

**2**  
**—****Seminal  
or  
Symbolic?**

STEVEN K. GREEN

**T**he litigation road to the Supreme Court's decision in *Zelman v. Simmons-Harris* was long and tortuous.<sup>1</sup> Filed initially in 1996, the case wound its way slowly through the Ohio and federal courts, eliciting rulings that favored both sides in the controversy. Going into the Supreme Court arguments in February 2002, the plaintiffs had prevailed in four out of five lower court decisions. But as we all know, the final decision is all that matters in the world of constitutional litigation, and voucher proponents can take great satisfaction in their victory. For one point is clear: the Supreme Court—albeit by the narrowest of margins—held that vouchers for private religious schools, as represented in the Cleveland Scholarship Program, are constitutional under the Establishment Clause.<sup>2</sup>

Yet the *Zelman* decision may tell us little else, particularly about how the Court would rule on a differently constructed voucher program or, more immediately, whether voucher-like programs will withstand challenges brought under state laws.

1. 122 S. Ct. at 2460 (2002).

2. *Id.* at 2473.

That long and winding road to *Zelman* may thus look more like an expressway in comparison to the next round of voucher litigation.

I wish to make three points in response to Kenneth Starr's observations about the *Zelman* holding. First, I wish to give my analysis of the holding as one of the attorneys who challenged the Cleveland program. Second, I will discuss the significance of the holding, which can be viewed in some respects as a seminal ruling, while in other respects as being primarily symbolic. I will close with my perspective on the next step in the legal controversy over vouchers.

### **The Holding**

In *Zelman*, the Court highlighted two factors as being crucial to its holding that vouchers for private religious schools do not contravene the Establishment Clause: program neutrality and private choice. First, the Court held that eligibility under the scholarship program, both as to participating schools and student eligibility, was religiously neutral, meaning that the program neither favored religion nor created incentives for religious use.<sup>3</sup> Examining the *face* of the statute (rather than its application), the Court emphasized that the scholarship is part of general undertaking to provide educational services, that it confers its benefit to a broad class of individuals without reference to religion, and that it permits participation of all schools within the Cleveland and adjoining school districts, public and private alike. As Chief Justice Rehnquist wrote: "government programs that neutrally provide benefits to a broad class of citizens defined without reference to religion are not readily subject to an Establishment Clause challenge."<sup>4</sup>

3. Id. at 2467–68.

4. Id. at 2467.

*Seminal or Symbolic?*

37

Second, the Court emphasized the element of *private choice*, finding that the public aid reaches religious schools “only as a result of genuine and independent choices of private individuals.”<sup>5</sup> “Where a government aid program . . . provides assistance directly to a broad class of citizens who, in turn, direct government aid to religious schools wholly as a result of their own genuine and independent private choice, the program is not readily subject to challenge under the Establishment Clause.”<sup>6</sup>

The Court’s reliance on neutrality as the organizing paradigm for Establishment Clause cases is troubling. As I have discussed elsewhere, neutrality is insufficient as a constitutional value because it (1) lacks any independent, substantive meaning and (2) obscures other Establishment Clause values central to our constitutional system.<sup>7</sup> Neutrality is not self-defining; it must draw its substance from other sources.<sup>8</sup> As Justice Souter demonstrated in his *Mitchell v. Helms* dissent, the Court has used the term “neutrality” to represent quite disparate concepts: secular or nonreligious; a median between religious and secular; and evenhanded treatment.<sup>9</sup> Even if neutrality is equated with evenhandedness, as is advocated by a Court plurality and Kenneth Starr, it is an inadequate proxy for the “spacious conception” of religious freedom found in

5. *Id.* at 2466.

6. *Id.* at 2467.

7. See Steven K. Green, “Of (Un)Equal Jurisprudential Pedigree: Rectifying the Imbalance Between Neutrality and Separationism,” 43 B.C. L. Rev. 1111, 1131–33 (September 2002); Steven K. Green, “The Ambiguity of Neutrality,” 86 Cornell L. Rev. 692, 706–08 (March 2001).

8. See Douglas Laycock, “Formal, Substantive, and Disaggregated Neutrality Toward Religion,” 39 DePaul L. Rev. 993, 998 (Summer 1990) (“We must specify the content of neutrality by looking to other principles in the religion clauses”).

9. See *Mitchell v. Helms*, 530 U.S. 793, 878–84 (2000) (Souter, J., dissenting).

the Establishment Clause.<sup>10</sup> The Court's version of formal, evenhanded neutrality is concerned only with *equal treatment* of participants and is divorced from substantive considerations of starting and ending points. The Court's version also lacks regard for the comprehensiveness of treatment, which should be central to notions of equality. No voucher program will ever assist more than a minuscule number of students or provide a comprehensive solution to the problem of "failing schools." Finally, evenhanded neutrality is incomplete as a constitutional doctrine because it fails to account for other important values that inform the religion clauses, such as protecting religious liberty and autonomy, ensuring interreligious equality, alleviating religious dissension, and protecting the legitimacy and integrity of government and religion.<sup>11</sup>

In a similar manner, reliance on "private choice" obscures larger considerations of the degree and comprehensiveness of government subsidies of religion, concerns that lie at the heart of the nonestablishment mandate.<sup>12</sup> As discussed below, voucher aid can involve substantial transfers of public funds to religion, create dependency on the government largesse, and threaten the autonomy and integrity of religious institutions. These concerns arise irrespective of whether the act of private choice is truly genuine, meaningful, and independent.

Granted, we acknowledged in our brief that private choice *could* be a factor in assessing an Establishment Clause viola-

10. See *McCullum v. Bd. of Educ.*, 333 U.S. 203, 213 (1948) (Frankfurter, J., concurring).

11. See Green, "Of (Un)Equal Jurisprudential Pedigree," 43 B.C. L. Rev. at 1131–33.

12. See: Steven K. Green, "Private School Vouchers and the Confusion Over 'Direct' Aid," 10 Geo. Mason Univ. Civ. R. L. J. 47 (Winter 1999/Spring 2000); Laura S. Underkuffler, "Vouchers and Beyond: The Individual as Causative Agent in Establishment Clause Jurisprudence," 75 Ind. L. J. 167 (Winter 2000).

*Seminal or Symbolic?*

39

tion—that “true private choice,” as Justice O’Connor termed it two years earlier<sup>13</sup>—could neutralize the constitutional infirmity of aid advancing religion, but only where a broad universe of options exists among which to choose. Choice is only genuine and meaningful if the beneficiary has a wide variety of options, exercises some independent control over the funds, and is not effectively forced to redeem his benefit only at religious sources. Otherwise, the beneficiary’s control and discretion over how the funds are applied would be transparent, and the ultimate use at a religious school would correctly be attributable to the state.<sup>14</sup>

We pointed to the fact that over 80 percent of schools participating under the Cleveland program are religious and that when one considered the number of seats available to voucher-eligible students, the ratio rises to 96 percent religious. (Actually, during the 2001–2002 school year, religious seats accounted for 99 percent of the available private school openings). We also noted that no suburban public school participates in the program, nor are any likely to participate based on past practice under both the voucher program and interdistrict transfer programs. This means that meaningful choice is illusive; that if you are a parent with a voucher, 99 percent of the potential uses are at religious schools. This skewing of options creates an incentive for religious education and is unconstitutional.

The Court rejected our argument that “true private choice” does not exist, despite the preponderance of religious schools participating under the program. Initially, the majority reiter-

13. *Mitchell v. Helms*, 530 U.S. 793, 842 (2000) (O’Connor, J., concurring in the judgment).

14. See *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 10 (1993) (noting that as a prerequisite for constitutionality, beneficiary choices “cannot be attributed to state decisionmaking”).

ated that the number of students who end up in religious schools under the program is irrelevant. Provided the program is neutral on its face, the amount of government aid channeled to religious institutions by recipients has no constitutional significance—that it would be loath to have a constitutional rule turn on how program beneficiaries choose to exercise their options.<sup>15</sup>

This part of the ruling mischaracterized our argument (and sidestepped the issue of neutrality) in two respects. First, we argued that the 99 percent figure is indicative not of how parents have decided to exercise their options in a truly open universe *but of the availability of options themselves*. As stated, in Cleveland, if a parent wants her child to participate in the voucher program, there is a mathematical certainty that she will attend a religious school, regardless of what that parent desires.<sup>16</sup> This makes the ultimate placement decision attributable to the state. Second, we argued that the Court could not presume the neutrality of the program merely from its face but rather from how it works in practice. The fact that 99 percent of options are religious indicates that the program is not truly neutral, notwithstanding the absence of any religious language in the statute. Neutrality cannot be determined in isolation of the facts.

The Court also held (primarily through Justice O'Connor) that the appropriate universe to consider for genuine private choice is not that of the participating private schools but includes magnet, charter, and possibly even public schools.<sup>17</sup>

15. 122 S. Ct. at 2470.

16. *Id.* at 2496 (Souter, J., dissenting) (“The 96.6 percent reflects, instead, the fact that too few nonreligious school desks are available and few but religious schools can afford to accept more than a handful of voucher students”).

17. *Id.* at 2469, 2478.

*Seminal or Symbolic?*

41

The Court maintained that voucher parents are able to consider all of these educational options for their children (even though some magnet and charter schools do not offer the same grades as the religious schools), and when one considers all these alternatives, the percentage of children attending religious schools drops to under 20 percent.<sup>18</sup> The fact that two nonreligious private schools had converted to community/charter schools after the program was initiated added credence to the argument that the various types of schools are all part of the same universe of options for the parents.

Despite that last fact, the Court still chose the wrong baseline, for the entire purpose of the voucher program is to provide an *alternative* to public schooling. If a parent desires a voucher in order to remove his child from the public schools, considering those options in the universe—or at least traditional public school offerings in the mix<sup>19</sup>—is analytically dishonest and skews the range of true *alternatives* for parents. For those parents, the alternative of the public schools is already closed.

Second, eligibility for the various educational alternatives often varies widely, as do program content and emphasis. Some programs are needs-based, some are competitive, others rely on lotteries for entry, while all options are affected by factors such as convenience, available transportation, and program content. For example, a magnet school with a French immersion program or one for math-gifted students may not be a realistic option for many children. Although a small number of children may be eligible for several of the education alternatives, most children will likely qualify for only one alternative. Justice O'Connor resorted to a high degree of formalism

18. Id. at 2471.

19. Id. at 2469 (“schoolchildren enjoy a range of options: They may remain in public school”).

by claiming that a community/charter school does not have to offer the same grades or programs as a religious school to represent an option for a voucher-eligible student.<sup>20</sup>

Third, there is a qualitative difference between public and private schools that argues against including public schools in the constitutional equation. Differences in funding schemes, accountability requirements, curriculum standards, and legal obligations distinguish the two institutions. This consideration leads to a fourth: even if charter and magnet schools should be included within the greater universe of options, that consideration fails to address the composition of the *private school* universe. For parents who prefer a private school alternative, there should be a balanced secular-sectarian mix to guarantee that choice is not skewed. A state cannot circumvent its constitutional obligation of nonadvancement of religion by creating a predominately religious program but then seeking to counterbalance it with two or three secular programs. The constitutionality of each program must stand in its own. Otherwise, the no-funding prohibition would lose all meaning, since the state could always point to other related programs to counteract the purposeful support of religion.<sup>21</sup>

The Court's discussion of the appropriate universe of options, however, represents a less than clear victory for voucher proponents. Its emphasis on the availability of magnet and charter schools alternatives indicates that a state must provide a broad array of secular education options to ensure the constitutionality of a voucher program. One could argue that under the holding, secular options must predominate—that the Court's 20 percent religious figure sets a benchmark. Also,

20. *Id.* at 2479.

21. See *id.* at 2493 (Souter, J., dissenting). See Steven K. Green, "The Illusionary Aspect of 'Private Choice' for Constitutional Analysis," 38 *Willamette L. Rev.* 549, 571–72 (Fall 2002).

*Seminal or Symbolic?*

43

there is O'Connor's interesting comment that nonreligious school alternatives need not be *superior* to religious schools to be an option, but that they must be *adequate*.<sup>22</sup> This suggests that a state could not offer a religiously dominated voucher program as the only alternative to a failing public school system without the existence of charter and magnet schools. These interpretations stand in contrast, however, to the Court's formalistic approach that focuses on the facial neutrality of the program, an approach that is willing to look outside the contours of a particular program to consider related educational opportunities.

**The Significance of *Zelman***

The question of whether *Zelman* was correctly decided does not address the issue of its significance. Is *Zelman* a watershed ruling, a seminal holding? Does it constitute a change in the jurisprudence, and what are its implications for future litigation? Or, to the contrary, does *Zelman* represent merely the natural culmination of the Court's evolving jurisprudence, such that the holding is primarily symbolic?

Few Establishment Clause cases had been as eagerly anticipated or received as much build-up as *Zelman*. Prior to the decision, *Church & State* magazine called *Zelman* "the most important education funding case in 50 years," and Dean John Jeffries of University of Virginia Law School characterized the holding as presenting "the most important church-state issue of our time."<sup>23</sup> More than 100 groups weighed in with amicus briefs, with both sides predicting dire consequences for the

22. 122 S. Ct. at 2477 (O'Connor, J., concurring).

23. *Church & State* (November 2001); John C. Jeffries Jr., and James E. Ryan, "A Political History of the Establishment Clause," 100 Mich. L. Rev. 279 (November 2001).

Constitution and education policy from an unfavorable decision.

In contrast to the advance billing, the Court majority and Justice O'Connor played down the significance of their holding. Both opinions sought to put the decision within the mainstream of Establishment Clause jurisprudence, or at least within the developments over the past twenty years. Chief Justice Rehnquist wrote that the decision fit squarely within a jurisprudence of "true private choice programs [that] has remained consistent and unbroken."<sup>24</sup> Justice O'Connor was more adamant, asserting that the holding did not, "when considered in light of other longstanding government programs that impact religious organizations and our prior Establishment Clause jurisprudence, mark a dramatic break from the past."<sup>25</sup> Later in her concurrence, as if to persuade an unconvinced audience, O'Connor reiterated that "today's decision [does not] signal a major departure from this Court's prior Establishment Clause jurisprudence."<sup>26</sup>

On one level, O'Connor is correct: the decision does not effect a major change in the law. The Court has been speaking about neutral programs of general applicability for over fifty years<sup>27</sup> and of independent choice for close to twenty years.<sup>28</sup> It placed its holding squarely within the earlier decisions of *Mueller v. Allen*, *Witters v. Washington Department of Services for the Blind*, *Zobrest v. Catalina Foothills School District*, *Agostini v. Felton*, and *Mitchell v. Helms* that discussed indirect aid.<sup>29</sup> These decisions, Rehnquist wrote, "have drawn a

24. 122 S. Ct. at 2467, 2466.

25. *Id.* at 2473 (O'Connor, J., concurring).

26. *Id.* at 2476.

27. See *Everson v. Board of Education*, 330 U.S. 1, 16–17 (1947).

28. See *Mueller v. Allen*, 463 U.S. 388, 399 (1983).

29. 122 S. Ct. at 2465–68.

consistent distinction between government aid programs that provide aid directly to religious schools . . . and programs of true private choice.”<sup>30</sup> In relying on these holdings, *Zelman* added little new to the law. More significantly, the *Zelman* holding does not disturb the distinction between direct and indirect government aid to religious institutions, the former form being prohibited. Neither *Zelman* nor those earlier holdings apply to “programs that provide aid *directly* [from the government] to religious schools,” Rehnquist noted.<sup>31</sup> Thus, a state could not allocate direct aid to private schools on a per capita basis.

*Zelman* is thus a cautious decision; it broke no new legal ground and declined to reverse any earlier holdings, preferring to distinguish decisions to the contrary.<sup>32</sup> In fact, Rehnquist reaffirmed that the appropriate standard of review remains the much maligned *Lemon* test, which asks whether a state law has the purpose or effect of advancing or inhibiting religion.<sup>33</sup> O’Connor echoed that the “test today is basically the same as that set forth in [the 1963 school prayer cases].”<sup>34</sup> Of course, this is the Court’s job, to legitimate its decisions by relying on precedent and *stare decisis*.

Considering only the law, one could argue that *Zelman* is a jurisprudential step *back* from two years earlier. In *Mitchell v. Helms*, the Court upheld the direct grant of Chapter 2 materials—library books, equipment, computers—to religious schools. There, the plurality emphasized the neutrality of the Chapter 2 program, suggesting that was all that was necessary

30. *Id.* at 2465.

31. *Id.*

32. *Id.* at 2472 (distinguishing *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973)).

33. *Id.* at 2465. See *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971).

34. 122 S. Ct. at 2476 (O’Connor, J., concurring).

for constitutionality. Provided government acted evenhandedly, it could fund all aspects of religious education.<sup>35</sup> Although private choice might help ensure the constitutionality of a program, it was not a necessary ingredient.<sup>36</sup> That holding brought a strong rebuke from O'Connor, who called the plurality's sole emphasis on neutrality a "rule of unprecedented breadth."<sup>37</sup> As a result, in order to secure O'Connor's vote, the *Zelman* decision emphasizes the private choice aspect of vouchers and does not hang its hat on program neutrality. Thus, for the purposes of doctrinal development, *Zelman* is much more symbolic than it is a seminal decision.

The fact that *Zelman* may not represent a watershed in Establishment Clause jurisprudence does not mean that it is without significance. Although the majority applied existing law, the decision signifies the dominance of neutrality and private choice theories in the government benefits side of Establishment Clause jurisprudence. As discussed above, the Court's increasing reliance on neutrality, to the exclusion of separationist principles, is troubling because it ignores other religion clause values that are "of equal historical and jurisprudential pedigree."<sup>38</sup> Even if neutrality is the correct analytical standard for judging such controversies, the majority misapplied the law by finding neutrality and private choice in a case where neither principle existed. And finally, *Zelman* must be considered significant if for no other reason than it answers that nagging "voucher question." With the exception of integration and school prayer, few education issues have

35. *Mitchell*, 530 U.S. at 809–10.

36. *Id.* at 816 ("Although the presence of private choice is easier to see when aid literally passes through the hands of individuals . . . there is no reason why the Establishment Clause requires such a form").

37. *Id.* at 837 (O'Connor, J., concurring in the judgment)

38. *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819, 849 (1995) (O'Connor, J., concurring).

*Seminal or Symbolic?*

47

been as contentious. Although possibly not seminal for breaking new legal ground, *Zelman* is highly significant for what it has wrought.

First, the holding opens the door to substantial transfers of public funds to religious schools. Under the Milwaukee and Cleveland programs alone, the annual amount of public funding flowing to private schools is \$40 and \$8 million, respectively.<sup>39</sup> The Court claimed that substantiality on its own has never been a concern, particularly in choice situations,<sup>40</sup> but O'Connor spent several pages contrasting the amount of the voucher aid to other funding and tax breaks that already flow to religious institutions so as to demonstrate its comparative insignificance.<sup>41</sup> Possibly, she protests too much. *Zelman* authorizes statewide voucher programs, such as in Florida, which, if fully implemented, could result in billions of unrestricted dollars flowing to religious schools.

Substantially also means more than the gross amounts, which will always pale when compared with the billions of dollars spent on public education. Under prior holdings, aid is also considered substantial if it subsidizes the religious educational mission or pays for the entire educational experience of children attending religious schools.<sup>42</sup> Previously, permissible aid was in discrete and focused forms (for example, Title I programs) that supplemented the private schools' costs but

39. See U.S. General Accounting Office, *School Vouchers: Publicly Funded Programs in Cleveland and Milwaukee* (August 2001).

40. 122 S. Ct. at 2466, 2470. But see *Witters*, 474 U.S. at 488 (noting that “[no] significant portion of the aid expended under the Washington program as a whole will end up flowing to religious education”).

41. *Id.* at 2473–76 (O'Connor, J., concurring).

42. *Zobrest*, 509 U.S. at 12 (discussing “substantial” aid); *Grand Rapids School District v. Ball*, 473 U.S. 373, 394 (1985) (same); *Meek v. Pittenger*, 431 U.S. 349, 365 (1975) (discussing the prohibition on “massive aid”).

did not supplant their educational obligations.<sup>43</sup> Also, the Court often noted that no public funds flowed to the coffers of religious schools.<sup>44</sup> After *Zelman*, a state may pay the entire educational costs of a student to attend a religious school. And apparently, there is nothing to prevent a religious school from being composed entirely of voucher students. This is *substantial* aid, any way you slice it.

Finally, *Zelman* is significant in that it authorizes payment for religious instruction and worship. Under previous aid decisions, the Court emphasized that the government aid was secular and could not be applied to religious uses.<sup>45</sup> This prior barrier, however, is now broken under the aegis of private choice. Even Justice O'Connor acknowledged that *Zelman* is distinct from other indirect aid cases because a significant portion of the funds reaches religious schools without restrictions on their use.<sup>46</sup> Justice Souter is correct that issues of substantiality and divertability had long been central to Establishment Clause jurisprudence.<sup>47</sup> Now they are not.

### The Future for Vouchers

What, then, is the next step in the legal battle over vouchers? Clearly, *Zelman* does not obligate states to establish voucher programs, but holds only that it is constitutional to create programs that include religious schools. The most immediate issue on the horizon concerns the ability of states to operate educational funding and scholarship programs that exclude

43. *Agostini*, 521 U.S. at 228.

44. *Id.*; *Zobrest*, 509 U.S. at 10.

45. *Agostini*, 521 U.S. at 223, 228; *Zobrest*, 509 U.S. at 10; *Bowen v. Kendrick*, 487 U.S. 589, 611–12 (1988); *Sloan v. Lemon*, 413 U.S. 825, 829 (1973).

46. 122 S. Ct. at 2473 (O'Connor, J., concurring).

47. *Id.* at 2490 (Souter, J., dissenting).

*Seminal or Symbolic?*

49

religious schools or prohibit the use of the scholarships in religious programs.<sup>48</sup>

One example is found in programs that are unique to Maine and Vermont that permit towns without public schools to tuition-out their students to neighboring public and private schools. Both states prohibit using the tuition grants at religious schools. During the mid-1990s, three cases were litigated in Maine and Vermont over these restrictive grants, the issue being whether the exclusion of religious schools discriminated against religion in violation of the free exercise, free speech, and equal protection clauses.<sup>49</sup> In all cases courts upheld the exclusion, but those holdings turned primarily on the fact that the Establishment Clause required such distinctive treatment.<sup>50</sup> With *Zelman*, that compelling government interest in avoiding an Establishment Clause violation apparently vanishes. As a result, the Institute for Justice has recently filed a new action in Maine asserting that the disparate treatment under state tuitioning violates Equal Protection.<sup>51</sup>

The second example is those state college scholarship programs that prohibit the use of state aid at either pervasively sectarian colleges or in programs of religious study.<sup>52</sup> As in the Maine and Vermont cases, many of these statutes are based on distinct state constitutional provisions that often require a

48. A second important issue, outside the scope of this conference, concerns the ability of states to impose conditions on recipient religious schools—such as curriculum and nondiscrimination requirements—that may threaten the schools' religious autonomy interests.

49. See *Strout v. Albanese*, 178 F.3d 57 (1st Cir. 1999); *Bagley v. Raymond School District*, 728 A.2d 127 (Me. 1999); *Chittenden Town School District v. Dept. of Educ.*, 738 A.2d 539 (Vt. 1999).

50. See *Strout*, 178 F.3d at 60–62.

51. See *Anderson v. Town of Durham*, Cumberland County (Me.), Superior Court.

52. See, e.g., *Columbia Union College v. Clarke*, 159 F.3d 151 (4th Cir. 1998).

more rigorous separation between church and state. Approximately thirty-five states have constitutional provisions that explicitly bar funds flowing to religious institutions.<sup>53</sup> An example is Article I, section 6, of the Indiana constitution, which states that “[n]o money shall be drawn from the treasury for the benefit of any religious or theological institution.” Article 8, section 3, adds that “[t]he principal of the Common School fund shall remain a perpetual fund . . . and the income thereof shall be inviolably appropriated to the support of Common Schools, and to no other purpose whatsoever.” In common parlance, these provisions are often called “Blaine amendments,” or “Baby-Blaines,” in that many are based on a failed attempt in 1876 to amend the U.S. Constitution to prohibit public funding of parochial schools.<sup>54</sup>

The question presented by these stricter state constitutional provisions is whether they can serve as free-standing constitutional justifications for distinguishing between religious and nonreligious recipients, or whether they must give way to the federal equal protection and free exercise interests. Not more than two months following *Zelman*, a state trial court struck down Florida’s voucher program based on the state constitution which provides that “[n]o revenue from the state or any political subdivision or agency thereof shall ever be taken from the public treasury, directly or indirectly in aid of any church, sect, or religious denomination or in aid of any sectarian institution.”<sup>55</sup> The Florida appellate courts will be

53. See Note, “School Choice and State Constitutions,” 86 Va. L. Rev. 117, 123 (2000).

54. See Steven K. Green, “The Blaine Amendment Reconsidered,” 36 Am. J. Legal Hist. 38 (1992).

55. *Holmes v. Bush*, Case No. CV 99-3370 (Aug. 5, 2002); Fla. Const. Art. I § 3.

*Seminal or Symbolic?*

51

forced to reconcile this constitutional provision with the intervenors' free exercise and equal protection claims.

More recently, in a case called *Davey v. Locke*, the Ninth Circuit held that Washington State's refusal to allow an otherwise eligible student to use a state scholarship for a ministerial program violated the free exercise clause, notwithstanding the stricter command of the Washington constitution.<sup>56</sup> The court held that the prohibition on using the scholarship for ministerial training discriminated on the basis of religion, such that the state constitution had to give way. This holding conflicts with an earlier Ninth Circuit decision that such denials violate neither equal protection nor free exercise—that the state is merely exercising its authority to fund those programs it chooses, and that no one can demand that the government subsidize expression of a constitutional right.<sup>57</sup> The Supreme Court has granted review in *Davey*, potentially to resolve this conflict between stricter state constitutions and federally guaranteed rights, although the Court could also find the free exercise claim is insufficient.

Admittedly, this presents a close issue. On the one hand, state courts may interpret their constitutions to afford greater protection than guaranteed under the federal constitution.<sup>58</sup> The assumption has been that states can provide a more rigorous separation of church and state just as they can provide greater protection against search and seizure. Also, the government may selectively fund certain programs without being required to fund related programs and without succumbing to viewpoint discrimination.<sup>59</sup> The decisions upholding limita-

56. *Davey v. Locke*, 299 F.3d 748 (9th Cir. 2002); cert. granted 123 S. Ct. 2075 (2003).

57. *KDM v. Reedsport Sch. Dist.*, 196 F.3d 1046 (9th Cir. 1999).

58. See *Pruneyard Shopping Center v. Robins*, 447 U.S. 74 (1980).

59. See *Rosenberger*, 515 U.S. at 833.

tions on funding of abortion-related services affirm this rule.<sup>60</sup> As the Court has indicated on several occasions:

[Government] may selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program in another way . . . In doing so, the Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of the other.”<sup>61</sup>

Finally, earlier Court holdings indicate that states do not violate equal protection by refusing to fund private education.<sup>62</sup>

On the other hand, some states have already decided to fund private schooling but are excluding private religious schooling only. This is a distinction based on religion and implicates free speech, free exercise, and equal protection values. The argument is that while states are under no obligation to fund private education, once they do so, they cannot make eligibility turn on religious affiliation.<sup>63</sup> However, in *Rust v. Sullivan*, the government was also funding only one side of the debate—family counseling that discouraged abortion—but the Court found no viewpoint discrimination.<sup>64</sup>

The outcome will likely turn on how broadly or narrowly courts define these values and view the distinctive treatment. In the *Davey* case, the distinctive treatment was not directed against any group of persons (and Mr. Davey was not a member of a protected class), but against the use of a state benefit. Washington State did not declare Mr. Davey ineligible based

60. See *Harris v. McRae*, 448 U.S. 297 (1980); *Maher v. Roe*, 432 U.S. 464 (1977).

61. *NEA v. Finley*, 524 U.S. 569, 588 (1999) (quoting *Rust v. Sullivan*, 500 U.S. 173, 193 (1991)).

62. *Norwood v. Harrison*, 413 U.S. 455, 462 (1973).

63. *Davey*, 299 F.3d at 756.

64. 500 U.S. at 193–94 (not singling out a disfavored group on basis of speech).

*Seminal or Symbolic?*

53

on his religion, but merely placed limits on how he could use the state scholarship. Mr. Davey, irrespective of whether he is an evangelical or not, could still receive a scholarship to attend a state university and could even apply it at his religious college, just not toward a program of religious training.<sup>65</sup>

Still, because the state is funding other types of degree programs it appears to be denying a benefit on the basis of religion. The question may turn on whether the state has created a funded forum for diverse educational perspectives and is discriminating on the basis of religious viewpoints. The closer the analogy to a speech-related forum, the stronger the argument that the state cannot distinguish between applications or perspectives.<sup>66</sup>

Such cases may also turn on how courts view the purpose behind the Blaine amendments. Some people are seeking to tar the Blaine amendments with religious animus—particularly, anti-Catholicism—to show that the purpose of such state provisions is to discriminate against religion.<sup>67</sup> If that can be proved, then the states' reliance on the state constitutions may be invalid. To be sure, some of the impetus for the Blaine amendments rested on nativism and anti-Catholicism—to keep parochial schools from receiving public funding.<sup>68</sup> Without a doubt, nineteenth-century nativist groups such as the American Protective Association used the Blaine amendments to further their bigoted cause.

Focusing solely on this aspect obscures the much larger dynamic at work 150 years ago, when public schools were still

65. *Davey*, 299 F.3d at 761 (McKeown, J., dissenting).

66. Contrast *Rosenberger*, 515 U.S. at 837 (forum analysis applies), with *Finley*, 524 U.S. at 586 (rejecting forum analysis).

67. See the Web site for the Becket Fund for Religious Liberty, [www.blaineamendments.org/](http://www.blaineamendments.org/).

68. See Green, n. 44 above.

in their infancy and faced significant hurdles of funding, public acceptability, and hostility to universal education. Free, universal, and nonsectarian public education was still a novel idea, and the mere fact that officials viewed funding of private religious schools as a threat to that ideal does not necessarily translate into religious animus. Not only Catholics but Lutheran, Baptist, Methodist, and Presbyterian schools desired public funding.<sup>69</sup> Public schools were seen as the engine of democracy and equality while private schooling was exclusive and class-reinforcing. The no-funding rule thus ensured the survival of public schooling and furthered ideals of equality and inclusion. The mere fact that state constitutions exclude funding of religious education does not mean they have or had the purpose or object of suppressing religion or religious conduct. Irrespective of the motives of some constitution drafters, public funding of religious instruction and worship strikes at the heart of Establishment Clause values. Lest we forget, non-establishment is also a means of ensuring religious liberty.

This controversy over state constitutional prohibitions thus represents the next legal battleground for vouchers. It is likely the Supreme Court will have to resolve this issue, too. With *Davey* already before the Court, we may have an answer to this question sooner than later. But if the past is any guide, this uncertainty may continue for several years.

69. William Oland Bourne, *History of the Public School Society of the City of New York* (New York: William Wood & Co., 1870), pp. 48–75; Diane Ravitch, *The Great School Wars* (New York: Basic Books, 1974), p. 40.