

Vouchers for Sectarian Schools after *Zelman*:
Will the First Circuit Expose Anti-Catholic Bigotry in the
Massachusetts Constitution?

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Introduction: School Voucher Litigation in the Wake of *Zelman*

In *Zelman v. Simmons-Harris*,¹ decided in June 2002, the U.S. Supreme Court ruled that an Ohio voucher program for Cleveland school children is constitutional and does not violate the Establishment Clause of the First Amendment. The Court reversed the Sixth Circuit Court of Appeals, which had struck down the program on Establishment Clause grounds,² and upheld the Cleveland voucher program by a 5 to 4 vote.

Most of public education's prominent professional groups have consistently opposed voucher programs that allow public money to pay for education in sectarian schools. The National School Board Association, joined by several other professional groups, filed an *amici curiae* brief in *Zelman*, arguing that the Cleveland voucher program is unconstitutional.³ Within days after the Supreme Court released its decision upholding the Cleveland program, many of public education's advocacy groups issued press releases expressing disappointment in *Zelman*'s outcome.⁴

Although *Zelman* settled federal constitutional questions about vouchers, voucher opponents continued fighting in the courts.⁵ Most of this post-*Zelman* litigation involved arguments about the legality of various state constitutional or statutory bans against public aid for sectarian education.⁶

A substantial body of scholarship has shown that some of the state statutes and constitutional bans against funding for sectarian education have their roots in 19th century

religious prejudice. In particular, so-called “Blaine Amendments,” 19th century state constitutional provisions that prohibit public monies from aiding sectarian schools, are steeped in a heritage of anti-Catholic bigotry.⁷

This article is in four parts. First, it describes the Supreme Court’s *Zelman* decision, in which the Court upheld the constitutionality of the Cleveland voucher program against an Establishment Clause challenge, thus dismantling a major constitutional roadblock to public assistance for families sending their children to sectarian schools.

Second, the article summarizes the scholarship about the Blaine Amendments, which loom now as a major legal obstacle in many states to the implementation of voucher programs that include religious schools. This scholarship shows that the Blaine Amendments are—to say the least—cultural artifacts of 19th century anti-Catholic bigotry.

Third, the article briefly reviews two post-*Zelman* court cases involving so-called “Blaine Amendments”: *Bush v. Holmes*⁸ and *Locke v. Davey*.⁹ In the first case, a Florida appellate court struck down Florida’s voucher program as being a violation of Florida’s Blaine Amendment. In the second case, the Supreme Court declined to invalidate a Washington constitutional provision that banned the use of public money for sectarian education. Although commentators had labeled the Washington provision a Blaine Amendment,¹⁰ the Supreme Court determined it was not, saying no evidence had been produced that indicated Washington’s constitutional provision had been instituted out of anti-religious prejudice.

Finally, this article exams the case of *Wirzbarger v. Galvin*,¹¹ in which the First Circuit Court of Appeals is currently considering the constitutionality of a Massachusetts constitutional provision that bars Bay State citizens from using the state’s voter initiative process to amend or repeal a 19th century constitutional ban against public funding for sectarian schools. Indisputable scholarship shows that the Massachusetts legislature approved this constitutional ban against public funding for sectarian schools at a time when it was overwhelmingly dominated by the anti-Catholic Know-Nothing Party.¹²

Wirzbarger provides the First Circuit (and ultimately perhaps the Supreme Court) an opportunity to weaken a state constitutional provision that was borne of religious intolerance and that wholly nullifies *Zelman*’s significance in the State of Massachusetts. This article argues that the First Circuit should reverse the federal district court’s decision and allow Massachusetts voters the opportunity to amend or repeal their state’s bigoted constitutional bar against public aid for sectarian schools.

***Zelman*: The Supreme Court Upholds the Cleveland Voucher Program**

In 1995, the Ohio legislature created the Cleveland voucher program in response to the deplorable conditions in the Cleveland public schools. This program offered vouchers to the parents of children in Cleveland’s public school system, which they could use to attend private schools—either secular or religious.¹³ Under the program, children could also use their vouchers to attend nearby public school systems; but, as of 2000, no public system had agreed to participate in the program.¹⁴

In 1999, about 3,700 of Cleveland’s 75,000 students participated in this voucher program.¹⁵ Most children were from minority and low-income families, and sixty percent

came from families living below poverty level. Ninety-six percent of the recipients enrolled in religious schools, many of them Catholic.¹⁶

In 1996, voucher opponents filed suit in an Ohio state court, claiming the voucher program violated both state law and the Establishment Clause of the U.S. Constitution. In 1999, the Ohio Supreme Court rejected the constitutional claim, but it did conclude that the Ohio legislature had committed a technical violation by approving the program in legislation primarily devoted to another topic.¹⁷ The legislature remedied this procedural flaw, and the program continued to operate basically in its original form.¹⁸

After losing in the state courts, voucher opponents sued again in federal court, repeating their claim that the Cleveland voucher program violated the Establishment Clause of the U.S. Constitution because it allowed public funds to go to religious schools. A federal trial court agreed and enjoined the program.¹⁹

Ohio education officials appealed to the Sixth Circuit; but in December 2000, a three-judge panel upheld the trial court's ruling.²⁰ The Sixth Circuit panel concluded that the voucher program had the "primary effect"²¹ of advancing religion and therefore violated the Establishment Clause.²²

In a remarkably bitter dissent, Sixth Circuit Judge Ryan accused the court majority of "nativist hostility"²³ to religious schools. In striking down the voucher program, Judge Ryan said, the majority had sentenced "nearly 4,000 poverty-level, mostly minority children in Cleveland to return to the indisputably failed Cleveland public schools."²⁴

Ohio education officials appealed the Sixth Circuit opinion, and the Supreme Court agreed to hear the case in 2001. The Court heard oral arguments on February 20,

2002. On June 27, 2002, the Supreme Court issued its decision; by a 5 to 4 vote, it reversed the Sixth Circuit,²⁵ finding no constitutional infirmity in the Cleveland voucher program.

The Court rejected the Sixth Circuit's conclusion that the voucher program impermissibly aided religious schools. On the contrary, the Court wrote, the Cleveland program was "entirely neutral with respect to religion."²⁶ The program provided vouchers to "a wide spectrum of individuals, defined only by financial need and residence in a particular school district."²⁷ Cleveland families are permitted to "exercise genuine choice among options public and private, secular and religious."²⁸ Therefore, the program was one of "true private choice."²⁹ As such, Justice Rehnquist concluded, the Cleveland voucher program did not violate the Establishment Clause.

Although the *Zelman* decision was decided on constitutional grounds, the Court took note of the desperate condition of the Cleveland public schools. "For more than a generation," the Court wrote, "Cleveland's public schools have been among the worst performing public schools in the nation."³⁰ Rehnquist noted that a federal district court had declared a "crisis of magnitude" and placed the school system under state control in 1995:

Shortly thereafter, the state auditor found that Cleveland's public schools were in the midst of a "crisis that is perhaps unprecedented in the history of American education." The district has failed to meet any of the 18 state standards for minimal acceptable performance. Only 1 in 10 ninth graders could pass a basic proficiency examination, and students at all levels performed at a dismal rate compared with students in other Ohio public schools. More than two-thirds of high school students either dropped or failed out before graduation. Of those students who managed to reach their senior year, one of every four still failed to graduate. Of those students who did graduate, few could read, write, or compute at levels comparable to their counterparts in other cities.³¹

Justice Clarence Thomas joined the majority opinion and submitted a concurring opinion as well. Thomas emphasized the value of the Cleveland voucher program as a means of giving poor urban families an alternative to Cleveland's failing public schools.³² Quoting the Supreme Court's decision in *Brown v. Board of Education*,³³ Thomas wrote, "[I]t is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education."³⁴ Nevertheless, he pointed out, "the promise of public education has failed poor inner-city blacks."³⁵

Justice Thomas rejected the argument that vouchers undermine the democratic ideal of common public schools, stating:

While the romanticized ideal of universal public education resonates with the cognoscenti who oppose vouchers, poor urban families just want the best education for their children, who will certainly need it to function in our high-tech and advanced society. As Thomas Sowell noted 30 years ago: "Most black people have faced too many grim, concrete problems to be romantics. They want and need certain tangible results, which can be achieved only by developing certain specific abilities." The same is true today.³⁶

School choice programs that involve religious schools, Thomas argued, only appear unconstitutional to those who distort constitutional values in a way that disserves those Americans who are in greatest need.³⁷ Thomas concluded his concurring opinion by quoting Fredrick Douglas: "[N]o greater benefit can be bestowed upon a long benighted people, than giving to them, as we are here earnestly this day endeavoring to do, the means of an education."³⁸

Zelman's Aftermath: Voucher Opponents Vow to Keep Fighting in the Courts

Virtually all of the professional organizations that represent public education's major constituencies had taken the position that the Supreme Court should affirm the

Sixth Circuit's opinion in *Zelman* and declare the Cleveland voucher program unconstitutional.³⁹ The National School Board Association clearly expressed this view in an *amici curiae* brief that was filed with the Court in the *Zelman* case.⁴⁰ Several education organizations joined NSBA in its brief: the National Parent Teachers Association, the American Association of School Administrators, the National Association of Secondary School Principals, the National Association of Elementary School Principals, the American Association of University Women, the National Association of Elementary School Principals, the National Association of Federally Impacted Schools, and the National Association of Bilingual Education.⁴¹

When the Court reversed the Sixth Circuit and upheld the Cleveland voucher program, most of public education's various interest groups wasted no time in criticizing the *Zelman* decision. Within a few days after the Supreme Court ruled, the following organizations issued press releases expressing disappointment with *Zelman*: the National Association of Elementary School Principals,⁴² the National Parent Teachers Association,⁴³ the National School Boards Association,⁴⁴ the National Association of State Boards of Education,⁴⁵ the National Association of Secondary School Principals,⁴⁶ and the Association for Supervision and Curriculum Development.⁴⁷

In fact, some groups not only expressed disappointment with *Zelman*, they pledged to continue fighting vouchers both politically and in the courts. In particular, the nation's two largest teachers' unions vowed to oppose voucher programs by every means available to them. Bob Chase, president of the National Education Association, the nation's largest teachers' union, issued a press release saying NEA would continue to fight vouchers for private and religious schools "at the ballot box, in state legislatures,

and in state courts.”⁴⁸ (According to the *Wall Street Journal*, NEA had previously raised its membership dues for the specific purpose of fighting voucher proposals.⁴⁹) Sandra Feldman, president of the American Federation of Teachers, issued a press release echoing the same sentiment. Feldman said that AFT would fight any future efforts to enact voucher legislation in the United States.⁵⁰

In addition to the unions, public education’s administrators and school board groups vowed to continue fighting school vouchers. The executive director of the American Association of School Administrators, a national group that represents public school superintendents, announced that his organization would “continue to oppose any proposed law and/or referendum that would direct public tax funds to religious and other private K-12 schools.”⁵¹

Most commentators agreed that the next major battleground over vouchers would be the state courts, particularly courts in jurisdictions with state constitutional provisions that are more stringent than the federal Establishment Clause in banning public aid to religious schools.⁵² There are approximately thirty states with stringent anti-aid provisions in their constitutions.⁵³ These constitutional provisions are collectively referred to as “Blaine amendments.”⁵⁴

Blaine Amendments: “repellant residues of 19th Century nativism”⁵⁵

James G. Blaine served as a Republican leader of the U.S. House of Representatives during the Grant administration.⁵⁶ In 1875, Blaine sought to insert an amendment into the U.S. Constitution prohibiting public funds from coming “under the control of any religious sect.”⁵⁷ This effort, as scholars have shown, was motivated by

Blaine's desire to capitalize on a wave of anti-Catholic feelings that swept through the United States in the years following the Civil War.⁵⁸

Although Blaine's proposed amendment narrowly failed, similar provisions were added to many state constitutions; and several western territories were required to insert a Blaine-type amendment into their proposed state constitutions as a condition of achieving statehood.⁵⁹ By 1890, twenty-nine states had adopted constitutional provisions barring public aid to religious schools.⁶⁰

Voucher advocates argue that the Blaine amendments are—to use columnist George Will's description—“repellant residues of 19th century nativism”⁶¹--and should be declared unconstitutional.⁶² Voucher opponents—backed by the teachers unions and public education's most powerful professional organizations—retort that the history of the state-level Blaine amendments is nuanced and not rooted in religious prejudice.⁶³ They also contend that the Blaine Amendments uphold the states' legitimate interest in prohibiting public funds from going to sectarian institutions.

In *Mitchell v. Helms*,⁶⁴ Justice Thomas, who wrote the plurality opinion, stated clearly that hostility to aid to religious schools, such as that expressed in Blaine's amendment and the many state-level Blaine Amendments, had a “shameful pedigree”⁶⁵ that was rooted in anti-Catholic prejudice.

Opposition to aid to “sectarian” schools acquired prominence in the 1870s with Congress's consideration (and near passage) of the Blaine Amendment, which would have amended the Constitution to bar any aid to sectarian institutions. Consideration of the amendment arose at a time of pervasive hostility to the Catholic Church and to Catholics in general, and it was an open secret that “sectarian” was code for “Catholic.”⁶⁶

Thomas concluded that “nothing in the Establishment Clause requires the exclusion of pervasively sectarian schools from otherwise permissible aid programs, and

other doctrines of this Court bar it. *This doctrine, born of bigotry, should be buried now.*⁶⁷

Many scholars concur with Justice Thomas’s assessment, agreeing that antipathy toward Catholicism was a major factor in the adoption of these constitutional amendments.⁶⁸ Toby Heytens summarizes the scholarly consensus on this point:

[T]he conclusion that [the Blaine Amendments] were driven by the Protestant/Catholic divide is unmistakable, despite the fact that none of the amendments refer specifically to Roman Catholics or Catholic Schools. This appears to be the scholarly consensus. It is also supported by the statistics regarding private school religious affiliation at the time, the Senate debate over the Federal Blaine Amendment, and the breakdown of social and political groups that supported and opposed the measure.⁶⁹

And Paul Viteritti, perhaps the foremost scholar regarding the Blaine Amendments, summarized them as follows: “Taken as a whole, these measures reflect the confluence of political forces that erupted when strong nativist sentiment was joined with the common-school movement at the turn of the century to stem the growth of religious schools and their support with state funds.”⁷⁰

Bush v. Holmes: Florida Voucher Program Invalidated by State Blaine Amendment

In spite of their odious history, the Blaine Amendments—with their overt hostility toward public funding for sectarian schools—provided a perfect vehicle for voucher opponents to challenge legislated voucher programs.⁷¹ In fact, even prior to *Zelman*, voucher opponents had relied on Blaine Amendments to stop the Milwaukee and Cleveland voucher programs. In both cases, however, those efforts were unsuccessful; and the programs were upheld in the state courts.⁷²

In a Florida case, however, filed before the *Zelman* decision and still ongoing, voucher opponents were more successful. Indeed, in *Bush v. Holmes*, decided only six weeks after the *Zelman* decision was issued, a Florida trial court invalidated the Florida voucher program under Florida's Blaine Amendment.⁷³ In August 2004, the trial court's decision was upheld by a Florida intermediate appellate court.⁷⁴

Florida's voucher program was adopted into law by the Florida legislature in 1999.⁷⁵ Like the Cleveland voucher program, the Florida program permitted children in failing public schools to use state-funded vouchers to attend private schools—both secular and religious.

In the summer of 1999, the Florida Education Association, the Florida branch of the American Federation of Teachers, the Florida PTA, and other anti-voucher groups filed lawsuits seeking to have the program declared unconstitutional under the Florida and U.S. constitutions.⁷⁶ In March 2000, a Florida trial judge invalidated the program on the grounds that it violated the Florida Constitution's guarantee of an adequate system of public schools.⁷⁷ But in October 2000, a Florida appellate court reversed the trial court's decision and remanded the case back to the trial court level for a determination as to alternative constitutional arguments, including whether the voucher program violated Florida's Blaine Amendment.⁷⁸

Then in August 2002, only six weeks after the Supreme Court's *Zelman* decision, a Florida trial judge struck down the program on the grounds that it violated Article I, Section 3 of the Florida Constitution—Florida's Blaine Amendment.⁷⁹ Within 48 hours after the decision was released, National School Board Association, the American

Federation of Teachers, the National Education Association, and the National PTA issued statements praising the Florida judge's decision.⁸⁰

The State of Florida appealed this decision, but in November 2004, the full Florida appellate court, upheld the trial court in an 8-5-1 opinion.⁸¹ The appellate court concluded that Florida's "no-aid provision" is more restrictive than the Establishment Clause of the First Amendment of the United States Constitution.⁸² Thus, even if the Florida voucher program is constitutional under the Establishment Clause as it was interpreted in *Zelman*, it falls afoul of the Florida Constitution's ban against using public money to aid sectarian institutions.⁸³ Moreover, since the Florida Constitution forbids both direct and indirect aid, the fact that vouchers went to parents and not to sectarian institutions themselves did not render the voucher program constitutional.⁸⁴

Furthermore, the Florida appellate court rejected any argument that Florida's Blaine Amendment was adopted in a spirit of anti-Catholic prejudice, concluding that "there is no evidence of religious bigotry in Florida's no-aid provision."⁸⁵ Nevertheless, the court added, "Even if the no-aid provisions were "born of bigotry," such a history does not render the final sentence of Article I, section 3 [Florida's no-aid provision] superfluous."⁸⁶

Now that the full First District Court of Appeal has ruled, *Bush v. Holmes* will undoubtedly be appealed to the Florida Supreme Court.⁸⁷ In its current posture, *Bush v. Holmes* is discouraging for voucher proponents, because the Blaine Amendment utilized to invalidate Florida's voucher program is but one of about thirty such amendments embedded in state constitutions across the United States.

***Locke v. Davey*: Supreme Court Leaves Washington’s “Blaine Amendment” in Place**

Bush v. Holmes dramatically illustrated the power of the Blaine Amendments to derail voucher programs like the one upheld in *Zelman*. Obviously, a broad ruling by the Supreme Court invalidating a state’s Blaine Amendment on federal constitutional grounds would go a long way toward reducing the use of these provisions as an anti-voucher strategy. And in *Locke v. Davey*,⁸⁸ voucher advocates thought they saw an opportunity for the Court to do exactly that.⁸⁹ Unfortunately, from the voucher advocates’ perspective, the Supreme Court declined to take this opportunity.

In *Locke v. Davey*, Joshua Davey received a publicly-funded Washington Promise Scholarship, which he could use to offset the cost of his postsecondary education.⁹⁰ Davey wished to use his scholarship to help pay expenses at Northwest College, a sectarian institution affiliated with the Assemblies of God denomination, where he planned to pursue a degree in devotional theology.⁹¹ However, Davey learned that Washington state law prohibited him from using his scholarship to pursue a degree in theology.⁹²

Davey sued Washington state officials, arguing that the state statute that prohibited him from using his scholarship for theological study violated the Establishment Clause, Free Exercise and Free Speech Clauses of the First Amendment.⁹³ He also argued that the statutory prohibition violated the Equal Protection Clause of the Fourteenth Amendment.⁹⁴ A federal trial court rejected Davey’s constitutional claims and awarded summary judgment in favor of the State of Washington.⁹⁵

On appeal, a divided panel of the Ninth Circuit reversed the trial court.⁹⁶ The appellate court made three findings: that the State had singled out religion for

unfavorable treatment, that the State's antiestablishment concerns were not compelling, and that a ban on the use of Washington's Promise Scholarship Program for religious study was unconstitutional.⁹⁷

In reaching its decision, the Ninth Circuit rejected the State of Washington's argument that a ban on scholarship funding for theological study was justified under the State's constitutional prohibition against using public funds to aid religious schools. In the Ninth Circuit's view, "once the State of Washington decided to provide Promise Scholarships to all students who meet objective criteria, it had to make the financial benefit available on a viewpoint neutral basis."⁹⁸

The Ninth Circuit decision in *Davey v. Locke* did not take the history of Washington's constitutional prohibitions against public aid for religious schools into account when reaching its decision; nor did it label those provisions as Blaine Amendments. In other words, the Ninth Circuit did not attach any bigoted motivation to the passage of these provisions. Robert William Gall, a staff attorney for the Institute of Justice, wrote that identifying Washington's constitutional provision with its real interest of anti-Catholic discrimination, would have "forced a head-on confrontation with Blaine's legacy."⁹⁹ Such a confrontation, Gall believed, "would produce a blanket condemnation of all states' religion clauses that can be linked to that [anti-Catholic] legacy."¹⁰⁰

Nevertheless, voucher advocates took heart from the Ninth Circuit's decision. And when the United Supreme Court agreed to review the case, both sides of the voucher issue realized that the Court's decision could have a major impact on whether voucher programs would survive against legal challenges brought under various other Blaine

Amendments. If the Supreme Court clearly denounced Washington's Blaine Amendments as being rooted in bigotry and declared such provisions to be unconstitutional under the First Amendment of the U.S. Constitution, then state-level challenges to voucher programs would be effectively cleared away.

After all, as discussed above, a plurality of the Supreme Court had taken explicit notice of the anti-Catholic bigotry that had fueled the proposed federal Blaine Amendment.¹⁰¹ In *Mitchell v. Helms*, the plurality opinion stated plainly that hostility to aid religious schools had "a shameful pedigree that we do not hesitate to disavow . . ."¹⁰²

Unfortunately, from the perspective of voucher advocates, the Supreme Court's decision in *Locke v. Davey* was disappointing. In a 7 to 2 decision, the Supreme Court reversed the Ninth Circuit's decision.¹⁰³ The Court concluded that the State of Washington had a substantial interest in not funding the pursuit of devotional degrees.¹⁰⁴ Moreover, the Court ruled, the State need not fund training for religious degrees simply because it provided scholarship funding for secular studies.¹⁰⁵

Perhaps most importantly, the Court declined to declare that Washington's constitutional anti-aid provision was rooted in hostility towards the Catholic religion.

[W]e find neither in the history or text of Article I, Section 11 of the Washington Constitution, nor in the operation of the Promise Scholarship Program, anything that suggests animus toward religion. Given the historic and substantial state interest at issue, we therefore cannot conclude that the denial of funding for vocational religious instruction is inherently constitutionally suspect.¹⁰⁶

Indeed, the Court went further when and stated that that Washington's constitution does *not* contain a Blaine Amendment.

The *amici* contend that Washington's Constitution was born of religious bigotry because it contains a so-called "Blaine Amendment," which has been linked with anti-Catholicism. As the

State notes and Davey does not dispute, however, the provision in question is not a Blaine Amendment. . . . Neither Davey nor *amici* have established a credible connection between the Blaine Amendment and Article I, §11, the relevant constitutional provision. Accordingly, the Blaine Amendment’s history is not before us.¹⁰⁷

Naturally, voucher opponents were delighted with the Supreme Court’s decision in *Locke v. Davey*. The American Federation of Teachers, which had joined in filing an *amicus* brief in the case, clearly understood the significance of the ruling. “Had we not won this case,” an AFT attorney said, “our battle against vouchers in the state courts would have been dealt a significant setback.”¹⁰⁸

***Wirzburger v. Galvin*:¹⁰⁹ First Circuit Considers Massachusetts’s Anti-Aid Provision**

Taken together, *Bush v. Holmes* and *Locke v. Davey* demonstrate that no-aid provisions in state constitutions, whether or not they are labeled as Blaine Amendments, are powerful barriers to the implementation of voucher programs like the one upheld in *Zelman*. A federal case, however, currently before the First Circuit, has the potential for weakening the power of a Blaine-style constitutional amendment in the Massachusetts Constitution to stop voucher programs from being implemented in the Bay State.

Wirzburger v. Galvin,¹¹⁰ as the case is titled at the appellate level, is particularly intriguing, because the evidence is overwhelming that the state constitutional provision that is at the heart of that court case was approved by Massachusetts legislators in the spirit of rampant anti-Catholic bigotry that prevailed in the state in the mid-19th century.

Plaintiffs in the case, parents whose children attended Catholic schools, sought to utilize the initiative provision in the Massachusetts Constitution to amend Article 18 of the Massachusetts Constitution (referred to by the court as the “Anti-Aid Amendment”),¹¹¹ which prohibits public money from aiding, either directly or indirectly,

any religious elementary or secondary school.¹¹² Plaintiffs or their supporters had obtained sufficient signatures on a citizen initiative petition (more than 80,000) to put the question of amending the Article 18 on the ballot.¹¹³ However, state officials refused to put the matter to a vote on the grounds that the Massachusetts Constitution prohibited the Anti-Aid Amendment or any constitutional provision pertaining to religion from being amended or repealed through a voter initiative.¹¹⁴

Specifically Article 48 of the Massachusetts Constitution, adopted at the State's 1917-1918 Constitutional Convention, established an initiative process whereby citizens, by collecting sufficient signatures, could put legislative proposals to a popular vote. However, before Article 48 was finally adopted, two amendments were inserted. One amendment (called the "Anti-Aid Exclusion") prohibited the use of the voter initiative process to modify the Anti-Aid Amendment, the 1855 constitutional prohibition against public aid for sectarian schools, which the 1917-1918 delegates had already amended and strengthened. In addition, delegates inserted the so-called "Religious Exclusion" amendment into Amendment 48, forbidding the use of the initiative process to introduce any matter pertaining to religion.

In their motion for summary judgment, the plaintiffs presented historical evidence showing that the Massachusetts anti-aid provision, which was adopted by state voters in 1855, had first been approved by the Massachusetts legislature when it was overwhelmingly dominated by the anti-Catholic Know Nothing Party. Specifically, the plaintiffs provided the court with the affidavit of John R. Mulkern, a professor at Babson College and author of *The Know-Nothing Party of Massachusetts: The Rise and Fall of a*

People's Movement.¹¹⁵ The affidavit describes the blatant anti-Catholicism of Massachusetts state government in the mid-1850s.

In his affidavit, Mulkern stated that the Know-Nothing Party of the 1850s “had its roots in the anti-Catholic, anti-foreign Native American movement of the 1840s.”¹¹⁶ The party derived its name from the fact that “its members were sworn to deny knowing anything about its existence,”¹¹⁷ and the party reflected a broad-based hostility toward the Irish that existed in Massachusetts at that time.¹¹⁸

In 1854, Mulkern explained, the Know-Nothing Party of Massachusetts swept into power in a landslide election. “Every constitutional state officer, the entire congressional delegation, all forty state senators, and all but 3 of the 379 representatives [of the state legislature] bore the Know-Nothing stamp.”¹¹⁹ In addition, a Know-Nothing candidate won the Massachusetts governor’s office with a 63 percent majority of the vote, carrying all but twenty of the state’s more than 300 towns.¹²⁰

Citing from his book, Mulkern described the anti-Catholic activities of this outrageously bigoted political party. Working together, the Governor and legislature passed legislation mandating “a daily reading of the King James Bible in the public schools (which was offensive to Catholics),”¹²¹ dismissing Irish state workers, banning the teaching of foreign languages in the public schools, and limiting public office to native-born citizens. In addition, the legislature approved a proposed constitutional amendment to bar Roman Catholics from holding public office.¹²²

In 1854, the Know-Nothing dominated legislature overwhelmingly approved a constitutional amendment prohibiting the use of any public money for the benefit of any religious school. The provision was submitted to Massachusetts voters, who passed it by

a comfortable margin in 1855.¹²³ This provision became Article XVIII of the Massachusetts Constitution; and, according to Mulkern, “was based on nativist and anti-Catholic bias and intended to preserve native-born Protestant dominance.”¹²⁴

In addition to the expert testimony of Dr. Mulkern, the *Wirzburger* plaintiffs submitted the affidavit of Dr. Charles Glenn, a professor at Boston University and author of *The Myth of the Common School*. Glen explained that anti-Catholic sentiment was a major factor in the development of the common schools in Massachusetts in the mid-1850s.¹²⁵ A major goal of these schools, as Glen discussed more fully in his book, was to assimilate Catholic school children into American Protestant culture.¹²⁶

In fact, the Boston School Committee made this goal explicit in an 1850 document that stressed the assimilation agenda of the Protestant-dominated school authorities:

We must open the doors of our school houses and invite and compel them to come in. There is no other hope for them or for us . . . In our Schools they receive moral and religious teaching, powerful enough if possible to keep them in the right path amid the moral darkness which is their daily and domestic walk . . . unless we can redeem this population in their childhood by moral means, we must control them by force, or support them as paupers at a maturer period of life.¹²⁷

Thus, the Boston School Committee made daily Bible reading a mandatory part of the school day in 1851; and the Know-Nothing-dominated state legislature adopted a law to that effect in 1855.¹²⁸ Catholics found this practice offensive, since school authorities used the King James Bible for these daily exercises and not the Catholic approved Douay Bible.

An incident referred to as the “Eliot School Rebellion”¹²⁹ illustrates the Protestant dominance of public education in Boston during the 1850s. In March 1859, a teacher at

Boston's Eliot School ordered Thomas Whall, a Catholic school boy, to read the Ten Commandments from the King James Bible.¹³⁰ Whall refused, having been admonished by his father not to do so. An assistant to the school principal then stepped into the classroom and informed the class, "Here's a boy that refuses to repeat the Ten Commandments, and I will whip him till he yields if it takes the whole forenoon."¹³¹ The administrator then beat Whall severely with a rattan stick for half an hour.¹³²

At the conclusion of this beating, the Eliot School principal ordered all boys not willing to read from the King James version of the Bible to leave the school, and about 100 Catholic schoolboys were discharged.¹³³ The following day, three hundred Catholic school boys were discharged from school for the same offense.¹³⁴

This then was the environment in which the voters of Massachusetts adopted a constitutional amendment barring any public aid to sectarian schools, and it is this 1855 constitutional amendment that the *Wirzburger* plaintiffs had sought to amend through a voters' initiative. However, as previously discussed, delegates at the 1917-1918 Massachusetts Constitutional Convention foresaw this possibility more than eighty years ago and approved another constitutional provision that prohibits any initiative petition to repeal the Anti-Aid Amendment or any other initiative petition that concerned "religion, religious practices, or religious institutions."¹³⁵ This provision was approved by Massachusetts voters and became Article 48 of the Massachusetts Constitution.

Plaintiffs submitted historical evidence to show that the 1917 Anti-Aid Exclusion and the Religious Exclusion were also adopted during a period of anti-Catholic prejudice in Massachusetts,¹³⁶ and they asked the court to order the State of Massachusetts to

process their initiative petition and put the amendment of the state's constitutional anti-aid provision to a vote.¹³⁷

Unfortunately, the federal district court was not persuaded. In a March 2004 opinion, a federal judge issued a declaratory judgment stating that Amendment Article 48 of the Massachusetts Constitution is not “invalid as violative of the First and Fourteenth Amendments to the United States Constitution” and entered judgment against the plaintiffs.¹³⁸ In the trial court's view, the constitutional limitation on the use of voter initiatives represented a consensus among the 1917 constitutional convention delegates that the voter initiative process for passing legislation should not be available without limitation.¹³⁹

These exclusions reflect an evident judgment that some questions are better resolved in a process that permits extended debate and compromise than in a process that essentially puts a fixed proposition to the general electorate for a single up or down vote. The wisdom and prudence of the exclusions are a matter on which opinion could reasonably be divided, but it cannot be said that insisting that certain subjects are better addressed in the traditional way of representative government before they are put on the state-wide ballot is an irrational idea.¹⁴⁰

Plaintiffs appealed the district court's decision to the First Circuit, and briefs were filed in the summer of 2004.¹⁴¹ In an amici curiae brief, Massachusetts's two largest teachers unions (joined by several other anti-voucher groups) argued that the current version of the 1855 anti-aid amendment cannot be construed as anti-Catholic because it was wholly rewritten in two subsequent state constitutional conventions in which Catholic legislators participated.¹⁴² And it is true that the current version of the Know-Nothing Party's original handiwork differs somewhat from the original.¹⁴³ Nevertheless, the central theme of bigotry still resides in the Massachusetts anti-aid provision, and this “shameful pedigree,”¹⁴⁴ to use Justice Thomas's words, helped shape the jurisprudence

and political climate that has been hostile to sectarian education in the United States for 150 years.

Wirzburger v. Galvin is probably the most important case since *Zelman* with regard to the future of vouchers because the evidence of anti-Catholic bigotry surrounding the passage of the 1855 Massachusetts anti-aid amendment is quite strong—stronger than any evidence that has been presented so far in other Blaine Amendment challenges. If the First Circuit reverses the federal trial court’s decision and allows voters the option of amending or repealing the Massachusetts anti-aid provision, its decision will hearten voucher advocates in other states whose goals are blocked by Blaine Amendments.

If the First Circuit’s opinion in *Wirzburger* upholds the district court’s opinion, thereby prohibiting Massachusetts voters from amending or repealing their state’s bigoted constitutional ban against aid to sectarian schools, the Supreme Court may well grant *certiorari* and review the case. Given the Court’s strong condemnation of Blaine Amendments in the *Mitchell v. Helms* plurality opinion, it is hard to imagine the Supreme Court passing up an opportunity to address the Bay State’s disgraceful constitutional heritage that the *Wirzburger* plaintiffs unmasked.

Conclusion

As the Supreme Court acknowledged more than thirty-five years ago, “private education has played and is playing a significant and valuable role in raising national levels of knowledge, competence, and experience.”¹⁴⁵ The Court noted that millions of children have been educated in private schools—including parochial schools—and the

fact that so many parents send their children to them is a strong indication that “those schools do an acceptable job of providing secular education to their students.”¹⁴⁶

Today, as the Supreme Court recognized so articulately with regard to the children of Cleveland, Ohio,¹⁴⁷ impoverished inner-city school children are not receiving an adequate education in many public schools. Clearly they deserve an alternative to dysfunctional urban school systems like the one in Cleveland.

In *Zelman*, the Supreme Court offered a ray of hope to inner-city families trapped in dysfunctional school systems. By allowing low-income Cleveland school children to use vouchers to pursue other educational options—including religious schools—the Supreme Court provided impoverished, inner-city school children an alternative to the “indisputably failed”¹⁴⁸ Cleveland public school system.

After *Zelman*, voucher opponents focused their attacks in the state courts, where state Blaine Amendments or other state constitutional provisions have the power to nullify *Zelman*’s significance. In *Bush v. Holmes*,¹⁴⁹ anti-voucher forces won a significant post-*Zelman* victory when a Florida appellate court invalidated a Florida voucher program under the state’s Blaine Amendment. And in February 2004, the Supreme Court declined to nullify a Washington constitutional provision that some had labeled as a Blaine Amendment, finding no evidence of anti-Catholic animus in Washington’s constitutional anti-aid provision.¹⁵⁰ Unless the Supreme Court issues an overarching decision that eliminates or at least undermines various state constitutional challenges to legislated voucher programs, voucher opponents may soon render *Zelman* almost irrelevant.

Wirzburger v. Galvin, now pending before the First Circuit, is the next important case in the ongoing battle between voucher advocates and their opponents. If the case gets to the Supreme Court, the Justices will have the chance to invalidate a bigoted state constitutional provision that effectively nullifies *Zelman*'s ruling in the State of Massachusetts. In the spirit of *Zelman*, the Court should take this opportunity and clear away another legal obstacle to the goal the Supreme Court so clearly hoped to achieve when it rendered its historic decision in 2002—expanding the opportunities for American children to attend decent schools.

References

¹ Zelman v. Simmons-Harris, 536 U.S. 639 (2002).

² Simmons-Harris v. Zelman, 234 F.3d 945 (6th Cir. 2000), *rev'd*, 536 U.S. 639 (2002).

³ Brief of the National School Board Association, et al. as Amicus Curiae in Support of Respondents, Zelman v. Simmons-Harris, 536 U.S. 639 (2002) (Nos. 00-1751, 00-1777, 00-1779).

⁴ See, e.g., *Court Ruling Still Leaves Flaws in Vouchers*, National School Board Association (June 27, 2002) available at <http://www.nsba.org/pressroom/pr062702-2.htm> (last visited Nov. 13, 2004) (proclaiming voucher programs to be “a bad idea”).

⁵ See, e.g., Tony Mauro, *Voucher advocates plan next push to high court*, American Lawyer Media (August 5, 2002), available at <http://www.law.com/jsp/article.jsp?id=1024079086859> (last visited Oct. 5, 2004) (voucher opponents gearing up to use Blaine Amendments as barriers to voucher programs).

⁶ See, e.g., Owens v. Colorado Cong. Of Parents, Teachers, and Students, 92 P.3d 933 (Color. 2004) (declaring a Colorado voucher program unconstitutional under state constitutional provision providing for local control of schools); Bush v. Holmes, Case Nos. 1D02-3160, 1D02-3163 and 1D02-3199, 2004 Fla. App. LEXIS 12479, 29 Fla. L. Weekly D 1877 (Fla. Dist. Ct. App., Aug. 16, 2004) (declaring Florida voucher program invalid as violation of Florida constitutional bar against use of public funds for sectarian schools).

⁷ For extended discussions of the Blaine Amendments, see 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, 553-54 (2003); Kyle Duncan, *Secularism's Laws: State Blaine Amendments and Religious Persecution*, 72 FORDHAM L. REV. 493 (2003); Toby J. Heytens, Note: *School Choice and State Constitutions*, 86 VA. L. REV. 117 (2000); Joseph P. Viteritti, *Davey's Plea: Blaine, Blair, Witters, and the Protection of Religious Freedom*, 27 HARV. J. L. & PUB. POL'Y 299 (2003); Joseph P. Viteritti, *Blaine's Wake: School Choice, The First Amendment, and State Constitutional Law*, 21 HARV. J. L. & PUB. POL'Y 657 (1998); Eric W. Treene, *The Grand Finale is Just the Beginning* (2002). Available at <http://www.blaineamendments.org/scholarship/PolicyPapers.html>. Brandi Richardson, Comment, *Eradicating Blaine's Legacy of Hate: Removing the Barrier to State Funding of Religious Education*, 52 CATH. U. L. REV. 1041 (2003).

⁸ Case Nos. 1D02-3160, 1D02-3163 and 1D02-3199, WL 2566078 (Fla. App. 1 Dist., Nov. 12, 2004).

⁹ 124 S. Ct. 1307, 1315 (2004).

¹⁰ *Id.* at 1314 (noting that brief for United States as Amicus Curiae and brief for Becket Fund for Religious Liberty and others as Amici Curiae had argued that the Washington Constitution contained a Blaine Amendment).

¹¹ Boyette v. Galvin, 311 F. Supp. 2d 237 (D. Mass. 2004), appeal docketed, sub nom. Wirzburger v. Galvin, No. 04-1625 (1st Cir., Apr. 29, 2004).

¹² Aff. of John R. Mulkern, submitted in support of plaintiffs' motion for summary judgment, Boyette v. Galvin, 311 F. Supp. 2d 237 (D. Mass. 2004) (No. 98-10377-GAO), citing JOHN R. MULKERN, THE KNOW-NOTHING PARTY OF MASSACHUSETTS: THE RISE AND FALL OF A PEOPLE'S MOVEMENT 94 (1990). See also generally, CHARLES L. GLENN, THE MYTH OF THE COMMON SCHOOLS 203 (anti-immigrant feeling reached its height in Massachusetts in 1850s, “resulting in the election of an overwhelming majority of state legislators who were strongly opposed to Catholic claims for equal consideration”).

¹³ *Zelman*, 536 U.S. at 645. Under the Cleveland program, vouchers are distributed to families according to financial need. “Families with incomes below 200% of the poverty line are given priority and are eligible to receive 90% of private school tuition up to \$2,250. For these lowest-income families, participating private schools may not charge a parental co-payment greater than \$250.” *Id.* at 647. In other words, schools that accept children from low-income families must accept a tuition cap of \$2,500 for such children. For all other children, the program provides a voucher worth up to 75% of tuition costs to a maximum of \$1,875. Children in this category can only participate in the voucher program if the number of available vouchers (determined annually by the Ohio Superintendent for Public Instruction) exceeds the number of low-income families that choose to participate. Parents who choose private schools are issued a voucher check that is made payable to them; and the parents are required to endorse their voucher checks over to their chosen school. *Id.*

¹⁴ *Id.* at 647.

¹⁵ *Id.*

¹⁶ *Id.*.

¹⁷ *Simmons-Harris v. Goff*, 711 N.E.2d 203 (Ohio 1999).

¹⁸ *Zelman*, 536 U.S. at 648.

¹⁹ *Zelman v. Simmons-Harris*, 54 F. Supp. 2d 725 (N.D. Ohio). (The Supreme Court stayed the trial court’s injunction pending full review by the Sixth Circuit Court of Appeals. *Zelman*, 536 U.S. at 648.)

²⁰ *Simmons-Harris v. Zelman*, 234 F.3d 945 (6th Cir. 2000), *rev’d*, 536 U.S. 639 (2002).

²¹ *Zelman*, 536 U.S. at 648.

²² *Id.*

²³ 243 F.3d at 973 (Ryan, J., concurring in part and dissenting in part).

²⁴ *Id.* at 974.

²⁵ *Zelman*, 536 U.S. at 648 (2002).

²⁶ *Id.* at 662.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.* at 644.

³¹ *Id.* at 644.

³² *Id.* at 676 (Thomas, J. concurring).

³³ 347 U.S. 483, 493 (1954).

³⁴ *Zelman*, 536 U.S. at 676 (Thomas, J., concurring).

³⁵ *Id.* at 682 (Thomas, J. concurring).

³⁶ *Id.* (Thomas, J., concurring).

³⁷ *Id.* (Thomas, J., concurring).

³⁸ *Id.* at 684 (Thomas, J., concurring).

³⁹ Richard Fossey, *False Generosity Toward Inner City School Children: Why the Fierce Opposition to Vouchers for "Sectarian" Schools*, SISTER PAULA JEAN MILLER, F.S.E. & RICHARD FOSSEY, MAPPING THE CATHOLIC CULTURAL LANDSCAPE (2004) ("Zelman was almost universally condemned by public education's major constituency groups—the National School Board Association, the National Parent Teachers Association, public school administrators groups, and the teachers unions.")

⁴⁰ Brief of the National School Board Association, et al. as Amicus Curiae in Support of Respondents (December 10, 2001) (Zelman v. Simmons-Harris, Nos. 00-1751, 00-1777, 00-1779).

⁴¹ *Id.*

⁴² *Principals Discouraged by Supreme Court's School Voucher Decision*, National Association of Elementary School Principals (June 27, 2002), available at <http://www.naesp.org/comm/prss6-27-02.htm> (last visited Aug. 14, 2002).

⁴³ *National PTA Vows to Continue Fighting Private School Vouchers*, National Parent Teachers Association (June 27, 2002), available at <http://www.pta.org/aboutpta/pressroom/pr020627.asp> (last visited Nov. 13, 2004)

⁴⁴ *Court Ruling Still Leaves Flaws in Vouchers: Voucher Programs Bad Idea for Students, Says School Boards President*, National School Board Association (June 27, 2002), available at <http://www.nsba.org/pressroom/pr062702-2.htm> (last visited Nov. 13, 2004).

⁴⁵ Brenda Welburn, *Statement by Brenda Welburn on the U.S. Supreme Court's Cleveland Voucher Decision*, National Association of State Boards of Education (2002), available at http://www.nasbe.org/Press_Release.html. (last visited Aug. 14, 2002).

⁴⁶ Gerald Tirozzi, *Statement on the Supreme Court Ruling on the Cleveland Voucher Program*, National Association of Secondary Principals (2002), available at http://www.nassp.org/publicaffairs/pr_clvlndvchrs.html (last visited Nov. 13, 2004).

⁴⁷ Gene Carter, *Statement by Gene Carter, Executive Director, Association for Supervision and Curriculum Development*, Association for Supervision and Curriculum Development (June 27, 2002), available at http://www.ascd.org/educationnews/sc_voucher_decision_statement.html (last visited Nov. 13, 2004).

⁴⁸ Bob Chase, *Statement of Bob Chase, President of the National Education Association on the U.S. Supreme Court Decision on Private School Tuition Vouchers*, National Education Association (June 27, 2002), available at <http://www.nea.org/nr/nr020627.html> (Nov. 13, 2004).

⁴⁹ Editorial, *Without Merit*, WALL ST. J., July 10, 2002, at A34.

⁵⁰ Sandra Feldman, *Statement by Sandra Feldman, President, American Federation of Teachers, on the Supreme Court's Ruling on School Vouchers*, American Federation of Teachers (June 27, 2002), available at <http://www.aft.org/press/2002/062702.html>. (last visited Nov. 13, 2004).

⁵¹ Paul Houston, *Statement of AASA Executive Director Paul Houston on the Cleveland Voucher Case*, AASA Online, available: http://www.aasa.org/News_Room/2002/june/6-27-02.htm (last visited Nov. 13, 2004).

⁵² See generally, Ellen M. Halstead, Note: *After Zelman v. Simmons-Harris, School Vouchers Can Exclude Religious Schools*, 54 SYRACUSE L. REV. 147 (2204) (discussing challenges to voucher programs under state constitutions after Supreme Court's decision in *Zelman*).

⁵³ Robert A. Dietzel, Comment: *The Future of School Vouchers: A Reflection on Zelman v. Simmons-Harris and an Examination of the Blaine Amendments as a Viable Challenge to Sectarian School Aid*, 2003 MICH. ST. DCL L. REV. 791, 801 (2003). See also Frank R. Kemerer, *The Constitutional Dimension of School Vouchers*, 3 TEX. F. ON C.L. & C. R. 137 (analyzing states' constitutional anti-aid provisions).

⁵⁴ Heytens, *supra* note 7, at 123; Duncan, *supra* note 7, at 493.

⁵⁵ George Will, *A Choice for Children*, WASH. POST, Nov. 29, 1998, at C7.

⁵⁶ For an excellent and thorough discussion of the proposed constitutional amendment sponsored by Congressman Blaine in 1875 and 1876, see Steven K. Green, *The Blaine Amendment Reconsidered*, AM. J. L. HISTORY 36 (1992), 39-69.

⁵⁷ Quoted in DeForrest, *supra* note 7, at 568. The text of Blaine's amendment can also be found at *Text of the Federal Blaine Amendment*, Blaine Amendments, available at <http://www.blaineamendments.org/Intro/BAtext-US.html> (last visited October 20, 2004).

⁵⁸ Steven K. Green, *The Blaine Amendment Reconsidered*, AM. J. LEGAL HIST. 36, 39-69 (1992). Other commentators agree with Green's conclusions. See also Viteritti, *Blaine's Wake*, *supra* note 7, at 659.

⁵⁹ Viteritti, *Blaine's Wake*, *supra* note 7, at 673.

⁶⁰ *Id.*

⁶¹ George Will, *A Choice for Children*, WASH. POST, Nov. 29, 1998, at C7.

⁶² Mauro, *supra* note 5 (voucher advocates will ask Supreme Court to declare Blaine Amendments to be unconstitutional).

⁶³ See, e.g., Brief of Historians and Law Scholars as *Amicus Curiae* on Behalf of Petitioners at 1-2, *Locke v. Davey*, 124 S. Ct. 1307, 1315 (2004) (No. 02-1315) (Blaine Amendment arose from variety of motivations and no evidence that Washington State's constitutional anti-aid provisions are based on anti-Catholic animus). The Americans United for Separation of Church and State provided costs associated with the production, printing, and filing of the brief. *Id.* at 1. See also, Brief of the American Jewish Congress, on behalf of Itself, the American Federation of Teachers, the American Jewish Committee, and the Baptist Joint Committee on Public as *Amici Curiae* on behalf of Petitioners at 1-4, *Locke v. Davey*, 124 S. Ct. 1307, 1315 (2004) (No. 02-1315) (same).

⁶⁴ 530 U.S. 793 (2000).

⁶⁵ *Id.* at 828.

⁶⁶ *Id.* at 828-29.

⁶⁷ *Id.* at 829 (emphasis added).

⁶⁸ See, e.g., DeForrest, *supra* note 7, at 555 (Blaine Amendments “motivated by a desire to preserve an unofficial Protestant establishment in public education, and to ensure that minority religions—Catholicism, in particular—would be unable to officially challenge that establishment”); Duncan, *supra* note 7, at 493 (Blaine Amendments arose in mid to late 1800s in response to strife between Protestants and Catholics).

⁶⁹ Heytens, *supra* note 7, at 138.

⁷⁰ Viteritti, *Blaine’s Wake*, *supra* note 7, at 675.

⁷¹ See, e.g., Dietzel, *supra* note 7 (discussing the impact of Blaine Amendments on voucher programs in aftermath of *Zelman* decision). See also generally, J. Scott Slater, Florida’s “Blaine Amendment” and Its Effect on Educational Opportunities, 33 STETSON L. REV. 581 (2004) (post-*Zelman* discussion of constitutionality of Florida voucher program under Florida’s Blaine Amendment); Michael J. Dailey, Comment: *Blaine’s Bigotry: Preventing School Vouchers in Oklahoma . . . Temporarily*, 39 U. TULSA L. REV. 207, 225 (2003) (discussing effect of Oklahoma Blaine Amendment on any proposed school voucher scheme in Oklahoma).

⁷² Warner v. Benson, 578 N.W.2d 602 (Wis.) (upholding the Milwaukee voucher program on both state and federal constitutional grounds); Simmons-Harris v. Goff, 711 N.E.2d 203 (Ohio 1999) (Cleveland voucher program struck down for violating state constitution’s one-subject for legislative bills but held not to be in violation of either state or federal constitution’s anti-establishment or religion clauses).

⁷³ Dana Canedy, *Florida Court Bars Use of Vouchers*, N.Y. TIMES, August 6, 2002, at A10.

⁷⁴ Bush v. Holmes, Case Nos. 1D02-3160, 1D02-3163 and 1D02-3199, 2004 Fla. App. LEXIS 12479, 29 Fla. L. Weekly D 1877 (Fla. Dist. Ct. App., August 16, 2004).

⁷⁵ Bush v. Holmes, 767 S.2d 668, 671 (Fla. Dist. Ct. App. 2000).

⁷⁶ *Id.*

⁷⁷ *Id.* at 672.

⁷⁸ *Id.* at 677

⁷⁹ See, e.g., The Blaine Amendment website at <http://www.blaineamendments.org/states/states.html> (September 21, 2004) (Florida constitutional provision identified as Blaine Amendment). The Blaine Amendment website is affiliated with the website of Becket Fund for Religious Liberties, is available at <http://www.becketfund.org/> (September 21, 2004). See also Slater, *supra* note 71, at 591-93 (referring to Florida’s anti-aid amendment as a “Blaine Amendment” and recounting provision’s history).

⁸⁰ *NSBA Hails Fla. Court Ruling That Vouchers Are Unconstitutional*, National School Boards Association (August 5, 2002), available at <http://www.nsba.org/pressroom/pr080502.htm> (last visited Nov. 14, 2004); *NEA Hails Florida Voucher Decision*, National Education Association (August 5, 2002), available at <http://www.nea.org/nr/nr020805.html>. (last visited Nov. 14, 2004); Sandra Feldman, *Statement by Sandra Feldman, President, American Federation of Teachers, on Florida Court Ruling on the Unconstitutionality of Vouchers*, American Federation of Teachers (August 5, 2002), available at <http://www.aft.org/press/2002/062702.html> (last visited Nov. 14, 2004).

⁸¹ Bush v. Holmes, Case Nos. 1D02-3160, 1D02-3163 and 1D02-3199, 2004 WL 2566078 (Fla. App. 1 Dist., Nov. 12, 2004). One judge disagreed with both the majority and the dissent, arguing that the constitutionality of the challenged Florida scholarship program should be decided on a school-by-school basis. *Id.* at *25-30.

⁸² *Id.* at *13.

⁸³ *Id.* at *13-14.

⁸⁴ *Id.* at *8.

⁸⁵ *Id.*, at *7.

⁸⁶ *Id.*

⁸⁷ Florida Court of Appeal Strikes Down School Choice, *Institute for Justice* (Nov. 12, 2004), available at <http://222.ij.org/cases/index.html> (last visited Nov. 14, 2004).

⁸⁸ 124 S. Ct. 1307 (2004).

⁸⁹ See Brief of the Becket Fund for Religious Liberty, the Catholic League in Support of Religious and Civil Rights, and Historians and Legal Scholars as *Amici Curiae* in Support of Respondent, *Locke v. Davey*, No. 02-1315 (filed September 8, 2003) (arguing that the case presented the U.S. Supreme Court with an opportunity “to tear out, root and branch, the state constitutional provisions that have reinforced religious discrimination in the funding of education for well over a century”). See also generally, Brief of the State of Florida, the Honorable John Ellis “JEB” Bush, Governor, and the Florida Department of Education as *Amici Curiae* in Support of Respondent, *Locke v. Davey*, No. 02-1315 (filed September 8, 2003) (not maintaining that Washington’s constitution contains a Blaine Amendment but arguing that Ninth Circuit’s decision but making reference to school voucher litigation in the State of Florida).

⁹⁰ *Locke*, 124 S. Ct. at 1310.

⁹¹ *Id.*

⁹² *Id.* at 1311. The relevant statutory provision, cited by the Supreme Court, is WASH. REV. CODE 28B.10.814 (1997), which states, “No aid shall be awarded to any student who is pursuing a degree in theology.”

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Davey v. Locke*, 299 F.3d 748, 755 (9th Cir. 2002), *rev.*, 124 S. Ct. 1307 (2004).

⁹⁹ Robert William Gall, *The Past Should Not Shackle the Present: The Revival of a Legacy of Religious Bigotry by Opponents of School Choice*, N. Y. U. ANN. SURV. AM. L. 413, 434 (2003).

¹⁰⁰ *Id.*

¹⁰¹ *Mitchell v. Helms*, 530 U.S. 793, 828 (2000) (plurality opinion).

¹⁰² *Id.*

¹⁰³ *Locke v. Davey*, 124 S. Ct. 1307.

¹⁰⁴ *Id.* at 1315.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 1315 note 7 (citations omitted).

¹⁰⁸ *U.S. Supreme Court ruling blunts latest voucher threat*, AFT News and Trends, available at http://www.aft.org/pubs-reports/american_teacher/2004/mayjune/news_trends.htm#Supreme (last visited Sept. 21, 2004).

¹⁰⁹ *Boyette v. Galvin*, 311 F. Supp. 2d 237 (D. Mass. 2004), appeal docketed, *sub nom. Wirzburger v. Galvin*, No. 04-1625 (1st Cir., April 29, 2004). The case was renamed *Wirzburger v. Galvin* after Patricia Boyette, one of the original plaintiffs, died. Brief for Appellant, at 2 note , *Wirzburger v. Galvin*, No. 04-1625 (1st Cir., filed July 6, 2004).

¹¹⁰ *Boyette v. Galvin*, 311 F. Supp. 2d 237 (D. Mass. 2004), appeal docketed, *sub nom. Wirzburger v. Galvin*, No. 04-1625 (1st Cir., April 29, 2004).

¹¹¹ *Id.*, 311 F. Supp. at 239.

¹¹² MASS. CONST. amend. art. 18, § 2 states:

No grant, appropriation or use of public money or property or loan of credit shall be made or authorized by the Commonwealth or any political division thereof for the purpose of founding, maintaining or aiding any infirmary, hospital, institution, primary or secondary school other school or institution of learning, whether under public control or otherwise, wherein any denominational doctrine is inculcated, or any other school, or any college, infirmary, hospital, institution, or educational, charitable or religious undertaking which is not publicly owned and under the exclusive control, order and superintendence of public officers or public agents authorized by the commonwealth or federal authority or both, except that appropriations may be made for the maintenance and support of the Soldiers' Home in Massachusetts and for free public libraries in any city or town, and to carry out legal obligations, if any, already entered into, and no such grant, appropriation or use of public money or property or loan of public credit shall be made or authorized for the purpose of founding, maintaining or aiding any church, religious denomination or society.

This constitutional provision is the current iteration of a Massachusetts constitutional amendment banning public aid to sectarian schools that was originally approved by Massachusetts voters in 1855 and superseded by MASS. CONST. amend. Art. XLVI in 1917. In 1974, section 2 of Art. XLVI was replaced by the present section. All three versions of the Anti-Aid Amendment are set forth in note 139.

¹¹³ Brief for Appellant at 4, *Wirzburger v. Galvin*, No. 04-1625 (1st Cir., filed July 6, 2004).

¹¹⁴ *Boyette*, 311 F. Supp. at 239-40.

¹¹⁵ Aff. of John R. Mulkern, submitted in support of plaintiffs' motion for summary judgment, *Boyette v. Galvin*, 311 F. Supp. 2d 237 (D. Mass. 2004) (No. 98-10377-GAO).

¹¹⁶ *Id.* at 5-6.

¹¹⁷ *Id.* at 6.

¹¹⁸ *Id.*, citing JOHN R. MULKERN, *THE KNOW-NOTHING PARTY OF MASSACHUSETTS: THE RISE AND FALL OF A PEOPLE'S MOVEMENT* 67 (1990).

¹¹⁹ *Id.*, citing MULKERN 76.

¹²⁰ *Id.*, citing MULKERN 94.

¹²¹ *Id.*, quoting MULKERN 102.

¹²² *Id.*

¹²³ *Id.* at 8.

¹²⁴ *Id.*

¹²⁵ Aff. of Charles L. Glenn, submitted in support of plaintiffs' motion for summary judgment, *Boyette v. Galvin*, 311 F. Supp. 2d 237 (D. Mass. 2004) (No. 98-10377-GAO).

¹²⁶ CHARLES L. GLENN, *THE MYTH OF THE COMMON SCHOOLS* 202 (1987) (program to assimilate immigrant school children "rested upon a conviction of the superior moral value of Protestantism—an almost universal assumption among Protestants . . .).

¹²⁷ *Id.* (citation omitted).

¹²⁸ *Id.* at 203.

¹²⁹ JOHN T. MCGREEVY, *CATHOLICISM AND AMERICAN FREEDOM* 7 (2003).

¹³⁰ *Id.* at 8.

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Boyette*, 311 F. Supp. 2d at 239, quoting MASS. CONST. amend. art. 48, § 2.

¹³⁶ ROBERT H. LORD, JOHN E. SEXTON, & EDWARD T. HARRINGTON, *HISTORY OF THE ARCHDIOCESE OF BOSTON IN THE VARIOUS STAGES OF ITS DEVELOPMENT* 581-85 (1944) (describing the anti-Catholic atmosphere in Massachusetts during the 1917 state constitutional convention). Pages 581 through 585 of the text were attached to Mulkern's affidavit that was filed in support of plaintiffs' motion for summary judgment.

¹³⁷ *Boyette*, 311 F. Supp. at 240.

¹³⁸ *Id.* at 244.

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ (This case was re-titled *Wirzburger v. Galvin* after the death of Patricia Boyette, one of the original plaintiffs) Appellants' Opening Brief at 1 note 2, *Wirzburger v. Galvin*, No. 04-1625 (filed July 7, 2004).

¹⁴² Brief of Jewish Alliance for Law and Security as *Amici Curiae* for Defendant Appellees, *Wirzburger v. Galvin*, No. 04-162 (filed Aug. 13, 2004). The following organizations joined in the brief: American Baptist Churches of Massachusetts, Americans United for Separation of Church and State, Citizens for Participation in Political Action, Citizens for Public Schools, The League of Women Voters of Massachusetts, The Massachusetts Federation of Teachers, The Massachusetts Teachers Association, The Greater Boston Civil Rights Coalition, and the Unitarian Universalist Association of Congregations.

¹⁴³ The 1855 constitutional amendment, in its original form, stated as follows:

All monies raised by taxation in the towns and cities for the support of public schools, and all moneys which may be appropriated by the state for the support of common schools, shall be applied to, and expended, in, no other schools than those which are conducted according to law, under the order and superintendence of the authorities of the town or city in which the money is to be expended; and such moneys shall never be appropriated to any religious sect for the maintenance exclusively of its own schools.

The 1855 provision was superseded in 1917. As ratified in 1917, Article XLVI, §2 reads as follows:

All moneys raised by taxation in the towns and cities for the support of public schools, and all moneys which may be appropriated by the commonwealth for the support of common schools shall be applied to, and expended in, no other schools than those which are conducted according to law, under the order and superintendence of the authorities of the town or city in which the money is expended; and no grant, appropriation or use of public money or property or loan of public credit shall be made or authorized by the commonwealth or any political division thereof for the purpose of founding, maintaining or aiding any other school or institution of learning, whether under public control or otherwise, wherein any denominational doctrine is inculcated, or any other school, or any college, infirmary, hospital, institution, or educational, charitable or religious undertaking which is not publicly owned and under the exclusive control, order and superintendence of public officers or public agents authorized by the commonwealth or federal authority or both, except that appropriations may be made for the maintenance and support of the Soldiers' Home in Massachusetts and for free public libraries in any city or town, and to carry out legal obligations, if any, already entered into; and no such grant, appropriation or use of public money or property or loan of public credit shall be made or authorized for the purpose of founding, maintaining or aiding any church, religious denomination or society.

Article 18, §2 of the present Massachusetts Constitution states:

No grant, appropriation or use of public money or property or loan of credit shall be made or authorized by the Commonwealth or any political subdivision thereof for the purpose of founding, maintaining or aiding any infirmary, hospital, institution, primary or secondary school, or charitable or religious undertaking which is not publicly owned and under the exclusive control, order and supervision of public officers or public agents authorized by the Commonwealth or federal authority or both, except that appropriations may be made for the maintenance and support of the Soldiers' Home in Massachusetts and for free public libraries in any city or town and to carry out legal obligations, if any, already entered into; and no such grant, appropriation or use of public money or property or loan of public credit shall be made or authorized for the purpose of founding, maintaining or aiding any church, religious denomination or society. Nothing herein contained shall be construed to prevent the Commonwealth from making grants-in-aid to

private higher educational institution or to students or parents or guardians of students attending such institutions.

¹⁴⁴ *Mitchell v. Helms*, 530 U.S. 793, 828 (2000).

¹⁴⁵ *Board of Educ. Of Central Sch. Dist. No. 1 v. Allen*, 392 U.S. 236, 247 (1968).

¹⁴⁶ *Id.* at 248.

¹⁴⁷ *Zelman*, 536 U.S. at 644 (discussing performance of Cleveland public schools).

¹⁴⁸ *Simmons-Harris v. Zelman*, 234 F.3d 945, 974 (6th Cir. 2000), *rev'd*, 536 U.S. 639 (2002)(Ryan, J. concurring in part and dissenting in part).

¹⁴⁹ *Bush v. Holmes*, Case Nos. 1D02-3160, 1D02-3163 and 1D02-3199, WL 2566078 (Fla. App. 1 Dist., Nov. 12, 2004).

¹⁵⁰ *Locke v. Davey*, 124 S. Ct. 1307, 1315 (2004).