

Vouchers and Vespers: The Need for an Uncertain Change in School  
Voucher Programs

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## I. INTRODUCTION

Mary, a thirteen-year old African-American middle school student lives in the inner-city of Metropolis. Mary's public school does not have the teachers or resources necessary to challenge her academically. In fact, Mary's school consistently fails to meet state performance standards.<sup>1</sup> In an effort to improve the education system, State has enacted a voucher program, which provides financial assistance for low-income students, such as Mary, to attend any private or public school of their choosing. The best school in Mary's neighborhood is St. Anne's, a private Catholic school. Mary's parents decide to enroll Mary at St. Anne's, even though they are Methodists. In the more structured environment at St. Anne's, Mary begins to excel, and she becomes the first person in her family to attend college.<sup>2</sup>

Recently, the Supreme Court held in *Zelman v. Simmons-Harris* that state voucher programs providing aid to sectarian schools, like the fictitious "State" program above, do not violate the Establishment Clause<sup>3</sup> if the aid is given in a neutral fashion directly to parents, who then direct the funds to a participating school of their choice.<sup>4</sup> These voucher programs can have significant benefits, both to the individual student and the education system in general.<sup>5</sup> Many state constitutions, however, contain

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<sup>1</sup> See Patrick M. Garry, *Religious Freedom Deserves More than Neutrality: The Constitutional Argument for Nonpreferential Favoritism of Religion*, 57 FLA. L. REV. 1, 35 (2005) ("[S]tudies have revealed that most urban public school students around the nation are failing to perform at even the most basic level of achievement.").

<sup>2</sup> See *id.* ("An investigation commissioned by the National Center for Education Statistics shows that . . . minority students who attend Catholic schools do even better than their public-school peers, and . . . are more likely to graduate, go on to college, and earn a degree.").

<sup>3</sup> "Congress shall make no law respecting an establishment of religion . . . ." U.S. CONST. amend. I.

<sup>4</sup> See *Zelman v. Simmons-Harris*, 536 U.S. 639, 644-48 (2002) (upholding Ohio voucher program including sectarian schools).

<sup>5</sup> See *infra* notes 16, 20, 22 and accompanying text.

provisions, generally known as “Blaine Amendments,” that prohibit state funding of religious activities and therefore preclude inclusion of sectarian schools in voucher programs.<sup>6</sup> Several recent attempts to overturn such provisions under the federal constitution have been unsuccessful in state courts.<sup>7</sup> By restricting use of vouchers at sectarian schools, which accounted for approximately 80% of all private schools in the country in 2000,<sup>8</sup> states adopting a voucher program in an effort to improve their education system severely limit the effectiveness of such a program. Thus, voucher proponents are now seeking to challenge voucher programs excluding sectarian schools on federal constitutional grounds. As this paper will illustrate, the uncertain success of such challenges under the Supreme Court’s current jurisprudence highlights the need for a broader political push to remove state barriers that deny religious organizations the funding they need to serve our communities as the government cannot.

Part II describes the policy behind voucher programs in general,<sup>9</sup> details the standards for constitutional voucher programs,<sup>10</sup> and examines the discriminatory

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<sup>6</sup> Some state courts, however, have construed their Blaine Amendments narrowly, holding that they would not bar inclusion of sectarian schools in state-funded voucher programs. See *Simmons-Harris v. Goff*, 711 N.E.2d 203, 212 (Ohio 1999); *Jackson v. Benson*, 578 N.W.2d 602, 621-23 (Wis. 1998).

<sup>7</sup> See, e.g., *Bush v. Holmes*, 886 So.2d 340, 366 (Fla. Dist. Ct. App. 2004) (finding that “no-aid provision [of Florida Constitution] does not violate the federal Free Exercise Clause”); *Chittendon Town School Dist. v. Dept. of Educ.* 738 A.2d 539, 564 (Vt. 1999) (finding application of compelled support clause in Vermont Constitution preventing tuition payment program “does not implicate the Free Exercise Clause of the First Amendment”). *But see* *Simmons-Harris v. Goff*, 711 N.E.2d 203, 212 (Ohio 1999) (holding that Ohio’s Blaine Amendment would not invalidate state voucher program); *Jackson v. Benson*, 578 N.W.2d 602, 621-23 (Wis. 1998) (holding that Wisconsin’s Blaine Amendment did not impede Milwaukee voucher plan).

<sup>8</sup> STEPHEN P. BROUGHMAN & LENORA A. COLACIELLO, NATIONAL CENTER FOR EDUCATION STATISTICS, *Private School Universe Survey 1999-2000*, 1 (Aug. 2001), at <http://nces.ed.gov/pubs2001/2001330.pdf>.

<sup>9</sup> See *infra* notes 14-34 and accompanying text.

<sup>10</sup> See *infra* notes 35-61 and accompanying text.

underpinnings of most state Blaine Amendments.<sup>11</sup> Part III then responds to various constitutional concerns raised by opponents of public funding for sectarian schools and concludes that most of these concerns are either exaggerated or can be avoided through careful structuring of voucher programs.<sup>12</sup> Part III also examines the most likely constitutional grounds for challenge of state Blaine Amendments—the Free Exercise, Equal Protection, and Due Process Clauses—and highlights the difficulty voucher proponents face in overturning these state provisions.<sup>13</sup> Unless the Supreme Court is willing to invalidate state Blaine Amendments because of their discriminatory history, these provisions will likely survive a constitutional challenge and continue to prohibit funding of sectarian schools, hindering the potential of voucher programs and ultimately harming students like Mary who are most in need of support.

## II. BACKGROUND

### A. THE POLICY DEBATE

In 1955, Nobel laureate economist Milton Friedman introduced the concept of school vouchers to address the mediocrity of the American public education system.<sup>14</sup> Largely based on his reasoning, voucher proponents argue that by dispensing funds directly to the student's family and allowing parents to choose between available education options, free market competition will lead to higher quality schools.<sup>15</sup>

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<sup>11</sup> See *infra* notes 62-75 and accompanying text.

<sup>12</sup> See *infra* notes 76-108 and accompanying text.

<sup>13</sup> See *infra* notes 110-212 and accompanying text.

<sup>14</sup> Rita-Anne O'Neill, *The School Voucher Debate after Zelman: Can States be Compelled to Fund Sectarian Schools Under the Federal Constitution*, 44 B.C. L. REV. 1397, 1400-01 (2003).

<sup>15</sup> Hannah M. Rogers, *School Vouchers: A Solution to an Educational Crisis or Impermissible Government Involvement in Religion*, 52 DRAKE L. REV. 821, 825 (2004).

Research studying established voucher programs supports this argument, revealing that public schools respond positively to such competition.<sup>16</sup> Thus, implementing voucher programs on a wider basis by including sectarian schools would increase the competitive pressure on public schools to perform. Joining these “free market intellectuals” are those who lament the monopoly of public schools, which arguably causes inefficiency and hinders diversity.<sup>17</sup>

Advocates of school choice further argue that vouchers serve to equalize educational opportunities for poor, largely minority, urban students who generally have little choice other than to attend failing public schools.<sup>18</sup> Opponents argue that voucher students experience only minimal improvement in educational performance,<sup>19</sup> but research has shown that private voucher schools, which generally spend less per-pupil

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<sup>16</sup> See generally, Caroline M. Hoxby, *School Choice and School Competition: Evidence from the United States*, 10 SWEDISH ECONOMIC POLICY REVIEW 11 (2003).

<sup>17</sup> David S. Salisbury, Cato Institute, *What Does a Voucher Buy? A Closer Look at the Costs of Private Schools*, Policy Analysis No. 483, Aug. 28, 2003, at 3.

<sup>18</sup> O'Neill, *supra* note 14, at 1401; see also Frank J. Macchiarola, *Why the Decision in Zelman Makes So Much Sense*, 59 N.Y. U. ANN. SURV. AM. L. 459, 464-65 (2003); Rogers, *supra* note 15, at 826. Such families, largely African-American, generally cannot afford to live in suburban areas with “better” public schools or send their child to private school. See Paul E. Peterson, *A Call for Cityside Voucher Programs*, in SCHOOL VOUCHERS: SETTLED QUESTIONS, CONTINUING DISPUTES 16, 18 (The Pew Forum on Religion and Public Life, 2002). As Justice Thomas noted in his *Zelman* concurrence, African-Americans are among the most vocal advocates for school choice programs. See *Zelman v. Simmons-Harris*, 536 U.S. 639, 682 (2002) (Thomas, J., concurring) (“Just as blacks supported public education during Reconstruction, many blacks and other minorities now support school choice programs because they provide the greatest educational opportunities for their children in struggling communities.”). In part, this may be because evidence and theory suggest that school choice programs may achieve what *Brown v. Board of Education* has not. See Garry, *supra* note 1, at 35 (referring to studies showing that “private schools produce better cognitive outcomes (even after controlling for the family background of the students), provide a safer and more structured learning environment, and have less racial segregation”). But see Sharon K. Russo, *Vouchers for Religious Schools: The Death of Public Education*, 13 S. CAL. INTERDISC. L. J. 49, 68-71 (2003) (noting that private schools are more segregated than public schools); Steven H. Shiffrin, *The First Amendment and the Socialization of Children: Compulsory Public Education and Vouchers*, 11 CORNELL J. L. & PUB. POL’Y 503, 540-41 (2002) (arguing that vouchers could aggravate racial segregation in education because parents will choose religious schools in their neighborhoods that do not include majority of other races).

<sup>19</sup> See Martin Carnoy, *Should States Implement Vouchers Even if They Are Constitutional?*, in *School Vouchers: Settled Questions, Continuing Disputes* 26 (The Pew Forum on Religion and Public Life, 2002).

than public schools, are approximately 300% more productive than public schools in educating these poorer and “harder to educate” students.<sup>20</sup> Importantly, because voucher programs may include out-of-district public schools,<sup>21</sup> such encouraging results need not be limited to private schools; research shows that poorer students attending public schools in neighboring districts with middle-class or wealthy students benefit academically.<sup>22</sup> Unfortunately, many suburban public schools have been reluctant to open their doors to students from adjacent communities.<sup>23</sup> Thus, without a formal voucher program, urban students generally have no choice other than to attend the failing public schools.

One serious concern raised by voucher opponents is that because they are not subject to state and federal reporting requirements or compliance laws, private schools are not publicly accountable.<sup>24</sup> In other words, public taxpayers are not privy to how and where their funds are spent.<sup>25</sup> This concern may be alleviated in part by requiring private schools who wish to participate in voucher programs to agree to comply with certain state requirements.<sup>26</sup> Moreover, it may be precisely this aspect of private schools that parents seeking vouchers value: permitting parents to choose schools that

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<sup>20</sup> Hoxby, *supra* note 16, at 56 (measuring productivity as achievement versus spending).

<sup>21</sup> The Cleveland program upheld in *Zelman* includes such a feature. See *Zelman*, 536 U.S. at 645.

<sup>22</sup> Molly S. McUsic, *The Future of Brown v. Board of Education: Economic Integration of the Public Schools*, 117 HARV. L. REV. 1334, at 1335 (2004). Possible theories explaining this occurrence include group socialization theory or the influence of peer group norms, increased motivation of parents of such children, or increased resources. *Id.* at 1356-58.

<sup>23</sup> Macchiarola, *supra* note 18, at 464; Peterson, *supra* note 18, at 18. Structured voucher programs could correct this problem by requiring public schools to accept students from other neighborhoods.

<sup>24</sup> Russo, *supra* note 18, at 64-67 (noting lack of requirements regarding student performance and population, employment matters, and discrimination).

<sup>25</sup> *Id.*

<sup>26</sup> In fact, such was the case in the Cleveland program challenged in *Zelman*. See *Zelman*, 536 U.S. at 645.

allow for “specialization, innovation, and creativity” because they are free from state regulation adds diversity to the marketplace and engenders competition.<sup>27</sup>

Opponents of vouchers also argue that vouchers drain public schools of resources,<sup>28</sup> the brightest students, and the best teachers, thereby driving down the quality of public schools further.<sup>29</sup> These concerns, however, are largely rebutted by empirical evidence. Because of the significant per-pupil cost disparity between private (especially sectarian) and public schools,<sup>30</sup> voucher programs are generally cost-effective for taxpayers.<sup>31</sup> Further, because current public school financing schemes rely largely on local tax funds that remain with the local public schools regardless of the number of students enrolled, vouchers funded by the state are actually “fiscally advantageous” to public school students.<sup>32</sup> Finally, researchers have not found any evidence that school choice programs “cream skim” the brightest public school students.<sup>33</sup> In fact, at least one study has shown that students choosing alternatives to public education have suffered disproportionately from discrimination in the public

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<sup>27</sup> See Salisbury, *supra* note 17, at 7-8 (arguing that “imposing regulations on private schools . . . would only dilute the positive effects of competition and choice” that make private schools attractive).

<sup>28</sup> Russo, *supra* note 18, at 72-75; *cf.* Shiffrin, *supra* note 18, at 539 (arguing that providing vouchers will increase overall cost of education and reduce public funds available for attracting quality teachers). Professor Shiffrin does note, however, that the force of this objection is somewhat lessened if vouchers were available only to low-income students. *Id.*

<sup>29</sup> O’Neill, *supra* note 14, at 1401.

<sup>30</sup> See Salisbury, *supra* note 17, at 3-4 (indicating that average tuition for all private schools is \$4,689, as opposed to average per pupil spending in public schools of \$9,354). Even assuming that the higher expenses for special needs children disproportionately inflates the per pupil spending figure for public schools, this spending gap is significant.

<sup>31</sup> Macchiarola, *supra* note 18, at 464.

<sup>32</sup> Peterson, *supra* note 18, at 22.

<sup>33</sup> Peterson, *supra* note 18, at 20; *cf.* Hoxby, *supra* note 16, at 59 (studying charter schools). “Cream skimming” refers to the removal of “the higher-scoring students to private schools, driving down average public school test scores.” O’Neill, *supra* note 14, at 1401.

school system.<sup>34</sup> Thus, the evidence regarding school choice and voucher programs strongly supports expansion of these programs to include sectarian schools in order to maximize their potential benefits.

#### B. CONSTITUTIONALITY OF VOUCHER PROGRAMS AFTER *ZELMAN V. SIMMONS-HARRIS*

Until recent years, the greatest threat to programs providing public funds to sectarian schools was the Establishment Clause of the First Amendment,<sup>35</sup> applied to the states by the Fourteenth Amendment.<sup>36</sup> Since the 1971 case of *Lemon v. Kurtzman*, the Supreme Court has used a three prong test to determine whether a statute or governmental regulation violates the Establishment Clause: the regulation or rule must have a “secular legislative purpose”; its “primary effect must . . . neither advance nor inhibit religion”; and it must not “foster an excessive government entanglement with religion.”<sup>37</sup> In the years following *Lemon*, the Court used this test to strike down state programs that gave substantial aid directly to sectarian schools and, thus, could be diverted to sectarian uses.<sup>38</sup> Conversely, the Court upheld programs that provided public aid on a neutral basis to private individuals, who then determined

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<sup>34</sup> Hoxby, *supra* note 16, at 59.

<sup>35</sup> U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion....”).

<sup>36</sup> *Everson v. Board of Education*, 330 U.S. 1, 15 (1947) (noting applicability of First Amendment’s prohibition on abridging religious freedom to states and stating that “there is every reason to give the same application and broad interpretation to the ‘establishment of religion’ clauses”).

<sup>37</sup> *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971) (internal quotation marks omitted). In *Lemon*, the Court invalidated Rhode Island and Pennsylvania’s practices of government payment of sectarian teachers’ salaries. *Id.* at 606-607.

<sup>38</sup> See Sara J. Crisafulli, *Zelman v. Simmons-Harris: Is the Supreme Court’s Latest Word on School Voucher Programs Really the Last Word?*, 71 *FORDHAM L. REV.* 2227, 2232-40 (2003) (detailing Court’s jurisprudence in this area between 1971 and 1985).

whether to direct the aid to sectarian schools.<sup>39</sup> In 1997, the Court substantially modified the *Lemon* test in *Agostini v. Felton* by collapsing the entanglement inquiry into the primary effect inquiry.<sup>40</sup> In reversing its earlier decision in *Aguilar v. Felton*<sup>41</sup> and upholding a federally sponsored program that provided remedial assistance to sectarian students by public school teachers,<sup>42</sup> the Court found that the program provided benefits on a neutral basis and had sufficient procedural safeguards to prevent entanglement.<sup>43</sup> Three years later, the Court relied on *Agostini* in *Mitchell v. Helms* to uphold a program that provided educational equipment to both public and sectarian schools.<sup>44</sup> Again, the Court emphasized the neutrality of the aid and the private choice afforded to individual recipients.<sup>45</sup>

Following in the wake of *Agostini* and *Mitchell*, the *Zelman* Court upheld an Ohio program that allowed vouchers to be used at sectarian private schools in the Cleveland area.<sup>46</sup> The voucher program was instituted in response to a “crisis of magnitude” in the Cleveland School District, which had been placed under state control by a Federal District Court in 1995.<sup>47</sup> The state had also embarked upon a broader program of educational choice by instituting programs establishing and governing community and

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<sup>39</sup> See *id.* at 2240-44 (outlining cases upheld under this principle).

<sup>40</sup> See *Agostini v. Felton*, 521 U.S. 203, 232-33 (1997) (noting that “[r]egardless of how we have characterized the issue, . . . the factors we use to assess whether an entanglement is ‘excessive’ are similar to the factors we use to examine ‘effect’”).

<sup>41</sup> 473 U.S. 402 (1985).

<sup>42</sup> *Agostini*, 521 U.S. at 230.

<sup>43</sup> *Id.* at 234-35.

<sup>44</sup> *Mitchell v. Helms*, 530 U.S. 793, 807 (2000).

<sup>45</sup> *Id.* at 810-14.

<sup>46</sup> *Zelman v. Simmons-Harris*, 536 U.S. 639, 644-48 (2002).

<sup>47</sup> *Id.* at 644 (internal quotation marks omitted).

magnet schools.<sup>48</sup> The vouchers were distributed to parents of eligible students based on financial need and could be used at any private or out-of-district public school participating in the program.<sup>49</sup> The choice of school was entirely up to the parent.<sup>50</sup> In order to participate in the program, a private school was required to meet statewide educational standards and agree to abide by a non-discrimination policy.<sup>51</sup> Further, a participating school could not “advocate or foster unlawful behavior or teach hatred of any person or group on the basis of race, ethnicity, national origin, or religion.”<sup>52</sup> During the 1999-2000 school year, 82% of the private schools participating in the program were sectarian and enrolled 96% of the participating students.<sup>53</sup>

Because the challengers of the voucher program conceded that it was enacted for the “valid secular purpose” of increased educational opportunities for children in the failing Cleveland city school district, the Court turned its focus to the effect prong of the *Lemon/Agostini* test.<sup>54</sup> First, the Court found that the program was “neutral in all respects toward religion” and available equally to all schools and families without reference to religion.<sup>55</sup> Thus, it offered no financial incentives that favored the participating sectarian schools.<sup>56</sup> Second, because public funds reached the sectarian

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<sup>48</sup> *Id.* at 647.

<sup>49</sup> *Id.* at 645-46.

<sup>50</sup> *Id.* at 646.

<sup>51</sup> *Id.* at 645.

<sup>52</sup> *Id.* (internal quotation marks omitted).

<sup>53</sup> *Id.* at 647.

<sup>54</sup> *Id.* at 649.

<sup>55</sup> *Id.* at 653.

<sup>56</sup> *Id.* In fact, the Court noted that the voucher program created some financial disincentives for the sectarian schools, as students choosing to enroll at a sectarian school received much less than students enrolling at community or magnet schools. *Id.* at 654. Further, parents enrolling their children in private schools were required to copay at least some of the tuition. *Id.*

schools “solely as a result of the numerous independent decisions of private individuals,” there could be no “imprimatur of government endorsement.”<sup>57</sup> Further, the fact that the majority of the participating private schools were sectarian did not indicate a lack of genuine educational opportunities, especially in light of the state’s broader educational program including community and magnet schools.<sup>58</sup> Likewise, the fact that 96% of the participants chose to attend sectarian schools was not relevant to the constitutionality of the program, both because such statistics reflected the exercise of private choice and because these figures would vary from year to year.<sup>59</sup> Thus, the aspects of neutrality and private choice ensured that any incidental advancement of a religious message or mission was fairly attributed to the individual recipient of the funds, not the government itself.<sup>60</sup>

The *Zelman* Court indicated that school voucher programs providing funds to sectarian schools are constitutional under the Establishment Clause, at least so long as they meet the same principles of neutrality and private choice as the Cleveland program. Importantly, however, *Zelman* is only permissive; “it removes rather than creates a constitutional impediment to state policy.”<sup>61</sup> By removing the Establishment Clause as a hurdle to these programs, the Court has freed each state to make their own

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<sup>57</sup> *Id.* at 655. In this context, the Court noted the importance of viewing the voucher program against the broader goal of assisting poor children in failing schools. *Id.*

<sup>58</sup> *Id.* at 656-58. Later in the opinion, the Court clarified that the constitutionality of the program was not affected by the fact that the community and magnet schools were not part of the voucher program itself; the fact that they represented secular alternatives to the sectarian schools was sufficient. *Id.* at 660, n. 6.

<sup>59</sup> *Id.* at 659. In concurrence, Justice O’Connor also noted that when including students who were enrolled in either community or magnet schools, the number of students enrolled in sectarian schools dropped to 16.5% of all students taking advantage of alternative educational options in the Cleveland area. *Id.* at 664 (O’Connor, J., concurring).

<sup>60</sup> *Id.* at 652.

<sup>61</sup> Ira C. Lupu & Robert W. Tuttle, *Zelman’s Future: Vouchers, Sectarian Providers, and the Next Round of Constitutional Battles*, 78 NOTRE DAME L. REV. 917, 955 (2003).

policy judgments regarding the wisdom of vouchers and their use at sectarian schools. As the next section illustrates, many states made their choice over a century ago, during the early years of our nation's educational system.

### C. THE NEXT CHALLENGE: STATE BARRIERS TO PUBLIC FUNDING OF SECTARIAN EDUCATION

The debate regarding the use of public funds at sectarian schools has its roots in the origins of the public education system. The first state public education systems were organized and financed by state governments and the churches.<sup>62</sup> Over time, however, advocates of a “common school” available to all began to institute reform leading to “nonsectarian” public schools,<sup>63</sup> which not only taught basic subjects, but also “enculture[d] [students] with American values and attitudes.”<sup>64</sup> These values, however, were overwhelmingly Protestant; the curriculum included readings from the King James Bible and other devotional exercises.<sup>65</sup> As immigrants changed the religious composition of the population, tensions between the Protestant majority and Catholic minority grew. Catholics attempted, with some success, to de-Protestantize common schools, awakening a corresponding rise of anti-Catholic sentiment.<sup>66</sup>

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<sup>62</sup> Peter H. Hanna, *School Vouchers, State Constitutions, and Free Speech*, 25 CARDOZO L. REV. 2371, 2381-83 (2004).

<sup>63</sup> See *id.* at 2383-84 (describing efforts of Horace Mann, the “father of public education” and the first State Secretary of Education).

<sup>64</sup> Mark Edward DeForrest, *An Overview and Evaluation of State Blaine Amendments: Origins, Scope, and First Amendment Concerns*, 26 HARV. J. L. & PUB. POL'Y 551, 559 (2003); see also O'Neill, *supra* note 14, at 1402 (“[O]ne of the admitted functions of the common school system was to serve as an instrument for the acculturation of the growing immigrant populations during the eighteenth and nineteenth centuries.”).

<sup>65</sup> See DeForrest, *supra* note 64, at 559-60.

<sup>66</sup> *Id.* at 560-564; Hanna, *supra* note 62, 2385; see also Kyle Duncan, *Secularism's Laws: State Blaine Amendments and Religious Persecution*, 72 FORDHAM L. REV. 493, 505-07 (2003) (describing conflict

Aware of the growing unrest, President Grant called for a constitutional amendment to resolve the public education issue.<sup>67</sup> Seizing the opportunity to ingratiate himself with the then-beleaguered Republican Party, Representative James Blaine of Maine introduced such an amendment on December 14, 1875,<sup>68</sup> which read as follows:

No State shall make any law respecting an establishment of religion or prohibiting the free exercise thereof; and no money raised by taxation in any State for the support of public schools, or derived from any public fund therefore, nor any public lands devoted thereto, shall ever be under the control of any religious sect, nor shall any money so raised or lands so devoted be divided between religious sects or denominations.<sup>69</sup>

The amendment, primarily motivated by a fear of Catholic control and influence over public schools,<sup>70</sup> failed to pass the Senate, falling just four votes shy of the two-thirds majority needed.<sup>71</sup>

Far from fading away into oblivion, however, Blaine's cause was taken up by the states; by the 1890s, approximately thirty states had incorporated similar language into

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between Protestants and Catholics over school funding and stating that "a more systematic reaction arose in the form of legislation forbidding 'sectarian control' over public schools and blocking any diversion of public money to religious institutions").

<sup>67</sup> DeForrest, *supra* note 64, at 565; Hanna, *supra* note 62, at 2389.

<sup>68</sup> See DeForrest, *supra* note 64, at 557-58 (describing Blaine's motivation for proposing amendment).

<sup>69</sup> *Id.* at 556.

<sup>70</sup> See *id.* at 567-73 (describing proposed amendment's route through Congress and detailing congressional debate highlighting anti-Catholic motivation); Duncan, *supra* note 66, at 509 ("Blaine's proposed amendment 'rewrote the First Amendment to apply it to the states and to specify a single logical consequence of separation—the one most popular with anti-Catholic voters.'" (quoting PHILIP HAMBURGER, SEPARATION OF CHURCH AND STATE 297 (2002))).

<sup>71</sup> O'Neill, *supra* note 14, at 1402.

their constitutions.<sup>72</sup> Today, almost forty state constitutions contain Blaine Amendments.<sup>73</sup> Further, approximately thirty state constitutions also include “compelled support” clauses, which guarantee that citizens will not be compelled to support religious activity without his or her consent.<sup>74</sup> Overwhelmingly, states have chosen to restrict public aid to sectarian schools. Voucher proponents are therefore facing their next challenge and seeking to invalidate these *state* constitutional amendments under the *federal* constitution. The most likely routes for such challenges and their probable success are discussed below in Part III.B.<sup>75</sup>

### III. DISCUSSION

#### A. CONCERNS REGARDING VOUCHER USE AT SECTARIAN SCHOOLS

Despite the Court’s ruling in *Zelman*, many voucher critics continue to make arguments against the inclusion of sectarian schools in aid programs. Many of these arguments implicate either the Free Exercise Clause or Establishment Clause of the First Amendment. To the extent that the Court’s Establishment Clause analysis in *Zelman* is erroneous or incomplete, however, alternative arguments exist that can rebut these concerns.

1. *Preferential Treatment of Religion.* Opponents to voucher use at sectarian schools argue that because sectarian schools are operated predominantly by a handful of religious sects, such use will result in government support of a few religions rather

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<sup>72</sup> DeForrest, *supra* note 64, at 573. In some cases, territories seeking to be admitted into the union were required to include Blaine-type language in their constitutions. *Id.* at 573-74.

<sup>73</sup> O’Neill, *supra* note 14, at 1403. For an overview of the differing language and scope of state Blaine Amendments, see DeForrest, *supra* note 64, at 576-602, and Hanna, *supra* note 62, at 2397-2403.

<sup>74</sup> O’Neill, *supra* note 14, at 1403.

<sup>75</sup> See *infra* notes 107-212 and accompanying text.

than non-preferential treatment of all religions, and violate the Establishment Clause under *Lemon*'s primary effect prong, at least in spirit.<sup>76</sup> This argument, however, gives little weight to either the individual choice or competition aspects of vouchers. As the Court noted in *Zelman*, exercise of individual choice in distribution of public funds sufficiently removes any specter of government establishment or control.<sup>77</sup> Additionally, the fact that vouchers can be used at private schools may encourage both sectarian and secular schools to enter the market and thereby increase the diversity of educational choices.<sup>78</sup> Presumably, sufficient demand from parents with nonconformist beliefs will lead to the opening of schools espousing those beliefs. Further, parents may choose a school for reasons other than religious indoctrination--approximately two-thirds of students enrolled in sectarian schools in the Cleveland voucher program were of different faiths than the religious affiliation of the school they attended.<sup>79</sup> Finally,

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<sup>76</sup> See Shiffrin, *supra* note 18, at 545 (“[V]ouchers in many, if not most, jurisdictions would have a substantial disproportionate impact in favor of some religions.”); Notes, “*They Drew a Circle that Shut Me In*”: *The Free Exercise Implications of Zelman v Simmons-Harris*, 117 HARV. L. REV. 919, 920 (2004) (“[B]ecause of the government’s failure to take into account the divergent beliefs of religious nonconformists, it left a small but significant minority without a religiously palatable means of exercising [an educational] option.”).

<sup>77</sup> See *supra* note 57 and accompanying text.

<sup>78</sup> See *Zelman v. Simmons-Harris*, 536 U.S. 639, 656 n.4 (2002) (noting that several secular private schools were created in response to Cleveland voucher program).

<sup>79</sup> *Zelman*, 536 U.S. at 705 (2002) (Souter, J., dissenting). This fact engendered a lively debate among the Justices. Justice Souter argued that this indicated a lack of non-sectarian choices within the voucher program, *id.*, while Justice O’Connor argued that in the context of the state’s broader educational program, students had adequate non-sectarian choices. *Id.* at 672 (O’Connor, J., concurring). Although Justice Souter maintained that only the choices within the voucher program itself should be relevant to the neutrality inquiry, *id.* at 698-99 (Souter, J., dissenting), Justice O’Connor’s view seems to be supported by the simple fact that parents in Cleveland are faced with a choice of where to direct their tax dollars. By choosing to enroll their child at a public, community, or magnet school, they are directing their tax dollars to those schools. By the same token, enrolling their child at a private school will then direct their tax dollars to that school. Focusing merely on the schools participating in the voucher program itself does not encompass all the choices of where to send public money earmarked for their child’s education. Thus, contrary to Justice Souter’s argument, the choice of “where to go to school” is a choice of “where to spend the money.” See *id.* at 699 (Souter, J., dissenting). Justice Rehnquist, writing for the majority, stated: “The constitutionality of a neutral educational aid program simply does not turn on whether and

parents are not necessarily limited to sectarian schools. State voucher programs may be constructed within a broader program of alternative school options, including better-performing public schools in neighboring districts. Thus, it is unlikely that inclusion of sectarian schools in properly-constructed voucher programs will result in “an establishment of religion.”<sup>80</sup>

2. *Violation of Church-State Autonomy.* Opponents also argue that voucher use at sectarian schools will result in a breakdown of church-state autonomy, allowing the state to intrude too far into church matters, with a corresponding intrusion of the church into state matters.<sup>81</sup> Again, a program constructed in accordance with *Zelman* presumably does not present such a concern, as the elements of neutrality and private choice negate any inference of “excessive entanglement.”<sup>82</sup> Regardless of the majority’s analysis in that case, however, alternative theories also refute this objection. First, as detailed in Part III.B below, the original understanding of the Religion Clauses

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why, in a particular area, at a particular time, most private schools are run by religious organizations, or most recipients choose to use the aid at a religious school.” *Id.* at 659.

<sup>80</sup> U.S. CONST. amend. I (emphasis added). A related objection regarding voucher programs that include sectarian schools is that funding of religious organizations, even indirectly, will inevitably lead to social and political strife as differing sects compete for state funds, and that the “separation” policy underpinning the *Lemon* test is necessary to preclude such divisiveness. *Zelman*, 536 U.S. at 719-23 (Breyer, J., dissenting); see *id.* at 715-16 (Souter, J., dissenting) (“As appropriations for religious subsidy rise, competition for the money will tap sectarian religion’s capacity for discord.”); Shiffrin, *supra* note 18, at 546-48 (contending that voucher use at sectarian schools “threatens to corrupt our political debate,” and that “the concern that religious divisions can lead to violent conflicts should not be entirely read out of the Establishment Clause.”). In some ways, however, inclusion of sectarian schools would actually *lessen* religious strife, especially in the area of education, as parents dissatisfied with the secular (and sometimes anti-religion) curricula at public schools would be given the option to place their child in a school more in line with their own beliefs. Regardless, as noted by Justice Rehnquist in *Zelman*, the Court has consistently “rejected the claim that some speculative potential for divisiveness bears on the constitutionality of educational aid programs.” *Zelman*, 536 U.S. at 662, n.7.

<sup>81</sup> See *id.* at 712-14 (Souter, J., dissenting) (arguing that allowing voucher use at sectarian schools will lead to religious regulation); Shiffrin, *supra* note 18, at 546-48 (describing such concerns).

<sup>82</sup> See *Zelman*, 536 U.S. at 652-53 (“[I]f numerous private choices, rather than the single choice of a government, determine the distribution of aid, pursuant to neutral eligibility criteria, then a government cannot, or at least cannot easily, grant special favors that might lead to a religious establishment.”) (quoting *Mitchell v. Helms*, 530 U.S. 793, 810 (2000) (internal citations omitted)).

of the First Amendment supports the view that the Framers did not intend for the state to disavow all contact with religion; the Establishment Clause merely serves to ensure that no *one* religion was supported by the state to the exclusion of all others.<sup>83</sup>

Therefore, the “wall of separation between church and state” is not as absolute as many argue.

Second, as noted by Justice Thomas in his *Zelman* concurrence, the language of the Establishment Clause only restricts Congress; under the incorporation doctrine of the Fourteenth Amendment, this restriction may apply differently to the states.<sup>84</sup>

Accordingly, the “[s]tates may pass laws that include or touch on religious matters so long as these laws do not impede free exercise rights or any other individual religious liberty interest.”<sup>85</sup> Thus, using the Establishment Clause to strike down neutral programs at the expense of individual liberty—here, educational choice—would be antithetical to the Fourteenth Amendment’s guarantee of the same.<sup>86</sup>

Third, at least two scholars have argued that “economic and statistical analysis shows that it is possible to construct a tuition tax credit or voucher system . . . without aiding religion.”<sup>87</sup> Simply put, the amount of the voucher must be less than the cost of the secular courses at sectarian schools.<sup>88</sup> Although parents may not be able to enroll their child in a sectarian school without the government program, their decision to do so

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<sup>83</sup> See *infra* notes 143–146 and accompanying text.

<sup>84</sup> *Zelman*, 536 U.S. at 678 (Thomas, J., concurring) (“When rights are incorporated against the states through the Fourteenth Amendment they should advance, not constrain, individual liberty. Consequently, in the context of the Establishment Clause, it may well be that state action should be evaluated on different terms than similar action by the Federal Government.”).

<sup>85</sup> *Id.* at 679. As Justice Thomas later notes, the Free Exercise Clause of the First Amendment specifically protects individual rights, and thus “invites” incorporation. *Id.* at n.4.

<sup>86</sup> *Id.* at 680.

<sup>87</sup> RONALD D. ROTUNDA & JOHN E. NOWAK, 5 TREATISE ON CONSTITUTIONAL LAW §21.4 (3d ed. 1999).

<sup>88</sup> *Id.*

would not be the result of government encouragement of religion. They would only be exercising a choice of whether to receive educational benefits “in kind” at a public school or “in cash” for use at a private school.<sup>89</sup> Professors Nowak and Rotunda acknowledge that the “administrative regulation of religious activities would pose . . . danger to the values of government neutrality,” but also argue that, in the case of vouchers, “there is no need for a reporting and regulation system which would lead to administrative entanglement.”<sup>90</sup> Because the voucher amounts are calculated to ensure no benefit inures to religious activities, no further regulation of religious activities is needed. Additionally, private schools could be required to use secular educational materials that are not easily adaptable for religious education.<sup>91</sup> In fact, as mentioned earlier in Part II.A, it may be preferable for private schools participating in voucher programs to be completely free from state regulation. Although this may raise concerns regarding discrimination and equality where sectarian school policies differ from state and federal regulations regarding public school policies,<sup>92</sup> it may also engender diverse and experimental approaches to education that will benefit students.<sup>93</sup>

Opponents would argue that any amount of public funding to religious schools results in significant support of religion, and thus must be invalidated under the Establishment Clause. As Justice O’Connor noted in her *Zelman* concurrence,

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<sup>89</sup> *Id.* (internal quotation marks omitted).

<sup>90</sup> *Id.* Professors Rotunda and Nowak also note, however, that in the 1970s, the Court rejected such statistical guarantees as proof that an educational program did not aid religion and required procedural safeguards to ensure that public funds were not used for religious teaching. *Id.* Such safeguards, of course, raise other First Amendment concerns. *Id.* They continue: “To insist that any form of aid, no matter how neutral, continually be reported to insure its neutrality, but then to invalidate the program because of the reporting requirement, seems circular.” *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> Shiffrin, *supra* note 18, at 549.

<sup>93</sup> See *supra* note 27 and accompanying text.

however, a significant portion of federal, state, and local government tax funds (primarily in the form of tax benefits such as credits or deductions) currently flow, in a neutral fashion, to religious institutions without restrictions on subsequent use of those funds.<sup>94</sup> Thus, allowing significant public benefits to inure to religious institutions through tax credits and exemptions but using the Establishment Clause to invalidate the indirect funding of the secular aspects of education at a sectarian school seems inconsistent.

Finally, even serious concerns regarding church-state autonomy may be required to give way in light of a compelling state interest in quality education for all students, especially the poor.<sup>95</sup> In order to succeed under this argument, the state would need to show that public schools were failing, vouchers would substantially improve the system, and measures less invasive of the Establishment Clause would not be sufficient.<sup>96</sup> At least in some circumstances, evidence can likely be found to support the first two requirements.<sup>97</sup> The third requirement presents an interesting issue that we can only mention here. *Are there other ways in which the education system of our country may be effectively reformed?* Alternative proposals include affirmative action in higher education,<sup>98</sup> public school financing reform,<sup>99</sup> economic integration of public schools

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<sup>94</sup> *Zelman v. Simmons-Harris*, 536 U.S. 639, 663-68 (2002) (O'Connor, J., concurring).

<sup>95</sup> Shiffrin, *supra* note 18, at 550. Justice Thomas's opinion in *Zelman* contained language from which a similar argument may be inferred. *See Zelman*, 536 U.S. at 681-83 (Thomas, J., concurring).

<sup>96</sup> Shiffrin, *supra* note 18, at 550.

<sup>97</sup> *See supra* notes 1, 16, 20.

<sup>98</sup> *See Zelman*, 536 U.S. at 683 (Thomas, J., concurring) ("Society's other solution to these educational failures is often to provide racial preferences in higher education [which] . . . run afoul of the Fourteenth Amendment's prohibition against distinctions based on race.")

<sup>99</sup> Litigation concerning the constitutionality of school financing systems has been a feature of the public education reform movement since the 1960s. For an overview of this issue, see Deborah A. Verstegen & Robert C. Knoeppel, *Equal Education under the Law: School Finance Reform and the Courts*, 14 J.L. & POL. 555 (1998).

achieved either through school finance reform or residential integration measures,<sup>100</sup> and wholesale abolition of the private school system,<sup>101</sup> to name a few. Although these reform measures may be effective, many raise other constitutional concerns.<sup>102</sup> Further, with the possible exception of school finance reform, none have enjoyed public support to the same extent as vouchers. Thus, although this argument may not work in a state or area where public education is serving its intended purpose, it may provide additional support for voucher programs in those areas where children are not receiving an adequate education in the public schools.

3. *Taxpayer Concerns Regarding Use of Public Funds.* Finally, voucher opponents argue that inclusion of sectarian schools in publicly-funded voucher programs implicates taxpayer and free exercise concerns of compelled support.<sup>103</sup> Such concerns are largely overstated. First, as mentioned by Justice O'Connor in her *Zelman* concurrence, various religious institutions, including schools, already receive significant government benefits;<sup>104</sup> voucher programs have little, if any, practical difference from current tax schemes benefiting religious organizations. Further, many taxpayers are currently forced to support programs that are against their religious beliefs and arguably violate their free exercise rights. For example, Jehovah's Witnesses, who eschew medical care, are forced to support healthcare for millions

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<sup>100</sup> McUsic, *supra* note 22, at 1359-74.

<sup>101</sup> See generally, Erwin Chemerinsky, "Separate and Unequal: American Public Education Today," 52 AM. UNIV. L. REV. 1461 (2003) (arguing that only by having one system of education will all children receive adequate education).

<sup>102</sup> For example, a parent's right to direct the education of their child by enrollment in private schools was found to be part of substantive due process guaranteed by the Fourteenth Amendment in *Pierce v. Society of Sisters* 80 years ago. *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925). Under *Pierce*, requiring all children to attend public school violates this interest. *Id.* at 536.

<sup>103</sup> Shiffrin, *supra* note 18, at 544.

<sup>104</sup> *Zelman v. Simmons-Harris*, 536 U.S. 639, 663-68 (2002) (O'Connor, J., concurring).

through Medicaid and Medicare; these taxpayers have no constitutional recourse, so why should taxpayers opposing voucher use at sectarian schools?<sup>105</sup>

Taxpayer concerns may be heightened if the state does not require sectarian schools receiving public funds through voucher programs to follow state and federal discrimination law.<sup>106</sup> Individual sensitivities are often be offended by the actions of a private actor, but this does not necessarily entitle taxpayers to a method of redress under the constitution.<sup>107</sup> Where public funds are directed to a private school through private, individual choice, sectarian schools will likely not be found to be state actors and thus subject to federal constitutional restrictions.<sup>108</sup> Thus, taxpayer concerns relating to the use of public money at sectarian schools are no different than other areas where taxpayers conscientiously object to a government program, but are left with no recourse.

Overall, arguments against the use of vouchers at private sectarian schools are not compelling, especially where students do not have quality educational opportunities. Because of state Blaine Amendments and similar measures, however, parents of these students have a tough road ahead. Barring a legislative movement for change, advocates for inclusion of sectarian schools in voucher programs must resort to the

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<sup>105</sup> Cf. Shiffrin, *supra* note 18, at 544-45 (using taxpayer support of war as example).

<sup>106</sup> See *supra* note 24 and accompanying text.

<sup>107</sup> With a few exceptions, the Constitution's guarantee of individual rights and liberties applies only to actions or conduct of government entities. ROTUNDA & NOWAK, *supra* note 87, at §16.1(a). Thus, a private individual is not subject to suit on the basis that they have violated the civil or political rights of another unless the court determines that the private individual's actions may be deemed governmental or "state" actions under the relevant constitutional provision. *Id.*

<sup>108</sup> See *Rendell-Baker v. Kohn*, 457 U.S. 830, 840-843 (1982) (finding that private school, which primarily derived income from public sources and was regulated by state, was not state actor when it discharged certain employees). Of course, states may condition inclusion of sectarian schools in voucher programs on compliance with certain requirements regarding curricula, discrimination, and employment. Such a practice may implicate the doctrine of unconstitutional conditions, a discussion of which is beyond the scope of this paper. For a proficient analysis of this issue, see Lupu & Tuttle, *supra* note 61, at 977-81.

courts and attempt to overturn these state provisions on federal constitutional grounds.

## B. REMOVING THE BLAINE BARRIERS

In order to reform voucher programs that deny aid to sectarian schools, proponents must successfully challenge state Blaine Amendments and similar compelled support provisions. Essentially, challengers must argue that under the federal constitution, a voucher program that provides public funds to be used at private secular schools must also allow the funds to be used at private sectarian schools in accordance with *Zelman*'s requirements of neutrality and personal choice. The most likely grounds for challenge are found in the Religion Clauses of the First Amendment and the Equal Protection and Due Process Clauses of the Fourteenth Amendment. We emphasize that Blaine Amendments vary from state to state,<sup>109</sup> and the constitutionality of each must therefore be determined on a case-by-case basis. Our purpose here is to merely provide an overview of the available arguments for invalidity and illustrate the uncertainty of their success.

1. *Free Exercise Clause.* Voucher programs excluding sectarian schools by virtue of Blaine Amendment restrictions necessarily implicate the Free Exercise Clause<sup>110</sup> of the First Amendment, which is applied to the states through incorporation under the Fourteenth Amendment.<sup>111</sup> Although states are free to grant citizens “additional legal protections” in the area of religious exercise, the First Amendment is

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<sup>109</sup> See *supra* note 73.

<sup>110</sup> “Congress shall make no law . . . prohibiting the free exercise [of religion] . . . .” U.S. CONST. amend I.

<sup>111</sup> See KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW 1508 (15th ed. 2004) (“Free exercise of religion, like freedom of speech, is easily understood as the type of ‘liberty’ . . . encompassed by the Fourteenth Amendment and thus applied to the states.”).

the “floor” for religious protection.<sup>112</sup> If Blaine Amendments fall below this “floor,” they are unconstitutional under the First Amendment.

The fact that courts must choose “between a command not to establish religion and a command not to inhibit its practice”<sup>113</sup> complicates analysis of any law dealing with religion. At a minimum,<sup>114</sup> these competing principles require that the government act only in furtherance of “secular goals and that it achieve them in a religiously neutral manner.”<sup>115</sup> While recent Supreme Court jurisprudence largely allows “the states the discretion whether or not to accommodate religious practices so long as the laws themselves are neutral toward religion,”<sup>116</sup> the Court’s standard for neutrality varies according to the context of the challenge.<sup>117</sup> To be truly neutral, government action must avoid “classification in terms of religion either to confer a benefit or to impose a burden.”<sup>118</sup> Under this definition of neutrality, Blaine Amendments would almost certainly be unconstitutional if used to exclude sectarian schools from voucher programs: “If the government opens up its coffers to provide aid to secular private schools or their students, the principle of religious neutrality requires that they should also allow religionists and religious schools to participate in such aid programs.”<sup>119</sup> Instead of applying a single test for neutrality, however, the Supreme Court has added

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<sup>112</sup> Colleen Carlton Smith, *Zelman’s Evolving Legacy: Selective Funding of Secular Private Schools in State School Choice Programs*, 89 VA. L. REV. 1953, 1968 (2003).

<sup>113</sup> ROTUNDA & NOWAK, *supra* note 87, at §21.1.

<sup>114</sup> As discussed later in this section, at least one scholar has argued that the neutrality approach is inconsistent with the original intent of the First Amendment. See Garry, *supra* note 1, at 24.

<sup>115</sup> ROTUNDA & NOWAK, *supra* note 87, at §21.1.

<sup>116</sup> Shannon Black, *Locke v. Davey and the Death of Neutrality as a Concept Guiding Religion Clause Jurisprudence*, 19 ST. JOHN’S J. LEGAL COMMENT 337, 352-53 (2005).

<sup>117</sup> ROTUNDA & NOWAK, *supra* note 87, at §21.1.

<sup>118</sup> *Id.* (quoting PAUL KURLAND, RELIGION AND LAW 112 (1962)).

<sup>119</sup> DeForrest, *supra* note 64, at 609.

to the tension between the Religion Clauses by establishing different tests in analyzing Free Exercise and Establishment Clause challenges.<sup>120</sup> Whereas a law challenged under the Establishment Clause will not be given a “presumption of constitutionality,” a law challenged under the Free Exercise Clause will be given “great deference.”<sup>121</sup>

This deference was borne out in the Supreme Court's recent decision in *Locke v. Davey*,<sup>122</sup> a decision that may have important implications in the school voucher battle. In that case, the petitioner had received a scholarship from the state of Washington that could be used to finance his post-secondary education at any public or private university, with the caveat that he “[could] not pursue a degree in theology at that institution while receiving the scholarship.”<sup>123</sup> Desiring to major in “pastoral ministries,” Davey challenged the Washington program under the Free Exercise and the Establishment Clauses, among others.<sup>124</sup> The Supreme Court framed the free exercise issue as “whether Washington, pursuant to its own constitution, which has been authoritatively interpreted as prohibiting even indirectly funding religious instruction that will prepare students for the ministry . . . can deny them such funding without violating the Free Exercise Clause.”<sup>125</sup> Noting the long history of prohibiting public financial support of the clergy,<sup>126</sup> the Court found that restriction on the scholarship funds did not violate the Free Exercise Clause, stating that “if any room exists between the two

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<sup>120</sup> ROTUNDA & NOWAK, *supra* note 87, at §21.1.

<sup>121</sup> *Id.*

<sup>122</sup> 540 U.S. 712 (2004).

<sup>123</sup> *Id.* at 715-17.

<sup>124</sup> *Id.* at 717-18.

<sup>125</sup> *Id.* at 719.

<sup>126</sup> *Id.* at 722-24.

Religion Clauses, it must be here.”<sup>127</sup>

Although *Locke* validated the state’s refusal to allow public funds to be used for religious purposes, a free exercise challenge to similar state laws is not necessarily doomed. As the Court noted, the petitioner in *Locke* did not argue that the state constitutional provision at issue was a Blaine Amendment, and the history of anti-Catholic bias and discrimination implicated by such Amendments was therefore not before the Court.<sup>128</sup> In fact, the restriction on the scholarship was quite narrow, as it allowed for funding of secular degrees at “accredited religious schools”<sup>129</sup> where students were “still eligible to take devotional theology courses.”<sup>130</sup> Thus, *Locke* does not necessarily apply where the constitutional provision categorically excluding all sectarian schools from voucher programs can be linked to the anti-Catholic movement behind most Blaine Amendments.<sup>131</sup>

Unlike the constitutional provision at issue in *Locke*,<sup>132</sup> the discriminatory intent behind Blaine Amendments arguably implicates the principle of *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*.<sup>133</sup> In that case, the Supreme Court struck down a city ordinance banning the ritual slaughter of animals based on a showing that the

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<sup>127</sup> *Id.* at 725.

<sup>128</sup> *Id.* at 723 n.7.

<sup>129</sup> *Id.* at 724.

<sup>130</sup> *Id.*

<sup>131</sup> See *supra* notes 62- 74 and accompanying text.

<sup>132</sup> *Locke*, 540 U.S. at 720-21 (holding provision at issue facially neutral and thus not presumptively unconstitutional under *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993)). But see *id.* at 726 (Scalia, J., dissenting) (finding that principles of *Lukumi* were “irreconcilable with [the majority’s] decision”).

<sup>133</sup> 508 U.S. 520 (1993).

ordinance was enacted to restrict practice of the Santeria religion.<sup>134</sup> Under this principle, a law which discriminates against religious beliefs or conduct must be justified by a compelling state interest if the purpose of the law is to restrict such conduct.<sup>135</sup> Therefore, state Blaine Amendments may be unconstitutional under *Lukumi* where they were adopted primarily to restrict the religious practices and beliefs of Catholics.

Nevertheless, Blaine Amendment challengers attempting to use the *Lukumi* principle as opposed to the more recent *Locke* decision will encounter several difficulties. First, as the *Locke* Court notes, *Lukumi* involved a criminal prohibition of animal slaughter, whereas *Locke* involved a denial of scholarship benefits.<sup>136</sup> In addition, *Lukumi* dealt with a central “religious service or rite” to the Santeria religion, but the state’s interference with religion in *Locke* “is of a far milder kind,”<sup>137</sup> Because denial of school vouchers is closer to denial of scholarship funding, and the state interference with religion in denial of vouchers for sectarian schools could be similarly characterized as “mild,”<sup>138</sup> courts may be willing to apply the ruling in *Locke* over the *Lukumi* presumption despite any evidence of a discriminatory motive.

If the Court declines to apply the *Lukumi* presumption of unconstitutionality, Blaine Amendments will likely be upheld against a Free Exercise Challenge under the Court’s current jurisprudence. Because “sending children to sectarian schools is not

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<sup>134</sup> *Lukumi*, 508 U.S. at 524.

<sup>135</sup> *Id.* at 533.

<sup>136</sup> *Id.* at 720.

<sup>137</sup> *Id.*

<sup>138</sup> See *infra* notes 139-142 and accompanying text. This is especially true where parents desire to send their children to private sectarian schools for non-religious reasons, such as in the case of Mary, the hypothetical student appearing in the introduction of this paper.

central to any religious beliefs,”<sup>139</sup> state support of “only secular education does not impermissibly burden religious practices and thus falls outside of the parameters of the Free Exercise Clause.”<sup>140</sup> In rejecting a Free Exercise challenge to a Maine tuition program that provided aid only to “nonsectarian school[s],”<sup>141</sup> the Maine Supreme Court noted: “It is well established that there is no substantial burden placed on an individual’s free exercise of religion where a law or policy merely ‘operates so as to make the practice of [the individual’s] religious beliefs more expensive.’ ”<sup>142</sup> Under this rationale, the fact that Blaine Amendments make sectarian education cost-prohibitive for certain parents is insufficient to support a finding of unconstitutionality.

Nevertheless, Blaine Amendments *should* be unconstitutional under the Free Exercise Clause because they violate the spirit and intent of the Religion Clauses by excluding religion from the education system altogether. “[F]ar from seeking to banish religion from civic life,” the purpose of the First Amendment was to ensure “that religious diversity and pluralism ‘can thrive in America as almost nowhere else in the world.’ ”<sup>143</sup> Under this view of the Religion Clauses, “it is better to favor all religion than to risk discriminating against one or more religions or risk eliminating a religious presence from the nation’s public life altogether.”<sup>144</sup> The works of James Madison and Thomas Jefferson show that the principle of religious nondiscrimination was present at the time

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<sup>139</sup> O’Neill, *supra* note 14, at 1424.

<sup>140</sup> Smith, *supra* note 112, at 1991.

<sup>141</sup> Bagley v. Raymond School Dist., 728 A.2d 127, 130 (Me. 1999).

<sup>142</sup> *Id.* at 134 (quoting Goodall v. Stafford County School Bd., 60 F.3d 168, 171 (4th Cir.1995) (quoting Braunfeld v. Brown, 366 U.S. 599, 605 (1961))).

<sup>143</sup> DeForrest, *supra* note 64, at 614.

<sup>144</sup> *Id.* at 52.

of the Constitution,<sup>145</sup> and only in the politically activist, turbulent decades of the 1960s and 1970s did the “case law seem[] to reflect certain political attitudes toward religion more than it did historical precedence or constitutional principles.”<sup>146</sup> The Court’s more recent emphasis on neutrality in *Zelman* is encouraging, but its neutrality test is far from neutral (as evidenced by *Locke*) and “does not express the intended spirit of the First Amendment.”<sup>147</sup> Although the Court may never fully return to its previous doctrinal position and that of the Framers, the current goal of neutrality may provide some basis for overturning Blaine Amendments based on the discriminatory, exclusionary motive and intent behind those provisions.

2. *Equal Protection Clause.* Because they distinguish between recipients of public funds on the basis of religion, voucher programs excluding sectarian schools will also be challenged under the Fourteenth Amendment’s Equal Protection Clause.<sup>148</sup> In analyzing state legislation under the Equal Protection Clause, the Supreme Court applies different levels of scrutiny based on the nature of the challenged action.<sup>149</sup> Because of the historical context of the Fourteenth Amendment, racial classifications

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<sup>145</sup> *Id.*

<sup>146</sup> Garry, *supra* note 1, at 24. In his *Zelman* dissent, Justice Breyer argued that the separation interpretation of the Establishment Clause was the only practical approach to use of public funds at religious institutions because of the increasing diversity of religious views, compared to the relatively homogenous makeup of early American society. *Zelman v. Simmons-Harris*, 536 U.S. 639, 720-22 (2002) (Breyer, J., dissenting). As noted by several commentators, however, the “separationist” decisions from *Lemon* to *Aguilar* were themselves influenced by anti-Catholic feelings and suspicion. See Garry, *supra* note 1, at 25; Lupu & Tuttle, *supra* note 61, at 967.

<sup>147</sup> *Id.* at 3.

<sup>148</sup> The Fourteenth Amendment provides in part: “nor shall any State . . . deny to any person within its jurisdiction the equal protection of the laws.” U.S. CONST. amend. XIV §1.

<sup>149</sup> See SULLIVAN & GUNTHER, *supra* note 111, at 640 (noting that Supreme Court has “tried to identify types of situations warranting different degrees of judicial scrutiny”).

receive the strictest scrutiny.<sup>150</sup> Certain other classifications, such as those based on gender, alienage, and legitimacy, receive some level of heightened scrutiny,<sup>151</sup> but most “economic and social legislation” is generally subject to a deferential rational basis test.<sup>152</sup> The position of religion within this hierarchy is unclear.<sup>153</sup> Although the Court has never explicitly ruled on this issue, it has indicated that classifications based on religion receive the same scrutiny as those based on race.<sup>154</sup> In *Employment Division v. Smith*, the Court stated in dicta that “[j]ust as we subject to the most exacting scrutiny laws that make classifications based on race, . . . so too we strictly scrutinize governmental classifications based on religion.”<sup>155</sup> The Court has also noted that the state may not “classify along suspect lines like race or religion,”<sup>156</sup> nor differentiate on an “unjustifiable standard such as race, religion, or other arbitrary classification.”<sup>157</sup> According to some commentators, this standard of review applies whether the law “disables only religious institutions” or whether it “treats [religious institutions] more favorably than their secular counterparts.”<sup>158</sup> These statements do not definitively indicate that the Court would find religion to be a suspect class, but they strongly suggest that religion is on the same footing as race and thus subject to strict scrutiny.

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<sup>150</sup> *Strauder v. West Virginia*, 100 U.S. 303, 310 (1880) (recognizing that 14<sup>th</sup> Amendment “was [aimed] against discrimination because of race or color”).

<sup>151</sup> SULLIVAN & GUNTHER, *supra* note 111, at 769.

<sup>152</sup> *Id.* at 644.

<sup>153</sup> *Smith*, *supra* note 112, at 1991 (noting that whether Court has decided “to treat religion as a suspect class is an unanswered question”).

<sup>154</sup> *Id.* at 1991-92.

<sup>155</sup> *Employment Div. v. Smith*, 494 U.S. 872, 886 n.3 (1990).

<sup>156</sup> *Burlington N. R.R. v. Ford*, 504 U.S. 648, 651 (1992).

<sup>157</sup> *United States v. Armstrong*, 517 U.S. 456, 464 (1996).

<sup>158</sup> Lupa & Tuttle, *supra* note 61, at 963.

Alternatively, one commentator has argued that because “the Free Exercise Clause guarantees citizens the right to practice their religion without intentional governmental interference, . . . the Blaine Amendments discriminate against citizens for practicing a fundamental right<sup>159</sup> and must therefore be analyzed under strict scrutiny.<sup>160</sup>

If religious classifications are subject to strict scrutiny, then the state legislation must be narrowly tailored to meet a “compelling” governmental interest to overcome the presumption of unconstitutionality.<sup>161</sup> More specifically, “discrimination against religious educational activities” would require a significant compelling interest.<sup>162</sup> States cannot simply point to the language of their Blaine Amendments as their compelling justification.<sup>163</sup> Colleen Carlton Smith offers five rationales for states to defend Blaine Amendments even under strict scrutiny.<sup>164</sup> These interests include: “(1) a state interest in maintaining separation of church and state as an independent state constitutional value; (2) the importance of historical practice in this area; (3) a state interest in limiting or prohibiting the flow of public money to religious organizations as a policy preference designed to avoid political divisiveness; (4) the benefits to states of avoiding any need

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<sup>159</sup> Robert A. Dietzel, *The Future of School Vouchers: A Reflection on Zelman v. Simmons-Harris and an Examination of the Blaine Amendments as a Viable Challenge to School Aid Programs*, 2003 MICH. ST. DCL L. REV. 791, 842 (2003).

<sup>160</sup> See SULLIVAN & GUNTHER, *supra* note 111, at 837-38 (noting application of heightened scrutiny to “fundamental rights or interests”). Because this “fundamental values” component is similar to due process analysis, some commentators have termed this strand of equal protection analysis as “substantive equal protection.” *Id.* at 838 (quoting Kenneth L. Karst & Harold W. Horowitz, *Reitman v. Mulkey: A Telophase of Substantive Equal Protection*, 1967 SUP. CT. REV. 39 (1967)).

<sup>161</sup> See *id.* at 667.

<sup>162</sup> Luke A. Lantta, *The Post-Zelman Voucher Battleground: Where to Turn After Federal Challenges to Blaine Amendments Fail*, 67 LAW & CONTEMP. PROBS. 213, 222 (2004) (quoting Brief of Amicus Curiae Becket Fund for Religious Liberty, *State ex rel. Gallwey v. Grimm*, 48 P.3d 274 (Wash. 2002) (No. 68565-7)).

<sup>163</sup> Smith, *supra* note 112, at 1997 (noting that the “Supremacy Clause clearly demands that states may not simply point to the language of their constitution or laws as justification for a legal classification that implicates the Fourteenth Amendment”).

<sup>164</sup> *Id.*

to impose conditions on receipt of public funds or to monitor compliance with such conditions; (5) finally, states' ability to choose, as a policy preference, to fund only those schools over which the government has more extensive control.”<sup>165</sup> As illustrated in Part III.A., however, these arguments are not without answer.<sup>166</sup> Moreover, the discriminatory context of the Blaine Amendments provides a strong basis for challenging these proposed justifications. Most Blaine Amendments were enacted to foreclose non-Protestants from asserting their views in the public school curricula.<sup>167</sup> In *Hunter v. Underwood*, the Supreme Court invalidated a provision of the Alabama Constitution disenfranchising certain felons (primarily African-American) based on legislative history indicating that a “zeal for white supremacy ran rampant” at the 1901 Convention.<sup>168</sup> Given the similar discriminatory context of most state Blaine Amendments, it is unlikely that any proposed governmental justification will be “compelling” enough to withstand attack under strict scrutiny review.<sup>169</sup>

Regardless of the plausibility of an Equal Protection challenge under strict scrutiny, this route may be less attractive to challengers seeking to gain vouchers for use at sectarian schools. As noted by one commentator, “it is unclear how the

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<sup>165</sup> *Id.*

<sup>166</sup> See *supra* notes 76-108 and accompanying text.

<sup>167</sup> See *supra* notes 63-74 and accompanying text.

<sup>168</sup> *Hunter v. Underwood*, 471 U.S. 222, 229 (1985).

<sup>169</sup> Of course, such an argument would likely not be successful in states where adoption of a Blaine Amendment or similar provision was well-divorced from the Protestant-Catholic tension that prompted the drafting of the original provision, despite the discriminatory effect of Blaine Amendments in excluding sectarian schools from voucher programs. See *Washington v. Davis*, 426 U.S. 229, 252 (1976) (upholding test administered to prospective police officers because challengers failed to show discriminatory purpose behind adoption of test, regardless of any disproportionate impact test may have had on minority applicants). Should the Court decide to apply strict scrutiny under the fundamental rights prong of Equal Protection analysis, however, a discriminatory effect may be sufficient. Cf. *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, 670 (1966) (invalidating poll tax on Equal Protection grounds because of discriminatory effect on poor voters).

application of strict scrutiny to all religious classifications would work when applied to laws granting distinctive beneficial treatment toward religion.”<sup>170</sup> Further, finding religion to be a suspect class may require reevaluation of other areas of the law where the government in fact favors religion.<sup>171</sup> For this reason, Blaine’s challengers may wish to avoid the Equal Protection argument and focus instead on the Free Exercise challenge, which is directly aimed at correcting disfavored treatment of religious institutions.<sup>172</sup>

Moreover, despite the Court’s indications to the contrary, some arguments may be made that religion is not a suspect class.<sup>173</sup> Unlike groups traditionally triggering strict scrutiny, religious groups are generally not a “discrete and insular minority.”<sup>174</sup> Where the government distinguishes between religious and secular, neither group is a minority in the traditional usage. Of course, there are many circumstances in which one religious group is actually a minority in comparison to other religious groups and thus may be politically disadvantaged; the Protestant-Catholic tension that yielded the Blaine Amendment serves as proof. If religious classification does not trigger strict scrutiny under the Court’s Equal Protection analysis, challengers face the near-impossible task of showing that Blaine Amendments violate the Equal Protection Clause under the rational basis test. Under this test, a state must simply show some rational or legitimate

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<sup>170</sup> Smith, *supra* note 112, at 1994.

<sup>171</sup> See *id.* at 1994-95. Some examples given of existing laws favoring religious institutions include “tax exemptions for churches and clergy, exemptions from employment discrimination laws, exemptions from historic preservation laws, courts’ refusal to adjudicate intrareligious disputes, and exemptions from criminal prohibitions.” *Id.*

<sup>172</sup> Lupu & Tuttle, *supra* note 61, at 963.

<sup>173</sup> See Smith, *supra* note 112, at 1994.

<sup>174</sup> *Id.* The “discrete and insular minority” language from Justice Stone’s famous “footnote 4” in *United States v. Carolene Products Co.*, 304 U.S. 144, 152-53 (1938), has often been used in support of applying heightened scrutiny to certain classifications. In essence, he suggested that “judicial intervention is more appropriate the less political processes may be trusted to even out factional winners and losers over time.” SULLIVAN & GUNTHER, *supra* note 111, at 508.

reason for the enactment of the law.<sup>175</sup> Reviewing courts do not require a “perfect fit” between the means and ends, and legislatures are free to “act on the basis of generalizations” in making laws.<sup>176</sup>

In *Eullitt v. Maine Department of Education*, for example, citizens challenging a Maine statute barring a school district “from paying tuition to any private sectarian school”<sup>177</sup> failed to establish an Equal Protection challenge for precisely this reason.<sup>178</sup> The Maine Supreme Court declined to apply strict scrutiny, noting that “[t]he Supreme Court has taken a very limited approach in recognizing suspect classification.”<sup>179</sup> Instead, the court applied the rational basis test, finding Maine’s stated interests of “concentrating limited states funds on its goal of providing secular education, avoiding entanglement, and allaying concerns about accountability that undoubtedly would accompany state oversight of parochial schools’ curricula and policies” sufficient to sustain the statute.<sup>180</sup>

The Maine Supreme Court’s approach, although consistent with the Supreme Court’s generally deferential review of state laws not involving a suspect class or fundamental right,<sup>181</sup> is undermined by recent decisions such as *Romer v. Evans* that suggest Blaine Amendments might not survive even this low-level scrutiny.<sup>182</sup> *Romer* involved a challenge to a proposed referendum that called for an amendment to

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<sup>175</sup> See SULLIVAN & GUNTHER, *supra* note 111, at 644.

<sup>176</sup> *Id.*

<sup>177</sup> *Eullitt v. Maine, Dept. of Educ.*, 386 F.3d 344, 346 (2004).

<sup>178</sup> *Id.* at 356.

<sup>179</sup> *Id.* at 353 n.3.

<sup>180</sup> *Id.* at 356.

<sup>181</sup> See *supra* note 149, at 644-45.

<sup>182</sup> *Romer v. Evans*, 517 U.S. 620, 635 (1996).

Colorado's constitution repealing local gay rights ordinances that prohibited various kinds of discrimination.<sup>183</sup> The Supreme Court determined that the proposed amendment was unconstitutional under the Equal Protection Clause<sup>184</sup> for two primary reasons: (1) "the amendment has the peculiar property of imposing a broad and undifferentiated disability on a single named group;" and (2) "its sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class it affects."<sup>185</sup> In analyzing this second point, the Court expanded on the idea that the "disadvantage imposed is born of animosity toward the class of persons affected."<sup>186</sup> Relying on *Department of Agriculture v. Moreno*, the Court stated: "If the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest."<sup>187</sup> As Blaine Amendments were inspired by animosity toward Catholics and were designed to "curb[] the Catholic influence on school boards,<sup>188</sup> they may be unconstitutional under this "deference with teeth" rational basis test. Despite the lack of explicit reference to

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<sup>183</sup> *Id.* at 623-24. The amendment read in full:

Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination. This Section of the Constitution shall be in all respects self-executing.

*Id.* at 624

<sup>184</sup> *Id.* at 635.

<sup>185</sup> *Id.* at 632.

<sup>186</sup> *Id.* at 634.

<sup>187</sup> *Id.* at 634-35 (quoting *Dept. of Agric. v. Moreno*, 413 U.S. 528, 534 (1973)).

<sup>188</sup> DeForrest, *supra* note 64, at 566. This discrimination was even more obvious given the fact that religious activities such as prayer and Bible readings remained part of public school life for many years after the adoption of state Blaine Amendments.

Catholics as opposed to other religious groups in state Blaines, the anti-Catholic motivation of such provision is well-documented<sup>189</sup> and likely provides sufficient evidence of improper motivation, especially in the context of educational choice. This approach, however, is not without its own problems. Not only must this battle be fought on a state-by-state basis based on the specific history surrounding the adoption of each state provision, but it also “invites the possibility of successful contemporary reenactment.”<sup>190</sup> Nevertheless, if successful, voucher proponents will at least begin anew, and state legislatures can reform policy without a century’s worth of discrimination in the way.

3. *Substantive Due Process*. Finally, state Blaine Amendments may be challenged under the Due Process Clause of the Fourteenth Amendment,<sup>191</sup> which “provides heightened protection against governmental interference with certain fundamental rights and liberty interests.”<sup>192</sup> In *Pierce v. Society of Sisters*, the Court acknowledged the “liberty of parents and guardians to direct the upbringing and education of children under their control”<sup>193</sup> and struck down an Oregon statute that required compulsory attendance at public schools.<sup>194</sup> More recently, the Court

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<sup>189</sup> See *supra* note 69 and accompanying text.

<sup>190</sup> Lupu & Tuttle, *supra* note 61, at 969.

<sup>191</sup> The Fourteenth Amendment provides in part: “nor shall any State deprive any person of life, liberty, or property, without due process of law.” U.S. CONST. amend. XIV, §1.

<sup>192</sup> *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997).

<sup>193</sup> *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925).

<sup>194</sup> *Id.* at 536. Interestingly, the statute at issue was yet another attempt by the Protestant majority to restrict the educational choices of the minority Catholic immigration population. See Paula Abrams, *The Little Red Schoolhouse: Pierce, State Monopoly of Education and the Politics of Intolerance*, 20 CONST. COMMENT. 61, 63 (2003) (noting “Oregon ballot initiative was largely the product of anti-Catholic and anti-immigrant sentiments”).

“breath[ed] new life into *Pierce*”<sup>195</sup> in *Troxel v. Granville*<sup>196</sup> and reinforced the right of a parent to control the upbringing of children in the context of visitation rights of grandparents.<sup>197</sup> Because the Court has not definitively clarified the nature of this right, however, the strength of this argument is uncertain.<sup>198</sup>

Several scholars have recognized that *Pierce* and *Troxel* may provide a constitutional argument in support of voucher programs generally, especially for low-income parents who can not afford private schools.<sup>199</sup> The due process argument arguably takes on special meaning in the context of poor parents who cannot afford to exercise their constitutional right to send their children to private schools, because “the state should be held accountable for the special compulsory effect that its imposition of a general compulsory education requirement has on the poor.”<sup>200</sup> Although the Court

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<sup>195</sup> Ira Bloom, *The New Parental Rights Challenge to School Control: Has the Supreme Court Mandated School Choice?*, 32 J.L. & EDUC. 139, 169 (2003). Professor Bloom emphasizes that seven of the Justices “rely heavily on *Pierce* to underscore parents rights to control the education of their children.” *Id.* at 172-74.

<sup>196</sup> *Troxel v. Granville*, 530 U.S. 57, 65-68 (2000).

<sup>197</sup> *Troxel*, 530 U.S. at 60-63.

<sup>198</sup> *Pierce* was decided under a less restrictive test than the current requirement that the state justify its restriction by a compelling state interest. See 16B AM JUR. 2D CONSTITUTIONAL LAW §913 (2004). Further, several commentators have noted that it would likely be decided strictly on First Amendment grounds today. ROTUNDA & NOWAK, *supra* note 87, at § 21.7. While *Troxel* did acknowledge the right announced in *Pierce*, the Justices failed to agree on the level of scrutiny required to review state regulations impacting this liberty interest. See Bloom, *supra* note 195, at 174 (“The standard of review . . . may range from the plurality opinion’s presumption in favor of a parental decision, to Justice Thomas’s desire to apply strict scrutiny to any governmental infringement . . .”).

<sup>199</sup> See Bloom, *supra* note 195, at 183 (arguing that liberty interest recognized in these cases “should support a demand for assignment to a public school rated as satisfactory or for choice of one of the evolving governance options . . . [such as] charter schools or vouchers). *But see* Gary J. Simson, *School Vouchers and the Constitution—Permissible, Impermissible, or Required?*, 11 CORNELL J. L. & PUB. POL’Y 553, 561-62 (2002) (arguing that *Pierce* would not “support a constitutional claim to vouchers for the poor” because parental interest differs from other fundamental rights as it deals with “another person’s autonomy,” and because public education does not “substantially impede[] parents in shaping their children’s values and future direction”).

<sup>200</sup> See Simson, *supra* note 199, at 556-57 (noting that compulsory education laws requiring parents to send their child to free public school as only school they can afford seemingly violates parental right recognized in *Pierce* by “structur[ing] parental options in a way that makes parents’ ability to pay critically relevant to their ability to make a free choice”). Dean Simson notes that as an alternative to voucher

has invalidated state regulations where the burdens imposed on poorer citizens hinder their exercise of certain fundamental rights, such as voting and access to the courts,<sup>201</sup> it has refused to extend this principle to other rights more directly tied to personal choice, such as abortion.<sup>202</sup> Therefore, the Court is unlikely to find that a parent's right to direct the education of his child requires the state to fund the parent's exercise of that choice.

Regardless of the viability of a due process argument in support of vouchers generally, a stronger substantive due process argument may be made in support of inclusion of sectarian schools when a state decides to implement a voucher program, because of the added weight of the Free Exercise Clause implications.<sup>203</sup> Arguably, a voucher program excluding sectarian schools pursuant to a Blaine Amendment or compelled support clause interferes with both the parent's right to direct their child's education and the child's free exercise rights.<sup>204</sup> The critical issue, however, is whether

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programs, states could choose to "establish an exemption from compulsory education laws for parents who cannot afford to pay for private education." *Id.* He discounts this option as impracticable, however, both because of its "troubling" policy and its almost certain failure in actually persuading poor parents to remove their children from school entirely. *Id.*

<sup>201</sup> *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, 670 (1966) (invalidating state poll tax requirement); *Griffin v. Illinois*, 351 U.S. 12, 19 (1956) (holding that state must provide trial transcript or equivalent to appealing indigent criminal defendant). Note, however, that the court has most often relied on the Equal Protection Clause in analyzing economic barriers. See *Harper*, 383 U.S. at 664; *Griffin*, 351 U.S. at 13. Significantly, the Court has declined to include education as a fundamental right on par with voting and court access. *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973).

<sup>202</sup> *Harris v. McRae*, 448 U.S. 297, 316 (1980) ("[I]t simply does not follow [from *Roe v. Wade*] that a woman's freedom of choice carries with it a constitutional entitlement to the financial resources to avail herself of the full range of protected choices. . . . [A]lthough government may not place obstacles in the path of a woman's exercise of her freedom of choice, it need not remove those not of its own creation. Indigency falls in the latter category.").

<sup>203</sup> Simson, *supra* note 199, at 562.

<sup>204</sup> *Id.*

allowing only secular options substantially burdens these rights.<sup>205</sup>

In *Wisconsin v. Yoder*, for example, the Supreme Court invalidated a compulsory attendance law challenged by Amish parents who objected to public education on religious grounds.<sup>206</sup> Although primarily decided on First Amendment grounds, the Court relied in part upon the parental right announced in *Pierce*.<sup>207</sup> In finding the “substantial burden” test met, Justice Burger noted that the imposition of the compulsory education law upon Amish children “would gravely endanger if not destroy the free exercise of respondents’ religious beliefs.”<sup>208</sup> When read in conjunction with lower court cases distinguishing *Yoder* based on the strength of the free exercise claim presented by the Amish,<sup>209</sup> it is unlikely that voucher challengers will be able to show that exclusion of sectarian schools from voucher programs “substantially burdens” free exercise rights, especially as parents have other opportunities to instill religious values in their children.<sup>210</sup>

Nevertheless, *Troxel’s* reaffirmance of the centrality of the parent’s role in a child’s upbringing seemingly strengthens the due process argument because the

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<sup>205</sup> Generally, “the test of substantive due process is whether a ‘compelling state interest’ is advanced by the regulation and whether the regulation is the ‘least restrictive method’ available to effectuate the compelling state interest.” 16B AM JUR. 2D CONSTITUTIONAL LAW §913 (2004). Because of the unique nature of a constitutional claim based on due process and free exercise rights, however, our analysis focuses on the substantial burden test utilized in similar cases.

<sup>206</sup> *Wisconsin v. Yoder*, 406 U.S. 205, 234 (1972).

<sup>207</sup> *Id.* at 232.

<sup>208</sup> *Id.* at 219.

<sup>209</sup> *E.g.*, *Brown v. Hot, Sexy, and Safer Products, Inc.*, 68 F.3d 525, 539 (1st Cir. 1995) (upholding district court’s dismissal of due process and free exercise challenge brought by parents of 15-yr old students who had been required to attend AIDS awareness program including sexually explicit material). The First Circuit first found that the parents failed to state a due process claim because the *Pierce* principle did not confer a constitutional right for parents to “dictate individually what the schools teach their children.” *Id.* at 534. The court then distinguished *Yoder* based on the Supreme Court’s emphasis in that case that the law at issue “threatened [the Amish’s] entire way of life.” *Id.* at 539.

<sup>210</sup> *Simson*, *supra* note 199, at 563-64.

decision “d[id] not rest upon the presence of a religious element in the parental decision making.”<sup>211</sup> Thus, challengers may have no need to rely on the additional free exercise argument propounded in *Yoder*. Given the lack of consensus in *Troxel*, however, it is unclear that the scope of this parental liberty right is broad enough to require states to include religious options in voucher programs.<sup>212</sup> Until the Court refines the *Pierce* liberty interest, it is unlikely that parents seeking inclusion of sectarian choices in voucher programs can rely on *Pierce* and *Troxel* to overturn Blaine Amendments and similar provisions.

#### IV. CONCLUSION

Despite the need for improvement in the country’s public schools, the evidence that voucher programs might provide this positive influence through diversity and competition, and the Supreme Court’s ruling that private choice voucher programs providing aid to sectarian schools do not violate the Establishment Clause, Blaine Amendments continue to stand in the way of these programs. The discriminatory history of most of these provisions provides a basis for challenge under the Free Exercise and Equal Protection Clauses, but the success of such arguments is unclear under the Supreme Court’s current jurisprudence. Although history suggests that providing aid to sectarian schools does not violate the original intent and spirit of the First Amendment, the Court has recently refused to require a state to extend aid to scholarship students attending private theological colleges. Thus, unless the court is

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<sup>211</sup> Bloom, *supra* note 195, at 175.

<sup>212</sup> In fact, Justice O’Connor, writing for the plurality, specifically declined to delineate the scope of this right. *Troxel v. Granville*, 530 U.S. 57, 73 (2000).

swayed by the discriminatory background of individual state Blaine Amendments, such provisions will likely withstand a Free Exercise Clause challenge. Similar uncertainty surrounds an Equal Protection challenge, as the success of such a challenge rests on the Court's willingness to recognize religion as a suspect class prompting strict scrutiny, or, alternatively, willingness to rely on any discriminatory motive behind such provisions. Further, even if individual state Blaine Amendments are overturned, states may reinstate similar prohibitions against funding of religious activities based on other legitimate reasons. Finally, even though the Court has recently reaffirmed a parent's right to direct his or her child's education, Blaine Amendments will likely survive a substantive due process challenge, given their less-than-total burden on the exercise of religious liberties.

Although arguments may be made on both sides of the issue, Blaine Amendment supporters seem likely to prevail under the Court's current jurisprudence and may continue to preclude voucher programs from providing aid to sectarian schools. Given the overwhelming number of sectarian private schools in the country, however, voucher programs must include sectarian schools in order to be effective. In a time when legislators and parents alike are struggling to understand and find ways to correct the failures of the public school system, this result is unfortunate and ultimately harms those students like Mary, who desire to attend a private sectarian school not to further their faith, but to change their future.

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