Breyer) concurred in the judgment in *Trinity Lutheran* on a very narrow ground, characterizing the program involved as one to improve the health and safety of children and “leav[ing] the application of the Free Exercise clause to other kinds of public benefits for another day.”<sup>372</sup> The two dissenting justices viewed Missouri’s action as justified under the federal Establishment Clause because it provided aid directly to a church but left open how they would view an educational choice case like the scholarship program involved in *Zelman*.<sup>373</sup> The remaining four justices (Chief Justice Roberts and Justices Alito, Kagan, and Kennedy), like Justices Thomas and Gorsuch, gave a narrow reading to *Locke*. This reading emphasized language in that decision about how the program involved did not exclude religion (and religious people) in general from its benefits, by allowing scholarship recipients to attend pervasively sectarian colleges and study devotional religion.<sup>374</sup>

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367. *Id.*

368. *Locke v. Davey*, 540 U.S. 712, 725–34 (2004).

369. *Trinity Lutheran*, 137 S. Ct. at 2025 (quoting *Locke*, 540 U.S. at 720) (Thomas, J., concurring).

370. *Id.*

371. *Id.*

372. *Id.* at 2027.

373. *See id.* at 2030–31; *see also Zelman v. Simmons-Harris*, 536 U.S. 639, 639 (2002).

374. *See Trinity Lutheran*, 137 S. Ct. at 2025–26; *Locke v. Davey*, 540 U.S. 712, 725 (2004).

V. IMPLICATIONS OF *TRINITY LUTHERAN* FOR FUTURE EDUCATIONAL CHOICE LITIGATION

As occurred in *Locke*,<sup>375</sup> several *amici* briefs to the Supreme Court discussed the state constitutional provision in question as an anti-Catholic Blaine Amendment.<sup>376</sup> None of the four opinions discussed this fact, but at least unlike *Locke*, the Court did not simply erroneously deny that the provision in question was a Blaine.<sup>377</sup> By narrowing the interpretation of *Locke*, however, the Court has narrowed the “play in the joints” between the Establishment and Free Exercise Clauses that has allowed the supposed “antiestablishment concerns” of state Blaine Amendments to limit the full scope of the Free Exercise Clause.<sup>378</sup>

The *Locke* Court tied the outcome of Equal Protection Clause analysis to the Free Exercise Clause.<sup>379</sup> Thus, school choice advocates can only be heartened by the recognition that six members of the Court have acknowledged the discriminatory nature of excluding churches from generally available public benefit programs.<sup>380</sup> This recognition should bode well for educational choice advocates in cases where state Blaine Amendments prohibit the participation of students whose families want to use scholarships to attend religious schools. If it is discriminatory to exclude churches from neutral programs, it is at least equally discriminatory to exclude families by excluding the religious schools they choose.<sup>381</sup> It is one thing to link vocational training for the clergy to antiestablishment interests going beyond the Establishment Clause, given the historical concerns about public funding of clergy. It is quite another when the antiestablishment concerns were “born of [anti-Catholic] bigotry,”

375. Brief of United States Conference of Catholic Bishops, North Park Theological Seminary, the Worldwide Church of God, and Clifton Kirkpatrick, as Stated Clerk of the Presbyterian Church (U.S.A.) as Amici Curiae in support of Respondent, *Locke v. Davey*, 540 U.S. 712 (2004) (No. 02-1315), 2003 WL 22087619.

376. See, e.g., Brief for the Institute for Justice as Amicus Curiae at 26–35, *Trinity Lutheran Church v. Comer*, 137 S. Ct. 2012 (2017) (No. 15-577).

377. See *Locke*, 540 U.S. at 725.

378. *Trinity Lutheran*, 137 S. Ct. at 2032.

379. *Id.*

380. *Id.*

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

and served to protect a Protestant monopoly over public education funding for public schools that were generically Protestant.<sup>382</sup>

Moreover, while the Supreme Court avoided consideration of the Free Speech Clause in *Locke* by baldly stating that denial of funding to pursue vocational theology degrees did not involve an unconstitutional viewpoint restriction on speech,<sup>383</sup> elementary and secondary schools are a way in which parents teach their children. This is true whether the parents allow the government to teach their children in public schools, whether the parents teach directly by homeschooling, or whether they choose private schools. Educational choice programs subsidize the children's education, and, by allowing parents to choose from multiple viewpoints, appear to create a limited public forum in which viewpoint discrimination is possible. *Rosenberger* and the public forum cases on which it is based should not permit elimination of the religious viewpoint.<sup>384</sup> Educational choice programs appear to be another situation in which the free exercise and free speech analyses lead to the same conclusion.

We may not have long to wait for an answer to the question of whether the broad interpretation of Blaine Amendments must be cut back to conform to the Federal Constitution's protection for free exercise, free speech, and equal protection. Immediately after it issued its *Trinity Lutheran* decision, the Court granted review of, reversed, and remanded two cases from state supreme courts that involved state Blaine Amendments and educational programs.<sup>385</sup> Petitions for certiorari in these cases were held, pending the long-delayed decision in *Trinity Lutheran*.<sup>386</sup>

The first of these cases filed with the Court came from the Colorado Supreme Court and involves one of its Blaine

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382. *Mitchell v. Helms*, 530 U.S. 793, 829 (2000).

383. *Locke*, 540 U.S. at 720 n.3.

384. *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 819 (1995).

385. See *Taxpayers for Pub. Educ. v. Douglas Cty. Sch. Dist.*, 351 P.3d 461 (Colo. 2015), *rev'd sub nom. Doyle v. Taxpayers for Pub. Educ.*, 137 S. Ct. 2324 (2017) (remanding for consideration in light of *Trinity Lutheran*); *Moses v. Skandera*, 367 P.3d 838 (N.M. 2015), *rev'd sub nom. N.M. Assoc. of Non-Public Sch. v. Moses*, 137 S. Ct. 2325 (2017) (remanding for consideration in light of *Trinity Lutheran*).

386. The death of Justice Scalia occurred after certiorari was granted in *Trinity Lutheran*, and the case was one of several delayed by a desire to have a fully staffed Court. See Amy Howe, *Argument Preview: More Than Just a Playground Dispute*, SCOTUS BLOG (Apr. 12, 2017 11:08 AM), <http://www.scotusblog.com/2017/04/argument-preview-just-playground-dispute/>.

Amendments: article IX, section 7.<sup>387</sup> In *Taxpayers for Public Education v. Douglas County School District*, the Colorado Supreme Court invalidated a scholarship program enacted by a school district.<sup>388</sup> Three of the seven justices held it violated article IX, section 7 because it aided or supported religious schools, even though the beneficiaries of the scholarships were the eligible families.<sup>389</sup> A fourth justice joined the plurality in invalidating the program on the basis that it violated an unrelated state statute.<sup>390</sup> Three justices dissented, arguing that an earlier Colorado Supreme Court decision had already held that programs providing grants to students did not violate this provision.<sup>391</sup>

Remand of the *Taxpayers for Public Education* decision squarely raised the question of whether excluding religious schools from those at which students may use their scholarships violates the federal free exercise, free speech, and equal protection rights of the students and their parents. Unfortunately, however, the Colorado Supreme Court dismissed the case as moot after the school board rescinded the scholarship program.<sup>392</sup>

The second case the Supreme Court remanded, *Moses v. Skandera*,<sup>393</sup> came from the Supreme Court of New Mexico and involved article XII, section 3 of the New Mexico Constitution.<sup>394</sup>

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387. COLO. CONST. art. IX, § 7 reads as follows:

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.

388. 351 P.3d 461 (Colo. 2015). The Institute for Justice, which employs the author of this article, represents parents who have intervened on the side of the defendants, the school district, and the state board of education.

389. *See id.* at 475.

390. *Id.* (Marquez, J., concurring in the judgement).

391. *Id.* at 480–87 (Eid, J., dissenting in part)

392. *Taxpayers for Pub. Educ. v. Douglas Cty. Sch. Dist.*, 356 P.3d 833 (Colo. Ct. App. 2013).

393. 367 P.3d 838 (N.M. 2015).

394. N.M. CONST. art. XII, § 3 (“[N]o part of the proceeds arising from the sale or disposal of any lands granted to the state by congress, or any other funds

This case involves lending secular textbooks for free to students in private schools—similar to the issue addressed by the New York Court of Appeals and the United States Supreme Court in *Board of Education v. Allen*.<sup>395</sup> The New Mexico Supreme Court rejected the argument that the textbooks benefited the students rather than the schools and invalidated the program.<sup>396</sup> Article XII, section 3 is undoubtedly a Blaine Amendment, but unusual in that it prohibits aid to private secular as well as sectarian schools.<sup>397</sup> The majority of private schools in New Mexico are religious schools,<sup>398</sup> but the New Mexico Supreme Court may on remand assert that the line drawn in its Constitution is between public schools, colleges, and universities on the one hand and all private schools, colleges, and universities on the other. A decision invalidating the textbook program on this basis could substantially affect the likelihood of further review by the United States Supreme Court. Nonetheless, assuming the public schools of New Mexico were generically Protestant in orientation when the provision was adopted, one can argue that the line actually drawn in this constitutional provision was a line drawn to protect a Protestant public school monopoly from the historically sectarian (largely Catholic) schools.

Additionally, a third case involving an educational choice program and a broad interpretation of a Blaine Amendment is currently pending appeal in the Montana Supreme Court. That case, *Espinoza v. Department of Revenue*,<sup>399</sup> involves a state tax credit for donations to private scholarship funds.<sup>400</sup> Although there are many such tax credit choice programs,<sup>401</sup> they are challenged much less

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appropriated, levied or collected for educational purposes, shall be used for the support of any sectarian denominational, or private school, college, or university.”)

395. 392 U.S. 236, 243 (1968).

396. *Moses*, 367 P.3d at 849.

397. N.M. CONST. art. XII, § 3.

398. *New Mexico Private Schools*, PRIV. SCH. REV. (last visited Mar. 31, 2018), <https://www.privateschoolreview.com/new-mexico> (stating that 63% of private schools are “religiously affiliated”).

399. *Appeal docketed*, No. DA 17-0492 (Mont. Aug. 17, 2017) (State of Montana Office of the Clerk of the Supreme Court Docket Search), <https://supremecourtcket.mt.gov/search/case?case=20598>. The author represents the parents in *Espinoza*.

400. Brief for Appellant at 1–2, *Espinoza v. Mont. Dep’t of Revenue*, *appeal docketed*, No. DA 17-0492 (Mont. Aug. 17, 2017).

401. See *James G. Blaine: Who Was He, and How Is He Affecting Children’s Education Today?*, EDCHOICE (May 24, 2016), <https://www.edchoice.org/blog/james-g-blaine-affecting-childrens-education-today/>. There are twenty-one tax-credit-generated

frequently—and so far never successfully—than government scholarship programs, because they do not involve appropriations of public money.<sup>402</sup> A challenge to one such program under the Establishment Clause was rejected by the United States Supreme Court in *Arizona Christian School Tuition Organization v. Winn* in 2011.<sup>403</sup> The Court held that because no appropriation of taxpayer funds was involved, the taxpayer plaintiffs lacked standing to sue under *Flast v. Cohen*,<sup>404</sup> which created an exception for taxpayers to allege Establishment Clause violations where public funds were involved.

Montana has a fairly typical Blaine Amendment in its constitution in article X, section 6.<sup>405</sup> After the legislature enacted the tax credit-generated scholarship program in 2015, the Department of Revenue relied on article X, section 6 to issue an

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scholarship programs in seventeen states. Nine of those states have Blaine Amendments. Martin F. Luken & Michael Shaw, *School Choice Fallacies: Disproving Detractors' Allegations Against Tax-Credit Scholarship Programs*, EDCHOICE (2017), <https://www.edchoice.org/wp-content/uploads/2017/08/2017-7-Tax-Credit-Brief.pdf>.

402. *Gaddy v. Ga. Dep't of Revenue*, 802 S.E.2d 225 (Ga. 2017); *Magee v. Boyd*, 175 So.3d 79 (Ala. 2015); *Kotterman v. Killian*, 972 P.2d 606 (Ariz. 1999); *McCall v. Scott*, 199 So.3d 359 (Fla. Dist. Ct. App. 2016); *Griffith v. Bower*, 747 N.E.2d 423 (Ill. App. Ct. 2001), *cert. denied*, 755 N.E.2d 477 (Ill. 2001); *Toney v. Bower* 744 N.E.2d 351 (Ill. App. Ct. 2001), *cert. denied*, 754 N.E.2d 1293 (Ill. 2001). In addition to these educational choice cases, other appellate and supreme courts have concluded that tax credits are not payments of public funds. *See Manzara v. State*, 343 S.W.3d 656 (Mo. 2011); *Tax Equity All. for Mass., Inc. v. Comm'r of Revenue*, 516 N.E.2d 152 (Mass. 1987); *State Bldg. & Constr. Trades Council*, 162 Cal. App. 4th 289 (Cal. Ct. App. 2008); *Olson v. State*, 742 N.W.2d 681 (Minn. Ct. App. 2007).

403. 563 U.S. 125 (2011).

404. 392 U.S. 83 (1968).

405. MONT. CONST. art. X, § 6 reads as follows:

- (1) The legislature, counties, cities, towns, school districts, and public corporations shall not make any direct or indirect appropriation or payment from any public fund or monies, or any grant of lands or other property for any sectarian purpose or to aid any church, school, academy, seminary college, university, or other literary or scientific institution, controlled in whole or in part by any church, sect, or denomination.
- (2) This section shall not apply to funds received from federal sources provided to the state for the express purpose of distribution to non-public education.

Subsection (2) was added to this section when the 1972 Constitution was adopted to replace Montana's original 1889 Constitution. LARRY M. ELLISON & FRITZ SNYDER, *THE MONTANA STATE CONSTITUTION: A REFERENCE GUIDE* 182 (2001).

administrative rule excluding all religious schools from participation, meaning that students receiving scholarships could use them only at non-religious schools.<sup>406</sup> Three parents who sent their children to a Christian private school sued the Department of Revenue, arguing the program is not subject to section 6 because it is aiding them as private individuals rather than aiding the schools they choose for their children's education.<sup>407</sup> The trial court agreed with the parents and enjoined the administrative rule, and the Department of Revenue has filed an appeal with the Montana Supreme Court.<sup>408</sup>

## VI. CONCLUSION

In both of these pending cases, state Blaine Amendments have had a pernicious effect of denying parents support for their educational choices. After *Zelman*, there is no serious argument that the programs at issue violate the Establishment Clause. Thus, whatever antiestablishment interest the states have in enforcing a stricter separation of church and state than the Federal Constitution derives from these state provisions. In 2000, the four justices of the plurality opinion in *Mitchell v. Helms* recognized that the federal Blaine Amendment had its roots in anti-Catholic bigotry.<sup>409</sup> But the Court as a whole has failed to recognize and address the similar motivation behind the state constitutional antecedents of that failed amendment and its progeny in the state constitutions. Under the Supreme Court's precedent, such as *Church of the Lukumi Babalu Aye*, governmental action directed at disfavoring particular religions, which is precisely what the state and federal Blaine Amendments are, is plainly forbidden by the Free Exercise Clause.<sup>410</sup>

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406. See MONT ADMIN. R. 42.4.802 (2015) (removing churches, academies, seminaries, colleges, universities, literary or scientific institutions, or any other sectarian institutions owned or controlled in whole or in part by any church, religious sect, or denomination—or its employee(s)—from being classified as a “qualified education provider,” for which education donation tax credits would be permitted).

407. See Plaintiffs' Brief in Support of Their Motion for Summary Judgment at 1–5, *Espinoza v. Montana Dep't of Revenue*, No. DV-15-1152A (Mont. Dist. Ct. May 13, 2016) (on file with author).

408. *Espinoza v. Dep't of Revenue*, Mont. Sup. Ct. No. DA 17-0492 (*appeal filed* Aug. 17, 2017). The Montana Supreme Court hearing took place on April 6, 2018.

409. 530 U.S. 793, 828 (2000).

410. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 547 (1993).

The Supreme Court's failure to confront broadly interpreted state Blaine Amendments has allowed state interpretations of these provisions to limit parents' ability to pursue private school alternatives to public education. But, ironically, public schools originated as generically Protestant in orientation at a time when Protestants and Catholics were united in agreement on the importance of including religion as a component of education.<sup>411</sup> The effects of this failure have thus morphed over time from discrimination against Catholics wanting a religion-based education for their children to discrimination against parents of any religious denomination wanting such an education.<sup>412</sup> The Supreme Court's test for Establishment Clause violations has long barred government action having the purpose or effect of advancing *or inhibiting* religion.<sup>413</sup> But, the Court has honored the "inhibiting" language in the breach. This has left the Free Exercise Clause and sometimes the Free Speech Clause to carry the weight of protecting religious people and organizations from governmental discrimination, under which the Court has pursued an uncertain course where state Blaine Amendments are involved.

On the one hand, the Court in *Widmar* refused to allow Missouri to use a Blaine Amendment to deny religious organizations the free space on college campuses it provided to secular organizations.<sup>414</sup> On the other hand, the Court in *Locke* allowed Washington to use its Blaine Amendment to deny a merit-based scholarship to a student pursuing a religious vocation, with the Court majority dodging the obvious fact that the provision in question was a Blaine Amendment.<sup>415</sup> With its recent decision in *Trinity Lutheran*, the Court appears to have signaled that it reads *Locke* narrowly, as limited to pursuit of religious vocations.<sup>416</sup> Unlike *Trinity Lutheran*, which

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411. See, e.g., JORGENSEN, *supra* note 45, at 216–21 (observing that both Catholics and Protestants viewed the American education system as the primary means for "socializ[ing] children into a specific value system, the core of which consisted of the faith and teaching of the Church").

412. See generally *id.* at 132–36 (discussing how, by the early 1900s, state courts were no longer deferring to local school board determinations regarding the validity of reading the Bible as vital curriculum).

413. *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971) (citing *Bd. of Educ. v. Allen*, 392 U.S. 236, 243 (1968)).

414. See generally *Widmar v. Vincent*, 454 U.S. 263, 264–67 (1981).

415. See generally *Locke v. Davey*, 540 U.S. at 712.

416. *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2024–25 (2017).

involved aid provided directly to a church (rather than aid provided to students and their families), the pending New Mexico and Montana cases involving Blaine Amendments warrant further analysis from the Supreme Court. In these cases, opponents are likely to argue that states may impose their Blaine Amendments as barriers to constitutional educational choice programs. But if such reasoning is accepted, it would have a crippling effect in many states on educational choice and the rights of children to self-select a religious education if and when they so desire. Nevertheless, *Trinity Lutheran* represents a major step forward for advocates seeking to overturn broad state Blaine Amendments as barriers to true educational choice.

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