

The Grand Finale is Just the Beginning: School Choice and the Coming Battle Over Blaine Amendments

by Eric W. Treene*

The oral arguments in the Cleveland school choice case, *Zelman v. Simmons-Harris*, held on February 20, left choice supporters publicly encouraged and privately ebullient. After years of nudging the Supreme Court toward acceptance of the idea that the genuine and independent choices of parents to direct public aid toward private education do not “establish” religion, and years of being tempted by coquettish signals from the Court in *Rosenberger*,¹ *Agostini*,² and most recently in both the plurality and the concurring opinions in *Mitchell v. Helms*,³ school choice activists now can barely contain themselves. While none yet dares declare victory, the bench appeared so skeptical of NEA General Counsel Robert Chanin’s insistence that the program was jury-rigged to aid religion, and there was such a general sense in the air of the passing of an old order and the ascendancy of an idea whose time has come, that there is now more talk of whether the decision will be 5-4 or 6-3, and how fact-specific the Court’s decision will be, than there is of whether school choice will be upheld.

If the Cleveland program is indeed held by the Supreme Court not to violate the Establishment Clause, the decision will rightly be heralded as a triumph opening the door to school choice across the nation. For it is the Court’s Establishment Clause jurisprudence that has occupied center stage in the legal debate over school vouchers. It has been the Establishment Clause that has barred numerous well-meaning aid programs, like the special education services for kids in parochial school initially struck down in *Aguilar v. Felton*⁴ and resurrected in *Agostini v. Felton*.⁵ And it was the Establishment Clause that very well might have barred the modest tax deductions for private school expenses in *Mueller v. Allen*⁶ and the government-paid sign language interpreter at a parochial school in *Zobrest v. Catalina Foothills School District*,⁷ had these 5-4 decisions gone the other way. Given all of this—plus the fact that a plan of partial reimbursement for private school tuition, albeit of a markedly different character from the program being tested in the Cleveland case, had been struck down in 1973 in *Committee for Public Education and Religious Liberty v. Nyquist*,⁸ it was quite natural that school choice activists and opponents formulating litigation strategies have honed in on the

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1 *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995).

2 *Agostini v. Felton*, 521 U.S. 203 (1997).

3 *Mitchell v. Helms*, 530 U.S. 793 (2000).

4 473 U.S. 402 (1985).

5 521 U.S. 203 (1997).

6 463 U.S. 388 (1983).

7 509 U.S. 1 (1993).

8 413 U.S. 756 (1973).

Establishment Clause. It also explains why the media as well have focused on the U.S. Constitution whenever school choice is discussed.

Moreover, the effort to overcome the Establishment Clause barrier has presented a nail-biting, fighting-for-every-beach-head battle full of high drama, adding to the sense that we are headed toward a great climax. School choice proponents had won an important victory in the Wisconsin Supreme Court upholding the Milwaukee voucher plan in 1998, despite fierce opposition by the teachers' unions and strict separationist groups.⁹ This, coupled with the Arizona Supreme Court's decision upholding a tax credit for contributions to private school scholarship funds in January 1999, gave real momentum to the school choice movement.¹⁰ Then two decisions came down in April and May of 1999 that dampened the enthusiasm. The Supreme Court of Maine¹¹ and the First Circuit¹² both ruled that that Maine's rural tuitioning plan, under which students in communities without high schools are given tuition grants toward education at a nearby private or public school, could not be extended to include private religious schools without violating the federal Establishment Clause. This discouraging development was quickly eclipsed by the June 1999 decision of the Ohio Supreme Court that the Cleveland voucher plan did not violate the Establishment Clause.¹³ After the Ohio legislature modified the Cleveland plan to comply with some technical state law requirements, school choice opponents tried their luck in federal court, and persuaded District Court Judge Solomon Oliver to issue a preliminary injunction blocking the program on Establishment Clause grounds. The Sixth Circuit let it stand, but the Supreme Court reversed the injunction. Judge Oliver went on to invalidate the program on Establishment Clause grounds as expected,¹⁴ and the Sixth Circuit then gave the High Court with an offer it could not refuse: it upheld Judge Oliver's decision,¹⁵ leaving one interpretation of the Cleveland choice plan's constitutionality in state court and the opposite in federal court.

Which is all to say that should the Supreme Court uphold school choice, the decision will rightly be seen as the glorious end of a long and hard-fought struggle. But the end is just the beginning. Not that I will refrain from popping a champagne cork or two, and relishing the weeping and gnashing of teeth in the papers the next morning, but a victory on the Establishment Clause question is only the start of a long, state-by-state battle to roll back the barriers to school choice. And this is not a state-by-state battle only in the positive, Federalist Society sense of placing the issue in the hands of the people of each state and their elected representatives, to enact or reject school choice plans as they may deem best. The next battle to a large extent will not be in the laboratories of democracy, but in the courts. While in some states school choice will simply be a hotly contested policy debate, in a majority of states there will be protracted legal battles over provisions that generally have been out of the public eye in the school choice debate:

9 *Jackson v. Benson*, 578 N.W.2d 602 (Wis. 1998), *cert. denied*, 525 U.S. 997 (1998).

10 *Kotterman v. Killian*, 972 P.2d 606 (Az. 1999), *cert. denied*, 528 U.S. 921 (1999).

11 *Bagley v. Raymond Sch. Dept.*, 728 A.2d 127 (Me. 1999), *cert. denied*, 528 U.S. 947 (1999).

12 *Strout v. Albanese*, 178 F. 3d 57 (1st Cir. 1999), *cert. denied*, 528 U.S. 931 (1999).

13 *Simmons-Harris v. Goff*, 711 N.E.2d 203 (Oh. 1999).

14 72 F. Supp.2d 834 (N.D. Oh. 1999).

15 234 F.3d 945 (6th Cir. 2000).

state constitutional restrictions on aid to religious schools, often known as Blaine Amendments.

Barriers to School Choice

Thirty-seven state constitutions have provisions placing some form of restriction on government aid to religious schools beyond that in the United States Constitution. The vast majority of these—legal scholars place the number at between 29 and 33 states¹⁶—were enacted in the wake of the failed attempt of U.S. House Speaker James G. Blaine to add a provision to the United States Constitution to bar states from giving any aid to religious schools. These state “Blaine Amendments” are modeled on the language of Representative Blaine’s amendment, which would have provided:

No State shall make any law respecting an establishment of religion, or prohibiting the free exercise thereof; and no money raised by taxation in any State for the support of public schools, or derived from any public fund therefor, nor any public lands devoted thereto, shall ever be under the control of any religious sect; nor shall any money so raised or lands so devoted be divided between religious sects or denominations.¹⁷

The Blaine Amendments are all variations on this basic text, and tend to be more specific than the “under the control of” language in the original. Delaware’s Blaine Amendment (Article 10 § 3), for example, states: “No portion of any fund . . . shall be appropriated to, or used by, or in aid of any sectarian, church or denominational school.” Missouri’s (Article 9 § 8) is even more thorough, and emphatic, stating that no government body “shall ever make an appropriation or pay from any public fund whatever, anything in aid of any religious creed, church or sectarian purpose, or to help to support or sustain any private or public school, academy, seminary, college, university, or other institution of learning controlled by any religious creed, church or sectarian denomination whatever.”

Some of the Blaine Amendments have little or no case law interpreting them. Others have been interpreted to be limited in scope. But many have been expansively construed to bar forms of school aid that the Supreme Court has expressly upheld under the Establishment Clause. The clearest example is the State of Washington, which, after the Supreme Court unanimously held in *Witters v. Washington Department of Services for the Blind*¹⁸ that it would not violate the Establishment Clause for a blind man to use state vocational training aid to attend a seminary in ruled on remand that such aid would

16 See Note, *School Choice and State Constitutions*, 86 VA. L. REV. 117, 123 n.32 (2000) (reporting the conclusions of several law review articles on how many state constitutional provisions are properly called Blaine Amendments). The number depends on how one classifies the language adopted by different states constitutions, which vary range in their similarity to the precise Blaine language, and on how long beyond the mid-1870’s enactment of such a measure should be termed a Blaine Amendment.

17 LLOYD JORGENSON, *THE STATE AND THE NON-PUBLIC SCHOOL, 1825-1925*, at 138-139 (1987).

18 474 U.S. 481 (1986).

violate the state constitution's Blaine Amendment.¹⁹ Similarly, bus transportation to private religious schools, upheld against Establishment Clause challenge in *Everson v. Board of Education*,²⁰ has been invalidated by state courts interpreting their Blaine Amendments,²¹ as have textbook loan programs similar to the one upheld in *Board of Education v. Allen*,²² and a proposed tax deduction for private school tuition similar to the one upheld in *Mueller v. Allen*.²³

These Blaine Amendments thus potentially could derail school choice efforts in states throughout the country. Even if the Supreme Court were to catch us by surprise and invalidate the Cleveland voucher plan, Blaine Amendments could pose a threat to tuition tax credit and deduction plans, tax credits for contributions to scholarship funds, and other choice proposals. One survey of how Blaine Amendments have been interpreted found that seventeen states have "restrictive" Blaine Amendments, ten others have Blaine Amendments of "uncertain" interpretation, and eight states have Blaine Amendments "permissive" toward state aid.²⁴ If these numbers are correct, and our internal research at the Becket Fund to date tends to support them, then school choice will either be a non-starter in more than half the states or will at least face contentious litigation over the scope of such states' Blaine Amendments.

The most obvious strategy would be a case-by-case effort to convince courts that their state's Blaine Amendment should not be construed to bar aid to families that only reaches religious schools through parental choice. In some states with strictly interpreted Blaine Amendments, however, this will not be possible. The only choice in such states is to make the Blaine Amendments disappear as a factor entirely. This could be done by two means. The first is by state constitutional amendment. The second is for courts to find that applying Blaine Amendments to bar school choice violates the United States Constitution. While the latter may give some Federalists pause as federal overbearing on state autonomy, the Blaine Amendments, as will be shown below, were no ordinary constitutional amendments. They were a direct result of the nativist, anti-Catholic bigotry that was a recurring theme in American politics throughout the 19th and early 20th centuries. Indeed, in some cases, the Blaine Amendments adopted by states were themselves a result of federal heavy-handedness: the Congress required many states to adopt Blaine language as a condition for admittance to the Union.

The Blaine Amendments represented a deliberate attempt to suppress the growth of the Catholic schools, and give the public schools a monopoly on the inculcation of values with public funds. And the public schools of the time were markedly Protestant in

19 *Witters v. State Com'n for the Blind*, 771 P.2d 1119 (1989).

20 330 U.S. 1 (1947).

21 See, e.g., *Epeldi v. Engelking*, 488 P.2d 860 (Idaho 1971), cert. denied, 406 U.S. 957 (1972).

22 392 U.S. 236 (1968). See, e.g., *California Teachers Association v. Riles*, 632 P.2d 953 (Cal. 1981); *McDonald v. School Bd. of Yankton Indep. Sch. Dist.*, 246 N.W. 2d 113, 117 (S.D. 1985).

23 463 U.S. 388 (1983). See *Opinion of the Justices*, 514 N.E.2d 353 (Mass.1987) (proposed bill to provide a tax deduction to parents for private and public school expenses would violate Massachusetts' Anti-Aid Amendment).

24 See Frank R. Kemerer, *The Constitutional Dimension of School Vouchers*, 3 TEX. FORUM ON CIV. LIB & CIV. RTS. 137, 181 (1998).

character, undercutting any claim that they were based on lofty Madisonian motives of keeping government out of religious matters. As Justice Thomas said in his plurality opinion in *Mitchell v. Helms*, describing how the bar on aid to “sectarian” schools in the Supreme Court’s jurisprudence derived from Blaine’s amendment:

[H]ostility to aid to pervasively sectarian schools has a shameful pedigree that we do not hesitate to disavow. . . . Opposition to aid to “sectarian” schools acquired prominence in the 1870s with Congress’s consideration (and near passage) of the Blaine Amendment, which would have amended the Constitution to bar any aid to sectarian institutions. Consideration of the amendment arose at a time of pervasive hostility to the Catholic Church and to Catholics in general, and it was an open secret that “sectarian” was code for “Catholic.” . . . This doctrine, born of bigotry, should be buried now.²⁵

An understanding of the nefarious history of Blaine’s failed amendment and the state versions that followed is critically important to the school choice movement for three reasons. First, their true purpose should be brought to light and made clear to judges who are interpreting how a given Blaine Amendment’s terms should be applied. Second, in any repeal efforts, it should be made clear to the public what these provisions are: remnants of 19th century bigotry hamstringing educational reform in the 21st century. And finally, as will be explained in greater detail below, the purpose behind the original passage of the Blaine Amendments makes them particularly vulnerable to challenge under the Free Exercise and Equal Protection clauses of the United States Constitution.

The Pre-Blaine Nativists and the Common School

The story of Blaine Amendments starts not with Blaine himself, but much earlier in the 19th century, for the wave of nativist, anti-Catholic sentiment that he sought to exploit in the 1870s was but one of a series of nativist outbursts that ebbed and flowed throughout the 19th and early 20th centuries.

During the first half of the 19th century, with the growth the public or common schools, educators such as Horace Mann sought to ensure that the schools were non-sectarian. But by this they did not mean secular. They believed “that moral education should be based on the common elements of Christianity to which all Christian sects would agree or to which they would take no exception,” including the “reading of the Bible as containing the common elements of Christian morals but reading it with no comment in order not to introduce sectarian biases.”²⁶ As Horace Mann stated in 1848:

[S]ectarian books and sectarian instruction, if their encroachment were not resisted, would prove the overthrow of the schools Our system earnestly inculcates all Christian morals; it founds its morals on the basis of religion; it welcomes the religion of the Bible; and in receiving the

25 530 U.S. at 828-829.

26 R. FREEMAN BUTTS, *THE AMERICAN TRADITION IN RELIGION AND EDUCATION* 118 (1950).

Bible, it allows it to do what it is allowed to do in no other system, to speak for itself.²⁷

However, as Catholic immigrants grew in numbers throughout the nation, they began to raise the objection that what was called “non-sectarian” was in fact a form of “common” Protestantism focused on individual interpretation of the Bible.

In New York, this conflict between “non-sectarian” and “sectarian” religion came to a head in 1842. The New York Public School Society, which administered the common schools, could not appreciate Catholics’ objections to required readings, without note or comment, of the “nonsectarian” King James Bible. The King James Version was strictly forbidden to Catholic children, who read the Douai version. They were thus forced to choose between disobeying their parents and priests or disobeying their teachers. Catholics also objected to textbooks describing Martin Luther as “the great reformer. . . . The cause of learning, of religion, and of civil liberty, is indebted to him, more than any man since the Apostles,” and to others with passages openly disparaging “Popery.”²⁸ Catholics proposed that a portion of the school fund be given to them for the support of their own alternative schools.

The Public School Society did agree to make certain proposed textbook revisions, but these failed to settle the controversy. After a series of fruitless meetings over proposed changes, the Public School Society’s trustees expressed their frustration that, to the Catholics, “[e]ven the Holy Scriptures are sectarian and dangerous ‘without note or comment’; and certainly no comments would be acceptable other than those of their own church.”²⁹ The legislature attempted to end the controversy by enacting a law establishing a City Board of Education to establish free public schools, and barring the distribution of public funds to “sectarian” schools, legislation that was the precursor to New York’s enactment of a Blaine Amendment to its constitution in 1894. The law also prohibited the teaching of sectarian doctrine in the public schools. This did not end the controversy, or make the public schools any less sectarian. The first Board of Education elected after the school controversy was supposedly settled hired a prominent nativist as Superintendent of Education, and the schools included daily readings from the Protestant Bible. Catholics objected, but the Board ruled that reading the Bible “without note or comment” did not constitute sectarianism.³⁰

As the numbers of Irish, German, and other European Catholic and Jewish immigrants surged, nativist sentiments across the country did too, spurring the growth of organized nativist groups. In New York, nativist societies combined to form the American Republican Party in 1843, which evolved into the powerful (and national) Know-Nothing party in the 1850s.³¹ The Know-Nothings, pledged to oppose

27 Report to the Board of Education in 1848, quoted in 2 ANSON STOKES, CHURCH AND STATE IN THE UNITED STATES 57 (1950).

28 DIANE RAVITCH, THE GREAT SCHOOL WARS: NEW YORK CITY, 1805-1973, at 52 (1974).

29 *Id.* at 50.

30 *Id.* at 80.

31 See LLOYD P. JORGENSON, THE STATE AND THE NON-PUBLIC SCHOOL, 1825-1925, 94-95.

Catholicism and support the reading of the King James Bible in the public schools, were active throughout the country and particularly strong in the Northern and border states, sending seventy-five Congressmen to Washington in 1854.³² Abraham Lincoln wrote of the Know-Nothings:

As a nation we began by declaring that “all men are created equal.” We now practically read it, “all men are created equal, except Negroes.” When the Know-Nothings get control, it will read “all men are created equal except Negroes and foreigners and Catholics.” When it comes to this, I shall prefer emigrating to some country where they make no pretense of loving liberty.³³

Nowhere, though, was the party more successful than in Massachusetts. The elections of 1854 swept the Know-Nothing party into power. Know-Nothings won the governorship, the entire congressional delegation, all forty seats in the Senate, and all but three of the 379 members of the House of Representatives.³⁴ Armed with this overwhelming mandate, they turned quickly to what Governor Henry J. Gardner called the mission to “Americanize America.”³⁵ The Know-Nothings required the reading of the King James Bible in all common schools; they proposed constitutional amendments (which passed both houses of the legislature) that “would have deprived Roman Catholics of their right to hold public office and restricted office and the suffrage to male citizens who had resided in the country for no less than twenty-one years”; they dismissed Irish state-government workers; and they banned foreign-language instruction in the public schools.³⁶ The official bigotry is perhaps best—and comically—illustrated by the removal of a Latin inscription above the House Speaker’s desk and the establishment by the legislature of a “Joint Special Committee on the Inspection of Nunneries and Convents.”³⁷ This Committee was charged with the task of liberating women thought to be captive in convents and stamping out other “acts of villainy, injustice, and wrong . . . perpetrated with impunity within the walls of said institutions.”³⁸

Most notable with regard to the school choice issue is the fact that the Know-Nothings also succeeded in adding an amendment to the Massachusetts Constitution, a “Blaine Amendment” that predated Blaine’s proposed U.S. Constitutional amendment by twenty years. It provided: “Moneys raised by taxation in the towns and cities for the support of public schools, and all moneys which may be appropriated by the state for the support of common schools . . . shall never be appropriated to any religious sect for the maintenance exclusively of its own schools.”³⁹ The amendment’s proponents were open about their motives:

32 *Id.* at 71.

33 Letter from Abraham Lincoln to Joshua Speed (Aug. 24, 1855), *reprinted in* 2 THE COLLECTED WORKS OF ABRAHAM LINCOLN 320, 323 (R. Basler ed., 1953).

34 JOHN R. MULKERN, THE KNOW-NOTHING PARTY IN MASSACHUSETTS 76 (1990).

35 *Id.* at 94.

36 *Id.* at 102.

37 *Id.* at 102-103.

38 *Id.* at 103.

39 MASS. CONST. amend. art. XVIII (superseded by MASS. CONST. amend. art. XLVI).

Sir, I want all our children, the children of our Catholic and Protestant population, to be educated together in our public schools. And if gentlemen say that the resolution has a strong leaning towards the Catholics, and is intended to have special reference to them, I am not disposed to deny that it admits of such interpretation. I am ready and disposed to say to our Catholic fellow-citizens: “You may come here and meet us on the broad principles of civil and religious liberty, but if you cannot meet us upon this common ground, we do not ask you to come.”⁴⁰

A number of other states added pre-Blaine non-sectarian amendments to their constitutions during this period, including Minnesota (1857), Ohio (1851), and Wisconsin (1849). A number of other states passed similar measures in the form of legislation, but it would not be until the mid-1870s that the move to amend state constitutions would take hold in earnest.

James Blaine’s Revenge

After becoming more muted during the Civil War and Reconstruction, nativism raged again in the 1870s. In 1875, President Grant decried the Roman Catholic Church as a source of “superstition, ambition and ignorance.” Representative James G. Blaine, the speaker of the House of Representatives and a presidential hopeful, sought to capitalize on the resurgence of nativism by seeking passage of the amendment that bears his name. As the Supreme Court of Arizona so succinctly described the legislative history in *Kotterman v. Killian*⁴¹: “[C]ontemporary sources labeled the amendment part of a plan to institute a general war against the Catholic Church.”

Blaine’s amendment barely failed in the Congress, passing the House 180-7 but falling four votes short of the Senate. And Blaine’s nativism came back to haunt him. His failure to distance himself from a prominent supporter in New York who gave an infamous speech condemning Democrats as the party of “Rum, Romanism, and Rebellion” was said to have cost him New York state and the presidency. But Blaine had his revenge, state by state.

Over the next fifteen years, states either voluntarily adopted similar “Blaine Amendments” to their constitutions,⁴² or were forced by Congress to enact such articles as a condition of their admittance into the Union.⁴³ This period was marked by a

40 OFFICIAL REPORT OF THE DEBATES AND PROCEEDINGS IN THE STATE CONVENTION ASSEMBLED MAY 4, 1853 TO REVISE AND AMEND THE CONSTITUTION OF THE COMMONWEALTH OF MASSACHUSETTS, Vol. II, at 630 (Mr. Lothrop).

41 972 P.2d 606, 624 (Az. 1999).

42 See, e.g., N.Y. CONST. art. XI § 3 (adopted 1894); DEL. CONST. art. X § 3 (adopted 1897); KY. CONST. § 189 (adopted 1891); MO. CONST. art. IX § 8 (adopted 1875).

43 See, e.g., Act of Feb. 22, 1889, 25 Stat. 676, ch. 180 (1889) (enabling legislation for South Dakota, North Dakota, Montana and Washington); Act of June 20, 1910, 36 Stat. 557 § 26 (1910) (enabling

sustained organized nativist movement with the growth of groups such as the Junior Order of United American Mechanics, who sought “to maintain the public-school system of the United States, and to prevent sectarian interference therewith [and] to uphold the reading of the Holy Bible therein.”⁴⁴ Most prominent among these groups was the American Protective Association, whose oath included a pledge to “use my utmost power to strike the shackles and chains of blind obedience to the Roman Catholic Church from the hampered and bound consciences of a priest-ridden and church-oppressed people . . . that I will use my influence to promote the interest of all Protestants everywhere in the world that I may be; that I will not employ a Roman Catholic in any capacity if I can procure the services of a Protestant.”⁴⁵

This was the environment in which the Blaine Amendments were passed. Rather than being separationist measures in the spirit of Madison and Jefferson, they reflect the fears and prejudices of later generations and were indeed the very opposite of separation. They were unabashed attempts to use the public school to inculcate the religious views and values of the majority and to suppress minority, or “sectarian,” faiths. As Professor Ira Lupu noted, reflecting on 19th century roots of 20th century doctrines barring the funding of religious schools: “The Protestant paranoia fueled by waves of Catholic immigration to the U.S., beginning in the mid-nineteenth century, cannot form the basis of a stable constitutional principle.”⁴⁶ On a similar note, Professor Joseph Viteritti observes that:

Although Blaine never won his party’s nomination or secured passage of his controversial amendment, his name would live in perpetuity as a symbol of the irony and hypocrisy that characterized much future debate over aid to religious schools: employing constitutional language, invoking patriotic images, appealing to claims of individual rights. All these ploys would serve to disguise the real business that was at hand: undermining the viability of schools run by religious minorities to prop up and perpetuate a publicly supported monopoly of government-run schools.⁴⁷

And just as the Supreme Court has affirmatively rejected the influence of the Blaine Amendments on the Court’s jurisprudence—namely, as discussed above, Justice Thomas’ rebuke that the “pervasively sectarian” doctrine grew out of the Blaine Amendments and that “hostility to aid to pervasively sectarian schools has a shameful

legislation for New Mexico and Arizona); Act of July 3, 1890, 26 Stat. L. 215 § 8, ch. 656 (1890) (enabling legislation for Idaho); S.D. CONST. art. VIII § 16; N.D. CONST. art. 8 § 5; MONT. CONST. art. X § 6; WASH. CONST. art. IX § 4, art. I § 11; ARIZ. CONST. art. IX § 10; IDAHO CONST. art. X § 5
44 *Derry Council, No. 40, Junior Order United American Mechanics v. State Council of Penn.*, 47 A. 208, 209 (Pa. 1900).

45 *Oath No. Four of the APA*, quoted in HUMPHREY J. DESMOND, *THE A.P.A. MOVEMENT, A SKETCH* 36 (1912).

46 Ira C. Lupu, *The Increasingly Anachronistic Case Against School Vouchers*, 13 NOTRE DAME J. OF L., ETHICS & PUB. POL. 375, 386 (1999).

47 Joseph P. Viteritti, *CHOOSING EQUALITY* 153 (1999). See also Nicole Stelle Garnett & Richard W. Garnett, *School Choice, the First Amendment, and Social Justice*, 4 TEX. REV. L. & POL. 301, 337-338 (2000).

pedigree that we do not hesitate to disavow. . . . This doctrine born of bigotry should be buried now.”⁴⁸—so too should the Blaine Amendments themselves be viewed with singular suspicion today.

Freeing 21st Century Education Reform from 19th Century Anachronisms

Blaine Amendments are a formidable obstacle to school choice, with, as noted earlier, as many as twenty-seven being either strictly interpreted or having insufficient case law to know how much of a threat they pose. In the school choice cases decided thus far, they have not proven to be much of a barrier, which is perhaps a reason why they have been given such little attention by the media. The Ohio Supreme Court ruled, in *Simmons-Harris v. Goff*, that its Blaine Amendment (Section 2, Article VI of the Ohio Constitution), which states that “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” was not violated by the Cleveland school choice plan because school funds would only reach such “sects” through the “independent decisions of parents and students.”⁴⁹ Similarly, in *Jackson v. Benson*, the Wisconsin Supreme Court found that its Blaine Amendment, which provides “nor shall any money be drawn from the treasury for the benefit of religious societies, or religious or theological seminaries” was not violated by the Milwaukee school choice plan, because “for the benefit of,” was to be construed strictly and did not apply to merely incidental benefits. Arizona’s Supreme Court did not merely give its Blaine Amendment a narrow construction, but suggested that the circumstantial evidence of its connection to the original Blaine Amendment undermined its validity. The court observed that “[t]he Blaine amendment was a clear manifestation of religious bigotry, part of a crusade manufactured by the contemporary Protestant establishment to counter what was perceived as a growing ‘Catholic menace.’”⁵⁰

The issue did not arise in the Maine Supreme Court in *Bagley* because Maine has no Blaine Amendment. In *Chittenden Town School District v. Vermont Department of Education*,⁵¹ the Vermont Supreme Court did hold that school choice would violate the state constitution. But Vermont also has no Blaine Amendment. It rested its decision on the state’s corollary to the Establishment Clause, which holds that no person “can be compelled to . . . support any place of worship . . . contrary to the dictates of conscience.” While Ohio and Wisconsin’s narrowing of their Blaine Amendments was encouraging, *Chittenden* suggests that even narrow language not directed at schools at all can be construed to encompass school choice.

There are three ways that Blaine Amendments can be eliminated as an obstacle to school choice: interpreting them narrowly, repealing them, or finding them to violate the United States Constitution.

48 530 U.S. at 828-829.

49 711 N.E.2d at 212.

50 *Kotterman v. Killian*, 972 P.2d 606, 624 (1999).

51 738 A.2d 539, 547 (Vt. 1999), *cert. denied*, 528 U.S. 1066 (1999).

1. Interpretation

Encouraging courts to interpret Blaine Amendments narrowly is a strategy that the Ohio and Wisconsin cases suggest can be successful. The growing awareness of the Blaine Amendments' connection to 19th century nativist excesses, reflected in the *Mitchell* decision, the Arizona Supreme Court's decision in *Kotterman*, and recent scholarship,⁵² should be used by school choice activists to encourage courts to limit the interpretation of their Blaine Amendments.

The Becket Fund submitted a brief to the Washington State Supreme Court, which as noted earlier has a strict Blaine Amendment, urging the court not to use it to bar educational opportunity grants used at colleges with a religious affiliation.⁵³ We described the history of the Blaine Amendments generally and the adoption of Washington State's version, and, arguing that it was "a law with a shameful history," urged the court to avoid broadly construing it. We also argued that the court would, by adopting a narrow construction, avoid the constitutional questions of the sort described in section 3 below. We are awaiting a decision from the court.

This would be a particularly effective strategy in states where the case law interpreting a state's Blaine Amendment has been mixed. For example it is unclear whether New York's Blaine Amendment would be construed to bar school choice. The New York Court of Appeals struck down, in a 4-3 decision, the provision of bus transportation to parochial school children in 1938.⁵⁴ This was overturned by constitutional amendment the same year. In 1968, the Court of Appeals held that the loan of secular textbooks to parochial school did not violate the New York Blaine Amendment or the Establishment Clause in *Board of Education v. Allen*⁵⁵ (the Establishment Clause holding of which was affirmed by the U.S. Supreme Court). But the court of appeals decision in *Allen* was 4-3, and it is unclear how the court would rule on a school choice plan like Cleveland's today. Under these circumstances, the well-documented history of the school battles between nativists and Catholics throughout the 19th century in New York should certainly be brought into play, and may prove decisive.

2. Amending the Constitutions

A second way that the history of the Blaine Amendments can be used to open the door to school choice is through campaigns to repeal them. The rejection by voters in 2000 of proposals that included repeal of Blaine Amendments in California and Michigan should not be interpreted to mean that repeal efforts cannot generate popular support. The California initiative, Proposition 38, was a complicated amendment that did not merely alter the Blaine Amendment, but also wrote into the state constitution a voucher system that guaranteed every child in the state \$4,000 in vouchers for private school, regardless of income. The Michigan initiative, Proposal 1, was likewise a complicated

52 See, e.g., notes 16, 46 and 47, *supra*.

53 Available at www.becketfund.org/litigate/WashBlaineBrief.pdf.

54 *Judd v. Board of Educ.*, 278 N.Y. 200 (1938).

55 *Board of Educ. v. Allen*, 20 N.Y.2d 109 (1967).

constitutional amendment that set up a voucher plan at the same time that it altered the Blaine Amendment.

A straightforward constitutional amendment to permit school choice would be much more likely to succeed. In particular, it allows school choice proponents to highlight the nefarious history behind the Blaine Amendment, and leaves the merits and specifics of school choice programs for another day. Such campaigns would present the simple argument that legislators should be free to consider or reject school choice on its merits, and not have the debate cut off by anachronistic measures from a dark episode in American history.

The Becket Fund is currently representing a group of Massachusetts parents who seek to amend the state's anti-aid amendment (which as noted earlier came earlier in the 19th century and is thus not technically a Blaine Amendment) to permit school choice measures such as vouchers and tax credits. Their initiative petition to get this question on the ballot, however, was blocked by a 1917 constitutional amendment that bars citizen initiative petitions that seek to alter or repeal the anti-aid amendment. This measure was added at a time when Catholic political power was growing in the state and many of the same fears and prejudices expressed in 1854 resurfaced. We have filed a federal suit on their behalf under the Free Exercise Clause and the Equal Protection Clause against enforcement of this discriminatory provision. Under a preliminary injunction permitting them to collect signatures as the suit proceeds, our clients gathered more than 80,000 signatures—well beyond the required number. A showdown ensued between the pro-choice House Speaker and the teachers'-union-backed Senate President, resulting in the measure being blocked from moving forward. Our lawsuit is scheduled for trial this summer. But a poll released by the Pioneer Institute at the time of the showdown in the legislature revealed that 58 percent of Massachusetts voters supported a constitutional amendment that would permit school choice legislation. The poll results suggest that while school choice remains contentious, when the issue is presented as a question of whether the legislature should even be permitted to take it up, people view the issue as one of democratic openness. When educated about the motives behind the Blaine Amendments, people will rightly see them for what they are: barriers to the democratic process that were not based on the protection of fundamental rights and the rule of law, but which were in fact sheer exercises of power by a religious majority against a feared and despised minority.

3. U.S. Constitutional Challenges to the Blaine Amendments

The Blaine Amendments are vulnerable to challenge under the Free Exercise Clause and the Equal Protection Clause, both because of their discrimination against religious families and because of their sordid past.

The Supreme Court consistently has held that laws that discriminate on the basis of religion violate the Free Exercise Clause, most recently in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*.⁵⁶ The Blaine Amendments, with only a few

56 508 U.S. 520 (1993).

exceptions, do just that: they bar aid to religious or “sectarian” schools while permitting identical aid to secular schools. Such discrimination violates the Free Exercise Clause. In *Peter v. Wedl*,⁵⁷ the Eighth Circuit held that the Free Exercise Clause barred a town from denying aid to disabled children attending religious schools that they would receive if they attended private secular schools. The court in *Peter* noted that the type of aid at issue had been found to be constitutional by the Supreme Court under the Establishment Clause, and therefore separation of church and state concerns did not justify the discrimination. This holding is supported by the First Circuit’s decision in *Strout v. Albanese*, discussed above, which held that Maine could exclude religious private schools from its rural tuitioning plan without violating the Free Exercise Clause, on the grounds that this discrimination was required by the Establishment Clause. But the First Circuit stated that had the voucher-like aid sought by the plaintiffs *not* violated the Establishment Clause, the state of Maine’s discrimination against the plaintiffs would not be permitted. Thus if vouchers are found by the Supreme Court to be constitutional, such discrimination should be found to be a Free Exercise Clause violation. The Ninth Circuit has disagreed, however, finding on facts nearly identical to those in *Peter v. Wedl* that there was no Free Exercise violation in the denial of aid.⁵⁸

Similarly, such discrimination constitutes a violation of the Equal Protection Clause. The Supreme Court has stated in *dicta* that religion is a suspect classification like race or alienage that is subject to strict scrutiny. Probably because of the availability of the Free Exercise Clause to litigants, though, it has never had to so rule. But the origins of the Blaine Amendments in nativist bigotry and a deliberate intention to suppress Catholic schools make the Equal Protection Clause a particularly appropriate vehicle for challenging them. In other Equal Protection cases, the Supreme Court has closely examined the purpose behind constitutional amendments. In *Hunter v. Underwood*,⁵⁹ the Court struck down an Alabama constitutional amendment disenfranchising people convicted of crimes of “moral turpitude,” since it was demonstrated that the constitutional convention of 1901 that enacted the amendment was motivated by a desire to disenfranchise blacks. The passage of time, and the fact that the law was not implemented in the modern day with similar motivation, did not purge the taint of the constitutional amendment’s origins. Also relevant is the Supreme Court’s *Romer v. Evans*⁶⁰ decision, which found that a Colorado constitutional amendment barring local gay rights laws was motivated by irrational animus and thus could not survive even rational basis review. Certainly if the constitutional amendment at issue in *Romer* could not pass rational basis review, the Blaine Amendments, if *Romer* is applied with any degree of logical consistency, cannot possibly pass the strict scrutiny applied to suspect classifications.

57 155 F.3d 992 (8th Cir. 1998).

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

59 471 U.S. 222 (1985).

60 517 U.S. 620 (1996).

Conclusion

If June brings good news from the Supreme Court, celebration is undoubtedly in order. But supporters of school choice must not believe we have moved on from the endless court battles and that the choice issue may join the educational reform dialogue on an equal footing with other proposals. A heavy set of shackles will have been removed, but there is yet another ball and chain to be dealt with: the Blaine Amendments, forged in dark nativism more than a century ago. By casting light on the true purpose of the Blaine Amendments and their discriminatory effect on religious families today, hopefully choice will eventually be permitted to stand or fall based on what it promises for the future, and not hobbled by the bigotry of the past.