THE PAST SHOULD NOT SHACKLE THE PRESENT: THE REVIVAL OF A LEGACY OF RELIGIOUS BIGOTRY BY OPPONENTS OF SCHOOL CHOICE

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"The past is never dead. It's not even past."[1]

William Faulkner

I. INTRODUCTION

In *Zelman v. Simmons-Harris*, the Supreme Court ruled that school voucher programs in which parents choose which schools, including religiously affiliated schools, their children attend do not violate the First Amendment's Establishment Clause.[2] The consequences of *Zelman* were dramatic: First, the hundreds of children enrolled in Cleveland's school choice program were spared a return to schools that had consistently failed to provide them with a competent, much less quality, education.[3] Second, teachers' unions and other opponents of school choice can no longer use the

* Staff Attorney, Institute for Justice. I would like to thank my colleagues at the Institute for reviewing drafts of this article and providing helpful comments. As I wrote the article, I often turned to Dick Komer and Bob Freedman for helpful ideas and suggestions regarding the First Amendment's neutrality principle; their contributions certainly enhanced my discussion of that principle. Of course, any errors are my own.

1. WILLIAM FAULKNER, REQUIEM FOR A NUN act 1, sc. 3.

2. *See* Zelman v. Simmons-Harris, 536 U.S. 639, 643–44 (2002).

3. *See id.* at 644. The statistics cited by the Court regarding the failures of the Cleveland public school system are simultaneously shocking and depressing. For example,

> [t]he [school] district had failed to meet any of the 18 state standards for minimal acceptable performance. Only 1 in 10 ninth graders could pass a basic proficiency examination, and students at all levels performed at a dismal rate compared with students in other Ohio public schools. More than two-thirds of high school students either dropped or failed out before graduation. Of those students who managed to reach their senior year, one of every four still failed to graduate. Of those students who did graduate, few could read, write, or compute at levels comparable to their counterparts in other cities.

Id.

Establishment Clause as a weapon with which to attack school choice programs that are built upon the genuine and independent decisions of parents.

But *Zelman* did not end the legal battles over school choice. Opponents of school choice had based their attacks on these programs not only on the Establishment Clause, but also on state constitutional provisions known as "Blaine amendments." In the wake of *Zelman,* these amendments have become their most prominent weapon. Generally, school choice opponents argue that these amendments provide greater protection against religious establishment than that provided by the Establishment Clause.[4] The problem with this argument is (at least) two-fold. First, as Part II of this article explains, the Blaine amendments were not rooted in a noble desire to supplement the protection against religious establishment provided by the First Amendment; rather, they were the product of the political triumph of anti-Catholic bigotry in the resolution of the great "School Question" of the nineteenth century. Thus, as Professor Douglas Laycock has concluded, the legacy of this era provides no general legal or moral principle that supports the position of school choice opponents.[5] Second, as I argue in Part III, the Blaine amendments, rather than provide greater protection against the establishment of religion, run afoul of the First Amendment when they are interpreted in such a manner as to discriminate against religion. This article concludes with the observation that the battle over school choice should focus on providing educational opportunity to all of America's children; it should not be waged with weapons of bigotry forged in the fires of nineteenth century anti-Catholicism.

4. *See, e.g.*, Elliot Mincberg, *Vouchers, the Constitution and the Court*, 10 GEO. MASON U. CIV. RTS. L.J. 155, 157 (Winter/Spring 1999/2000) ("[T]here is no question that states can go further than the federal government, *not only in the establishment clause*, but in a whole range of different areas.") (emphasis added). Mr. Mincberg is Vice President and Legal Director for People for the American Way Foundation, a leading opponent of school choice. *See also* Appellees' Brief at 13, Bush v. Holmes, Nos. 1D02-3160/1D02-3163/1D02-3199 (Fla. Dist. Ct. App. served July 3, 2002) (on file with NYU Annual Survey of American Law) (arguing that Florida's Blaine amendment "is intended to go beyond the Establishment Clause in prohibiting the use of public funds to pay for children to attend sectarian private schools").

5. *See* Douglas Laycock, *The Underlying Unity of Separation and Neutrality*, 46 EMORY L.J. 43, 51–53 (1997).

II.
A HISTORY OF BIGOTRY: ANTI-CATHOLICISM, THE COMMON SCHOOL MOVEMENT, AND THE BIRTH OF THE BLAINE AMENDMENTS

Starting around 1830, hundreds of thousands of Catholic immigrants from Ireland and Germany arrived in America.[6] The bigotry with which they were greeted reached its zenith when several states enacted, sometimes because Congress forced them to, their own versions of the Blaine Amendment, a proposed federal constitutional amendment that singled out Catholics for discrimination in order to resolve the great "School Question" in favor of the country's Protestant majority.[7] Examining the animus behind these amendments reveals a shameful legacy of America's past, and puts the burden on school choice opponents to demonstrate why state Blaine amendments, historical artifacts designed to discriminate against a disfavored religious minority, should now limit the kinds of educational opportunities that parents are able to provide for their children.

A. An Anti-Catholic Climate

Throughout the second half of the nineteenth century, America's Protestant majority viewed the growing population of Catholic immigrants with both disdain and suspicion. Nativist leaders viewed the new immigrants as ignorant automatons who were at worst instruments of the Catholic Church's supposed quest for world domination, and at best a threat to social order and democratic institutions.[8] Samuel F.B. Morse, best known for his invention of the telegraph, was also a rabid anti-Catholic and an author of nativist tracts.[9] In his book *Foreign Conspiracy against the Liberties of the United States*, Morse claimed that "despotic" European powers were using Catholics to accomplish a political takeover of America. Catholic schools, he said, would place the country's children within "the double bondage of spiritual and temporal slavery."[10] Other writers expressed similar views. In a published collection of newspaper articles, an author calling himself "An American" charged that Catholics were a ticking time bomb; their "mental servitude" and

6. PHILIP HAMBURGER, SEPARATION OF CHURCH AND STATE 202 (2002).

7. *See infra*, notes 74–76 and accompanying text.

8. *See* CHARLES LESLIE GLENN, JR., THE MYTH OF THE COMMON SCHOOL, 68–69 (1988); DAVID H. BENNETT, THE PARTY OF FEAR, 85–92 (1988).

9. *See* BENNETT, *supra* note 8, at 40; GLENN, *supra* note 8, at 68–69.

10. GLENN, *supra* note 8, at 68–69.

"docility in obeying the orders of their priests" insured that they would be eager instruments of a despotic conspiracy that was being overseen by plotting "Jesuit agents" sewn among the immigrant hordes.[11]

Unfortunately, the views of Morse and "An American" were not far off from those of the country's Protestant majority, which was all too willing to believe tales of Catholics' alleged moral turpitude and conspiracies.[12] A vast array of books and pamphlets warned of "Popish despotism" and contributed to the popular perception of the Catholic Church as an anti-democratic, dangerous, and even evil institution.[13] Books alleging that convents abused their female charges and served as a hotbed of papist conspiracy were best-sellers.[14] The 1850s in particular witnessed a long string of violent conflicts between Protestants and Catholics; several Catholic churches were destroyed and vandalized, and Protestant and Catholic mobs frequently clashed with each other in the streets.[15] In that same decade, the infamous Know-Nothing party rode the rising tide of nativism to attract prominent politicians away from other parties and to achieve significant political triumphs—including taking control of several statehouses and six governorships in 1855.[16] Because Catholics made up the bulk of the ever-growing number of new immigrants, the nativist movement was naturally an anti-Catholic movement. As David Bennett has pointed out, the dreaded "alien menace" was, by mid-century, a "Catholic menace."[17]

B. The Common School Movement

The Common School Movement, which began in the 1830s, was, in large part, an attempt to tame the "Catholic menace" by assimilating immigrants through a state-controlled system of education that all children were to attend.[18] Until that movement took

11. The collection, published in 1835, was titled *Imminent Dangers to the Free Institutions of the United States through Foreign Immigration and the Present State of the Naturalization Laws*. *Id*. at 68.

12. *See id.* ("Anti-Catholicism was a respectable sentiment across the Protestant spectrum."); *see also* BENNETT, *supra* note 8, at 87.

13. BENNETT, *supra* note 8, at 86, 90.

14. *See id*. at 42.

15. *Id*. at 90.

16. *Id*. at 115; LLOYD P. JORGENSON, THE STATE AND THE NON-PUBLIC SCHOOL 1825–1925, at 29 (1987).

17. BENNETT, *supra* note 8, at 85.

18. *See* GLENN, *supra* note 8, at 84; *see also* JORGENSON, *supra* note16, at 28 ("The [common] school movement and nativisim were. . . inextricably bound up with one another."); *see* Joseph P. Viteritti, *Blaine's Wake: School Choice, the First*

hold, state governments regularly funded private, church-run schools.[19] Education reformers such as Horace Mann, perhaps the most prominent leader of the movement, as well as Massachusetts' first secretary of education, thought that this practice posed a danger to national unity; they saw the common school, a public monopoly over the education of the young, as a necessary reform to properly socialize all children into the workings of American society and democratic institutions.[20] In other words, as Joseph Viterriti has described in less charitable terms, "[o]pen to all, public education was to take the unwashed masses who immigrated from Europe and instruct them at public expense in literacy, morality, and civic virtue."[21]

The role and popular perception of the common school as an assimilator cannot be overstated. As the tide of immigration swelled, most Protestant Americans—not just education reformers—were receptive to, and even rallied around, the common school. Like the reformers, they were concerned that the newcomers would not be properly assimilated, and they viewed the common school movement as the most effective means of maintaining social order and national unity.[22] Mann and his fellow reformers appeared to address these concerns by stressing that the common school would, by providing instruction in republican virtues, do nothing less than shape, on a fundamental level and in a common pattern, the character of each and every child who attended it.[23] Mann viewed this character-shaping mission as too important to be entrusted to children's parents, who, if left to their own devices, would neglect or even thwart it.[24] Only the common school could supply the "moral means for the renovation of mankind;" without this "renovation," immigrants would be stuck in their "ancestral degeneracy."[25]

Amendment, and State Constitutional Law, 21 HARV. J.L. & PUB. POL'Y 657, 666–67 (1998) (describing common school system as a means for the Protestant majority to impose its worldview on the Catholic minority) [hereinafter Viteritti, *Blaine's Wake*].

19. *See* Joseph P. Viteritti, *Choosing Equality: Religious Freedom and Educational Opportunity Under Constitutional Federalism*, 15 YALE L. & POL'Y REV. 113, 179 (1996) [hereinafter Viteritti, *Choosing Equality*]; *see also* JORGENSON, *supra* note 16, at 1–19.

20. *See* Viteritti, *Choosing Equality*, *supra* note 19, at 181; GLENN, *supra* note 8, at 82–84; JORGENSON, *supra* note 16, at 20–21.

21. *See* Viteritti, *Choosing Equality*, *supra* note 19, at 179.

22. GLENN, *supra* note 8, at 84.

23. *See id.* at 82–83.

24. *See id.*

25. *Id.* at 81–83.

These moral means were the teachings and values of the Protestant majority. Protestant leaders openly spoke of public schools as Protestant institutions, and viewed those schools as a means to combat the growth of Catholicism.[26] Indeed, the curriculum of the common school heavily promoted Protestant morality and intolerance of Catholics and other nonbelievers.[27] As Steven Green has observed, the common school, whose curriculum featured readings from the King James Bible, became the primary means to promote a "Protestant way of life."[28]

Unsurprisingly then, Protestant clergymen were closely involved with almost every aspect of the common school movement.[29] The Protestant clergy helped form, lead, and fill the ranks of several prominent educational and religious societies that promoted the growth of common schools.[30] In that role, many of them denounced Catholicism and the threat to America it supposedly represented.[31] For example, the Reverend Alexander Campbell, head of a society called the Ohio College of Teachers, warned that the Catholic Church was "the Babylon of John, the Man of Sin of Paul, and the Empire of the Youngest Horn of Daniel's sea monster."[32] The American Education Society, whose members included many prominent clergymen, adopted several resolutions condemning Catholicism.[33] Protestant clergymen served on state school boards, as secretaries of education, and as school superintendents.[34] One of the more famous, or infamous, of these clergymen was Robert J. Breckenridge, the "Father of public education in Kentucky," who decried the "prevalent disposition [of parents] to commit the education of Protestant children to the several orders of the Romish priesthood," and declared the Pope to be the "Anti-Christ, a man of sin and son of Pestilence."[35] Protestant clergymen also organized and led "teachers' institutes," teaching seminars that, prior to the Civil War, were the primary means of vocational training for teachers.[36] Given this involvement, as well as the notion that the com-

26. JORGENSON, *supra* note 16, at 107.

27. *See* Viteritti, *Blaine's Wake*, *supra* note 18, at 666.

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

29. JORGENSON, *supra* note 16, at 31–54.

30. *Id.* at 33–36.

31. *See id.*

32. *Id.* at 36.

33. *Id.* at 33.

34. *See id.* at 37–54.

35. *Id.* at 43–44 (alteration in original).

36. *Id.* at 56–57.

mon school was supposed to engage in a moral "renovation" of children, it is no accident that becoming a teacher was often compared to becoming a missionary in service of a divine calling.[37] Clergymen also wrote several textbooks that were widely used in common schools.[38] As Professor Lloyd Jorgenson has observed, textbooks used in common schools frequently contained assertions

> [t]hat 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, [and] 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.[39]

Other schoolbooks described Catholics as deceitful, murderous, and hopelessly mired in ignorance.[40]

Mann encouraged the use of the common school as an instrument for the inculcation of Protestant values and teachings. Indeed, for Mann and his fellow education reformers in the movement, the idea of an education without the inculcation of religious values was simply unthinkable—moral renovation necessarily had a religious component.[41] Mann agreed with the Protestant clergy that the mission of a public school was fundamentally religious in nature:

> I believed then, as now, that *religious instruction in our schools*, to the extent which the constitution and the laws of the State allowed and prescribed, *was indispensable to their highest welfare, and essential to the vitality of moral education*. Then as now, also, I believed that sectarian books and sectarian instruction, if their encroachments were not resisted, would prove the overthrow of the schools.[42]

To the modern observer, the second sentence of Mann's remarks appears to contradict the first because Mann plainly ascribes different meanings to the words "religious" and "sectarian," which are typically used interchangeably today. But when Mann and

37. *Id.* at 57–59.

38. *Id.* at 61.

39. *Id.*

40. DIANNE RAVITCH, THE GREAT SCHOOL WARS: NEW YORK CITY, 1805–1973, at 51–52 (1974).

41. *See* GLENN, *supra* note 8, at 146, 168. *See also* JORGENSON, *supra* note 16, at 20 ("Virtually all leaders of the Common School Movement accepted Horace Mann's lead in insisting that religious instruction was an indispensable part of the work of the common school.").

42. GLENN, *supra* note 8, at 168 (emphasis added).

others in the common school movement called for the exclusion of sectarian instruction from public schools, they were actually referring to the exclusion of all religions *except* mainstream Protestantism.[43] By definition, mainstream Protestantism, the religion of the majority, was "non-sectarian." Thus, Mann could speak of barring "sectarian instruction" from public schools, but simultaneously institute a state curriculum that included having students say prayers, sing hymns, and read the King James Bible.[44] Catholics particularly opposed the latter practice, which they viewed as a means of Protestant indoctrination.[45] The leaders of the common-school movement thus created a double standard that favored Protestantism over Catholicism; in their view, however, this double standard was actually a religion-neutral stance.[46] "Sectarianism" had become a code word for Catholicism.[47] By such means was the hypocrisy contained within the double standard enshrined within the workings of the American common school.

C. The Birth of the Blaine Amendments

The Catholic minority understandably chafed under a system that treated them and their faith as dangerous and whose purpose was to instill Protestant morality within their children. In the 1870s, Catholics mounted a renewed challenge to the Protestant answers to the "School Question," which was really a two-part question concerning the consolidation and protection of Protestants' common-school monopoly over public education. The questions were: (1) whether public funding could go to private Catholic schools and (2) whether students would read the King James Bible in public

43. *See* Viteritti, *Blaine's Wake*, *supra* note 18, at 666.

44. *See id.* at 666–67.

45. Catholic leaders stressed that the direct reading of the Bible was a sectarian practice, in the true sense of the word "sectarian." As one Catholic leader stated during a debate over Bible-reading in New York City's public schools,

> [t]he Catholic Church tells her children that they must be taught their religion by AUTHORITY. The Sects [i.e., Protestants] say, read the bible, judge for yourselves. The bible is read in the public schools, the children are allowed to judge for themselves. The Protestant principle is therefore acted upon, slily inculcated, and the schools are Sectarian.

RAVITCH, *supra* note 40, at 45.

46. *See* Viteritti, *Choosing Equality*, *supra* note 19, at 179–80; RAVITCH, *supra* note 40, at 35. This double standard spilled over into the judicial system, which regularly produced holdings that the reading of the Bible was not a sectarian activity. *See, e.g.*, Donahoe v. Richards, 38 Me. 376, 379–80 (1854). *See also* Green, *supra* note 28, at 44–45.

47. *See* Mitchell v. Helms, 530 U.S. 793, 828 (2000).

schools.[48] The first question concerned preserving a monopoly over public funds so that Catholic schools would not undermine the universality of the common school system; the second concerned ensuring that the monopoly was worth preserving, i.e., that Protestant morality would continue to be taught within that system. By the Civil War, Protestants had secured the answers they wanted to both of the question: "no" to the former, and "yes" to the latter.[49] These answers had been secured with state-by-state political battles fought by a combination of Know-Nothing politicians, Protestant leaders, and state school officials.[50] These battles, which sometimes erupted into real violence, were marked by blatant appeals to anti-Catholicism.[51]

In the war's aftermath, however, Catholics had modest success in challenging the Protestant majority's answers to the "School Question." By the 1870s, they had succeeded in eliminating Bible reading from some public school systems.[52] Moreover, as Catholics gained majority status in many northern cities, they succeeded in obtaining public funding for Catholic schools.[53] The "School Question" again became an important, highly charged political issue.[54]

The Protestant backlash to this "Catholic menace" was swift and powerful. Protestant churches joined with nativist groups to take up the battle, fighting to preserve both Bible reading in the common school and the common school's monopoly on public funding.[55] They found an important and willing ally in President Ulysses S. Grant, who sensed that the enormous popularity of an anti-Catholic movement might divert attention from the scandals of his administration and boost the electoral prospects of the Republican Party by casting it as the party of "reform."[56] In 1875, he made a speech in which he proclaimed that Americans should "[e]ncourage free schools, and resolve that not one dollar, appropriated for their support, shall be appropriated to the support of

48. *See* JORGENSON, *supra* note 16, at 69, 110; Green, *supra* note 28, at 41.

49. *See* JORGENSON, *supra* note 16, at 110.

50. *Id.* at 69.

51. *See id.*

52. Green, *supra* note 28, at 45–47 (describing the elimination of Bible reading and religious instruction from schools in Cincinnati, New York City, Chicago, Buffalo, Rochester, and in Michigan and other northern states).

53. *See id.* at 42–43.

54. *See id.* at 41.

55. Viteritti, *Blaine's Wake*, *supra* note 18, at 670.

56. *See* Green, *supra* note 28, at 48–49.

any sectarian schools."[57] He later proposed that Congress pass a constitutional amendment that would block such appropriations.[58]

James G. Blaine, then a Republican congressman with serious presidential ambitions, recognized that Grant had given him an opening to use anti-Catholic sentiment to realize those ambitions.[59] He quickly submitted to the House of Representatives his draft of the amendment Grant had asked Congress to pass.[60] Most political observers recognized Blaine's amendment for what it was: an instrument of political opportunism that was directed against Catholics.[61] As *The Nation* observed at the time, "all that Mr. Blaine means to do or can do with his amendment is, not to pass it but to use it in the campaign to catch anti-Catholic votes."[62] Democratic Senator Lewis Bogy of Missouri called the amendment "a cloak for the most unworthy partisan motives."[63] These motives included boosting Blaine's bid for the presidency and suggesting that the Democratic Party was aligned with the unpopular Catholic Church.[64] The Democrats knew that the perception of such an alignment would severely damage them at the polls; Republicans did, in fact, press the argument that such an alignment existed.[65]

The original text of the amendment that Blaine submitted to the House read as follows:

> 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.[66]

During the amendment's consideration in 1876, the Senate Judiciary Committee added the following sentence, which appeared in the final version: "This article shall not be construed to prohibit the reading of the Bible in any school or institution."[67] Speaking in favor of this provision during the Senate debate, the amendment's

57. *Id.* at 47.
58. *See id.* at 52.
59. *See id.* at 49.
60. *See id.* at 53.
61. *See id.* at 54. *See also* Viteritti, *Blaine's Wake*, *supra* note 18, at 671–72.
62. Green, *supra* note 28, at 54.
63. *Id.* at 67.
64. *See id.*
65. *See id.* at 55, 67.
66. *Id.* at 53 n.96.
67. *Id.* at 60.

primary spokesman in the Senate maintained that "the Bible is a religious and not a sectarian book."[68] This remark illustrates not only how "sectarian" had become a code word for "Catholic," but also that the drafters of the amendment were concerned about both parts of the School Question: They sought not only to preserve the common school monopoly over public funds, but also to preserve public schools as instruments for teaching Protestant morality.

The Blaine Amendment passed the House by a vote of 180 to 7, and the vote in the Senate was 28 to 16 in favor of its passage.[69] However, the Senate vote fell short of the supermajority requirement necessary to amend the Constitution.[70] During the amendment's consideration by Congress, Blaine failed to capture the Republican nomination for the presidency.[71] Although he had been appointed a Senator in the aftermath of his defeat, he did not even bother to show up for the vote on the amendment.[72] Apparently, *The Nation*'s criticism of Blaine was correct: Once the amendment was no longer politically useful to him, he lost all interest in its passage.[73]

Unfortunately, others did not abandon the weapon of bigotry that Blaine helped forge. The defeat of the amendment in Congress by no means quieted anti-Catholic animus, which had produced several Blaine-like amendments in state legislatures even before the amendment's consideration, and continued to do so in the decades that followed.[74] In those states that chose to pass their own versions of the amendment, "Blaine's presence seems to have been felt throughout the deliberations."[75]

Not all states had a choice as to whether anti-Catholicism would become a permanent part of their constitutional fabric. Congress forced new states, including Washington, Montana, New Mexico, Utah, North Dakota, South Dakota, Oklahoma, Arizona, and others to include versions of the Blaine Amendment in their constitutions in order to gain admission into the Union.[76] Today,

68. *Id.* at 66 n.157.

69. *See id.* at 59, 67.

70. *See id.* at 67.

71. *See id.* at 56.

72. *See id.* at 67–68.

73. *See id.* at 54.

74. *See* Viteritti, *Blaine's Wake*, *supra* note 18, at 673.

75. *Id.*

76. *See id*; *see also* Illinois *ex. rel.* McCollum v. Bd. of Educ., 333 U.S. 203, 220 n.9 (1948) (Frankfurter, J., concurring); Paul Taylor, *The Costs of Denying Religious*

thirty-seven states have constitutional provisions with Blaine-like language that forbid public aid to religious schools.[77]

Blaine's legacy lives on in these amendments, which, given their history, cannot be described as a principled attempt to provide protections against religious establishment greater than that provided by the First Amendment. Rather, the interest they embody is more accurately described as discrimination against a religious minority by a religious majority anxious to consolidate its educational monopoly. Although they would rather not acknowledge it, that is the real state "interest" that school choice opponents have now pressed into the service of their cause. As explained below, that interest cannot overcome the guarantee of religious neutrality afforded by the First Amendment.

III.
THE BLAINE AMENDMENTS CLASH WITH RELIGIOUS NEUTRALITY

Like the school voucher program upheld by the Supreme Court in *Zelman*, we can expect future school choice programs to allow students to attend public schools, private religious schools, and private non-religious schools.[78] For example, Florida's Opportunity Scholarship Program, which gives vouchers to the parents of children in failing public schools, includes all three options as a means of ensuring that children receive a quality education.[79] Thus, parents who wish to send their child to, say, a Lutheran or Catholic school are treated no differently from those who wish to send their children to non-religious schools or higher performing public schools.

Organizations the Right to Staff on a Religious Basis When They Join Federal Social Service Efforts, 12 GEO. MASON U. CIV. RTS. L.J. 159, 192 (2002).

77. The Institute for Justice has identified thirty-seven Blaine amendments. It considers a provision to be a Blaine amendment if it "specifically prohibits state legislatures (and usually other governmental entities) from appropriating funds to religious sects or institutions (often specifically including religious schools)." Richard D. Komer, *Answers to Frequently Asked Questions About State Constitutions' Religion Clauses* at http://www.ij.org/cases/school/blaine_faq.shtml (updated May 28, 2003).

78. *See* Zelman v. Simmons-Harris, 536 U.S. 639, 655 (2002) (describing the range of public and private options available to participants in the Cleveland school choice program).

79. *See* Opportunity Scholarship Program, FLA. STAT. ANN. § 229.0537 (West Supp. 2003). My colleagues and I at the Institute for Justice are representing several parents with children in Florida's Opportunity Scholarship Program against a challenge to the program mounted by school choice opponents under that state's Blaine Amendment.

School choice programs, like Medicaid and Social Security, are general welfare programs designed to address the needs of the public—in this case, the need for a quality education.[80] No one would seriously contend that a Jewish or Catholic person should be excluded from participation in a program like Medicaid because she might choose to receive treatment at a religious hospital, or be disallowed her monthly Social Security check because she might give a portion of the check's proceeds to her synagogue or church. However, opponents of school choice, by latching on to Blaine amendments, are employing that same line of reasoning within the context of school choice programs.[81] That is, they assert that parents in a school choice program should not have the option to send their children to religious schools. Thus, they argue, programs that provide a religious school option must either be invalidated or modified substantially so that all religious options are eliminated.[82]

These opponents concede, as they must, that under *Zelman*, the inclusion of religious options in a school choice program is permissible under the First Amendment. They contest, however, that the converse is true—that the *exclusion* of religious options is *impermissible* under the First Amendment. Their arguments in this vein are unpersuasive for two reasons. First, as the Supreme Court held even before *Zelman*, states may not prevent religious people or organizations from enjoying public benefits on equal terms with those who are non-religious; the First Amendment dictates that religion be treated neutrally, rather than in a discriminatory fashion.[83] Second, as the Supreme Court and other federal courts have held, the supposed need for a state to comply with provisions of its constitution that purport to provide greater protection against religious establishment than that provided by the First Amendment is not a compelling reason to violate an individual's First Amendment

80. The *Zelman* Court characterized the Cleveland voucher program as a general welfare program, noting that it distributed "[p]rogram benefits" to "participating families." *Zelman*, 536 U.S. at 653. The "[p]rogram benefits" to which it referred were "educational opportunities to the children of a failed school district." *Id.*

81. Indeed, the school choice opponents who have filed a Blaine amendment challenge to Florida's Opportunity Scholarship Program are employing this very reasoning.

82. Conveniently for opponents of school choice, the existence of religious options becomes the stated reason for attacking school choice programs. I would contend that, particularly for teachers' unions, this reason provides cover for their real, unstated goal: to preserve a public school monopoly that is threatened by competition from *all* private schools, religious *and* non-religious.

83. *See infra* notes 84–86 and accompanying text.

rights within the context of public, neutral programs in which participants make independent decisions regarding how they use the benefits afforded by those programs.

A. The General Principle of Religious Neutrality

The notion that government must treat religion in a neutral fashion is not a new idea. More than fifty years ago, in *Everson v. Board of Education of Ewing*, the Supreme Court held that the First Amendment "requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary."[84] Little noticed is the fact that the second prong of the *Lemon* test also guarantees religious neutrality, stating that the "primary effect [of a statutory program] must be one that neither advances *nor inhibits* religion."[85] Thus the Court's holding in *Zelman* was just one case in a long line of precedent upholding general welfare programs that select their beneficiaries by religiously neutral criteria and allow individuals to choose how to use the benefit.[86]

Nothing in the First Amendment or the rest of the Constitution requires that a school choice program be enacted. But once such a program is enacted, the state, or for that matter courts, cannot eliminate the ability of participants to select religious schools solely because those schools are religious. That is, just as neutrality permits the *inclusion* of religious options in these programs, it forbids their *exclusion* on the ground that they are religious. Neutrality is a two-way street. This aspect of neutrality often escapes attention because, as the Supreme Court has noted, most of its Establishment

84. Everson v. Bd. of Educ. of Ewing, 330 U.S. 1, 18 (1947).

85. Lemon v. Kurtzman, 403 U.S. 602, 612 (1971) (emphasis added).

86. *See, e.g.*, Zelman v. Simmons-Harris, 536 U.S. 639 (2002) (upholding a school choice program that was religiously neutral and provided for independent choice); Mitchell v. Helms, 530 U.S. 793 (2000) (plurality opinion) (approving a program that provided aid on a neutral basis to both religious and non-religious schools); Agostini v. Felton, 521 U.S. 203, 208–09 (1997) (allowing state-employed teachers to teach on the grounds of religious schools); Rosenberger v. Rectors and Visitors of the Univ. of Va., 515 U.S. 819, 837 (1995) (invalidating state policy to exclude religious groups from participating in program paying for journal publication costs); Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1, 3 (1993) (allowing state-paid sign language interpreter to translate all classes, including religious classes, for deaf student on the grounds of a religious school); Witters v. Wash. Dep't of Servs. for the Blind, 474 U.S. 481, 487–88 (1986) (allowing a blind individual to use state vocational rehabilitation funds to pay for religious instruction as a part of job retraining program); Mueller v. Allen, 463 U.S. 388, 398–99 (1983) (allowing state tax deduction to be used for educational expenses incurred at private, private religious, and public schools).

Clause jurisprudence has focused on attempts to benefit, rather than disfavor, religion.[87]

The Supreme Court's decision in *Rosenberger v. Rectors and Visitors of the University of Virginia*[88] is particularly noteworthy not only because it involved an attempt by a state entity to disfavor religion, but also because that attempt occurred within the context of a program that, like school-choice programs, provides public benefits. In that case, the Supreme Court ruled that the University could not exclude from funding a religious student journal that met all the requirements for receiving that funding save one—it ran afoul of the requirement that it not "primarily promote[ ] or manifest[ ] a particular belie[f] in or about a deity or an ultimate reality."[89] For that reason alone, the University denied it the same funding it gave to non-religious student publications. The Court held that once the University decided to fund private speakers who used the money to convey their own messages, it had created a fiscal forum in which it could not engage in viewpoint discrimination against the subset of religious speakers.[90] Turning back the University's claim that requiring it to fund a religious publication just as it funded non-religious publications would violate the Establishment Clause, the Court noted that "[w]e have held that the guarantee of neutrality is respected, not offended, when the government, following neutral criteria and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse."[91] Moreover, it noted that, in *Everson*, "we cautioned that in enforcing the prohibition against laws respecting an establishment of religion, we must 'be sure that we do not inadvertently prohibit [the government] from extending its general state law benefits to all its citizens without regard to their religious belief.'"[92] In other words, states cannot—and cannot be required to—single out and ban religious options from general welfare programs in which participants make independent choices; neutrality prevents the discriminatory exclusion of those options.

87. *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 532 (1993).

88. 515 U.S. 819 (1995).

89. *See id.* at 825.

90. *See id.* at 835.

91. *Id.* at 839.

92. *Id.* (quoting Everson v. Bd. of Educ. of Ewing, 330 U.S. 1, 16 (1947)) (alteration in original).

B. Neutrality and the Blaine Amendments

School choice opponents' use of Blaine amendments to attack school choice programs is just the kind of attack on a state program providing "general state law benefits" that the Supreme Court warned against in *Everson* and *Rosenberger*. The only way such an attack can succeed is if there is a compelling interest to justify violating the principle of neutrality.[93] In this section, I will discuss Supreme Court cases, as well as a recent Ninth Circuit decision, that have held that state constitutional provisions concerning religion cannot provide that compelling interest within the context of a school choice program like Cleveland's or Florida's. Reviewing this precedent with the history of the Blaine amendments in mind, it is only logical to ask whether the discriminatory animus those amendments enshrine can ever be compelling enough to justify the nonneutral treatment of religion. In other words, can discriminatory intent justify discrimination? As I conclude below, to pose that question is to answer it.

We begin our brief review with *Widmar v. Vincent*.[94] In that case, the Supreme Court held that the University of Missouri could not exclude religious groups from conducting meetings in university facilities.[95] The University routinely allowed all other kinds of groups to use its facilities, but passed a regulation forbidding its facilities to be used for "religious worship" or "religious teaching."[96] The Court rejected the University's arguments that allowing religious groups to use its facilities would violate the Establishment Clause, noting that supplying a public forum, i.e., a public benefit, to all student groups cannot be construed as advancing religion or impermissibly providing it benefits.[97]

More significantly for purposes of this discussion, the Court also rejected the University's argument that it could not allow religious groups to use its facilities under the Missouri Constitution, which, according to the University, had "gone further than the Federal Constitution in proscribing indirect state support for relig-

93. *See, e.g.,* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531–32 (1993); Peter v. Wedl, 155 F.3d 992, 996–97 (8th Cir. 1998).

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

95. *Id.* at 267.

96. *Id.* at 265.

97. As I discuss below, the Court subsequently noted in *Rosenberger* that there is no difference between a government providing access to public facilities and providing access to the benefits afforded by public expenditures. *See infra* note 103 and accompanying text.

ion."[98] The Court held that the Missouri Constitution did not provide a compelling state interest to exclude religious groups from the forum it had created, stating that "the 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."[99] That is, state constitutions cannot deprive citizens of their federal rights under the First Amendment by imposing special disabilities on the exercise of those rights; allowing them to participate in a forum available to all others only if they refrain from exercising those rights is unconstitutional.

Just five years earlier, in *McDaniel v. Paty*,[100] the Supreme Court articulated this principle in a somewhat different, but entirely relevant, context. In that case, the Supreme Court invalidated a provision of Tennessee's constitution that forbade ministers from serving as state legislators.[101] According to the Court, this provision, which would have required a minister to abandon his calling in order to run for and hold elective office, violated ministers' First Amendment right to the free exercise of their religion.[102] Both *McDaniel* and *Widmar* are correctly viewed as cases in which the Court disallowed states from using provisions in their constitutions that supposedly went beyond the Federal Establishment Clause to condition the receipt of otherwise available public benefits, i.e., holding elective office and meeting in public facilities, on the abandonment of the First Amendment freedoms of free exercise (as in *McDaniel*) or free speech (as in *Widmar*). The principle of neutrality, which speaks to both the inclusion and exclusion of religious options from programs that provide general state law benefits to individuals, forbids the imposition of such conditioning.

As discussed earlier, the concept of neutrality as a two-way street was developed further in *Rosenberger*, even though the University in that case did not attempt to rely on a state religion clause before the Supreme Court as a basis for supporting its discriminatory policy. Significantly, the *Rosenberger* Court indicated that its

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

99. *Id.* at 276.

100. 435 U.S. 618 (1978).

101. *See id.* at 629. McDaniel, an ordained Baptist minister, wanted to serve as a delegate to Tennessee's 1977 limited constitutional convention. He could not do so, however, because the state legislature had applied the constitutional provision at issue to those who wished to serve as delegates. *See id.* at 621.

102. *See id. at* 626, 630.

holding in *Widmar*, as well as other cases in which religious groups had been allowed to use public facilities, was applicable to situations involving not just access to *physical* forums such as public facilities, but also to access to *fiscal* forums that the state opens up to individual choices and operates on a religion-neutral basis.[103] Because voucher-based school choice programs are such forums, it follows that state constitutional provisions cannot, consistent with the holdings of *Widmar* and *McDaniel*, serve as a compelling interest to exclude religious options from those programs.

Taking its cue from these cases is the Ninth Circuit's recent decision in *Davey v. Locke*.[104] In that case, the Ninth Circuit held that the State of Washington's Blaine amendment did not provide a compelling state interest for excluding religious options from an otherwise neutral scholarship fund.[105] Washington provides a "Promise Scholarship" to college students who meet objective statutory criteria concerning financial need and academic standing.[106] However, a state statute provided that "no aid shall be awarded to any student who is pursuing a degree in theology."[107] Washington argued that its state constitution mandated the exclusion of religious options from the scholarship program by virtue of its requirement that "'[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.'"[108]

The court found that the state's selection criteria for scholarship and the statute violated the First-Amendment free exercise rights of Joshua Davey, who wished to use his scholarship funds to

103. *See* Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819, 830, 832 (1995) ("The [Student Activities Fund] is a forum more in a metaphysical than in a spatial or geographic sense, but the same principles [that would apply to a spatial or geographic forum such as a public facility] are applicable.") (citing Widmar v. Vincent, 454 U.S. 263 (1981)); *see also id.* at 843 ("There is no difference in logic or principle, and no difference of constitutional significance, between a school using its funds to operate a facility to which students have access, and a school paying a third-party contractor to operate the facility on its behalf."). In subsequent cases, the Supreme Court explicitly stated that public-forum analysis is "instructive" in situations involving public funding. *See* Bd. of Regents of the Univ. of Wis. Sys. v. Southworth, 529 U.S. 217, 229–30 (2000); *see also* Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 544 (2001).

104. 299 F.3d 748 (9th Cir. 2002), *cert. granted* 123 S.Ct. 2075 (U.S. May 19, 2003) (No. 02-1315).

105. *See id.* at 760.

106. *See id.* at 750.

107. *Id.* at 750 n.1 (quoting WASH. REV. CODE § 28B.10.814 (1997)).

108. *Id.* at 750 n.2 (quoting WASH. CONST. art. I, § 11).

pursue a degree in theology.[109] The court noted that, just as Tennessee had attempted to condition the receipt of a benefit (holding public office) on relinquishing the right to free exercise of religion in *McDaniel*, Washington was impermissibly conditioning the receipt of scholarship funds on the relinquishment of the same right.[110] In other words, "Washington's restriction disables students majoring in theology from the benefit of receiving the Scholarship just as Tennessee's classification disabled ministers from the benefit of being a delegate."[111]

The court rejected Washington's assertion that this reasoning presumed a general right of an individual to receive state funding for his free exercise of religion. It pointed out that, under *Rosenberger*, while the government is not required to subsidize the exercise of fundamental rights, it cannot discriminate against the exercise of those rights when it funds a general welfare program; denying participation (which, in a fiscal forum, involves the receipt of financial benefits) solely on the basis of religion to otherwise eligible recipients violates the First Amendment.[112] In other words, "once the state of Washington decided to provide Promise Scholarships to all students who meet objective criteria, it had to make the financial benefit available on a viewpoint neutral basis."[113] Thus, "[t]he bottom line is that the government may limit the scope of a program that it will fund, but once it opens a neutral 'forum' (fiscal or physical), with secular criteria, the benefits may not be denied on account of religion."[114]

Washington's final line of defense supporting its exclusion of Davey from its scholarship program was its constitution's Blaine amendment, which, as noted above, prohibited the application of public funds to religious instruction. The court began its analysis by assuming that the Washington Supreme Court would take a "less accommodating" view of the state provision than the United States Supreme Court's view of the Federal Establishment Clause.[115] It then framed the question to be considered as whether the state's purported interest in applying the provision, "no matter how strin-

109. *Id.* at 760.

110. *See id.* at 754 (discussing McDaniel v. Paty, 435 U.S. 618 (1978)).

111. *Id.*

112. *See id.* at 755–56 (discussing Rosenberger v. Rectors and Visitors of the Univ. of Va., 515 U.S. 819 (1995)).

113. *Id.* at 755.

114. *Id.* at 756.

115. *Id.* at 758.

gently construed, is compelling enough to outweigh a credible free exercise challenge under the federal Constitution."[116]

The court, relying on the holding of *Widmar*, held that Washington's constitution would have to supply a compelling state interest in order to justify its non-neutral treatment of religious options.[117] Significantly, the court recognized that even though *Widmar* involved a free speech, rather than a free exercise, claim, its requirement that a state demonstrate a compelling interest to justify religious discrimination was applicable to Davey's free exercise claim.[118] In other words, there is no logical reason to assume that the principle of neutrality operates any differently in the context of free exercise claims than in the context of free speech claims. As the court noted, "there is little reason to suppose that what fails to justify the violation of one right [free speech in *Widmar*] somehow permits violation of a different right [free exercise]."[119] Indeed, the *Widmar* court strongly suggested that its holding would have been the same if a free exercise claim had been at issue, noting that the Free Speech Clause, like the Free Exercise Clause, places restrictions on the state's interest to achieve "greater separation of church and state."[120] And, in *McDaniel*, as noted above, the Supreme Court held that such an interest could not be used to infringe upon McDaniel's right to free exercise of religion.

When the court analyzed Washington's interest in "not appropriating or applying money to religious instruction as mandated by its constitution" in the context of the operation of the Promise Scholarship Program, it found that interest, although "indisputably strong," was "less than compelling."[121] Significantly, the court noted that "[t]he Promise Scholarship is a secular program that rewards superior achievement by high school students who meet objective criteria."[122] The flow of public funds to religious institutions happens only as a result of the choices of those individual students; no objective observer would believe that the state itself was attempting to fund religious instruction or establish a state religion.[123] In other words, the neutrality of the program and the fact that individual choices determined where the scholarships went—two features

116. *Id.*
117. *See id.* at 759 (citing Widmar v. Vincent 454 U.S. 263, 276 (1981)).
118. *See id.*
119. *Id.*
120. *See Widmar*, 454 U.S. at 276.
121. *Davey*, 299 F.3d at 759–60.
122. *Id.* at 760.
123. *See id.*

of the program that, incidentally, were determinative in upholding the Cleveland voucher program in *Zelman*—rendered the state's interest non-compelling.

The reasoning of *Davey* regarding Washington's Blaine amendment has obvious applicability to school choice programs, particularly voucher programs. Indeed, a voucher program is nothing more or less than a "scholarship" program whose recipients are determined by objective criteria. Just as the Promise Scholarship program is a fiscal forum, so is a voucher program. Parents and children make independent choices within that forum as to where they redeem their voucher. Under the court's reasoning—which merely carries the Supreme Court's neutrality jurisprudence to its logical conclusion—state constitutional provisions concerning religion cannot be used to discriminate against the inclusion of religious options, or the ability of parents and children to select those options, in school choice programs that have the features of neutrality and individual choice. This is good news for the parents and children for whom school choice programs have provided an escape from failing public schools.

The news would be even better had the Ninth Circuit taken into account the history of Washington's Blaine amendment. If it had done so, it would have concluded that the real interest enshrined by that amendment was discriminating against the Catholic minority; it would have thus given no credence to the notion that the state's interest was "indisputably strong."[124] Identifying the interest as a strong one suggests that the court misidentified it as providing greater protection against religious establishment than what is afforded by the Federal Establishment Clause. Correctly identifying the real interest would not have changed the outcome of the case—after all, *Widmar*, on which the *Davey* court heavily relied, also failed to recognize that one of the state religion clauses relied upon by Missouri was a Blaine amendment harboring a discriminatory interest.[125] However, an identification of the real interest

124. *See id.* at 759. For a discussion of how Washington was forced, under the Federal Enabling Act, to include a Blaine amendment within its constitution in order to join the Union, see Katie Hosford, *The Search for a Distinct Religious-Liberty Jurisprudence Under the Washington State Constitution*, 75 WASH. L. REV. 643, 649–50 (2000).

125. The Missouri Supreme Court appears to have acknowledged that Missouri's Blaine amendment was the product of anti-Catholic animus. *See* Oliver v. State Tax Comm'n, 37 S.W.3d 243 n.20 (Mo. 2001) (stating that Steven Green's article on the anti-Catholic history of the Blaine amendments, *The Blaine Amendment Reconsidered*, provides "historical context" for the enactment of Missouri's Blaine amendment).

would have grounded both *Widmar*'s and *Davey*'s analysis firmly within historical reality and forced a head-on confrontation with Blaine's legacy. Such a confrontation, I believe, would produce a blanket condemnation of all state religion clauses that can be linked to that legacy. At the very least, a proper identification of the interest at hand would signal that other courts should take a hard look at state religion clauses, and never uncritically accept the notion that the interest they advance is merely "going beyond" the Establishment Clause. Surely, if the state interests at issue in *Widmar* and *Davey*, benignly framed in just that manner, are not compelling reasons to discriminate against the inclusion of religious options in neutral forums, the same is doubly true for the real interest: historical discrimination against a religious minority. Indeed, the argument that such an interest could ever be compelling is absurd—that is why school choice opponents would rather ignore, or dismiss as irrelevant, the history of the provisions on which they rely.[126]

Other courts are starting to identify correctly, rather than ignore or dismiss, the real interest at issue. A plurality of the Supreme Court has recently taken explicit notice of the bigotry

126. A good example of willful ignorance of the historical evidence regarding the anti-Catholic origins of the Blaine amendments can be found on the website of People for the American Way. That organization argues that the Blaine amendments are a "Red Herring," that only "some" who supported Blaine were motivated by anti-Catholic bigotry, and that state constitutional provisions banning the appropriation of public funds to religious schools were motivated solely by devotion to the principle of separation of church and state. *See The Blaine Diversion*, *at* http://www.pfaw.org/pfaw/general/default.aspx?oid=8024 (last visited July 17, 2003). For other opponents of school choice, the dismissal of this history sometimes involves the assertion that, even though the Blaine amendments are rooted in an anti-Catholic past, their original intent can be ignored because they now serve a benign interest in maintaining church-state separation. For example, the southern area director of the Anti-Defamation League, Arthur Teitelbaum has argued that "'[t]he so-called Blaine amendments have a past rooted in anti-Catholic sentiment, but today they are a valued shield against government regulation of religious institutions and prevent corrosive conflict among religions in competition for limited government resources.'" *See* Nacha Cattan, *O.U. Op-ed: Voucher Foes Draw on States' Anti-Catholic Legacy*, Forward *at* http://forward.com/issues/2002/02.08.30/news10.html (Aug. 30, 2002). However, the general assertion that discriminatory constitutional provisions can survive judicial scrutiny simply because a great deal of time has passed and they can now be imagined to serve modern, non-discriminatory interests, has been rejected by the Supreme Court. *See, e.g.*, Hunter v. Underwood, 471 U.S. 222, 233 (1985) (holding that provision of Alabama Constitution disenfranchising felons convicted of certain crimes was unconstitutional because it was drafted with the purpose of discriminating against blacks; refusing to uphold the provision even though state asserted a modern, non-discriminatory interest in that disenfranchisement).

underlying the attempt to enact the federal Blaine Amendment. In *Mitchell v. Helms*, the Court rejected a challenge to a federal program that provided educational materials and equipment to public and private schools, including private religious schools.[127] A plurality of the Court commented on the history of the proposed federal Blaine Amendment and the anti-Catholic bigotry that produced it:

> [H]ostility to aid to pervasively sectarian schools has a shameful pedigree that we do not hesitate to disavow. . . . Opposition to aid to "sectarian" schools acquired 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 to Catholics in general, and it was an open secret that "sectarian" was code for "Catholic."[128]

One year earlier, in *Kotterman v. Killian*,[129] the Arizona Supreme Court also had occasion to comment on the Blaine Amendment's shameful pedigree. In that case, the court upheld a program that gives tax credits to individuals who donate money to non-profit scholarship organizations. The plaintiffs in *Kotterman* argued that Arizona's scholarship program, which permitted children to use scholarships at religious schools, violated a provision of the state constitution that prohibited any public money from being "'appropriated for or applied to any religious worship, exercise, or instruction, or to the support of any religious establishment.'"[130] In rejecting that argument, the Arizona Supreme Court clearly indicated that it wanted no part of a ruling that would link Arizona's constitution to the bigotry of the federal Blaine Amendment; the court stated that it "would be hard pressed to divorce the amendment's language from the insidious discriminatory intent that prompted it."[131]

Just as the United States and Arizona Supreme Courts have recognized the bigotry behind the federal Blaine Amendment, other courts should recognize that the same bigotry lurks behind the state Blaine amendments that are being used to attack school choice programs. That animus cannot justify discrimination today under any circumstances. Recognition of this fact does not necessarily mean that courts must find all state Blaine amendments to be unconstitu-

127. 530 U.S. 793, 801 (2000) (plurality opinion).
128. *Id.* at 828 (emphasis added) (internal citations omitted).
129. 972 P.2d 606 (Ariz. 1999).
130. *Id.* at 616–17 (quoting ARIZ. CONST. art. II, § 12).
131. *Id.* at 624.

tional under the First Amendment; it only requires that the Blaine amendments not be interpreted so broadly as to conflict with the First Amendment. The Blaine amendments were passed in order to prevent state governments from appropriating public money to sectarian, i.e., Catholic, *schools*. By contrast, school choice programs such as vouchers are appropriations to *parents*, who make genuine and independent choices from a host of options—including religious and non-religious private schools, as well as public schools—as to where their children are educated. Religious schools benefit from this aid only as a result of the genuine and independent choices of parents; parents, not state governments, determine where public funds go. Thus, courts are compelled neither by history nor logic to strike down school choice programs by broadly interpreting state Blaine amendments in a manner that clashes with the First Amendment.[132] Indeed, courts should not, at the prodding of school choice opponents, go out of their way to create such a clash.

IV.
CONCLUSION

The future of school choice in America turns largely on the legal battles concerning the Blaine amendments. In the nineteenth century, the Protestant majority forged these amendments to preserve the Protestant monopoly over public education in the face of what they portrayed as a growing "Catholic menace." Opponents of school choice now use these amendments in an attempt to preserve a public school monopoly that, in cities and towns across the country, has consistently failed to provide a quality education to children. As the history of the Blaine amendments demonstrates, the assertion that the amendments are noble, principled attempts by the states to provide greater protection against religious establishment than that afforded by the First Amendment is specious. Rather than tributes to the idea of "separation of church and state," these amendments are relics of a legacy of discrimination (as well as cynical political opportunism) that opponents of school choice have embraced in order to preserve the public school monopoly at the expense of children and their parents. Expanding the scope of the discrimination to include all religious options—updating

132. For example, the Wisconsin Supreme Court, in upholding the Milwaukee school choice program against a challenge under that state's Blaine amendment, interpreted that provision in a manner consistent with the First Amendment. *See* Jackson v. Benson, 578 N.W.2d 602, 620 (Wis. 1998).

Blaine's legacy for the twenty-first century, if you will—does not make it palatable. Indeed, discrimination against all religions and religious believers is no more worthy of America now than discrimination against Catholicism and Catholics was in the nineteenth century.

The promise of *Brown v. Board of Education*,[133] that all children have the opportunity to receive a quality education, remains unfulfilled so long as a single child remains trapped in a school that consistently fails to provide him with that opportunity.[134] School choice programs provide real educational opportunity where it did not previously exist. Thus, interpreting Blaine amendments to strike down such programs because they allow the participation of religious schools permits a shameful legacy of bigotry to thwart the realization of *Brown*'s promise. Opponents of school choice should deal honestly with this irony. Fortunately, the principle of religious neutrality, if vindicated by the courts confronted with these amendments and the real interest that lurks behind them, will keep the legacy of James Blaine where it belongs—in a part of the past that most Americans disavow without hesitation.

133. 347 U.S. 483 (1954).

134. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.

Brown, 347 U.S. at 493. For an interesting discussion of what Professor Joseph Viteritti considers to be the "promise of *Brown*," and how he believes school choice can help fulfill that promise, see JOSEPH P. VITERITTI, CHOOSING EQUALITY: SCHOOL CHOICE, THE CONSTITUTION, AND CIVIL SOCIETY (1999).