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Blaine's Bigotry: Preventing School Vouchers in Oklahoma...Temporarily

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BLAINE'S BIGOTRY: PREVENTING SCHOOL VOUCHERS IN OKLAHOMA . . . TEMPORARILY

I. INTRODUCTION

In *The Role of Government in Education*, Milton Friedman articulated the importance of education in a democratic setting, stating:

> A stable and democratic society is impossible without widespread acceptance of some common set of values and without a minimum degree of literacy and knowledge on the part of most citizens. Education contributes to both. In consequence, the gain from the education of a child accrues not only to the child or to his parents but to other members of the society; the education of my child contributes to other people's welfare by promoting a stable and democratic society.[1]

Therefore, it is understandable why poorly performing elementary and secondary public schools and their effects on children in the United States have been a focus of concern and debate for many years.[2] Parents constantly search for methods to ensure that their children receive the quality education their hard-earned tax dollars should provide.[3] Very little debate exists among citizens concerning the overall importance of education to this country; even the United States Supreme Court has acknowledged the "pivotal role" that education plays in our society.[4]

Although people agree that education is crucial, they also recognize that the current education system is failing to provide many students with an education that ensures the children's ability to be productive members of society.[5] Debate among think tanks, politicians, parents, teachers, and other groups has generated many proposed solutions, but these proposals have received far from unanimous support.[6]

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1. Milton Friedman, *The Role of Government in Education*, in *Economics and the Public Interest* 123, 124-25 (Robert A. Solo ed., Greenwood Press 1982).

2. *See* U.S. Gen. Acctg. Off. Rpt. to the Hon. Judd Gregg, *School Vouchers: Publicly Funded Programs in Cleveland and Milwaukee* 1 (Aug. 2001) (available at <http://www.gao.gov/new.items/d01914.pdf>).

3. Suzanne Hansen, *School Vouchers: The Answer to a Failing Public School System*, 23 Hamline J. Pub. L. & Policy 73, 73 (2001).

4. *Plyler v. Doe*, 457 U.S. 202, 221 (1982) ("[E]ducation has a fundamental role in maintaining the fabric of our society. We cannot ignore the significant social costs borne by our Nation when select groups are denied the means to absorb the values and skills upon which our social order rests.").

5. *See* Richard W. Garnett, *The Right Questions About School Choice: Education, Religious Freedom, and the Common Good*, 23 Cardozo L. Rev. 1281, 1283 (2002) ("[T]here is widespread, though certainly not unanimous, agreement that 'far too many' of our nation's government schools are failing." (footnotes omitted)).

6. *See id.* at 1284-85.

Generally, a student is assigned to a certain school district corresponding to the student's place of residence[7] without regard to the school's performance.[8] This system allows parents very little choice as to which school their child attends. Almost fifty years ago, Friedman, an economist, saw the inherent flaws in this system of education and proposed absolute school choice for the nation's parents.[9] Friedman's concept of school choice, which would allow parents the freedom to choose which and what type of school[10] their children attend, has moved to the forefront of the current education debate.[11] Accompanying the parents' choice of school are funds to help offset any increased expense that may accrue in attending the different school.[12] The most controversial of the school choice proposals, school vouchers, allow parents to apply tax proceeds to educational purposes.[13] School vouchers are simply programs that provide payment in the name of students for parents to apply to the tuition of a school they choose.[14] These vouchers provide to a child, regardless of socioeconomic background, the opportunity to receive the quality education that had been previously available only to the wealthy.[15]

Enactment of voucher programs would drastically alter the modern school system.[16] Notwithstanding the extraordinary changes that would occur following implementation of a voucher program, the past twenty years have seen many proposals for school choice.[17] The voucher concept, controversial as it is, continues to be the focus of much debate.[18] This discussion over vouchers has found its way into political campaigns across the country, reaching even the 2000 presidential campaign.[19]

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7. *See e.g.* Okla. Stat. tit. 70 § 1-113 (2001).

8. *See e.g. id.* § 8-103.1 (mandating that the student apply to the school board of the new school and meet the criteria outlined in the school's transfer policy to be allowed to transfer between school districts without residing in the district).

9. *See* Friedman, *supra* n. 1, at 123-44.

10. Parents may choose to send their children to the state-assigned public school, another public school, a charter school, or a private school.

11. Brian P. Gill et al., *Rhetoric Versus Reality: What We Know and What We Need to Know About Vouchers and Charter Schools* 1 (Rand 2001).

12. Jo Ann Bodemer, Student Author, *School Choice Through Vouchers: Drawing Constitutional Lemon-Aid from the Lemon Test*, 70 St. John's L. Rev. 273, 280 (1996).

13. Garnett, *supra* n. 5, at 1283.

14. Renee Oliver, *Everything You Always Wanted to Know about Vouchers* <http://www.educational-freedom.org/whychoice.htm> (accessed Sept. 22, 2003).

15. Garnett, *supra* n. 5, at 1282 ("[F]amilies of means can make choices about education. They move to neighborhoods with good schools. They can send their kids to private or parochial schools. Poor parents have no such choices. If their local schools are failing, their kids are trapped." (quoting Geneva Overholser, *Coming Around on Vouchers*, Wash. Post A15 (Sept. 20, 1999) (internal quotations omitted)).

16. *See id.* at 1303 ("[S]hifting educational authority from government to parents is a policy that rests upon basic beliefs about the dignity of the person, the rights of children, and the sanctity of the family; it is a shift that also promises a harvest of social trust as the experience of responsibility is extended to all." (quoting John E. Coons, *School Choice and Simple Justice*, First Things 15, 15 (Apr. 1992) (footnote and internal quotations omitted)).

17. *See infra* § II (discussing the various proposals and current programs in operation).

18. *See* Hansen, *supra* n. 3, at 74.

19. President George W. Bush is a voucher supporter, while former Vice President Al Gore opposes them. *Id.* at 74-75.

The voucher debate has also hit close to home in Oklahoma, where the public has focused on the school system.[20] Because of concern for the state schools, former Governor Frank Keating and former Congressman J.C. Watts, Jr., supported voucher programs.[21] Furthermore, the media frequently questioned candidates about their opinion on the implementation of school voucher programs during the gubernatorial election of 2002.[22] This kept education a central issue on everyone's mind. And, like the rest of the nation, candidates stood on both sides of the issue.[23]

Making history in 1990, the Wisconsin state legislature enacted the first school voucher program in the United States, aimed specifically at Milwaukee public schools.[24] Originally, this program allowed choice only among other public schools and non-religious private schools in Milwaukee.[25] Wisconsin later amended the program by removing the nonsectarian requirement for private schools; as a result, the students were permitted to use vouchers to attend religious schools.[26]

Since 1990, other states have chosen to adopt systems of school vouchers.[27] Currently, three states—Wisconsin, Ohio, and Florida—have publicly-funded voucher programs.[28] And in 2000, "at least 21 states... proposed voucher legislation."[29] With the increase in number of programs, voucher opponents have taken their complaints to the courts, arguing that these programs violate the United States Constitution.[30] The United States Supreme Court rejected this argument in the summer of 2002, ruling that the voucher program enacted in

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20. *See e.g.* Okla. Educ. Assn., *Save Our Schools* <http://www.okea.org/SOS/index.htm> (accessed Oct. 8, 2003).

21. Catharine V. Ewing, Student Author, *Constitutional Law: Vouchers, Sectarian Schools, and Constitutional Uncertainty: Choices for the United States Supreme Court and the States*, 53 Okla. L. Rev. 437, 438 (2000).

22. *See Nine Seeking Governor's Seat: Voters to Pick Party Nominees in Aug. 27 Primaries*, Tulsa World A11, A11 (Aug. 12, 2002) (available in 2002 WL 7129484) (asking of each candidate, "Should the state adopt a school voucher law?").

23. *See id.*

24. Hansen, *supra* n. 3, at 80.

25. *See id.* at 80-81.

26. Wis. Stat. § 119.23(2)(b) (2001-2002) ("[A]ny pupil... may attend... any private school located in the city" if the school complies with the terms of the statute, namely: registers with the superintendent of schools, meets health and safety codes, and is non-discriminatory as defined in the United States Code); *see* Hansen, *supra* n. 3, at 81.

27. *See* U.S. Gen. Acctg. Off. Rpt. to the Hon. Judd Gregg, *School Vouchers: Publicly Funded Programs in Cleveland and Milwaukee* 1 (Aug. 2001) (available at <http://www.gao.gov/new.items/d01914.pdf>).

28. *Id.*

29. Natl. Conf. of St. Legis., *School Vouchers* <http://www.ncsl.org/programs/educ/voucher.htm> (accessed Sept. 22, 2003).

30. *See e.g. Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); *Jackson v. Benson*, 578 N.W.2d 602 (Wis. 1998); *Bush v. Holmes*, 767 S.2d 668 (Fla. Dist. App. 2000); *Holmes v. Bush*, 2002 WL 1809079 (Fla. Cir. Aug. 5, 2002).

Cleveland, Ohio did not violate the Establishment Clause[31] of the U.S. Constitution.[32]

After the Court's landmark decision in *Zelman v. Simmons-Harris*, Oklahoma state legislators now have the framework to design federally permissible school voucher programs. The voucher program in Florida, however, illustrates that voucher opponents may take another route to bar the programs within the states.[33] Like Florida, thirty-six states, including Oklahoma, have Blaine Amendments—state constitutional clauses that are much stricter than the U.S. Constitution concerning funds that may reach sectarian institutions.[34] Many state constitutions completely bar any public funding of religious institutions.[35] In fact, the Oklahoma constitutional language, which is viewed as very strict,[36] will defeat any attempt to implement a school voucher program.[37]

As history reveals, the Blaine Amendments were the product of bigotry and anti-catholic sentiment present in this country during the late 1800's.[38] A considerable amount of debate concerning the merits of these amendments still exists today.[39] Barry Lynn, Executive Director of Americans for Separation of Church and State, acknowledges the bigotry present in the Amendment's enactment; however, he is quick to point out that "[t]he effect of these amendments has been positive for all religions, including the Catholic Church, and we have no discomfort using them."[40] Much to the dismay of the Blaine Amendment supporters, the continued vitality of the amendments with respect to school vouchers should be only temporary, as the United States Constitution will work to overrule the bigoted language in state constitutions.[41] Shortly after the *Zelman* decision, the Ninth Circuit Court of Appeals held, on free exercise grounds, that the Blaine Amendment in Washington could not prevent a scholarship recipient from studying theology.[42] Last Term, the United States Supreme Court granted certiorari[43] to this case and oral arguments will be heard in December 2003.[44]

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

32. *Zelman*, 536 U.S. at 662-63.

33. *See Holmes*, 2002 WL 1809079 at *1.

34. The Becket Fund for Religious Liberty, *Blaine Amendments, States* <http://www.blaineamendments.org/states/states.html> (accessed Oct. 2, 2003).

35. *See* Frank R. Kemerer, *State Constitutions and School Vouchers*, 120 Educ. L. Rptr. 1, 5-7 (1997).

36. *See* Ewing, *supra* n. 21, at 437.

37. *See id.*; Kemerer, *supra* n. 35, at 5.

38. *See* Tony Mauro, *The 'Blaine' Game: Voucher War Heads to States that Ban Funding of Religious Schools*, 25 Leg. Times 1, 1 (Aug. 5, 2002).

39. *Id.* at 8.

40. *Id.* (internal quotations omitted).

41. *See infra* § IV (discussing the Blaine Amendments and their enactment).

42. *See Davey v. Locke*, 299 F.3d 748, 760 (9th Cir. 2002).

43. *Locke v. Davey*, 123 S. Ct. 2075 (2003).

44. S. Ct., *Oral Arguments, Argument Calendars, Session Beginning December 1, 2003* <http://www.supremecourtus.gov/oral_arguments/argument_calendars/monthlyargumentcaldecember2003.pdf> (last updat-ed Nov. 3, 2003).

Studying the relative uncertainty of school vouchers in the United States, this comment will focus on the likelihood of voucher success in Oklahoma.[45] Section II of this comment explores the turbulent history of school vouchers, including current programs, to provide a background on school vouchers. Then, the comment shifts in Section III to the constitutionality of vouchers under the Establishment Clause as outlined in Supreme Court precedent and specifically the *Zelman* decision. Section IV examines the history and enactment of Blaine Amendments in the United States and Oklahoma. Section V of the comment looks at the likelihood of removing the last constitutional hurdle for school voucher implementation in Oklahoma, including the merits and arguments for and against overturning the Blaine Amendments by the U.S. Supreme Court.

II. HISTORY OF EDUCATIONAL VOUCHERS

A. *Early History*

Scholars have written about providing choice in educational settings for centuries.[46] In 1776, Adam Smith wrote that children should be allowed to choose their own teachers, as this would advance the teachers' skills.[47] In *The Rights of Man*, Thomas Paine proposed granting tax funds to low-income families so they could choose which schools their children would attend.[48] Then, nearly fifty years ago, a Nobel laureate in economics, Milton Friedman, supported absolute school choice for parents, a plan whereby the government played little to no role in education.[49]

In what may have been the first widely used voucher program, the federal government enacted the G.I. Bill[50] as veterans were returning from World War II.[51] This legislation allowed military veterans to obtain money to pay tuition at the university of their choice.[52] Veterans were allowed to choose any university

45. Because of Oklahoma's very strict interpretation of its Blaine Amendment, any action taken that successfully subverts the effects of the amendment could be used by the other states to achieve identical results.

46. *See* Eric Nasstrom, Student Author, *School Vouchers in Minnesota: Confronting the Walls Separating Church and State*, 22 Wm. Mitchell L. Rev. 1065, 1070 (1996).

47. *Id.*

48. *Id.*

49. *See* Friedman, *supra* n. 1, at 123-44 (noting that the government could play a minimal role in the education of children by giving parents vouchers that could be used at participating schools of their choosing and could use any extra proceeds to spend on other educationally related materials); Nasstrom, *supra* n. 46, at 1070-71; Charles J. Russo & Ralph D. Mawdsley, *The Supreme Court and Vouchers: An Idea Whose Time Has Come?*, 160 Educ. L. Rep. 279, 279-80 (2002).

50. *See Servicemen's Readjustment Act of 1944*, Pub. L. No. 78-346, 58 Stat. 284 (1944). The Bill has been amended numerous times over the past sixty years. In 1984, Congress enacted the "All Volunteer Force Educational Assistance Program" of the "Montgomery GI Bill Program." In this program, the recipient of the aid must accept a pay reduction while in active duty. Later, in 1987, the United States Congress made the program permanent. *See* University of Central Florida Office of Veteran's Affairs, *History of the GI Bill* <http://www.va.ucf.edu/new_page_1.htm> (accessed Oct. 2, 2003).

51. Bodemer, *supra* n. 12, at 304.

52. *See* 58 Stat. at 288 ("[Qualifying veterans] shall be eligible for and entitled to such course of education or training as he may elect, and at any approved educational or training institution at which he chooses to enroll. . . .); *id.* at 290 ("As used in this part, the term 'educational or training institutions'

that complied with the provisions of the statute, even religious private schools.[53] Interestingly, the G.I. Bill has never been challenged in the courts to determine its permissibility under the Constitution, despite its nearly identical nature to school vouchers.[54]

Republican presidents over the past twenty years have attempted to capitalize on the success of the G.I. Bill by enacting similar programs for children.[55] President Reagan urged Congress to enact voucher programs in 1983, 1985, and 1986 with no success.[56] In 1991, former President Bush proposed the "GI Bill for Children," which was also unsuccessful.[57] Popular belief is that the lobbying of special interest groups, particularly the National Education Association,[58] was the impetus behind the failure of the proposals.[59] The push for federal legislation enacting school vouchers lessened with President Bush's defeat in the 1992 election.[60] Recently, however, President George W. Bush, in the No Child Left Behind Act of 2001,[61] was successful in ensuring legislation that will increase the likelihood for parents with children in failing schools to choose another school.

B. Predominant Arguments

Despite the G.I. Bill's success and presidential support, there is still heated debate over vouchers.[62] The arguments for and against vouchers take many forms, ranging from the need to prevent religious indoctrination to the application of market hypothesis theories.[63]

Typically, opponents of school vouchers focus on the economic impact vouchers will have on the public school system, the fear of state-sponsored religious indoctrination of children, and other social concerns.[64] Economic arguments spring from the belief that by allowing state money to be applied to

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shall include all public or private elementary, secondary, and other schools furnishing education for adults, business schools and colleges, scientific and technical institutions, colleges, vocational schools, junior colleges, teachers colleges, normal schools, professional schools, universities, and other educational institutions. . . .").

53. Bodemer, *supra* n. 12, at 304.

54. Hansen, *supra* n. 3, at 78-79.

55. Nasstrom, *supra* n. 46, at 1074-75.

56. *Id.* at 1074, 1074 n. 6.

57. Bodemer, *supra* n. 12, at 305.

58. Hereafter referred to as the "NEA." The NEA is comprised of 2.7 million members working in all levels of education throughout the country. NEA, *About NEA* <http://www.nea.org/aboutnea.html> (accessed Oct. 11, 2003). The stated purpose of the organization is "advancing the cause of public education." *Id.*

59. Bodemer, *supra* n. 12, at 306 ("No group lobbied against the GI Bill; the GI Bill for Children, however, was vehemently opposed by the NEA." (footnote omitted)).

60. Nasstrom, *supra* n. 46, at 1075.

61. *See* Pub. L. No. 107-110, 115 Stat. 1425 (2002). This choice, though, is limited to other schools in the district, including charter schools. *See* Dept. of Educ., *Executive Summary of the No Child Left Behind Act of 2001* <http://www.ed.gov/nclb/overview/intro/execsumm.pdf> (accessed Sept. 27, 2003).

62. *See e.g.* NEA, *Vouchers* <http://www.nea.org/vouchers> (accessed Oct. 11, 2003).

63. *See* Brian L. White, Student Author, *Potential Federal and State Constitutional Barriers to the Success of School Vouchers*, 49 U. Kan. L. Rev. 889, 896-902 (2001).

64. *See id.* at 898-902.

private schools, the already low operating budgets of the public schools will be depleted even further.[65] Opponents also fear that school vouchers will "coerce" students into attending private religious schools when other options are limited.[66] The legal attacks focus on the belief that the limited nonsectarian options offered present a clearly unconstitutional combination of church and state.[67] These arguments predict that school vouchers will likely "encourage economic, racial, ethnic, and religious stratification"[68] in the schools. If given the choice, opponents argue, parents will choose schools with students similar to their children.[69]

Proponents of vouchers, on the other hand, focus their arguments on market theories, schools' performance ratings, and equity.[70] The statistics available concerning public schools' poor performance are a frequent mode of attack utilized by voucher supporters.[71] They point to the vast increases in spending over the years which have only resulted in mediocre to poor performance in the schools.[72] Similar to how the marketplace provided for great everyday innovations, it is argued that a voucher program would provide great advancement in education.[73] This marketplace theory rests on the belief that voucher systems "would create a competitive environment which would ultimately result in better education for both the private and public school student."[74] Another contention studies the greater effectiveness of private schools as compared to their public counterparts; this is the case despite the lower operating budgets of private schools.[75] Because public schools trail their private counterparts in efficiency and product quality, proponents argue, market forces will either require that the school improve or dissolve.[76] Finally, voucher advocates assert that requiring students to remain in failing schools because of their place of residence is not

65. Hansen, *supra* n. 3, at 75.

66. *See Zelman*, 536 U.S. at 706-07 (Souter, Stevens, Ginsburg & Breyer, JJ., dissenting).

67. *See* Kemerer, *supra* n. 35, at 1.

68. NEA, *supra* n. 58.

69. They believe this segregation will be by race, religion, and economic class, *cf. id.*, whereas, "the common school involves a healthy social mixing of children from all races and classes." Gill et al., *supra* n. 11, at 19.

70. *See* White, *supra* n. 63, at 896-97.

71. They argue that increased spending has failed, so it is time to try school vouchers. *See* Bodemer, *supra* n. 12, at 275.

72. *See* U.S. Dept. of Educ., *Why No Child Left Behind is Important to America* <http://www.nochildleftbehind.gov/next/stats/index.html> (last accessed Nov. 24, 2002) (showing the vast increases in spending over the past decade with negative results in some cases, while others see a minor improvement; but all of the tested achievement levels fall below the fifty percent barrier of success) (on file with the *Tulsa Law Review*).

73. White, *supra* n. 63, at 897.

74. Bodemer, *supra* n. 12, at 287-88. Voucher proponents argue the competition between public and private schools that will result from the voucher programs will motivate each school to provide a better product (education) in order to maintain their customers (students and parents). *See* White, *supra* n. 63, at 897.

75. *See* White, *supra* n. 63, at 896.

76. Bodemer, *supra* n. 12, at 303.

fair.[77] Wealthy families are readily able to send their children to private schools, but poorer families cannot do this, making the situation inherently unfair.[78]

As the arguments illustrate, the public has been divided on the issue across the nation. With the hope that their efforts will either prevent or ensure voucher enactment, opponents and proponents of vouchers, alike, funnel millions of dollars each year into lobbying efforts and campaign contributions across the country.[79]

C. *Milwaukee Parental Choice Program*

Wisconsin's implementation of the nation's first school voucher program in 1990 was an enormous victory for voucher advocates.[80] This program, titled the Milwaukee Parental Choice Program (MPCP),[81] allowed parents to use vouchers at any public school or a nonsectarian private school of their choice.[82] In 1995, the Wisconsin Legislature amended this program to give parents the choice of sending their children to religious private schools.[83] According to the statute, a child living in Milwaukee may attend any private school within the city[84] as long as the school meets certain qualifications, including academic performance[85] and anti-

77. White, *supra* n. 63, at 896-97.

78. *Id.*

79. NEA, *supra* n. 58.

80. *See* Hansen, *supra* n. 3, at 80.

81. Wis. Stat. § 119.23.

82. Hansen, *supra* n. 3, at 80.

83. *Jackson*, 578 N.W.2d at 608. Another change in the program at that time was the process by which tuition money was disbursed. While the original program sent the check directly to the school chosen by the parents, the amended program provided for the money to be sent directly to the parents who then applied the money to the school of their choosing. Hansen, *supra* n. 3, at 81.

84. The applicable statute states:

> (2)(a) Subject to par. (b), any pupil in grades kindergarten to 12 who resides within the city may attend, at no charge, any private school located in the city if all of the following apply:
>
> 1. The pupil is a member of a family that has a total family income that does not exceed an amount equal to 1.75 times the poverty level determined in accordance with criteria established by the director of the federal office of management and budget.
>
> 2. In the previous school year the pupil was enrolled in the school district operating under this chapter, was attending a private school under this section, was enrolled in grades kindergarten to 3 in a private school located in the city other than under this section or was not enrolled in school.
>
> 3. The private school notified the state superintendent of its intent to participate in the program under this section by February 1 of the previous school year. The notice shall specify the number of pupils participating in the program under this section for which the school has space.
>
> 4. The private school complies with 42 USC 2000d.
>
> 5. The private school meets all health and safety laws or codes that apply to public schools.

Wis. Stat. § 119.23(2)(a).

85. *Id.* § 119.23(7)(a). The statute states:

> (7)(a) Each private school participating in the program under this section shall meet at least one of the following standards:
>
> 1. At least 70% of the pupils in the program advance one grade level each year.
>
> 2. The private school's average attendance rate for the pupils in the program is at least 90%.

discrimination standards.[86] To prevent religious schools from imposing their beliefs and practices upon the children without parental consent, parents have the option of excluding their children from religious activities.[87]

Not surprisingly, the MPCP was met with opposition and challenged in court on state and federal constitutionality claims.[88] In 1998, the Wisconsin Supreme Court ruled that the program was acceptable under both the United States and Wisconsin constitutions.[89] The United States Supreme Court denied certiorari,[90] and thus the MPCP is safe pending subsequent review.

D. Ohio Pilot Project Scholarship Program

For many years, the public schools within the Cleveland Municipal School District had been among the worst performing in the nation.[91] This poor performance caused the federal court in the Northern District of Ohio to declare that the school system was in a crisis situation.[92] To help alleviate the problem, the district court granted full control of the school to the state.[93] Following some preliminary tests, the state auditor declared that "Cleveland's public schools were in the midst of a 'crisis that is perhaps unprecedented in the history of American education.'"[94] The students in this school district were not able to compete with students in other districts throughout the state; in fact, only ten percent of Cleveland's ninth graders were able to pass proficiency tests.[95] And with the district's high dropout rate, only one-twelfth of those who were eligible to graduate actually did.[96] Tests showed that those who did graduate from Cleveland's schools had basic skills well below those of the students at other schools.[97]

To help combat this problem, the Ohio Legislature enacted the Ohio Pilot Project Scholarship Program in 1995.[98] This program allows the students in failing

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3. At least 80% of the pupils in the program demonstrate significant academic progress.
4. At least 70% of the families of pupils in the program meet parent involvement criteria established by the private school.

Id.

86. *Id.* § 2(a)(4); *see* 42 U.S.C. § 2000(d) (2000) ("No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.").

87. Wis. Stat. § 119.23(7)(c).

88. *See Jackson v. Benson*, 578 N.W.2d 602, 620 (Wis. 1998) (holding that the amended MPCP did not violate the Wisconsin Constitution); *Davis v. Grover*, 480 N.W.2d 460, 477 (Wis. 1992) (finding the original version of the MPCP valid).

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

90. *Jackson v. Benson*, 525 U.S. 997 (1998).

91. *Zelman*, 536 U.S. at 644.

92. *Id.*

93. *Id.*

94. *Id.* (quoting Cleveland City Sch. Dist. Performance Audit 2-1 (Mar. 1996)).

95. *Id.*

96. *Zelman*, 536 U.S. at 644.

97. *Id.*

98. Ohio Rev. Code Ann. §§ 3313.97-3313.979 (West 1999).

schools[99] to receive scholarship assistance to attend other schools; parents may choose nonsectarian private, sectarian private, charter, or magnet schools, or their children can attend public schools in adjacent districts.[100] Like the MPCP, tuition payments are in the parents' names for endorsement to the school they choose.[101] The program also allows children who remain in their assigned schools to obtain funding for private tutoring; this provision was added as an attempt to improve those schools with low performances.[102]

Similar to the MPCP, the participating schools and students in the Ohio system must meet a number of standards.[103] A private school must register with the superintendent of public instruction and comply with the statutory terms to be accepted into the program.[104] Moreover, the only students eligible for aid are those from low-income families who would otherwise have no opportunity to choose a different school.[105]

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99. *Id.* § 3313.975(A) (defining a failing school as those "that are or have ever been under federal court order requiring supervision and operational management of the district by the state superintendent").

100. *Id.* (providing money for students who choose to stay in the public schools to be used for tutoring assistance).

101. *Id.* § 3313.979 ("Each scholarship or grant to be used for payments to a registered private school or to an approved tutorial assistance provider is payable to the parents of the student entitled to the scholarship or grant.").

102. *Id.* § 3313.978(B) ("The state superintendent shall also award in any school year tutorial assistance grants to a number of students equal to the number of students who receive scholarships under division (A) of this section.").

103. *See Zelman*, 536 U.S. at 645-46.

104. The statutory registration requirements state:

> (A) No private school may receive scholarship payments from parents pursuant to section 3313.979 of the Revised Code until the chief administrator of the private school registers the school with the superintendent of public instruction. The state superintendent shall register any school that meets the following requirements:
>
> (1) The school is located within the boundaries of the pilot project school district;
>
> (2) The school indicates in writing its commitment to follow all requirements for a state-sponsored scholarship program specified under sections 3313.974 to 3313.979 of the Revised Code, including, but not limited to, the requirements for admitting students pursuant to section 3313.977 of the Revised Code;
>
> (3) The school meets all state minimum standards for chartered nonpublic schools in effect on July 1, 1992, except that the state superintendent at the superintendent's discretion may register nonchartered nonpublic schools meeting the other requirements of this division;
>
> (4) The school does not discriminate on the basis of race, religion, or ethnic background;
>
> (5) The school enrolls a minimum of ten students per class or a sum of at least twenty-five students in all the classes offered;
>
> (6) The school does not advocate or foster unlawful behavior or teach hatred of any person or group on the basis of race, ethnicity, national origin, or religion;
>
> (7) The school does not provide false or misleading information about the school to parents, students, or the general public;
>
> (8) The school agrees not to charge any tuition to low-income families participating in the scholarship program in excess of ten per cent of the scholarship amount. . . .

Ohio Rev. Code Ann. § 3313.976(A).

105. *Id.* § 3313.974(D) (defining a low-income family as "a family whose income is below the level which the superintendent of public instruction shall establish"); *Zelman*, 536 U.S. at 646 ("Families with incomes below 200% of the poverty line are given priority and are eligible to receive 90% of

An overwhelming majority of the students participating in the Ohio program attend religious private schools.[106] This is largely attributed to the abundance of religious private schools as compared to nonsectarian private schools.[107] Although there is a financial incentive for neighboring school districts to participate,[108] none had done so by the time *Zelman* was decided.[109] One of the primary criticisms of this program is that parents may be coerced into sending their children to religious schools because of the small number of non-religious schools in Cleveland.[110]

Consequently, the Ohio program has been the subject of litigation since its implementation in 1995.[111] Soon after the program's enactment, a group of Ohio taxpayers challenged it on both state and federal constitutional grounds.[112] In that action, the Ohio Supreme Court found the program in violation of the state constitution's uniformity clause and declined to rule on the federal question.[113] The legislature immediately corrected the deficiency by making the program universally available to students in Ohio schools, rather than limiting it to the students in Cleveland's schools.[114]

With the uniformity clause problem amended, the program was once again challenged on claims that it violated the federal Establishment Clause.[115] While reviewing the case for summary judgment, the district court held that the program's permissibility rested on the existence of significant options between sectarian and non-sectarian private schools.[116] Relying on the figures showing that the vast majority of private schools were religious schools, the district court found the program unconstitutional because of insufficient choice.[117] The Sixth Circuit Court of Appeals affirmed the summary judgment order of the district court. The United States Supreme Court granted certiorari.[118] Chief Justice Rehnquist wrote

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private school tuition up to $2,250.... [P]articipating private schools may not charge a parental co-payment greater than $250.").

106. *Zelman*, 536 U.S. at 647 (noting that in the 1999-2000 school year, there were more than 3,700 student participants, ninety-six percent of whom attended religious private schools).

107. *Id.* (noting that forty-six out of the fifty-six private schools in the program are religiously affiliated).

108. *Id.* (observing that adjacent school districts are eligible to receive two to three times more funding per student than their private school counterparts).

109. *Id.*

110. *See id.* at 706-07 (Souter, Stevens, Ginsburg & Breyer, JJ., dissenting).

111. *See Zelman*, 536 U.S. 639 (reversing the appeals court decision and finding that the program was non-violative of the U.S. Constitution); *Simmons-Harris v. Zelman*, 234 F.3d 945 (6th Cir. 2000) (affirming the decision of the district court that the program was in violation of the U.S. Constitution); *Simmons-Harris v. Goff*, 711 N.E.2d 203 (Ohio 1999) (holding that the program was not in violation of the U.S. Constitution but procedurally it violated the Ohio Constitution); *Simmons-Harris v. Zelman*, 72 F. Supp. 2d 834 (N.D. Ohio 1999) (issued summary judgment finding violation of the establishment clause).

112. *Goff*, 711 N.E.2d 203.

113. *Zelman*, 536 U.S. at 648; *see* Ohio Const. art. II, § 26 (stating that "all laws, of a general nature, shall have a uniform operation throughout the State....").

114. *Zelman*, 536 U.S. at 648.

115. *Id.* at 644.

116. *Simmons-Harris*, 72 F. Supp. 2d at 864-65.

117. *Id.*

118. *Zelman v. Simmons-Harris*, 533 U.S. 976 (2001).

the landmark opinion for the Court, declaring the program constitutional.[119] As a result, the program remains in operation today.

E. Florida Opportunity Scholarship Program

Much like other public education systems across the country, Florida public schools have a detailed history of struggles.[120] In fact, Florida's public schools' rankings are normally in the bottom ten of the states in many subject areas.[121] In 1999, the Florida Legislature enacted the Florida Opportunity Scholarship Program (OSP),[122] an educational voucher program, to help combat the education problem throughout the state.[123] The legislature's intent was "to provide enhanced opportunity for students in [Florida] to gain the knowledge and skills necessary for postsecondary education, a technical education, or the world of work."[124] In form and operation, Florida's program is similar to those in Ohio and Wisconsin, with two exceptions: the OSP is available statewide, and it is available to all students without reference to family income.[125]

Under Florida's OSP, participating schools are required to meet a standard before their students become eligible for the program.[126] For students to become entitled to benefits, the public school to which they would be assigned must show repeated failures in academic evaluations.[127] Once the school fails for the requisite number of years, private schools, both "sectarian and non-sectarian," are allowed to participate in the program.[128] Money is then distributed to parents to pay the

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119. *Zelman*, 536 U.S. at 662-63. For a discussion of the *Zelman* decision, see *infra* § III(C).

120. Hansen, *supra* n. 3, at 86.

121. *Id.*

122. *See* Fla. Stat. § 1002.38 (2003).

123. *Id.* § 1002.38(1).

124. *Id.*

125. Hansen, *supra* n. 3, at 86.

126. *See* Fla. Stat. § 1002.38(2).

127. *See id.* § 1002.38(2)(a) (Any school district receiving a grade of "F" in two of four school years shall have the OSP available to the students attending that district's schools).

128. Private schools must meet the following eligibility requirements:

> (a) Demonstrate fiscal soundness by being in operation for 1 school year or provide the Department of Education with a statement by a certified public accountant confirming that the private school desiring to participate is insured and the owner or owners have sufficient capital or credit to operate the school for the upcoming year serving the number of students anticipated with expected revenues from tuition and other sources that may be reasonably expected. In lieu of such a statement, a surety bond or letter of credit for the amount equal to the opportunity scholarship funds for any quarter may be filed with the department.
>
> (b) Notify the Department of Education and the school district in whose service area the school is located of its intent to participate in the program under this section by May 1 of the school year preceding the school year in which it intends to participate. The notice shall specify the grade levels and services that the private school has available for the Opportunity Scholarship Program.
>
> (c) Comply with the antidiscrimination provisions of 42 U.S.C. s. 2000d.
>
> (d) Meet state and local health and safety laws and codes.
>
> (e) Accept scholarship students on an entirely random and religious-neutral basis without regard to the student's past academic history; however, the private school may give

tuition costs at a private school of their choice.[129] The OSP method of disbursement is identical to that of Ohio and Wisconsin.[130]

Opponents of educational choice for children promptly challenged this law under the federal and state constitutions.[131] Deciding this case just over one month after the Supreme Court's ruling in *Zelman*, the circuit court declared the program unconstitutional, explaining that the relevant language of the Florida Constitution is stricter than the corresponding language of the U.S. Constitution.[132] Florida Governor Jeb Bush appealed this decision to the state appeals court.[133]

III. VOUCHERS UNDER THE UNITED STATES CONSTITUTION

School voucher opponents often look to the Establishment Clause of the U.S. Constitution in efforts to defeat the programs.[134] In the past, the U.S. Supreme Court has made many rulings and proposed many different tests concerning the Establishment Clause of the Constitution,[135] but debate concerning the clause's proper interpretation continues.[136] Some argue that absolutely no

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preference in accepting applications to siblings of students who have already been accepted on a random and religious-neutral basis.

(f) Be subject to the instruction, curriculum, and attendance criteria adopted by an appropriate nonpublic school accrediting body and be academically accountable to the parent for meeting the educational needs of the student. The private school must furnish a school profile which includes student performance.

(g) Employ or contract with teachers who hold a baccalaureate or higher degree, or have at least 3 years of teaching experience in public or private schools, or have special skills, knowledge, or expertise that qualifies them to provide instruction in subjects taught.

(h) Comply with all state statutes relating to private schools.

(i) Accept as full tuition and fees the amount provided by the state for each student.

(j) Agree not to compel any student attending the private school on an opportunity scholarship to profess a specific ideological belief, to pray, or to worship.

(k) Adhere to the tenets of its published disciplinary procedures prior to the expulsion of any opportunity scholarship student.

Id. § 1002.38(4).

129. *Id.* § 1002.38(6)(g).

130. *See supra* § II(C)-(D) (discussing the Ohio and Wisconsin voucher programs).

131. *Holmes*, 2002 WL 1809079 at *1.

132. Jim Saunders, *Judge Strikes Vouchers Plan: Program Ruled Unconstitutional*, Fla. Times-Union A1 (Aug. 6, 2002) (available in 2002 WL 5968777). The state constitution contains the following language:

> There shall be no law respecting the establishment of religion or prohibiting or penalizing the free exercise thereof. Religious freedom shall not justify practices inconsistent with public morals, peace or safety. No revenue of the state or any political subdivision or agency thereof shall ever be taken from the public treasury directly or indirectly in aid of any church, sect, or religious denomination or in aid of any sectarian institution.

Fla. Const. art. I, § 3.

133. However, the Florida Supreme Court is expected to deliver the final decision. Saunders, *supra* n. 132.

134. U.S. Const. amend. I.

135. *See* Elisha Winkler, Student Author, Simmons-Harris v. Zelman *234 F.3d 945 (6th Cir. 2000)*, 10 Am. U. J. Gender Soc. Policy & L. 757, 758 (2002).

136. Nasstrom, *supra* n. 46, at 1081.

public money should flow to religious interests, while others contend that it is permissible so long as the money does not favor religion.[137] The Court's stance falls between these competing arguments, realizing that "mandating total separation of church and state is unrealistic and undesirable."[138]

A. Lemon v. Kurtzman

The most cited precedent for Establishment Clause jurisprudence is found in *Lemon v. Kurtzman*.[139] In that case, the Court sought to "draw lines with reference to the three main evils against which the Establishment Clause was intended to afford protection: 'sponsorship, financial support, and active involvement of the sovereign in religious activity.'"[140] In articulating its decision, the Court outlined what has become known as the "Lemon Test."[141] To avoid running afoul of the Establishment Clause, a statute or program must satisfy a three-pronged test: "[f]irst, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, . . . finally, the statute must not foster 'an excessive entanglement with religion.'"[142] If any one of the prongs is not satisfied, the statute is found unconstitutional.[143]

Throughout the relatively brief history of this test, rules and patterns have arisen to address the different prongs.[144] First, the prong requiring a secular legislative purpose is rarely ever found to be an issue.[145] This is especially true in school funding cases, where the statute's motivation is to improve education—not to suppress or support religion.[146] The second prong of the test is generally considered the most important and most difficult element of the test.[147] It "seeks to ensure governmental programs remain neutral with respect to religion"[148] by looking for "an attitude of 'neutrality,' neither 'advancing' nor 'inhibiting' religion."[149] The third prong of the Lemon Test, outlawing "an excessive entanglement with religion,"[150] was later re-characterized as an element of the second prong in *Agostini v. Felton*.[151]

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137. *Id.*
138. Bodemer, *supra* n. 12, at 293 (footnote omitted).
139. 403 U.S. 602, 615-20 (1971) (holding that state-sponsored salary supplements to teachers at religious schools who instructed the students in non-religious subjects were unconstitutional because the supplements represented an excessive entanglement with religion).
140. *Id.* at 612 (quoting *Walz v. Tax Commn.*, 397 U.S. 664, 668 (1970)).
141. *Id.* at 612-13.
142. *Id.* (quoting *Walz*, 397 U.S. at 674).
143. Nasstrom, *supra* n. 46, at 1082.
144. *See id.* at 1083-84.
145. *Id.* at 1083.
146. *See id.*
147. *Id.* at 1084.
148. Nasstrom, *supra* n. 46, at 1083-84.
149. *Comm. for Pub. Educ. v. Nyquist*, 413 U.S. 756, 788 (1973) (footnote omitted).
150. *Lemon*, 403 U.S. at 613.
151. 521 U.S. 203, 233 (1997) ("[I]n *Lemon* itself, the entanglement that the Court found 'independently' to necessitate the program's invalidation also was found to have the effect of inhibiting

B. Agostini v. Felton

In 1997, the Supreme Court modified the Lemon Test to help evaluate state money that was reaching private religious schools.[152] In addition to incorporating the third prong into the second, the Court added two additional steps to the analysis.[153] First, the action must not allow for any indoctrination occurring in the schools that "could reasonably be attributed to governmental action."[154] The Court later explained,

> In distinguishing between indoctrination that is attributable to the State and indoctrination that is not, we have consistently turned to the principle of *neutrality*, upholding aid that is offered to a broad range of groups or persons without regard to their religion. If the religious, irreligious, and areligious are all alike eligible for governmental aid, no one would conclude that any indoctrination that any particular recipient conducts has been done at the behest of the government.[155]

The second addition made to the Lemon Test in *Agostini* was the restriction that any recipient of aid was not to be referenced by religion.[156]

C. Zelman v. Simmons-Harris

During the summer of 2002, the Supreme Court ruled on the permissibility of the Ohio Pilot Project Scholarship Program under the Establishment Clause of the Constitution.[157] The Court's opinion rested on the modified Lemon Test as outlined in *Agostini*.[158] The court first determined that no dispute existed between the parties concerning the secular nature of the legislation.[159] Next, the court turned to the second prong of the test.[160] The analysis of this prong turned to precedent set forth in previous cases where aid was provided to religious schools.[161] The programs in the cases varied from those providing direct aid[162] to those that involve "true private choice, in which government aid reaches religious schools only as a result of the genuine and independent choices of private individuals."[163] The Court noted its rejection of Establishment Clause challenges

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religion. Thus, it is simplest to recognize why entanglement is significant and treat it—as we did in *Walz*—as an aspect of the inquiry into a statute's effect." (citation omitted)); *see* Winkler, *supra* n. 135, at 759.

152. *See Agostini*, 521 U.S. 203. This test is often referred to as the "Modified Lemon Test." Hansen, *supra* n. 3, at 93.

153. Hansen, *supra* n. 3, at 93.

154. *Mitchell v. Helms*, 530 U.S. 793, 809 (2000) (plurality).

155. *Id.* (emphasis added).

156. Hansen, *supra* n. 3, at 93.

157. *See Zelman*, 536 U.S. 639.

158. *Id.* at 648-49.

159. *Id.* at 649.

160. *Id.*

161. *Id.*

162. *See Mitchell*, 530 U.S. at 801 (plurality) (holding that governmental agency loans of educational materials to private schools does not violate the establishment clause); *Agostini*, 521 U.S. at 208-09 (holding that a program providing remedial instruction to disadvantaged children was not invalid under the Establishment Clause).

163. *Zelman*, 536 U.S. at 649 (citations omitted).

to three different cases involving neutral programs that directly provided aid to a group of people, who through their own choice used it for religious schools.[164]

In *Mueller v. Allen*,[165] parents of Minnesota schoolchildren received tax deductions to help offset the costs of private school or other educational expenses. To be eligible for the deductions, parents were required to spend money on expenses that were acceptable under the statute.[166] The decision to spend money was neither compelled nor suggested by the state; instead, parents who spent the money did so solely as a result of their own private choice.[167] Those opposed to the program argued that because an overwhelming majority of beneficiaries sent their children to religious schools under the program, it was effectively advancing religion.[168] The Court rejected this argument: "We would be loath to adopt a rule grounding the constitutionality of a facially neutral law on annual reports reciting the extent to which various classes of private citizens claimed benefits under the law."[169] As a result, the Court found this program to be constitutionally permissible.[170]

Next, the Court noted its decision in *Witters v. Washington Department of Services for the Blind*.[171] In that case, the Court approved a scholarship program that aided blind people studying to become pastors.[172] Because the students were freely able to apply the scholarship to any vocational school, the Court found it was a program of pure private choice.[173] Private choice coupled with universal availability to all blind people "without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited,"[174] allowed the Court to conclude that the program was not inconsistent with the Establishment Clause.[175]

Finally, the Court looked at *Zobrest v. Catalina Foothills School District*,[176] which involved a federal program that allowed sign language interpreters to aid deaf students in religious schools.[177] In that case, the Court stated, "[G]overnment programs that neutrally provide benefits to a broad class of citizens defined without reference to religion are not readily subject to an Establishment Clause challenge just because sectarian institutions may also receive an attenuated financial benefit."[178] The Court found that all disabled children qualified to receive benefits, making them the primary beneficiaries, not the religious

164. *Id.*
165. 463 U.S. 388, 391 (1983).
166. *Zelman*, 536 U.S. at 650.
167. *Mueller*, 463 U.S. at 399.
168. *See id.* at 401.
169. *Id.*
170. *Id.* at 404.
171. *Zelman*, 536 U.S. at 650-51 (citing *Witters v. Wash. Dept. of Servs. for the Blind*, 474 U.S. 481 (1986)).
172. *Witters*, 474 U.S. at 482.
173. *Id.* at 488.
174. *Id.* (quoting *Nyquist*, 413 U.S. at 782-83 n. 35) (internal quotations omitted).
175. *Id.* at 489.
176. 509 U.S. 1 (1993).
177. *Zelman*, 536 U.S. at 651-52 (citing *Zobrest*, 509 U.S. at 3).
178. *Zobrest*, 509 U.S. at 8.

schools;[179] therefore, the program was acceptable under the Establishment Clause.[180]

Synthesizing the holdings in *Mueller*, *Witters*, and *Zobrest*, the Court outlined a standard to be applied in cases involving the constitution and individual choice:

> [W]here a government aid program is neutral with respect to religion, and provides assistance directly to a broad class of citizens who, in turn, direct government aid to religious schools wholly as a result of their own genuine and independent private choice, the program is not readily subject to challenge under the Establishment Clause. A program that shares these features permits government aid to reach religious institutions only by way of the deliberate choices of numerous individual recipients. The incidental advancement of a religious mission, or the perceived endorsement of a religious message, is reasonably attributable to the individual recipient, not to the government, whose role ends with the disbursement of the benefits.[181]

Stemming from this rule, the Court's primary focus in *Zelman* was the "true private choice" parents were allowed to make regarding tuition.[182] The Court reasoned that the method in question, by which parents receive the tuition money from the state and then endorse the check over to the school of their choice, meets the standard.[183] Applying this rule to its finding of private choice, the Court found that the Ohio Pilot Project Scholarship Program did not violate the Establishment Clause.[184] The Justices comprising the majority reasoned that the program assists a broad class of individuals without reference to their religion, it permits any public or private school within the district as well as adjacent public school districts to participate, and the destination of the scholarship money is directly controlled by the parents' private choice.[185]

D. Constitutionally Permissible School Voucher Framework

The landmark decision for the future of school vouchers in *Zelman* supplied the framework for constitutionally permissible voucher programs that legislatures across the country should find easy to emulate. The program must pass scrutiny under the Modified Lemon Test—namely it must be secular in nature, facially neutral, and allow for private choice.[186]

The secular requirement has never posed a problem for legislatures enacting programs with borderline Establishment Clause issues.[187] Presumably any attempt at education reform has improvement of the status quo as its motivation, rather

179. *See id.* at 9-10.
180. *Id.* at 14.
181. *Zelman*, 536 U.S. at 652.
182. *See id.* at 652-53.
183. *Id.* at 653.
184. *Id.*
185. *Id.* at 648-55.
186. *See Zelman*, 536 U.S. at 648-56.
187. Nasstrom, *supra* n. 46, at 1083.

than furthering religious ideals. Therefore, in order to avoid scrutiny, the legislature must simply ensure that its true inspiration for reform is to enhance the school systems.

Next, the legislature must ensure that the program is facially neutral with respect to religion.[188] This means that the decisions regarding which children may participate as well as which institutions provide adequate education must be neutral. To achieve these ends, the legislature must extend the program to a whole class of people, such as the low-income families in Cleveland[189] and Milwaukee,[190] or any student who attends a failing school in Florida.[191] Standards for institutional participants may include health and safety standards, non-discriminatory provisions, minimum hours of classroom instruction, suitable performance levels, minimum numbers of students allowed to attend, an application procedure to be completed, evidence of fiscal responsibility, acceptance policies for the students, educational requirements for the faculty members, and maximum tuition price levels.[192] It is important that these standards do not refer to the schools by religion; instead, the qualifications must be universal for all participants.[193]

Finally, the legislature must ensure that the schools receive the scholarship money solely as a result of the private choice of parents.[194] The government may not coerce or influence the parents to choose one school or another; the choice must be exclusively that of the student and parents.[195] To illustrate that families were not coerced into choosing religious schools, the *Zelman* Court noted that families who chose private schools were required to pay a small portion of the tuition.[196] The Court went on to say that "such features of the program are not necessary to its constitutionality, [but] they clearly dispel the claim that the program 'creates . . . financial incentive[s] for parents to choose a sectarian school.'"[197] Moreover, the government should make the tuition checks payable to the children's parents, not to the individual school districts. If the checks were made out to the schools it would appear that the state had some level of influence over the decisions of parents. The Ohio, Wisconsin, and Florida programs all make checks payable to parents, further dispelling any doubt that the parental choice was not influenced by the government.[198]

If state legislatures follow the guidelines set forth above in drafting voucher programs, federal Establishment Clause questions will likely be dismissed.

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188. *See Zelman*, 536 U.S. at 648-55.
189. *Id.* at 646.
190. Wis. Stat. § 119.23(2)(a)(1).
191. Fla. Stat. § 1002.38(2)(a).
192. *See e.g. id.* § 1002.38; Ohio Rev. Code Ann. § 3313.976; Wis. Stat. § 119.23(2)(b)(1).
193. *Zelman*, 536 U.S. at 662.
194. *Id.* at 653.
195. *See id.* at 653-54.
196. *Id.* at 654.
197. *Id.* (quoting *Zobrest*, 509 U.S. at 10).
198. Fla. Stat. § 1002.38(6)(g); Ohio Rev. Code Ann. § 3313.979; Wis. Stat. § 119.23(4)(b).

However, this does not guarantee that all proposed and enacted voucher programs will automatically pass judicial scrutiny.

IV. STATE RELIGION CLAUSES

Proponents of school voucher programs believed the ruling in *Zelman* won the final round against the anti-voucher sentiment.[199] But they failed to anticipate the reach of state constitutional amendments that more strictly prohibit government spending regarding religious institutions.[200] In fact, one such amendment has already been employed to defeat the OSP at the trial court level in Florida.[201]

A. The Origin of Blaine Amendments

The state religion clauses, often termed Blaine Amendments, are the direct result of bigotry and one person's dream to become president of the United States.[202] On December 14, 1875, former Speaker of the House James G. Blaine proposed a constitutional amendment strictly prohibiting any money from being spent on religious institutions.[203] There was great support for this amendment in both houses of Congress, but after passing in the House of Representatives, it narrowly failed to acquire the two-thirds majority needed in the Senate.[204]

Blaine, a Republican, was believed to be the heir apparent to the presidency, held at the time by Ulysses S. Grant.[205] The year before Blaine's proposal, however, the Democrats took control of the House of Representatives for the first time since the Civil War.[206] This shift in control forced Republicans to "re-energize the Northern Protestants who formed the Republican base."[207] Blaine was no different.[208] Because he was born to a Catholic mother, Protestants had even greater apprehension about his beliefs.[209] To offset their fears, Blaine spoke of his deeply rooted Protestant background, but he did not feel this rhetoric was enough to assure the Republican base.[210] As a result, he decided to propose an

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199. Marvin Olasky, *Breaking Through Blaine's Roadblock* <http://www.worldmag.com/world/issue/08-24-02/cover_1.asp> (Aug. 24, 2002).

200. *Id.*

201. *See Holmes*, 2002 WL 1809079 at *2.

202. Olasky, *supra* n. 199.

203. Phillip W. DeVous, *Bigotry—A Threat to Parental Choice* <http://www.acton.org/ppolicy/comment/article.php?id=99> (Aug. 7, 2002) (noting that the text of the amendment proposed in the U.S. House read, "No state shall make any law respecting an establishment of religion, or prohibiting the free exercise thereof; and no money raised by taxation in any State for the support of public schools, or derived from any public fund therefore, nor any public lands devoted thereto, shall ever be under the control of any religious sect: nor shall any money raised or lands so devoted be divided among religious sects or denominations.").

204. It failed by only four votes in the Senate. Joseph P. Viteritti, *Blaine's Wake: School Choice, the First Amendment, and State Constitutional Law*, 21 Harv. J.L. & Pub. Policy 657, 672 (1998).

205. Olasky, *supra* n. 199.

206. *Id.*

207. *Id.*

208. *Id.*

209. *Id.*

210. Olasky, *supra* n. 199.

amendment to the U.S. Constitution that was meant to tap into the anti-Catholic bigotry that had permeated American politics through much of the century.[211] Despite his efforts, Blaine was not the Republican nominee for president in 1876;[212] however, he remained very active in GOP politics until his death in 1893.[213]

B. *Enactment of Blaine Amendments by the States*

Even though the amendment failed to receive the necessary two-thirds vote in the Senate, versions of the Blaine Amendment found their way into many state constitutions.[214] In fact, thirty-seven states currently have these provisions in their constitutions.[215] The large number of states that have Blaine language in their constitutions can largely be attributed to the actions of Congress following the failed attempt to amend the U.S. Constitution.[216] Congress enacted legislation that required any new state seeking admission into the United States to adopt provisions in its constitution with Blaine-like language.[217] As a result, state constitutions typically have language stating that "no money raised by taxation for the support of public schools, or derived from any public fund, . . . shall ever be under the control of a religious sect."[218]

The language of Blaine-like amendments in state constitutions seems to clearly preclude any government funds from reaching religious institutions. However, courts do not always interpret these clauses so strictly.[219] For example, the Arizona Supreme Court found that tax credits to people who donated money for tuition grant programs did not violate the state's constitution.[220] The court acknowledged in its opinion that "[t]he Blaine Amendment was a clear

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211. In fact, it was said that "[a]ll 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." *Id.* (quoting the March 1876 issue of *The Nation*) (internal quotations omitted).

212. This is thought to be the result of lingering questions of his Catholic roots and a House investigation that accused him of using his power to ensure a land grant railroad from which he would extract profits. Becket Fund for Religious Liberty, *Blaine Amendments, James G. Blaine* <http://www.blaineamendments.org/background/JGB.html> (accessed May 21, 2002) (on file with the *Tulsa Law Review*).

213. Blaine served as Secretary of State twice and was the Republican nominee for president in 1884, which he lost to Chester A. Arthur in a close race. Olasky, *supra* n. 199.

214. Some were enacted immediately after the failed attempt to adopt a federal constitutional amendment, while others were enacted in the decades following the attempt. Because some of the states were not admitted into the union before Blaine's proposal and its failure, many of the states that adopted the language of Blaine's amendment did so as an initial part of the constitution rather than as a subsequent amendment. *See* Becket Fund for Religious Liberty, *Blaine Amendments, States* <http://www.blaineamendments.org/states/states.html> (accessed Oct. 12, 2003).

215. *Id.*

216. *See* Mauro, *supra* n. 38, at 8.

217. *Id.*

218. H.R. Comm. on Educ. & Workforce, *What's Next for School Choice?*, 107th Cong. 100 (July 23, 2002) (testimony of Professor Douglas W. Kmiec) (internal quotations omitted).

219. *Id.* (noting that Wisconsin, Ohio, Arizona, and Illinois have all upheld variants on choice, while Maine, Vermont, and Florida have used these clauses to prevent school choice programs).

220. *Kotterman v. Killian*, 972 P.2d 606 (Ariz. 1999) (en banc). The Court found that the tax credit was not an appropriation of the public's money, rather, a program that decreased the participants' tax burdens. *Id.* at 621.

manifestation of religious bigotry, part of a crusade manufactured by the contemporary Protestant establishment to counter what was perceived as a growing 'Catholic menace.'"[221] As previously noted, a circuit court in Florida reached a different decision, finding that the state's school voucher program violated the state's constitution.[222] Other rulings regarding these provisions range from levels of uncertainty, permissiveness, to the complete bar of any sort of spending on religious institutions.[223]

C. *Blaine in Oklahoma*

Identical to the amendments in the other states, the language in the Oklahoma Constitution appears much stricter in regard to religious spending than its federal counterpart, the Establishment Clause.[224] The Oklahoma Blaine Amendment reads:

> No public money or property shall ever be appropriated, applied, donated, or used, directly or indirectly, for the use, benefit, or support of any sect, church, denomination, or system of religion, or for the use, benefit, or support of any priest, preacher, minister, or other religious teacher or dignitary, or sectarian institution as such.[225]

Unlike the lax interpretation in Arizona, the Oklahoma provision is thought to be one of the most restrictive regarding aid to private institutions.[226] The combination of restrictive constitutional language, case law, and attorney general opinions prevents any sort of public spending from reaching religious institutions.[227]

Since 1907, the year in which Oklahoma was admitted into the Union, there have been three cases that interpreted and applied article II, section 5 of the constitution in connection with state aid to schools.[228] The first of these cases, *Oklahoma Railway Company v. St. Joseph's Parochial School*,[229] gave great hope for spending in favor of religious institutions. The Oklahoma Supreme Court found that a contract entered into by Oklahoma City providing half-price bus fares to school children of both public and religious schools did not violate the state constitution.[230] This decision seemed to allow aid to students of sectarian schools.[231]

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221. *Id.* at 624 (quoting Joseph P. Vitteritti, *Choosing Equality: Religious Freedom and Educational Opportunity under Constitutional Federalism*, 15 Yale L. & Policy Rev. 113, 146 (1996)).

222. *See Holmes*, 2002 WL 1809079 at *1.

223. These classifications are based on state court decisions, wording of the clauses, and attorney general opinions. *See* Kemerer, *supra* n. 35, at 39-40 tbl. 1.

224. *See* Okla. Const. art. II, § 5.

225. *Id.*

226. The other states considered very restrictive are Michigan, Florida, Georgia, Montana, and New York. Kemerer, *supra* n. 35, at 5.

227. *See id.* at 40 tbl. 1.

228. Ewing, *supra* n. 21, at 479.

229. 127 P. 1087 (Okla. 1912).

230. *Id.* at 1089.

231. *See* Ewing, *supra* n. 21, at 479.

The Oklahoma Supreme Court distinguished the next two cases from the holding in *Oklahoma Railway.*[232] In 1941, the court found that a law requiring public school buses to transport parochial students to and from school was in violation of the constitution.[233] The *Gurney* Court set this case apart by focusing on the fact that the buses used were provided with public money, whereas *Oklahoma Railway* involved no form of public spending.[234] It was also noted that the former case was simply interpreting a railway company's contract with the city.[235]

Then, in 1963, the Oklahoma Supreme Court applied and upheld its 1941 decision.[236] Like *Oklahoma Railway* and *Gurney*, *Antone* involved a law that provided for the transportation of private religious school students.[237] The court reasoned that "[a]ny such aid or benefit, either directly or indirectly, is expressly prohibited by [article II, section 5] of the Constitution of Oklahoma. It must be upheld and enforced by all Courts."[238]

The conclusion that can be taken from these cases is that the Oklahoma Supreme Court strictly interprets the constitution and thus clearly prevents any public money from reaching a religious institution by either direct or indirect means.[239] Flowing from this strict interpretation is the great likelihood that any attempted voucher program in Oklahoma will fail to pass state constitutional challenges.

V. FUTURE OF SCHOOL VOUCHERS IN OKLAHOMA

As previously noted, school voucher programs are permissible within the framework of the Establishment Clause of the U.S. Constitution, and the Oklahoma legislators have been given the formula to enact a similar program.[240] Currently, however, a voucher program would not survive scrutiny under Oklahoma's Blaine Amendment.[241] In order for vouchers to be permissible in Oklahoma, the constitutional language must be confronted. This confrontation may be commenced by either a proposal by the state legislature to amend the Oklahoma Constitution or by a challenge to the permissibility of the Blaine Amendment in the courts.

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232. *Id.* at 479-80.
233. *Gurney v. Ferguson*, 122 P.2d 1002, 1005 (Okla. 1941).
234. *Id.* at 1004.
235. *Id.*
236. *Bd. of Educ. for Ind. Sch. Dist. No. 52 v. Antone*, 384 P.2d 911, 913-14 (Okla. 1963).
237. Here, the Midwest City school board decided to transport parochial students to the school each morning and home in the evening. *Id.* at 912.
238. *Id.* at 914.
239. Ewing, *supra* n. 21, at 483.
240. *See supra* § III(D).
241. *Cf. Antone*, 384 P.2d at 14; *Gurney*, 122 P.2d at 1005.

A. *Legislative Vision*

The first hurdle for voucher proposals in Oklahoma to overcome is the lack of support in the state legislature. As pointed out in the *Daily Oklahoman* shortly after the Supreme Court decision in *Zelman*, the "debate over school vouchers has registered barely a blip on Oklahoma's education or political radar."[242] Of course, this support must begin with the citizens of the state, and like all other arenas dealing with school vouchers, there are both supporters and opponents of the programs.[243] Much of the debate is fueled by the work of public interest groups such as the Oklahoma Christian Coalition, which is in favor of vouchers, and the Oklahoma State Boards Association, which stands firmly against the programs.[244] Furthermore, as results from other programs across the country are released, interest groups will begin flooding the airwaves with messages of success or failure. If public opinion does evolve toward choice as a solution to educational problems in the state, the legislators should mirror the program after the guidelines outlined in *Zelman*.[245]

B. *Confronting Blaine*

Of course, any sort of legislative action to enact vouchers presumes that the state's Blaine Amendment hurdle has been overcome. This could occur by either constitutional amendment or the finding of a de facto or de jure violation of the U.S. Constitution.

1. Constitutional Amendment

The first possible way to overcome the strict Blaine Amendment in the Oklahoma Constitution is to amend the constitution. Such an amendment may simply repeal Article II, Section 5 in its entirety, eliminate the term "indirectly" from the current language, or grant an exemption to religious schools that meet certain requirements. By amending the constitution, the legislature would be able to ensure a permissible school voucher program under the Oklahoma Constitution.

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242. Christy Watson, *Little Concern Seen on School Voucher Issue*, 111 Daily Oklahoman 1A, 1A (July 14, 2002) (available in 2002 WL 23138225).

243. *See Vouchers: Pro and Con*, 108 Daily Oklahoman 14 (Jan. 24, 1999) (available in 1999 WL 7697575). One newspaper article illustrates the variance of opinions held by its readers on school vouchers. *Id.* For example, one citizen comments:

> No tax breaks for private schools. If you want your kid to go to private schools, you should pay for it! The state provides public education. The majority of children should be considered . . . not just a few! That money should be put into public schools. No school vouchers!

Id. Conversely, another citizen argues, "With the decline of our public schools . . . we're paying for education, but we're paying for substandard education. I feel with my tax money, I should have the right to send my child to whatever school I feel is best for her." *Id.*

244. Ewing, *supra* n. 21, at 438-39.

245. *See supra* § III(D).

Even though amending the constitution provides the most certain outcome in regards to Blaine, it is not an easy task to accomplish.[246] To commence amendment proceedings, one of the legislative houses would have to propose the amendment, which must then receive a majority vote of each of the two houses.[247] If approved, the amendment would then be submitted to the people, who must vote a majority for acceptance.[248] Because of the largely divisive viewpoints among people on the issue of religious spending, it may prove difficult to obtain a majority vote in favor of any program.[249] Consequently, constitutional amendment, while a certain approach to guaranteeing voucher success, seems like a less than viable option in Oklahoma.

2. Free Exercise Challenge

The less certain method to overcome the Blaine roadblock is to challenge either the constitutionality of the amendments as a whole or their effect under the U.S. Constitution. This challenge could be brought on the grounds of prohibiting the free exercise of religion as outlined by the U.S. Constitution. In addition, there may be an actionable Equal Protection claim to be pursued.[250]

The Free Exercise Clause of the U.S. Constitution appears to be the solution to overcoming state constitutional hurdles for school voucher programs.[251] As outlined in *Sherbert v. Verner*,[252] a law that impedes upon religion must be enacted for a compelling state interest.[253] In *Sherbert*, the Court noted that "only the gravest abuses, endangering paramount interests, give occasion for permissible limitation."[254] Next, if a compelling state interest has been identified by the Court, it must be shown that the law uses a method that is narrowly tailored to serve that interest.[255]

The Supreme Court has provided the framework to approach a Free Exercise challenge with respect to Blaine Amendments in some of its earlier decisions.[256] In *Widmar v. Vincent*, the Court noted that "the state interest . . . 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. . . ."[257] Justice Thomas, in the plurality decision in *Mitchell*, wrote that "hostility to aid to pervasively sectarian schools has a shameful pedigree that we do not hesitate to disavow . . . . This doctrine, born of bigotry, should be buried

246. *See* Okla. Const. art. 24, § 1.
247. *Id.*
248. *Id.*
249. *See supra* n. 243.
250. The possible challenge under the Equal Protection Clause will not be examined in this paper because the Free Exercise Clause will preempt that analysis.
251. U.S. Const. amend. I.
252. 374 U.S. 398 (1963).
253. *Id.* at 406.
254. *Id.* (quoting *Thomas v. Collins*, 323 U.S. 516, 530 (1945)) (internal quotations omitted).
255. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531-32 (1993).
256. *Mitchell*, 530 U.S. at 827-28 (plurality); *Widmar v. Vincent*, 454 U.S. 263, 276 (1981).
257. 454 U.S. at 276.

now."[258] *Mitchell* illustrates the contempt four of the Supreme Court Justices have for the Blaine Amendments and suggests that they will determine the amendments to be unconstitutional.[259] In addition, Justice Breyer's dissenting opinion in *Zelman*, which was joined by Justices Stevens and Souter, mentioned the anti-Catholic atmosphere surrounding the Blaine Amendments.[260] As a result, Kevin Hasson, the executive director of the Beckett Fund for Religious Liberty, says that "you have seven of the nine justices deploring the history of the Blaine Amendments [and it is] hard to imagine that if the appropriate case reaches them, they won't strike them down."[261]

When the Court hears the *Davey* case later this year, or one of the other cases challenging the Blaine Amendments which are working their way through the courts,[262] it will likely take one of two available approaches. First, the Court could find that the amendments themselves violate the Free Exercise Clause, and thus overturn them. Alternatively, the Court may decide that the amendments are facially acceptable but have no effect in the voucher setting because they are not a compelling interest in satisfaction of the Free Exercise Clause. Regardless of the Court's approach, it seems certain that one of the cases will be the "appropriate case" to stop Blaine from acting as an impediment to school vouchers.[263]

a. Overturning Blaine

Blaine Amendments in the states fail on their face to pass the strict scrutiny required by the Free Exercise Clause. For the amendments to pass judicial examination, they must, like a statute, be the result of a compelling government interest.[264] As history illustrates, the origin of these amendments stemmed from bigotry and one man's desire to be president.[265] The states might argue that their compelling interest was to prevent the entanglement of the government with religion, but the Federal Establishment Clause already restricts this occurrence. If furtherance of the principles outlined in the Establishment Clause were the interest for the states, any furtherance of that doctrine must be within the ambits

258. *Mitchell*, 530 U.S. at 828-29 (plurality).

259. *Id.*

260. *Zelman*, 536 U.S. at 719-21 (Breyer, Stevens & Souter, JJ., dissenting).

261. Mauro, *supra* n. 38, at 8 (internal quotations omitted).

262. *See e.g.* Becket Fund for Religious Liberty, *Beckett Fund Challenges South Dakota's Blaine Amendment* <http://www.becketfund.org/press/2003/042403.html> (Apr. 24, 2003) (discussing a challenge to the Blaine Amendment in South Dakota); Becket Fund for Religious Liberty, *Litigation:* Boyette v. Galvin <http://www.becketfund.org/litigate/boyette.html> (accessed Oct. 12, 2003) (discussing a challenge to the Blaine Amendment in Massachusetts); Sheryl James, *State Sued by Student as College Aid Pulled: Theology is Now Major; It Makes Her Ineligible* <http://www.freep.com/news/education/schol6_20030206.htm> (Feb. 6, 2003) (discussing a challenge to Michigan's refusal to fund scholarships for religious studies in higher education).

263. *See* Mauro, *supra* n. 38, at 8.

264. As Justice Brennan, writing for the Court, stated, "[W]hen we are presented with a state law granting a denominational preference, our precedents demand that we treat the law as suspect and that we apply strict scrutiny in adjudging its constitutionality." *Larson v. Valente*, 456 U.S. 228, 246 (1982).

265. Olasky, *supra* n. 199.

of the Free Exercise Clause.[266] Because there is no genuine compelling state interest to maintain the amendments, the determination of whether there was narrow tailoring is unnecessary, and the amendments should be overturned for violation of the Free Exercise Clause.

b. Blaine Not a Compelling Interest

If the Court fails to reject the amendments, it is still likely that a voucher program will be allowed in the states with Blaine Amendments. In the voucher setting, if a state provides vouchers only to students who attend public or non-religious private schools, the state will likely assert that this discrimination is meant to satisfy both the Establishment Clause and the Blaine Amendment in the state.[267] The Supreme Court has already ruled that if a voucher program is properly created and run, the Establishment Clause does not serve as a bar to prevent its continued operation.[268] Therefore, the only viable argument for the discrimination against religious schools is the compelling interest of satisfying the state's Blaine Amendment.

In the summer of 2002, the Ninth Circuit Court of Appeals ruled on a case which appears to have dispelled the hopes that the Blaine Amendment will serve as a compelling interest for states to allow exclusion of religious schools from voucher programs.[269] In August 1999, Joshua Davey was selected as a recipient of the Washington Promise Scholarship,[270] which helped offset the costs of his first year of postsecondary education.[271] By law, recipients of the scholarship are not allowed to major in theology.[272] In addition to the Washington Blaine Amendment, the state maintains an additional law prohibiting funding "to any student who is pursuing a degree in theology,"[273] which extends this theological

266. *Widmar*, 454 U.S. at 276.
267. *See Davey*, 299 F.3d at 758.
268. *Zelman*, 536 U.S. at 662-63.
269. *See Davey*, 299 F.3d at 760.
270. Eligibility for the program is limited to those people who:

(a) [Graduate] from a public or private high school located in the state of Washington; and

(b) [Are] in the top fifteen percent of his or her 2000 graduating class; or

(c) Attained a cumulative score of 1200 or better on the Scholastic Assessment Test I (SATI) on the first attempt; or

(d) Attained a cumulative score of 27 or better on the American College Test (ACT) on the first attempt; and

(e) [Have] a family income less than one hundred thirty-five percent of the state's median; and

(f) [Enroll] at least half time in an eligible postsecondary institution in the state of Washington; and

(g) [Are] not pursuing a degree in theology.

Wash. Admin. Code 250-80-020(12) (2003).
271. *Davey*, 299 F.3d at 750-51.
272. Wash. Admin. Code 250-80-020(12)(f).
273. Wash. Rev. Code § 28B.10.814 (2002).

barrier to other forms of state scholarships. In compliance with the law, the Washington Higher Education Board withdrew Davey's scholarship when he declared a double major in Pastoral Studies and Business Management and Administration.[274] Davey sued the executive director of the educational board, the chair of the educational board, the associate director of the educational board, and the governor for violating his Free Exercise Clause privileges.[275]

The defendants in this case claimed that avoiding the violation of its own state constitution[276] was a compelling reason to deny the scholarship to Davey.[277] The court of appeals rejected this contention, finding that the exclusion of people based on their religious studies is a violation of the Free Exercise Clause.[278] In reaching this conclusion, the court acknowledged the words of the U.S. Supreme Court, stating, "[G]uarantee 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."[279]

c. *The Free Exercise Challenge*

Because of the sweeping reforms that would occur and the strong public opinion surrounding religion throughout the country, an outright repeal of the Blaine Amendments in state constitutions seems unlikely, at first. However, if the Supreme Court hears a string of Blaine Amendment challenges, it is quite possible that it will chip away at the effect of the amendments until they are in effect repealed. *Davey* presents the first opportunity for the Court to whittle away the effects of the amendments. When the Supreme Court hears the case, forces on both sides of the church and school debate will do their best to ensure that the Court applies either the Free Exercise Clause guidelines or overlooks them.

People opposed to the free exercise argument will argue that the Blaine Amendments block spending on religious institutions, and they will further argue that the strict scrutiny requirement does not apply. As the Court pointed out in *Regan v. Taxation with Representation of Washington*,[280] "[A] legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right, and

274. *Davey*, 299 F.3d at 751.

275. *Id.*

276. Washington's Blaine Amendment is found in a combination of three sections of their constitution. Becket Fund for Religious Liberty, *Blaine Amendments, States, Washington* <http://www.blaineamendments.org/states/states_files/WA.html> (accessed Oct. 12, 2003) (citing Wash. Const. art. IX, § 4 ("All schools maintained or supported wholly or in part by the public funds shall be forever free from sectarian control."); Wash. Const. art. I, § 11 ("No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment..."); Wash. Const. art. XXVI, § 4 ("Provision shall be made for the establishment and maintenance of systems of public schools free from sectarian control, which shall be opened to all the children of said state.")).

277. *Davey*, 299 F.3d at 758.

278. *Id.* at 760.

279. *Id.* (quoting *Good News Club v. Milford C. Sch.*, 533 U.S. 98, 114 (2001)) (internal quotations omitted).

280. 461 U.S. 540 (1983).

thus is not subject to strict scrutiny."[281] The opposition will contend that the decision not to provide scholarships for theology students, or alternatively scholarships for religious private schools, is simply the government refusing to fund a guaranteed right. Because of this, strict scrutiny need not apply in the case, which would allow the amendment to remain in force.

On the other hand, advocates of school vouchers will argue that strict scrutiny must indeed be met. Their reasoning will align with that set forth by the Ninth Circuit. In advancement of this argument, they will analogize the program to *Rosenberger v. Rector and Visitors of the University of Virginia*,[282] where the Court noted that a program expending funds to promote a diversity of views from private speakers is bound by the precepts of the Free Exercise Clause.[283] Both the scholarship program in Washington and a school voucher program will likely meet this requirement. And with the apparent discrimination inherent in prohibiting aid to sectarian institutions, they would surely fail to pass constitutional examination.

Following the arguments both for and against the Blaine Amendments prohibiting voucher programs, the Court will likely find the Blaine Amendments ineffective in a voucher setting to prevent aid to religious schools. While the Court could take the opportunity to completely dispel the amendments, it is more likely that they will simply be found not to serve the compelling interest required to infringe upon one's religious beliefs.

VI. CONCLUSION

School voucher programs stand as a very controversial subject when discussing the improvement of public schools across the nation. The Supreme Court, in its landmark decision in 2002, found that such programs are constitutional. This was the case even though public money was ending up in religious private schools. Litigation over the merits of the programs under state constitutions is currently standing as the next bar to vouchers. In Oklahoma, vouchers will certainly be found impermissible under Article II Section V of the constitution. However, with the recent Ninth Circuit Court of Appeals decision and the subsequent grant of certiorari coupled with the current makeup of the U.S. Supreme Court, the Free Exercise Clause of the U.S. Constitution will likely soon defeat the state Blaine Amendments, grown out of bigotry in the late nineteenth century. Once there is a definitive ruling on the Blaine Amendments,

281. *Id.* at 549 (finding that Congress' decision not to provide public money for lobbying purposes was not a restriction on their free speech rights).

282. 515 U.S. 819 (1995).

283. *Id.* at 834 (finding a University policy to make payments for printing costs of student groups could not prohibit a Christian organization from receiving the funds).

the future of voucher programs, and better educational opportunities for all children in Oklahoma and across the nation, will turn to state legislators and public opinion.

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