Religious Liberties

Blaine Amendments and the Unconstitutionality of Excluding Religious Options From School Choice Programs

By Erica Smith

Note from the Editor:

This article discusses the school choice movement and how Blaine Amendments have hampered some school choice programs. It advocates strongly, based primarily on the Religion Clauses of the First Amendment, against the use of Blaine Amendments to undermine school choice.

The Federalist Society takes no positions on particular legal and public policy matters. Any expressions of opinion are those of the author. Whenever we publish an article that advocates for a particular position, as here, we offer links to other perspectives on the issue, including ones opposed to the position taken in the article. Because this article takes a particularly strong position against Blaine Amendments and for school choice, we have provided links here to articles arguing equally strongly in the other direction. As always, we also invite responses from our readers. To join the debate, please email us at info@fedsoc.org.

• Brief for Amici Curiae, Legal and Religious Historians, in Support of Respondent, 8-9, 16, Trinity Lutheran Church of Columbia, Inc. v. Pauley, No. 15-577 (U.S. cert. granted Jan. 15, 2016), http://www.scotusblog.com/wp-content/uploads/2016/07/15-577_amicus_resp_legal_and_religious_historians.authcheckdam.pdf.

• Rob Boston, *The Blaine Game*, Church & State (Sept. 2002), https://www.au.org/church-state/september-2002-church-state/featured/the-blaine-game.

• Jill I. Goldenziel, *Blaine's Name in Vain?: State Constitutions, School Choice, and Charitable Choice*, 83 Denver Univ. L. Rev. 1 (2005), http://scholar.harvard.edu/files/jill/files/jgoldenziel_denver_2005_vol83_no1.pdf.

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Introduction

The U.S. Supreme Court has long held that the Establishment Clause permits the government to include religious options in neutral and generally available public benefit programs. In this term's *Trinity Lutheran Church of Columbia, Inc. v. Pauley*, the Court may finally resolve the open question of whether the government may *exclude* religious options from such public benefit programs. This issue has become crucial to the national school choice movement.

School choice programs are on the rise and now exist in 28 states and the District of Columbia. These programs give families financial assistance to choose private schooling[1] that best fits their children's individual needs, usually regardless of whether that schooling is nonreligious or religious. Religious private schools are the most popular choice for parents for a variety of reasons, including their traditional teaching methods, convenient locations, and, of course, their religious instruction.

The biggest obstacles to school choice programs are state constitutional provisions called "Blaine Amendments."[2] Predominantly passed in the late 1800s, Blaine Amendments prevent the state from appropriating public funds "in aid of . . . sectarian schools."[3] These amendments are present in 37 state constitutions[4] and have been interpreted in some states to restrict school choice programs that include religious options—or to prohibit such programs altogether. Most recently, Blaine Amendments have been used in New Hampshire, Colorado, and Montana to justify excluding religious schools from school choice programs, instead allowing families to only choose secular options.

While Blaine Amendments may seem benign on their face, they are marred by controversy. It is widely acknowledged among scholars and even Supreme Court justices that they were largely enacted to discriminate against the wave of Catholic immigrants that came to this country in the nineteenth century. These immigrants were frustrated with the generic Protestantism that was taught in the public schools at the time and fought for public funding for Catholic schools. Protestant lawmakers responded by passing Blaine Amendments to protect their monopoly on public funding for schools. Although the public schools are now secular,

1 School choice programs sometimes also offer families financial assistance to choose other private educational options, such as homeschooling, tutoring, therapies, and college classes.

2 These provisions are referred to as "Blaine Amendments" because they were modeled after a failed federal constitutional amendment proposed by Congressman James G. Blaine in 1875. *See* discussion at *infra* Part III.A.1.

3 *See, e.g.*, 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.").

4 *See* Richard D. Komer & Olivia Grady, School Choice and State Constitutions: A Guide to Designing School Choice Programs (2d ed. 2016), http://ij.org/wp-content/uploads/2016/09/50-state-SC-report-2016-web.pdf (listing the Blaine Amendments in each state).

these Amendments continue to be used to discriminate against Catholic schools and religious schools of all denominations, as well as the families who wish to send their children to them.

Supreme Court precedent strongly suggests that the use of Blaine Amendments to exclude religious options in school choice programs violates the neutrality principle of the Free Exercise and Establishment Clauses. Blaine Amendments have both the purpose and the effect of discriminating against religion, and this discrimination cannot be justified by a compelling government rationale. The Supreme Court has never squarely addressed this issue, however, and the lower courts are currently split.

Now, the Supreme Court finally has an opportunity to resolve this issue in *Trinity Lutheran*. *Trinity Lutheran* involves a constitutional challenge to the use of Missouri's Blaine Amendment to exclude a church-run daycare from an otherwise neutral government program. If *Trinity Lutheran* holds that religious entities cannot be excluded from a public benefit program, it would have a monumental effect on the school choice movement. The Court may also provide guidance on whether, and to what extent, the Blaine Amendments' bigoted history impedes their validity today.

This article has five parts. Part I provides a brief overview of the school choice movement. Part II explains how opponents of school choice have used Blaine Amendments to block school choice programs and, more recently, to exclude religious schools from these programs. Part III argues that this exclusion violates the Free Exercise and Establishment Clauses of the U.S. Constitution. Part IV describes the circuit split on this issue, which deepened after the Supreme Court's 2004 decision regarding a college scholarship program, *Locke v. Davey*. Finally, Part V discusses the U.S. Supreme Court's cert grant in *Trinity Lutheran* and how the Court could use this case to finally resolve the Blaine Amendment controversy.

I. The School Choice Movement

The school choice movement has gained impressive momentum over the last 25 years. The first modern school choice program was enacted in 1990 in Milwaukee, Wisconsin. There are now 58 programs in 28 states and the District of Columbia,[5] serving 1.3 million students.[6]

School choice programs are very popular with parents. Parents choose to leave the public schools in order to participate in school choice programs for a variety of reasons, including better academic quality, safety, less bullying, and, more generally, an environment where their children will feel happy and supported.[7] School choice programs largely meet parental expectations. Studies of parents participating in several different school choice programs show consistent parental satisfaction rates of over 95 percent.[8]

Religious schools are a particularly attractive option for many parents. Parents often prefer religious private schools to secular private schools for several reasons, including religious schools' tendency to offer more traditional schooling,[9] and because religious schools are often in more convenient locations than secular schools, since there are more religious schools available.[10] Many parents also choose religious schools so that they can reinforce the religious beliefs and moral values that they teach at home.

Despite their popularity, however, school choice programs still face fierce opposition. Their primary opponents are public school districts, teachers' unions, and advocates for strict separation of church and state, all of which have brought numerous lawsuits against these programs across the country.[11] These groups argue that the government cannot constitutionally fund school choice for families who choose religious schools. After the Supreme Court rejected this argument under the federal

5 These states are Alabama, Arkansas, Arizona, Florida, Georgia, Iowa, Illinois, Indiana, Kansas, Louisiana, Maryland, Maine, Minnesota, Mississippi, Montana, New Hampshire, North Carolina, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Virginia, Vermont, and Wisconsin. *See School Choice in America*, ED Choice, http://www.edchoice.org/school-choice/school-choice-in-america/ (last visited Dec. 11, 2016).

6 *Id.*

7 *See, e.g.*, Dick Carpenter II & Marcus Winters, *Who Chooses and Why in a Universal Choice Scholarship Program: Evidence from Douglas County, Colorado*, Journal of School Leadership 923-924 (Sept. 2015), http://www.uccs.edu/Documents/coe/newsandevents/who%20chooses%20and%20why-DCSD.pdf.

8 Jason Bedrick, *Surprise: In Indiana, Parental Choice Increases Parental Satisfaction*, National Review (Feb. 11, 2014), http://www.nationalreview.com/corner/370833/surprise-indiana-parental-choice-increases-parental-satisfaction-jason-bedrick.

9 In contrast, some secular private schools are focused around alternative teaching methods, like in the Waldorf and Montessori schools (although some Montessori schools are themselves religiously affiliated).

10 *See, e.g.*, *Facts and Studies*, Council for Am. Private Educ., http://www.capenet.org/facts.html (last visited Dec. 11, 2016) (stating that there are 33,613 private schools in the United States, and that 79 percent of private school students attend religiously-affiliated schools).

11 *See, e.g.*, Bush v. Holmes, 767 So. 2d 668, 670, 672 (Fla. Dist. Ct. App. 2000), *decision disapproved of by* 919 So. 2d 392 (Fla. 2006) (noting that plaintiffs, including the Florida Education Association (a teachers' union), challenged Florida's Opportunity Scholarship Program under the Establishment Clause and state constitutional provisions); McCall v. Scott, 199 So. 3d 359, 361, 363 (Fla. Dist. Ct. App. 2016) (noting the Florida Education Association (a teachers' union) was one of the plaintiffs in this suit challenging Florida's Tax Credit Scholarship Program under Florida's Blaine Amendment, Fla. Const. Art. I, § 3, and that Americans United for Separation of Church and State was one of the legal groups representing the plaintiffs); Schwartz v. Lopez, 382 P.3d 886, 890 (Nev. 2016) (en banc) (noting that the ACLU of Nevada and Americans United for Separation of Church and State represented the plaintiffs in this suit challenging Nevada's Education Savings Account program under its Blaine Amendment); Duncan v. New Hampshire, 102 A.3d 913, 916-17 (N.H. 2014) (noting that the ACLU Foundation Program on Freedom of Religion and Belief and the Americans United for Separation of Church and State represented the plaintiffs in this suit challenging New Hampshire's Education Tax Credit program under its Blaine Amendment); Simmons-Harris v. Goff, No. 96APE08-982, 1997 WL 217583, at *1–2 (Ohio Ct. App. 1997), *aff'd in part, rev'd in part*, 711 N.E.2d 203 (Ohio 1999) (noting that the Ohio Education Association (a teachers' union) and the ACLU of Ohio Foundation were two of the groups representing plaintiffs in their Establishment Clause challenge to Ohio's voucher program, which was later rejected by the U.S. Supreme Court in *Zelman v. Simmons-Harris*).

Establishment Clause in 2002,[12] these groups now rely on state constitutions to support their legal claims.[13]

II. Blaine Amendments

Today, the most common means used to challenge school choice programs are state constitutional provisions called "Blaine Amendments." Blaine Amendments bar the use of "public funds" to "aid" sectarian institutions. Thirty-seven states have Blaine Amendments,[14] which were predominantly enacted between 1875 and 1900. School choice opponents argue that Blaine Amendments prohibit giving public funds to individuals when those individuals may choose to spend those funds at religious schools, as these funds could arguably aid sectarian institutions—however incidentally.

Just in the past ten years, Blaine Amendments have been used to challenge school choice programs eleven times.[15] There are still more instances of opponents pointing to Blaine Amendments to try to convince state legislatures and governors to reject school choice bills.[16]

School choice proponents, however, have become increasingly successful in defending against these challenges. They primarily argue that school choice scholarships do not result in giving public aid to religious schools. This is because schools never receive "aid" under any common understanding of that word; instead, they simply receive payment in exchange for services rendered—specifically, parents pay them for the service of educating their children. Families, not religious schools, are receiving the public "aid."[17] This and other arguments have convinced multiple courts that Blaine Amendments do not apply to school choice programs.[18] They have also given more state governments the confidence to enact such programs.

But not everyone is convinced. Although more school choice programs are being passed, Blaine Amendments have recently been used against school choice programs in a new way: to restrict the programs to students who wish to attend secular schools, excluding students who wish to attend religious schools.

In the past three years, such restrictions have been implemented in three different states, all under different circumstances. In 2013, a New Hampshire state trial court limited a scholarship program after finding that the state's Blaine Amendment did not allow families to use the scholarships at religious schools. The program existed in this severed state for a year before the New Hampshire Supreme Court restored the program, finding that the plaintiffs lacked standing to challenge it.[19] The next year, the Montana Department of Revenue relied on the state's Blaine Amendment to unilaterally adopt a rule limiting that state's new scholarship program to just students attending secular schools, directly contravening the will of the legislature. A Montana trial court issued a preliminary injunction against the rule in March 2016, and that case continues to be litigated.[20] Most recently, Douglas County, Colorado, chose to limit its scholarship program to students attending secular schools after a plurality on the Colorado Supreme Court interpreted Colorado's Blaine Amendment to prohibit scholarships for students attending religious schools.[21] The limitation on the program resulted in additional legal challenges, and the County rescinded the limitation on November 15, 2016.[22] The fate of the original program, which included both religious and secular schools, has yet to be determined, as cert petitions seeking review

12 Zelman v. Simmons-Harris, 536 U.S. 639 (2002).

13 *See, e.g.,* cases cited *infra* note 17.

14 *See* Komer & Grady, *supra* note 4, at 11.

15 Magee v. Boyd, 175 So. 3d 79 (Ala. 2015); Cain v. Horne, 202 P.3d 1178 (Ariz. 2009) (en banc); Niehaus v. Huppenthal, 310 P.3d 983 (Ariz. App. 2013); Taxpayers for Pub. Educ. v. Douglas Cty. Sch. Dist., 351 P.3d 461 (Colo. 2015), *petition for cert. docketed*, Colo. State Bd. of Educ. v. Taxpayers for Pub. Educ. (U.S. Nov. 2, 2015) (No. 15-558); *McCall*, 199 So. 3d 359; *Bush*, 919 So. 2d 392; Gaddy v. Ga. Dep't of Revenue, No. 2014 CV 244538 (Fulton Cty. Super. Ct., Feb. 5, 2016), *appeal docketed* (Ga. Mar. 7, 2016) (No. S16D0982); Meredith v. Pence, 984 N.E.2d 1213 (Ind. 2013); *Duncan*, 102 A.3d 913; Schwartz, 382 P.3d 886; Oliver v. Hofmeister, 368 P.3d 1270 (Okla. 2016).

16 For instance, in the past year, this has occurred in Minnesota, Montana, New Hampshire, Virginia, South Dakota, and Texas. *See, e.g.*, Dana Ferguson, *Governor Seeks Legal Advice on Scholarships Bills*, Argus Leader (Mar. 14, 2016), http://www.argusleader.com/story/news/politics/2016/03/14/daugaard-asks-supreme-court-input-bills/81760312/ (describing how critics urged the Governor of South Dakota to veto a school choice bill pursuant to the state's two Blaine Amendments). Similar advocacy has occurred in multiple other states over the years.

17 *See, e.g.*, *Magee*, 175 So. 3d at 135 ("[T]he Section 8 tax-credit provision was designed for the benefit of parents and students, and not for the benefit of religious schools."); Kotterman v. Killian, 972 P.2d 606, 620, ¶ 46 (Ariz. 1999) (en banc) ("The way in which a[] [school tuition organization] is limited, the range of choices reserved to taxpayers, parents, and children, the neutrality built into the system—all lead us to conclude that benefits to religious schools are sufficiently attenuated to foreclose a constitutional breach."); *Niehaus*, 310 P.3d at 987, ¶ 15 ("The specified object of the [Empowerment Scholarship Accounts program] is the beneficiary families, not private or sectarian schools."); Toney v. Bower, 744 N.E.2d 351, 360–63 (Ill. App. 2001) (finding persuasive the reasoning in *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 12 (1993), that "[t]he direct beneficiaries of the aid were disabled children; to the extent that sectarian schools benefitted at all from the aid, they were only incidental beneficiaries"); *Meredith*, 984 N.E.2d at 1228–29 ("The direct beneficiaries under the voucher program are the families of eligible students and not the schools selected by the parents for their children to attend."); Goff v. Simmons-Harris, 711 N.E.2d 203, 211 (Ohio 1999) ("The primary beneficiaries of the School Voucher Program are children, not sectarian schools."); Jackson v. Benson, 578 N.W.2d 602, 626–27, ¶¶ 81–82 (Wis. 1998) (describing the vouchers as "life preservers" that have "been thrown" to students participating in the program).

18 *Id.*

19 *Duncan*, 102 A.3d at 926–27.

20 Espinoza v. Mont. Dep't of Revenue, No. DV-15-1152(D) (Mont. Dist. Ct. Mar. 31, 2016).

21 *Taxpayers for Pub. Educ.*, 351 P.3d at 469–71.

22 Mike DiFerdinando, *Douglas County School Board Rescinds Latest Voucher Program*, Highlands Ranch Herald (Nov. 15, 2016), http://highlandsranchherald.net/stories/Douglas-County-School-Board-rescinds-latest-voucher-program,239051.

of the Colorado Supreme Court's judgment striking down the original program are currently pending at the Supreme Court.[23]

Excluding students who wish to attend religious schools from school choice programs raises profound constitutional issues under the U.S. Constitution. Even if Blaine Amendments are correctly interpreted to require such exclusion, this exclusion would still have to comply with the First Amendment. It likely does not. Applying Blaine Amendments to discriminate between students who wish to attend religious schools and students who wish to attend secular schools likely violates the Free Exercise and Establishment Clauses.

III. Exclusion of Religious Options From School Choice Programs Is Likely Unconstitutional

The application of a Blaine Amendment to bar school choice programs that include religious options—or to exclude religious options from these programs—is likely unconstitutional under both the Free Exercise and Establishment Clauses. Such exclusion discriminates against the religious families who wish to choose religious schools. Further exacerbating this discrimination is the bigotry against Catholics that motivated the enactment of the Blaine Amendments in the first place.

One of the central tenets of the Religion Clauses is government neutrality toward religion. Just as the government may not advance religion, it also may not inhibit religion.[24] This neutrality principle prohibits discrimination among different religions, as well as discrimination against all religion.[25] The Supreme Court typically applies this neutrality requirement by analyzing a law's purpose and effect. Although the Court's Religion Clause jurisprudence has been fickle, it has consistently held that either a primary discriminatory purpose or a primary discriminatory effect is sufficient to fail both the Free Exercise Clause's neutrality test[26] and the Establishment Clause's *Lemon* test.[27] Failing either test means the law is subject to strict scrutiny and very likely unconstitutional.[28]

Here, excluding religious options from school choice programs has both the purpose and the effect of discriminating against religion. It is thus subject to strict scrutiny and unlikely to survive review.

A. Many Blaine Amendments Have a Discriminatory Purpose

It is widely acknowledged, including by the Supreme Court, that Blaine Amendments were predominantly enacted between the 1870s and 1890s to protect the Protestant monopoly over the public schools from the influence of new Catholic immigrants.[29] A law with the purpose of discriminating against religion is presumptively unconstitutional under both the Free Exercise Clause and the Establishment Clause, and is thus subject to strict scrutiny.[30] Therefore, in a challenge to the application of a Blaine Amendment to exclude students attending religious schools from participating in a school choice program, a court should review that Blaine Amendment's history in order to determine if it was passed with a discriminatory motive. If so, the religious exclusion must be reviewed with strict scrutiny.

1. Many Blaine Amendments Have a History of Anti-Catholicism

In the 1800s, the country was predominantly Protestant, and public schools taught a generic Protestantism. Teachers led students in daily prayer, sang religious hymns, extolled Protestant ideals, read from the King James Bible, and taught from anti-Catholic textbooks.[31] This status quo, however, was challenged

23 *Doyle*, 351 P.3d 461, *petition for cert. filed* (No. 15-556). The Court has not yet made a decision on the cert petition, perhaps because it is waiting to first render a decision in *Trinity Lutheran*. *See infra* Part V for discussion of *Trinity Lutheran*.

24 Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 523 (1993) ("The principle that government may not enact laws that suppress religious belief or practice is so well understood that few violations are recorded in our opinions.").

25 *Id.* at 532 ("[T]he First Amendment forbids an official purpose to disapprove of a particular religion or of religion in general."); McCreary Cty. v. ACLU of Ky., 545 U.S. 844, 860 (2005) ("The touchstone for our [Establishment Clause] analysis is the principle that the 'First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion.'").

26 The best example of the Court's Free Exercise analysis of an allegedly discriminatory law is in *Church of the Lukumi Babalu Aye*, where the Court asked whether (1) "the object or purpose of a law is the suppression of religion or religious conduct," or (2) whether it "impose[d] burdens only on conduct motivated by religious belief." 508 U.S. at 533, 543. Essentially, *Lukumi* boils down to a purpose and effect analysis, which has substantial overlap with the Court's *Lemon* test.

27 The modern *Lemon* test has two prongs, under which a law fails the test unless (1) it has a "secular purpose" that is not simply secondary to a "religious objective," and (2) it has a "principal or primary effect . . . that neither advances nor inhibits religion. *McCreary Cty.*, 545 U.S. at 864; Agostini v. Felton, 521 U.S. 203, 218 (1997) (citing Lemon v. Kurtzman, 403 U.S. 602, 612 (1971)).

28 *E.g.*, Colo. Christian Univ. v. Weaver, 534 F.3d 1245, 1266 (10th Cir. 2008) ("[S]tatutes involving discrimination on the basis of religion, including interdenominational discrimination, are subject to heightened scrutiny whether they arise under the Free Exercise Clause, the Establishment Clause, or the Equal Protection Clause." (internal citations omitted)); *see also Church of the Lukumi Babalu Aye*, 508 U.S. at 546 ("A law that targets religious conduct for distinctive treatment or advances legitimate governmental interests only against conduct with a religious motivation will survive strict scrutiny only in rare cases.").

29 *See, e.g.*, Mitchell v. Helms, 530 U.S. 793, 828 (2000) (plurality) ("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.'"); *Zelman*, 536 U.S. at 721 (Breyer, J., dissenting) ("Catholics sought equal government support for the education of their children in the form of aid for private Catholic schools," but Protestants insisted "that public schools must be 'nonsectarian' (which was usually understood to allow Bible reading and other Protestant observances) and public money must not support 'sectarian' schools (which in practical terms meant Catholic).").

30 *See* discussion and cited cases *supra* notes 26-28.

31 Mark Edward DeForrest, *An Overview and Evaluation of State Blaine Amendments: Origins, Scope, and First Amendment Concerns*, 26 Harv. J.L. & Pub. Pol'y 551, 559 (2003) ("The common schools . . . were used to assimilate immigrants and their children into American society by enculturating them with American values and attitudes. Central

by the increase in Catholic immigration, starting with the Irish potato famine in the 1840s. The new Catholic immigrants urged the government to either remove Protestantism from the public schools or provide public funding for Catholic schools.[32]

Some Protestants felt that their way of life was threatened by these immigrants, leading to decades of conflict. In the 1840s and 50s, the conflict led to protests, riots, vandalism, and even violence against Catholics.[33] Also in the 1850s, the Know-Nothing Party gained substantial influence as a third-party, with hundreds of Know-Nothings winning congressional seats, state legislature seats, and governorships.[34] The Know-Nothing Party chose the supposed Catholic threat to the public schools as one of its signature issues.[35]

Although the issue died down during the Civil War,[36] the public school controversy peaked in the 1870s. In September 1875, President Ulysses S. Grant, a former Know-Nothing who had become a Republican,[37] delivered a widely-publicized speech calling for the end of all public support for "sectarian schools."[38] It was widely understood that "sectarian" was code for Catholic, in contrast to the nondenominational Protestantism taught in public schools.[39] Three months later, President Grant delivered a congressional address calling for a constitutional amendment prohibiting such sectarian support.[40] The Republican Party also added the positon to its official party platform.[41]

Representative James Blaine, who hoped to succeed Grant as president, took up the cause. Within days of Grant's speech, he introduced a constitutional amendment to prohibit public school funding from being used for any "religious sect or denomination."[42] The proposed amendment passed in the House, and the Senate then amended it to allow "the reading of the Bible in any school"—a clear reference to the public school practice of reading the Protestant Bible.[43]

At the time, the anti-Catholic sentiments behind the proposed amendment were well understood. *The Nation*, which supported the proposal, characterized it as a "[c]onstitutional amendment directed against the Catholics" and declared it was designed to "catch anti-Catholic votes."[44] The *New York Tribune* labeled the amendment as part of a plan to "institute a general war against the Catholic Church."[45] And the *New York Times* referred to the proposal as addressing "the Catholic question."[46] The bill's anti-Catholic motives were also evident during the legislative debates, during which the supposed danger posed by the Catholic

to this enculturation was moral education grounded in Protestant religiosity. While professing to be free of sectarianism, the common schools were actually propagators of a generic Protestantism that, in the words of Professor Joseph Viteritti, 'was intolerant of those who were non-believers.'" (internal citations omitted)); Steven K. Green, *The Blaine Amendment Reconsidered,* 36 Am. J. Legal Hist. 38, 41 (1992) (noting "the obvious evangelical Protestant overtones to public education" and "the practice of hymn singing, praying, and reading from the King James Bible in the public schools").

32 Joseph P. Viteritti, Choosing Equality: School Choice, the Constitution, and Civil Society 85 (1999).

33 *See, e.g.*, *Zelman*, 536 U.S. at 720–21 (Breyer, J., dissenting) ("Dreading Catholic domination," native Protestants "terrorized Catholics." In some states, "Catholic students suffered beatings or expulsions for refusing to read from the Protestant Bible, and crowds . . . rioted over whether Catholic children could be released from the classroom during Bible reading." (internal citations omitted)); Commonwealth v. Cooke, 7 Am. L. Reg. 417 (Mass. Police Ct. 1859) (allowing teacher to beat Catholic student who refused to read from the Protestant Bible); Viteritti, *supra* note 32, at 79–83 (describing Philadelphia Bible riots in the 1840s); DeForrest, *supra* note 31, at 561 ("In one often-noted 1842 incident, the Catholic bishop of New York advocated public funding of the parochial school system in that state. In response a mob burned down his house and state troops had to be called out to defend the bishop's cathedral from attack.").

34 Tyler Anbinder, Nativism and Slavery: The Northern Know Nothings and the Politics of the 1850s 127 (1992).

35 *See, e.g.*, Viteritti, *supra* note 32, at 71 ("At a time when traditional American values seemed to be threatened by vast waves of immigration, the party promised to reinvigorate and preserve a homogeneous Protestant culture. The principal means proposed for achieving this were to restrict elective offices to native-born Americans and to establish a twenty-five year residency requirement for citizenship. But these goals proved to be unattainable, and, in practice, the Know-Nothings and their sympathizers focused their efforts primarily on the School Question.").

36 *Id.* at 111.

37 William S. McFeely, Grant: A Biography 69 (2002) (stating that Grant was "briefly" in the Know-Nothing party").

38 Speech available at Jim Allison, *President U.S. Grant's Speech*, The Constitutional Principle: Separation of Church and State, http://candst.tripod.com/granspch.htm (last visited Dec. 11, 2016).

39 *See* Green, *supra* note 31, at 57 n.117 (citing The Index, September 7, 1876, p. 426) ("For 'sectarian' (quoting from the [Republican] platform), read 'Catholic,' and you have the full meaning . . . ."); *Mitchell*, 530 U.S. at 828 (plurality) ("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.'"); *Zelman*, 536 U.S. at 721 (Breyer, J., dissenting) ("Catholics sought equal government support for the education of their children in the form of aid for private Catholic schools," but Protestants insisted "that public schools must be 'nonsectarian' (which was usually understood to allow Bible reading and other Protestant observances) and public money must not support 'sectarian' schools (which in practical terms meant Catholic).").

40 Speech available at Gerhard Peters & John T. Woolley, *Seventh Annual Message*, The American Presidency Project, http://www.presidency.ucsb.edu/ws/?pid=29516 (last visited Dec. 11, 2016) ("I suggest for your earnest consideration, and most earnestly recommend it, that a constitutional amendment be submitted . . . prohibiting the granting of any school funds or school taxes, or any part thereof, either by legislative, municipal, or other authority, for the benefit or in aid, directly or indirectly, of any religious sect or denomination, or in aid or for the benefit of any other object of any nature or kind whatever . . . . No sectarian tenets shall ever be taught in any school supported in whole or in part by the State, nation, or by the proceeds of any tax levied upon any community.").

41 *See* Green, *supra* note 31, at 56 (calling to ban public support for "any school or institution under sectarian control").

42 *See* 4 Cong. Rec. 5454 (1876).

43 4 Cong. Rec. 5453, 5456 (1876).

44 *See* Green, *supra* note 31, at 54 (quoting The Nation, Mar. 16, 1876, at 173).

45 *Id.* at 44 (quoting The New York Trib., July 8, 1875, at 4).

46 *Id.* at 58 (quoting N. Y. Times, Aug. 5, 1876, at 5) (stating that the Democratic nominee for President, New York Governor Samuel Tilden, "desired immediate action on the amendment so as to 'take the Catholic question out of politics.'").

Church and its schools was discussed at length.[47] One senator even insisted that Congress had a "duty . . . to resist" the teachings of the "aggressive" Catholic Church "by every constitutional amendment and by every law in our power."[48]

Although the federal constitutional amendment (narrowly) failed in the Senate, [49] similar amendments were enacted across the country into state constitutions. Just over the next year, 14 states added their own "Baby Blaine" Amendments.[50] Now, 37 states have Blaine Amendments in their state constitutions. While an individual assessment would be required before drawing conclusions about any particular Blaine Amendment, the legislative history of many of these amendments reveals that they were similarly motived by anti-Catholic bigotry.[51]

In fact, seven justices on the U.S. Supreme Court have already recognized the Blaine Amendments' sordid history. *In Mitchell v. Helms*, four conservative justices stated in dicta that the Blaine movement was "born of bigotry" and called for its legacy to be "buried now."[52] And three liberal justices discussed the Blaine movement's hateful pedigree at length in their dissent in *Zelman v. Simmons-Harris*.[53] The Supreme Court, however, has never squarely addressed the constitutionality of Blaine Amendments, and they continue to be enforced today.

2. Blaine Amendments Enacted with Discriminatory Motives Are Likely Unconstitutional Under the Religion Clauses As Applied to Limit School Choice Programs

Blaine Amendments enacted to discriminate against Catholics raise serious issues under the Free Exercise and Establishment Clauses. While most of these Amendments were passed over a century ago, the Supreme Court has made clear that the passage of time is insufficient to cleanse a law of its tainted history. The Court has also held that a law passed for discriminatory reasons is unconstitutional when it continues to disadvantage the group it was originally intended to discriminate against. That is exactly what occurs when Blaine Amendments are applied to exclude students attending religious schools from school choice programs. This application of the Blaine Amendments is therefore presumptively unconstitutional and subject to strict scrutiny.

In *Hunter v. Underwood*, for example, the Supreme Court unanimously struck down an Alabama constitutional provision under the Equal Protection Clause[54] because of its discriminatory intent when it was enacted over 80 years earlier.[55] The challenged provision disenfranchised citizens who had been convicted for certain crimes, including misdemeanors involving "moral turpitude."[56] Although the provision was neutral on its face, the record showed it was originally intended to target African Americans, who were believed to disproportionately commit such offenses.[57] In striking down the law, the Court emphasized that the delegates at Alabama's constitutional convention "were not secretive about their purpose" and that bigotry at the convention "ran rampant."[58] The Court also rejected the government's argument that "events occurring in the succeeding 80 years had legitimated the provision"; what mattered instead was that the provision was originally intended to disadvantage African

47 *See id.* at 67 (discussing statements of senators who opposed the amendment who stated the amendment was directed against Catholics); *id.* (citing 4 Cong. Rec. 5589 (1876)) ("Senator Lewis Bogy (D-Missouri) called the amendment 'a cloak for the most unworthy partisan motives' and charged that the Republicans were replacing the 'bloody shirt' with unfounded fears of an imperial papacy."); DeForrest, *supra* note 31, at 570–73 (discussing congressional record).

48 4 Cong. Rec. 5588 (1876) (Statement of Sen. Edmunds).

49 The amendment received a majority in the Senate but fell four votes short of the supermajority needed to proceed to the states for ratification. Joseph P. Viteritti, *Blaine's Wake: School Choice, the First Amendment, and State Constitutional Law*, 21 Harv. J.L. & Pub. Pol'y 657, 672 (1998).

50 DeForrest, *supra* note 31, at 573.

51 New Hampshire, Colorado, and Missouri are examples. Professor Charles L. Glenn of Boston University testified on the "Discriminatory Origins" of New Hampshire's Blaine Amendment on behalf of defendant-intervenors in recent litigation involving that Amendment. Charles L. Glenn, *The Discriminatory Origins of New Hampshire's 'Blaine' Amendment* (Mar. 21, 2013), http://mirrorofjustice.blogs.com/files/glenn-on-nh-blaine.pdf. The New Hampshire Supreme Court ultimately did not address the issue, finding the plaintiffs in the suit lacked standing. *Duncan*, 102 A.3d at 926–27. Professor Glenn also testified regarding the tainted history behind Colorado's Blaine Amendment in the ongoing suit in that state. *See Taxpayers for Publ. Educ.*, 351 P.3d 461. And as discussed *infra* Part V, the history behind Missouri's Blaine Amendment is discussed in the briefing of *Trinity Lutheran v. Pauley*.

52 *Mitchell*, 530 U.S. at 802, 829 (plurality opinion by Justice Thomas, joined by Chief Justice Rehnquist and Justices Scalia and Kennedy) (upholding law that provided supplies to both secular and religious private schools).

53 536 U.S. at 719–21 (dissent by Justice Breyer, joined by Justices Stevens and Souter).

54 While *Hunter* involved a challenge under the Equal Protection Clause and not either Religion Clause, all three clauses similarly prohibit discriminatory intent or purpose. *See, e.g.*, *Colo. Christian Univ.*, 534 F.3d at 1266 ("[S]tatutes involving discrimination on the basis of religion, including interdenominational discrimination, are subject to heightened scrutiny whether they arise under the Free Exercise Clause, the Establishment Clause, or the Equal Protection Clause." (internal citations omitted)); Frederick Mark Gedicks, *The Permissible Scope of Legal Limitations on the Freedom of Religion or Belief in the United States*, 19 Emory Int'l L. Rev. 1187, 1189–1190 (2005) ("[A]t the least, the [Religion] Clauses render presumptively invalid laws that single out a particular religion or religion generally for special burdens . . . . Similarly, the Equal Protection Clause of the Fourteenth Amendment provides constitutional protection against religious discrimination.").

55 471 U.S. 222, 232-33 (1985). This is not the only time the Court has struck down a state constitutional provision under the Equal Protection Clause because it was discriminatory. *See* Romer v. Evans, 517 U.S. 620 (1996) (striking down Colorado's constitutional amendment that prevented the state or local governments from giving protected status based on sexual orientation).

56 *Id.* at 223–24.

57 *Id.* at 227.

58 *Id.* at 229.

Americans and that it continued to negatively affect African Americans.[59]

The same is true with the Blaine Amendments. First, just as in *Hunter*, the anti-Catholic sentiments behind the Blaine Amendments passed in the late 1800s are virtually undisputed. Even historians who argue that other motivations drove the Blaine Amendments—such as ensuring that adequate funds would exist for public schools—concede that "[a]nti-Catholicism" was "[o]ne [f]actor" at play.[60] This is likely sufficient to violate the Constitution. Indeed, in *Hunter*, the Court rejected the relevance of an additional, permissible purpose behind the challenged provision,[61] holding that a permissible purpose could "not render nugatory the purpose to discriminate."[62] The same should hold with Blaine Amendments.

Second, like in *Hunter*, the Blaine Amendments continue to adversely affect Catholics—the original targets of the discrimination—as well as adherents of other religions. As explained below, religious families are burdened whenever Blaine Amendments are used to exclude religious options from school choice programs.

Thus, the application of Blaine Amendments with a documented history of bigotry to prohibit religious participation in school choice programs is likely presumptively unconstitutional. Such an application would disadvantage Catholics and other religious groups, perpetuating the bigotry that originally motivated these Blaine Amendments. This application would thus be subject to strict scrutiny.

B. Blaine Amendments Have a Discriminatory Effect

Even if a particular Blaine Amendment lacked a discriminatory purpose when enacted, it would likely still be unconstitutional under the Religion Clauses as applied to school choice programs to exclude students who wish to attend religious schools. That is because this application has the primary effect of discriminating against religious families who wish to send their children to these schools. This discriminatory effect provides independent grounds to review this application of the Blaine Amendment with strict scrutiny.

The Supreme Court has long stated that a law with a neutral purpose is still discriminatory under the Free Exercise Clause if it only applies to "conduct motivated by religious beliefs."[63] Similarly, a law with the primary effect of inhibiting religion fails the Establishment Clause's *Lemon* test.[64] There are few examples in the case law of laws that fail these tests. As the Supreme Court stated in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, "[t]he principle that government may not enact laws that suppress religious belief or practice is so well understood that few violations are recorded in our opinions."[65] In addition, Supreme Court cases finding a discriminatory effect have for the most part only involved discrimination against particular religions.[66]

The Court, however, has strongly implied that excluding all religious schools from a school choice program would be unconstitutional. In *Zelman*, for instance, the Court stated that a program that "differentiates based on the religious status of beneficiaries or providers of services" would violate the "touchstone of neutrality" under the Establishment Clause.[67] The Court reiterated this idea two years later in *Locke v. Davey*.[68] Although *Locke* actually rejected a discrimination claim involving a college scholarship program, the Court's rationale for why the program's exclusion was constitutional provides valuable guidance for thinking about exclusions in school choice programs. This guidance ultimately leads to a conclusion that excluding all religious options in school choice programs is unconstitutional.

Locke arose when a student wishing to become a church pastor challenged a Washington State program that awarded college scholarships to low-income, academically gifted students, but excluded students pursuing a "devotional theology" degree.[69] The Court found that strict scrutiny should not apply to the program because it showed no "hostility" toward religion.[70] Instead, the Court emphasized that "the entirety of the [program]

59 *Id.* at 232-33.

60 Brief for Amici Curiae, Legal and Religious Historians, in Support of Respondent, 8-9, 16, Trinity Lutheran Church of Columbia, Inc. v. Pauley, No. 15-577 (U.S. cert. granted Jan. 15, 2016), http://www.scotusblog.com/wp-content/uploads/2016/07/15-577_amicus_resp_legal_and_religious_historians.authcheckdam.pdf (conceding that anti-Catholicism was a factor behind the Blaine Amendments, despite an overall argument that it was not the predominant motivation, and conceding that "animus may have motivated some supporters" of the Blaine Amendments).

61 *Hunter*, 471 U.S. at 231–32. Evidence showed that another motivation behind the legislation was an intent to discriminate against poor people, regardless of their race. *Id.* Being poor is not a protected classification under the Equal Protection Clause, and the Court assumed, without deciding, that such a motive would be permissible. *Id.* at 232.

62 *Id.*

63 *See, e.g.*, *Church of the Lukumi Babalu Aye*, 508 U.S. at 524 ("[T]he principle of general applicability was violated because the secular ends asserted in defense of the laws were pursued only with respect to conduct motivated by religious beliefs.").

64 *See, e.g.*, *Agostini*, 521 U.S. at 218 (stating the *Lemon* test requires that a law's "principal or primary effect must be one that neither advances nor inhibits religion") (citing *Lemon*, 403 U.S. at 612).

65 508 U.S. at 523.

66 *See, e.g.*, *Church of Lukumi Babalu Aye*, 508 U.S. at 524 (striking down law prohibiting animal sacrifice, as it had both the purpose and effect of targeting the religion of Santeria); Larson v. Valente, 456 U.S. 228, 253 (1982) (striking down state charitable solicitations law under the Establishment Clause when it had the "principal effect" of treating some religious denominations more favorably than others); Fowler v. Rhode Island, 345 U.S. 67 (1953) (finding municipal ordinance unconstitutional as applied when its interpretation had the effect of letting some religious groups hold sermons in the park, but not others). *But see* McDaniel v Paty, 435 U.S. 618 (1978) (plurality opinion) (striking down state law barring ministers or priests from holding public office).

67 *Zelman*, 536 U.S. at 654, n.3.

68 540 U.S. 712 (2004).

69 *Id.* at 715–16.

70 *Id.* at 724 ("Far from evincing the hostility toward religion which was manifest in *Lukumi*, we believe that the entirety of the Promise Scholarship Program goes a long way toward including religion in its benefits."); *id.* at 721 (finding no "evidence of hostility toward religion");

goes a long way toward including religion in its benefits."[71] Specifically, it allowed scholarships for students attending religious schools and taking religious classes, including devotional theology courses, just as long as they were not pursuing a devotional theology degree.[72]

As the program was not hostile toward religion, the Court upheld it under what appeared to be intermediate scrutiny. The Court held that the program's exclusion was justified by the state's interest in not funding the clergy, an interest that the Court found to be "substantial" in that such funding was recognized to constitute a "hallmark[] of an 'established' religion" since the country's founding.[73]

After *Locke*, it seems likely that excluding *all* religious schools from a school choice program—or any other generally available student-aid program—would show "hostility" toward religion, triggering strict scrutiny under the Free Exercise Clause (which *Locke* narrowly avoided). Such total exclusion would not go "a long way toward including religion in its benefits"[74] and would instead prohibit "conduct motivated by religious belief" from having any place in the program.[75] Indeed, religious belief is the primary motivator of many parents who select religious schools for their children. While the student in *Locke* was obviously motivated by religion to pursue a devotional theology degree, the Court emphasized that the program still allowed him to attend the religious school of his choice and even to take devotional classes.[76] In contrast, a total religious exclusion would disallow any funding for a student who wishes to attend a religious school.

Excluding all religious schools from a school choice program would also run afoul of the Establishment Clause, as its primary effect would be to "inhibit religious practice" under *Lemon*'s second prong. The exclusion forces religious families to choose between receiving a scholarship and attending a school that accords with their religious beliefs. If parents choose a secular private school, they are rewarded with hundreds or even thousands of dollars. But if they want their child to attend a religious private school, they will receive nothing—and either have to pay tuition out of pocket or be unable to enroll their child in a private school at all.[77]

It is difficult to imagine how such a system would not inhibit religious practice. Religious schooling is integral to guiding children in the practice of religion and is even required by certain religions.[78] Yet some parents will inevitably feel pressure to forgo religious schooling for the opportunity to send their child to a private secular school with government funding. This is exactly the type of pressure that the Religion Clauses are meant to prevent.[79]

Any law that discriminates against religion in either its purpose or effect is presumptively unconstitutional under the First Amendment and must be examined under strict scrutiny. Using a Blaine Amendment to exclude religious schools from an otherwise generally available choice program is likely presumptively unconstitutional. Not only were many of the Blaine Amendments enacted with discriminatory motives, but such an exclusion has a discriminatory effect on religious practices. Thus, religious exclusions must undergo strict scrutiny and will likely not survive review.

C. Laws Excluding Religious Options from School Choice Programs Cannot Survive Strict Scrutiny

Under strict scrutiny, a government would have to prove that its exclusion of religious schools from a school choice program is narrowly tailored to achieve a compelling state interest. It is unlikely that a government could offer a compelling interest for its exclusion.

A state would likely argue that it wishes to exclude religious options from a school choice program in order to distance the state from religion and avoid entanglement between the two. But the Supreme Court has already held that an asserted state interest in "achieving greater separation of church and State than is already ensured under the Establishment Clause of the Federal

id. at 720 ("[T]he State's disfavor of religion (if it can be called that) is of a far milder kind.").

71 *Id.*

72 *Id.* at 724–25.

73 *Id.* at 722, 724 ("[W]e can think of few areas in which a State's antiestablishment interests come more into play.").

74 *Id.* at 724.

75 *Church of the Lukumi Babalu Aye*, 508 U.S. at 543.

76 *Locke*, 540 U.S. at 724–725 (describing how the plaintiff would still be allowed to take devotional theology classes with the scholarship money).

77 Some may argue that this choice is little different from the choice parents already face when their state lacks a school choice program: they can either pay to send their child to a religious private school or send their child to a public school for free. But this choice is legally distinguishable and does not pose the same constitutional concerns. The public schools exist entirely independent of the private schools and, while all states are required to provide public schooling, no state is required to subsidize private schooling. Once the government decides to subsidize private school tuition, however, it creates a new and separate benefit to families, and the Religion Clauses require that it do so on a neutral and nondiscriminatory basis. *See, e.g.*, Widmar v. Vincent, 454 U.S. 263, 267–68 (1981) ("The Constitution forbids a State to enforce certain exclusions from a forum generally open to the public, even if it was not required to create the forum in the first place."). Thus, the public/private distinction is different than a religious/non-religious distinction.

78 For example, Catholic doctrine requires parents to send their children to Catholic schools "wherever and whenever it is possible." Pope Paul VI, *Declaration on Christian Education: Gravissimum Educationis*, Vatican (Oct. 28, 1965), http://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_decl_19651028_gravissimum-educationis_en.html (reminding "Catholic parents of the duty of entrusting their children to Catholic schools wherever and whenever it is possible").

79 *Zelman* held that, under the Establishment Clause, the government could not "coerc[e] parents into sending their children to religious schools," as this would violate the *Lemon* test. *Zelman*, 536 U.S. at 655–56. It stands to reason that discouraging parents from sending their children to religious schools would also be problematic under the *Lemon* test. The government must be "neutral" as to the parents' choice and cannot coerce or influence this choice. *Id.* at 652–54, 654 n.3 (stating that, to satisfy the "touchstone of neutrality" under the Establishment Clause, a program cannot "differentiate[] based on the religious status of beneficiaries or providers of services").

Constitution [] is limited by the Free Exercise Clause" and does not qualify as a "compelling interest."[80]

Locke does not hold otherwise. The Court in *Locke* never found that the government had a compelling interest in not funding the training of ministers. In fact, the Court avoided strict scrutiny analysis altogether. Instead, *Locke*'s analysis was akin to intermediate scrutiny, and merely found that the restriction was justified by the state's "substantial" interest in not funding ministers.[81]

But even assuming that there is a compelling state interest in not providing scholarships to fund the training of ministers, this interest is narrow and distinguishable from any state interest in withholding scholarships from students attending religious schools. Unlike this country's long and established history of opposing public support for the clergy, there is not a comparable history of opposing aid for families choosing religious schools. In fact, many states have long provided such aid, even before the advent of school choice programs. This aid is often provided on neutral criteria to all families choosing private schooling and includes subsidies for transportation, textbooks, and supplies.[82] While some courts have stuck down such programs, they are in the minority, and these rulings do not rise to the level of the deeply rooted public opposition to funding the clergy discussed in *Locke*.[83] Perhaps this is because many understand such aid to be for families and their personal educational choices, and not for religious institutions themselves.[84]

It is thus unlikely that the state has a compelling interest in excluding religious options from an otherwise neutral and generally available school choice program, and it would be

80 *Widmar,* 454 U.S. at 276–77 (striking down university regulation that made its facilities available for use by student groups for secular reasons but excluded student groups who wished to use the facilities for religious worship or teaching, as this exclusion was a violation of free speech); *see also* Tenafly Eruv Ass'n v. Borough of Tenafly, 309 F.3d 144, 172–73 (3d Cir. 2002) (rejecting borough's asserted "interest in avoiding 'an Establishment Clause controversy'").

81 *Locke*, 540 U.S. at 725.

82 Approximately 15 courts, including the U.S. Supreme Court, have upheld such student-aid programs. *See* Mueller v. Allen, 463 U.S. 388 (1983) (holding that Minnesota's tax deduction for education expenses—including the cost of tuition, textbooks, and transportation—does not violate the *Lemon* test despite overwhelmingly benefiting parents with students in parochial schools); Cochran v. La. State Bd. of Educ., 281 U.S. 370 (1930) (holding that students and the state were the beneficiaries under a program providing textbooks to parochial school students, not the school or the religious denomination with which the school is affiliated); Bd. of Educ. of Stafford v. State Bd. of Educ., 709 A.2d 510 (Conn. 1998) (upholding law funding transportation of private school students); Neal v. Fiscal Court, Jefferson Cty., 986 S.W.2d 907 (Ky. 1999) (holding that the Jefferson County Fiscal Court's plan to allocate funds for the transportation of private elementary school students did not violate Kentucky's Blaine Amendment); Borden v. La. State Bd. of Educ., 123 So. 655 (La. 1929) (upholding the constitutionality of a program in which public funds were used to purchase, among other things, textbooks for parochial schools); Bd. of Educ. of Baltimore Cty. v. Wheat, 199 A. 628 (Md. 1938) (holding that using public money to provide transportation for children attending private schools does not violate Maryland's Constitution); Attorney Gen. v. Sch. Comm. of Essex, 439 N.E.2d 770 (Mass. 1982) (holding that a statute requiring transportation of private school students on public school buses was a community safety measure not unlike police or fire protection); Alexander v. Bartlett, 165 N.W.2d 445 (Mich. Ct. App. 1968) (holding that a statute permitting local school districts to furnish transportation without charge for students of state-approved private schools did not violate Michigan's first Blaine Amendment); Chance v. Miss. State Textbook Rating & Purchasing Bd., 200 So. 706 (Miss. 1941) (en banc) (holding that loaning public textbooks to private school pupils does not violate Mississippi's Blaine Amendment); Everson v. Bd. of Educ. of Ewing Twp., 44 A.2d 333 (N.J. 1945) (holding that the transportation of private school students at public expense was designed to help parents comply with mandatory attendance laws, which is a public purpose, and therefore does not violate the New Jersey Constitution); Bd. of Educ. of Cent. Sch. Dist. No. 1 v. Allen, 228 N.E.2d 791 (N.Y. 1967), *aff'd*, 392 U.S. 236 (1968) (holding that New York's textbook loan program does not violate the state's Blaine Amendment); Cunningham v. Lutjeharms, 437 N.W.2d 806 (Neb. 1989) (holding that lending textbooks to private schools does not violate the First Amendment's Establishment Clause); Honohan v. Holt, 244 N.E.2d 537 (Ohio Ct. Com. Pl. 1968) (holding that the indirect benefits flowing to religious schools from the transportation of their pupils at public expense do not violate the Ohio Constitution); Rhoades v. Sch. Dist. of Abington Twp., 226 A.2d 53 (Pa. 1967) (upholding the constitutionality of a statute authorizing transportation of private school students); Bowerman v. O'Connor, 247 A.2d 82 (R.I. 1968) (upholding a textbook loan program that included students attending religious schools under the state's Compelled Support Clause); Janasiewicz v. Bd. of Educ. Of Kanawha, 299 S.E.2d 34 (W. Va. 1982) (holding that transportation program for private school students was constitutional).

83 Approximately 10 courts have struck down such student-aid programs. Matthews v. Quinton, 362 P.2d 932 (Alaska 1961) (holding that transportation of private school students at public expense violates the Alaska Constitution); California Teachers Ass'n v. Riles, 632 P.2d 953 (Cal. 1981) (holding that lending textbooks to private schools violated the state constitution's Blaine Amendments); Spears v. Honda, 449 P.2d 130 (Haw. 1968) (holding that a statute authorizing the transportation of private school students at public expense violated the state's Blaine Amendment); Epeldi v. Engelking, 488 P.2d 860 (Idaho 1971) (holding that the state could not subsidize the transportation of private school students without violating Idaho's Blaine Amendment); Fannin v. Williams, 655 S.W.2d 480 (Ky. 1983) (holding that a Kentucky statute that provided state-supplied textbooks to children in private schools violated the Kentucky Blaine Amendment); Bloom v. Sch. Comm. of Springfield, 379 N.E.2d 578 (Mass. 1978) (striking down textbook loan program); Paster v. Tussey, 512 S.W.2d 97 (Mo. 1974) (en banc) (striking down textbook program under the state Constitution's Compelled Support Clause and Blaine Amendment); Dickman v. Sch. Dist. No. 62C, 366 P.2d 533 (Or. 1961) (holding that a statute authorizing the state to provide textbooks to students at parochial schools violated the state's Blaine Amendment); Moses v. Skandera, 367 P.3d 838 (N.M. 2015), *petition for cert. filed*, N. M. Ass'n of Non-Pub. Sch. v. Moses (U.S. May 19, 2016) (No. 15-1409) (holding that lending instructional materials for free to students who attend private schools involved an appropriation of state funds and violated one of New Mexico's two Blaine Amendments); Mitchell v. Consol. Sch. Dist. No. 201, 135 P.2d 79 (Wash. 1943) (en banc) (striking down a transportation program for private school students under the state Blaine Amendment); *see also* Luetkemeyer v. Kaufmann, 364 F. Supp. 376 (D. Mo. 1973), *aff'd by mem. op.*, 419 U.S. 888 (1974) (holding that the state's refusal to provide school bus transportation to religious school pupils did not violate the students' equal protection rights because the decision was not irrational). For a discussion of *Luetkemeyer,* see *infra* note 103.

Notably, some of these courts have upheld other student aid programs. *See supra* note 82 for the Kentucky, Massachusetts, and Michigan decisions.

84 *See, e.g.*, *Cochran*, 281 U.S. at 374–75 (holding that students and the state were the beneficiaries under a program providing textbooks to parochial school students, not the school or the religious denomination with which the school is affiliated).

unnecessary for a court to reach the narrowly tailored part of the strict scrutiny analysis. The exclusion would likely fail strict scrutiny.

IV. Lower Courts Disagree About Whether the Government Can Exclude Religious Options from Student-Aid Programs

Although the Supreme Court has strongly implied that the exclusion of all religious options from an otherwise generally available school aid program would be unconstitutional, the Court has never squarely addressed such an exclusion. As a result, the lower courts have split on this issue. On one side, the Sixth, Eighth, and Tenth Circuits have all struck down restrictions in public programs that discriminated against students attending religious schools.[85] On the other side of the split, the First Circuit and the Vermont and Maine Supreme Courts have upheld such restrictions.[86] Justice Thomas acknowledged this split as early as 1999, urging the Court to "provide the lower courts . . . with much needed guidance."[87] But, 18 years later, the split has only deepened.

The Supreme Court's decision in *Locke v. Davey* is partly responsible for this deepening divide. Specifically, the Court caused confusion with its emphasis on the "room for play in the joints" between the Free Exercise and Establishment Clauses.[88] In other words, just because a state action is not *forbidden* by the Establishment Clause does not mean it is *required* by the Free Exercise Clause. In *Locke*, for instance, the Court recognized that the Establishment Clause would *allow* a state to offer scholarships for those majoring in devotional theology, as long as these scholarships were granted in the context of a neutral and generally available program. But the state was not *required* by the Free Exercise Clause to grant these scholarships. As *Locke* stated, "[i]f any room exists between the two Religion Clauses, it must be here."[89]

The problem is that the lower courts cannot agree on how much "room for play in the joints" exists between the two clauses. The leading opinions representing the two different perspectives are *Eulitt v. Maine Department of Education*[90] and *Colorado Christian University v. Weaver*.[91]

Eulitt represents the view that there is significant room between the Establishment and Free Exercise Clauses. In *Eulitt*, the First Circuit upheld the exclusion of all religious schools from Maine's "town tuition programs," in which a town can pay for children to attend the private school of their choice instead of maintaining a public school. The court claimed that *Locke* compelled this holding, finding there was "no authority that suggests that the 'room for play in the joints' identified by [*Locke*] is applicable to certain education funding decisions but not others."[92] Yet the court ignored *Locke*'s conclusion that the Washington program was not discriminatory only because it went "a long way toward including religion in its benefits," which the *Eulitt* exclusion certainly did not do.[93] *Eulitt* also skimmed over Maine's interest in the exclusion, merely noting that states may "act upon their legitimate concerns about excessive entanglement with religion, even though the Establishment Clause may not require them to do so."[94] The court never even identified what Maine's "legitimate concern" was, nor did it inquire into whether that concern was historically recognized and "substantial," as the *Locke* Court did. By upholding the religious exclusion without any inquiry into whether its purpose or effect was discriminatory, the court rubberstamped the exclusion under rational basis review—an approach that has no support in the Supreme Court's Religion Clause jurisprudence.

The Tenth Circuit later read *Locke* far more narrowly in *Colorado Christian University v. Weaver*. There, the court invalidated Colorado's exclusion of "pervasively sectarian" schools from state scholarship programs under the Free Exercise, Establishment, and Equal Protection Clauses.[95] The opinion, written by then-Judge Michael McConnell, states that *Locke* "suggests, even if it does not hold, that the State's latitude to discriminate against religion is confined to certain 'historic and substantial state interest[s],' and does not extend to the wholesale exclusion of religious institutions and their students from otherwise neutral and generally available government support."[96] *Colorado Christian* is thus consistent with *Locke*'s strong implication that the wholesale exclusion of

85 *Colo. Christian Univ.*, 534 F.3d at 1256 (striking down exclusion of "pervasively sectarian" schools from college scholarship program); Peter v. Wedl, 155 F.3d 992, 997 (8th Cir. 1998) (holding that a Minnesota regulation violated the Free Exercise Clause when it required school districts to provide special education services to private school children but prohibited children attending religious schools from receiving these services on school grounds); Hartmann v. Stone, 68 F.3d 973, 977, 985–86 (6th Cir. 1995) (striking down regulation under the Free Exercise Clause that barred providers who "teach or promote religious doctrine" from a federal child-care program); *see also* Badger Catholic, Inc. v. Walsh, 620 F.3d 775, 777, 779 (7th Cir. 2010) (striking down, under *Locke*, public university's ban on the use of extracurricular student funds for "worship, proselytizing, or religious instruction," as the ban completely barred religious support).

86 These courts have all upheld the exclusion of religious schools from town tuition programs, in which towns pay for parents to send their children to the school of their choice in lieu of the town maintaining a public school. Strout v. Albanese, 178 F.3d 57, 64–65 (1st Cir. 1999); Bagley v. Raymond Sch. Dep't, 728 A.2d 127, 147 (Me. 1999); Chittenden Town Sch. Dist. v. Vt. Dep't of Educ., 738 A.2d 539, 562–63 (Vt. 1999).

87 Columbia Union Coll. v. Clarke, 527 U.S. 1013, 1013 (1999) (Thomas, J., dissenting from denial of certiorari).

88 *Locke*, 540 U.S. at 718–19. The Court quoted this language from its case, *Walz v. Tax Commission of the City of New York*, 397 U.S. 664, 669 (1970).

89 *Locke*, 540 U.S. at 725.

90 386 F.3d 344 (1st Cir. 2004); *see also* Anderson v. Town of Durham, 895 A.2d 944, 961 (Me. 2006).

91 534 F.3d 1245.

92 *Eulitt*, 386 F.3d at 355.

93 *Locke*, 540 U.S. at 724.

94 *Eulitt*, 386 F.3d. at 355.

95 *Colo. Christian Univ.*, 534 F.3d at 1258, 1266, 1269.

96 *Id.* at 1255 (internal citations omitted).

religious options from a student-aid program would be hostile toward religion and therefore unconstitutional.[97]

Today, the courts continue to divide over whether school choice programs can constitutionally exclude religious schools from otherwise generally available scholarship programs. The most recent court to join the split is a Montana trial court, which issued a preliminary injunction against a religious exclusion in March 2016.[98] Without resolution by the U.S. Supreme Court, more courts will become divided.

V. The Supreme Court's upcoming decision in Trinity Lutheran may provide clarity on this controversy

The U.S. Supreme Court now has an opportunity to resolve this split—or at least provide much-needed clarity—when it decides *Trinity Lutheran Church of Columbia, Inc. v. Pauley*.[99] *Trinity Lutheran* concerns whether it is constitutional to rely on a state Blaine Amendment to exclude churches from a public benefit program.

In *Trinity Lutheran,* a church-run daycare center challenged Missouri's Blaine Amendment[100] under the Religion Clauses and the Equal Protection Clause after state officials used the Amendment to deny it a state grant to replace its playground surface with a safer material.[101] The daycare was originally intended to be one of 15 grant recipients because it had one of the best grant applications, but the state later denied the grant solely because of the daycare's religious affiliation. In a divided opinion, the Eighth Circuit rejected what is characterized as the daycare's facial challenge to the Blaine Amendment.[102]

In rejecting the challenge, the Eighth Circuit majority relied on *Locke*.[103] It reasoned that the daycare "seeks to compel the direct grant of public funds to churches, another of the 'hallmarks of an established religion'" and that, at the very least, the state's decision not to give a grant to the daycare fell into the "play in the joints" between the Religion Clauses.[104] The majority, however, acknowledged that "there is active academic and judicial debate about the breadth of the [*Locke*] decision."[105] The majority also conceded that the next "logical constitutional leap in the direction the [Supreme] Court recently seems to be going" is toward holding that a government may not bar the distribution of public aid based solely on religion.[106] Yet the Eighth Circuit refused to go in this direction itself, finding such a holding would still be "a leap of great magnitude" from the Court's previous decisions, and "only the Supreme Court can make that leap."[107]

The daycare is now urging the Supreme Court to make that "logical constitutional leap" and to rule that denying public aid based solely on religious status is unconstitutional. Even if the Supreme Court rejects the daycare's request, however, there are several other outcomes that could benefit the school choice movement.

For instance, the Court could reject the challenge because, as the Eighth Circuit noted, the grant program involves direct institutional aid. In contrast, school choice programs only involve *student* aid; government funds are given to students who choose where to spend them, rather than given to religious institutions. Indeed, the distinction between institutional aid and individual aid is well established in Religion Clause jurisprudence.[108] In the former, the state is choosing to support a religious institution, while in the latter, no money goes to a religious institution except through the private and voluntary decisions of individuals. The Court could make this institution/individual aid distinction implicit in its reasoning, or it could go further, explicitly noting that, under *Locke*, the total exclusion of religious schools from a student-aid program is unconstitutional.

In addition, it is possible that the Court will address the anti-Catholic history behind Missouri's Blaine Amendment. This history has been discussed in the daycare's opening brief and in at least one amicus brief.[109] The Court could hold that this history makes the Amendment's application to the daycare unconstitutional, or just note that the Amendment is constitutionally suspect. Even if the Court finds that there is not enough historical evidence to make any firm conclusions about Missouri's Amendment, the Court could leave the door open to future challenges of applications of other Blaine Amendments that are religiously discriminatory.

Of course, *Trinity Lutheran* could also fail to provide any meaningful guidance on student-aid programs or Blaine

97 *See Locke*, 540 U.S. at 724.

98 *Espinoza*, No. DV-15-1152(D).

99 788 F.3d 779 (8th Cir. 2015), *cert granted,* 136 S. Ct. 891 (U.S. Jan. 15, 2016) (No. 15-577).

100 Article I, Section 7 of the Missouri Constitution states that "no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect or denomination of religion."

101 788 F.3d at 782.

102 Oddly, the majority in *Trinity Lutheran* never addressed the plaintiff's as-applied challenge which, according to the dissent, was the only challenge it even brought. *Id.* at 790–91 (Gruender, J., concurring in part and dissenting in part).

103 *Id.* at 785. The majority also expressed that it felt bound to reject the facial challenge to the Blaine Amendment because of the Supreme Court's summary affirmance thirty years earlier in *Luetkemeyer v. Kaufmann*, which held that the state could constitutionally use Missouri's Blaine Amendment to deny funding for religious school busing while simultaneously providing busing to public school students. *Trinity Lutheran*, 788 F.3d at 785. *Luetkemeyer*, however, did not involve a program that provided aid to some private school students and not others, like in other student-aid cases, which presents a distinctly different Free Exercise claim.

104 *Id.* at 785 & n.3 (some internal quotation marks omitted).

105 *Id.* at 785.

106 *Id.*

107 *Id.*

108 *See, e.g.*, *Zelman*, 536 U.S. at 649 (collecting cases).

109 Brief of Petitioner 42–43, Trinity Lutheran, No. 15-557 (U.S. cert. granted Jan. 15, 2016), http://www.scotusblog.com/wp-content/uploads/2016/04/TrinityLutheranPetitionersBrief.pdf; Brief for Amicus Curiae Douglas County School District and Douglas County School Board in Support of Petitioner 27-36, Trinity Lutheran, No. 15-557, http://www.scotusblog.com/wp-content/uploads/2016/04/TrinityLutheranMeritsAmicusDCSD.pdf.

Amendments. If this occurs, the Court should seize the next opportunity to do so, whether that be in the Colorado case, the Montana case,[110] or another student-aid case. Until then, lower courts and state legislatures will continue to wrestle with this issue, with predictably inconsistent results.

VI. Conclusion

Excluding religious options from otherwise neutral and generally available student-aid programs is likely discriminatory under the Free Exercise and Establishment Clauses. Further exacerbating this discrimination is the bigotry against Catholics that motivated the enactment of the Blaine Amendments in the first place. Until the Supreme Court resolves this issue, however, both lower courts and legislators will continue to struggle with it, causing uncertainty for school choice programs nationwide.

110 *See* discussion of both the Colorado and Montana cases *supra* Part II.