

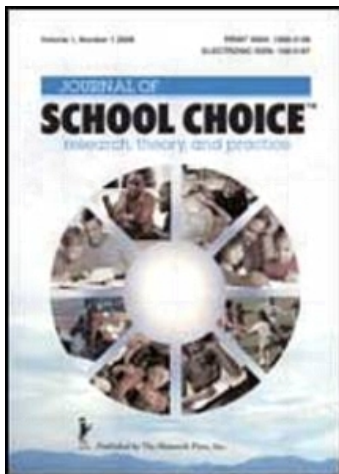
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## School Choice and State Constitutions' Religion Clauses

Richard D. Komer <sup>a</sup>

<sup>a</sup> Institute for Justice, Arlington, Virginia, USA

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## SCHOOL CHOICE AND THE LAW

# School Choice and State Constitutions' Religion Clauses

RICHARD D. KOMER

*Institute for Justice, Arlington, Virginia, USA*

*After the U.S. Supreme Court's decision in *Zelman v. Simmons-Harris*, only state religion clauses represent a potential constitutional bar to the inclusion of religious options in properly designed school choice programs. The two most significant are compelled support clauses and Blaine Amendments. Both are frequently misinterpreted by state courts as applied to school choice when courts take language intended to prevent the provision of aid to religious institutions and apply it to programs aiding individuals and families. Through a historical analysis of their genesis and a legal analysis of related case law, this article demonstrates why the provisions are misinterpreted. The article concludes with a discussion of implications of the history and case law for contemporary school choice programs, noting that in many states these misinterpretations render tax credit programs the preferable alternative for school choice programs.*

**KEYWORDS** *school choice, tax credits, scholarships, vouchers, Blaine Amendments, state constitutions, religion clauses*

### INTRODUCTION

While opponents of school choice programs have always used both federal and state religion clauses to challenge school choice programs,<sup>1</sup> after the U.S. Supreme Court's decision in *Zelman v. Simmons-Harris* (2002) only the

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Address correspondence to Richard D. Komer, Institute for Justice, 901 N. Glebe Rd., Suite 900, Arlington, VA 22203, USA. E-mail: rkomer@ij.org

state religion clauses represent a potential constitutional bar to the inclusion of religious options in properly designed school choice programs.<sup>2</sup> *Zelman* held that religiously neutral school choice programs could allow parents to select religious schools for their children using state-supplied scholarships without violating the federal Constitution's Establishment Clause. However, as the analysis below indicates, courts frequently misinterpret state religion clauses, extending their reach beyond the plain language of and intent behind these provisions. This is done despite the fact that one group of these provisions, the Blaine Amendments, have their origins in bigotry and bias—a longstanding reason for finding a law unconstitutional (*Yick Wo v. Hopkins*, 1886). The principal way in which state courts misinterpret those provisions is by taking language intended to prevent the provision of aid to religious institutions and applying it to programs aiding individuals and families.<sup>3</sup>

The objective of this article is to inform the academic and legal community of the history and language of these provisions and to prevent further misreading of them. The article also discusses the implications of the history of the religion clauses, and subsequent case law, for the creation and constitutionality of choice programs. The article begins with a brief background on why state constitutions contain religion clauses and then addresses two of the most important types of religion clauses in relation to school choice—compelled support and Blaine Amendments. The history of each will be reviewed and analyzed, and implications for school choice programs will be discussed.

## BACKGROUND

### Why State Constitutions Contain Religion Clauses

People coming of age in the second half of the 20th century are accustomed to thinking of the U.S. Constitution as the principal basis for legal protections, so much so that one can forget that this was not always so. In creating a federal government of limited powers, the authors of the Constitution wrote against a backdrop of sovereign states exercising broad plenary powers pursuant to their state constitutions. Thus, for example, while the federal Constitution says not a word about education, all state constitutions establish systems of public education. Similarly, all state constitutions contain clauses addressing religion.

Of course, the federal Constitution also addresses religion in several places, most notably in the first two clauses of the First Amendment, commonly called the Establishment and Free Exercise Clauses, which state that “Congress shall pass no law respecting an establishment of religion, or prohibiting the free exercise thereof.” As the text indicates, the clauses are addressed to Congress and serve as limitations on Congress's legislative power. This focus on congressional power and failure to address states' legislative authority was quite deliberate, as at the time the Bill of Rights

was adopted in 1791 a number of states still had established state religions (Hamburger, 2002). Generally speaking, the New England states established Congregationalism as their state religions, while the Southern states established Anglicanism. Massachusetts did not disestablish Congregationalism as its state religion until 1833. Consequently, the language of the federal religion clauses had a dual purpose: to prevent Congress from establishing one religion as a national religion and to prevent Congress from interfering with the states' ability to establish or continue their own state religions if they so chose.

The First Amendment left the states to adopt their own religion clauses and statutes, with the result that all state constitutions contain provisions addressing religion. Religious freedom is one of the most critical personal liberties and has been so recognized in most state constitutions from very early on in their histories. Yet like provisions addressing education, state constitutional provisions addressing religion have undergone substantial development over time, with each state following a unique path. Moreover, the development of both education and religion clauses are intertwined historically, with important implications for contemporary school choice programs.

### The Changing Role of the Federal Religion Clauses

Although on its face addressed solely to Congress, the protections and limitations of the First Amendment, including the Religion Clauses, have in modern times been applied by the U.S. Supreme Court as limitations on states' actions as well. This is done via the incorporation doctrine, under which the Fourteenth Amendment, adopted in 1868, "incorporates" the Religion Clauses as part of the Fourteenth Amendment's guarantees of equal protection and due process of law. It was, however, only in 1930 that the U.S. Supreme Court incorporated the Free Exercise Clause in *Cochran v. Louisiana Board of Education* (1930) and the Establishment Clause in *Everson v. Board of Education* (1947). So from ratification of the First Amendment in 1791 until 1947, the Establishment Clause was not viewed as binding on the states, which were free to develop their own religion clause jurisprudence without federal interference.

Currently, the federal religion clauses apply to states' actions and provide a floor beneath which states may not fall in protecting these rights. States do remain free to offer greater protection for individuals, such as applying a more protective interpretation of state search and seizure provisions than that given to the Fourth Amendment's corresponding language by the U.S. Supreme Court. This is true to some extent in the area of religion as well, where states can interpret their guarantees in ways that do not parallel interpretation of the Federal Religion Clauses.<sup>4</sup> Efforts by states to enforce a greater degree of church-state separation, however, can run

afoul of the religious freedom guarantees of the First Amendment, as occurred in *Widmar v. Vincent* (1981), in which the U.S. Supreme Court rejected Missouri's attempt to forbid use by religious student groups of generally available meeting space at a public university.

## THE TWO PRINCIPAL TYPES OF STATE CONSTITUTIONS' RELIGION CLAUSES

### The "Compelled Support" Clauses

Several state constitutions contain religion clauses predating the ratification of the Federal Constitution in 1789 and the Bill of Rights in 1791, with quite different wording from the federal Religion Clauses. These clauses use "compelled support" language and trace their origins back to Pennsylvania, one of the original 13 colonies. Unlike most of the other original colonies, Pennsylvania never had an established church (Viteritti, 1998). Pennsylvania takes its name from William Penn, the original proprietor who received a charter from the King of England in 1682. The charter was accompanied by "Laws Agreed Upon in England," which included the following 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 peacefully and justly in *Civil Society*, shall, in no ways be molested or prejudiced in their Religious Perswasion [sic] 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. (Cogan, 1997, p. 31, emphasis in original)

William Penn was a Quaker and founded Pennsylvania as a place of refuge for his co-religionists, who, like the Puritans of New England, had suffered religious persecution at the hands of the Anglican Establishment in England. Unlike the Puritans, who established their own creed (Congregationalism) as the official religion in the New England colonies and denied religious liberty to all noncongregants, Penn and the Pennsylvania Quakers created a regime of religious toleration. Thus, Pennsylvania refused to "compel . . . [any Person] to frequent or maintain any Religious **Worship**, Place or **Ministry** whatever."

In colonies with established churches, all persons were typically required to attend and pay taxes (commonly called tithes) in support of the churches and their ministers. The colonial and then state governments also provided money raised by taxation or grants of state-owned land for the construction and maintenance of church buildings as well as for religious colleges dedicated to the training of ministers of the official denomination.

America's oldest college, Harvard, was founded in 1636 to train Congregational ministers and for many years after Independence continued to receive subsidies from the commonwealth of Massachusetts.

The 1682 Pennsylvania Charter language formed the basis for similar language in Pennsylvania's 1776 Constitution. Article II reads in part:

II. 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 maintain any ministry, contrary to, or against, his own free will and consent . . . (Cogan, 1997, p. 32)

This language was copied by several of the original 13 states as they drafted constitutions and disestablished their state religions. Of the original 13 states, similar compelled support provisions to Pennsylvania's can now be found in the constitutions of New Hampshire, Connecticut, Rhode Island, New Jersey, Delaware, Maryland, and Virginia. The next three states admitted to the union also adopted compelled support language: Vermont, Kentucky, and Tennessee, as did the six states admitted from the Old Northwest Territory: Ohio, Indiana, Illinois, Michigan, Wisconsin, and Minnesota. Many later states also adopted similar language: Alabama, Arkansas, Texas, Missouri, Iowa, West Virginia, Kansas, Nebraska, South Dakota, New Mexico, Colorado, and Idaho, for a grand total of 29 states.

By adopting this language, states were preventing or ending the establishment of official religions, and the language is quite obviously aimed at avoiding the mandatory church attendance and compelled financial support that characterized the establishment of a particular religion as the official religion of the state.<sup>5</sup> For example, Virginia had an official state religion from its founding as a colony in 1607, namely the Church of England or Anglicanism. Unlike the New England colonies and Pennsylvania, the southern colonies were not founded by members of minority sects fleeing religious persecution in England. By the time of the Revolution, however, many non-Anglican Virginians objected to being forced to support a church in which they did not believe. This led in 1776 to the following statement in the Declaration of Rights:

XVI. That religion, or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence, and therefore all men are equally entitled to the free exercise of religion, according to the dictates of conscience; and that it is the mutual duty of all to practice Christian forbearance, love, and charity, towards each other. (Cogan, 1997, p. 44)

The Virginia legislature then adopted an act on October 7, 1776, titled "an act for exempting the different societies of Dissenters from the support and

maintenance of the Church as by law established, and its Ministers, and for other purposes therein mentioned." The act exempted "all dissenters, of whatever denomination, from the said church . . . from all levies, taxes, and impositions whatever, towards supporting such church, as it now is or hereafter may be established, and its ministers" (Cogan, 1997, p. 44). Adherents of the established church, however, continued to be required to support it financially.

In 1786, Virginia Governor Patrick Henry proposed a bill for religious assessments under which all taxpayers would be taxed by the state to support the church of their choice, which would have extended the state's role from collecting taxes from Anglicans to support their established church to a similar function for all the churches (*Everson v. Board of Education*, 1947). This led to James Madison's famous "Remonstrance against Religious Assessments," where he championed the dissenters' view that all religious support should be entirely voluntary and not the state's concern. Henry's bill failed to pass, and instead that same year the legislature passed a "Bill for Religious Freedom," not only stating "[t]hat to compel a man to furnish contributions of money for the propagation of opinions he disbelieves, is sinful and tyrannical," but also that "forcing him to support this or that teacher of his own religious persuasion, is to deprive him of that comfortable liberty of giving his contributions to the particular pastor whose morals he would make his pattern" (Cogan, 1997, p. 51). The operative part of the law then provides in part, "That no man shall be compelled to frequent or support any religious worship, place or ministry whatsoever," language clearly modeled on the 1776 Pennsylvania constitution. This bill took Virginia out of the business of supporting an established church by acting as the collector for tithes due it from its adherents.

#### IMPLICATIONS FOR SCHOOL CHOICE PROGRAMS

With one exception, state courts have not used those compelled support clauses to strike down programs that provide aid to families using private schools, including religious ones. The most obvious explanation is that the language of these clauses implies a prohibition on direct state support for and attendance in churches, not schools. The exception, however, is a modern case from Vermont, *Chittenden Town School District v. Vermont Department of Education* (1999), where the Vermont Supreme Court reversed its prior position that its compelled support clause allowed greater state aid than the federal Establishment Clause. In its reversal, the court held that its compelled support clause prohibited the provision of tuition assistance to students choosing religious schools, despite the fact that all students freely chose their schools, whether public or private.<sup>6</sup> In so holding, the court took two leaps of logic beyond the plain language of the compelled support provision that other state courts have not taken in

interpreting their compelled support clauses: first, that tuition aid to students constituted “support” to the schools they chose and second, that such support to religious schools was support to a “place of worship.” Unless other states choose to follow Vermont’s lead, compelled support clauses should not present a barrier to school choice programs

### The State Blaine Amendments

The “compelled support” clauses are not, however, the sole or even the most common state constitutional provision relating to religion. A second sort of provision, the Blaine Amendment, is found in 37 state constitutions, and many states—19 in all—have both compelled support clauses and Blaine Amendments in their constitutions. These provisions have a very different provenance than the compelled support provisions, one based in religious bigotry and intolerance, as opposed to religious liberty like the compelled support clauses.<sup>7</sup> The earliest of these amendments date from the middle of the 1800s and are thus considerably more recent in origin than the compelled support clauses.

A majority of Blaine Amendments are found in state constitutions’ education articles, although a number of states like Washington have more than one Blaine Amendment: one involving the K–12 educational system and another addressing all social welfare programs. Their language varies, but all contain the concept of forbidding appropriation of state money to sectarian educational institutions.

The history of Blaine Amendments is inextricably bound up with the history of education in America, and a brief background is necessary for a proper understanding of the amendments’ historical context, particularly the fact that early education in the United States was inextricably bound up with religion. Thus, the history of education in America is in part the history of religion in America, particularly in the 17th and 18th centuries, but continuing well into the 20th century and ending only in the decades after the U.S. Supreme Court applied the federal Establishment Clause to the states and required removal of all religious aspects from the public schools.

An examination of Massachusetts, the second oldest of the 13 English colonies after Virginia, illustrates this history. A prominent characteristic of Protestantism is the importance of personal Bible reading to apprehend the revealed word of God, and Bible reading was a vitally important activity of the Puritans who founded the Massachusetts colonies. The first compulsory education provision in what became the United States was the Massachusetts’ parental neglect law, known as the Law of 1642, which charged parents and masters of apprentices with ensuring that children and apprentices knew the principles of religion and the capital laws of the Commonwealth (Matzat, n.d.). To ensure compliance with this law, in 1647 Massachusetts passed the law known as the “Old Deluder Satan Law,” which some



scholars regard as the beginning of public education in America. It read in part as follows:

It being one chief project of that old deluder, Satan, to keep men from the knowledge of the scriptures, as in former time, by keeping them in an unknown tongue, so in these latter times, by persuading them from the use of tongues that so at last the true sense and meaning of the original might be clouded by false glosses of saint-seeming deceivers, that learning might not be buried in the graves of our fathers, in church and common-wealth . . . it is therefore ordered . . . [that] after the Lord has increased [a settlement] to the number of fifty householders, [they] shall forthwith appoint one within their town, to teach all such children as shall resort to him, to write and read . . . and it is further ordered, That where any town shall increase to the number of one hundred families or householders, they shall set up a grammar school for the university. (Cubberley, 1934, pp. 18–19)

Under this law, the purpose of the mandated schools was to teach the children to read and write so that they could read the scriptures directly, in contrast to Catholics who continued to use the Latin Bible, which keeps the scriptures “in an unknown tongue” (Latin) and Catholics reliant on priests (“saint-seeming deceivers”) who prefer to keep their audience illiterate so they can propound “false glosses.” Thus, the purpose of the earliest school law was explicitly religious, to facilitate the personal Bible reading essential to leading a proper or saintly life (Monaghan, 2005). Throughout the colonies, local ministers were expected to set up schools for their parishioners’ children, and later when common schools were established, Protestant ministers often served as school directors and superintendents (Tyack, 1966).

Not only did Massachusetts charter and provide financial support for Harvard College, but the legislature regularly chartered and provided initial funding to private schools, usually at the secondary level, which were invariably religious.<sup>8</sup> In a land-rich but cash-poor age, this support took the form of land grants to the boards seeking to establish these private schools. The boards would sell off the land to settlers and use the proceeds to erect the new schools’ buildings. Many of the private high schools found throughout New England were capitalized in this fashion, although most if not all have shed all vestiges of their religious heritage, except in many cases their names.

Massachusetts was also the site of the beginnings of the Protestant Common School Movement led by Horace Mann, who became Massachusetts’ first Commissioner of Education:

The Common School Movement was a series of state movements occurring roughly during the period 1830–1860 that looked toward the expansion and improvement of education at the elementary school level. More

specifically, its goals were to provide schooling for all white children, partially or wholly at public expense; to encourage or require school attendance; to create training programs for teachers; and to establish some measure of state control over such processes. Virtually all the 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. They agreed, further, that the inclusion of doctrines unique to any one sect would alienate all other sects, so the public schools would have to be non-sectarian. (Jorgenson, 1987, p. 20)

These nonsectarian or nondenominational common schools were, however, nondenominationally Protestant. "Bible reading was seen by the leaders of the Common School Movement as the centerpiece of the schools' instructional program, a source of cohesiveness and strength" (Jorgenson, 1987, p. 60). Moreover, "The Common School Movement was from its outset deeply imbued . . . with the evangelical fervor of the Second Awakening" (Jorgenson, 1987, p. 28). The Second Awakening was a religious movement that transformed American Protestantism during the same time the Common School Movement was in progress. The Second Awakening resulted in explosive growth in the Baptist and Methodist denominations, displacing the old-line denominations of Presbyterians, Congregationalists, Lutherans, and Episcopalians as the largest Protestant denominations. Both these newly ascendant groups and the older denominations were comfortable with the pan-Protestantism of the Common School Movement (Jorgenson, 1987).

Catholics, however, were not so comfortable. They found the common/public schools to be pervasively hostile to their religion, with many of the public school texts being unabashedly anti-Catholic (Elson, 1964; Jorgenson, 1987). Moreover, their efforts to be excused from reading from the Protestant version of the Bible were generally rebuffed (Tyack, James, & Benavot, 1987). Increasingly, Catholics concluded that to avoid the hostile Protestant atmosphere of the public schools they would have to create their own schools, ideally with public funding.

Catholic efforts to receive direct public funding for their budding Catholic schools equivalent to that provided to the "nondenominational" Protestant public schools were met often with outrage on the part of the Protestant establishment, who denied any equivalence between their public schools and the "sectarian" Catholic schools. Reacting to the rapidly growing Catholic population after 1840, "The Know-Nothing Movement, the culmination of antebellum nativism, appeared first in the eastern cities where Roman Catholic immigrants had settled in large numbers" (Jorgenson, 1987, p. 70). The political manifestation of the Know-Nothings was initially the American Republican Party, founded in New York in 1843, which spread rapidly to neighboring states, becoming the American Party in 1845 (Jorgenson, 1987).

By 1854, the Know-Nothing party had taken control of the state governments of Massachusetts and Delaware and shared control of Pennsylvania. In 1855, Rhode Island, New Hampshire, Connecticut, Maryland, and Kentucky fell to them as well, and tremendous inroads that fell short of actual control were made in Tennessee, Virginia, Georgia, Alabama, and Louisiana (Jorgenson, 1987).

Although the Know-Nothings failed to achieve their anti-foreigner and anti-Catholic goals at the national level, they succeeded dramatically at the state level. According to Jorgenson (1987), the Know-Nothing campaigns achieved “a major turning point in the development of American education. . . . These campaigns firmly established the precedent that non-public schools were ineligible to receive public financial support” (p. 72).

In response to the growing nativist sentiments, America’s Catholic bishops met in the First Baltimore Plenary Council in 1852 (Jorgenson, 1987). The bishops strongly endorsed the parochial school concept for the first time and set the main Catholic themes regarding education: resistance to required reading of the King James Bible in public schools and a demand for public aid for their parochial schools. Those demands reflected a growing recognition that the Protestant Establishment was using the public schools to “Protestantize” Catholic children and that opposition to funding Catholic schools supported this effort by making it difficult for Catholic families to avoid the public schools.<sup>9</sup>

Massachusetts, the bellwether of public education by virtue of its pioneering efforts as birthplace of the Common School Movement, exemplified the nativist reaction to these demands. The Massachusetts election of 1854 resulted in the capture by Know-Nothings of majorities in both houses of the legislature and the governorship (Jorgenson, 1987). Many of the legislators (24, in fact) were Protestant clergymen, and the Know-Nothings promptly began implementing their anti-Catholic platform. They passed laws restricting the right to vote to those persons with 21 years of residence in the country and limiting the right to hold public office to native-born citizens, and they set up a Nunnery Investigating Committee to pursue scurrilous rumors. They passed a law mandating reading of the Bible, understood to mean the Protestant King James Bible. They also successfully pushed through a constitutional amendment that prohibited the appropriation of any public school money to any sect (meaning the Catholic Church) for the maintenance of its own schools.

Despite their widespread political success in the 1854 and 1855, the Know-Nothings passed rapidly from the national scene during the few years remaining before the Civil War, being largely absorbed into the new Republican Party, but the nativism that had spawned them welled up cyclically in the decades succeeding the Civil War (Higham, 1955). These nativist and anti-Catholic outbursts continued to focus on rebuffing efforts of Catholics to exempt their children in public schools from being forced to read the

Protestant Bible and to obtain direct public funding for their parochial schools. The response of the Protestant establishment was to follow Massachusetts's example and require reading of the King James Bible and forbid aid to sectarian—Catholic—schools. By 1876, 14 states had prohibited the use of public money for sectarian schools, and by 1890 another 15 states had incorporated language to that effect into their state constitutions (Viteritti, 1999).

A pivotal year in this progression was 1875, when the Speaker of the U.S. House of Representatives, James G. Blaine of Maine, took up the suggestion of his fellow Republican, President Ulysses Grant, "that not one dollar [should] be apportioned to support any sectarian schools" (Green, 1992, p. 47). Blaine, aspiring to the Republican nomination for president to succeed Grant, hoped to ride anti-Catholic prejudice to the White House as the champion of the Protestant public schools by introducing an amendment to the federal Constitution. Besides applying the religion clauses of the First Amendment to the states, his amendment provided that no public money or lands raised or devoted to the public schools be under the control of, or used to support the schools of, any sect. Although his amendment fell just short in the Senate of garnering the supermajority required for a constitutional amendment after passing overwhelmingly in the House, his name has ever since been applied to state constitutional provisions that accomplished at the individual state level what he failed to achieve at the federal level, including those like Massachusetts' provision, that long predate his failed effort.

Although in 1876 Republicans failed to achieve the supermajorities required to send a proposed federal constitutional amendment to the states for ratification, they had more than enough votes to mandate in enabling legislation that territories seeking to become new states include in their initial constitutions provisions establishing a public school system and reserving the proceeds of all federal lands granted to the state for educational purposes to support of the public schools. These enabling laws also required that the states ensure that the public schools be free of sectarian control, which was understood to mean that while the public schools could continue to be Protestant in orientation and continue to require reading from the King James Bible, Catholic schools as sectarian institutions could never be supported as part of the public school system. In response to these requirements, the constitutions of every state admitted to the union after 1876 contain Blaine Amendments.<sup>10</sup>

Today there are at least 37 states with language in their constitutions that can be properly classified as Blaine Amendments. The characteristic of the typical Blaine Amendment—what makes it a Blaine Amendment—is that it contains a prohibition on state funding of sectarian schools. This reflects, of course, the underlying purpose of these amendments to rebuff Catholics' demands for equal funding for their schools, funding equal to that given to

the Protestant public schools. These amendments are usually but not exclusively found in the education articles of state constitutions, alongside provisions establishing the public school system and limiting the use of the Common School Fund<sup>11</sup> to support of the public schools. Some states, such as Massachusetts, go beyond prohibiting funding of sectarian schools and include all sectarian institutions of any kind (colleges, hospitals, orphanages, nursing homes, etc.).<sup>12</sup>

#### IMPLICATIONS FOR SCHOOL CHOICE PROGRAMS

State Blaine Amendments vary in their language in ways that can have significant implications for school choice litigation,<sup>13</sup> but consideration of those variations is beyond the scope of this article. State judicial and legal interpretation of these provisions is highly variable and sometimes reflects differences in language between the different states. What these provisions have in common, however, is that they all clearly prohibit direct grants to religious schools<sup>14</sup> to support their educational activities. This comes as no surprise, because direct grants are precisely what Catholics had requested throughout the school controversies of the 1800s and precisely what the Amendments were intended to prevent. In the battle over efforts to expand school choice, however, the real question is whether these provisions prohibit aid to families that allow them to make educational choices, including if they so desire, the choice of a religious school.

This is a question of interpretation, of how broadly the language of these provisions can and should be read. Although the language involved is different than that of the federal Establishment Clause, the interpretational question regarding school choice programs is quite similar: can the language be read as prohibiting programs that empower parents to choose schools for their children when many of those families will choose religious schools? Opponents of school choice argue that aiding parents making such choices is aiding the schools they choose and thus represents prohibited support for religious schools. Proponents, on the other hand, argue that whatever benefits the religious schools derive from the program are at most incidental to the benefits being provided to the children and that such incidental benefit is very different from the institutional aid the language of the Blaine Amendments clearly covers. School choice proponents argue for an interpretation paralleling that under the Establishment Clause, which allows the choice of religious schools, while opponents argue for a nonparallel interpretation that forbids the choice of religious schools.

There are at least three reasons that the proper interpretation of Blaine Amendments' scope is a narrower one, limiting only direct grants to religious schools and not educational aid to families through school choice programs: (a) the drafters of these amendments specifically targeted aid to schools, not students; (b) the drafters were motivated by religious bigotry;

and (c) expansive interpretations of the amendments can violate federal guarantees of religious liberty.

As the history of Blaine Amendments' drafting and adoption demonstrates, they were intended to address the direct funding Catholics were lobbying for and not programs that aid families on a religiously neutral basis. In this view, Blaine Amendments should be interpreted parallel to the federal Establishment Clause to permit programs that allow families to choose religious or nonreligious options. Unfortunately, many cases in state courts have failed to limit the reach of their religion clauses to the type of assistance they were intended to prevent.

Ever since the U.S. Supreme Court applied the Establishment Clause to the states in *Everson*, opponents of the inclusion of religious options in public programs have used both the Establishment Clause and the state religion clauses to challenge state programs. This has resulted in some states, such as Illinois and Wisconsin, taking a parallel approach to interpretation, under which a program passing muster under the federal constitution also passes muster under the state religion clauses. Other states, such as California and Washington, take a nonparallel course and invalidate programs acceptable under the Establishment Clause as incompatible with the state religion clauses.

Much of what can be gleaned from state case law in fact derives from state court consideration of programs enacted after the U.S. Supreme Court upholds a program from one state under the Establishment Clause and other state legislatures pass similar programs that are then challenged in state court. Historically, most state cases interpreting both compelled support provisions and Blaine Amendments have resulted from two federal Establishment Clause cases: *Everson v. Board of Education* (1947) and *Board of Education v. Allen* (1968).

*Everson* addressed New Jersey's creation of a program subsidizing all New Jersey school children's transportation to school, private as well as public. Since most of the private school students were being transported to Catholic schools, opponents of the program alleged it violated New Jersey's compelled support clause and the Establishment Clause by supporting Catholic schools. After the New Jersey Supreme Court held that the program was valid under both its compelled support clause and the federal Establishment Clause, the U.S. Supreme Court accepted review of the Establishment Clause outcome. Finding that the program was religiously neutral and primarily for the benefit of the children and not the schools, the Court affirmed the finding of no violation of the Establishment Clause.<sup>15</sup> Quite a few states then followed New Jersey's example,<sup>16</sup> resulting in challenges under their state religion clauses that were sometimes successfully rebuffed (*Americans United, Inc. v. Independent School District*, 1970; *Attorney General v. School Committee of Essex*, 1982; *Board of Education v. Wheat*, 1938; *Bowker v. Baker*, 1946; *Honohan v. Holt*, 1968; *Nichols v. Henry*, 1945;

*Snyder v. Newtown*, 1960; *Springfield School District v. Department of Education*, 1979; *State ex rel. Hughes v. Board of Educ.*, 1970) and sometimes not (*Board of Education v. Antone*, 1963; *Epeldi v. Engelking*, 1971; *Matthews v. Quinton*, 1961; *McVey v. Hawkins*, 1953; *Opinion of the Justices*, 1966; *Spears v. Honda*, 1968; *State ex rel. Reynolds v. Nussbaum*, 1962; *Visser v. Nooksack Valley School District*, 1949).

The *Allen* case resulted in similar guidance in understanding how some states interpret their religion clauses. In *Allen*, New York's highest court upheld a program loaning free secular textbooks to all school children in the state, including those attending religious schools. In doing so, the court changed its previous interpretation of its Blaine Amendment,<sup>17</sup> adopted a view of it that paralleled the interpretation of the Establishment Clause and held that the textbook program met that Clause's standards. The opponents of the program appealed the Establishment Clause interpretation to the U.S. Supreme Court, which upheld the program on the basis of *Everson* standards, finding that it was religiously neutral and primarily benefited the children rather than the schools. As with *Everson*, several other states followed New York's lead and enacted textbook loan programs, which were then challenged in states courts, again with mixed results.<sup>18</sup>

While the transportation and textbook programs these two cases spawned have generated the largest component of state religion clause jurisprudence, challenges to other state education programs have also contributed. Because some Blaine Amendments are not limited to elementary and secondary education but encompass higher education as well, there are cases involving aid to religious colleges, and more importantly aid to students attending college, including religious colleges (which are essentially school choice programs for higher education). In fact, one of the organizations opposed to including religious options in public programs, Americans United for Separation of Church and State, launched a national litigation campaign in the 1970s to ensure that college students receiving state assistance would not be able to choose religious colleges, thereby generating several relevant cases (e.g., *Americans United for Separation of Church and State v. Blanton*, 1977; *Americans United for Separation of Church and State v. Bubb*, 1974; *Americans United for Separation of Church and State v. Dunn*, 1975; *Americans United for Separation of Church and State v. State*, 1982). This campaign was generally unsuccessful. Thus, as result of decades of litigation, many states draw a distinction between permissible aid to families and impermissible aid to schools in interpreting their state religion clauses—as the clauses' history suggests they should—while other states do not.

The second reason Blaine Amendments should be interpreted narrowly is their blatantly discriminatory origins. Indeed, there is a growing recognition on the part of the U.S. Supreme Court that the state Blaine Amendments were “born of bigotry” and “should be buried now” (*Mitchell v.*

*Helms*, 2000, p. 828).<sup>19</sup> A plurality of the Court said in *Mitchell v. Helms* that “Hostility to aid to pervasively sectarian schools has a shameful pedigree that we do not hesitate to disavow” (p. 828). The Supreme Court has not hesitated to invalidate state constitutional provisions adopted with a discriminatory intent, such as in *Hunter v. Underwood* (1985), where it found a violation of the Equal Protection Clause caused by a provision of the Mississippi Constitution enacted in 1901 that disenfranchised persons convicted of certain crimes. The Court found that the provision, though racially neutral on its face, had been adopted because it had the effect of disenfranchising a disproportionate number of African-American potential voters. Similarly, the Blaine Amendments were passed to deny aid to Catholic schools while continuing to fund nondenominational Protestant public schools, thereby discriminating on the basis of religion.<sup>20</sup>

One state supreme court faced with an argument for an expansive reading of its state’s Blaine Amendments has declined to give its constitutional provisions a broader reading than the Establishment Clause because of the Amendments’ history. In *Kotterman v. Killian* (1999), the Arizona Supreme Court concluded, “The Blaine amendment was a clear manifestation of religious bigotry, part of a crusade manufactured by the contemporary Protestant establishment to counter what was perceived as a growing ‘Catholic’ menace” (p. 624). Under the circumstances the Court gave its provision a narrow reading “because we would be hard pressed to divorce the amendment’s language from the insidious discriminatory intent that prompted it” (p. 624).

Third, Blaine Amendments should not be interpreted expansively to forbid religious options in neutral public programs, such as school choice programs, because to do so would constitute a violation of *federal* guarantees of religious freedom. The U.S. Supreme Court in *Everson*, and the plurality in *Mitchell*, recognized that the federal religion clauses (the Establishment Clause and the Free Exercise Clause of the First Amendment) do not permit singling out religion for disfavored treatment. Rather, government must be neutral toward religion, neither promoting religion nor discriminating against it.

This neutrality principle is also recognized in the test formulated by the Court for considering alleged Establishment Clause violations, the *Lemon* test. That three-part test, deriving from *Lemon v. Kurtzman* (1971), contains as its second part the requirement that a statute or program’s primary effect must be one that “neither advances nor inhibits religion” (p. 612). Prohibiting students from selecting religious schools in a school choice program that allows them to choose private schools—the result of striking down a school choice program on Blaine or compelled support grounds, because the program includes religious options—would appear to plainly inhibit religion. Similarly, subsidizing all student publications at the University of Virginia except for those with a religious viewpoint was found by the Supreme Court to violate the Free Speech Clause in *Rosenberger v. Rector and Visitors of the University of Virginia* (1995).



In *Locke v. Davey* (2004), however, the Supreme Court refused to follow the neutrality principle to its logical conclusion and permitted Washington State to use one of its Blaine Amendments to deny scholarship aid to college students pursuing religious vocational degrees.<sup>21</sup> *Locke* held that states could prohibit aid that the Establishment Clause permits, with the majority opinion in *Locke* noting that historically the establishment of state religions in the United States had included state support for training of ministers of the established church.<sup>22</sup>

It remains to be seen how broadly this permission extends. A recent decision by the U.S. Court of Appeals for the 10th Circuit, *Colorado Christian University v. Weaver* (2008), concludes,

The opinion [in *Locke*] suggests, even if it does not hold, that the state's latitude to discriminate against religion is confined to certain 'historic and substantial interests' [i.e., training for the ministry] . . . and does not extend to the wholesale exclusion of religious institutions and their students from otherwise neutral and generally available government support. (p. 1,254)

Unless and until this suggestion coalesces into an actual holding by the U.S. Supreme Court, however, expansive interpretations of state Blaine Amendments will remain possible and continue to deny students' rights to select religious schools free from discrimination.

## STATE CONSTITUTIONS AND TAX BENEFIT PROGRAMS

One final general note: the primary focus of this article has been on provisions relevant to possible enactment of voucher-type school choice programs. Most state constitutional jurisprudence involves grant programs that appropriate state funds, and both the compelled support clauses and Blaine Amendments developed to address the use of state money and taxes to support religious institutions via legislative appropriations. Tax benefit<sup>23</sup> school choice programs arguably fall outside of such strictures, because they do not appropriate or spend public money but instead permit individuals and/or corporations to retain money that would otherwise be collected. Several states, however, do have language that specifically addresses tax benefits related to education or that the state supreme court has construed to apply to tax benefits, with Michigan being an example of the former category (Michigan Constitution, art. VIII, §2) and Massachusetts an example of the latter (Opinion of the Justices, 1987). In the vast majority of states, however, there is no explicit language or interpretation that precludes creation of a school choice tax benefit program.

More than 20 years ago the U.S. Supreme Court made it clear that it regarded state tax benefit programs as less problematic under the Establishment

Clause than programs actually expending funds. In *Mueller v. Allen* (1983), the Court upheld a Minnesota tax benefit for educational expenses, even though opponents alleged that 96 percent of the benefits claimed were for parochial school tuition. Courts in both Arizona and Illinois have refused to apply their Blaine Amendments to school choice tax benefits programs on the basis that no state funds are involved (*Kotterman v. Killian*, 1999; *Griffith v. Bower*, 2001; *Toney v. Bowers*, 2001; *Winn v. Arizona Christian School Tuition Organization*, 2009). Accordingly, where state case law precludes a voucher-type program, it may well be possible to enact and successfully defend a tax benefit school choice program.

## CONCLUSION

Conceived in anti-Catholic bigotry and intended to rebuff Catholic efforts to obtain funding for their schools equal to that provided to the nondenominational Protestant public schools, the Blaine Amendments have also been applied in some states to thwart efforts to aid families who use or would like to use private schools. Another common form of state religion clause, the compelled support clause, has an older history more closely linked to the antiestablishment aspect of the federal Establishment Clause and has proven more resistant to efforts to (mis)apply them to programs aiding individuals using private schools. Now that the U.S. Supreme Court has clarified that properly framed aid programs can permit students and their families to select religious schools among others, the state religion clauses have taken on added salience because they provide the strongest remaining weapon of school choice opponents.

In *Locke* the U.S. Supreme Court declined an opportunity to deliver on the suggestion in *Everson* that the federal religion clauses do not permit the exclusion of individuals from religiously neutral benefit programs solely because they have chosen to attend religious schools. Until the day the Court fully vindicates this principle of religious neutrality, school choice advocates in states that have applied their Blaine Amendments to exclude benefits for students at religious schools would be wise to pursue school choice programs such as tax benefit programs rather than voucher-type programs.<sup>24</sup> School choice advocates in states that have construed their Blaine Amendments to parallel the restrictions of the federal Establishment Clause are free to consider both tax benefit and voucher programs.

## NOTES

1. Opponents of school choice programs have always preferred to bring their claims in state court and included claims of violation of any relevant state constitutional provisions, in addition to a

claim the program violates the Establishment Clause. Success on a state claim, especially one not involving a state religion clause, often precludes review by the U.S. Supreme Court, whose jurisdiction is limited to federal questions. State supreme courts are the final arbiters of the meaning of state constitutions, including the state religion clauses, except where their interpretations infringe on federally protected rights.

2. Under *Zelman*, a properly designed school choice program passes muster under the Establishment Clause if it provides benefits to broad group of individuals without reference to religion (i.e., is religiously neutral) and those individuals choose which participating school to use, free of government influence.

3. *Zelman* rejected a similar misinterpretation of the Establishment Clause that mistakenly equated aid to individuals with institutional aid to the schools they chose. In rejecting that misinterpretation the court relied on a series of precedents distinguishing between aid to individuals and aid to institutions and permitting individuals to choose to use their aid in religious institutions.

4. In *Locke v. Davey* (2004), for example, the U.S. Supreme Court allowed Washington State to use a state religion clause to deny scholarships to college students who were pursuing religious vocational degrees while acknowledging that the students could have been included in the program without violating the Establishment Clause. In the case of religion, the question of when states may provide “greater” protections than the federal constitutional standards is complicated by the fact that in some cases the federal religion clauses may point to conflicting outcomes. The dissent in *Locke*, for example, viewed Washington’s greater protections against an establishment of religion as infringing the free exercise rights of theology students, agreeing with the appeals court that the interpretation of Washington’s Blaine Amendment had to yield to the Free Exercise Clause.

5. Although these “compelled support” clauses were intended to prevent establishment of an official state religion, their adoption in a particular state did not necessarily end discrimination against particular religions and their adherents. For example, although Vermont adopted its compelled support language in 1777, its 1777 constitution also required a religious qualification for membership in the General Assembly, requiring all members to take an oath that they “own and profess the protestant religion.” This preference for the protestant religion was dropped in Vermont’s 1793 constitution (Hill, 1992). Similarly, the New Hampshire constitution of 1784 contained a religious test requiring that all representatives, senators, executive councilors, and the governor be “of the Protestant religion,” a requirement not repealed until 1877. Despite containing “compelled support” language, another provision of the 1784 New Hampshire constitution contained language authorizing public support of “protestant teachers of piety, religion and morality,” a provision not removed until 1968, despite repeated efforts (Marshall, 2004).

6. Though it based its decision in part on the supposed historical understanding of its compelled support language, the court gave no weight to the fact that for approximately the first 100 years of the program’s existence, students could freely choose religious as well as secular schools. This choice had ended in 1961, when the court had incorrectly concluded that permitting choice of religious schools violated the Establishment Clause, which it characterized as “more demanding” than Vermont’s compelled support clause (*Suart v. South Burlington School District*, 1961). The *Chittenden* (1999) litigation was precipitated when the Vermont Supreme Court recognized in *Campbell v. Manchester Board of School Directors* (1994), that *Suart*’s holding on the Establishment Clause was no longer good law.

7. As previously indicated, the state compelled support clauses did not eliminate religious tests for holding public office, which primarily excluded Catholics because they did not profess the “protestant religion.” Nor were the compelled support clauses used to prevent the monopoly over public funding exercised by the public schools, despite those schools being generically protestant institutions. Rather than seeking to use the compelled support language to eliminate religion in the public schools, the Catholics, the primary opponents of the protestant-oriented public schools, sought equal public support for their Catholic schools. The Catholics agreed with the protestants on the importance of religion in publicly supported schools but wanted the schools their children attended to reflect their own religion.

8. The provision for the promotion of education in the 1780 Massachusetts constitution served as the model for similar provisions in the constitutions of both New Hampshire (pt. 2, art. 83) and Maine (art. VIII, § 1). According to a recent biographer (McCullough, 2001), John Adams was especially proud of the language of the Massachusetts provision that he had authored.

9. After it became clear that protestant efforts to deny public funding to Catholic schools had succeeded, efforts shifted to trying to destroy the Catholic schools themselves through various means such as, for example, state inspection laws. These latter efforts culminated in Oregon’s 1922 passage by

initiative of a law requiring that all children attend the public schools, a victory nullified by the U.S. Supreme Court in its landmark decision in *Pierce v. Society of Sisters* in 1925, which unanimously affirmed the right of parents to send their children to private schools. A primary backer of the Oregon initiative was the Ku Klux Klan, an organization dedicated to opposing Blacks, Catholics, and Jews.

10. Those states are Colorado (1876), North Dakota (1889), South Dakota (1889), Montana (1889), Washington (1889), Idaho (1890), Wyoming (1890), Utah (1896), Oklahoma (1907), New Mexico (1912), Arizona (1912), Alaska (1959), and Hawaii (1959).

11. The typical Common School Fund is a trust fund established to use the proceeds derived from federal lands ceded to the state for supporting a public school system. Today, public school expenditures far outstrip the income generated by these trust funds, which results in the public school systems being heavily subsidized from general revenues as well (at the state level) and typically property taxes (at the local level). Thus, in most states there is at least one source of funding that is off-limits for use in supporting school choice programs, the Common School Fund.

12. Article XVIII of the Massachusetts constitution, quoted earlier, was amended in 1917 to include all sectarian institutions within its prohibition on funding. The same constitutional convention that proposed that change also endorsed the inclusion of an initiative and referendum article to the constitution that makes for a more democratic means of amending the constitution and overturning statutes. That article, however, excludes use of the new process for amendment of certain constitutional articles, including article XVIII (See *Wirzburger v. Galwin*, 2005).

13. For example, some state Blaine Amendments provide that no aid may be provided to religious schools “directly or indirectly” (e.g., Florida Constitution Article I, § 3 and New York Constitution Article XI, § 3). The Florida Court of Appeals held in *Bush v. Holmes* (2004) that this “indirect” language prohibited a voucher program. The New York Court of Appeals held that its similar language does not prohibit aid to individuals in *Board of Education v. Allen* (1967).

14. Please note that here I am switching to the phrase “religious schools” in place of “sectarian schools.” With the secularization of the public schools and the concomitant shedding of their generic protestant heritage, the operative distinction today is between secular public schools and all religious schools and no longer between nondenominational protestant “public” schools and “sectarian” Catholic schools. The secularization of the public schools is itself another result of the application of the federal Religion Clauses to the states by the U.S. Supreme Court.

15. In *Everson* (1947), the Supreme Court recognized that the federal religion clauses are not intended to place the state in a hostile relationship toward religion and that singling out students attending religious schools could have this effect: “That Amendment [the First] 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. State power is no more to be used so as to handicap religions than it is to favor them” (p. 18).

16. For simplification purposes, I treat all decisions involving transportation programs as if they occurred after *Everson*, although a few such state court decisions actually predate it.

17. The previous interpretation had occurred in *Judd v. Board of Education* (1938), in which the court had invalidated under a Blaine Amendment a transportation program similar to that upheld by the U.S. Supreme Court nine years later in *Everson* (1947). The New York electorate had responded to *Judd* by amending its Blaine Amendment to specifically authorize religiously neutral transportation programs but leaving the language otherwise intact. In *Board of Education v. Allen* (1968), the New York court rejected the reasoning of *Judd*, and now poor *Judd* is dead.

18. Cases upholding textbook programs include *Borden v. Louisiana State Board of Education* (1928), *Chance v. Mississippi State Textbook Rating & Purchasing Board* (1941), *Bowerman v. O'Connor* (1968), and Opinion of the Justices (1969). Cases striking down textbook programs include *Dickman v. School District No. 62C* (1961), *People ex rel. Klinger v. Howlett* (1973), *Mallory v. Barrera* (1976), *Gaffney v. State Department of Education* (1974), *California Teachers Association v. Riles* (1981), and *Elbe v. Yankton Independent School District* (1986).

19. The plurality in *Mitchell* (2000) noted that “Opposition to aid to ‘sectarian’ schools acquired prominence in the 1870s with Congress’s 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.’” The plurality went on to say that 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” (p. 828).

20. Of course, with the dereligionification of the nation's public schools occurring after the Supreme Court applied the Establishment Clause to the states beginning with *Everson* in 1947, state Blaine Amendments now police a line between secular public schools and religious private schools, and an argument could be made that the previous discrimination between religions has been dissipated. Discrimination against all religious schools in favor of nonreligious schools, whether public or private, remains.

21. The majority opinion in *Locke* authored by Chief Justice Rehnquist disingenuously denies that the relevant provision is a Blaine Amendment, perhaps because Chief Justice Rehnquist had joined Justice Thomas's plurality opinion in *Mitchell v. Helms* (2000) recognizing that the biased origins of the prohibition on aid to pervasively sectarian schools meant that it deserved to be buried now. But the provision at issue in *Locke* is unquestionably a Blaine Amendment (DeForrest, 2004).

22. The majority opinion, however, failed to recognize such historical state support for ministerial training was limited to ministers of the established religion and no others, unlike the religiously neutral Washington program that allowed for ministerial training for any religion as well as training for all other careers and professions as well.

23. I use here the phrase "tax benefit" programs to encompass both tax credit and tax deduction programs. Both sorts of programs reduce the taxpayer's tax liability, with tax credit programs reducing directly the amount of tax owed and tax deduction programs reducing the amount of income subject to tax, thereby indirectly reducing the amount of tax owed.

24. The same goes for any state like Vermont that has interpreted its compelled support clause to require discrimination against students choosing religious schools in otherwise neutral aid programs.

## REFERENCES

- Americans United Inc. v. Independent School District*, 179 N.W.2d 146 (MN 1970).  
*Americans United for Separation of Church and State v. Blanton*, 433 F. Supp. 97 (M.D. Tenn. 1977), *aff'd*, 434 U.S. 803 (1977).  
*Americans United for Separation of Church and State v. Bubb*, 379 F. Supp. 872 (D. Kan. 1974).  
*Americans United for Separation of Church and State v. Dunn*, 384 F. Supp. 714 (D. Tenn. 1974), vacated and remanded, 421 U.S. 958 (1975).  
*Americans United for Separation of Church and State v. State*, 648 P.2d 1072 (Colo. 1982).  
*Attorney General v. School Committee of Essex*, 439 N.E.2d 770 (MA 1982).  
*Board of Education v. Allen*, 228 N.E.2d 791 (N.Y. 1967).  
*Board of Education v. Allen*, 392 U.S. 236 (1968).  
*Board of Education v. Antone*, 384 P.2d 911 (OK 1963).  
*Board of Education v. Wheat*, 199 A. 628 (MD 1938).  
*Borden v. Louisiana State Board of Education*, 123 So. 655 (LA 1928).  
*Bowerman v. O'Connor*, 247 A.2d 82 (RI 1968).  
*Bowker v. Baker*, 167 P.2d 256 (CA App. 1946).  
*Bush v. Holmes*, 886 So.2d 340 (Fla. 1st DCA 2004), *aff'd* on other grounds, 919 So.2d 392 (Fla. 2006).  
*California Teachers Association v. Riles*, 632 P.2d 953 (CA 1981).  
*Campbell v. Manchester Board of School Directors*, 641 A.2d 352 (1994).  
*Chance v. Mississippi State Textbook Rating & Purchasing Board*, 200 So. 706 (MS 1941).  
*Chittenden Town School District v. Vermont Department of Education*, 738 A.2d 539. cert. denied, 528 U.S. 1066 (1999).

- Cochran v. Louisiana Board of Education*, 281 U.S. 370 (1930).
- Cogan, N. (Ed.). (1997). *The complete Bill of Rights: The drafts, debates, sources, and origins*. New York: Oxford University Press.
- Colorado Christian University v. Weaver*, 534 F.3d 1245 (10th Cir. 2008).
- Cubberley, E. P. (1934). *Readings in public education in the United States*. Boston: Houghton Mifflin.
- DeForrest, M. E. (2004). The connection between the federal Blaine Amendment and Article I, §11 of the Washington state constitution. *Tulsa Law Review*, 40, 295–320.
- Dickman v. School District No. 62C*, 366 P.2d 533 (OR 1961).
- Elbe v. Yankton Independent School District*, 640 F. Supp. 1234 (D. S.D. 1986).
- Elson, R. M. (1964). *Guardians of tradition: American schoolbooks of the nineteenth century*. Lincoln, NE: University of Nebraska Press.
- Epeldi v. Engelking*, 488 P.2d 860 (ID 1971).
- Everson v. Board of Education*, 330 U.S. 1 (1947).
- Gaffney v. State Department of Educ.*, 220 N.W.2d 550 (NE 1974).
- Green, S. K. (1992). The Blaine Amendment reconsidered. *American Journal of Legal History*, 36(1), 38–69.
- Griffith v. Bower*, 747 N.E.2d 423 (Ill. App. 2001).
- Hamburger, P. (2002). *Separation of church and state* Cambridge, MA: Harvard University Press.
- Higham, J. (1955). *Strangers in the land: Patterns of American nativism, 1860–1925*. Piscataway, NJ: Rutgers University Press.
- Hill, W. C. (1992). *The Vermont state constitution: A reference guide*. Santa Barbara, CA: Greenwood Press.
- Honohan v. Holt*, 244 N.E.2d 537 (OH trial ct. 1968).
- Hunter v. Underwood*, 471 U.S. 222 (1985).
- Jorgenson, L. P. (1987). *The state and the non-public school: 1825–1925*. Columbia, MO: University of Missouri Press.
- Judd v. Board of Education*, 15 N.E.2d 576 (NY 1938).
- Kotterman v. Killian*, 972 P.2d 606, 624 (Ariz.), cert. denied, 528 U.S. 921 (1999).
- Lemon v. Kurtzman*, 403 U.S. 602 (1971).
- Locke v. Davey*, 540 U.S. 712 (2004).
- Mallory v. Barrera*, 544 S.W.2d 556 (MO 1976).
- Marshall, S. (2004). *The New Hampshire state constitution: A reference guide*. Santa Barbara, CA: Praeger.
- Matthews v. Quinton*, 362 P.2d 932 (AK 1961).
- Matzat, A. L. (n. d.). Massachusetts education laws of 1642 and 1647. Retrieved August 6, 2009, from <http://www.nd.edu/~rbarger/www7/masslaws.html>.
- McCullough, D. (2001). *John Adams*. New York: Simon & Schuster.
- McVey v. Hawkins*, 258 S.W.2d 929 (MO 1953).
- Mitchell v. Helms*, 530 U.S. 793, 829 (2000).
- Monaghan, E. J. (2005). *Learning to read and write in colonial America*. Amherst, MA: University of Massachusetts Press.
- Mueller v. Allen*, 463 U.S. 388 (1983).
- Nichols v. Henry*, 191 S.W.2d 930 (KY 1945).
- Opinion of the Justices, 216 A.2d 668 (DE 1966).

- Opinion of the Justices, 258 A.2d 343 (NH 1969).
- Opinion of the Justices, 514 N.E.2d 353 (Mass. 1987).
- People ex rel. Klinger v. Howlett*, 305 N.E.2d 129 (IL 1973).
- Pierce v. Society of Sisters*, 208 U.S. 510 (1925).
- Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995).
- Spears v. Honda*, 449 P.2d 130 (HA 1968).
- Snyder v. Newtown*, 161 A.2d 770 (CT 1960).
- Springfield School District v. Department of Education*, 397 A.2d 1154 (PA 1979).
- State ex rel. Hughes v. Board of Educ.*, 174 S.E.2d 711 (WV 1970).
- State ex rel. Reynolds v. Nussbaum*, 115 N.W. 2d 761 (WI 1962).
- Swart v. South Burlington School District*, 167 A. 2d 514, 518 (1961).
- Toney v. Bowers*, 744 N.E.2d 351 (Ill. App. 2001).
- Tyack, D. (1966). The kingdom of God and the common school. *Harvard Educational Review*, 36, 447–455.
- Tyack, D., James, T., & Benavot, A. (1987). *Law and the shaping of public education, 1789–1954*. Madison, WI: University of Wisconsin Press.
- Visser v. Nooksack Valley School District*, 207 P.2d 198 (WA 1949).
- Viteritti, J. (1998). Blaine's wake: School choice, the First Amendment, and state constitutional law. *Harvard Journal of Law & Public Policy*, 21(3), 657–719.
- Viteritti, J. (1999). *Choosing equality: School choice, the constitution, and civil society*. Washington, DC: Brookings.
- Widmar v. Vincent*, 454 U.S. 263 (1981).
- Winn v. Arizona Christian School Tuition Organization*, 562 F.3d 1002 (9th Cir. 2009).
- Wirzbarger v. Galvin*, 412 F.3d 271 (1st Cir. 2005).
- Yick Wo v. Hopkins*, 118 U.S. 356 (1886).
- Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).