



# Blaine's Name in Vain?: State Constitutions, School Choice, & Charitable Choice

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**BLAINE’S NAME IN VAIN?:  
STATE CONSTITUTIONS, SCHOOL CHOICE, AND CHARITABLE CHOICE**

**JILL GOLDENZIEL<sup>1</sup>**

*In this article, Ms. Goldenziel explores the growing controversy over “no-funding provisions,” state constitutional provisions that restrict state funding of religious institutions. These provisions, allegedly rooted in anti-Catholic bigotry, may threaten state implementation of school choice programs and faith-based initiatives involving public funding of religious social service organizations. Ms. Goldenziel argues that these no-funding provisions, which are commonly termed “Blaine Amendments,” “Little Blaines,” or “Baby Blaines,” are often unrelated to the failed federal Blaine Amendment, and do not always share the federal amendment’s infamous anti-Catholic history. In the first study of its type, Ms. Goldenziel surveys the language and history of constitutional provisions prohibiting funding of religious institutions in all fifty states, and details the constitutional history and judicial interpretation of these provisions in eight representative states: Ohio, Wisconsin, Arizona, Florida, Colorado, Michigan, Vermont, and Maine. Ms. Goldenziel concludes that the fates of school vouchers and faith-based initiatives will not rest on the so-called “Blaine Amendments,” but on the ideological and jurisprudential tendencies of state judiciaries. Debate over school choice and charitable choice should therefore move from courtrooms to the political arena.*

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<sup>1</sup> Associate, Becker, Glynn, Melamed, & Muffly, New York, NY. J.D., NYU School of Law, 2004. A.B. Princeton University 2000. Thanks to Noah Feldman, John Sexton, Steven K. Green, Helen Hershkoff, Amy Powell, Paul Rodney, Abigail Stewart, Priyamvada Sinha, the Princeton and Columbia University library staff, and especially to Michael Pine.

## I. INTRODUCTION

The Supreme Court has just multiplied the controversy over original intent in constitutional law by fifty. In 2002, the Supreme Court held that the participation of religious schools in Cleveland's school voucher program in *Zelman v. Simmons-Harris* did not violate the federal establishment clause.<sup>2</sup> Yet two years later, the Supreme Court implicitly approved the use of state constitutional amendments to provide stronger protection from religious establishment than that guaranteed by the federal constitution.<sup>3</sup> These "no-funding" provisions, which prohibit state funding of religious institutions, exist in most state constitutions. State courts may invoke these provisions to block school choice and charitable choice programs, like the Cleveland voucher program, that involve public funding of faith-based educational or social service organizations. However, pro-voucher and pro-charitable choice activists argue that the prejudicial, anti-Catholic history of these provisions renders them invalid. Will state jurists apply original intent analysis, strict construction, or another form of interpretation to these provisions? And how will their decisions affect the future of school choice and charitable choice in the states?

These questions are currently fueling voucher debates across the country. Spurred by the Court's ruling in *Zelman*, school choice advocates have launched new political initiatives in states across the country. In the past three years, Florida and Colorado, among others, have established new school choice programs.<sup>4</sup> Congress recently approved the first federal school

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<sup>2</sup> *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).

<sup>3</sup> *Locke v. Davey*, 124 S.Ct. 1307, 1314 note 7 (2004).

<sup>4</sup> Florida Opportunity Scholarship Program, FL. STAT. ANN. tit. XVI, § 229.0537 (2002); Colorado Opportunity Contract Pilot Program, H.B. 1160 (2003).

voucher program for Washington, D.C.<sup>5</sup> School choice proponents successfully added referenda to the 2002 election ballots in California and Michigan.<sup>6</sup> Although these proposals were defeated, the solidification of Republican control in the 2004 elections has increased the likelihood that other states will soon create voucher programs. In 2000 alone, “at least 21 states . . . proposed voucher legislation.”<sup>7</sup> A bitter voucher battle is currently underway in South Carolina.<sup>8</sup>

No-funding provisions are also likely to be at issue in litigation over state involvement in “charitable choice” programs. The 1996 Welfare Reform Act first introduced provisions, known informally as charitable choice legislation, that allow faith-based organizations to participate in new federal welfare programs.<sup>9</sup> Since then, charitable choice provisions have been incorporated into several other pieces of federal legislation.<sup>10</sup> In 2001, President George W. Bush established the White House Office of Faith-Based and Community Initiatives to oversee efforts to encourage the participation of religious and community-based organizations in the activities of all federal agencies.<sup>11</sup> Currently, twenty governors and have established similar offices or

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<sup>5</sup> District of Columbia Student Opportunity Scholarship Act of 2003, H.R. 684, 108th Cong. (2003); Senate Legislative Branch Appropriations Act of 2004, S.1373, 108th Cong. (2004) (authorizing budget including funds for D.C. school voucher program).

<sup>6</sup> See <http://www.heritage.org/Research/Education/Schools/california.cfm> (discussing California’s ballot initiative); <http://www.heritage.org/Research/Education/Schools/michigan.cfm> (discussing Michigan’s ballot initiative) (last visited Sept. 1, 2003).

<sup>7</sup> Nat’l Conf. of St. Legis., *School Vouchers*, at <http://www.ncsl.org/programs/educ/voucher.htm> (last visited Mar. 7, 2005).

<sup>8</sup> Bill Robinson, *School Voucher Measure Criticized*, THE STATE, Oct. 8, 2004, at <http://www.thestate.com/mld/thestate/news/9864771> (last visited Mar. 7, 2005); Jennifer Talheim, *Leaders Observe Voucher Program*, MyrtleBeachOnline.com, December 16, 2004, at <http://www.myrtlebeachonline.com/mld/myrtlebeachonline/news/local/10428447.htm?template=contentM>, (last visited Mar. 7, 2005).

<sup>9</sup> Personal Responsibility and Work Opportunity Reconciliation Act, 42 U.S.C. § 60a (2000) (permitting participation by FBOs in the Temporary Assistance to Needy Families and Welfare to Work programs). Since the passage of this act, all subsequent legislative provisions permitting the participation of religious organizations in federally-funded programs have become informally known as “charitable choice” provisions.

<sup>10</sup> See, e.g., Community Services Block Grant of 1998, 42 U.S.C. § 9920 (2000); Children’s Health Act of 2000, 42 U.S.C. § 300x-65 (2000); Community Solutions Act of 2001, H.R. 7, 107th Cong. (2001); CARE Act. S. 472, 108th Cong. (2003);

<sup>11</sup> Exec. Order No. 13,199, 37 WKLY. COMP. PRES. DOC. 235 (Jan. 29, 2001).

liaisons to assist religious and community-based organizations in their respective states.<sup>12</sup>

Charitable choice programs have met a great deal of opposition on both the federal and state levels.<sup>13</sup>

The Supreme Court's 2004 decision in *Locke v. Davey* has unearthed the no-funding provisions as a potential way to block both school choice and charitable choice programs. In *Davey*, the state of Washington revoked a college student's merit-based "Promise Scholarship" after he declared a major in Pastoral Ministries.<sup>14</sup> The state premised its revocation of the scholarship on the state's no-funding provision, which prohibits the use of state funds for religious education.<sup>15</sup> The Washington Supreme Court had previously invoked its no-funding provision to prohibit the use of state vocational training funds to support a blind man's pastoral studies at a Christian college.<sup>16</sup> While the district court granted summary judgment for the state, the Ninth Circuit reversed in July 2002, invalidating the state law that excludes theology students from benefiting from the scholarship program and invigorating school choice proponents.<sup>17</sup>

In February 2004, the Supreme Court reversed the Ninth Circuit's decision in a 7-2 opinion authored by Chief Justice Rehnquist. The Court held that state constitutions may extend greater religion-state separation and greater guarantees of religious liberty to state citizens beyond those afforded by the federal constitution. The Court reasoned that the state's interest in not funding theological instruction was based on a desire to avoid establishment of religion, and

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<sup>12</sup> Important Contact Information, White House Office of Faith-Based and Community Initiatives, <http://www.whitehouse.gov/government/fbci/contact.html#liaisons> (last visited Mar. 13, 2005).

<sup>13</sup> See generally Jill I. Goldenziel, *Administratively Quirky, Constitutionally Murky: The Bush Faith-Based Initiative*, 8 N.Y.U. J. LEGIS. & PUB. POL'Y (forthcoming Spring 2005).

<sup>14</sup> *Davey v. Locke*, 299 F.3d at 750.

<sup>15</sup> *Id.*

<sup>16</sup> *Witters v. State Comm'n for the Blind*, 771 P.2d 1119 (1989) (on remand from *Witters v. Washington Dep't of Servs. For the Blind*, 474 U.S. 481 (1986)).

<sup>17</sup> Institute for Justice, *Ninth Circuit Ruling in Religious Funding Case Could Remove "Blaine Amendment" Obstacle to School Choice*, July 19, 2002, at [http://www.ij.org/media/school\\_choice/misc/7\\_19\\_02pr.shtml](http://www.ij.org/media/school_choice/misc/7_19_02pr.shtml) (quoting Institute for Justice Senior Attorney Richard Komer).

not on hostility toward religion, and so denying the scholarship to theology students was permissible.

In amicus briefs submitted to the Supreme Court, school choice and charitable choice activists argued that the provision at issue in *Davey* should be invalidated because it is a state “Blaine Amendment.”<sup>18</sup> The Washington provision and others like it, also known as “Little Blaines” or “Baby Blaines,” are nicknamed after a similar federal constitutional amendment proposed by Congressman James G. Blaine in the late nineteenth century. In amicus briefs in *Davey* and elsewhere, school choice proponents have argued that the no-funding provisions are relics of anti-Catholic bigotry that violate the Free Exercise and Equal Protection clauses and should be repealed.<sup>19</sup> However, in a footnote, the Court stated that the provision in dispute in *Davey* was not a Blaine Amendment, since Article I, §11 of the Washington Constitution originated in the federal Enabling Act of 1889, and not in an Anti-Catholic movement.<sup>20</sup> Since “neither *Davey* nor amici have established a credible connection between the federal Blaine Amendment and Article I, §11,” the Court found that “the [federal] Blaine Amendment’s history is simply not before us.”<sup>21</sup> The Supreme Court’s treatment of the federal Blaine Amendment’s history in *Davey* will make it harder for school choice and charitable choice proponents to advance historical arguments against the Blaine Amendments in lower courts.

However, the specter of Blaine still remains in those states whose amendments have a more tangible connection to the history of the federal Blaine Amendment. School choice and charitable choice activists have launched initiatives and lawsuits specifically targeting these no-

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<sup>18</sup> See, e.g., Richard W. Garnett, Brief Amici Curiae the Becket Fund for Religious Liberty, the Catholic League for Religious and Civil Rights, and Historians and Legal Scholars in Support of Respondent, *Locke v. Davey*, 124 S.Ct. 1307 (2004).

<sup>19</sup> See, e.g., *id.*; see, e.g., Gall, *supra* note 23; Mauro, *supra* note 23; Rossi, *supra* note 23; Treene, *supra* note 23.

<sup>20</sup> *Locke v. Davey*, 124 S.Ct. 1307, 1314 note 7 (2004).

<sup>21</sup> *Id.*

funding provisions.<sup>22</sup> Many view these “no-funding provisions” as a bar to school choice and charitable choice programs.<sup>23</sup> Confirming these fears, Florida’s appellate court, sitting en banc, recently affirmed a lower court’s ruling that the state’s school choice program is unconstitutional because it conflicts with the state’s no-funding provision.<sup>24</sup> The case is currently on appeal before Florida’s Supreme Court.<sup>25</sup> School choice and charitable choice supporters fear the impact of such a ruling for other state programs, and supporters of school choice fear that other state and federal courts will adopt a similar interpretation.<sup>26</sup> For this reason, the so-called “Blaine Amendments” have been dubbed the “most prominent weapon” of school choice opponents in the wake of *Zelman*.<sup>27</sup>

However, the threat of the no-funding provisions to school choice and charitable choice programs is overstated. The tainted past of the federal Blaine Amendment and its relevance to modern state jurisprudence is exaggerated. Only scant historical records and incomplete constitutional convention journals document the enactment of these amendments in the states, and the few available accounts reveal little evidence of bigotry. Whatever anti-Catholic animus might have lain behind the no-funding provisions at their inception has not yet been shown to

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<sup>22</sup> See, e.g., Becket Fund Blaine Amendment Website, <http://www.blaineamendments.org> (arguing that the Blaine Amendments are anti-Catholic relics and should be repealed); *Pucket v. Rounds*, No. 03-CV-5033, (D. S.D. Apr. 23, 2003) (challenging South Dakota’s Blaine Amendment).

<sup>23</sup> See, e.g., Robert William Gall, *The Past Should Not Shackle the Present: The Revival of a Legacy of Religious Bigotry by Opponents of School Choice*, 59 ANN. SURV. AM. L. 413 (2003); Tony Mauro, *Voucher Advocates Plan Next Push to High Court* (August 5, 2002), at <http://www.law.com/jsp/article.jsp?id=1024079086859> (last visited Sept. 1, 2003) (discussing controversy over Blaine Amendments as it relates to the voucher debate); Holly Lebowitz Rossi, *State Constitutions Are Next Hurdles in Vouchers Fight* (August 8, 2002), at <http://pewforum.org/news/display.php?NewsID=1413> (last visited Sept. 1, 2003); Eric W. Treene, *The Grand Finale is Just the Beginning: School Choice and the Coming Battle Over Blaine Amendments*, at <http://www.fed-soc.org/pdf/FedSocBlaineWP.html.pdf> (last visited Sept. 1, 2003).

<sup>24</sup> *Bush v. Holmes*, 886 So.2d 340, 358; 193 Ed. Law Rep. 938, 29 Fla. L. Weekly D2543 (Fla.App. 1 Dist. Nov 12, 2004) (*en banc*) (holding “For a court to interpret the no-aid provision as adding nothing [beyond that language which is identical to the First Amendment of the U.S. Constitution] to article I, section 3 of the Florida Constitution would require that court to ignore the clear meaning of the text of the provision and its formative history.”).

<sup>25</sup> *Voucher Ruling May Take Awhile*, MIAMI HERALD, Dec. 21, 2004, at <http://www.miami.com/mld/miamiherald/news/politica/10464079> (last visited Mar. 7, 2005).

<sup>26</sup> Linda Kleindienst, *For Now, Students Can Use Vouchers*, ORLANDO SENTINEL, August 7, 2002; and Linda Kleindienst, *Bush Appeals Ruling that Tossed Vouchers*, SUN-SENTINEL (Fort Lauderdale, Fla.), August 7, 2002.

<sup>27</sup> Gall, *supra* note 23, at 414.

influence current state jurisprudence. Also, rather than being an insurmountable obstacle to school choice and charitable choice legislation, the no-funding provisions appear quite malleable in the hands of state jurists. Several state supreme courts have upheld school choice programs by reinterpreting their no-funding provisions or evading the implications of their text altogether.

This paper argues that the ambiguous history of the no-funding provisions renders them helpful to neither side of the school choice and charitable choice debates. Despite the potential implications of the history of the state no-funding provisions for political and legal battles over school choice and charitable choice programs, no study yet compares the legislative and legal history of the no-funding provisions in each individual state. Here, I begin this project by presenting a general discussion of the current case law and scholarship on the no-funding provisions and related provisions in all fifty states. I then focus on eight representative states, detailing the legislative history, political context, and case law pertinent to their no-funding provisions. After discussing the significance of the interpretation of the no-funding provisions in the field of state constitutional law, I conclude by elaborating on the implications of the state no-funding provisions for the debates over school choice and charitable choice.

## **II. RELEVANT STATE CONSTITUTIONAL PROVISIONS**

Two primary types of state constitutional provisions present potential obstacles to school choice and charitable choice programs: no-funding provisions and compelled support provisions. Many states have both provisions. Scholars disagree over the precise meaning of what constitutes a no-funding provision or a compelled support provision. Under the broadest reading, only three states have neither no-funding provisions nor compelled support provisions:

Louisiana, Maine, and North Carolina.<sup>28</sup> These provisions may exist as distinct constitutional sections or as part of one religion-related section that includes a state's free exercise and/or establishment clauses.

### **A. No-Funding Provisions: The So-Called “Blaine Amendments”**

The first category of state constitutional provisions that may serve as a bar to school choice and charitable choice programs explicitly prohibits public funding of religious institutions. These provisions are often called “Blaine Amendments,” a name which stems from a similar, federal constitutional amendment that was proposed in 1876 by Congressman James G. Blaine of Maine. The Blaine Amendment was drafted in the wake of controversies over the public funding of sectarian education and religious exercises in the public schools.<sup>29</sup> Beginning in the mid-nineteenth century, Catholic immigrants increasingly began to lobby for, and receive, parochial school funding.<sup>30</sup> Non-Catholics responded by calling for legislation prohibiting public funding of “sectarian” schools.<sup>31</sup> Two federal constitutional amendments to this end were introduced in Congress in 1871 and 1872, but both bills failed.<sup>32</sup> In an 1875 speech before the convention of the Society of the Army of the Tennessee, President Grant came out in support of such an amendment, encouraging Americans to resolve that “not one dollar,” appropriated for the support of free schools “shall be appropriated to the support of any sectarian schools,” and for religion to be left to “the family altar, the Church, and the private school, supported entirely

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<sup>28</sup> *c.f.* Ellen M. Halstead, *After Zelman v. Simmons-Harris, School Voucher Programs Can Exclude Religious Schools*, 54 SYRACUSE L. REV. 147, 167 (2004).

<sup>29</sup> Steven K. Green, *The Blaine Amendment Reconsidered*, 36 J. AM. LEGAL HIST. 42 (January 1992); Steven K. Green, *Blaming Blaine: Understanding the Blaine Amendment and the No-Funding Principle*, 2 FIRST AMENDMENT L. REV. 107 (2004). Green's two articles present the most complete treatments of the history of the federal Blaine Amendment available. *C.f.* Noah Feldman, *Non-Sectarianism Reconsidered*, 18 J. L. & POL. 65 (2002).

<sup>30</sup> Green, *The Blaine Amendment Reconsidered*, 36 J. AM. LEGAL HIST. 42.

<sup>31</sup> *Id.* at 43; *See generally* Green, *Blaming Blaine*, 2 FIRST AMENDMENT L. REV. 107 (2004).

<sup>32</sup> *Id.*

by private contributions.”<sup>33</sup> Grant’s paean to the importance of “Keep[ing] the Church and State forever separate”<sup>34</sup> was subsequently praised in newspapers, Protestant publications, and “free thought” journals alike.<sup>35</sup>

Blaine, an ambitious politician with presidential aspirations,<sup>36</sup> seized the opportunity to rally behind the President and unite the Republican Party.<sup>37</sup> He proposed a constitutional amendment that would fulfill Grant’s ideal, providing that “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>38</sup> Then, as now, most religious schools were Catholic schools, and Blaine’s “non-sectarianism” often, but not exclusively, served as a facade for his followers’ anti-Catholic sentiments.<sup>39</sup> However, Blaine maintained that he was not anti-Catholic, and no evidence suggests that he had any personal animosity toward Catholics.<sup>40</sup> Blaine’s mother was Catholic and his daughters were educated in Catholic schools. Publicly, Blaine maintained that the amendment was merely meant to settle the “School Question,” the day’s most heated political issue.<sup>41</sup> Although the federal Blaine Amendment failed narrowly in the Senate in 1876,<sup>42</sup> many states subsequently

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<sup>33</sup> Quoted in *Id.* at 47-48.

<sup>34</sup> *Id.* at 48.

<sup>35</sup> *Id.* at 48.

<sup>36</sup> *Id.* at 49.

<sup>37</sup> *Id.* at 48-54.

<sup>38</sup> Quoted in *Id.* at 53, n 96.

<sup>39</sup> For an thorough discussion of non-Sectarianism as more than anti-Catholicism, *See* Noah Feldman, *Nonsectarianism Reconsidered*, 18 J.L. & Pol. 65 (2002) and Steven K. Green, *Blaming Blaine: Understanding the Blaine Amendment and the No-Funding Principle*, 2 FIRST AMENDMENT L. REV. 107 (2004).

<sup>40</sup> Steven K. Green, Brief Amicus Curiae of Historians and Law Scholars on Behalf of Petitioners Gary Locke, et. al., 2003 WL 21697729, in *Locke v. Davey* 124 S.Ct. 1307 (2004).

<sup>41</sup> Green, *supra* note 29, at 54. Green also notes that evidence substantiates Blaine’s lack of personal animosity toward Catholics. Green, *supra* note 29, at 54, n. 103.

<sup>42</sup> Green, *supra* note 29, at 57.

adopted similar language in their constitutions, and such provisions have been dubbed “Blaine Amendments.”

### ***B. Compelled Support Provisions***

Besides no-funding provisions, many state constitutions have “compelled support” provisions that may also be construed to prohibit school choice and charitable choice programs. Compelled support provisions provide that no citizen of a state will be compelled by the state to attend or support religious institutions.<sup>43</sup> The language of these provisions originated in Virginia’s *Bill for Establishing Religious Freedom*, authored by Thomas Jefferson.<sup>44</sup> Arguing that civil authority should not interfere with religion, the Bill proclaimed that “No man shall be compelled to frequent or support any religious worship, place or ministry whatsoever . . . .”<sup>45</sup> James Madison introduced the bill in the Virginia legislature in January 1786, and with the support of a broad coalition of Protestant sects, it passed.<sup>46</sup> Later, the Virginia constitution adopted a similar “compelled support” provision, and several of the earliest state constitutions followed suit, including Pennsylvania, and Vermont.<sup>47</sup> Today, twenty-nine states have compelled support provisions<sup>48</sup> modeled from Jefferson’s *Bill for Establishing Religious Freedom* and based on a shared distaste for the practices of taxation and coercion to support an

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<sup>43</sup> *E.g.*, VA CONST. Art. I, § 16: “No man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever ... or the people of any district within this Commonwealth, to levy on themselves or others, any tax for the erection or repair of any house of public worship, or for the support of any church or ministry.”

<sup>44</sup> See G. Alan Tarr, *Church and State in the States*, 64 WASH. L. REV. 73, 86 (1989).

<sup>45</sup> *Id.* at 82.

<sup>46</sup> *Id.* at 82.

<sup>47</sup> *Chittenden Town School Dist. v. Department of Educ.*, 169 Vt. 310 (Vt. Jun. 11, 1999), *cert. denied*, *Andrews v. Vermont Department of Educ.*, 528 U.S. 1066 (1999) (holding compelled support provision rendered voucher program unconstitutional); *c.f.* Halstead, *supra* note 28, at 170.

<sup>48</sup> Richard D. Komer, *School Choice: The State Constitutional Challenge*, 10 LIBERTY AND LAW 5, at [http://www.ij.org/publications/liberty/2001/10\\_5\\_01\\_f.asp](http://www.ij.org/publications/liberty/2001/10_5_01_f.asp) (last visited Sept. 1, 2003).

established church.<sup>49</sup> Like the no-funding provisions, at least one state's compelled support provision has been used to prohibit a school choice program.<sup>50</sup>

### III. MODERN BLAINE DEBATES

In recent and pending actions, school choice proponents have charged that the “Blaine Amendments” are relics of anti-Catholic bigotry that states have continually used to discriminate against religious minorities, in violation of the free exercise clause of the federal First Amendment. In support of their contention, they cite decisions in which no-funding provisions have been used to block the equal participation of religious educational institutions on par with similar secular institutions in programs such as busing, scholarships, and textbook loans. For example, in the much-criticized *Witters* decision, the Washington Supreme Court held that state support for a blind man's theology education would violate the state's no-funding provision, even after the U.S. Supreme Court held that such aid would not violate the federal First Amendment.<sup>51</sup> Currently, the Becket Fund's complaint in *Pucket v. Rounds* charges that the South Dakota no-funding provision has been used to exclude religious schools and children from numerous government benefits, including textbook loans and school busing programs.<sup>52</sup> Wherever state courts hold that state constitutions provide stronger protections against religion/state entanglement than the federal constitution, school choice and charitable choice

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<sup>49</sup> Richard D. Komer, School Choice: Answers to Frequently Asked Questions About State Constitutions' Religion Clauses, (internet paper) Washington, D.C., Institute for Justice, September 6, 2002, at [http://www.ij.org/cases/school/Blaine\\_faq.shtml](http://www.ij.org/cases/school/Blaine_faq.shtml) (last visited Sept. 1, 2003).

<sup>50</sup> See Chittenden, 169 Vt. 310 (Vt. Jun. 11, 1999), *cert. denied*, *Andrews v. Vermont Department of Educ.*, 528 U.S. 1066 (1999).

<sup>51</sup> *Witters v. State Comm'n for the Blind*, 771 P.2d 1119 (1989) (on remand from *Witters v. Washington Dep't of Servs. For the Blind*, 474 U.S. 481 (1986)); See also Institute for Justice, *Ninth Circuit Ruling in Religious Funding Case Should Remove "Blaine Amendment" Obstacle to School Choice* [http://www.ij.org/media/school\\_choice/misc/7\\_19\\_02pr.shtml](http://www.ij.org/media/school_choice/misc/7_19_02pr.shtml) (last visited Sept. 1, 2003) (calling the Washington Blaine Amendment “one of the most notorious and broadly construed Blaine Amendments in the nation”).

<sup>52</sup> *Pucket v. Rounds*, Complaint, No. 03-CV-5033, (DSD Apr. 23, 2003), ¶22 (challenging South Dakota's no-funding provision).

proponents argue that no-funding provisions serve to discriminate against religious minorities. Bound by their prejudicial roots, these “Blaine Amendments” allegedly continue to promote religious discrimination and should be repealed.

However, support for these arguments is lacking.<sup>53</sup> First, many of the provisions which activists term “Blaine Amendments” cannot justifiably be associated with James G. Blaine and Reconstruction-era anti-Catholic bigotry. A variety of circumstances spanning the nineteenth and twentieth centuries surrounded the adoption of state constitutional provisions restricting public funding of religious institutions. Yet activists seem to apply the Blaine name and taint indiscriminately to rhetorically reinforce their argument that all of these provisions have prejudicial origins.<sup>54</sup> For this reason, scholars disagree on the number of Blaine Amendments in existence. For example, the pro-voucher Becket Fund and Institute for Justice list thirty-seven states that have Blaine Amendments. However, *Kotterman v. Killian*, an Arizona Supreme Court opinion upholding the constitutionality of the state’s school tax credits, mentions only twenty-nine states that have Blaine language.<sup>55</sup>

Inclusive definitions encompass state amendments enacted under circumstances quite different from those surrounding the debate over the federal Blaine Amendment. Many of these so-called “Blaine Amendments” and related provisions were enacted before the federal Blaine Amendment debate began. Wisconsin’s constitution, for example, contains language nearly identical to the federal Blaine Amendment, but it was adopted in 1848.<sup>56</sup> Similar provisions

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<sup>53</sup> See generally Steven K. Green, Brief Amicus Curiae of Historians and Law Scholars on Behalf of Petitioners Gary Locke, et al., 2003 WL 21697729, in *Locke v. Davey*, 124 S.Ct. 1307 (2004).

<sup>54</sup> See Toby J. Heytens, Note, *School Choice and State Constitutions*, 86 VA. L. REV. 117, 123, n. 32 (2000) (citing the divergent conclusions of several law review articles of the number of state constitutional provisions properly called “Blaine Amendments”).

<sup>55</sup> *Kotterman v. Killian*, 972 P.2d 606, 624 (Ariz. 1999).

<sup>56</sup> WIS. CONST. art. I, § 18.

were mandated by Congress in the legislation enabling the statehood of North Dakota,<sup>57</sup> South Dakota, Montana, Washington,<sup>58</sup> Arizona,<sup>59</sup> New Mexico,<sup>60</sup> Utah, Idaho,<sup>61</sup> and Oklahoma, and were later ratified as part of the constitutions of those states.<sup>62</sup> Michiganians, who refused to repeal their no-funding provision in a 1970 voter proposition, were not affected by the same anti-Catholic prejudice as Blaine and many of his supporters when reaffirming their so-called “Blaine Amendment.”<sup>63</sup> Some states’ provisions do not even have language similar to the original Blaine Amendment, but are dubbed “Blaine Amendments” because they prohibit public funding of religious schools.

States also may have unwittingly adopted no-funding provisions when copying provisions from other states’ constitutions. Borrowing from other states’ constitutions was common practice; a state often borrowed from the constitution of states admitted to the Union just before it in hopes of expediting its own admission.<sup>64</sup> Wisconsin’s constitutional provisions resemble those of Massachusetts and Pennsylvania, and its constitutional convention record, though incomplete, supports the idea that it borrowed heavily from elsewhere. Wisconsin adopted its bill of rights, including the provision against public funding of religious schools,

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<sup>57</sup> Act of Feb. 22, 1889, 25 Stat. 676, ch. 180 (1889) (enabling legislation for North Dakota, South Dakota, Montana, and Washington).

<sup>58</sup> See Robert F. Utter & Edward J. Larson, *Church and State on the Frontier: The History of the Establishment Clauses in the Washington State Constitution*, 15 HASTINGS CONST. L.Q. 451, 458-59 (1988).

<sup>59</sup> Act of June 20, 1910, 36 Stat. 557, ch. 26 (1910) (enabling legislation for New Mexico and Arizona).

<sup>60</sup> See also ROBERT W. LARSON, *NEW MEXICO’S QUEST FOR STATEHOOD 1946-1912* 160-67 (1968) (recounting why New Mexico drafted constitution containing such clause in probable hopes of securing Union acceptance, even though it was so locally unpopular that it was viewed as likely cause of the constitution’s defeat by a vote of New Mexican citizens).

<sup>61</sup> Act of July 3, 1890, 26 Stat. L. 215 §8, ch. 656 (1890) (enabling legislation for Idaho).

<sup>62</sup> Utter & Larson, *supra* note 58 at 458-69 (listing enabling acts requiring a Blaine-like provision).

<sup>63</sup> Mark Edward DeForrest, *An Overview and Evaluation of State Blaine Amendments: Origins, Scope, and First Amendment Concerns*, 26 HARVARD J. L. & PUB. POL’Y. 551, 588-590 (Spring 2003).

<sup>64</sup> *Kotterman v. Killian*, 972 P.2d 606, 624 (Ariz. 1999).

wholesale, without any recorded debate, on the first day of its constitutional convention.<sup>65</sup> States that chose to copy the provisions of other state constitutions to expedite their admission to the Union cannot be said to have copied any nascent anti-Catholicism in an “original” state’s provisions.

Second, the historical record reveals little to support the argument that all no-funding provisions were prejudicial in origin. Most state constitutional conventions occurred in the nineteenth century, and records were kept sparsely, if at all. Convention debates were not recorded verbatim, leaving it nearly impossible to determine the intent behind the adoption of each provision. As historian Philip Hamburger notes, support of the separation of church and state in the mid-nineteenth century became a secular, “American” principle, despite the nativist undertones of the period’s movement for religious liberty.<sup>66</sup> One cannot know definitively whether the no-funding provisions were passed for anti-Catholic reasons, out of a desire to separate religion and state, or some combination of these and other motives.

Third, despite the claims of opponents of the no-funding provisions, the provisions have not engendered case law that prohibits school choice and charitable choice. Judicial interpretation is hardly bound by the historical context of a provision’s enactment. The similar language of these provisions does not necessarily signify that they were enacted for a similar legislative purpose, and certainly does not mean judges will interpret them similarly in state courts. Even those provisions that closely mirror the federal Blaine Amendment have been treated quite differently in the courts since their enactment. Indeed, some state jurists have lauded their no-funding provisions for providing protection to religious freedom superior to even

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<sup>65</sup> Reporter’s Preface, *Journal of the Convention to Form a Constitution for the State of Wisconsin, with a Sketch of the Debates, Begun and Held at Madison, on the Fifteenth Day of December, 1847* 1 (Madison, W.T. Tenney, Smith & Holt, Printers, 1848).

<sup>66</sup> PHILIP HAMBURGER, *SEPARATION OF CHURCH AND STATE* (2002), 192.

the federal constitution. For example, the Wisconsin Supreme Court has touted its no-funding provision as “a more complete bar to any preference for, or discrimination against, any religious sect, organization, or society than any other state in the Union,” which is hardly a discriminatory interpretation.<sup>67</sup>

#### IV. COMPARING THE STATE NO-FUNDING PROVISIONS

Scholars disagree over the definition of a Blaine Amendment. No agreement exists as to whether Blaine Amendments are defined by their textual similarity to the original Blaine Amendment, their restrictiveness on funding to sectarian institutions, or their alleged anti-Catholic intent.<sup>68</sup> Pursuant to *Locke v. Davey*, in which the Supreme Court noted that Washington’s provision was not connected to the federal Blaine Amendment because it was derived from the federal Enabling Act, I have conducted my own study of state constitutional provisions prohibiting funding to religious institutions. I have surveyed the language involving funding to religious institutions in all fifty state constitutions to determine which have similar language to the Blaine Amendment, and to differentiate those which were enacted before the 1875 introduction of the federal Blaine Amendment.

Approximately thirty-nine states have provisions restricting funding to religious schools or institutions.<sup>69</sup> Twenty-three of these states enacted their no-funding provisions between the

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<sup>67</sup> *Weiss v. District Board of School District No. Eight of Edgerton*, 76 Wis. 177, 44 N.W. 967, 977 (1890) (praising Wisconsin’s “Blaine Amendment,” which was written before existence of federal Blaine Amendment).

<sup>68</sup> *See, e.g.*, Toby G. Heytens, *School Vouchers and State Constitutions*, 86 VA L. REV. 117 (2000); Kotterman v. Killian, 972 P.2d 606, 621 (1999), Becket Fund Blaine Amendments Website, <http://www.blaineamendments.org> (last visited Mar. 13, 2005) (citing different numbers of “Blaine Amendments.”)

<sup>69</sup> ALA. CONST. art. XIV § 263 (1901); ALASKA CONST. art. VII § 1 (1956); ARIZ. CONST. art. IX, § 10, art. II, § 12 (1910); CAL. CONST. art. IX, § 8, art. XVI, § 5 (1879); COLO. CONST. art. V, § 34, art. IX § 7 (1876); DEL. CONST. art. X, § 3 (1897); FLA. CONST. art. I, § 3 (1845); GA. CONST. art. I, § 11 (1877); HAW. CONST. art. I, § 11 (1959); IDAHO CONST. art. IX, § 5 (1890); ILL. CONST. art. 10 § 3 (1870); IND. CONST. art. 1, § 6 (1816); KAN.

birth of the 1875 federal Blaine Amendment and 1925, at the height of the debate over the “schools question” in the U.S.<sup>70</sup> Of these twenty-three states, nine derived their no-funding provisions directly from the federal enabling acts that granted them statehood.<sup>71</sup> Eleven others re-ratified their constitutions or amended the no-funding provisions after 1960, signifying their approval of these provisions in a modern context.<sup>72</sup> While the federal Blaine Amendment was confined to restrictions of public funding of schools, twenty-one of the thirty-nine no-funding provisions restrict funding to all religious institutions or societies, or any funding that will be used for a religious purpose.<sup>73</sup> Thus, the influence of the federal Blaine Amendment on the fifty state constitutions is indirect and difficult to trace.

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CONST. art. VI (1859), § 6 (C); KY. CONST. § 189 (1891); MASS. CONST. art. XVIII (1919); MICH. CONST. art. I, § 4 (1850); MINN. CONST. art. I, § 16 (1857), art. XIII, § 2 (1857); MISS. CONST. art. IV, § 66 (1890), art. 8, § 208 (1890); MO. CONST. art. I, § 7 (1875), art. IX, § 8 (1875); MONT. CONST. art. X, § 6 (1889); NEB. CONST. art. VII, § 11 (1875); NEV. CONST. art. XI, § 10 (1880); N.H. CONST. pt. 2, art. § 83 (1877); N.M. CONST art. XII, § 3 (1911); art. XII, § 4 (1911); N.Y. CONST art. XI, § 3 (1846); N.D. CONST art. VIII, § 5 (1889); OHIO CONST. art. VI, § 2 (1851); OKLA. CONST. art. I, § 5, art. XI, § 5 (1907); OR. CONST. art. I, § 5 (1857); PA. CONST. art. III, § 15 (1874), art. III, § 29 (1874); S.C. CONST. art. XI, § 4 (1889); S.D. CONST. art. VI, § 3, art. VIII, § 16; TEX. CONST. art. I, § 7 (1876), art. VII, § 5 (C) (1876); UTAH CONST. art. I, § 4 (1895), art. X, § 9 (1895); VA CONST. art. IV, § 16 (1830); art. VIII, § 16 (1830); WASH. CONST. art. I, § 11 (1889), art. IX, § 4 (1889); WIS. CONST. art. I, § 18 (1848); WYO. CONST. art. I, § 19, art. III, § 36, art. VII, § 8 (1889).

<sup>70</sup> *See id.*

<sup>71</sup> Act of Feb. 22, 1889, 25 Stat. 676, ch. 180 (1889) (enabling legislation for North Dakota, South Dakota, Montana, and Washington); Act of June 20, 1910, 36 Stat. 557, ch. 26 (1910) (enabling legislation for New Mexico and Arizona).

<sup>72</sup> CAL. CONST. art. IX, § 8, art. XVI, § 5 (re-adopted and amended 1974); FLA. CONST. ART. I, § 3 (re-adopted after full debate at Constitutional Convention of 1968); GA. CONST. art. I, § 11 (re-ratified 1982); MINN. CONST. art. I, § 16, art. XIII, § 2 (constitution generally revised 1972); MONT. CONST. art. X, § 6 (constitution revised 1972); NEB. CONST. art. VII, § 11 (amended 1976); NEV. CONST. art. XI, § 10 (re-ratified 1938); OKLA. CONST. art. I, § 5, art. XI, § 5 (amended 1978 to remove discussion of segregation); PA. CONST. art. III, § 29 (amended 1933, 1937, 1963; renumbered 1967); TEX. CONST. art. I, § 7 (1876), art. VII, § 5 (C) (amended 1989).

<sup>73</sup> CAL. CONST. art. IX, § 8, art. XVI, § 5 (1879); COLO. CONST. art. V, § 34, art. IX § 7 (1876); GA. CONST. art. I, § 11 (1877); HAW. CONST. art. I, § 11 (1959); IDAHO CONST. art. IX, § 5 (1890); MASS. CONST. art. XVIII (1919); MINN. CONST. art. I, § 16 (1857), art. XIII, § 2 (1857); MISS. CONST. art. IV, § 66 (1890), art. 8, § 208 (1890); MO. CONST. art. I, § 7 (1875), art. IX, § 8 (1875); OKLA. CONST. art. I, § 5, art. XI, § 5 (1907); OR. CONST. art. I, § 5 (1857); PA. CONST. art. III, § 15 (1874), art. III, § 29 (1874); S.D. CONST. art. VI, § 3, art. VIII, § 16; TEX. CONST. art. I, § 7 (1876), art. VII, § 5 (C) (1876); UTAH CONST. art. I, § 4 (1895), art. X, § 9 (1895); VA CONST. art. IV, § 16; art. VIII, § 16 (re-ratified 1971); WIS. CONST. art. I, § 18 (1848).

In a comprehensive study of eight representative state Blaine Amendments, I will show further that these provisions should have little bearing on school choice and charitable choice debates. I will focus my analysis on Ohio, Wisconsin, Arizona, Florida, Colorado, Michigan, Vermont, and Maine. I chose these representative states because of their representative case law, representative types of (or lack of) no-funding provisions, their geographic diversity,<sup>74</sup> and the different historical circumstances surrounding the enactment of their constitutions. Taken together, the constitutional histories of these eight representative states will illuminate the ambiguous significance of the no-funding provisions for school choice and charitable choice debates throughout the country.

### ***A. Basic No-Funding Language***

Ohio, Wisconsin, and Arizona all have constitutional language similar to the federal Blaine Amendment. Although these state constitutions were enacted at different times, each state has a provision prohibiting any “sect” from controlling public school funds,<sup>75</sup> or public funding from aiding any “sectarian” school.<sup>76</sup> Yet the courts of these three states have ignored both linguistic similarities and diverse histories of these provisions and have construed their “no-funding” provisions in completely different ways.

#### **1. Ohio**

The Ohio no-funding provision was enacted in 1851, at the state’s second constitutional convention. At the 1873-74 convention to revise the Constitution of Ohio, a proposition was

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<sup>74</sup> Because states in different regions came into being under very different historical circumstances, a better comparison of the history of state no-funding provisions comes from comparing states in different regions. Moreover, states in similar regions admitted closely in time to one another are more likely to have copied constitutional language from each other, so a comparison of no-funding provisions in geographically diverse states ensures that similar language was adopted under different circumstances.

<sup>75</sup> OHIO CONST. art. VI, § 2.

<sup>76</sup> ARIZ. CONST. art. IX, § 10.

made to delete the line, “but no religious or other sect, or sects, shall ever have any exclusive right to, or control of, any part of the school funds of this state.”<sup>77</sup> This provision was presented to the convention as a “Catholic measure.”<sup>78</sup> However, the words of at least one Catholic delegate reveal that the provision did not receive uniform Catholic support:

“So far as I know, [the amendment] was presented without the cognizance, and urged without the indorsement of a single Catholic of this Convention, other than its author. So far as it assumed to present the wishes of any other Catholic here, I believe it was an assumption totally unwarranted. . . . Trusting to my constituency as fair representatives – and I represent as large a proportionate Catholic constituency as any man on this floor – I do not believe even a minority in numbers of Catholics want such change, or any special privilege under law or Constitution. . . . We need no special interposition of law or Constitution in our favor . . . That some of the Catholic clergy have condemned the public schools, and insisted on Catholic schools for the education of Catholic children, has no bearing on this issue. We are asking no constitutional mandate to enforce their ideas . . . .”<sup>79</sup>

The Convention subsequently failed to adopt the amendment, leaving the language of Article VI, § 2 as it stands today.

Thus, the intent behind Article VI, § 2 of the Ohio constitution appears unclear. The provision was both supported and contested by Catholic and non-Catholic delegates at the 1873-74 Constitutional convention, at the same time that the question of public funding to religious schools was becoming a federal issue. The alleged bigotry behind this provision is uncertain.

Despite the prohibition on public funding to religious schools in the Ohio Constitution, the Ohio Supreme Court has held that a state school voucher programs is permissible. In *Simmons-Harris v. Goff*, the Ohio Supreme Court was deeply influenced by federal constitutional jurisprudence when interpreting its state constitution.<sup>80</sup> The court avoided conflict

<sup>77</sup> JOURNAL OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF OHIO, 1873-74, VOL. 1, 77.

<sup>78</sup> JOURNAL OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF OHIO, 1873-74, VOL, 2, PT. III, 2333.

<sup>79</sup> Delegate Jackson, *Id.*

<sup>80</sup> *Simmons-Harris v. Goff*, 711 N.E.2d. 203 (Ohio 1999).

between the program and the state's no-funding provision by adopting the federal *Lemon* test for determining whether the program constituted the establishment of religion under both the First Amendment, the religious freedom provisions of the Ohio constitution,<sup>81</sup> and the state no-funding provision, which dates to 1851.<sup>82</sup> The court found the program constitutional under the U.S. Supreme Court's *Lemon* test, but pointedly noted that it used the *Lemon* test because it is a "logical and reasonable method," not because the religion clauses of the Ohio constitution are coextensive with the federal religion clauses.<sup>83</sup> The court explicitly "reserve[d] the right to adopt a different constitutional standard pursuant to the Ohio Constitution, whether because the federal constitutional standard changes or for any other relevant reason."<sup>84</sup> One might speculate about what type of "relevant reason" would cause the Ohio Supreme Court to deviate from federal constitutional jurisprudence in its interpretation of the state constitution, especially if public opinion had not been so much in favor of taking drastic measures to fix the ailing Cleveland public schools.

In this context of federal influence, the Ohio Supreme Court specifically discussed the prohibition on the control of state school funds by religious sects in Article VI , Section 2 of the

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<sup>81</sup> OHIO CONST. art. I, §7 ("Religious Freedom, Encouraging Education": All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own conscience. No person shall be compelled to attend, erect, or support any place of worship, or maintain any form of worship, against his consent; and no preference shall be given, by law, to any religious society; nor shall any interference with the rights of conscience be permitted. No religious test shall be required, as a qualification for office, nor shall any person be incompetent to be a witness on account of his religious belief; but nothing herein shall be construed to dispense with oaths and affirmations. Religion, morality, and knowledge, however, being essential to good government, it shall be the duty of the General Assembly to pass suitable laws, to protect every religious denomination in the peaceable enjoyment of its own mode of public worship, and to encourage schools and the means of instruction.")

<sup>82</sup> OHIO CONST. art. VI, §2 ("The General Assembly shall make such provisions, by taxation, or otherwise, as, with the income arising from the school trust fund, will secure a thorough and efficient system of common schools throughout the state; but no religious or other sect, or sects, shall ever have any exclusive right to, or control of, any part of the school funds of this state.")

<sup>83</sup> *Simmons-Harris v. Goff*, 711 N.E.2d 203, 211 (Ohio 1999). *Lemon v. Kurtzman* established a three-pronged test for establishment of religion that was the Supreme Court's standard in establishment clause cases for more than twenty-five years. To pass the *Lemon* test, a statute must have a secular legislative purpose and a primary effect that neither advanced nor inhibited religion, and must not involve excessive entanglement between government and religion. Although *Lemon* has not been overruled, it has been modified and criticized in recent Supreme Court cases, including *Zelman*. See *Lemon v. Kurtzman*, 403 U.S. 602, 612-613 (1971).

<sup>84</sup> *Id.* at 212.

Ohio constitution. The court did not consider the history of this provision, perhaps because the official journal of the state constitutional convention includes no discussion related to its passage.<sup>85</sup> Instead, the court stressed the role of independent choice in the Cleveland voucher program, noting that “[N]o money flows directly from the state to a sectarian school and no money can reach a sectarian school based solely on its efforts or the efforts of the state. Sectarian schools receive money that originated in the School Voucher Program only as the result of independent decisions of parents and students,”<sup>86</sup> Thus, the voucher program does not violate the state’s no-funding provision, since the sectarian schools do not have an “exclusive right to, or control of” any part of Ohio’s school funds, as forbidden by the state constitution<sup>87</sup> The U.S. Supreme Court plurality relied on this “independent choice” reasoning when later upholding the constitutionality of the program in *Zelman v. Simmons-Harris*.<sup>88</sup>

Since *Zelman* was decided, the Ohio legislature has established a Task Force on Nonprofit-, Faith-Based and Other Organizations,<sup>89</sup> which created a Governor’s Office of Faith-Based and Community Initiatives.<sup>90</sup> The Office is currently involved in an initiative called the Ohio Compassion Capital Project which grants funds to faith and community-based organizations.<sup>91</sup> Yet this program may not be permissible under the state constitution.

Although the Cleveland program is constitutional, the future of school choice and charitable choice in Ohio remains unclear. Both the U.S. Supreme Court and Ohio Supreme Court holdings in the *Simmons-Harris* cases appear limited to the circumstances of the Cleveland

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<sup>85</sup> “Journal of the Constitutional Convention of the State of Ohio,” convened January 9, 1912; adjourned June 7, 1912; reconvened and adjourned without discussion August 26, 1912.

<sup>86</sup> *Simmons-Harris v. Goff*, 711 N.E. 2d at 212.; See also William Herber, *The Constitutions of the United States and of the State of Ohio, 1913: Thoroughly Annotated and Indexed*.

<sup>87</sup> *Simmons-Harris v. Goff*, 711 N.E.2d at 212 (Ohio 1999).

<sup>88</sup> *Zelman v. Simmons-Harris*, 122 S.Ct. 2460 (2002).

<sup>89</sup> Ohio General Assembly Amended Substitute House Bill No. 175 (2004).

<sup>90</sup> See The Governor’s Office of Faith-Based and Community Initiatives, <http://www.fbciohio.gov> (last visited Mar. 13, 2005).

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

voucher program. The Ohio Supreme Court even noted that a different school voucher program might damage the funding of public education and “could be subject to a renewed constitutional challenge.”<sup>92</sup> This admission, along with the Ohio Supreme Court’s explicit reservation of the right to depart from federal constitutional analysis, allow the Ohio Supreme Court great flexibility in determining future no-funding provision decisions. *Simmons-Harris v. Goff* presents an excellent example of how experienced jurists selectively molded state constitutional language for a specific, narrow purpose.

The *Simmons-Harris v. Goff* decision exemplifies two techniques that state supreme courts have used to circumvent the no-funding provisions. First, courts may hold state constitutional provisions to be coextensive with federal First Amendment standards, either generally or for the purposes of a single case. Courts may also narrowly interpret “exclusive right to, or control of” funding so that programs which do not involve direct funding of religious institutions by the state are deemed constitutional. Using these methods of analysis, courts can evaluate school choice and charitable choice programs without considering either the strict separationist interpretation of the no-funding provision or any anti-Catholic bigotry in the history of the provision, and tailor the language of the provision to the circumstances of the specific voucher program. Under this method, the prejudicial and “threatening” elements of the no-funding provision are rendered irrelevant, or at least flexible.

## 2. Wisconsin

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<sup>92</sup> *Simmons-Harris v. Goff*, 711 N.E.2d. at 212 Ohio 1999).

Wisconsin’s prohibition of public funding of “religious societies, or religious or theological seminaries,” included in Article I, §18 of the Wisconsin Constitution,<sup>93</sup> was framed long before the federal Blaine Amendment, and did not specifically prohibit the funding of religious schools. An 1846 draft constitution containing this provision failed primarily due to disagreement over property rights,<sup>94</sup> and a second constitution was successfully ratified in 1848.<sup>95</sup> Unfortunately, the records of both Wisconsin constitutional conventions leave much room for speculation as to the original intent behind the state’s constitutional provisions. At both conventions, the no-funding provision was grouped as part of a declaration of rights and adopted wholesale on the first day of both conventions, with no recorded discussion.<sup>96</sup> However, records of the debates surrounding Article I, §18 may be incomplete. The reporter at the 1847-48 constitutional convention admits that he often altered the language of the delegates, although he claims this did not affect the substance of the debates.<sup>97</sup> At least four delegates also asked for their remarks to be stricken from the record.<sup>98</sup> The reporter further warns that the convention did not decide to record its proceedings until the “business of the convention was considerably advanced,” and so the early debates “are not as full and complete as they would have been.”<sup>99</sup>

While the history of these early debates may be particularly vague, later discussion at the

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<sup>93</sup> WIS. CONST. art. I, § 18: “The right of every person to worship Almighty God according to the dictates of conscience shall never be infringed; nor shall any person be compelled to attend, erect or support any place of worship, or to maintain any ministry, without consent; nor shall any control of, or interference with, the rights of conscience be permitted, or any preference be given by law to any religious establishments or modes of worship; nor shall any money be drawn from the treasury for the benefit of religious societies, or religious or theological seminaries.”

<sup>94</sup> Reporter’s Preface, *Journal of the Convention to Form a Constitution for the State of Wisconsin, with a Sketch of the Debates, Begun and Held at Madison, on the Fifteenth Day of December, 1847* (Madison, W.T. Tenney, Smith & Holt, Printers, 1848) at 1.

<sup>95</sup> *Id.*

<sup>96</sup> Milo M. Quaife, ed., *The Convention of 1846*, State Historical Society of Wisconsin, 1919; Milo M. Quaife, ed., *The Struggle Over Ratification*, State Historical Society of Wisconsin, 1919; *Journal of the Convention to form a Constitution for the State of Wisconsin*, 1847-1848, 143. The convention’s Committee on General Provisions drafted the declaration of rights and passed it unanimously before bringing it to the convention floor. *Id.* at 51.

<sup>97</sup> Reporter’s Preface, *Journal of the Convention to form a Constitution for the State of Wisconsin*, 1847-1848, at 1.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

convention on related topics also reveals little controversy or prejudice. The convention record shows no mention of religion whatsoever in a discussion of common schools and the school fund.<sup>100</sup> The convention also overwhelmingly voted to forbid sectarian instruction in public schools and universities immediately after such proposals were made, with no discussion recorded.<sup>101</sup> Historians note that at the time of the constitutional convention, Wisconsin already had a well-established tradition of common schools with a universal non-sectarian tradition, and did not have any parochial school system of note until well after the constitution was ratified.<sup>102</sup> Public education in Wisconsin had already begun in 1845, and was offered statewide after its codification in the 1848 constitution.<sup>103</sup> Historian Steven K. Green notes that despite some tensions between Protestant, Catholic, and Lutheran immigrants, no evidence exists that the Wisconsin constitution-makers were anti-religious in drafting the no-funding provisions.<sup>104</sup>

The best available insight into the meaning of Article I, §18 comes from the Wisconsin Supreme Court's first ruling on this provision in 1890, just forty-two years after its enactment. In *State Ex Rel. Weiss et al v. District Board of School-Dist. No. 8 of the City of Edgerton*, the Wisconsin Supreme Court extended Article I, § 18 to prohibit state funding of religious activities in public schools and religious schools themselves. The court held that the reading of the King James Bible in common schools contravened Article I, §18, reasoning that bible-reading in public schools was equivalent to public funds being funneled to religious schools. The court

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<sup>100</sup> *Journal of the Convention to form a Constitution for the State of Wisconsin*, 1847-1848, 322.

<sup>101</sup> *Id.*, 336.

<sup>102</sup> Steven K. Green, Brief Amicus Curiae of Historians and Law Scholars on Behalf of Petitioners Gary Locke et. al., 2003 WL 21697729, in *Locke v. Davey* 124 S.Ct. 1307 (2004). See also Alice E. Smith, 1 *The History of Wisconsin* 588-589 (1985); Richard N. Current, 2 *The History of Wisconsin*, 162-169 (1976); See also Joseph A. Ranney, "Absolute Common Ground": The Four Eras of Assimilation in Wisconsin Education Law, 1998 *Wis. L. Rev.* 791, 793-93, 796-97 (1998) (placing the development of the parochial school systems after the enactment of the 1848 constitution).

<sup>103</sup> The Wisconsin Mosaic, *A Brief History of Education in Wisconsin*, at <http://www.scils.rutgers.edu/~dalbello/FLVA/background/education.html>, last visited Mar. 7, 2005; WIS. CONST. Art. X.

<sup>104</sup> Steven K. Green, *Blaming Blaine: Understanding the Blaine Amendment and the No-Funding Principle*, 2 *FIRST AMENDMENT L. REV.* 107 (2004).

held that Article I, §18 was adopted as a protection against this and other encroachments on the religious freedom of its inhabitants.<sup>105</sup> The court noted that Article I, §18 was framed “with reference to attracting” a heterogeneous mix of settlers to Wisconsin, including many Catholics and Jews.<sup>106</sup> In his majority opinion, Justice Lyon remarks on what would later be known as his state’s “Blaine Amendment”:

“What more tempting inducement to cast their lot with us could have been held out to [new settlers] than the assurance that, in addition to the guaranties of the right of conscience and of worship in their own way, the free district schools in which their children were to be, or might be, educated, were absolute common ground, where the pupils were equal, and where sectarian instruction, and with it sectarian intolerance, under which they had smarted in the old country, could never enter? Such were the circumstances surrounding the convention which framed the constitution”<sup>107</sup>

Thus, the earliest available judicial account of the drafting of Article I, §18 reveals no prejudicial intentions. To the contrary, Wisconsin’s so-called “Blaine Amendment” apparently was meant to protect religious freedom.

The Wisconsin’s Supreme Court has repeatedly held that Article I, §18 is distinct from the First Amendment of the federal constitution. However, the court has repeatedly applied Supreme Court analysis pertinent to the religion clauses of the U.S. Constitution to Article I, §18, blurring the distinctions between the religion provisions of the two documents. For example, in 1962, the Wisconsin Supreme Court explicitly noted that its state establishment clause in Article I, §18 even might even be “less flexible” than the First Amendment.<sup>108</sup> However, ten years later, the same court adopted federal constitutional analysis in a challenge to a statute permitting the state to contract with a church-affiliated university to provide dental

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<sup>105</sup> *Weiss v. District Board of School District No. Eight of Edgerton*, 76 Wis. 177, 44 N.W. 967, 977 (1890) (Conkley, J., concurring).

<sup>106</sup> *Id.* at 974 (Lyon, J.).

<sup>107</sup> *Id.*

<sup>108</sup> *State ex rel Reynolds v. Nusbaum* (“Reynolds”), 17 Wis. 2d 148, 149 (1962).

education.<sup>109</sup> In its Article I §18 analysis, the court adopted the Supreme Court’s “primary effect” analysis, noting that the provision’s benefits clause “is not to be read as requiring that some shadow of incidental benefit to a church related institution brings a state grant or contract to purchase within the prohibition of the section.”<sup>110</sup> The payments in the dental education program should not be seen as payments “for the benefit of” the religious institution, but as payments for the advancement of the dental health of Wisconsin’s citizens.<sup>111</sup> Thus, the court found the statute to serve a “completely secular and entirely valid public purpose” despite the church/state interaction.

In 1974, the Wisconsin Supreme Court again applied federal First Amendment analysis to Article I, § 18. This time, the court upheld a program allowing school boards to contract with sectarian institutions to provide for the educational needs of handicapped children under the state and federal constitutions.<sup>112</sup> The court first analyzed the federal First Amendment challenge, applying the *Lemon* test, and determined that the statute satisfied *Lemon*’s requirement of having a primary effect that neither advanced nor inhibited religion.<sup>113</sup> The court then noted that since the religion provisions of the federal and Wisconsin constitutions have similar purposes, the Wisconsin constitution’s further prohibition of the use of state funds to support religious institutions simply encompasses the “primary effects” prong of the federal *Lemon* test.

In 1996, the Wisconsin Supreme Court emphasized the distinctness of Article I, § 18 from the First Amendment, but then applied federal constitutional analysis to interpret it. In *State v. Miller*,<sup>114</sup> the court held that requiring Amish citizens to display red reflective tape on

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<sup>109</sup> State ex rel Warren v. Nusbaum (“Nusbaum I”), 55 Wis. 2d 316 (1972).

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* at 334.

<sup>112</sup> State ex rel Warren v. Nusbaum, 64 Wis.2d 314 (1974). “Nusbaum II.”

<sup>113</sup> *Id.* at 322-27.

<sup>114</sup> State v. Miller, 202 Wis.2d 56 (1996).

their slow-moving vehicles, in violation of their religious beliefs, violated the right to freedom of conscience guaranteed by Article I, §18. The court explicitly based its holding on the guarantees embodied in the state constitution alone,<sup>115</sup> and discussed at length the distinction between Article I, §18 and the religion clauses of the First Amendment.<sup>116</sup> The court held that its prior recognition that both clauses “serve the same dual purpose,” and its prior decisions to interpret Article I, §18 “in light of United States Supreme Court Cases,” “should not be read as an abandonment of our long-standing recognition that the language of the two documents is not the same.”<sup>117</sup> The court concludes that its “analysis of the freedom of conscience as guaranteed by the Wisconsin Constitution is not constrained by the boundaries of protection the United States Supreme Court has set for the federal provision. We hold that our state constitution provides an independent basis on which to decide this case.”<sup>118</sup> Despite this strong language,<sup>119</sup> the court applied the U.S. Supreme Court’s compelling interest/least restrictive alternative analysis for free conscience claims to the case, “see[ing] no need to depart from this time-tested standard.”<sup>120</sup> Thus, even when their distinctness has been painstakingly emphasized, the federal and Wisconsin state religion clauses are intricately related.

In a celebrated 1998 case, the Wisconsin Supreme Court again blurred the relationship between the federal and state religion clauses. In *Jackson v. Benson*, the Milwaukee Teachers’ Education Association and a group of students’ parents brought suit under Article I, §18 to challenge a Milwaukee school voucher program that allows the participation of religious schools.<sup>121</sup> The Wisconsin Supreme Court upheld the program under the federal and Wisconsin

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<sup>115</sup> *Id.* at 62.

<sup>116</sup> *Id.* at 62-66.

<sup>117</sup> *Id.* at 64.

<sup>118</sup> *Id.* at 65-66.

<sup>119</sup> *Id.* at 64.

<sup>120</sup> *Id.* at 69.

<sup>121</sup> *Jackson v. Benson*, 218 Wis.2d 835 (1998), 525 U.S. 997 (cert denied).

constitutions, and the U.S. Supreme Court's denial of certiorari fueled speculation that they would soon declare vouchers constitutional. To avoid a clash with Article I, §18, the Wisconsin Supreme Court interpreted the Wisconsin constitution's religion clauses as coextensive with the federal religion clauses.<sup>122</sup> Ignoring its holding two years earlier that the two provisions are distinct, the court grounded its interpretation on its even earlier statements that the religion clauses of the state and federal constitutions serve the same dual purpose, and that Article I §18 encompasses the primary effects test.<sup>123</sup> Since the Milwaukee voucher program did not have the primary effect of advancing religion, it did not violate Article I, §18. One commentator argues that the Wisconsin Supreme Court in *Jackson* construed Article I, §18 as coextensive with the federal religion clauses merely because the plaintiffs erred by not asserting that the provisions are distinct.<sup>124</sup> The court may have felt bound by a prior holding that it would use First Amendment analysis to interpret Article I, §18 unless directed otherwise by the plaintiff.<sup>125</sup>

Although Wisconsin has not yet established a Faith-Based Initiative liaison in its governor's office, the state has begun funding faith-based social service programs pursuant to the federal charitable choice laws. *Freedom from Religion Foundation v. McCallum*,<sup>126</sup> one of the few legal challenges to the constitutionality of Bush's national Faith-Based Initiative, involved a Wisconsin program. Wisconsin funded Faith Works, a faith-based, long-term alcohol and drug addiction treatment program. The court held that the case did not reach the issue of the constitutionality of the charitable choice law, and then upheld the funding of Faith Works even

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<sup>122</sup> *Id.* at 876-77.

<sup>123</sup> *Id.* at 876-77, citing *State ex rel. Warren v. Nusbaum (Nusbaum II)*, 64 Wis.2d 314, 327-28, quoting *Nusbaum I*, 55 Wis. 2d 316, 332 (1972).

<sup>124</sup> Jack Stark, *THE WISCONSIN STATE CONSTITUTION: A REFERENCE GUIDE*, (Greenwood Books, 1997) at 67.

<sup>125</sup> *Lange v. Lange*, 175 Wis. 2d 373 (1993), *rev. denied*, 505 N.W. 2d 137 (Wis. Jul. 20, 1993), *cert. denied*, 511 U.S. 1025 (1994).

<sup>126</sup> *Freedom From Religion Found. v. McCallum*, 179 F. Supp. 2d 950 (W.D.Wisc. 2002) (granting partial summary judgment); *Freedom From Religion Found. v. McCallum*, 214 F. Supp. 2d 905 (W.D.Wisc. 2002), *aff'd* 324 F.3d 880 C.A. 7 (Wis.) 2003.

though the program resulted in governmental indoctrination of religion in violation of the Establishment Clause.<sup>127</sup> Relying on the U.S. Supreme Court’s opinion in *Mitchell v. Helms*,<sup>128</sup> the court held that the funding was constitutional because all offenders participated in the treatment program of their own free choice, and that the program’s safeguards ensured that they made true private choices.<sup>129</sup> The plaintiff did not invoke Article I, § 18 of the Wisconsin constitution in its suit. However, future challenges to similar grants from the governor’s discretionary fund to faith-based organizations might do better by invoking the state constitution, which may be more flexible than the federal religion clauses.

The Wisconsin Supreme Court’s treatment of Article I, § 18 allows it to rely on federal constitutional jurisprudence while reserving the right to construe the provision more strictly in the future. *Jackson*’s crafty wording does not overrule *Weiss*, *Nusbaum I*, *Miller* and other cases insisting that Article I, §18 is distinct from and stronger than the federal religion clauses. Although the Wisconsin Supreme Court has consistently interpreted Article I, § 18 in accordance with federal constitutional standards, the Wisconsin Supreme Court’s repeated insistence that Article I, § 18 is distinct from the First Amendment leaves future school choice and charitable choice programs open to potential legal challenge.

### 3. Arizona

Arizona’s no-funding provisions were thrust into its constitution by Congressional order.<sup>130</sup> The enabling act of 1899 which authorized the statehood of Arizona and New Mexico contained the proviso that both nascent states must have constitutional language forbidding

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<sup>127</sup> 214 F. Supp. 2d at 915, 920.

<sup>128</sup> *Mitchell v. Helms*, 530 U.S. 793 (2000).

<sup>129</sup> *McCallum*, 179 F.Supp. 2d at 915.

<sup>130</sup> ARIZ. CONST. art. II, §12 (“No public money or property shall be appropriated for or applied to any religious worship, exercise, or instruction, or to the support of any religious establishment.”); ARIZ. CONST. art. IX, §10 (“No tax shall be laid or appropriation of public money made in aid of any church, or private or sectarian school, or any public service corporation.”);

public funding to sectarian schools.<sup>131</sup> Opponents of the Blaine Amendments claim that the same anti-Catholic animus behind the federal Blaine Amendment motivated this mandate to new states in the enabling acts. However, a recent study by historians prepared in an amicus brief to *Locke v. Davey* found that no evidence of anti-Catholic bigotry lay behind a similar enabling act for Washington State that same year,<sup>132</sup> and the Supreme Court noted in a footnote that the history of the federal Blaine Amendment was not relevant to consideration of Washington's similar provision.<sup>133</sup> In general, the Arizona Constitution borrowed heavily from other states as its legislature attempted to get the new state off to a swift start, and it is likely that the no-funding provision was simply lifted without thought from the Enabling Act. No evidence exists to show that the legislature gave any more consideration to the issue of public funding to religious schools than to any other issue.<sup>134</sup> The Arizona Supreme Court, recognizing the difficulty of determining the intent of its constitutional framers, notes that no comprehensive history of the Arizona constitutional convention exists.<sup>135</sup> "The verbatim transcript of the 1910 constitutional convention reveals little discussion on the convention floor about the religion clauses."<sup>136</sup> In general, when reading through the constitutional convention proceedings, the court comments that "one is impressed by the fact that major issues were often glossed over with no debate or discussion."<sup>137</sup> Again, the truth about the impetus for the enactment of Arizona's no-funding provision may be undiscoverable.

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<sup>131</sup> Act of June 20, 1910, 36 Stat. 557, ch. 26 (1910) (enabling legislation for New Mexico and Arizona).

<sup>132</sup> Steven K. Green, Brief Amicus Curiae of Historians and Law Scholars on Behalf of Petitioners Gary Locke et al., 2003 WL 21697729, in *Locke v. Davey* 124 S.Ct. 1307 (2004).

<sup>133</sup> *Locke v. Davey*, 124 S.Ct. 1307, note 9 (2004).

<sup>134</sup> Bruce Bonner Mason, *REVISION OF THE ARIZONA CONSTITUTION: A COMMENTARY* (1961). John D. Leshy, *THE ARIZONA STATE CONSTITUTION: A REFERENCE GUIDE* (1993); *MINUTES OF THE CONSTITUTIONAL CONVENTION OF ARIZONA* (1910).

<sup>135</sup> *Kotterman v. Killian*, 972 P.2d 606, 621 (1999), *cert. denied* 528 U.S. 921 (1999), citing Thomas E. Seheridan, *Arizona: A History* 385 (1995); *MINUTES OF THE CONSTITUTIONAL CONVENTION OF ARIZONA* (1910).

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

<sup>137</sup> *Id.* at 622.

Arizona does not have a school voucher program, but it has offered school choice since 1997 in the form of tax credits. Parents who send their children to private schools, including religious schools, receive tax credits equal to the amounts of their tuition dollars up to five hundred dollars.<sup>138</sup> In 1999, a taxpayer group challenged this program under the state's no-funding provisions. In *Kotterman v. Killian*,<sup>139</sup> The Arizona Supreme Court upheld the program, ruling that no evidence existed that the framers of the Arizona constitution meant to prohibit tax credits of this sort, based on their reading of plain meaning of the text of the Arizona constitution. In doing so, the court effectively held the Arizona state constitutional provisions coextensive with the federal First Amendment, noting that no evidence existed of the intent of the Arizona constitutional framers to exceed the requirement of the federal establishment clause.<sup>140</sup> The court felt bound by a duty to interpret the state constitution in light of contemporary circumstances, including the state's commitment to education and the Supreme Court's allowance of direct aid programs involving school choice.<sup>141</sup> Finally, the majority addressed the state's no-funding provision. Strangely, while the court was quick to reject the difficulty of discerning the intent of the framers of the Arizona constitution, they swiftly dismissed the state's no-funding provisions as a "clear manifestation of religious bigotry" and discounted their relevance for constitutional interpretation.<sup>142</sup> The court noted that there is "no recorded history directly linking the [federal Blaine] amendment with Arizona's constitutional convention."<sup>143</sup> Nevertheless, the court found itself "hard pressed to divorce the amendment's language from the insidious discriminatory intent that prompted it," and deemed the state no-

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<sup>138</sup> *Id.* at 610.

<sup>139</sup> *Id.*

<sup>140</sup> *Id.* at 624.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

funding provisions to have no bearing on its decision in this case.<sup>144</sup> The same Arizona scholarship program is currently being challenged in federal court pursuant to the First Amendment.<sup>145</sup> However, given the Arizona Supreme Court’s decision in *Kotterman* and the Supreme Court’s denial of certiorari in it, the program seems likely to stand. Arizona’s faith-based initiative programs, which include the establishment of a liaison in the governor’s office also appear constitutional under *Kotterman*’s interpretation of the no-funding provisions.<sup>146</sup>

Arizona’s Supreme Court remains the most aggressive in its treatment of its no-funding provisions. No other state has deemed its no-funding provisions irrelevant because of its prejudicial past, without considering the particularities of the state provision’s history. The U.S. Supreme Court chose not to involve itself in the Arizona court’s interpretation of its own constitution, denying certiorari in the case.<sup>147</sup> Thus, the case remains the most powerful ammunition in the arsenal of anti-Blaine activists.

### ***B. States with Strict No-Funding Provisions***

States with strict no-funding provisions, such as Florida, Colorado, and Michigan, include additional restrictions beyond the basic language prohibiting funding to religious schools or institutions. These three state constitutions contain provisions prohibiting any “political subdivision”<sup>148</sup> or “any county, city, town, township, school district, or other public corporation”<sup>149</sup> Michigan is the only state to have an additional constitutional provision

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

<sup>145</sup> *Winn v. Hibbs*, 124 S.Ct. 2276 (2004) (remanding to the district court for further proceedings).

<sup>146</sup> See <http://www.whitehouse.gov/government/fbci/contact.html#liaisons>.

<sup>147</sup> *Kotterman v. Killian*, *cert. denied*, 528 U.S. 921 (1999).

<sup>148</sup> FLA. CONST. art. I, § 3 (“No revenue of the state or any political subdivision or agency thereof shall ever be taken from the public treasury directly or indirectly in aid of any church, sect, or religious denomination or in aid of any sectarian institution.”)

<sup>149</sup> COLO. CONST. ART. IX, § 7 (“Neither the general assembly, nor any county, city, town, township, school district or other public corporation, shall ever make any appropriation, or pay from any public fund or moneys whatever,

explicitly prohibiting school vouchers.<sup>150</sup> However, state courts will not necessarily rely on this stringent language when considering voucher and charitable choice programs.

## 1. Florida

Currently, Florida is a Blaine battleground, but the history of its no-funding provision is quite benign. The legal battle over Florida's school choice program is the most prominent example of the potential force of no-funding provisions to block school choice programs.

Florida's no-funding provision was originally enacted in 1838 without any recorded debate.<sup>151</sup> The original language survived constitutional revisions in 1861, 1865, 1868, 1885, and 1968.<sup>152</sup> An proposal to create a stronger no-funding provision explicitly prohibiting funding to sectarian schools failed at the 1885 Florida constitutional convention with no recorded debate.<sup>153</sup> Thus, Florida's provision appears designed to prohibit funding of all religious institutions, not just religious schools.

Despite this strict language, Florida state courts have often permitted state funding of religious institutions. Florida appellate courts have approached issues of church-state

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anything in aid of any church or sectarian society, or for any sectarian purpose, or to help support or sustain any school, academy, seminary, college, university or other literary or scientific institution, controlled by any church or sectarian denomination whatsoever, nor shall any grant or donation of land, money, or other personal property, ever be made by the state, or any such public corporation to any church, or for any sectarian purpose.”)

<sup>150</sup> MICH. CONST. ART. VIII, § 2: (“No public monies or property shall be appropriated or paid or any public credit utilized, by the legislature or any other political subdivision or agency of the state directly or indirectly to aid or maintain any private, denominational or other nonpublic, preelementary, elementary, or secondary school. No payment, credit, tax benefit, exemption or deductions, tuition voucher, subsidy, grant or loan of public monies or property shall be provided, directly or indirectly, to support the attendance of any student or the employment of any person at any such nonpublic school or at any location or institution where instruction is offered in whole or in part to such nonpublic school students. The legislature may provide for the transportation of students to and from any school.”)

<sup>151</sup> FLA. CONST. 1838 art. I, § 3; JOURNAL OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF FLORIDA (1838).

<sup>152</sup> FLA. CONST. 1861, FLA. CONST. 1865, FLA. CONST. 1868, FLA. CONST. 1885, FLA. CONST. 1968.

<sup>153</sup> JOURNAL OF THE FLORIDA CONSTITUTIONAL CONVENTION OF 1885, (1885), 215 (Art. IX, § 13, part of Ordinance No. 32 proposed by Mr. Sheats, “No law shall be enacted authorizing the diversion or the lending of any county or district school funds, or the appropriation of any part of the permanent or available school fund to any other than school purposes; nor shall the same, or any part thereof, be appropriated to or used for the support of any sectarian school.”)

entanglement using a type of neutrality analysis, permitting state funds to benefit religion so long as they have an incidental, but not a primary effect, of advancing religion. Accordingly, Florida appellate courts have held that a bible distribution program in public schools is unconstitutional for advancing religion,<sup>154</sup> but have upheld a county ordinance forbidding alcohol sales on Christmas because it did not amount to tacit endorsement or establishment of Christianity as an official religion.<sup>155</sup> As recently as 2000, Florida appellate courts have upheld the constitutionality of statutes that provide indirect benefits to sectarian institutions, such as penalty enhancements for crimes committed near or involving places of worship.<sup>156</sup>

Florida courts have stirred controversy by invoking Article IX, §1 to invalidate Florida's school choice program. The Florida Opportunity Scholarship Program has been hotly contested since its enactment on June 21, 1999.<sup>157</sup> The following day, a coalition of parents, citizens, and interest groups filed suit, alleging that the program violated the Florida constitution.<sup>158</sup> The program was heavily supported by Governor Jeb Bush as part of his educational reform program,<sup>159</sup> and especially as education reform continued to be a pivotal issue in the 2002 Florida gubernatorial election.<sup>160</sup> The program allows parents of children in failing schools to transfer their children to higher-performing private schools, including parochial schools. Most recipients use the scholarship to attend religious schools, angering separationist groups.<sup>161</sup>

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<sup>154</sup> *Brown v. Orange County Bd. of Public Instruction*, 128 So. 2d 181 (Fla. 2d DCA, 1960).

<sup>155</sup> *Silver Rose Entertainment Inc. v. Clay County*, 646 So. 2d 246 (Fla. 1st DCA 1994).

<sup>156</sup> *Rice v. State* 754 So. 2d 881 (Fla. 5th DCA 2000) (upholding constitutionality of statute enhancing penalties for controlled substance crimes committed near place of worship); *Todd v. State and Hutchinson v. State*, 643 So. 2d 625 (Fla. DCA 1st 1994) (upholding penalty enhancement for mischief involving religious property).

<sup>157</sup> *Bush v. Holmes*, 767 So. 2d 668, 671 (Florida DCA 1, 2000).

<sup>158</sup> *Id.*

<sup>159</sup> Kimberly Miller, "State Reviewing Accreditation of Private Schools," *Palm Beach Post*, 1 December 2002.

<sup>160</sup> Major issue in recent election Alisa LaPolt, "Bush, McBride Spar Over Education," *The News-Press* (Fort Myers, FL, 7 October 2002), National, Pg. 1A.

<sup>161</sup> Linda Kleindienst, "For Now, Students Can Use Vouchers," *ORLANDO SENTINEL* Aug. 7, 2002.

In *Holmes v. Bush*,<sup>162</sup> The Florida Circuit Court granted summary judgment holding that the Florida Opportunity Scholarship Program violates the state’s no-funding provision, Article I, Section 3 of the Florida Constitution.<sup>163</sup> The court reasoned that the funds for the program come directly from the tax revenues of Florida and its political subdivisions.<sup>164</sup> Distribution of the scholarship funds results in an equivalent reduction of public school funds, and thus the depletion of the public treasury. Although the payments are made directly to parents,<sup>165</sup> the parents are required to “restrictively endorse the warrant to the private school,”<sup>166</sup> which constitutes “indirect support” forbidden by the State Constitution. Here, the court notes that the Alaska Supreme Court made a parallel holding on this issue.<sup>167</sup> The court distinguished the New York Court of Appeals’ decision in *Board of Education v. Allen*, which upheld a New York statute allowing the purchase and loan of school books to parochial school students.<sup>168</sup> Unlike the program in *Allen*, OSP was clearly intended to assist parochial schools, since full tuition to parochial schools is paid under OSP. The court noted, however, that the intention of the legislature is always debatable and is therefore not determinative when deciding the facial constitutionality of any provision in Florida.<sup>169</sup>

While the court discounted the legislative purpose behind the OSP program, it placed great weight on Florida’s decision to keep its no-funding provision when it revised its constitution in 1968. The Florida Constitutional Revision Commission proposed eliminating the

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<sup>162</sup> *Holmes v. Bush*, 2002 WL 1809079 (Fla. Cir. Ct. 2002).

<sup>163</sup> “There shall be no law respecting the establishment of religion or prohibiting or penalizing the free exercise thereof. Religious freedom shall not justify practices inconsistent with public morals, peace or safety. No revenue of the state or any political subdivision or agency thereof shall ever be taken from the public treasury directly or indirectly in aid of any church, sect, or religious denomination or in aid of any sectarian institution.”

<sup>164</sup> *Id.* at 1.

<sup>165</sup> *Id.* at 2

<sup>166</sup> *Id.* at 2, citing §229.0537(6)(b)

<sup>167</sup> *Sheldon Jackson College v. State*, 599 P.2d 127 (Alaska, 1979). (discussed *infra*).

<sup>168</sup> *Id.* at 2, citing *Board of Education v. Allen*, 228 N.E.2d. 791 (N.Y. Ct. of App. 1967) (upholding a NY statute allowing the purchase and loan of school books to parochial school students).

<sup>169</sup> *Id.*

prohibition on governmental aid to religious institutions, but the Florida legislature acted “to strengthen the restriction and its applicability to ‘indirect aid [to parochial schools].’” This demonstrated a clear intent of the framers of the 1968 Florida Constitution to restrict state funding of religious schools. Thus, the Florida state appellate court struck down the OSP as violative of Article IX, Section 1 of the Florida State Constitution: Florida’s so-called no-funding provision.<sup>170</sup> The Florida appellate court, sitting en banc, recently upheld this decision, noting that the history of the federal Blaine Amendment was not relevant to the case.<sup>171</sup>

The Florida appellate court’s ruling met with political outcry. The OSP program had been heavily supported in the state legislature as part of Governor Bush’s educational reform package.<sup>172</sup> Governor Bush has appealed the decision, and the state continues to award opportunity scholarships pending disposition by the Florida Supreme Court.<sup>173</sup> Because the decision in *Holmes v. Bush* was released after the U.S. Supreme Court’s decision in *Zelman*, pro-voucher activists fear that it may serve as a signpost to other state courts about how courts should interpret state no-funding provisions in the current establishment clause climate. In Florida, politicians fear that the opinion will destroy other state programs involving funding to religious institutions.<sup>174</sup> Some pro-school choice commentators and activists have assailed the Blaine Amendment’s prejudicial origins, hoping that the no-funding provision itself will be struck down as unconstitutional, allowing the OSP to continue.<sup>175</sup>

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<sup>170</sup> In the lower court proceeding, the plaintiffs voluntarily dismissed their challenge under Article IX, Section 6 of the constitution, the claim that the OSP violated the provision that the state school fund only be used for the support and maintenance of free public schools. *See* *Bush v. Holmes*, 767 So.2d. 768 (Fla. 1st DCA 2000).

<sup>171</sup> *Bush v. Holmes*, 886 So. 2d 340, 351 note 9 (2004).

<sup>172</sup> IJ Website.

<sup>173</sup> Linda Kleindienst, “For Now, Students Can Use Vouchers,” *ORLANDO SENTINEL*, 7 August 2002, and Linda Kleindienst, “Bush Appeals Ruling that Tossed Vouchers,” *SUN-SENTINEL* (Fort Lauderdale, FL) August 7, 2002.

<sup>174</sup> Linda Kleindienst, “For Now, Students Can Use Vouchers,” *ORLANDO SENTINEL*, 7 August 2002.

<sup>175</sup> *See, e.g.*, “Law Cleanup Time,” *FLORIDA TIMES-UNION* (Jacksonville, Fla., Feb. 4, 2003), Metro Section, B-4).

The OSP's judicial fate may also bear on Florida's charitable choice programs. Governor Jeb Bush has embraced his brother's faith-based initiative, appointing a liaison to faith-based and community organizations in the governor's office.<sup>176</sup> Governor Bush has also issued an executive order establishing a twenty-five member Advisory Board to keep him abreast of issues affecting faith and community-based social service providers.<sup>177</sup> A supreme court ruling upholding a strict reading of Florida's no-funding provision could endanger these programs, jeopardizing social service provision to Florida's needy citizens.

No Florida Supreme Court precedent exists that provides a controlling interpretation of Article IX, Section 1, leaving the public to speculate on what the court's decision will be. The Florida Supreme Court is known to "lean[] left," which many believe will seal the demise of the OSP.<sup>178</sup> However, strong political and public support for the program may sway the court's decision. Following the state's prior case law on Article IX, § 1, the Florida Supreme Court could easily uphold the constitutionality of the OSP. It would argue that the OSP has only an incidental effect of advancing religion and does not advance religion over non-religion, and that the program is therefore permissible under the state constitution. The court might also choose to uphold the program under its longstanding presumption that challenges to legislative enactments should always be resolved in favor of the constitutionality of the law.<sup>179</sup> According to the 1944 case of *Taylor v. Dorsey*, the court should be liberal in its constitutional interpretation, and the law should not be held invalid unless it is clearly unconstitutional beyond a reasonable doubt.<sup>180</sup>

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<sup>176</sup> Volunteer Florida, [http://www.volunteerfloridafoundation.org/about\\_faithbased.php](http://www.volunteerfloridafoundation.org/about_faithbased.php) (last visited Mar. 13, 2005).

<sup>177</sup> State of Florida Office of the Governor Executive Order No. 04-245 (Nov. 18, 2004).

<sup>178</sup> "Law Cleanup Time," FLORIDA TIMES-UNION (Jacksonville, Fla., Feb. 4, 2003), Metro Section, B-4.

<sup>179</sup> See *Taylor v. Dorsey*, 155 Fla. 305, 317 (S.Ct. Fla. 1944) (*en banc*).

<sup>180</sup> See *Taylor v. Dorsey*, 155 Fla. 305, 317 (S.Ct. Fla. 1944) (*en banc*).

The court might use the *Taylor* principle to construe the no-funding provision liberally, perhaps coextensively with the federal establishment clause such that it would permit state funding to religious institutions under the OSP.

However, it is likely that the Florida Supreme Court could not rely only on this past analysis. First, most of these appellate cases relied on the framework established by the U.S. Supreme Court in *Lemon v. Kurtzman*.<sup>181</sup> While *Lemon* remained the salient federal doctrine of establishment clause jurisprudence for more than twenty-five years, the Supreme Court's recent decisions in *Agostini*, *Mitchell*, and *Zelman* have made its current relevance questionable at best.<sup>182</sup> Furthermore, the appellate cases above do not explicitly address the state's no-funding provision. In *Holmes v. Bush*, the issue has been raised and briefed by the parties and was the deciding factor in the lower court's opinion, so the Florida Supreme Court should address it. Alternatively, the court might strike down the OSP based on the Florida constitution's local control provision, recently invoked in a similar case before the Colorado Supreme Court.<sup>183</sup> The political preferences of the court's members, or public opinion, will be the deciding factor.

## 2. Colorado

Like Florida, Colorado is currently a hotbed of school choice and charitable choice activity. Colorado's no-funding provision was controversial from its inception.<sup>184</sup> Hundreds of Catholic and non-Catholic citizens of Colorado wrote to the Colorado Constitutional Convention of 1875-76 weighing in on both sides of the issue of whether to "withdraw from the control of

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<sup>181</sup> *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

<sup>182</sup> See *Agostini v. Felton*, 521 U.S. 203 (1997); *Mitchell v. Helms*, 530 U.S. 793, 802 (2000); *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).

<sup>183</sup> *Owens v. Colorado Congress of Parents, Teachers, and Students*, 92 P.3d 933 (Colo. 2004) (*see discussion infra*).

<sup>184</sup> COLORADO STATE CONSTITUTION: A REFERENCE GUIDE (2002) 7.

the legislature the public school fund,”<sup>185</sup> some noting that “free, non-sectarian common schools are essential.”<sup>186</sup> The convention noted that the “petitions for and against such division [of the Public School Fund] contain nearly an equal number of names.”<sup>187</sup> A strict no-funding provision barring the legislature and any political subdivision of the state from funding any sectarian institution was eventually adopted.<sup>188</sup> Some delegates reported that backlash against an aggressive Catholic bishop, Monsignor Joseph Machebeuf, prompted the passing of the no-funding provision.<sup>189</sup> Allegedly, Monsignor Machebeuf threatened to tell his constituency not to ratify the constitution unless the religion provisions contained language to his liking, fueling the other delegates to pass a provision against his interests.<sup>190</sup> However, no evidence exists of more widespread anti-Catholic animus behind the no-funding provision.

The jurisprudential history of Article IX, § 7 would not oppose school choice and charitable choice programs, despite the state’s restrictive Blaine language. The available state constitutional history does not elaborate on the enactment of Article IX, § 7.<sup>191</sup> The most comprehensive treatment of the provision in the state’s case law is in the Colorado Supreme Court case of *People ex rel. Vollmar v. Stanley* in 1927.<sup>192</sup> According to *Stanley*, the framers of the Colorado constitution of 1875-76 did not mean “sectarian” to be synonymous with “religious.” Instead, they meant the common usage of the term, which specifically referred to the various Christian sects.<sup>193</sup> Thus, the state could freely sponsor a program that involved all

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<sup>185</sup> PROCEEDINGS OF THE COLORADO CONSTITUTIONAL CONVENTION 1875-76, 228 (1876). *See also id.*, 235, 236, 261, 277, 278, 295, 296, 314, 351.

<sup>186</sup> *Id.* at 277.

<sup>187</sup> *Id.* at 311.

<sup>188</sup> *Id.* at 360-62; COLO. CONST. art. IX, § 7.

<sup>189</sup> COLORADO STATE CONSTITUTION: A REFERENCE GUIDE (2002) 224.

<sup>190</sup> *Id.*

<sup>191</sup> Dale A. Oesterle and Richard B. Collins, THE COLORADO STATE CONSTITUTION: A REFERENCE GUIDE (Westport, Conn.: Greenwood Press, 2002).

<sup>192</sup> 255 P. 610 (1927).

<sup>193</sup> 255 P. at 616.

religions generally.<sup>194</sup> Under *Stanley*'s analysis, a voucher program involving all religious schools generally would presumptively be constitutional. In 1953, the Colorado Supreme Court held that a school custodian's loaning his services to a church did not violate the state no-funding provision, with little explanation of its reasoning.<sup>195</sup> In 1982, the Supreme Court of Colorado upheld the Colorado Student Incentive Grant Program, a higher education tuition aid program that permitted assistance to students attending religious schools.<sup>196</sup> The court held that aid to an institution of higher education will not have the primary effect of advancing religion unless 1) it is so pervasively sectarian that a substantial portion of its functions are subsumed in the religious mission, or 2) if the aid funds a specifically religious activity in an otherwise substantially secular setting. The court thus noted that the program did not violate the state no-funding provision, especially since it involved only higher education, the aid flowed to the student and not the institution, and the aid went to students from both public and private institutions. The decision heavily draws on the *Lemon* test, and this could be grounds for distinguishing this opinion.

Colorado's voucher program, the Colorado Opportunity Contract Pilot Program, was passed by the state legislature on March 31, 2003.<sup>197</sup> The vote was held among partisan lines, and many constituents did not approve of the program.<sup>198</sup> The goal of the program is "to help close the achievement gap between high and low-performing students by providing a broader

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<sup>194</sup> 255 P. at 618 (upholding a bible-reading program in public schools. The program was later implicitly overruled by *Conrad v. City and County of Denver*, 656 P.2d 662 (1982)).

<sup>195</sup> *School Dist. No. 97 in Weld County v. Schmidt*, 263 P.2d 581, 128 Colo. 495 (1953).

<sup>196</sup> *Americans United for Separation of Church and State Fund, Inc. v. State*, 648 P.2d 1072 (1982).

<sup>197</sup> COLO. REV. STAT. 22-56-101, *et. seq.* (2003). See also John J. Sanko and Nancy Mitchell, "School Vouchers March Forward," *Rocky Mountain News* (Denver, CO, 20 February 2003) (discussing passage of voucher bill).

<sup>198</sup> See Eric Hubler, *Voters Not Sold on Lawmakers' Voucher Push, Poll Says*, *THE DENVER POST* February 14, 2003; Nancy Mitchell, *Union-Backed Poll Shows Voters Still Wary of Vouchers*, *ROCKY MOUNTAIN NEWS* (Denver, CO), February 14, 2003.

range of educational options for parents of high poverty, low achieving students.”<sup>199</sup> Under the program, a parent chooses a private or sectarian school for her child to attend, and participating school districts pay for education at those private schools.<sup>200</sup> Citizen groups filed suit against the voucher program, alleging the violation of eight separate state constitutional provisions, including the no-funding provision.<sup>201</sup> However, the court never reached the no-funding argument, instead invalidating the program based on the “local control” provision of Article IX., §15, a provision found in only six other states.<sup>202</sup> The court found that the program allowed local school boards no discretion over how their money is spent to provide instruction for students who live in the district, and they found no way to reconcile the constitutional requirement of local control with the program’s administration.<sup>203</sup> Thus the voucher program was found unconstitutional, and the rest of the constitutional challenges to the program were rendered moot.<sup>204</sup> On June 28, 2004, the Colorado Supreme Court, sitting en banc, upheld this analysis and struck down the program based on the “local control” provision.<sup>205</sup> Although the Colorado Opportunity Scholarship program does not apply to higher education, the court’s analysis is

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<sup>199</sup> Colorado Congress of Parents v. Owens, Denver, Colo. District Court, 03 CV 3734, (December 3, 2004), at <http://www.independenceinstitute.com> (last visited Apr. 14, 2004).

<sup>200</sup> *Id.*

<sup>201</sup> Colorado Congress of Parents v. Owens, Denver, Colo. District Court, 03 CV 3734, (Dec. 3, 2004), at <http://www.independenceinstitute.com>, (last visited Apr. 14, 2004) (citing violation of Art. IX, §7, the state’s no-funding provision).

<sup>202</sup> COLO. CONST. art. IX, §15 provides that The general assembly shall, by law, provide for organization of school districts of convenient size, in each of which shall be established a board of education, to consist of three or more directors to be elected by the qualified electors of the district. Said directors shall have control of instruction in the public schools of their respective districts.” The six other state provisions are: Fla. Const. art. IX, § 4 (providing that local school boards “shall operate, control and supervise” district schools); Ga. Const. art. VIII, § 5 (vesting local boards with authority to “establish and maintain” district schools); Kan. Const. art. VI, § 5 (providing that local public schools “shall be maintained, developed and operated by locally elected boards”); Mont. Const. art. X, § 8 (vesting “supervision and control of schools” in local boards); Va. Const. art. VIII, § 7 (vesting “supervision of schools” in local boards).

<sup>203</sup> Colorado Congress of Parents, Teachers and Students v. Owens, 2003 WL 23870661 (Colo. Dist. Ct. Dec. 03, 2003) (NO. 03 CV 3734).

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

<sup>205</sup> Owens v. Colorado Congress of Parents, Teachers, and Students, 92 P.3d 933 (Colo. 2004).

otherwise directly applicable to Florida's Opportunity Scholarship program and would bear toward its constitutionality.

The local control provision would not affect the constitutionality of Colorado's charitable choice programs. Governor Bill Owens has established a liaison in his office to the faith and community-based organizations.<sup>206</sup> The Colorado Workforce, Faith and Community Works Initiative, a state agency, has received a \$1.3 million dollar grant from the federal Compassion Capital Fund to improve relations with faith-based and non-profit organizations.<sup>207</sup> The status of these programs under the state constitution has not yet been challenged.

### 3. Michigan

Michigan's no-funding provision is strictest and perhaps the least ambiguous in the country. In addition to a general prohibition on state funding of sectarian institutions, the Michigan provision specifically excludes tuition voucher programs that assist with payment for nonpublic schools, in an amendment that was ratified by a popular vote in 1970.<sup>208</sup>

Michigan's prohibition of state funding to religious institutions has deep roots. The original Michigan constitution of 1835, well before the federal Blaine Amendment was created, provided that "No money will be drawn from the treasury for the benefit of religious societies."<sup>209</sup> The provision was enacted before the state had any significant number of parochial schools and before the wave of Catholic immigration.<sup>210</sup> More "traditional" Blaine language appeared in 1850 – still before the creation of the federal Blaine Amendment – and again in

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<sup>206</sup> See <http://www.whitehouse.gov/government/fbci/contact.html#liaisons> (last visited Mar. 13, 2005).

<sup>207</sup> Colorado Department of Labor and Employment, Colorado Government to Strengthen It's [sic] Partnerships with Faith-Based Community Organizations to Better Serve Customers, <http://www.coworkforce.com/News/fbeo.asp> (last visited Mar. 13, 2005).

<sup>208</sup> MICH. CONST. art. 8, §2 (ratified Nov. 3, 1970).

<sup>209</sup> MICH. CONST. OF 1835, art. I, §6.

<sup>210</sup> Steven K. Green, *Blaming Blaine: Understanding The Blaine Amendment and the No-Funding Principle*, 2 FIRST AMENDMENT L. REV. 107 (2004).

1908. That same language was ratified when the entire constitution was amended in 1963.<sup>211</sup> However, in 1970, the state legislature passed Public Act 100, which allowed direct financial support by the state to eligible private schools<sup>212</sup> A “Council Against Parochialism” quickly organized to ensure that this money would not flow to specific institutions instead of religious schools in general. The Council succeeded in getting its propositions onto the popular ballot, and the strengthened Blaine Amendment passed amid much controversy. Called upon to clarify the meaning of the provision, the Michigan Supreme Court held in 1971 that despite the “utter and complete confusion” of the campaign, the voters had definitively rejected parochialism, or public aid to religious schools.<sup>213</sup>

In 2000 Michigan voters overwhelmingly defeated a ballot proposition that would have approved a school voucher program and overruled the state’s no-funding provision.<sup>214</sup> Since then, Republicans have overtaken both houses of the state legislature, but Governor Jennifer Granholm opposes school choice, so little political activity over vouchers is occurring in the state. However, Gov. Granholm has established a liaison to faith and community-based organizations within her office and is hosting an annual conference for these groups.<sup>215</sup> Michigan boasts little case law on its no-funding provision, perhaps because it has clarified the intent of the provision, implicitly or explicitly, about every 50 years. However, Michigan boasts other constitutional provisions that could block school choice and charitable choice programs.

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Susan P. Fino, *The Michigan State Constitution: A Reference Guide* (Westport, Conn.: Greenwood Press, 1996).

<sup>212</sup> Matthew J. Brouillette, *School Choice in Michigan: A Primer for Freedom in Education*, Mackinac Center for Public Policy, at <http://www.mackinac.org>, (last visited Apr. 25, 2004).

<sup>213</sup> *In the matter of Executive Message of Governor v. Kelley*, 384 Mich. 390, 396 note 2 (1971).

<sup>214</sup> See Matthew J. Brouillette, *School Choice in Michigan: A Primer for Freedom in Education*, Mackinac Center for Public Policy, at <http://www.mackinac.org> (last visited Apr. 25, 2004); California also rejected a proposal that would have eliminated its provision restricting funding to religious schools in the 1982 general election. In 2000 Californians also defeated Proposition 38, which would have created a public school voucher program.

<sup>215</sup> Granholm Administration to Host Faith-Based Resource Symposium, Create Office of Community and Faith-Based Initiatives, <http://www.michigan.gov/som/0,1607,7-192--112680--,00.html> (last visited Mar. 13, 2005).

For example, the Michigan constitution has a compelled support provision,<sup>216</sup> and prohibits the use of public funds to aid private schools “directly or indirectly,” whether or not the schools are sectarian.<sup>217</sup> A decision striking down any Michigan school choice or charitable choice program might rest on these constitutional provisions, and the courts would not need to delve into Blaine’s controversial history.

### **C. States Without No-Funding Provisions**

States without no-funding provisions fall into two categories: those with and without compelled support provisions. States with compelled support provisions will find that their compelled support provisions are the most formidable opponents to voucher programs in their state constitutions, especially after the Vermont *Chittenden* case. For the states with neither no-funding provisions nor compelled support provisions, the lack of constitutional obstacles paves the way for public debate over school choice programs.

#### **1. Vermont**

Vermont’s constitution today is nearly identical to the original enacted in 1777. It bears many similarities to other colonial constitutions, and borrowed heavily from the original constitution of Pennsylvania.<sup>218</sup> Few cases were litigated under its Compelled Support clause until the *Chittenden* case in 1999.<sup>219</sup> The town of Chittenden had no high school, so it paid tuition to public high schools or approved independent high schools for the education of students

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<sup>216</sup> MICH. CONST. ART. I, § 4.

<sup>217</sup> MICH. CONST. art. 8, §2, CL. 2.

<sup>218</sup> See *Chittenden Town School Dist. v. Department of Educ.*, 169 Vt. 310 (Vt. Jun. 11, 1999), *cert. denied*, *Andrews v. Vermont Department of Educ.*, 528 U.S. 1066, Dec. 13, 1999.

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

in its school district. When the Chittenden school board modified its policy to allow for tuition reimbursement to sectarian schools, the Commissioner of Education terminated state aid to the district, and the Chittenden school board brought suit to declare its program constitutional.<sup>220</sup> In its opinion, the Vermont Supreme Court sought to understand the meaning of the Compelled Support clause by analyzing its plain language, its history, and its usage in similar cases in other states. The court commenced a thorough review of the influences on the Vermont constitution, determining that the historical records of other colonial constitutions in Pennsylvania and Virginia would have forbidden state aid to sectarian schools.<sup>221</sup> The Vermont Supreme Court reviewed the Wisconsin court's decision in *Jackson v. Benson* and the Ohio decision in *Simmons-Harris v. Goff*, carefully delineating the differences between the Wisconsin and Vermont constitutions that necessitated a different opinion.<sup>222</sup> The Vermont Supreme Court specifically refused to equate its state religion clauses with the federal religion clauses, as the Ohio and Wisconsin courts had done in *Simmons-Harris* and *Jackson*, because of Vermont's unique history and the historical record.<sup>223</sup> Thus, the Vermont Supreme Court invalidated the Chittenden Town tuition-reimbursement program based on the compelled-support clause. Based on the Vermont Court's reasoning and insistence on having an independent interpretation of the state constitution, this decision seems unlikely to change in light of the U.S. Supreme Court's subsequent decision permitting vouchers in *Zelman*.

## 2. Maine

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<sup>220</sup> *Id.* at 314.

<sup>221</sup> *Id.*, at 328-337.

<sup>222</sup> *Id.* at 339.

<sup>223</sup> *Id.* at 339, *see also* Johnson, J., concurring, "It is preferable that our interpretation of the Vermont Constitution be distinct and freestanding, and that the Court articulate the adequate and independent state grounds for decisions when the Vermont Constitution is invoked."

James G. Blaine’s home state has no “Blaine Amendment” and no compelled support provision. Despite this lack of restriction, the state does not fund religious schools and boasts little charitable choice activity. Parochial schools may not participate in Maine’s rural tuition-reimbursement program. Like Vermont, Maine permits those towns which cannot support high schools to pay tuition for their pupils at other approved area schools. The exclusion of religious schools from this “tuitioning” program has withstood challenge in both state and federal court. In 1999, the Supreme Judicial Court of Maine held that the federal establishment clause did not prevent Maine from excluding religious schools from the tuitioning program,<sup>224</sup> and that direct payments to religious schools would be impermissible under the Supreme Court’s establishment clause jurisprudence.<sup>225</sup> The federal First Circuit Court of Appeals held that the prohibition against religious school participation in the program did not violate the free exercise clause of the First Amendment because the grants could not be given to the schools consistently with the establishment clause.<sup>226</sup> The court noted that “There is no binding authority for the proposition that the direct payment of tuition by the state to a private sectarian school is constitutionally permissible.”<sup>227</sup>

In its first post-*Zelman* “counteroffensive” designed to strike down barriers to school choice throughout the nation,<sup>228</sup> the Institute for Justice recently filed another lawsuit challenging the exclusion of religious schools from Maine’s tuitioning program.<sup>229</sup> However, *Zelman* is unlikely to have changed either the state or federal court’s analysis of the Maine tuitioning program. The program in *Zelman* dealt with indirect aid to religious schools, while the Maine

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<sup>224</sup> Bagley v. Raymond, 728 A.2d 127, 136 (Vt. 1999).

<sup>225</sup> *Id.* at 147.

<sup>226</sup> Strout v. Albanese, 178 F.3d 57, 61 (1st Cir. 1999), *cert. denied*, 528 U.S. 931 (1999).

<sup>227</sup> Strout v. Albanese, 178 F.3d 57, 61 (1st Cir. 1999).

<sup>228</sup> Institute for Justice, *Vindicating the Supreme Court: Fighting for Parental Liberty by Stopping Religious Discrimination*, at <http://www.ij.org> (last visited Apr. 25, 2004).

<sup>229</sup> Anderson v. Town of Durham (2002).

program dealt with direct aid. Indeed, the Court's recent decision in *Locke v. Davey*<sup>230</sup> further supports the *Strout* decision, since it finds no free exercise violation where the establishment clause reaches.

#### **D. Other States**

Recent school choice litigation has also occurred in Pennsylvania and Illinois. In Pennsylvania, a suburban Philadelphia school district approved a tax benefit program for families who send their children to private schools or public schools in other districts.<sup>231</sup> The teachers' union successfully challenged the program on state constitutional grounds, with the state appellate court holding that the legislature did not intend, expressly or impliedly, to permit the school district to create such a tax credit program.<sup>232</sup> The state's no-funding provision did not factor into the Pennsylvania court's decision in this case. The school district chose not to appeal the case to the Pennsylvania Supreme Court.<sup>233</sup>

In Illinois, the state's no-funding provision was at issue in a challenge to an Illinois state tax credit program. Under the program, enacted in 1999, parents could receive a 25% income tax credit for expenditures related to sending their children to private schools, a credit of up to \$500/family. The Illinois Federation of Teachers immediately challenged the program, alleging that the program violated the religious establishment provisions of the Illinois constitution, including the state's no-funding provision. The program was upheld on summary judgment and certiorari was denied.

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<sup>230</sup> *Locke v. Davey*, 124 S.Ct. 1307 (2004).

<sup>231</sup> *Giacomucci v. Southeast Delco School District*, 742 A.2d 1165 (1999).

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

<sup>233</sup> Institute for Justice, Pennsylvania School Choice Case, *available at* <http://www.ik.org/cases/school/pennsylvania.shtml>, (last visited Apr. 25, 2004).

The Becket Fund, a non-profit law firm that seeks to protect “the free expression of all religious traditions,”<sup>234</sup> has recently filed lawsuits challenging no-funding provisions in South Dakota and Massachusetts. As mentioned above, Becket has filed a case in *Pucket v. Rounds* charging that the South Dakota no-funding provision has been used to exclude religious schools and children from numerous government benefits, including textbook loans and school busing programs.<sup>235</sup> The success of this case appears unlikely. South Dakota’s no-funding provision originated in the same enabling act as Washington’s no-funding provision, so the South Dakota courts are may choose to follow Washington’s strict interpretation of its no-funding provision. The strict Blaine state of Massachusetts also boasts a line of case law that interprets its no-funding provision strictly and is quite restrictive of school choice.<sup>236</sup> However, the Becket Fund recently filed litigation in an attempt to pave the way for Massachusetts’ first voucher program.<sup>237</sup> A group of parents that wants to repeal a 1917 constitutional amendment that currently bars referenda on the question of school choice. The constitutional provision forbids referenda on any law that relates to religion, religious practices, or religious institutions. The Becket fund claims that the anti-aid provision, like the federal Blaine Amendment, was adopted as a result of anti-Catholic animus and asks for it to be struck down under the free exercise and equal protection clauses. Although the lawsuit itself has nothing to do with the state “Blaine Amendment,” the Becket fund links the case to the Blaine Amendment discussion on its websites

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<sup>234</sup> See generally <http://www.becketfund.org>.

<sup>235</sup> *Pucket v. Rounds*, Complaint, No. 03-CV-5033, (DSD Apr. 23, 2003), ¶22 (challenging South Dakota’s no-funding provision).

<sup>236</sup> See, e.g., *Bloom v. School Committee of Springfield*, 382 Mass. 665 (1981) (holding that a statute requiring school committees to loan textbooks to pupils attending private schools, sectarian or nonsectarian, violates the state no-funding provision); *Collins v. Secretary of the Commonwealth*, 407 Mass. 837 (1990) (upholding an article of the state constitution excluding from the referendum process any law relating to religion, religious practices, or religious institutions).

<sup>237</sup> *Boyette v. Galvin*, 311 F.Supp. 2d 237 (D. Mass. 2004), *on appeal sub nom* *Wirzburger v. Galvin*, No. 04-1625 (1st Cir., filed May 19, 2004).

and refers to it as a Blaine Amendment “forerunner.”<sup>238</sup> The Becket Fund’s publicity of this case exemplifies broad use of the Blaine name to tie other school choice cases to alleged religious bigotry.<sup>239</sup>

## V. ANALYSIS: A POTENT WEAPON?

No-funding provisions by themselves should not serve as the foremost obstacle to school choice and charitable choice programs throughout the country. In the hands of a savvy court, even those no-funding provisions with the strongest wording will not prevent such programs from passing. As the examples above indicate, the history of the state no-funding provisions is not dispositive of their final adjudication. Sparse constitutional records and indecipherable legislative motives are hardly a basis for a modern court to make a reasoned decision. No states observe prohibitions on “sectarian” funding as black-letter law that restricts all funding of religious institutions. What time’s passage has not turned to gray, judges’ motivations may erase completely. State jurists will be free to decide the fate of school choice and charitable choice programs based on their own political leanings. Whether judges decide to uphold or strike down school choice and charitable choice programs, they will have plenty of constitutional and jurisprudential ammunition for doing so.

### ***A. How Courts May Uphold School Choice and Charitable Choice Programs Despite the No-Funding Provisions***

State jurists who want to uphold school choice and charitable choice programs have several options for doing so before they must even reach the state no-funding provisions. First, a

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<sup>238</sup> The Becket Fund, <http://www.becketfund.org>, last visited Mar. 7, 2005.

<sup>239</sup> See also Greater Educational Opportunities Foundation, Heritage Foundation, Milton & Rose Friedman Foundation.

jurist might root her argument in the free exercise clause of the state or federal constitutions by arguing that parents have the right to freely exercise their religious beliefs by choosing to send their children to a religious school on equal terms with a non-religious school. After *Zelman* and *Davey*, an open question remains as to whether state or federal free exercise clauses would permit a state to exclude religious schools from participating in a school choice program. A circuit split exists on this question at the federal level. In *Peter v. Wedl*, the Eighth Circuit held that the free exercise clause barred a state from denying aid to disabled children attending religious schools that they would receive if they attended non-religious private schools.<sup>240</sup> On nearly identical facts, the Ninth Circuit held the following year that denying such aid did not constitute a free exercise violation.<sup>241</sup> The Supreme Court temporarily let the question stand, denying certiorari in 2000.<sup>242</sup>

Many states have attempted to strengthen their free exercise guarantees beyond those of the federal free exercise provisions by passing state versions of the Religious Freedom Restoration Act (RFRA)<sup>243</sup> after the federal RFRA was struck down in *City of Boerne v. Flores*.<sup>244</sup> States passed RFRA in response to what many viewed as a curtailing on free exercise guarantees in the wake of *Department of Human Resources of Oregon v. Smith*.<sup>245</sup> Illinois,<sup>246</sup> Ohio,<sup>247</sup> and other state courts also acted to bolster their free exercise guarantees since *Smith*. The Minnesota Supreme Court explicitly rejected *Smith* and developed its own standard for evaluating whether state laws adversely affect religion.<sup>248</sup>

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<sup>240</sup> *Peter v. Wedl*, 155 F.3d 992 (8th Cir. 1998).

<sup>241</sup> *KDM ex rel. WJM v. Reedsport Sch. Dist.*, 196 F. 3d 1046 (9<sup>th</sup> Cir. 1999), *cert. denied*, 531 U.S. 1010 (2000).

<sup>242</sup> *Id.*

<sup>243</sup> *See, e.g.*, Illinois RFRA, 775 Ill. Comp. Stat. Ann. 35/15.

<sup>244</sup> 521 U.S. 507 (1997).

<sup>245</sup> 484 U.S. 872 (1990).

<sup>246</sup> *Vineyard Christian Fellowship of Evanston v. City of Evanston*, 250 F.Supp. 2d 967, 993-94 (N.D. Ill. 2003).

<sup>247</sup> *Humphrey v. Lane*, 728 N.E.2d 1039, 1045, *cert. denied*, 531 U.S. 263 (Oh., 2000).

<sup>248</sup> *State v. Hershberger*, 462 N.W. 2d 393, 397 (Minn. 1990)

State jurists who choose this way of justifying school voucher programs despite state no-funding provisions would couch their arguments in terms of a recent trend among state supreme courts to use state constitutions as a source of positive rights.<sup>249</sup> Under this model, free exercise is a positive right granted by state constitutions upon which neither state anti-establishment provisions nor the federal establishment clause may infringe. The state jurist would have to establish free exercise as a paramount right that would supersede any rights guaranteed by the no-funding provision.

A state court may also interpret the no-funding provisions to permit school choice and charitable choice programs. Most commonly, courts have declared the religion clauses of the state constitution coextensive with the federal religion clauses. The Ohio, Wisconsin, and Arizona courts have used this tactic.<sup>250</sup>

Courts can also interpret the no-funding provision narrowly so that the school choice plan does not violate the no-funding provision. For example, in *Simmons-Harris v. Goff*, the Ohio Supreme Court held that the school choice plan does not violate the no-funding provision because school funds would only reach “sects through the “independent decisions of parents and students.” Since only school choice programs involving indirect aid are constitutional under *Zelman*, most future school choice programs will likely involve indirect aid, and this analysis will be applicable. State courts may also apply this rationale to uphold charitable choice programs that involve indirect aid to religious organizations.

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<sup>249</sup> See generally Helen Hershkoff, Positive Rights and State Constitutions: The Limits of Federal Rationality Review, 112 Harv. L. Rev. 1131 (1999); Hans A. Linde, State Constitutions Are Not Common Law: Comments on Gardner’s Failed Discourse, 24 Rutgers L.J. 927 (1993), etc.

<sup>250</sup> Other courts that have held their religion clauses to be coextensive with federal religion clauses at various times include: Illinois (*People v. Falbe*, 727 N.E. 2d 200, 207 (Ill. 2000)(establishment provisions same)); North Carolina (*Appeal of Springmoor, Inc.*, 498 S.E.2d 177, 180 (N.C. 1998) (adopting law of both Religion Clauses)); Tennessee (*State v. Medicine Bird Black Bear White Eagle*, 63 S.W.3d 734, 761 (Tenn. Ct. App. 2001)(free exercise principles same)); and Louisiana (*Jabr v. Rapides Parish School Bd.*, 171 F.Supp. 2d 653, 659 note 5 (W.D. La. 2001) (La. and federal establishment clauses identical)).

Finally, courts who wish to uphold school voucher programs may declare the no-funding provision unconstitutional or irrelevant due to its prejudicial origins, as the Arizona Supreme Court did in *Kotterman*. Some activists cite two U.S. Supreme court cases as providing support for this approach. In *Hunter v. Underwood*,<sup>251</sup> the Supreme Court invalidated an Alabama criminal disenfranchisement statute, holding that it was racially motivated at its inception and continued to have a racially disparate impact. Similarly, anti-Blaine activists might argue that the no-funding provisions were motivated by anti-Catholic bigotry and that they continue to have disparate impact on Catholic schools, which still comprise most religious schools in the U.S.

Some scholars also cite the more recent case of *Romer v. Evans*,<sup>252</sup> in which the Supreme Court struck down a Colorado ballot proposition that invalidated a state constitutional amendment barring state actors from granting lesbians, gays, and bisexuals protection and rights as a class. The Court held that the statute had the discriminatory effect of denying a class of people protection from discrimination, a clear violation of equal protection. However, to analogize the no-funding provision cases to *Hunter* and *Romer*, challengers would have to definitively prove the anti-Catholic history of the no-funding provisions. Challengers would also have to show that the no-funding provisions in each state were directed against Catholics as a class, and not just religion in general, and continue to have disproportionate impact against Catholics as a class, and not just parochial schools. This task may not be possible given the complex history of the Blaine provisions and their differential treatment in the individual states. The *Kotterman* decision cites neither *Hunter* nor *Roemer*, and thus provides the least complicated option for striking down no-funding provisions, although it is the least authoritative.

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<sup>251</sup> 471 U.S. 222 (1985). See also Gall, *supra* note 23, (analogizing *Hunter v. Underwood* to the Blaine Amendment cases).

<sup>252</sup> 517 U.S. 620 (1996). See Ira C. Lupu and Robert W. Tuttle, *Zelman's Future: Vouchers, Sectarian Providers, and the Next Round of Constitutional Battles*, 78 NOTRE DAME L. REV. 917 (967-68)(2003).

### ***B. How Courts May Strike Down School Choice and Charitable Choice Programs without Reaching the No-Funding Provisions***

State jurists that wish to strike down school choice or charitable choice programs still need not reach the no-funding provisions. State courts have many other constitutional options that they can use to invalidate school choice programs. The local control provision used by the Colorado court to strike down the voucher program without reaching the state's no-funding provision can be found in only six other states. However, the compelled support provision can be found in twenty-nine states and presents a more powerful alternative for striking down school choice programs. The *Chittenden* case in Vermont demonstrates how a Compelled Support clause alone can invalidate a school choice program.

A state court might also claim that the state's anti-establishment provisions are more expansive than the federal establishment clause and thus do not permit school choice and charitable choice programs. While such a use of state anti-establishment provisions would be bold and perhaps unprecedented, nothing in *Zelman* forbids a state anti-establishment provision from being stronger than the federal anti-establishment provision and therefore being used to strike down a voucher program, as long as it does not violate the federal free exercise clause. The Supreme Court's opinion in *Locke v. Davey* also gives state supreme courts tacit permission to interpret their state constitutional provisions as stronger than the federal establishment clause.<sup>253</sup>

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<sup>253</sup> *Locke v. Davey*, 124 S.Ct. 1307 (2004).

## VI. CONCLUSION: DON'T BLAME BLAINE

Analyzing the history of eight so-called Blaine Amendments does not reveal them to be legislatively enacted bigotry. Blaine Amendment opponents have never explained how the no-funding provisions have consistently been used in a prejudicial manner that is directly traceable to their anti-Catholic roots. State no-funding provisions may or may not have been passed because of anti-Catholic animosity on the part of some or all voters. Courts in the past may or may not have interpreted their no-funding provisions according to their own prejudicial motivations. And all of this may or may not matter when no-funding provisions come before politically active judges with an array of options for interpretation at their fingertips. Moreover, Blaine Amendment opponents do not have a compelling argument as to why state constitutions cannot protect separation of religion and state more strictly than the federal constitution. As state courts increasingly interpret state constitutional law to create and enforce rights for state citizens, such an argument seems increasingly difficult to make.<sup>254</sup> Given the array of judicial options for circumventing, invalidating, or even ignoring state no-funding provisions, the federal Blaine Amendment simply cannot be blamed for halting school choice in the states. The name of Blaine seems mainly used in vain.

Where history is indecisive, activists on both sides of the school choice debate should bury the past and focus on the present. The true legislative intent behind all state no-funding provisions cannot be unearthed by any amount of historical digging, and should not be rewritten by partisan rhetoric. Debate over school choice belongs outside the courts and in the public realm, where the competing values of freedom of religion, freedom from religion, and superior

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<sup>254</sup> See generally *Judges' Forum No. 3: State Constitutional Law*, 59 N.Y.U. ANN. SURV. OF AM. L. 2 (2003).

education can manifest themselves at the polls. Only then can we know the true legislative intent behind the parochial school programs of today. We will also know the popular view on whether freedom from religion is meant to trump the value of saving failing schools, which can guide state courts in interpreting their constitutional provisions. By keeping school choice out of the courts and in the democratic arena, if school choice activists fail, they cannot blame Blaine, but only themselves.