COMMENTS

FLORIDA'S "BLAINE AMENDMENT" AND ITS EFFECT ON EDUCATIONAL OPPORTUNITIES

J. Scott Slater*

INTRODUCTION

On June 27, 2002, the United States Supreme Court handed down the most widely anticipated decision of its 2002 term[1] when it resolved a constitutional question that had been dominating the school-voucher debate for years.[2] In *Zelman v. Simmons-Harris*,[3] a five-to-four majority held that Cleveland's voucher program did not violate the Establishment Clause[4] of the United States Constitution.[5] Chief Justice William H. Rehnquist, writing for the majority, reasoned that voucher programs that allow state money to reach religious institutions by way of parental choice are "entirely neutral with respect to religion," and therefore do not amount to government endorsement of religion.[6]

Zelman was a resounding victory for school-choice advocates, who have been litigating school-choice cases across the Country

---

 Senior Associate, *Stetson Law Review*. B.A., University of Florida, 2000; J.D., Stetson University College of Law, expected 2004.

This Comment is dedicated to my wife, Stacy Marie, and my daughter, Morgan Rene, for standing by me and exerting remarkable patience, love, and understanding during the writing process and all my other law-school endeavors. I would like to thank Professors Ann M. Piccard and Thomas C. Marks, Jr., whose comments and suggestions assisted me in writing this Comment. Furthermore, I am grateful to Editors Bridget Remington, Addie Asay, and Mary Jane Arbutine for their patience and perseverance during stressful times. I would also like to thank the *Law Review* advisors, associates, staff, and editors, particularly Stephanie Redding, for their invaluable help in preparing this Comment for publication. Finally, I am forever thankful to all of my family and friends, especially my parents, whose undying love and support over the years made this accomplishment possible.

1. Avi Schick, *Veni, Vidi, Vouchers: Why the Battle for School Vouchers Isn't Over*, http://slate.msn.com/?id=2071085 (Sept. 17, 2002).

2. Vanessa Blum, *Pro-Voucher Forces Celebrate, Prepare for New Fights*, http://www.law.com/jsp/article.jsp?id=1024078920204 (July 1, 2002).

3. 536 U.S. 639 (2002).

4. U.S. Const. amend. I.

5. *Zelman*, 536 U.S. at 663.

6. *Id*. at 662 (finding that voucher programs, such as Cleveland's, involve "true private choice").

for more than a decade.[7] Many hailed the decision, referring to it as a "landmark" case,[8] "a decisive victory for the school[-]choice movement,"[9] and a ruling that "throw[s] open the schoolroom doors for needy students," allowing the Nation "to truly reform American education."[10] Attorney General John Ashcroft declared the decision a "great victory,"[11] and President George W. Bush was widely quoted when he characterized the decision as "just as historic" as *Brown v. Board of Education*.[12]

As it turned out, President Bush was just one of many commentators to compare *Zelman* with *Brown*.[13] In fact, the *Brown* rhetoric seemed to consume public commentary on the decision.[14] Some people proclaimed that *Zelman*'s significance equaled *Brown*'s because *Zelman* would guarantee equal education for low-income and minority students.[15] Other commentators declared

---

7. Blum, *supra* n. 2.

8. Pete Du Pont, *Blaine Is Slain*, http://www.opinionjournal.com/forms/printThis.html?id=110002060 (July 31, 2002).

9. Blum, *supra* n. 2.

10. George Pieler, *Supreme Court Shatters Education Status Quo*, http://www.ipi.org; *select* Press Releases (June 1, 2002).

11. Blum, *supra* n. 2.

12. 347 U.S. 483 (1954); Linda Greenhouse, *Win the Debate, Not Just the Case*, http://home.att.net/~tbe/newyorktimes2.htm (July 14, 2002) (originally published in *The New York Times*) (quoting President Bush's comparison of *Zelman* to *Brown*).

13. Greenhouse, *supra* n. 12 (discussing President Bush's comparison of *Zelman* to *Brown*). In fact, tying school choice and *Brown* together began long before the Court decided *Zelman*. *Id.* For example, Joseph P. Viteritti, professor of public policy at New York University, used *Brown*'s promise for equal opportunity in education as the theme of his often-cited book, *Choosing Equality: School Choice, the Constitution, and Civil Society* (Brookings Instn. Press 1999). Greenhouse, *supra* n. 12; *see generally* Richard W. Garnett, *Brown's Promise, Blaine's Legacy*, 17 Const. Commentary 651 (Winter 2000) (reviewing the book *Choosing Equality*). Some commentators awaiting the *Zelman* decision were also making the comparison. *E.g.* Jay P. Greene, *The New* Brown, http://www.nationalreview.com/comment/comment-greeneprint022102.html (Feb. 21, 2002) (predicting *Zelman* would be "the most important case concerning educational opportunity since *Brown*" and discussing the importance of social science to both cases).

14. Greenhouse, *supra* n. 12 (discussing how the pro-voucher attorneys used the *Brown-Zelman* linkage as a strategic move to win over both the Court's and the public's opinion of the voucher issue).

15. *E.g.* Steve Schuck, *Pro: Vouchers Open Doors for Poor Kids*, http://denver.bizjournals.com/denver/stories/2002/07/15/editorial6.html (July 15, 2002) (arguing that while *Brown* "removed bigots from the public schoolhouse doors who were blocking poor black children from entering . . . [*Zelman*] remov[ed] today's hypocrites [from] the doors of America's poorest performing schools [who are] preventing poor black . . . children from leaving"); John A. Sparks, Zelman: *Education as Emancipation*, 4 Shenango Institute Policy Brief (July 30, 2002), http://www.pamanufacturers.org/bulletins/press/press_release_07_30_02.html. (concurring that *Zelman*, like *Brown*, "will help to free poor African-American children from inferior schooling"); Greenhouse, *supra* n. 12 (quoting

that the decision would "stand with *Brown* as the most far-reaching and revolutionary [education] decision of the past 50 years."[16]

But now that the public has digested the decision, the *Brown* comparison and the commentary concerning *Zelman*'s true significance have begun to change.[17] Legal scholars and attorneys involved in school-choice litigation have warned that the widespread implementation of voucher programs and other school-choice programs will take some time[18] because school-choice advocates have other battles that must first be fought and won.[19] Although the comparisons to *Brown* continue, commentators are now using a different spin: *Zelman* might resemble *Brown*, not because of the revolutionary changes it will make, but because of the years it will take for *Zelman*'s effects to become apparent.[20]

The new rhetoric is that *Zelman* was merely the beginning of a long fight.[21] But why? Of course, like the desegregation advocates after *Brown*, school-choice supporters must confront a controversial policy debate over the merits of school choice.[22] But while some states simply will fight battles in state legislatures, most states will air these disputes in state courts.[23] The subject: nineteenth-century state constitutional provisions that prohibit

---

columnist George F. Will as stating, "yesterday, socially disadvantaged children had their best day in court since *Brown*").

16. Pieler, *supra* n. 10; *accord* Schuck, *supra* n. 15 (stating that *Zelman* is "as important as *Brown*"); Sparks, *supra* n. 15 (claiming that *Zelman* is "another *Brown* decision" and "*Brown* restated").

17. *See* Schick, *supra* n. 1 (discussing the Supreme Court's *Zelman* decision and its possible effects). For an article discussing the delayed effect *Zelman* would have, months before the case was even decided, see Eric W. Treene, *The Grand Finale Is Just the Beginning: School Choice and the Coming Battle over Blaine Amendments*, http://www.blaineamendments.org/scholarship/FedSocBlaineWP.html.pdf (Mar. 2002).

18. *See* Greg Toppo, *Voucher Backers to Put Forth Bills*, http://www.softcom.net/webnews/wed/ax/Aschools-vouchers.RC0c_Ca6.html (Aug. 6, 2002) (stating that "it's unlikely that there's going to be some revolutionary, overnight change . . .").

19. Treene, *supra* n. 17, at 2.

20. Schick, *supra* n. 1.

21. *Id.* (warning choice advocates that *Zelman* was just "the first leg of a very long journey").

22. *Id.*; *accord* Kate Zernike, *Vouchers: A Shift, but Just How Big?* http://www.udel.edu/anthro/ackerman/vouchers.pdf (June 30, 2002) (originally published in *The New York Times*) (quoting University of Virginia constitutional law professor, James E. Ryan, who noted that "*Brown* didn't do all that much to desegregate the schools because there was so much political opposition to it").

23. Treene, *supra* n. 17, at 2–3.

state money from flowing to religious institutions—provisions commonly known as "Blaine Amendments."[24]

These provisions are named after Congressman James G. Blaine,[25] who proposed an amendment to the United States Constitution in 1875.[26] His proposal, which would have expressly prohibited state funding of religious organizations and institutions,[27] was ultimately defeated in Congress.[28] The concept of the proposal, however, proved to be successful when state legislatures across the Country began incorporating the language of the proposed Blaine Amendment into their constitutions.[29] Approximately thirty-six states, including Florida, currently have provisions known as Blaine Amendments in their state constitutions.[30]

Gaining recognition as serious obstacles to voucher programs,[31] Blaine Amendments became the major topic of school-choice discussions after *Zelman*.[32] Many commentators speculated about how states would interpret their respective Blaine-like provisions,[33] with some commentators arguing that an interpretation disallowing school-choice programs might render the laws unconstitutional under the First Amendment.[34] Other commentators claimed that nativist sentiments and anti-Catholic bigotry in the

24. *Id*. at 3.

25. For a short biography, see The Becket Fund for Religious Liberty, *Who Was James G. Blaine?* http://www.blaineamendments.org/Intro/JGB.html; *select* Introduction; *select* Who Was James G. Blaine? (accessed Sept. 27, 2003).

26. *Infra* pt. I(C) (discussing Blaine's proposal).

27. *Infra* n. 88 and accompanying text (quoting Blaine's proposal).

28. Joseph P. Viteritti, *Blaine's Wake: School Choice, the First Amendment, and State Constitutional Law*, 21 Harv. J.L. & Pub. Policy 657, 672 (1998).

29. Frank B. Kemerer, *The Constitutional Dimension of School Vouchers*, 3 Tex. Forum on Civ. Liberties & Civ. Rights 137, 154 (1998).

30. Richard Komer & Clint Bolick, *School Choice: The Next Step: The State Constitutional Challenge*, http://www.ij.org/editorial/choice_next.shtml (July 1, 2002) (displaying a map that shows which states have Blaine Amendments). The number of states that have Blaine Amendments "is approximate because there is some dispute over which state constitutional provisions" actually resemble Blaine's proposal. Toby J. Heytens, *School Choice and State Constitutions*, 86 Va. L. Rev. 117, 123 n. 32 (2000).

31. Schick, *supra* n. 1 (describing Blaine Amendments as "seemingly ironclad prohibitions on state aid to sectarian schools").

32. *See* Rob Boston, *The Blaine Game: Supporters of Government Aid to Religious Schools Are Trying to Eliminate State Constitutional Provisions That Stand in Their Way*, http://www.au.org/churchstate/cs9021.htm (Sept. 1, 2002) (discussing Blaine Amendments and the movement to eliminate them from state constitutions).

33. Tony Mauro, *Voucher Advocates Plan Next Push to High Court*, http://www.law.com/jsp/article.jsp?id=1024079086859 (Aug. 5, 2002).

34. Komer & Bolick, *supra* n. 30. For a discussion of this First Amendment argument, see *infra* part IV, section B.

late nineteenth century motivated these provisions[35] and, for that reason alone, the courts should reject them.[36] Beyond the legal arguments, other people wondered what effect these provisions, which severely restricted the stream of tax dollars to religious organizations, would have on numerous state-sponsored programs.[37]

This Comment adds to the current Blaine-Amendment discussion by examining the ramifications of one particular Blaine Amendment—Article I, Section 3 of Florida's Constitution.[38] Due to the profound impact Blaine Amendments have on education, this Comment focuses on education and educational opportunities. This discussion is particularly relevant and timely because Florida's Blaine Amendment is the subject of pending litigation,[39] making Florida the site of the first major dispute in the Blaine-Amendment debate in the wake of the *Zelman* decision.[40]

Part I of this Comment provides a brief history of the original Blaine Amendment and concludes with a discussion of Florida's adoption of Blaine-like language into its Constitution.[41] Part II addresses *Holmes v. Bush*,[42] a school-choice case that has brought national attention to Florida's Blaine Amendment.[43] Part III examines the broader implications of Florida's Blaine Amendment in light of the *Holmes* decision. It concludes that the ramifications

35. *Infra* pt. I(A)–(C) (discussing the original Blaine Amendment's history and the anti-Catholic movement).

36. *E.g.* Phillip W. DeVous, *Bigotry—A Threat to Parental Choice*, http://www.acton.org/ppolicy/comment/article.php?id=99 (August 7, 2002) (stating that Blaine Amendments are based on "anti-religious bigotry over a century old" and that it is "high time" that states reject them); Mauro, *supra* n. 33 (quoting the executive director of The Becket Fund for Religious Liberty as stating that Blaine Amendments "enshrine bigotry").

37. Alisa Ulferts, *Judge Strikes Florida Vouchers*, http://www.sptimes.com/2002/08/06/State/Judge_strikes_Florida.shtml (Aug. 6, 2002) (quoting a concern about Medicaid payments to religious hospitals or state-funded college scholarships used at religious colleges).

38. Fla. Const. art. I, § 3.

39. *See infra* pt. II(B) (discussing *Holmes v. Bush*, 2002 WL 1809079 (Fla. 2d Cir. Ct. Aug. 5, 2002)).

40. *See* Institute for Justice, *Court Strikes Blow to School Choice in Florida*, http://www.ij.org/media/school_choice/florida/8_5_02pr.shtml (Aug. 8, 2002) (discussing Florida's Opportunity Scholarship Program and the impact of its elimination).

41. For discussion on the history of the original Blaine Amendment, see Steven K. Green, *The Blaine Amendment Reconsidered*, 36 Am. J. Leg. Hist. 38 (1992).

42. 2002 WL 1809079 (Fla. 2d Cir. Ct. Aug. 5, 2002).

43. *E.g.* David Royse, *Judge Rules School Voucher Law Violates Florida Constitution*, USA Today 7D (Aug. 6, 2002).

of this provision's existence in the Florida Constitution are serious and far-reaching because the provision brings into question the constitutionality of numerous educational programs, thereby affecting the opportunities of tens-of-thousands of students across the State. Finally, Part IV explores the different ways to eliminate the effects of Florida's Blaine Amendment and concludes that the most effective way would be to amend the Florida Constitution to remove, or at least alter, the Blaine-like language from Article I, Section 3.

I. HISTORY OF BLAINE AMENDMENTS

A. The Common School and the Exclusion of "Sectarian" Instruction

During the mid-nineteenth century, America witnessed the growth of the institution that represented the still-developing public education system—the common school.[44] The American common school was founded on the premise that religion and public education should forever be separate.[45] Contrary to modern rationale, however, this premise did not mean that public education should be secular.[46] Rather, the common school was filled with Bible readings, teachings of Christian morals, and, occasionally, religious services.[47] The concept of a religion-free public school was indeed a creature of fiction in the nineteenth century.[48]

Why, then, was the contradiction between the purpose of the common school and its actuality allowed to perpetuate society?[49]

---

44. Treene, *supra* n. 17, at 5.

45. Viteritti, *supra* n. 28, at 666.

46. *Id*.

47. Green, *supra* n. 41, at 45 (noting that these religious practices were not limited to the common school, but were found "In all levels of education, both public and private, primary through collegiate . . . .").

48. Professor Viteritti noted that "[t]he entire concept of a free, universal, secular education was in fact an institutional hypocrisy perpetrated by the political establishment." Viteritti, *supra* n. 28, at 666.

49. Perhaps no one demonstrates the inherent contradiction better than the founder of the common school himself, Horace Mann. In 1837, he spoke of the purpose of common schools to the newly created Board of Education and called for the "entire exclusion of religious teaching" from public education. Viteritti, *supra* n. 28, at 666 (citing Mann's First Annual Report to the Board of Education in 1837). Mann, undoubtedly in the next breath, then exclaimed to others that the common-school system "earnestly inculcates all Christian morals" and "welcomes the religion of the Bible." Treene, *supra* n. 17, at 5–6 (citing Mann's Report to the Board of Education in 1848). Indeed, Mann believed advocates of the system had the duty to "give to all so much religious instruction as is compatible with the

To most people, there was not a contradiction at all.[50] The vast majority of nineteenth-century Americans believed that Christianity and morality were inseparable and that the public school's duty was to promote both.[51] Therefore, it was not religion as the public views it today that nineteenth-century Americans meant to exclude from the common school, because such an education would become "shrunken, distorted, and monstrous."[52] Rather, it was the particular religions of individual groups that nineteenth-century Americans believed were dangerous.[53] This belief led to the term "sectarian" becoming an integral part of the discussion about religion and education.[54]

In fact, it was "sectarian" instruction, not religious instruction, that educators sought to exclude from public education.[55] The belief was that public schools would teach the common elements of Christianity through Bible readings, but without any commentary.[56] This method would ensure that the Bible could "speak for itself" without sectarian spin.[57] However, problems arose when religious minorities realized that the common schools were only having students read a certain version of the Bible—the Protestant King James version.[58]

B. Catholic Protest and Protestant Response

The primary objectors to the Bible readings were Catholic immigrants.[59] The King James version of the Bible was inconsistent with Catholic theology, so Catholic children attending public schools were placed in a difficult position.[60] But Catholic objec-

---

rights of others and with the genius of our government." Green, *supra* n. 41, at 45 n. 44.

50. Viteritti, *supra* n. 28, at 668.

51. Green, *supra* n. 41, at 45.

52. *Id.* (citing an editorial in 42 Presbyterian Q. and Princeton Rev. 320–321 (Apr. 1870)).

53. *Id*.

54. *Webster's* defines "sectarian," in part, as: "1. of or characteristic of a sect; 2. devoted to, or prejudiced in favor of, some sect; 3. narrow-minded; limited; parochial." *Webster's New World Dictionary of the American Language* 1287 (David B. Guralnik ed., 2d College ed., Simon & Schuster 1984).

55. Treene, *supra* n. 17, at 5.

56. *Id.*

57. *Id*. at 6 (quoting Horace Mann in the Report to the Board of Education in 1848).

58. Green, *supra* n. 41, at 41–45.

59. *Id.* Catholic protest became noticeable beginning in the 1830s, when the United States witnessed an influx of Catholic immigrants from Ireland and Germany. *Id.*

60. Treene, *supra* n. 17, at 6. "[The children] were thus forced to choose between dis-

tions reached beyond the Bible readings because the common-school curriculum overall was centered on the Protestant faith.[61] Catholic immigrants argued that the common school, purported by many people to teach the common elements of Christianity, was actually teaching the common elements of Protestantism.[62]

After Catholic activists and other religious minorities formed political alliances,[63] the Catholic activists sought to remedy the situation.[64] As early as the 1840s, they began to petition state legislatures for a share of the public-school fund for parochial schools, or alternatively, for exemption from taxation.[65] The Catholic rationale was that, if the government was going to pay for schools with Protestant overtones, then it should either relieve them from paying for those schools or pay for Catholic schools as well.[66] However, in some states the activists directly challenged the practice of Bible reading in the public schools and attempted to remove the pervasiveness of Protestant bias and religious exercises.[67]

Although these strategies were initially unsuccessful,[68] Catholics began to make significant progress during the years following the Civil War.[69] Finding political strength through their increased population,[70] Catholics started obtaining indirect public funding for their schools in New York, Wisconsin, and several

---

obeying their parents and priests or disobeying their teachers." *Id.*

61. Viteritti, *supra* n. 28, at 666; Green, *supra* n. 41, at 45 (noting that "[common] [s]chools were the primary promulgators of th[e] Protestant way of life"). Also, Catholics objected to the anti-Catholic overtones that accompanied the Protestant teachings. *Id.* at 41. Some common-school textbooks contained passages that openly criticized the Popery. Treene, *supra* n. 17, at 6.

62. Treene, *supra* n. 17, at 6. "[T]he reading of the Protestant Bible ma[kes] the schools Protestant, 'sectarian' institutions, and therefore unjust towards all other religious bodies." Green, *supra* n. 41, at 48 n. 67 (quoting *The President's Speech at Des Moines*, The Catholic World 438 (Jan. 1876)).

63. Heytens, *supra* n. 30, at 136. These allies included Jews and even liberal Protestants. Green, *supra* n. 41, at 44 n. 40.

64. Heytens, *supra* n. 30, at 136.

65. Green, *supra* n. 41.

66. *Id.* at 48. "We ask for nothing which we are not willing to concede to all our fellow-citizens—[i.e.], the natural right to have their children brought up according to their parents' conscientious convictions." *Id.* (quoting The Catholic World, *supra* n. 62, at 437).

67. *Id.* at 44.

68. *E.g. Roman Catholic Orphan Asylum v. Bd. of Educ.*, 13 Barb. 400 (N.Y. 1851) (denying Catholic schools a share of the common-school fund).

69. Heytens, *supra* n. 30, at 136.

70. Green, *supra* n. 41, at 42; Heytens, *supra* n. 30, at 135 (stating that "shortly after the end of the Civil War . . . just over one in ten Americans were Catholic").

northern cities.[71] Also, in 1872, the Ohio Supreme Court upheld the Cincinnati school board's decision to prohibit the reading of all religious books, including the Bible, and to prohibit all religious exercises in public schools.[72]

When Protestants found out that Catholics were successfully obtaining funding and removing religious exercises,[73] many of them called for legislative action.[74] Protestant church leaders campaigned with "nativist" groups, not only to preserve Bible study in the public-school curricula, but also to prohibit government funding of sectarian institutions.[75] Mounting pressure from these groups caused politicians to take a stance on the proper relationship between the church, the state, and the schools—an issue otherwise known as "the school question."[76]

C. Grant's Proposal, Blaine's Amendment

With the 1876 presidential election approaching, the Republican Party resolved to use the school question as part of its platform.[77] In September of 1875, Republican President Ulysses S. Grant called for the Nation to "Encourage free schools, and resolve that not one dollar, appropriated for their support, shall be appropriated to the support of any sectarian schools."[78] That December, President Grant delivered his State of the Union Address to Congress, recommending a constitutional amendment that would deny all direct or indirect public support to sectarian institutions.[79] These speeches, which clearly aligned the Republican

71. Heytens, *supra* n. 30, at 137. In 1871, four years before Blaine introduced his amendment, the Catholic diocese of New York City received more than $700,000 of public funds for parochial school education. Green, *supra* n. 41, at 43.

72. *Bd. of Educ. of Cincinnati v. Minor*, 23 Ohio St. 211 (Ohio 1872).

73. Removing the Bible from the public schools quickly became a trend among school boards. Viteritti, *supra* n. 28, at 670. After the Ohio Supreme Court banned Bible reading in *Minor*, school boards in cities such as New York and Chicago quickly followed suit. *Id.*

74. Green, *supra* n. 41, at 43.

75. Viteritti, *supra* n. 28, at 670. The nativist groups, alleged to be anti-immigrant or anti-Catholic, included the American Protective Association, the Order of the American Union, and the Alpha Association. Heytens, *supra* n. 30, at 137.

76. Green, *supra* n. 41, at 41–42.

77. Heytens, *supra* n. 30, at 137.

78. Green, *supra* n. 41, at 47 (quoting President Grant's speech to the Society of the Army of Tennessee in Des Moines, Iowa). Although President Grant called for common schools to be rid of sectarian influence, he also called for them to be rid of "pagan [and] atheistical dogmas." *Id.*

79. Heytens, *supra* n. 30, at 131–132 (quoting President Grant as calling for "a constitutional amendment . . . prohibiting the granting of any school funds, or school taxes, or

Party with the public-school lobby, also aligned the Party with the Protestant cause.[80]

President Grant's proposal was generally met with a favorable response.[81] While some people agreed with the proposal's principles, other people simply admired the idea of "removing the dangerous [school] question from politics as speedily as possible."[82] As expected, the dissenting voice came from the Catholic Church,[83] but the praise coming from the Protestant press virtually muted it.[84] The climate was ripe for someone to take advantage of the favorable public reaction to President Grant's messages and to sponsor the proposed amendment.

Representative James G. Blaine, a former Speaker of the House and a very influential member of Congress, eagerly undertook the task.[85] At the time, Blaine was seeking the Republican Party nomination to succeed Grant as president.[86] Well aware of the political value of President Grant's proposal, Blaine introduced a proposed constitutional amendment to Congress on December 14, 1875.[87] His proposal read as follows:

> 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.[88]

After debate in both houses of Congress, the amendment was referred to a judiciary committee, where it underwent a few

---

any part thereof . . . for the benefit or in aid, directly or indirectly, of any religious sect or denomination").

80. Green, *supra* n. 41, at 48 (noting the alignment with the Republican Party); Viteritti, *supra* n. 28, at 670 (noting the alignment with the Protestant cause).

81. Green, *supra* n. 41, at 48.

82. *Id.* at 53 (quoting N.Y. Trib. 4 (Dec. 15, 1875)).

83. *The Catholic World* pointed out that Catholics agreed with the content of President Grant's message because they too were in favor of schools free from sectarianism. Green, *supra* n. 41, at 48. However, contrary to most Americans at the time, Catholics believed that the Protestant faith was a sectarian faith. *Id.*

84. *Id.* at 53.

85. Viteritti, *supra* n. 28, at 670.

86. *Id.*

87. Heytens, *supra* n. 30, at 132.

88. Green, *supra* n. 41, at 53 n. 96 (citing 4 Cong. Rec. 205 (1875)).

changes.[89] The debate continued, controlled by discussions of federalism and of Congress' proper legislative power.[90] The new version overwhelmingly passed in the House, but it ultimately failed when it fell four votes short of the Senate's supermajority requirement.[91]

D. Blaine's Influence on Florida and Other States

Although Blaine's amendment failed, it spurred similar efforts at the state level as concern grew over the school question and the threat of parochial-school funding.[92] By 1890, twenty-nine states had constitutional provisions, with language similar to the Blaine Amendment, limiting the transfer of public funds to sectarian institutions.[93] Some states adopted the language voluntarily, but other prospective states were required to incorporate Blaine-like language into their new constitutions as a condition of their admittance into the Union.[94] Joseph P. Viteritti, Professor of Public Policy at New York University, noted that the incorporation of these provisions "was testimony to the fact that the spirit of Blaine had possessed the [N]ation."[95]

In 1885, the spirit of Blaine apparently hit Florida.[96] During that summer, the Florida Legislature convened to review the provisions of the 1868 constitution, and in turn, to adopt Florida's fifth constitution.[97] Before that time, Florida's Constitution had made no mention of public funding of religious institutions, but

89. *Id*. at 60. Ironically, one of the changes was an added sentence assuring that the provisions of the amendment would not be "construed to prohibit the reading of the Bible in any school or institution." *Id.*

90. *Id.* at 57–68. For an in depth discussion of the congressional debates regarding the Blaine Amendment, see *id.*

91. Viteritti, *supra* n. 28, at 672.

92. Kemerer, *supra* n. 29, at 154.

93. *Id*. Although a few of these provisions were enacted before Blaine's proposed amendment, most were enacted later. Heytens, *supra* n. 30, at 134 n. 97.

94. Viteritti, *supra* n. 28, at 673. Professor Viteritti suggested many states did not adopt the provisions voluntarily. *Id*. at 672. He noted that late nineteenth-century Republicans realized that federal aid could be used to manipulate public policy in the states. *Id.* He reasoned that, because most states west of the Mississippi River were receiving a substantial amount of their revenues from federal grants, they would then submit to "federal guidance" in return. *Id*. at 672–673.

95. *Id*. at 673.

96. *See* Fla. Const. Decl. of Rights § 6 (1885) (repealed 1968) (stating that "no money shall ever be taken from the public treasury directly or indirectly in aid of any church, sect or religious denomination").

97. *Id*.

instead contained provisions generally guaranteeing religious freedom and prohibiting laws that gave preference to religious establishments.[98] After reviewing those provisions, however, the Legislature decided to add extra language to the prohibition on State religious preferences.[99] The new provision read as follows:

> No preference shall be given by law to any church, sect or mode of worship and no money shall ever be taken from the public treasury directly or indirectly in aid of any church, sect or religious denomination or in aid of any sectarian institution.[100]

This provision clearly added something to Florida's Constitution that was not found in prior versions—an outright prohibition on the transfer of public dollars to religious institutions.[101] By the use of the "directly or indirectly" language, the prohibition, at least on its face, was stricter than most of the Blaine-like amendments being adopted around the Country.[102]

Florida's new "Blaine Amendment"[103] remained in that form until the State adopted its sixth constitution in 1968.[104] The constitutional-revision commission proposed and adopted a minor change to the provision that would ensure application, not only to the State itself, but also to all levels of government in Florida.[105] The provision then became part of Article I, Section 3 of Florida's Constitution, titled "Religious Freedom," and has remained unchanged to the present day. Florida's Blaine Amendment reads as follows:

> No revenue of the state or any political subdivision or agency thereof shall ever be taken from the public treasury directly or

98. Fla. Const. art. I, § 3 (1838) (repealed 1885) (stating "That all men have a natural and inalienable right to worship Almighty God according to the dictates of their own conscience; and that no preference shall ever be given by law, to any religious establishment, or mode of worship in this State."); Fla. Const. Decl. of Rights, §§ 4, 23 (1868) (repealed 1885); Fla. Const. art. I, § 3 (1865) (repealed 1885); Fla. Const. art. I, § 3 (1861) (repealed 1885).

99. Fla. Const. Decl. of Rights § 6 (1885).

100. *Id*.

101. *Id*.

102. Kemerer, *supra*, n. 29, at 162–173 (noting that most Blaine Amendments simply prohibited *direct* funding of religious institutions).

103. Of course, because the provision was added to a new constitution, it is not an actual "amendment."

104. Fla. Const. art. I, § 3.

105. In 1968, the commission added the words "No revenue of the state or any political subdivisions or agency thereof" to the provision. *Id*.

> indirectly in aid of any church, sect, or religious denomination or in aid of any sectarian institution.[106]

II. HOLMES v. BUSH

Florida's Blaine Amendment quietly remained in the Constitution for 117 years without much controversy or judicial interpretation. The few cases that involved the provision addressed issues such as tax exemptions for religiously affiliated property[107] and renting public lands to religious organizations.[108] Whenever a case involved Article I, Section 3, it was usually the establishment clause that was at issue, not the Blaine-like provision.[109] It was not until the end of the twentieth century that Florida's Blaine Amendment was finally awakened, when Americans were debating one of the most controversial school questions of the day—school vouchers.

A. The Opportunity Scholarship Program

During the 1998 Florida gubernatorial race, Republican nominee Jeb Bush pledged to significantly restructure Florida's K–12 education system.[110] That pledge became a reality soon after he was elected.[111] In the summer of 1999, Governor Bush signed into law the Bush/Brogan A+ Plan for Education (A+ Plan),[112] which addressed issues such as school accountability, reward sys-

106. *Id*. As part of the 1968 revision, the opening clause prohibiting state religious preferences found in the 1885 version was exchanged for a clause barring the state establishment of religion. Fla. Const. art. I, § 3. This clause is now the opening sentence to Article I, Section 3, but it is not technically part of the Blaine Amendment. *Id*. Instead, it is an establishment clause. *Id*. It reads, "There shall be no law respecting the establishment of religion or prohibiting or penalizing the free exercise thereof." *Id*. This establishment clause is very similar to the federal Establishment Clause, but differs in that it does not merely limit legislative power, but also prohibits all laws establishing a religion. *Id*. Florida's version also adds a prohibition against laws that "penalize" the free exercise of religion. *Id*.

107. *Johnson v. Presbyterian Homes*, 239 So. 2d 256 (Fla. 1970).

108. *Southside Estates Baptist Church v. Bd. of Trustees*, 115 So. 2d 697 (Fla. 1959).

109. *Pylant v. Orange County*, 328 So. 2d 199 (Fla. 1976); *Rice v. State*, 754 So. 2d 881 (Fla. 5th Dist. App. 2000).

110. *See* Peter Wallsten & Adam Smith, *Where Bush, McKay Stand*, http://www.sptimes.com/Debates98/tabspecial/stories/govissues.html (accessed Aug. 15, 2003) (discussing Jeb Bush's stance on education during his gubernatorial campaign).

111. Diane Rado, *Vouchers, Many Victories Mark Bush's First Session*, http://www.sptimes.com; *search* "Vouchers Many Victories Mark" (May 1, 1999).

112. *Id*. "Brogan" refers to Lieutenant Governor Frank T. Brogan, a former education commissioner and teacher, who significantly helped pass the legislation. *Id*.

tems, teacher quality, school funding, safety, and truancy reduction.[113] Also, the plan included a provision authorizing a school voucher program.[114] This program, known as the Opportunity Scholarship Program (OSP),[115] is the Nation's only statewide voucher program.[116]

Under the A+ Plan, all Florida public schools are graded on an A-to-F scale.[117] The OSP allows students who are assigned to schools that receive an "F" grade for two years during any four-year period to receive public funds (a scholarship), which may be used at another public school,[118] a private school, or a religious school.[119] The funds are paid to the students' parents, who then spend them at an eligible school of their choice.[120] Florida's Legislature believed that a student should not be compelled to remain in a substandard school against the wishes of the student's parent or guardian.[121]

B. The Constitutional Challenge

The day after Governor Bush signed the A+ Plan into law, several anti-voucher groups, such as the American Civil Liberties Union (ACLU), the National Education Association (NEA), and the People for the American Way, filed a lawsuit in state circuit court challenging the OSP.[122] Shortly thereafter, the American Federation of Teachers (AFT) filed a second lawsuit in the same court.[123] The cases were later consolidated as *Holmes v. Bush*.[124]

---

113. *Id.*

114. *Id.*

115. Fla. Stat. § 1002.38 (2002).

116. Daniel A. Grech, *Many Voucher Students Back in Public School*, http://www.bradenton.com/mld/bradenton/news/local/4438315.htm (Nov. 4, 2002).

117. Diane Rado, *Florida School Grades in: 78 Fail; Most Get C's, D's*, http://www.sptimes.com; *search* "Diane Rado" and "grades in" (June 25, 1999). The schools are graded based on the level of student performance on two standardized tests. *Id.* One is called the Florida Writes Test and the other is the Florida Comprehensive Assessment Test (FCAT), which tests the students' skills in reading, math, science, and writing. *Id.*

118. The vouchers can be used only at public schools that received a grade of "C" or better during the last grading period. Fla. Stat. § 1002.38(2)(a)(1).

119. *Id*.

120. Fla. Stat. § 1002.38(2).

121. Fla. Stat. § 1002.38(1) (stating the program's purpose, which is "to provide enhanced opportunity for students in this state to gain the knowledge and skills necessary for postsecondary education, a technical education, or the world of work").

122. Inst. of Just., Legal Cases, http://www.ij.org/cases/index.html; *select* School Choice, *select* Florida School Choice Case (accessed Mar. 3, 2003).

123. *Id.*

The *Holmes* plaintiffs alleged that the OSP was unconstitutional under both the Florida Constitution and the federal Constitution.[125] With regard to Florida's Constitution, the plaintiffs claimed the program violated the public education provision, the public-school funding provision, and Florida's religious freedom provision (including the Blaine Amendment).[126] The plaintiffs also alleged that the program violated the federal Establishment Clause.[127]

The circuit court originally addressed only whether the OSP violated Florida's public education provision, which requires the State to provide an adequate system of free public schools,[128] and the court found that the OSP did violate the provision.[129] However, the First District Court of Appeal later reversed the decision and remanded for consideration of the remaining claims.[130] However, before the circuit court would rule again, two of the three remaining claims disappeared from the picture: *Zelman* resolved the claim that the OSP violated the Establishment Clause,[131] and the *Holmes* plaintiffs voluntarily dismissed the claim alleging violation of the public-school funding provision.[132]

That left one remaining line of attack for school-choice opponents—Florida's Blaine Amendment.[133] But what a strong weapon it turned out to be. The voucher critics were well aware that the Supreme Court's ruling in *Zelman* had no bearing on their state constitutional claim[134] because state citizens are free to enact protections beyond what the federal Constitution provides.[135]

---

124. 2000 WL 526364 (Fla. 2d Cir. Ct. Mar. 14, 2000).

125. *Id.* at *1.

126. *Id*.

127. *Id*.

128. Fla. Const. art. IX, § 1.

129. *Holmes*, 2000 WL 526364 at *8.

130. *Holmes v. Bush*, 767 So. 2d 668, 671 (Fla. 1st Dist. App. 2000).

131. *Zelman*, 536 U.S. 639.

132. *Holmes,* 2002 WL 1809079 at *1.

133. The Blaine Amendment provision was truly the only part of Article I, Section 3 that was still at issue. The Supreme Court ruling in *Zelman* made the success of any argument alleging that the OSP violated Florida's establishment clause nearly impossible.

134. Associated Press, *Despite Supreme Court, Florida Voucher Challenge to Continue*, http://www.naplesnews.com/02/06/florida/d788255a.htm (June 28, 2002).

135. *See Oregon v. Hass*, 420 U.S. 714, 719 (1975) (stating that "a state is free *as a matter of its own law* to impose greater restrictions on police activity than those [the Supreme Court] holds to be necessary" but "a state may not impose such greater restrictions as a matter of *federal constitutional law* when [the Supreme Court] specifically refrains from imposing them" (emphasis in original)).

On August 5, 2002, Blaine's legacy came to life in Florida when a circuit court in Tallahassee struck down the OSP as unconstitutional under the "directly or indirectly" language of Article I, Section 3.[136] The court found that the language in the Blaine provision was "clear and unambiguous" and that there was "scant room for interpretation."[137] It empathized with the OSP's purpose—to give escape options to those school children who were "caught in the snare" of failing schools—but held that the court was required to follow the Florida Constitution's plain language.[138]

The attorneys for Bush and the other defendants argued that the OSP did not directly or indirectly aid any particular church or religious institution because the voucher payments go to the parents, who then use them at the schools of their choice.[139] But the court reminded Bush's attorneys that Florida's Blaine Amendment prohibits not only direct aid, but also indirect aid.[140] The court reasoned that "[t]o hold that this two-step, payment mechanism avoids the prohibition in Article I, Section 3 would be the functional equivalent of redacting the word 'indirectly' from this phrase of the [Florida] Constitution."[141] In finding that the OSP provides for public funds to be distributed indirectly in aid of sectarian institutions, the court concluded that the voucher program was unconstitutional under Florida's Constitution.[142]

III. IMPLICATIONS OF FLORIDA'S BLAINE AMENDMENT ON EDUCATIONAL OPPORTUNITIES

Not surprisingly, the *Holmes* decision attracted national media coverage.[143] After the Supreme Court removed the federal Establishment Clause barrier in *Zelman*, many state legislators contemplated advocating voucher programs in their own states.[144]

136. *Holmes*, 2002 WL 1809079 at *1.
137. *Id.*
138. *Id.* at *3.
139. *Id.* at *2.
140. *Id.*
141. *Id.* The court further reasoned that such a holding "would amount to a colossal triumph of form over substance." *Id.*
142. *Id.* at *3.
143. Royse, *supra* n. 43.
144. Toppo, *supra* n. 18.

With many states having Blaine Amendments of their own,[145] politicians paid close attention to the legal battle over the OSP in Florida.[146] But in Florida, the ruling caused some people to speculate about the broader implications of *Holmes* and of Florida's Blaine Amendment.[147] If the OSP is unconstitutional because it permits the indirect transfer of public money to religious schools, what about other state educational programs that ultimately allow public money to reach the hands of religious institutions?

The message from *Holmes* was clear: if a program or law allows state money to be given to individuals who then transfer the money to religious or sectarian institutions, thereby indirectly aiding the institution, the program is unconstitutional under Florida's Blaine Amendment.[148] Therefore, to determine the constitutionality of Florida's other educational programs, an analysis of these programs' procedures is necessary.

A. Florida's School Choice Programs

One category of programs that allows state funds to indirectly reach religious institutions is the unique array of school-choice programs currently available in Florida.[149] With a combination of options found in no other state, Florida has three different school-choice programs that give aid to elementary and secondary students wishing to attend a school that they believe best suits their educational needs[150]—a standard voucher program (the OSP),[151] a voucher program for disabled students,[152] and a corporate tax credit voucher program.[153] Florida's Blaine Amendment has already struck down the OSP, but what about the other programs?

---

145. Komer & Bolick, *supra* n. 30.

146. *See* Toppo, *supra* n. 18 (discussing that legislators in several states are seeking to allow families to use taxpayer funds for private or religious schools).

147. Linda Kleindienst, *For Now, Students Can Use Vouchers*, Orlando Sent. A1, A10 (Aug. 7, 2002).

148. *Supra* nn. 136–142 and accompanying text.

149. Robert Holland, *School Choice Comfort*, http://www.childrenfirstamerica.org/DailyNews/02Nov/1114021.htm (Nov. 14, 2002).

150. *Id.* Some commentators and policy analysts now refer to Florida as "School Choice Central" because of the unprecedented amount of choice options in the State. *Id.* (commenting that only Arizona comes close to matching the amount of various school-choice options for students).

151. *Supra* pt. II(A).

152. *Infra* pt. III(A)(1).

153. *Infra* pt. III(A)(2).

Was the *Holmes* decision merely a narrow ruling applicable only to the particular program at issue, or does the Blaine Amendment render other school-choice programs unconstitutional as well?

1. McKay Scholarships

One school-choice program in Florida is the John M. McKay Scholarships for Students with Disabilities (McKay Scholarships),[154] another voucher program Governor Bush signed into law in 1999.[155] Under the program, a disabled child may receive a voucher from the State to attend another school, public or private.[156] The voucher will pay up to the amount that the school district pays for the child annually, or the child may receive the amount of the school's tuition (if private), whichever is less.[157] In contrast to the OSP, however, a student becomes eligible simply by being a disabled student in a public school;[158] the school's grade from the State is immaterial.[159] If parents are dissatisfied with the education the public school is providing for their disabled children, for whatever reason, State assistance is available through the McKay Scholarships.[160]

The program's procedure is virtually identical to that of the OSP because parents of enrolled and eligible students are given state money in the form of vouchers, and they then use the vouchers at the school of their choice.[161] Both programs have the same two-step payment process, and both allow for the students to use the vouchers at religious schools.[162] The only true difference in the programs is who is eligible to receive the vouchers.

---

154. Fla. Stat. § 1002.39 (2002).

155. Lisa Fine, *Florida's "Other" Voucher Program Taking Off*, http://www.floridians.org/newsf/01/080801.html (Aug. 8, 2001) (originally published in *Education Week*). The program began in 1999 as a pilot project with just two students, and it was not opened to all students with disabilities until May 2001. *Id.*

156. Fla. Stat. § 1002.39. Under the McKay Scholarship Program, eligible private schools include sectarian and nonsectarian schools. Fla. Stat. § 1002.39(4).

157. Fine, *supra* n. 155.

158. Fla. Stat. § 1002.39(1). Disabled children include those who are physically and mentally handicapped, speech or hearing impaired, autistic, or anyone else who has an independent education plan (IEP). *Id*.; Shelby Oppel, *Vouchers Proposed for Disabled Students*, http://www.sptimes.com; *search* "vouchers proposed for disabled students" (May 3, 2003).

159. *See* Fine, *supra* n. 155 (discussing the McKay Scholarships).

160. *Id.*

161. Fla. Stat. § 1002.39(6)(f).

162. *Id*. at § 1002.38–1002.39.

Given these similarities, it becomes clear that the McKay Scholarship Program is unconstitutional under Florida's Blaine Amendment.[163] The same analysis applied to the OSP in *Holmes* could be similarly applied to the McKay Scholarships.[164] Using the *Holmes* court's words, "Since [the program] provides for revenue to be taken from the public treasury and disbursed indirectly in aid of sectarian institutions, it impermissibly violates Article I, Section 3 of the Florida Constitution."[165]

2. Florida Corporate Income Tax Credit Program

The last, and most recent, school-choice program is the Florida Corporate Income Tax Credit Program (Tax Credit Program).[166] Governor Bush signed the Tax Credit Program into law in 2001.[167] Under this program, business taxpayers can receive limited tax credits for contributions to eligible "nonprofit scholarship-funding organizations."[168] These nonprofit organizations then provide scholarship money to "qualified" low-income students so that they may attend the school of their choice, public or private (including religious schools).[169] The companies can contribute no more than seventy-five percent of their state income tax due for the taxable year, and they are limited to a five-million dollar contribution per nonprofit organization annually.[170]

---

163. The McKay Scholarship Program has not yet been challenged in court. Some people have recognized this as evidence that the teachers' unions and other special-interest groups "do not have the courage to stick with their anti-voucher principles when it comes to special-education students." Lisa Snell, *School Voucher Hypocrisy*, http://educationweak.blogspot.com/2002_08_01_educationweak_archive.html (Aug. 9, 2002) (further noting that "[w]e would do well to remind the media and all the stakeholders, that in Florida, the choices of more than 8,000 special education students are also at risk" by *Holmes*). If the circuit court's decision in *Holmes* is upheld, it is likely that the lack of courage will not last long.

164. *Supra* nn. 136–142 and accompanying text (discussing the constitutional analysis applied to the OSP).

165. *Holmes*, 2002 WL 1809079 at *3.

166. Fla. Stat. § 220.187 (2002).

167. Although signed into law in 2001, the program did not take effect until January 2002. *Id*.

168. Fla. Stat. § 220.187.

169. Fla. Stat. § 220.187(2)(c), (5). To qualify, one requirement is that the child must be eligible for free or reduced-price lunches under the National School Lunch Act. Fla. Stat. § 220.187(2)(e).

170. *Id*. at § 220.187(2)(b), (3)(a).

The constitutionality of the Tax Credit Program under Florida's Blaine Amendment is uncertain.[171] Although the Tax Credit Program appears to be indirect aid to religious institutions just as much as the OSP, there is a noticeable difference in the manner in which the religious institutions receive the scholarship money. Under the Tax Credit Program, the money that reaches the religious institutions technically comes from the contributing companies, not the State.[172] Therefore, the constitutional determination seems to turn on the question of whether granting a tax credit is considered taking "revenue of the [S]tate . . . from the public treasury."[173] In other words, do the religious institutions ultimately receive the contributing company's money or the State's money?[174]

On one hand, one could argue that the businesses donate State money that has been effectively granted to them. Because the money would otherwise enter the State treasury if the credit was not authorized, the State essentially has control and quasi-ownership over the money.[175] On the other hand, one could argue that the money was never "revenue of the [S]tate" because it never entered the public treasury.[176] Money cannot be "taken" from the treasury if the money was never in the treasury to begin with.[177]

The Arizona Supreme Court heard these same arguments in *Kotterman v. Killian*,[178] a case addressing a similar tax credit program's[179] constitutionality under Arizona's religion clauses or

171. The Tax Credit Program has not yet been challenged in court.

172. Fla. Stat. § 220.187(2)(b).

173. Fla. Const. art. I, § 3.

174. This issue was addressed in *Holmes* when the court was distinguishing two cases that the defendants had cited as authority in supporting their position. *Holmes*, 2002 WL 1809079 at *1. In both cases—*Johnson*, 239 So. 2d at 261, and *Nohrr v. Brevard County Educ. Facilities Auth.*, 247 So. 2d 304, 307 (Fla. 1971)—the Florida Supreme Court found that laws allowing money to indirectly benefit religious organizations were constitutional. However, the *Holmes* court distinguished those cases by noting that the tax exemptions in *Johnson* and the bond proceeds in *Nohrr* were not funds "emanat[ing] directly from the revenue of Florida and its political subdivisions," whereas the OSP funds clearly were. *Holmes*, 2002 WL 1809079 at *1.

175. *See Kotterman v. Killian*, 972 P.2d 606, 618 (Ariz. 1999) (noting similar arguments by the petitioners).

176. Fla. Const. art. I, § 3.

177. *Id.*

178. 972 P.2d 606.

179. Ariz. Rev. Stat. § 43-1089 (1997). Unlike Florida, Arizona has an individual state-income tax. Therefore, Arizona's tax credit program is not limited to business or corporate

"Blaine Amendments."[180] In concluding that Arizona's tax credit program did not violate the Blaine-like language in its constitution, the Arizona Supreme Court found that the scholarship money involved in the program was not "public money."[181] The Court cited Arizona caselaw defining State money as money that is actually in the State treasury and "credited to a particular fund therein."[182] It also cited numerous other cases from around the Country defining state or public money in a similar way.[183]

Given the similarities, the *Kotterman* case would likely be persuasive to a Florida court if the Tax Credit Program were judicially challenged.[184] The Arizona Supreme Court's definition of public money seemed logical and well-founded, and the Court also made an appealing argument, suggesting that, if tax credits constitute state money, then so must other long-established tax policies such as deductions and exemptions.[185] This reasoning would have particular significance if a Florida court adopted it, because the Florida Supreme Court has held that a statute exempting religious organizations from property taxes under certain conditions does not violate Article I, Section 3 of Florida's Constitution.[186] In

---

taxpayers. *Id.*

180. Ariz. Const. art. II, § 12; *id*. art. IX, § 10. However, as discussed at *infra* note 303, the Arizona Supreme Court actually refused to label its provisions prohibiting aid to religious schools as "Blaine Amendments." *Kotterman*, 972 P.2d at 624.

181. *Kotterman*, 972 P.2d at 617–620. The Arizona Constitution states "No public money or property shall be appropriated for or applied to any religious worship, exercise, or instruction, or to the support of any religious establishment." Ariz. Const. art. II, § 12. "No tax shall be laid or appropriation of public money made in aid of any church, or private or sectarian school, or any public service corporation." *Id*. art. IX, § 10.

182. *Kotterman*, 972 P.2d at 617 (citing *Grant v. Bd. of Regents*, 652 P.2d 1374, 1376 (Ariz. 1982)). The Arizona Court further noted that even money that enters the state treasury might not necessarily be money under "state title," such as when the state holds funds as a conduit. *Id.*

183. *Id*. (citing *McIntosh v. Aubry*, 14 Cal. 4th 1576 (Cal. App. 1st Dist. 1993); *State Bd. of Accounts v. Ind. U. Found.*, 647 N.E.2d 342 (Ind. Ct. App. 1995); *Wells v. Ky. Loc. Correctional Facilities Constr. Auth.*, 730 S.W.2d 951 (Ky. App. 1987); *Philip Morris v. Glendering*, 349 Md. 660 (Md. 1998); *Sherard v. State*, 509 N.W.2d 194 (Neb. 1993); *State ex rel. Sego v. Kirkpatrick*, 86 N.M. 359 (N.M. 1974); *Parsons v. S.D. Lottery Commn.*, 504 N.W.2d 593 (S.D. 1993)).

184. *Infra* nn. 186–188 and accompanying text (discussing the Florida Supreme Court's holding that a statute exempting religious organizations from property taxes under certain conditions does not violate Article I, Section 3 of the Florida Constitution).

185. *Kotterman*, 972 P.2d at 618.

186. *Johnson*, 239 So. 2d at 262. For a religious organization to be exempt from property taxes, the organization must, among other requirements, have used its property as a home for the elderly. Fla. Stat. § 192.06(14) (1967). The exemption applied not only to religious organizations, but to any other organization using its property for the same pur-

its lengthy quotation from the United States Supreme Court in *Walz v. Tax Commission of City of New York*,[187] the Florida Supreme Court included a portion of the opinion stating that granting a tax exemption is not transferring a part of the State's revenue, but is instead merely freeing the entity from the responsibility of contributing taxes to the revenue.[188] If a Florida court views tax credits in the same way that the Florida Supreme Court viewed exemptions, then the Tax Credit Program would probably pass constitutional muster.[189]

However, it is not certain that a Florida court would rule the same way that the Arizona Supreme Court ruled, or that a Florida court would view tax credits as equivalent to exemptions. There is a potentially significant difference between Florida's Blaine Amendment and Arizona's Blaine-like provisions; specifically, the Arizona provisions do not mention a prohibition on *indirect* aid to religious institutions.[190] In fact, the *Kotterman* court explicitly recognized this, stating that, "while the plain language of the provisions now under consideration indicates that the framers opposed *direct* public funding of . . . sectarian schools, we see no evidence of a similar concern for *indirect* benefits."[191] Furthermore, with regard to the argument that a tax credit is the functional equivalent of an exemption or a deduction (an argument that essentially renders *Johnson v. Presbyterian Homes*[192] a controlling case), a Florida court might agree with the lengthy *Kotterman* dissent arguing that tax credits are, in fact, significantly different from tax deductions and exemptions.[193]

---

pose. *Id*. The current equivalent to the statute is Florida Statutes Section 196.1975 (2002).

187. 397 U.S. 664 (1970).

188. *Johnson*, 239 So. 2d at 261 (citing *Walz*, 397 U.S. 664).

189. *Supra* nn. 178–182 and accompanying text (discussing the Arizona Supreme Court's suggestion that if tax credits constitute state money, then so must deductions and exemptions).

190. *Supra* n. 181 (quoting Arizona's Blaine-like provisions).

191. *Kotterman*, 972 P.2d at 619 (emphasis added).

192. 239 So. 2d 256.

193. *Kotterman*, 972 P.2d at 642–644 (Feldman, J., dissenting). The dissent also made a strong argument, citing numerous authorities, that tax credits are public money. *Id.* at 639–642. For this argument, the dissent relied heavily on the tax expenditure theory, which classifies tax credits and other tax policies as state "expenditures" similar to direct appropriations of state money. *Id.*

B. Financial Aid, Tuition Assistance, and Other Scholarships

Other programs that allow State funds to indirectly reach religious institutions are the numerous financial assistance programs available to college-level students in Florida.[194] Florida currently offers ten of these programs.[195] Six of the programs are need-based programs,[196] one is merit-based,[197] and three are "special interest" programs that may or may not consider need or merit.[198]

Although each program's procedure is slightly different, the basic concept is the same: the State distributes money to assist eligible students with their tuition payments.[199] This is essentially the same procedure that is used in the OSP, so the constitutional analysis is very similar.[200] Indeed, the only significant difference is that the financial assistance programs divert money to colleges and universities,[201] as opposed to elementary and high schools.

Unlike the money that funds the Tax Credit Program, the money that funds the college-level assistance programs is clearly public money.[202] The State transfers money from the general revenue into educational trust funds, and then the assistance awards are disbursed (often directly to the institutions) according to the specific program's procedure.[203] There also seems to be no

194. Fla. Dept. of Educ., *Office of Student Financial Assistance Annual Report to the Commissioner 2001–2002* (Oct. 2002) (available at http://firn.edu/doe/osfa/pdf/annualreport.pdf).

195. *Id*.

196. The need-based programs are the Florida Private Student Assistance Grant Program, Florida Statutes Section 1009.51 (2002), the Florida Work Experience Program, Florida Statutes Section 1009.77 (2002), the José Martí Scholarship Challenge Grant Program, Florida Statutes Section 1009.72 (2002), the Mary McLeod Bethune Scholarship Program, Florida Statutes Section 1009.73 (2002), the Seminole and Miccosukee Indian Scholarships, Florida Statutes Section 1009.56 (2002), and the Florida Postsecondary Student Assistance Grant Program, Florida Statutes Section 1009.52 (2002).

197. The merit-based program is the Florida Bright Futures Scholarship Program. Fla. Stat. § 1009.53–1009.538 (2002).

198. The three "special interest" programs are the Florida Resident Access Grant, Florida Statues Section 1009.89 (2002), the Scholarships for Children of Deceased or Disabled Veterans, Florida Statues Section 295.01 (2002), and the Ethics in Business Scholarships, Florida Statues Section 240.6054 (2002).

199. *Infra* pt. III(B)(1)–(3).

200. *Supra* pt. II(B) (describing the constitutional analysis of the OSP).

201. *Infra* pt. III(B)(1)–(3) (discussing the college-level financial assistance programs).

202. Fla. Stat. § 1010.73 (2002) (establishing the State Student Financial Assistance Trust Fund).

203. *Infra* pt. III(B)(1)–(3) (discussing the college-level financial assistance programs).

issue with regard to whether the public money is given "in aid" of the institutions. As with the OSP, the college-level institutions receive tuition payments that are subsidized, in whole or in part, by the State of Florida.[204]

However, one could argue that an issue differentiates the financial assistance programs from the OSP and the other school-choice programs. Commentators have suggested that, because religiously affiliated colleges tend to have more secular curricula than religiously affiliated elementary or secondary schools, some of the colleges are not actually "religious" or "sectarian."[205] This might be true for colleges that have historical ties to certain religions but have since become primarily secular.[206] However, some of Florida's private colleges are clearly "sectarian" and have stated religious missions.[207] The subsections that follow will briefly discuss the ten assistance programs that support tuition payments to arguably sectarian institutions.[208] The discussion begins with the two largest and most popular financial assistance programs in Florida.

1. Florida Bright Futures Scholarship Program

Created in 1997, the Bright Futures Scholarship Program[209] is the only merit-based scholarship that the State completely

204. Fla. Dept. of Educ., *supra* n. 194, at 43. Some of the programs provide for full payment of the recipient's tuition. For example, as discussed below, the Florida Academic Scholarships (part of the Bright Futures Scholarship Program) provide recipients with the equivalent of one hundred percent of tuition and fees. *Id.*

205. Martin Dyckman, *Arguing Alone Won't Make Schools Better*, http://www.sptimes.com/2002/08/11/Columns/Arguing_alone_won_t_m.shtml (Aug. 11, 2002) (quoting Steven Gey, a constitutional law professor at Florida State University). The argument has also been that there is less risk of religious indoctrination at the college level than there is at the elementary or secondary level. *See Am. United for Separation of Church & State Fund, Inc. v. State*, 648 P.2d 1072, 1084 (Colo. 1982) (finding Colorado's Student Incentive constitutional on its face).

206. In this sense, this Author agrees with Professor Gey's argument as recounted by Mr. Dyckman in the *St. Petersburg Times*. Dyckman, *supra* n. 205. In response to critics who argue that the *Holmes* decision puts in danger "state tuition grants to college students attending such religiously affiliated schools as Eckerd College and Stetson University," Professor Gey asserted that the curricula at those schools were "overwhelmingly secular." *Id*. As a student of one of those institutions, this Author agrees. However, the Professor's argument ignores those colleges that have retained an overwhelmingly religious curriculum, such as Clearwater Christian College.

207. See *infra* nn. 215–222 and accompanying text (discussing and listing private colleges with religious missions).

208. *Infra* pt. III(B)(1)–(3).

209. Fla. Stat. §§ 1009.53–1009.538 (2002).

funds.[210] This lottery-funded program rewards students for academic achievement and provides its recipients with payments equaling seventy-five to one hundred percent of the cost of tuition and fees.[211] Students become eligible for the scholarships by meeting certain academic criteria and attending one of Florida's public schools or a qualified private institution.[212] The program is, by far, Florida's largest financial assistance program, providing scholarships to nearly 100,000 students during the 2001–2002 school year.[213]

Unfortunately, it seems that the Bright Futures Scholarship Program is unconstitutional under Florida's Blaine Amendment. Not only does the Bright Futures Scholarship Program clearly permit disbursements of State money in aid of the institutions, but like most financial assistance programs, the disbursements are made directly to the institutions.[214] Thus, the issue of a two-step payment process does not even enter into the analysis, as it did in *Holmes* regarding the OSP.

Furthermore, the Bright Futures Scholarship Program allows religious or "sectarian" colleges and universities to participate as

---

210. Fla. Dept. of Educ., *supra* n. 194, at 41–46. Also, Florida offers the Robert C. Byrd Honors Scholarship Program, which is partially based on merit, but that program is funded by the federal government. *Id.* at 35.

211. Fla. Dept. of Educ., *supra* n. 194, at 43. The program is divided into three award categories—the Florida Academic Scholars Award, which awards one hundred percent of the cost of tuition and fees, plus $300 per year for college-related expenses; the Florida Merit Scholars Award, and the Florida Gold Seal Vocational Scholars Award, both of which award seventy-five percent of the cost of tuition and fees. *Id.* During the 2001–2002 school year, the Florida Merit Scholars Award had the most student recipients, providing 70,573 students with scholarships. *Id.* at vii. During the 2001–2002 fiscal year, for each dollar spent on a Florida lottery ticket, thirty-eight cents went to education programs. Florida Lottery, *Education and the Florida Lottery*, http://www.flalottery.com/lottery/edu/edu.html (accessed July 27, 2003).

212. Fla. Stat. § 1009.533.

213. Fla. Dept. of Educ., *Florida Bright Futures Scholarship Program*, http://www.firn.edu/doe/brfutures/home0072.htm (accessed Mar. 3, 2003).

214. Fla. Stat. § 1009.53(5) (stating that the "department [of Education] shall transmit payment for each award to the president or director of the postsecondary education institution, or his or her representative"). Even assuming one could make a valid argument that college-level financial assistance programs do not "aid" the institutions, the argument would certainly have no weight when applied to the Bright Futures Scholarships. Because the payments are equivalent to *at least seventy-five percent* of the student's tuition, it cannot be denied that the institutions are significantly benefiting from the program. *Holmes*, 2002 WL 1809079 at *2 (reasoning that because the OSP permits the state to pay for a student's entire tuition at a parochial school, the program is "certainly 'in aid of' the institution").

eligible institutions in the program.[215] For example, one of the eligible institutions is Clearwater Christian College—a school that is particularly important to discuss given that it is eligible to participate in almost all of the assistance programs reviewed in this section.[216] Clearwater Christian College has a "two-fold" mission that is stated as follows:

> [T]o deliver a quality education based on sound academic instruction in the context of the historic Christian faith; to help students develop the qualities of character that will enable them to lead fulfilling lives pleasing to both God and man.[217]

In stating Clearwater Christian College's purpose, the catalog describes the school as a "fundamental, Christian" institution that is "dedicated to sound academic instruction while propagating the historic Christian faith."[218] One of the stated goals is to "Provide programs which develop in the students godly character and a desire to know God and His Word so that they be conformed to the image of Christ."[219] And in revealing its educational philosophy, Clearwater Christian College promises to "integrate Biblical principles into the liberal arts" and provide a "True Christian education."[220] It is difficult to imagine a more sectarian institution.[221]

---

215. Fla. Dept. of Educ., *Florida Bright Futures Scholarship Program: Private 4-Year Institutions*, http://www.firn.edu/doe/brfutures/pri4yr.htm (accessed Sept. 9, 2003). All of the following eligible institutions have clearly-stated religious missions and educational philosophies: Clearwater Christian College (www.clearwater.edu), Florida Christian College (www.fcc.edu) [hereinafter *Florida Christian*], Spurgeon Baptist Bible College (www.spurgeon.edu), The Baptist College of Florida (www.baptistcollege.edu), Trinity Baptist College (www.tbc.edu), Trinity College of Florida (www.trinitycollege.edu), Trinity International University (www.tiu.edu), and Hobe Sound Bible College (www.hsbc.edu). *Id*.

216. *Id.*

217. Clearwater Christian College, *Catalog: Mission, Purpose and Goals*, http://www.clearwater.edu/2002catalog/Mission_Purpose_and_Goals/Mission_Purpose_and_Goals.pl?location=Mission_Purpose_and_Goals (accessed Sept. 9, 2003) (citing Proverbs 3:4).

218. *Id.*

219. *Id.*

220. *Id.*

221. Another example of a clearly sectarian school that is eligible under most of these programs is Florida Christian College (FCC). FCC "requires a Bible emphasis of all who earn a degree" and has the purpose of "educat[ing] men and women for Christian service" and "serv[ing] as a resource to the churches." *Florida Christian*, *supra* n. 215, at http://studentlife.fcc.edu/welcome.htm.

Because the Bright Futures Scholarship Program allows State revenue to be transferred to institutions such as Clearwater Christian College, the program is unconstitutional under Florida's Blaine Amendment.[222]

2. Florida Resident Access Grants

The William L. Boyd, IV, Florida Resident Access Grant Program[223] (FRAG) is a tuition assistance program that awards grants to students who attend private colleges and universities in Florida.[224] The Legislature created the program without intending to reward merit or reduce need; instead, it determined that a strong system of private colleges and universities would reduce the tax burden of Florida's citizens.[225] The FRAG awards are based on a percentage of the State's cost of funding a full-time undergraduate student at public colleges and universities.[226] With more than 30,000 students receiving the grants during the 2001–2002 school year, FRAG is the second largest financial assistance program discussed in this article.[227]

Perhaps because the program involves only private institutions, the Legislature seemed to be a little cautious in drafting the FRAG program. In setting out the eligibility requirements for the schools, the FRAG statute states that the college or university must have,

> a secular purpose, so long as the receipt of state aid by students at the institution would not have the primary effect of advancing or impeding religion or result in an excessive entanglement between the state and any religious sect.[228]

---

222. Florida's Bright Futures Scholarship Program has not yet been challenged in court.

223. Fla. Stat. § 1009.89 (2002).

224. *Id*. The Legislature specifically intended the program to be a "tuition assistance program" and not a "financial aid program" because the grants are not given to students based on "financial need or other criteria upon which financial aid programs are based." *Id*.

225. *Id*.

226. Fla. Dept. of Educ., *supra* n. 194, at 39. During the 2001–2002 school year, the average award was $2,216. *Id.*

227. *Id.* at vii. Other than the Bright Futures Scholarship Program, the only other financial assistance program that is larger than FRAG is the Public Student Assistance Grant. *Id*. However, that program is not discussed in this Comment because it involves solely public institutions. *Id.* at 7.

228. Fla. Stat. at § 1009.89(3). The statute also has another provision in its require-

This language closely mirrors the *Lemon* test[229] that has been the cornerstone of Establishment Clause jurisprudence under the federal Constitution.[230] Although complying with this language might render the FRAG program constitutional under the federal Establishment Clause or Florida's establishment clause,[231] it would not necessarily pass constitutional muster under the stricter confines of Florida's Blaine Amendment. In any event, one of the institutions eligible to receive FRAG payments is Clearwater Christian College,[232] and therefore the program is probably violating its own rules. Clearwater Christian College clearly does not have a secular purpose, and because the program allows for State money to be distributed[233] to an obviously sectarian institution, unfortunately the FRAG program is also unconstitutional under Florida's Blaine Amendment.[234]

3. Need-Based and Other Special Interest Assistance Programs

There are also several need-based financial aid programs that permit the State to transfer money to sectarian colleges and universities.[235] First, and probably most importantly, is the Florida Private Student Assistance Grant Program (PSAG).[236] The PSAG is Florida's largest need-based assistance program that includes

---

ments for student eligibility. Pursuant to the statute, one of the requirements is that the student not be "enrolled in a program of study leading to a degree in theology or divinity." *Id.* at (4)(b)(2). For a case that suggests the FRAG program might be unconstitutional under the Free Exercise Clause of the First Amendment, see *Davey v. Locke*, 299 F.3d 748, 750 (9th Cir. 2002), finding that a Washington scholarship program's policy of denying scholarships to students who pursue degrees in theology violated the Free Exercise Clause.

229. *Lemon v. Kurtzman*, 403 U.S. 602, 612–613 (1971).

230. *Id*.

231. In *Silver Rose Entertainment, Inc. v. Clay County*, Florida's First District Court of Appeal recognized that the *Lemon* test is used not only to analyze a federal Establishment Clause question, but also to analyze an alleged violation of Florida's establishment clause. 646 So. 2d 246, 251 (Fla. 1st Dist. App. 1994).

232. Fla. Dept. of Educ., *2002–2003 William L. Boyd, IV, Florida Resident Access Grant Program Eligible Institutions*, http://www.firn.edu/doe/osfa/eliginstfrag.htm (accessed Mar. 3, 2003).

233. Here, again, the State transfers the money directly to the institutions. Fla. Stat. § 1009.89(5)(a) (stating that "[t]he department shall make such payments to the college or university in which the student is enrolled").

234. The FRAG Program has not yet been challenged in court.

235. *Infra* nn. 237–248 and accompanying text (discussing need-based financial aid programs that permit the state to transfer money to sectarian colleges and universities).

236. Fla. Stat. § 1009.51. PSAG is part of a larger program called the Florida Student Assistance Grant Programs. Fla. Dept. of Educ., *supra* n. 194, at 7.

private schools as eligible institutions.[237] The PSAG provides financial aid to students who attend private colleges and universities and who demonstrate "substantial financial need."[238] The PSAG is funded not only by the State of Florida, but also by the federal government.[239]

The PSAG program, along with other need-based programs, allows several sectarian colleges and universities to participate and receive funds from the program.[240] Other need-based programs that allow sectarian institutions to receive tuition assistance payments from the State include: the Florida Postsecondary Student Assistance Grant Program,[241] the Florida Work Experience Program,[242] the José Martí Scholarship Challenge Grant Fund (scholarships for Hispanic students),[243] the Seminole and Miccosukee Indian Scholarships,[244] and possibly, the Mary McLeod Bethune Scholarship Program (scholarships for students who attend Florida Agricultural and Mechanical University, Bethune-Cookman College, Edward Waters College, or Florida Memorial College).[245]

---

237. Fla. Dept. of Educ., *supra* n. 194, at vii. During the 2001–2002 school year, 11,567 students received financial aid from PSAG. *Id.*

238. *Id.* at 7; Fla. Stat. § 1009.51.

239. Fla. Stat. § 1009.51.

240. Fla. Dept. of Educ., *2002–2003 Florida Private Student Assistance Grant Program Eligible Institutions*, http://www.firn.edu/doe/osfa/eliginstfsagpri.htm (accessed Mar. 3, 2003). Some of those institutions are Clearwater Christian College, Florida Christian College, St. John Vianney College Seminary, and The Baptist College of Florida. *Id*.

241. Fla. Stat. § 1009.52. An example of a school that is eligible for the program is Spurgeon Baptist Bible College. Fla. Dept. of Educ., *2002–2003 Florida Postsecondary Student Assistance Grant Program Eligible Institutions*, http://www.firn.edu/doe/osfa/eliginstfsagpost.htm (accessed Mar. 3, 2003).

242. Fla. Stat. § 1009.77. Eligible for the program are Clearwater Christian College, Florida Christian College, Hobe Sound Bible College, Spurgeon Baptist Bible College, The Baptist College of Florida, Trinity Baptist College, Trinity College of Florida, and Trinity International University. Fla. Dept. of Educ., *2002–2003 Florida Work Experience Program Eligible Institutions*, http://www.firn.edu/doe/osfa/eliginstfwep.htm (accessed Mar. 3, 2003).

243. Fla. Stat. § 1009.72. Two schools that are eligible for the program are Clearwater Christian College and Florida Christian College. Fla. Dept. of Educ., *2002–2003 José Martí Scholarship Challenge Grant Fund Eligible Institutions*, http://www.firn.edu/doe/osfa/eliginstjm.htm (accessed Mar. 3, 2003).

244. Fla. Stat. § 1009.56. An example of a school that is eligible for the program is Florida Christian College. Florida Christian College, *Financial Aid*, http://financialaid.fcc.edu/otheraids.htm (accessed Mar. 3, 2003).

245. Fla. Stat. § 1009.73. This Author uses the term "possibly" because this scholarship is given only to qualified students who attend certain schools, one of which is Bethune-Cookman College (www.cookman.edu). *Id*. Bethune-Cookman is not nearly as relig-

Other than the FRAG program, there are two "special interest" programs the State offers that distribute public revenue to religious institutions: the Ethics in Business Scholarship Program[246] and the Children of Deceased or Disabled Veterans or Children of Servicemen Classified as Prisoners of War or Missing in Action Scholarship Program.[247]

For purposes of constitutional analysis, PSAG, the other need-based programs, and the special interest programs are essentially the same as the Bright Futures Scholarship Program or the FRAG program. In fact, as stated above, once it is determined that the institutions receiving public funds are "sectarian" institutions, all of these financial assistance programs call for essentially the same constitutional analysis as the OSP. Because these financial assistance programs distribute State revenues to sectarian institutions such as Clearwater Christian College, they are unconstitutional under Florida's Blaine-like provision in Article I, Section 3.[248]

IV. SAVING EDUCATIONAL OPPORTUNITIES FROM FLORIDA'S BLAINE AMENDMENT

As evidenced above, the implications of Florida's Blaine Amendment are far-reaching.[249] Two of Florida's K–12 school-choice programs are, in all likelihood, unconstitutional, and the Tax Credit Program could be deemed unconstitutional as well. Also, nearly all of the college-level financial assistance programs

---

iously involved as the other schools mentioned so far, but the Governor's Office of Florida has suggested that the college might be sectarian. Governor's Office of Fla., *Opportunity Scholarships*, http://www.myflorida.com/myflorida/government/governorinitiatives/aplusplan/opportunityScholarships.html (accessed Mar. 3, 2003).

246. Fla. Stat. § 1009.765 (2002). An example of a school that is eligible for the program is Clearwater Christian College. Fla. Dept. of Educ., *2002–2003 Ethics in Business Scholarship Program Eligible Institutions*, http://www.firn.edu/doe/osfa/eliginsteb.htm (accessed Mar. 3, 2003).

247. Fla. Stat. § 295.01 (2002). Two schools that are eligible for the program are Clearwater Christian College and Spurgeon Baptist College. Fla. Dept. of Educ., *2002–2003 Scholarships for Children of Deceased or Disabled Veterans or Children of Servicemen Classified as Prisoners of War or Missing in Action Eligible Institutions*, http://www.firn.edu/doe/osfa/eliginstcddv.htm (accessed Sept. 6, 2003).

248. None of the assistance programs discussed in this section have yet been challenged in court.

249. Note that this Author does not use the phrase "the implications of the *Holmes* decision." This is because Florida's Blaine Amendment is unambiguous in its language, and its implications have always existed. The *Holmes* decision simply brought recognition to those implications.

that Florida offers are likely unconstitutional.[250] To retain these educational programs, something must be done to rid Florida of Blaine's legacy, and the most effective and appropriate measure would be a constitutional amendment.

However, before discussing the different ways to remove the Blaine obstacle, an important question must first be addressed: Why is it important to remove the obstacle? Certainly, a state is permitted to guarantee more freedom from religion,[251] and keeping the church and the state untangled is presumably a valued principle.[252] So why not welcome Blaine's legacy? There are two very important reasons.

First, Florida's Blaine Amendment is much more of a burden than it is a blessing. The federal Establishment Clause[253] and Florida's establishment clause[254] are more than sufficient to keep government and religion untangled. Those provisions, due to their language, are subject to reasonable interpretation.[255] Thus, courts can actually analyze whether a law has a secular or a religious purpose, whether it impermissibly results in an endorsement or advancement of religion, and whether there is an excessive entanglement between the state and religion.[256] The Blaine Amendment, on the other hand, strictly prohibits *any* state money from reaching a religious institution, directly or indirectly, without any room for interpretation, analysis, investigation, reasoning, or plain common sense.[257]

Indeed, if carried out to its logical conclusion (for which the provision's language seems to leave no other choice), Florida's

250. According to the analysis contained in this Comment, ten out of the fourteen college-level financial assistance programs are unconstitutional under Florida's Blaine Amendment.

251. *See Hass*, 420 U.S. at 719 (stating that states may impose greater restrictions than those the Supreme Court determines are necessary under federal constitutional standards, but states "may not impose such greater restrictions as a matter of *federal constitutional law* when [the Supreme Court] specifically refrains from imposing them") (emphasis added).

252. *See* U.S. Const. amend. I; Fla. Const. art. I, § 3, cl. 1.

253. U.S. Const. amend. I.

254. Fla. Const. art. I, § 3, cl. 1; *supra* n. 106 (quoting the language of Florida's establishment clause).

255. *Silver Rose Ent.*, 646 So. 2d at 251.

256. *Id*. (citing the *Lemon* test).

257. Schick, *supra* n. 1 (noting that states with Blaine Amendments "do not thus appear the least bit interested in inquiries concerning purpose and effect and seem to effectively block any aid to any religious schools").

Blaine Amendment leaves numerous other State-funded programs in constitutional limbo.[258] The Florida Governor's office wonders what the Amendment means to programs such as Medicaid and other health-care programs for the poor and elderly that send State money to religious hospitals.[259] Other people have expressed concerns about State-funded day care and preschool programs,[260] police assistance to churches,[261] and even public employees and welfare recipients spending their tax-supported income on religious organizations.[262] Taking it to an extreme, one commentator suggested that, as long as we are hosting Blaine's legacy, the State might as well deny tax refunds to people of faith because "They might give an offering at their house of worship."[263]

The reality is that the Blaine Amendment puts undue restrictions on the Legislature's ability to create laws and design programs that Florida's Legislature and Florida's citizens have decided are good public policy.[264] Say, for example, the State wanted to change the way lottery winnings are taxed by allowing winners to direct a percentage of the taxed portion to a charity of their choice. If the law allowed for a religious charity to be an eligible recipient, then it is possible some special-interest group could bring a lawsuit and have the law struck down under Florida's Blaine Amendment.[265] No judicial investigation into the program's effect on church-state relations would be allowed.

---

258. *Infra* nn. 259–263 and accompanying text (discussing state-funded programs that could be found unconstitutional because of Florida's Blaine Amendment).

259. Governor's Office of Fla., *supra* n. 245; Alisa Ulferts, *Judge Strikes Florida Vouchers*, http://www.sptimes.com/2002/08/06/State/Judge_strikes_Florida.shtml (accessed Sept. 6, 2003) (quoting Lieutenant Governor Frank Brogan as having similar concerns). Professor Gey responds by arguing that the hospitals would not be "sectarian institutions" because the hospitals are "saving lives, not souls." Dyckman, *supra* n. 205.

260. Kleindienst, *supra* n. 147, at A10 (quoting Lieutenant Governor Frank Brogan).

261. David Twiddy, *Voucher Challenge under Way*, http://www.bradenton.com/mld/bradenton/news/local/3631901.htm (July 10, 2002).

262. Alan E. Sears, *Please Don't Blaine Us Again*, http://www.crosswalk.com/news/1148502.html (accessed Aug. 18, 2003).

263. *Id.*

264. Interestingly, United States Senators had similar concerns when debating the original Blaine Amendment. Heytens, *supra* n. 30, at 133. The Senators expressed concerns that the Amendment "could 'prohibit religious instruction in prisons,' hospitals, or reformatories." *Id.* (citing 4 Cong. Rec. 5581–5582 (1876)).

265. Such a law would not even be subject to the same issues surrounding the Tax Credit Program—i.e., whether the money reaching religious groups is public money—because lottery winnings are, without a doubt, state money.

This leads to the other important reason to rid Florida's Constitution of Blaine's language. Regardless of whether school-choice programs or college scholarships are good policy, the courts should not be used as a forum for teachers' unions and other special-interest groups to overturn legislative enactments under the guise of religious freedom.[266] Whether individuals like the school-choice programs or not, Florida's citizens elected the legislators who enacted the voucher programs. The way to overturn the programs is by lobbying, electing new government officials,[267] influencing public opinion, and other means contemplated by the founders of American government. Of course, if certain programs do not pass constitutional muster under the tests of either the federal or Florida establishment clause, then courts should strike down those programs. But Florida's Constitution should not be used as a tool to make up for a lost debate in the Florida Legislature.

A. Successful Appeal of *Holmes v. Bush*

One way to avoid the Blaine Amendment's harmful effects would be for the Florida Supreme Court to ultimately decide that the OSP does not violate Article I, Section 3. For this to happen, though, the Court would have to engage in some hefty legal gymnastics, especially considering the provision's prohibition of "indirect" aid.[268] Again, as the *Holmes* court stated, the language is "clear and unambiguous," and it would require a "strained construction" to find the OSP constitutional.[269]

However, if the Florida Supreme Court realizes the extent of the Blaine Amendment's implications, then it might attempt a

266. There is plenty of evidence that teachers' unions are not concerned with the separation of church and state. For example, Maureen Dinnen, the President of the Florida Education Association, stated after the *Holmes* decision, "We knew when a judge looked at it that he would side with us. . . . It is absolutely wrong to divert tax money to private schools. Now we can focus on public schools again." Royse, *supra* n. 43. However, our judiciary should not be concerned with whether it is "wrong" to divert money to private schools, and whether the State is properly focusing on public schools.

267. In 2002, the citizens of Florida had an opportunity to elect gubernatorial candidate Bill McBride who would have done away with both the OSP and the Tax Credit Program. *See* United Teachers of Dade, *Why McBride?* http://www.utofd.com/why_mcbride.htm (accessed Sept. 6, 2003) (describing the McBride Education Plan). Instead, they reelected Jeb Bush, the individual who initiated the OSP.

268. Fla. Const. art. I, § 3.

269. *Holmes*, 2002 WL 1809079 at *1.

strained construction to remedy the problem.[270] Such a construction could happen in a number of different ways. First, the Court could read an "intent-to-aid requirement" into the Blaine provision. This was done in *Board of Education v. Allen*,[271] where the New York Court of Appeals upheld New York's state textbook loan program.[272] In interpreting New York's Blaine provision, which prohibits direct or indirect aid,[273] the Court found that the words "direct" and "indirect" relate only to the "means of attaining the prohibited end of aiding religion."[274] In other words, the Court construed the provision to prohibit the *intent* to aid the religious schools, whether by direct or indirect means,[275] thereby reading into the provision an "intent-to-aid requirement." After finding that there was "no intention to assist parochial schools," the New York Court of Appeals found the program constitutional.[276]

Another interesting approach the Florida Supreme Court could take would be to hold that the rule it laid out in *Johnson* is applicable when analyzing a claimed violation of the Blaine provision of Article I, Section 3.[277] *Johnson* involved a claim that tax exemptions for religious organizations violated both the federal Establishment Clause and Section 6 of the Declaration of Rights (containing the 1885 version of Florida's Blaine Amendment).[278] The rule was stated as follows:

> A state cannot pass a law to aid one religion or all religions, but state action to promote the general welfare of society, apart from any religious considerations, is valid, even though religious interests may be indirectly benefited.[279]

270. For discussion on the various ways state courts have interpreted "directly or indirectly," and Blaine provisions in general, see Frank R. Kemerer, *State Constitutions and School Vouchers*, 120 Educ. L. Rep. 1, 5–15 (October 1997).

271. 228 N.E.2d 791 (N.Y. 1967).

272. *Id*. at 799.

273. N.Y. Const. art. XI, § 3.

274. *Allen*, 228 N.E.2d at 794.

275. *Id*. at 793–794.

276. *Id.* at 794.

277. *Supra* n. 186–193 and accompanying text (discussing *Johnson*).

278. *Johnson*, 239 So. 2d at 257.

279. *Id*. at 261 (referencing *Murray v. Comptroller of Treasury*, 216 A.2d 897 (Md. 1966)).

Because the Court ultimately held that the exemptions did not violate Section 6 after applying the above rule,[280] commentators have speculated that the Court intended the rule to apply to a claim alleging violation of the Blaine Amendment's "directly or indirectly" language.[281] But a careful reading of the case shows that the Court spent its entire analysis discussing the federal Establishment Clause, and it never once mentioned the "directly or indirectly" language.[282] The most likely reason the *Johnson* Court found the exemptions constitutional under Section 6 was because the money involved was not taken from the public treasury.[283]

In any event, the Florida Supreme Court could decide to apply the *Johnson* rule to the OSP challenge. Because the program clearly has the intent of benefiting society's general welfare—i.e., the educations of elementary and secondary students—the program could be deemed constitutional despite the indirect benefit to the religious schools. Should this happen, the Court would, in effect, either be adding an "intent-to-aid requirement" to the Blaine Amendment or would simply be ignoring the Amendment all together.[284]

Although a successful appeal of *Holmes* would certainly be good news for educational opportunities, a reversal is not the best way to eliminate the effects of Florida's Blaine Amendment. Whatever "strained construction" the court might apply could only be seen as judicial legislating or judicial activism—both of which are improper means to remedy the situation. The *Holmes* decision was well-reasoned,[285] and the Blaine provision's strict language leaves the Florida Supreme Court with little room for

280. *Id.* at 262.

281. R. Craig Wood & Hernan Castro, *The Florida Opportunity Scholarship Program: An Analysis of the Florida School Voucher Plan*, 156 Educ. L. Rep. 739, 754–757 (2001).

282. *Johnson*, 239 So. 2d at 261–263.

283. The *Johnson* Court, in quoting *Walz*, mentioned that an exemption does not transfer state money to religious organizations. *Johnson*, 239 So. 2d at 259–260. Admittedly, however, the Court did not make its reliance on this quote very clear.

284. *See* Kemerer, *supra* n. 29, at 166 (noting that the South Carolina Supreme Court "simply ignored" its Blaine Amendment in upholding a college-level tuition assistance program in *Durham v. McLeod*, 192 S.E.2d 202 (S.C. 1972)).

285. Both of the above approaches—*Allen* and *Johnson*—were explicitly rejected by the circuit court in *Holmes*. *Holmes*, 2002 WL 1809079 at **1–2. With regard to *Allen*, the court noted that legislative intent, "always an elusive and debatable commodity," is not determinative of a law's facial constitutionality. *Id.* at *2. With regard to *Johnson*, as noted *supra* note 174 and accompanying text, the court found that the tax exemptions did not involve revenue of the State. *Id.* at *1.

interpretation. Indeed, the problem is not the *Holmes* interpretation of the Blaine Amendment, but the Amendment itself.

B. Free Exercise and Free Speech Argument in Federal Court

After the *Zelman* decision, school-choice advocates made their main goal in the Blaine Amendment litigation clear—to secure a federal precedent (preferably Supreme Court precedent) holding that state constitutional provisions with Blaine-like language discriminate against religious options and therefore violate the Free Exercise Clause[286] and the Constitution's ban on viewpoint discrimination.[287] This would be another way to mitigate the Blaine Amendment's harmful effects. With respect to Florida's Blaine Amendment, the argument would be that, because the Amendment forces programs, such as the OSP, to discriminate against students wishing to use the vouchers at a religious school, the Blaine Amendment is unconstitutional under the First Amendment.

School-choice advocates received their wish in July 2002 when the United States Court of Appeals for the Ninth Circuit decided *Davey v. Locke*.[288] In *Davey*, the court held that a State of Washington scholarship program excluding students pursuing a theology degree violated the Free Exercise Clause.[289] Because the court found that the program was not neutral toward religion, and therefore violated the Free Exercise Clause, the program was subject to strict scrutiny, requiring the State to show a "compelling interest" in violating First Amendment rights.[290] The State argued that its compelling interest was complying with its Blaine Amendment, which prohibited public funds in support of religious activities.[291] However, the Ninth Circuit found the interest less than compelling.[292] In citing *Widmar v. Vincent*[293] as authority, the court stated that the interest of "achieving greater separation of church and State than is already ensured under the Establish-

286. U.S. Const. amend. I.
287. Wall St. J., *The Next Voucher Battleground*, http://www.opinionjournal.com/forms/printThis.html?id=110002095 (Aug. 7, 2002).
288. 299 F.3d 748.
289. *Id*. at 760.
290. *Id.* at 757–758.
291. *Id.*
292. *Id.* at 759–760.
293. 454 U.S. 263 (1981).

ment Clause of the Federal Constitution is limited by the Free Exercise Clause."[294]

Davey might be persuasive to a federal court reviewing Florida's Blaine Amendment and the *Holmes* decision, but there is no guarantee that another court would hold the same way.[295] A different court could find either that the interpretation of Florida's Blaine Amendment, as applied to the OSP, does not violate the Free Exercise Clause, or that having stricter separation of church and state is sufficiently compelling in the Florida context.[296] Given that there are several recent Supreme Court precedents that have frowned upon religious discrimination,[297] the latter may be more likely.

The problem with this strategy—relying on the United States Supreme Court to ultimately strike down Florida's Blaine Amendment—is two-fold. First, whether or not the Supreme Court would overturn the Amendment is uncertain and speculative. It is beyond the scope of this Comment to review all of the

---

294. *Davey*, 299 F.3d at 759–760.

295. During this Comment's publication, the State of Washington appealed the Ninth Circuit's ruling in *Davey*, and the United States Supreme Court granted certiorari. *Locke v. Davey*, 123 S. Ct. 2075 (2003). The Court heard initial oral arguments on December 2, 2003. Oral Arg. Transcr., *Locke v. Davey*, 123 S. Ct. 2075 (2003). The Supreme Court's decision could have important implications regarding the constitutionality of Blaine Amendments around the country, including Florida's Blaine Amendment. *See* Linda Greenhouse, *Justices Resist Religious Study Using Subsidies*, N.Y. Times A1 (Dec. 3, 2003) (quoting Justice Stephen G. Breyer during oral arguments as stating, "The implications of this case are breathtaking"). The State of Florida, Governor Jeb Bush, and the Florida Department of Education filed an amici curiae brief in support of Joshua Davey, the student who initially brought the lawsuit against the State of Washington. Br. of the St. of Fla., the Hon. Jon Ellis, "Jeb" Bush, Governor, & the Fla. Dept. of Educ., as Amici Curiae in Support of Respt., *Locke & Davey*, 123 S. Ct. 2075 (2003).

296. For cases that were decided in such a fashion, see *Witters v. State Commission for the Blind*, 112 Wash. 2d 363 (Wash. 1989) (*Witters III*) (finding that Washington's compliance with its Blaine Amendment to deny public financial aid to a student pursuing a Bible studies degree did not violate the Free Exercise Clause); *Bagley v. Raymond School Department*, 728 A.2d 127 (Me. 1999) (finding that Maine's tuition program statute that excluded religious schools from receipt of state funds did not violate the Free Exercise Clause).

297. *E.g. Good News Club v. Milford C. Sch.*, 533 U.S. 98 (2001) (finding that a public school's exclusion of a Christian children's club from meeting after hours on school property because of its religious nature was unconstitutional viewpoint discrimination); *Rosenberger v. Rector & Visitors of U. of Va.*, 515 U.S. 819 (1995) (finding that a university's exclusion of a Christian student newspaper from a program that funded publication costs for student publications was unconstitutional viewpoint discrimination); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993) (finding that city ordinances that prohibited religious sacrificing of animals violated the Free Exercise Clause).

Supreme Court precedent shedding light on this issue, but there is caselaw to suggest it could be decided either way.[298] Second, this strategy would require the Court to rule that Florida's interest in complying with its constitution is not compelling, raising the unpopular issue of federalism that the Court may wish to avoid.[299]

C. Equal Protection Argument in Federal Court

Another strategy to remove Blaine's legacy would be to argue that the Amendment violates the Equal Protection Clause found in the United States Constitution's Fourteenth Amendment. Generally, the rule is that any state action that discriminates against a suspect class of individuals, such as racial minorities, is subject to strict scrutiny and must be narrowly tailored to serve a compelling state interest.[300] On the other hand, if the disparate treatment is not based upon a suspect class, then generally the state action must only have a rational relationship to a legitimate state interest.[301]

This argument is likely to fail in federal court. Even assuming religion is a suspect class,[302] school-choice advocates would be hard pressed to prove that Florida's Blaine Amendment had a discriminatory purpose.[303] Make no mistake, Florida's provision

298. For example, in *Widmar*, the Court was quite willing to limit the state interest of achieving a greater separation of church and state. *Widmar*, 454 U.S. at 276. Alternatively, the Court in *Witters v. Wash. Dept. of Serv. for the Blind* (*Witters II*), stated that the Washington Supreme Court was free to consider the "far stricter" language of its own constitution (referring to Washington's Blaine Amendment), and refused to decide at that point whether the Free Exercise Clause would force Washington to ignore its constitutional provision. 474 U.S. 481, 489 (1986).

299. After the Washington Supreme Court found no Free Exercise Clause violation on remand (*Witters III*), the United States Supreme Court denied certiorari. *Witters v. Wash. Dept. of Serv. for the Blind*, 493 U.S. 850 (1989). Perhaps this evidences hesitancy on the part of the Court to assert itself concerning this controversial subject.

300. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 16–17 (1973).

301. *Id.*

302. For an argument that religion is (or at least should be) a suspect classification, see Heytens, *supra* n. 30, at 141–145.

303. Advocates point to two recent judicial recognitions of the history of Blaine Amendments as proof that courts might find a clear discriminatory purpose. David W. Kirkpatrick, *A Blaine Amendment Update*, http://www.schoolreport.com/schoolreport/articles/blaine_7_00.htm (last updated July 2000). First, the advocates point to *Mitchell v. Helms*, 530 U.S. 793 (2000), in which Justice Clarence Thomas refers to Blaine Amendments as state provisions that have "a shameful pedigree that we do not hesitate to disavow." *Id.* at 828. Also, the advocates point to *Kotterman*, where the Arizona Supreme Court, speaking of the original Blaine Amendment, stated that "we would be hard pressed to divorce the amendment's language from the insidious discriminatory in-

probably *was* enacted with an anti-Catholic purpose given the closeness in time and the similarity to the original Blaine Amendment,[304] which had obvious roots in bigotry and nativism, but actually *proving* this would be difficult. The 1885 Constitutional Convention seems to have added this language without much debate or argument, and contemporary newspapers barely covered the addition of the new provision.[305]

Even if it could be proven that Florida's Blaine Amendment was enacted with a discriminatory purpose, the Amendment was probably "washed clean" when it was reviewed and changed in 1968.[306] Even an author who dedicated an entire article to advocating that most Blaine Amendments violate equal protection found that Supreme Court precedent indicates that any particular provision's discriminatory purpose is purged if the provision has been reenacted or amended.[307] In 1968, both occurred in Florida.[308]

D. Amending Florida's Article I, Section 3

By far, the most effective, definitive, and proper way to overcome the unnecessarily broad implications of Florida's Blaine Amendment would be to "return to the people to ask them to decide whether their State Constitution should be amended to grant the Legislature the power that it seeks"[309]—in this case, the power to create neutral assistance programs that allow beneficiaries the option to use the assistance at religious institutions. By amending Article I, Section 3, Florida's citizens and Legislature would have the freedom to decide the most appropriate way to alter the provi-

---

tent that prompted it." 972 P.2d at 624. However, the Arizona Supreme Court also found that there is "no recorded history directly linking the [Blaine Amendment] with Arizona's constitutional convention" and that it would require "significant speculation to discern such a connection." *Id.*

304. Even some anti-school choice advocates have seen a connection. For example, Robert Boston of Americans United for Separation of Church and State said, "[Florida's provision] certainly sounds like a Blaine [A]mendment—the time line would fit, and the language is similar." Jo Becker, *Voucher Debate Entwined with a Century-Old Fight*, http://www.sptimes.com/News/70699/State/Voucher_debate_entwin.shtml (July 6, 1999).

305. *Id*.

306. Martin Dyckman, *History of Religion Has a Place in Schools*, http://www.sptimes.com; *search* "Blaine bigotry" (July 18, 1999).

307. Heytens, *supra* n. 30, at 148–150.

308. Becker, *supra* n. 304 (quoting another as maintaining that Florida's Blaine Amendment was reenacted in 1968); Dyckman, *supra* n. 306 (noting that it was "reaffirmed in the Constitution of 1968 with a slight change").

309. *Spears v. Honda*, 449 P.2d 130, 139 (Haw. 1969).

sion. The provision could be changed, supplemented by additional language, or simply removed all together.

If changed, one approach would be to remove the "indirectly" language, thereby only prohibiting direct aid to religious institutions. The citizens of South Carolina took this approach to ensure the constitutionality of a college-level tuition assistance program that had recently been challenged.[310] Although this change would likely guarantee the school-choice programs' constitutionality, one could argue that it might not do the same for the college scholarships because most of the payments go directly to the institutions. However, because the payments are directed to the institutions only based on the students' individual choices, courts would likely view the aid as indirect; thus, even the college programs would probably enjoy constitutional protection under the newly changed provision.

Another approach would be to leave the prohibition against direct or indirect aid, but to add language that would ensure the constitutionality of school-choice programs and scholarships. One option would be to add the equivalent of the "intent-to-aid requirement," by qualifying the prohibition against aid with language such as: "but only if the distribution has a purpose or substantial effect of furthering or favoring a specific religion or religion itself." The school-choice programs and college-level assistance programs probably would not violate such a provision because they are offered on a neutral basis and because they have an intent to better the general welfare of Florida's citizens.

A more aggressive way to supplement the provision would be simply to add an extra sentence specifically permitting the creation of educational programs that allow the inclusion of religious institutions as options for students. New York took such an approach after *Judd v. Board of Education*,[311] in which the New York Court of Appeals found that New York's Blaine Amendment,[312] because of its indirect aid prohibition, disallowed State funding for school busing of parochial students.[313] After the deci-

310. Kemerer, *supra* n. 29, at 166 (noting the new provision made the state's constitution conform to the recently decided *Durham*, 192 S.E.2d 202).

311. 278 N.Y. 200 (1938).

312. N.Y. Const. art. IX, § 4 (renumbered N.Y. Const. art. XI, § 4 and amended 1938, renumbered N.Y. Const. art. XI, § 3 effective 1963).

313. *Judd*, 278 N.Y. at 211–212.

sion, New York's citizens supplemented their Blaine-like provision to allow what *Judd* had prohibited.[314] If Florida were to take the same approach, it would likely have the same effect—to give the Legislature the freedom to debate and implement the programs, without either requiring or prohibiting it to do so. Many school-choice advocates have argued that this would be the best way to amend a Blaine Amendment.[315]

Of course, the most direct way to remove Blaine's legacy would be to simply erase the Blaine-like language from the Florida Constitution all together. Such a change would leave only the prohibition against the establishment or penalization of religion. Because Florida's establishment clause is interpreted in accordance with federal Establishment Clause jurisprudence,[316] erasing the Blaine language would have the effect of rendering Florida's educational programs constitutional.[317] Professor Viteritti has noted that this sort of cordial relationship between federal and state jurisprudence is not uncommon.[318] He noted that some states have revised their constitutions to reflect evolving federal standards.[319] Given the good public policy reflected in cases such as *Zelman*, this option would be a commendable way to eliminate the constitutional dilemma that Florida's Blaine Amendment has caused.

CONCLUSION

Article I, Section 3 of the Florida Constitution, as it reads today, renders the vast majority of Florida's educational assistance programs unconstitutional. Because the OSP is a relatively small education reform plan, Florida's Blaine Amendment has only injured a minor fraction of the State's citizenry thus far—probably only a few thousand. But after *Holmes*, the eyes of teachers' un-

314. *See* N.Y. Const. art. XI, § 3 (concluding with "the [L]egislature may provide for the transportation of children to and from any school or institution of learning"); *see also* Treene, *supra* n. 17, at 11 (discussing New York's constitutional amendment).

315. *E.g. Treene*, *supra* n. 17, at 12 (arguing that amending in such a fashion would "present the simple argument that legislators should be free to consider or reject school choice on its merits, and not have the debate cut off by anachronistic measures from a dark episode in American history").

316. *Supra* n. 231.

317. Removing the Blaine-like language would render Florida's educational programs constitutional because *Zelman* resolved the federal constitutional challenges. *Supra* intro.

318. Viteritti, *supra* n. 28, at 684.

319. *Id.*

ions and other special-interest groups are surely growing wide. If challenged, the educational programs discussed in this Comment would likely be struck down, and the number of students affected would reach the hundreds-of-thousands. Most importantly, however, many of these students would be denied the means and opportunity to pursue society's most valued asset—a decent education.

Although there are several options available to mitigate the harmful effects of Florida's Blaine Amendment, the most direct and effective option is to simply amend the provision. Even though some people are hoping that *Holmes* will end up before the United States Supreme Court, and thus resolve the Blaine Amendment disputes once and for all,[320] Florida, as well as other states, should instead "attempt to put their own constitutional house[s] in order."[321] If Florida's citizens were serious when they amended the Florida Constitution to make education a paramount duty of the State,[322] then they should now take the next step and make another constitutional amendment to bury Blaine's legacy in Florida before it is too late.

320. *See* Wall St. J., *supra* n. 317 (discussing the voucher battle in Florida).

321. Ltr. from Thomas C. Marks, Jr., Professor of Law, Stetson U. College of L., *Letter to the Editor* (Aug. 9, 2002).

322. Fla. Const. art. IX, § 1.