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—**The Need
for Secular
Choice**

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Z*elman v. Simmons-Harris* brought to a close the battle over whether school vouchers that can be used at religious institutions inherently violate the Establishment Clause. But the fight for school vouchers is far from over. One of us (Cohen) believes that echoes of the *Zelman* fight will imperil political support unless we can achieve substantially increased participation by secular schools. And both of us foresee a new fight against voucher opponents invoking once-obscure state constitutional or statutory provisions known as “Blaine amendments” to prohibit the use of vouchers for parochial education programs.

***Zelman* and the Establishment Clause**

In 1995, after the Cleveland school district fell under state control for poor performance, the State of Ohio established a Pilot Project Scholarship Program (the “Program”) to provide educational choices to families with children enrolled in a school district under state control. The Program consisted of two parts: a tuition aid program and a tutorial assistance program.

Any private school—religious or secular—can participate in the Program and accept Program students, provided the school is located within the boundaries of a covered district and meets state educational standards. The private school must agree not to discriminate on the basis of race, religion, or ethnic background or to “advocate or foster unlawful behavior or teach hatred of any person or group on the basis of race, ethnicity, national origin, or religion.” Any public school in an adjacent school district may participate in the Program.

The Program began operating in the 1996–97 school year. In the 1999–2000 school year, 56 private schools participated, of which 46 (82 percent) were religiously affiliated. No eligible public school elected to participate in the Program. Over 3,700 students participated in the Program, and 96 percent enrolled in religiously affiliated schools.

The Legal Issue

The issue before the Court was whether the Program violates the Establishment Clause.

The Court’s Opinion

In a 5–4 decision, the Court held that the Program does not violate the Establishment Clause because it is “entirely neutral with respect to religion” and is a program “of true private choice.”¹

After stating that the Establishment Clause “prevents a State from enacting laws that have the ‘purpose’ or ‘effect’ of advancing or inhibiting religion,” the Court noted that its previous decisions have consistently distinguished between gov-

1. Chief Justice Rehnquist wrote the Court’s opinion; he was joined by Justices O’Connor, Scalia, Kennedy, and Thomas.

ernment programs that provide aid directly to religious schools, on the one hand, and programs of “true private choice” on the other (that is, where government aid reaches religious schools only as a result of the choice of private individuals). Because, the Court said, there was no dispute that the Program had been enacted for the “purpose” of providing educational assistance to poor children, the Court focused its inquiry on whether the Program had the “effect” of advancing or inhibiting religion.

Drawing from three previous decisions,² the Court said that “where a government aid program is neutral with respect to religion, and 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.” The Court found that the constitutional inquiry did not turn on “whether and why, in a particular area, at a particular time, most private schools are run by religious organizations, or most recipients choose to use the aid at a religious school.” As a result, the fact that 96 percent of the students participating in the Program enrolled in religiously affiliated schools did not factor heavily into the inquiry.³ The Court held that, despite the overwhelm-

2. *Zobrest v. Catalina Foothills School Dist.*, 509 U.S. 1 (1993) (upholding a federal program permitting sign-language interpreters to assist deaf children enrolled in religious schools); *Witters v. Washington Dept. of Servs. for the Blind*, 474 U.S. 481 (1986) (upholding a vocational scholarship program that provided tuition aid to a student studying to become a pastor); *Mueller v. Allen*, 463 U.S. 388 (1983) (upholding a Minnesota program authorizing tax deductions for private school tuition costs, among other things, even though 96 percent of the program’s beneficiaries were parents of children attending religious schools).

3. The Court noted that the 96 percent figure itself did not take into account students enrolled in alternative community schools, magnet schools, and traditional public schools with tutorial assistance. Including those stu-

ing number of parents choosing religiously affiliated schools, the Program could survive the Establishment Clause challenge because any “incidental advancement of a religious mission, or the perceived endorsement of a religious message, is reasonably attributable to the individual recipient, not to the government.”

Other Opinions

Justice O’Connor joined the Court’s opinion, but wrote separately to emphasize her beliefs that (1) the Court’s decision did not mark a “dramatic break from the past,” and (2) the inquiry should consider, as a factual matter, all educational alternatives available to parents in addition to religious schools. Agreeing with the Court’s statement that the inquiry must turn on the educational options actually available to parents rather than on a review of the choices the individuals ultimately make, Justice O’Connor found that after considering all the educational options available, parents have sufficient nonreligious educational options to make the Program constitutional.

Justice Thomas joined the Court’s opinion but also said, in a fairly dramatic departure from recent writing about the Establishment Clause, that states may have greater latitude than the federal government because the Fourteenth Amendment is concerned primarily with “individual liberty.”

Justices Stevens, Souter, Ginsberg, and Breyer dissented, arguing that the Program is, at bottom, a very large transfer of state funds to religious organizations, where the funds can be used for religious purposes.

dents in the denominator would drop the figure from 96 percent to under 20 percent.

The Politics of the Next Steps

One of us—Cohen—believes that school voucher programs are still very much threatened by the notion that school vouchers amount to government support of religious instruction. Supporters of school vouchers should now devote themselves to drastically enlarging secular-school participation, because the success of voucher programs almost surely depends on it.

Cohen thinks the victory in *Zelman*, while dramatic, was thin, and not just in headcount. Although the majority aimed at a ruling that could be said to rest on a “structural” interpretation of the First Amendment’s Establishment Clause—that is, no impermissible *purpose* of enhancing religion plus no impermissible *effect* of enhancing religion equals no constitutional violation—the opinion depends for much of its persuasiveness on the facts of this particular case. First of all, not only were the conditions in Cleveland’s inner-city schools uniquely terrible, but there also had been a state legislative determination of their terribleness. As the Court painted the picture, this case was like a drowning emergency, where the usual strategy is to throw every handy loose object in the general direction of the victim and hope something keeps him afloat. A lot of people, with a wide range of views about the First Amendment, are prepared to look at a situation like Cleveland’s and say, “OK, let’s try whatever anybody can think of.” In Cohen’s view, it is not clear that a future Supreme Court, perhaps one with a somewhat changed composition, will view *Zelman* as controlling in the context of broader programs not targeted at clear and conceded emergencies.

Moreover, at least by the time *Zelman* got to the Supreme Court, it was also conceded (and the Court explicitly assumed) that the Ohio program *was* a good-faith effort, undertaken to start resolving a difficult secular problem, and not undertaken

to promote religious instruction. But a program's purposes are a question of fact. Future cases where there is a dispute about a program's basic motives will present issues the Supreme Court did not need to resolve in *Zelman* and the opinion in *Zelman* will not necessarily determine their outcomes.

Finally, the majority conclusion rested on the key determination that enrollment in religious schools was the product of "true private choice." The majority was able to determine this, to its own satisfaction, because it found that the state had made available a range of other, secular, alternatives to the failing schools. But the existence of "true private choice" is also a question of fact, on which courts could reach different conclusions under different programs, or even under the Ohio program as the evidence changes with greater experience. Even more important, the Supreme Court supported its finding in *Zelman* of "true private choice" by stressing, in both Chief Justice Rehnquist's majority opinion and Justice O'Connor's concurrence, that the Ohio program was being judged in its early days, that the litigation itself had impeded its development, and that there was evidence suggesting that additional secular schools may start up, or open up places to transferee students, in response to this and other voucher programs. If this fails to happen, opponents will mount vigorous future attacks on *Zelman*.

The four-Justice minority went further than Court minorities usually do to invite such attacks. All three dissents, by Justices Stevens, Souter, and Breyer, end with rather ringing assertions that the Court has lost its way on a point fundamental to American society, and Justice Souter's opinion, joined by all three of the other dissenters, strongly suggests that they would vote to overturn *Zelman* tomorrow if they had a fifth vote.

Cohen's fear that school vouchers are still vulnerable to

anti–Establishment Clause objections is not, however, based primarily on the risk that *Zelman* itself will someday be overturned. The emotion-stirring issues covered by the Establishment Clause are political as well as legal. School voucher programs may not have sufficient political momentum to grow if their perceived effect is to promote primarily religious instruction. Many state legislatures just won't get involved, and others will limit themselves to applying rather small Band-Aids to obvious and gaping wounds. The result will be isolated accomplishments that participants in particular communities can be proud of, but no real program for attacking the widespread deficiencies of public schools.

Organizations that are on the front lines of big constitutional battles often have very categorical views, and it is easy to see the clash of these views as the heart of the issue. In the school voucher fight, for example, some proponents would stress—and would not compromise—the view that equal treatment of religious and secular institutions is right, and the companion view that the principle of “true private choice” is close to the heart of what the Religion Clauses of the First Amendment are about. Some opponents would of course invoke the supposed “wall of separation” between church and state, and be equally unwilling to compromise. The result in *Zelman*, thought of simply as a constitutional case, was a big (if narrow) victory for one theory over the other.

But voucher *programs* are not just a matter of constitutional theory. Their success depends on state legislative action, including state funding. That means they depend on popular support, which in turn depends on how the *public* views the very issues we are talking about—the need for experimentation and competition to solve school problems, the proper role of government programs in creating or assisting alternatives to traditional public schools, and the proper role of religious

institutions among those alternatives. The Supreme Court can to some extent guide public views on these issues: the Court may follow the election returns, as Mr. Dooley said, but voters follow the Court, too.

But voters have their own views on these issues, which will be shaped by the developing facts. Viewing the facts from the Supreme Court's perspective in *Zelman*, in the early days of a sincere response to an acknowledged crisis, many voters surely do favor what the Court did. It is easy for a voter to favor a program labeled as experimental, adopted in response to what everyone perceives as a true emergency, especially when the program does not cost very much. The voter may also rather easily say to herself, "That inner-city kid is probably better off—and less likely to grow up to be a menace to *me*—in a religious school with strong discipline, even if the religion is neither my own nor his."

If we were talking about a much broader, more mature, and costly program, voters' views might be far different. A pollster would surely get far less favorable average answers if he asked taxpayers, "Are you willing to have a significant portion of your state and local tax dollars spent to teach someone else's religion as part of a school curriculum for a large number of kids in your community?" Or suppose the pollster asked inner-city parents, "Are you satisfied with a state program in which the only real alternative for your child to escape the public schools is a school that teaches somebody else's religion?" Or suppose he asked people professing to be very religious, but whose denominations do not choose, or are simply too small, to support a local denominational school, "What do you think of governmental funds flowing, indirectly, to all these other denominational schools?" Or suppose he asked leaders of a church that does support a local denominational school,

“What do you think of having to admit students without regard to their religious background, and of having to teach tolerance of all religions, in some way that satisfies a state administrator, on pain of being declared ineligible for voucher funds?”

Cohen’s sense is that the only way to avoid getting entangled in these issues, and facing an eventual public tide of opposition that will limit voucher programs to providing small remedies in isolated cases, is to create genuine and substantial secular educational alternatives, so that sectarian schools become a fairly small part of a larger range of choices. In other words, it is not going to be enough to have “true private choice” in the limited and technical sense that satisfied a majority of the Supreme Court. If vouchers are going to be in widespread use, they are going to have to involve a range of options that satisfies large numbers of people, including taxpayers, that they individually are getting a fair and acceptable deal.

That means designing voucher programs that will induce existing secular schools, both public and private, to accept voucher students. In *Zelman*, the Supreme Court discussed and rejected the argument that the subsidy level was insufficient to attract into the program any schools that are not parishioner supported—that is, in essence, willing to educate inner-city youth precisely because of their religious missions. But the Supreme Court, as is often the case, did not have to deal with the real world. Its 5–4 determination that the subsidy numbers did not make out a constitutional claim was not the same as a determination that there is practical reason to expect that increasing numbers of secular places will become available. In Cohen’s view, proponents of vouchers need to work on that practical problem, because a program that ends up sending kids largely to religious institutions isn’t going to be allowed, by the public, to grow beyond its cradle.

Blaine Amendments

In a majority of states, protracted legal battles will ensue over the Blaine amendments and their restrictions on aid to religious schools. These amendments come to us with a dark historical pedigree.⁴

Blaine Amendments: A Short Primer

During the first half of the nineteenth century, with the growth of public or common schools, educators such as Horace Mann sought to ensure that the schools were nonsectarian. But by this they did not mean secular. They believed “that moral education should be based on the common elements of Christianity to which all Christian sects would agree or to which they would take no exception,” including the “reading of the Bible as containing the common elements of Christian morals but reading it with no comment in order not to introduce sectarian biases.”⁵ As Catholic immigrants grew in numbers throughout the nation, however, they began to complain that what was called “nonsectarian” was in fact a form of “common” Protestantism focused on individual interpretation of the Bible.

As the numbers of Irish, German, and other European Catholic and Jewish immigrants surged, so did nativist sentiments across the country, spurring the growth of organized nativist

4. This section of our paper is based substantially on Eric W. Treene’s article titled “The Grand Finale Is Just the Beginning: School Choice and the Coming Battle Over Blaine Amendments” and is used here with his permission and the permission of The Becket Fund for Religious Liberty. Mr. Treene’s article was published as a Federalist Society White Paper at a meeting of the Federalist Society’s Religious Liberties Practice Group at the Ave Maria Law School on March 22, 2002.

5. R. Freeman Butts, *The American Tradition in Religion and Education* (Boston: Beacon Press, 1950), p. 118.

groups. In New York, nativist societies combined to form the American Republican Party in 1843, which evolved into the powerful (and national) Know-Nothing Party in the 1850s.⁶ The Know-Nothings, who pledged to oppose Catholicism and support the reading of the King James Bible in the public schools, were active throughout the country and particularly strong in the northern and border states, sending seventy-five Congressmen to Washington in 1854.⁷

Nowhere, though, was the party more successful than in Massachusetts. The elections of 1854 swept the Know-Nothing Party into power. Know-Nothings won the governorship, the entire congressional delegation, all forty seats in the Senate, and all but three of the 379 members of the House of Representatives.⁸ Armed with this overwhelming mandate, they turned quickly to what Governor Henry J. Gardner called the mission to “Americanize America.”⁹ The Know-Nothings required the reading of the King James Bible in all common schools; they proposed constitutional amendments (which passed both houses of the legislature) that “would have deprived Roman Catholics of their right to hold public office and restricted office and the suffrage to male citizens who had resided in the country for no less than twenty-one years”; they dismissed Irish state-government workers; and they banned foreign-language instruction in the public schools.¹⁰ Of greatest relevance to the school choice issue was that the Know-Nothings also succeeded in adding an amendment to the Massachusetts constitution, providing: “Moneys raised by taxation

6. See Lloyd P. Jorgenson, *The State and the Non-Public School, 1825–1925* (Columbia: University of Missouri Press, 1987), pp. 94–95.

7. *Id.*, p. 71.

8. John R. Mulkern, *The Know-Nothing Party in Massachusetts* (Boston: Northeastern University Press, 1990), p. 76.

9. *Id.*, p. 94.

10. *Id.*, p. 102.

in the towns and cities for the support of public schools, and all moneys which may be appropriated by the state for the support of common schools . . . shall never be appropriated to any religious sect for the maintenance exclusively of its own schools.”¹¹

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

After becoming more muted during the Civil War and Reconstruction, nativism raged again in the 1870s. In 1875, President Ulysses S. Grant decried the Roman Catholic Church as a source of “superstition, ambition, and ignorance.” James G. Blaine, elected Speaker of the House of Representatives in 1868, sought to capitalize on the resurgence of nativism by seeking passage of the following amendment, which bears his name, to the United States Constitution:

No State shall make any law respecting an establishment of religion, or prohibiting the free exercise thereof; and no money raised by taxation in any State for the support of public schools, or derived from any public fund therefor, nor any public lands devoted thereto, shall ever be under the control of any religious sect; nor shall any money so raised or lands so devoted be divided between religious sects or denominations.¹²

Blaine’s amendment barely failed in the Congress, passing the House 180–7 but falling four votes short in the Senate. But

11. Massachusetts Constitution, Amendment Article XVIII (superseded by Massachusetts Constitution, Amendment Article XLVI).

12. Jorgenson, *The State and the Non-Public School*, pp. 138–39.

Blaine had his revenge, state by state. Over the next fifteen years, states either voluntarily adopted similar “Blaine amendments” to their constitutions,¹³ or were forced by Congress to enact such articles as a condition of their admittance into the Union.¹⁴ Thirty-seven state constitutions now have provisions placing some form of restriction on government aid to religious schools beyond that in the U.S. Constitution.

This was the environment in which the Blaine amendments were passed. Rather than being separationist measures in the spirit of Madison and Jefferson, they reflect the fears and prejudices of later generations and were indeed the very opposite of separation. They were unabashed attempts to use the public school to inculcate the religious views and values of the majority and to suppress minority, or “sectarian,” faiths.

The Next Battleground over School Choice

The Blaine amendments are all variations on the basic text of James Blaine’s original proposed amendment and tend to be more specific than the “under the control of” language in his original. Some of the Blaine amendments have little or no case law interpreting them. Others have been interpreted to be limited in scope. But many have been expansively construed to bar forms of school aid that the Supreme Court has expressly

13. See, e.g., New York Constitution, Article XI § 3 (adopted 1894); Delaware Constitution, Article X § 3 (adopted 1897); Kentucky Constitution, § 189 (adopted 1891); Missouri Constitution, Article IX § 8 (adopted 1875).

14. See, e.g., Act of Feb. 22, 1889, 25 Stat. 676, ch. 180 (1889) (enabling legislation for South Dakota, North Dakota, Montana, and Washington); Act of June 20, 1910, 36 Stat. 557 § 26 (1910) (enabling legislation for New Mexico and Arizona); Act of July 3, 1890, 26 Stat. L. 215 § 8, ch. 656 (1890) (enabling legislation for Idaho); South Dakota Constitution, Article VIII § 16; North Dakota Constitution, Article 8 § 5; Montana Constitution, Article X § 6; Washington Constitution, Article IX § 4, Article I § 11; Arizona Constitution, Article IX § 10; Idaho Constitution, Article X § 5.

upheld under the Establishment Clause. The clearest example is Washington State, which, after the Supreme Court unanimously held in *Witters v. Washington Department of Services for the Blind*¹⁵ that it would not violate the Establishment Clause for a blind man to use state vocational training aid to attend a seminary, ruled on remand that such aid would violate the state constitution's Blaine Amendment.¹⁶ Similarly, bus transportation to private religious schools, upheld against Establishment Clause challenge in *Everson v. Board of Education*,¹⁷ has been invalidated by state courts interpreting their Blaine amendments,¹⁸ as have textbook loan programs similar to the one upheld in *Board of Education v. Allen*,¹⁹ and a proposed tax deduction for private school tuition similar to the one upheld in *Mueller v. Allen*.²⁰

As these cases portend, Blaine amendments potentially could derail school choice efforts in states throughout the country. One survey of how Blaine amendments have been interpreted found that seventeen states have "restrictive" Blaine amendments, ten others have Blaine amendments of "uncertain" interpretation, and eight states have Blaine amendments "permissive" toward state aid.²¹ If these numbers

15. 474 U.S. 481 (1986).

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

17. 330 U.S. 1 (1947).

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

19. 392 U.S. 236 (1968). See, e.g., *California Teachers Association v. Riles*, 632 P.2d 953 (Calif. 1981); *McDonald v. School Bd. of Yankton Indep. Sch. Dist.*, 246 N.W. 2d 113, 117 (S.D. 1985).

20. 463 U.S. 388 (1983). See *Opinion of the Justices*, 514 N.E. 2d 353 (Mass. 1987) (proposed bill to provide a tax deduction to parents for private and public school expenses would violate Massachusetts' Anti-Aid Amendment).

21. See Frank R. Kemerer, *The Constitutional Dimension of School Vouchers*, 3 Tex. Forum on Civ. Lib & Civ. Rts. 137, 181 (1998).

are correct, school choice will either be a non-starter in more than half the states or will at least face contentious litigation over the scope of such states' Blaine amendments.

The most obvious strategy is a case-by-case effort to convince courts that their state's Blaine Amendment should not be construed to bar aid to families that reaches religious schools only through parental choice. In the states with strictly interpreted Blaine amendments, however, this may not be possible. The only choice in those states is to make the Blaine Amendments disappear as a factor entirely. This could be accomplished two ways: through state constitutional amendment, or through court rulings holding that the invocation of Blaine amendments to bar school choice violates the Free Exercise Clause of the Amendment of the U.S. Constitution.

An understanding of the nefarious history of Blaine's failed amendment and the state versions that followed is critically important to the school choice movement for three reasons. First, their true purpose should be brought to light and made clear to judges who are interpreting how a given Blaine Amendment's terms should be applied. Second, in any repeal efforts, it should be made clear to the public what these provisions are: remnants of nineteenth-century bigotry hamstringing educational reform in the twenty-first century. And finally, as a handful of cases suggest, the purpose behind the original passage of the Blaine amendments makes them particularly vulnerable to challenge under the Free Exercise Clause.

Challenging the Blaine Amendments

In the school choice cases decided thus far, Blaine amendments have not proved to be much of a barrier, which is perhaps why they have been given such little attention by the media. The Ohio Supreme Court ruled, in *Simmons-Harris v.*

Goff, that its Blaine Amendment (Section 2, Article VI of the Ohio Constitution), which states that “no religious or other sect, or sects, shall ever have any exclusive right to, or control of, any part of the school funds of this state,” was not violated by the Cleveland school choice plan because school funds would only reach such “sects” through the “independent decisions of parents and students.”²²

Similarly, in *Jackson v. Benson*, the Wisconsin Supreme Court found that its Blaine Amendment, which states “nor shall any money be drawn from the treasury for the benefit of religious societies, or religious or theological seminaries,” was not violated by the Milwaukee school choice plan, because “for the benefit of” was to be construed strictly and did not apply to merely incidental benefits. Arizona’s Supreme Court did not merely give its Blaine Amendment a narrow construction but suggested that the circumstantial evidence of its connection to the original Blaine Amendment undermined its validity. The court observed that “[t]he Blaine Amendment was a clear manifestation of religious bigotry, part of a crusade manufactured by the contemporary Protestant establishment to counter what was perceived as a growing ‘Catholic menace.’”²³

In *Chittenden Town School District v. Vermont Department of Education*²⁴ the Vermont Supreme Court held that school choice would violate the state constitution, but Vermont has no Blaine Amendment. It rested its decision on the state’s corollary to the Establishment Clause, which holds that no person “can be compelled to . . . support any place of worship . . . contrary to the dictates of conscience.” While Ohio and Wisconsin’s narrowing of their Blaine amendments was encouraging to school choice supporters, *Chittenden* suggests that

22. 711 N.E.2d 203, 212 (Ohio 1999).

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

24. 738 A.2d 539, 547 (Vt. 1999), *cert. denied*, 528 U.S. 1066 (1999).

even narrow language not directed at schools at all can be construed to encompass school choice.

As the battles begin to be waged in other Blaine states, we believe—Gray more strongly than Cohen—that the amendments will be vulnerable to challenge under the Free Exercise Clause, both because of their discrimination against religious families and because of their sordid past.

The Supreme Court consistently has held that laws that discriminate on the basis of religion violate the Free Exercise Clause, for example in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*.²⁵ The Blaine amendments arguably do just that: they bar aid to religious or “sectarian” schools while permitting identical aid to secular schools. In *Peter v. Wedl*,²⁶ the Eighth Circuit held that the Free Exercise Clause barred a town from denying aid to disabled children attending religious schools that they would receive if they attended private secular schools. The court in *Peter* noted that the type of aid at issue had been found to be constitutional by the Supreme Court under the Establishment Clause, and therefore separation of church and state concerns did not justify the discrimination. This holding is the converse of the First Circuit’s decision in *Strout v. Albanese*, which held that Maine could exclude religious private schools from its rural tuition plan without violating the Free Exercise Clause, on the grounds that this discrimination was required by the Establishment Clause. But the First Circuit stated that, had the voucher-like aid sought by the plaintiffs *not* violated the Establishment Clause, the state of Maine’s discrimination against the plaintiffs would not be permitted. Thus, after *Zelman*, such discrimination should be found to be a Free Exercise Clause violation. The Ninth Circuit

25. 508 U.S. 520 (1993).

26. 155 F.3d 992 (8th Cir. 1998).

has disagreed, however, finding on facts nearly identical to those in *Peter v. Wedl* that there was no Free Exercise violation in the denial of aid.²⁷

The Ninth Circuit did, however, find that the Free Exercise Clause was violated in *Davey v. Locke*.²⁸ In *Davey*, a student received a scholarship from the State of Washington based on his academic performance in high school, financial income, and his attendance at college within the state.²⁹ The scholarship was revoked when he declared a major in theology. The Ninth Circuit concluded that the Washington program facially discriminated on the basis of religion and was therefore subject to strict scrutiny.³⁰ The State argued that even if the program were subject to strict scrutiny, it had a compelling state interest in adhering to its own laws and state constitution, which included a Blaine Amendment.³¹ The Ninth Circuit held that “the establishment clause in Washington’s Constitution [does not] excuse [Washington’s] disabling Davey from receipt of the Promise Scholarship to which he was otherwise entitled under the program’s objective criteria solely on account of his personal decision to pursue a degree in theology.”³² The Supreme Court has granted *certiorari* in *Davey*, and its decision (some time in the term beginning October 2003) will be an important next chapter in the voucher debate.

Now that *Zelman* has freed the school voucher debate from the uncertainty of Federal Establishment Clause violation, the battle in the states remains. Given the nefarious origins of the

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

28. 299 F.3d 748 (9th Cir. 2002).

29. *Id.* at 750.

30. *Id.*

31. *Id.* at 758.

32. *Id.* at 760.

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Blaine amendments, recent cases narrowing their construction, and some promising Free Exercise cases, the outlook is optimistic that eventually there will be an unfettered public policy debate about school vouchers.