DAVEY'S PLEA: BLAINE, BLAIR, *WITTERS*, AND THE PROTECTION OF RELIGIOUS FREEDOM

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On December 2, 2003 the United States Supreme Court heard a Ninth Circuit case involving a man whose state-supported college scholarship was rescinded because he sought to use it to study for the ministry.[1] The case centers on Washington State's Promise Scholarship Program, which the state created to encourage low- and middle-income students with excellent high school academic records to attend college. Under the program, scholarship money is available during the students' first two years of college ($1125 in the first year, $1542 in the second) that can be spent on any education-related expenses.[2] Joshua Davey received such an award in 1999 and subsequently enrolled at Northwest College, an accredited Christian school in Kirkland, Washington. When he informed state authorities that he intended to major in pastoral ministries (with a second major in business administration), however, the scholarship was withdrawn.

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1. Locke v. Davey, 123 S. Ct. 2075 (2003). Oral argument is scheduled for Tuesday, December 2, 2003.

2. WASH. ADMIN. CODE § 250-80 (2003).

The Washington Higher Education Coordinating Board (HECB) based its action against Davey on a provision in the state administrative code that disqualifies students who are pursuing a degree in theology,[3] and a broader prohibition within the state constitution against public support for religion, religious instruction, or religious institutions.[4]

The action by HECB was upheld by a federal district court when Davey sought a preliminary injunction pursuant to claims that the state had violated his constitutional rights pertaining to religion, speech, assembly, and equal protection.[5] A Ninth Circuit panel reversed this decision in a 2-1 ruling, which held that HECB's policy lacks neutrality and discriminates on the basis of religion.[6] In a long dissent, Judge M. Margaret McKeown contended that the majority had failed to appreciate the state of Washington's "vision of religious freedom" formed more than one hundred years ago, in 1889, when a constitutional convention first adopted the state charter.[7]

Such an historical examination is indeed worthwhile, but, contrary to what Judge McKeown suggests, it shows that the original intent behind the framing of the Washington Constitution was to flout protections then believed to be contained within the First Amendment. The state constitutional provision was conceived in a climate polluted by religious bigotry, launched by nativist Republicans against Catholic immigrants who were developing a political stronghold in American cities. It is directly traceable to an attempt by Congressman James G. Blaine of Maine to enact an amendment to the federal Constitution banning aid to religious schools and a later move by Senator James Blair of New Hampshire to incorporate a similar provision in the legislation that permitted Washington and other territories to apply for statehood.

More importantly, Washington's existing legal restriction is at odds

3. WASH. ADMIN. CODE § 250-80-020(12)(g) (2003). The Revised Code of Washington also requires, "No aid shall be awarded to any student who is pursuing a degree in theology." WASH. REV. CODE § 28B.10.814 (2003).

4. It reads, "No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment." WASH. CONST. art I, § 11.

5. Davey v. Locke, No. C00-61R, 2000 U.S. Dist. LEXIS 22273 (W.D. Wash. 2000).

6. Davey v. Locke, 299 F.3d 748, 750 (9th Cir. 2002).

7. *Id.* at 760-61 (McKeown, J., dissenting); *see also* Derek D. Green, Note, *Does Free Exercise Mean Free State Funding? In* Davey v. Locke *The Ninth Circuit Undervalued Washington's Vision of Religious Liberty*, 78 WASH. L. REV. 653 (2003) (supporting Judge McKeown's opinion).

with federal constitutional standards that have been defined by more contemporary case law. The *Davey* case presents the United States Supreme Court with an opportunity to correct a serious disparity between fundamental federal rights and state law provisions that undermine those rights. Because such restrictions are found in the great majority of state constitutions operative today, the *Davey* ruling could prove to be a landmark for defining religious liberty into the twenty-first century. To do justice to the questions presented in the *Davey* case, however, the Court must reassess its prior ruling in *Witters*,[8] a similar case that aided in perpetuating the dissonance between federal and state constitutional standards. On the one hand, *Witters* furnished legal grounding for a more accommodationist First Amendment jurisprudence that has evolved over the last two decades, culminating with *Zelman*.[9] On the other hand, however, *Witters* granted the states wide latitude to define their own contradictory standards, thereby undermining the First Amendment.

Part I of this article analyzes the *Witters* ruling and its impact on federal and state constitutional law regarding religion. Part II traces the history of the religion clauses in the Washington Constitution and examines provisions in other state constitutions that will be affected by the outcome of the *Davey* decision. Part III compares the secularist (demanding strict separation) and neutralist (demanding neutrality) approaches to the First Amendment. It explains why the latter is a more compelling standard for protecting religious freedom and how its acceptance by the United States Supreme Court nullifies state law based on a more secularist standard.

I. *WITTERS* AS PRECEDENT

The *Witters* case was a three-act legal drama involving a blind student who had been denied the opportunity to use a state vocational rehabilitation grant while studying for the ministry at the Inland School of the Bible in Spokane, Washington. In 1984, the Washington Supreme Court ruled that such a use would violate the Establishment Clause of the First Amendment (*Witters I*).[10] Two

8. Witters v. Wash. Dep't of Servs. for the Blind, 474 U.S. 481 (1986).

9. Zelman v. Simmons-Harris, 536 U.S. 639 (2002) (approving state-supported vouchers for payment of tuition at religious schools).

10. Witters v. State Comm'n for the Blind, 689 P.2d 53 (Wash. 1984). The lower court held that such a payment violated both the federal and state constitutions, but the Washington supreme court initially reserved judgment on the state constitutional issue and

years later, the United States Supreme Court reversed the decision[11] but left the door open for the state court to reconsider the case solely on the basis of its own constitution, finding that "the state court is of course free to consider the applicability of the 'far stricter' dictates of the Washington State Constitution" (*Witters II*).[12] The Washington judiciary did just that in 1989. Citing "sweeping and comprehensive" prohibitions in its own constitution, the Washington Supreme Court invalidated the student's eligibility to receive the funding while pursuing a degree in preparation for the ministry (*Witters III*).[13]

The effect of the mixed signals communicated by the High Court in *Witters II* are widely apparent in the *Davey* case and are at the core of the disagreement between the trial court and the Ninth Circuit. At the trial level, Judge Barbara J. Rothstein took note that the facts in the two cases were "substantially similar,"[14] writing:

> The Supreme Court intimated that Washington's constitution may be a more stringent barrier to state funding of religious education. The Court also declined to review the Witters III decision after remand. Because the Washington Constitution prohibits the funding of religious instruction, both by its express terms and as interpreted by the state's highest court, HECB is entitled to judgment as a matter of law on Davey's [state constitutional] claims.[15]

The Ninth Circuit also recognized the similarity of the two cases and conceded that "the Washington Supreme Court's view of the Washington establishment clause is less accommodating than the United States Supreme Court's view of the federal Establishment Clause,"[16] but added, "[t]he real issue is whether that interest, no matter how stringently construed, is compelling enough to outweigh a credible free exercise challenge under the federal Constitution."[17] To that question, the panel responded in the negative.[18] The panel based

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based its ruling on federal standards.

11. *Witters*, 474 U.S. at 485-89.

12. *Id.* at 489.

13. Witters v. State Comm'n for the Blind, 771 P.2d 1119, 1122 (Wash. 1989).

14. Davey v. Locke, No. C00-61R, 2000 U.S. Dist. Lexis 22273, at *6 (W.D. Wash. 2000).

15. *Id.* at *9 (citations omitted).

16. Davey v. Locke, 299 F.3d 748, 758 (9th Cir. 2002).

17. *Id.*

18. *Id.* at 759-60.

> This leaves us with Washington's indisputably strong interest in not appropriating or applying money to religious instruction as mandated by its constitution, and Davey's interest in a scholarship to which he was entitled based

its ruling on federal case law that preceded *Witters*,[19] as well as the more recent *Zelman* decision,[20] which was grounded in part on *Witters*. In so doing, the Ninth Circuit set limits on state prerogatives implicit in *Witters II* that have yet to be explicitly addressed by the Supreme Court. As it now stands, *Witters II* can be read to imply that no such limits exist. This would mean that rights protected under the federal Constitution could be circumscribed by the states as they see fit. Such a view cannot be reconciled with the Supremacy Clause of the United States Constitution.[21]

A. The First Amendment

Writing for a unanimous court in *Witters II*,[22] Justice Thurgood Marshall focused his review of the federal questions on criteria set down in the *Lemon* case,[23] specifically rejecting the state court's finding that the aid sought by Mr. Larry Witters served to advance religion. Justice Marshall reasoned that the aid in question was permissible because the aid was made directly to the student, any aid reaching a sectarian institution was available as a result of an independent choice made by the student, and the aid was furnished by the state without regard to religion and for the indirect benefit of public and non-public schools alike.[24] He further reasoned that it was

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on the objective criteria the state set for qualification—but from which he was disabled based on his being a theology major. We believe that Washington's interest in this case is less than compelling.

Id.

19. Widmar v. Vincent, 454 U.S. 263 (1981) (ruling that Missouri's interest in complying with the establishment clause in its own constitution did not outweigh free speech interests protected by the First Amendment).

20. Zelman v. Simmons-Harris, 536 U.S. 639 (2002) (upholding Ohio's school voucher program).

21. "This Constitution, and the Laws of the United States which shall be made in pursuance thereof . . . shall be the Supreme Law of the Land; and the judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST. art. VI.

22. Justice Marshall was joined by Chief Justice Burger, Justices Brennan, White, Blackmun, Powell, Rehnquist, Stevens, and, in part, O'Connor.

23. Witters v. Washington Dep't of Servs. for the Blind, 474 U.S. 481, 484-85 (1986) (citing Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971) (establishing a three-part test for determining the constitutionality of state aid to religious institutions, requiring that (1) it has a secular legislative purpose, (2) its principal and primary effect neither inhibits nor advances religion, (3) it does not foster excessive entanglement between church and state)).

24. *Id.* at 487-88. The final point was a response to a prior ruling in which the Court found that the aid program in question was tailored for the specific purpose of benefiting non-public and, in particular, religious schools. Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756 (1973).

unlikely that a significant portion of the monies expended under the program in question would end up at religious schools.[25]

Though relatively brief in length, the *Witters II* decision sprouted three concurring opinions, filed respectively by Justices White, Powell, and O'Connor. Justice Powell's concurrence is especially noteworthy. Because Justice Powell had been the author of the more separationist *Nyquist* ruling that had helped anchor a decade of First Amendment jurisprudence, his opinion signaled a change of thinking on the High Court; co-signed by Chief Justice Burger and Justice Rehnquist, it laid the foundation for nearly two decades of First Amendment jurisprudence that would eventually follow.[26] Justice Powell focused his concurring opinion on the prior *Mueller* ruling, and protested that the Court had omitted an analysis of *Mueller* in developing a rationale for *Witters*.[27] *Mueller* approved a tax deduction in Minnesota that could be applied to a variety of education-related expenses, including tuition at religious schools. Drafted by the future Chief Justice, the *Mueller* ruling was based on two criteria that would later serve as signposts in the Rehnquist Court's thinking on aid to religious schools—*neutrality*[28] in the allocation of public benefits, and

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25. *Witters,* 474 U.S. at 488. This point was also made in response to prior rulings in which the aid struck down was directed specifically to non-public and sectarian institutions. *See* Sloan v. Lemon, 413 U.S. 825 (1973); Meek v. Pittenger, 421 U.S. 349 (1975). The issue of "substantiality" would later be introduced by Justices O'Connor and Souter as a significant factor in reviewing aid cases. *See* Joseph P. Viteritti, *Reading* Zelman*: the Triumph of Pluralism and its Effects on Liberty, Equality and Choice,"* 76 S. CAL. L. REV. 1105, 1116-17, 1136-39 (2003) [hereinafter Viteritti, *Reading Zelman*].

26. For a more detailed analysis of the evolution of First Amendment jurisprudence, see Viteritti, *Reading Zelman*, *supra* note 24, at 1119-41.

27. *Witters*, 474 U.S. at 490 (citing Mueller v. Allen, 463 U.S. 388 (1983)).

28. It is noteworthy that the Supreme Court had previously required the equal treatment of religious groups in *Widmar v. Vincent*, 454 U.S. 263 (1981), which held that a public university could not exclude a group from using its facilities for religious worship or teaching while permitting other groups to use the facilities without violating free speech rights under the First Amendment. The "limited open forum" doctrine was endorsed at the secondary school level in *Board of Education v. Mergens*, 496 U.S. 226 (1990), which upheld the Equal Access Act of 1984, 20 U.S.C.S. §§ 4071 *et seq.* (2003). The Equal Access Act makes it unlawful for:

> [A]ny public secondary school which receives Federal financial assistance and which has a limited open forum to deny equal access or a fair opportunity to, or discriminate against, any students who wish to conduct a meeting within that limited open forum on the basis of the religious, political, philosophical, or other content of the speech at such meetings.

20 U.S.C. § 4071(a) (2003). *See* Rosemary C. Salomone, *From* Widmar *To* Mergens: *The Winding Road of First Amendment Analysis*, 18 HASTINGS CONST. L.Q. 295 (1991) (tracing the evolution of case law). Together *Widmar* and *Mergens* grounded a significant body of case law requiring that religious groups be given equal access to public educational facilities. *See* Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S.

student or parental *choice* (and implicitly the indirect nature of aid to religious institutions). As if anticipating what was to come, Justice Powell carefully reiterated these identifying points.[29] Citing *Mueller*, Justice Powell also emphasized that the proportion of aid ending up at religious institutions had no bearing on the legality of the aid so long as neutrality and choice were present.[30]

In 1993, the Supreme Court determined in *Zobrest* that it was permissible for a student at a religious high school to use the services of a sign-language instructor made available under the auspices of the Individuals With Disabilities Education Act (IDEA).[31] In this case the Ninth Circuit affirmed a district court ruling, finding that the use of public funds by a student at a religious school served to advance religion, thereby violating the Establishment Clause of the First Amendment.[32] With Chief Justice Rehnquist writing for the majority, the Court reversed the Ninth Circuit, holding:

> That same reasoning [used in *Mueller* and *Witters*] applies with equal force here. The service in this case is part of a general government program that distributes benefits neutrally to any child qualifying as "disabled" under the IDEA, without regard to the "sectarian-nonsectarian, or public-nonpublic nature" of the school the child attends. By according parents freedom to select a school of their choice, the statute ensures that a government-paid interpreter will be present in a sectarian school only as a result of

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384 (1993) (involving a church's effort to show a film with a religious viewpoint at a public school); Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819 (1995) (involving the use of student activities fees for a publication with a religious message); Good News Club v. Milford Cent. Sch. 533 U.S. 98 (involving after-school program with religious content).

29. *See Witters*, 474 U.S. at 490-91.

> [T]he central question in this case is whether Washington's provision of aid to handicapped students has the "principal and primary effect" of advancing religion. *Mueller* makes the answer clear: state programs that are wholly neutral in offering educational assistance to a class defined without reference to religion do not violate the second part of the *Lemon v. Kurtzman* test because any aid to religion results from the private choices of individual beneficiaries.

Id. (citations omitted). *See also* Walz v. Tax Comm'n, 397 U.S. 664 (1970) (approving tax exemptions for religious institutions on an equal par with other nonprofit and charitable institutions).

30. Noting that 90% of the aid at stake in *Mueller* flowed to religious schools, Justice Powell wrote, "Nowhere in *Mueller* did we analyze the effect of Minnesota's tax deduction on the parents who were parties to the case; rather, we looked to the nature and consequences of the program *viewed as a whole*." *Witters*, 474 U.S. at 492. Although "substantiality" of the aid involved would be raised by Justices O'Connor and Souter as a pertinent factor in subsequent cases, it was not dispositive in *Zelman*. *See* Viteritti, *Reading Zelman*, *supra* note 24, at 1116-17, 1137-39.

31. Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1 (1993).

32. Zobrest v. Catalina Foothills Sch. Dist., 963 F.2d 1190, 1194-95 (9th Cir. 1992).

the private decisions of individual parents.[33]

The principles of neutrality and choice underscored in *Mueller*, *Witters*, and *Zobrest* were applied in subsequent cases, where the Rehnquist Court similarly upheld the appropriation of public funds and services to students at religious schools.[34] In *Agostini v. Felton*, the Court overturned long-standing precedents to allow public school teachers to administer federally-supported remedial instruction to poor students at religious schools.[35] In *Mitchell v. Helms*, the Court again overturned established precedents when it approved assistance to religious schools in the form of computers and other instructional materials.[36] Although the *Rosenberger*[37] decision was primarily adjudicated as an issue of viewpoint discrimination against a student group at the University of Virginia that circulated a publication with a religious message, the Court also relied upon *Mueller* and *Witters* as precedents to approve the funding made available to the group on the basis of neutrality.[38] But the most significant funding ruling to date is *Zelman*, upholding Ohio's school voucher program that appropriated funds to disadvantaged children in the Cleveland school district for tuition at private and religious schools.[39] *Zelman* dealt with the funding question head-on, more directly than any other case. Again writing for the Court, and citing *Mueller*, *Witters*, and *Zobrest* as the guiding precedents, Chief Justice Rehnquist recalled:

> Three times we have confronted Establishment Clause challenges to neutral government programs that provide aid directly to a broad class of individuals, who, in turn, direct the aid to religious schools or institutions of their own choosing. Three times we have rejected such challenges.[40]

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33. *Zobrest*, 509 U.S. at 10.

34. *See, e.g.*, Bd. of Educ. v. Grumet, 512 U.S. 687 (1994) (striking down a statute creating a school district and the consequential flow of public funding designed to serve a specific religious community).

35. 521 U.S. 203, 208-09 (1997) (overruling Aguilar v. Felton, 473 U.S. 402 (1985), and, in part, Sch. Dist. v. Ball, 473 U.S. 373 (1985)).

36. 530 U.S. 793, 808 (2000) (overruling *Meek v. Pittenger*, 421 U.S. 349 (1975), and *Wolman v. Walter*, 433 U.S. 229 (1977)).

37. Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819 (1995). *Rosenberger* relied primarily on *Lamb's Chapel v. Center Moriches Union Free School Dist*rict, 508 U.S. 384 (1993), and to a lesser extent on *Board of Education v. Mergens*, 496 U.S. 226 (1990), and *Widmar v. Vincent*, 454 U.S. 263 (1981), as precedent. *Id.*

38. *Rosenberger*, 515 U.S. at 839-40.

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

40. *Id.* at 649. He concluded:

In sum, the Ohio program is entirely neutral with respect to religion. It provides

B. The Limits of Federalism

At this point in our discussion it is fairly evident that the standards of church-state separation set by the State of Washington and the United States Supreme Court are inconsistent. The constitutional question is whether they are incompatible. This goes to the heart of what it means to have a "supreme law of the land," and the extent to which the states—more specifically, their constitution drafters, legislators, and judges—can work outside the boundaries of federal law. Ordinarily, the response to that question is rather straightforward; the national government's supremacy over the states, as well as the federal judiciary's authority to review state actions for their compatibility with federal law, has been settled since the Marshall Court.[41] States, however, reserve the power to write their own laws so long as they do not contradict federal law or rights protected under the United States Constitution.[42] States may also expand rights protected under the federal Constitution.[43]

The latter practice became more common when the Burger Court started to retreat from the civil rights agenda of the Warren Court and rights activists attempted to fill a perceived void in legal protections by urging a more aggressive local role under the auspices of the state constitutions.[44] The pattern was particularly notable in the area of criminal law.[45] It was both supported and encouraged by members of

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> benefits directly to a wide spectrum of individuals, defined only by financial need and residence in a particular school district. It permits such individuals to exercise genuine choice among options public and private, secular and religious. . . . In keeping with an unbroken line of decisions rejecting challenges to similar programs, we hold that the program does not offend the Establishment Clause.

Id. at 662-63.

41. *See, e.g.*, McCulloch v. Maryland, 17 U.S. 316 (1819); Cohens v. Virginia, 19 U.S. 264 (1821); Gibbons v. Ogden, 22 U.S. 1 (1824). *See also* Martin v. Hunter's Lessee, 14 U.S. 304 (1816) (upholding the Judiciary Act of 1789 and granting the Supreme Court appellate jurisdiction over state court decisions, a decision from which Chief Justice Marshall recused himself). For an analysis of Marshall's role in shaping the Constitution, see JEAN EDWARD SMITH, JOHN MARSHALL: DEFINER OF A NATION (1996). For commentaries on specific cases, see JOHN MARSHALL'S DEFENSE OF *MCCULLOCH V. MARYLAND* (Gerald Gunther ed., 1969); MAURICE G. BAXTER, THE STEAMBOAT MONOPOLY: *GIBBONS V. OGDEN*, 1824 (1972).

42. *See* Michigan v. Long, 463 U.S. 1032, 1040-41 (1983).

43. Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74, 81 (1980).

44. *See* Robert F. Williams, *Equality Guarantees in State Constitutional Law*, 63 TEX. L. REV. 1195 (1985) (commenting on the changing state role); G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS 161-70 (1998) (discussing the so-called "new judicial federalism").

45. *See* Shirley S. Abrahamson, *Criminal Law and State Constitutions: The Emergence of State Constitutional Law*, 63 TEX. L. REV. 1141 (1985) (discussing the trend).

the Burger Court, who had once stood with the majority forged by Chief Justice Warren and who wanted to preserve the latter's legacy.[46] Many professionals in law enforcement, however, saw the judicial activism by the states as a mechanism to flout the Constitution, and there was significant public reaction when state courts tried to implement unpopular policies like school busing after the federal courts had begun to temper their enthusiasm for student integration as a way to promote educational opportunity.[47] There was also a touch of irony in looking to the states to rescue rights identified with the Warren Court, since it was egregious acts by states in the form of racial discrimination, segregation, and voting irregularities that brought intervention by the federal courts from the start.[48] Some thirty years after the call for a "new judicial federalism" was first heard at the state level, it safely can be said now that the practice of using state constitutions to expand federally defined rights is increasingly accepted in the legal profession.[49] Yet what that means is not always clear, and it can be difficult to reconcile federal and state standards that might be inconsistent or incompatible.[50] The problem is especially perplexing with regard to the religion clauses of the First Amendment.[51]

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46. Justice Brennan was probably the most outspoken member of the court on this issue. *See* William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977); William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535 (1986). Justice Stevens has also encouraged the states to exercise independent criteria of judicial review. *See* Ronald K.L. Collins, *Justice Stevens Becomes Advocate of States' Role in the High Court*, NAT'L. L.J., August 27, 1984, at 20.

47. *See* Robert F. Williams, *In the Supreme Court's Shadow: Legitimacy of State Rejection of Supreme Court Reasoning and Result*, 35 S.C. L. REV. 353, 382 n.147 (1984) (questioning the wisdom of independent standards of review at the state level).

48. For a thoughtful and balanced review of the Warren Court's activism, see LUCAS A. POWE, JR., THE WARREN COURT AND AMERICAN POLITICS (2000), which explores the close connection between constitutional interpretation and political advocacy. For a more critical view of the Court's social activism, see DONALD L. HOROWITZ, THE COURTS AND SOCIAL POLICY (1977).

49. Robert Williams describes three, possibly four, distinct phases in history of the new judicial federalism, which he defines as discovery, backlash, acceptance, and an emerging dialogue. Robert F. Williams, *Introduction: The Third Stage of the New Judicial Federalism* 59 N.Y.U. ANN. SURV. AM. L. 211, 211-25 (2003).

50. *See* Lawrence Friedman, *The Constitutional Value of Dialogue and the New Judicial Federalism*, 28 HASTINGS CONST. L.Q. 93 (2000); Paul W. Kahn, *Interpretation and Authority in State Constitutionalism*, 106 HARV. L. REV. 1147 (1993) (highlighting the risks incurred when states adopt an independent posture apart from any consideration of federal standards or law).

51. *See* Joseph P. Viteritti, *Choosing Equality: Religious Freedom and Educational Opportunity Under Constitutional Federalism*, 15 YALE L. & POL'Y REV. 113, 142-60,

In fact, the idea of expanding religious rights by imposing stricter rules of church-state separation can seem paradoxical to religious observers. As the Rehnquist Court adopts a more sympathetic posture on the free exercise of religion, an attempt by a state court to impose a more restrictive standard of separation can impinge upon the very rights that the High Court intends to protect. The *Davey* litigation is a case in point. In her dissenting opinion, Judge McKeown insisted that the State of Washington's "vision of religious freedom" is one that is "completely free of governmental interference."[52] What exactly does that mean? For Joshua Davey, who qualified for a state scholarship, it would mean that his professional aspirations to become a minister would be grounds for treating him differently than if he had chosen to become a lawyer or a businessman. As the Ninth Circuit ruled, that differential response from a government agency violates the neutrality principal espoused by the Supreme Court.[53]

When the federal judiciary was in the process of undergoing a transition from the more secular orientation of the Burger Court to the more accommodationist perspective of the Rehnquist Court, the pertinent legal question was whether a point exists at which a more restrictive reading of the Establishment Clause infringes on rights protected by the Free Exercise Clause. Now that the Rehnquist Court seems to have actually moved towards greater accommodation with the adoption of the neutrality standard,[54] the stakes of the legal debate have changed to a more focused concern about federalism and its application to the religion clauses. So the constitutional question must be framed to ask: Is there an area of state discretion between the Establishment and Free Exercise Clauses of the First Amendment that allows state judges to make judgments concerning the permissibility of funding based on state laws or constitutions? If so, how wide a field of discretion is reasonable? At what point does the exercise of state discretion on the basis of local standards render First Amendment protections, as defined by the Supreme Court, meaningless? Where and how does one draw the line? One place to begin such an inquiry, as Judge McKeown recommends, is to examine the original intent of the state constitutional provision or law in question. Because Washington's state constitutional standard is not

188-92 (1996) (discussing the federalism question as applied to the religion clauses).

52. Davey v. Locke, 299 F.3d 748, 761 (9th Cir. 2002) (McKeown, J., dissenting).

53. *Id.* at 760.

54. *See supra* Part I.

atypical, such an investigation is instructive in a more general sense.

II. WASHINGTON'S VISION AS NATIONAL STANDARD

One cannot appreciate the motivations behind the writing of the Washington Constitution without considering a proposition that was put before the United States Congress in 1875 that would have enacted a constitutional amendment prohibiting public aid to religious schools. The idea was first put forward by President Ulysses S. Grant, who had pledged to "[e]ncourage free schools, and resolve that not one dollar, appropriated for their support, shall be appropriated to the support of any sectarian schools."[55] Grant, a Republican, was responding to a long brewing national debate over government funding of Catholic schools. Since the mid-nineteenth century, Catholic leaders in American cities had been engaged in a brutal battle with the Republican establishment over the assignment of Protestant Bibles, hymns, and prayers in the public schools.[56] As Irish immigration swelled the ranks of the Democratic Party, Catholic protests became more formidable and the growing activism of the recent arrivals threatened the political control that the Republican old guard had enjoyed over urban centers. Between 1869 and 1875, the local school boards in Cincinnati, Chicago, New York, Buffalo, and Rochester voted to prohibit Bible-reading and religious exercises in the public schools.[57] Demands to do the same were also being heard in Michigan and a number of other northern states.[58] In response to the growing "Catholic menace" that was gaining a political foothold in cities, many Protestant churches joined with newly formed nativist groups in a dual campaign to preserve religion (Protestantism) in the public schools and deny government support of sectarian (Catholic)

55. Steven K. Green, *The Blaine Amendment Reconsidered,* 36 AM. J. LEGAL HIST. 38, 47 (1992).

56. The most comprehensive account of these conflicts appears in LLOYD P. JORGENSON, THE STATE AND THE NON-PUBLIC SCHOOL, 1825-1925, 20-158 (1987). For accounts of events in particular cities, see MICHAEL FELDBERG, THE TURBULENT ERA: RIOT AND DISORDER IN JACKSONIAN AMERICA 9-32 (1980) (which discusses the Bible protests in Philadelphia); DIANE RAVITCH, THE GREAT SCHOOL WARS: NEW YORK CITY 1805-1973, at 27-76 (1974); JAMES W. SANDERS, THE EDUCATION OF AN URBAN MINORITY: CATHOLICS IN CHICAGO, 1833-1965, at 21-23, 33 (1977); Vincent P. Lannie & Bernard C. Diethorn, *For the Honor and Glory of God: The Philadelphia Bible Riots of 1840,* 8 HIST. EDUC. Q. 44 (1968).

57. Green, *supra* note 54, at 46-47.

58. *Id.*

institutions.[59]

President Grant's message would cement the alliance between the Republican Party and the anti-Catholic wing of the public school lobby.[60] His proposal for a constitutional amendment was taken up and sponsored by Congressman James G. Blaine of Maine.[61] Blaine, who was fully aware of the political demagoguery behind the proposal, advanced his amendment as a prelude to his campaign for the Republican nomination to succeed Grant in the White House, which was built around his (and the party's) opposition to "Rum, Romanism, and Rebellion."[62] During the course of congressional debate, Representative S.S. Cox criticized "a sinister sentiment of religious bigotry" among the bill's supporters, while Representative Henry W. Blaire, a Blaine ally, denounced Catholic leaders for their attempt to undermine the common school movement.[63] Another supporter, after urging his colleagues in the Senate to resist Catholicism, conceded that the amendment did not prohibit the teaching of general religious principles in the public schools, but only the "particular tenets or creed of some denomination."[64]

Beyond its transparent political objectives, Blaine's amendment

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59. For historical accounts, see RAY ALLEN BILLINGTON, THE PROTESTANT CRUSADE 1800-1860: A STUDY OF THE ORIGINS OF AMERICAN NATIVISM (1938); JOHN HIGHAM, STRANGERS IN THE LAND: PATTERNS OF AMERICAN NATIVISM, 1860-1925 (1963).

60. *See* Marie Carolyn Klinkhamer, *The Blaine Amendment of 1875: Private Motives for Political Action*, 42 CATH. HIST. REV. 15 (1957) (analyzing the role of nativism and anti-Catholic sentiment in the debate over a constitutional amendment).

61. Blaine's proposed amendment was worded 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.

JORGENSON, *supra* note 55, at 138-39.

62. KIRK PORTER & DONALD JOHNSON, NATIONAL PARTY PLATFORMS 1840-1964, at 53-55 (1966). *See generally* JORGENSON, *supra* note 55, at 138-41; Green, *supra* note 54; Klinkhamer, *supra* note 58; Joseph P. Viteritti, *Blaine's Wake: School Choice, the First Amendment, and State Constitutional Law*, 21 HARV. J.L. & PUB POL'Y 657, 665-72 (1998) [hereinafter Viteritti, *Blaine's Wake*] (describing the demagoguery behind Blaine's campaign). For an excellent account of the congressional debate over the Blaine Amendment, see Mark Edward DeForrest, *An Overview and Evaluation of State Blaine Amendments: Origins, Scope, and First Amendment Concerns*, 26 HARV. J.L. & PUB. POL'Y 551, 565-73 (2003).

63. Robert F. Utter & Edward J. Larson, *Church and State on the Frontier: The History of the Establishment Clauses in the Washington State Constitution*, 15 HASTINGS CONST. L.Q. 451, 465 (1988).

64. DeForrest, *supra* note 60, at 571.

betrayed a widely held understanding at the time that the First Amendment did not prohibit aid to religious schools. Blaine himself believed that his amendment would serve to correct that "constitutional defect."[65] Although Blaine's proposal garnered wide support in Congress, it fell four votes short of the two-thirds majority needed in the Senate to pass a constitutional amendment.[66] But it was not without consequence.

Blaine's flagrant attempt to exploit religious bigotry as a wedge to change the meaning of the Constitution galvanized support for a larger political movement. In subsequent years, Congress incorporated Blaine-like provisions in the enabling legislation that would authorize new territories to seek statehood. Thus, Congress mandated the inclusion of prohibitions against the funding of religious institutions as a condition for admission to the Union.[67] These prerequisites were not perceived locally as being especially onerous on the territories. Because sentiment against such funding had grown so ubiquitous, there was as much local support for prohibition as existed in Washington, D.C.[68] Congress, after all, was a representative body, reflecting the collectivity of local passions. The State of Washington was just one case in point. By 1876 fifteen states had passed legislation barring the use of public funds at religious schools; by 1890 twenty-nine states had incorporated similar

65. F. William O'Brien, *The States and "No Establishment": Proposed Amendments to the Constitution Since 1798*, 4 WASHBURN L.J. 183, 188 (1965) (quoting from Congressman Blaine's open letter, printed in the *New York Times*, Nov. 29, 1875, at 2). Since the religion clauses had not yet been incorporated by the Fourteenth Amendment to apply to the states, it was generally assumed that that states were free to define religious freedom as they saw fit. *See* Barron v. Baltimore, 32 U.S. (7 Pet.) 243 (1833); Permoli v. Municipality No. 1, 44 U.S. (3 How.) 589 (1845) (holding that the religion clauses of the First Amendment do not apply to the states). But, of course, the question of federalism is somewhat moot, because it was also largely perceived at the time that the Establishment Clause did not prohibit the federal government from giving aid to public schools either. *See* Viteritti, *Blaine's Wake*, *supra* note 60, at 661-66 (explaining that the Establishment Clause had not yet been applied to prohibit federal funding of religious institutions); Alfred Meyer, *The Blaine Amendment and the Bill of Rights*, 64 HARV. L. REV. 939 (1951) (discussing the federalism issue as it pertains to the Blaine Amendment).

66. The vote to support the amendment was 180 to 7 in the House of Representatives and 28 to 16 (27 members not voting) in the Senate. Meyer, *supra* note 63, at 942, 944 n.25.

67. The practice was not limited to the territories of the Northwest. *See* TOM WILEY, PUBLIC SCHOOL EDUCATION IN NEW MEXICO 27-31 (1965).

68. *See* David Tyack, *The Kingdom of God and the Common School: Protestant Ministers and the Educational Awakening in the West*, 36 HARV. EDUC. REV. 447 (1966); David B. Tyack, *The Perils of Pluralism: The Background of the Pierce Case*, 74 AM. HIST. REV. 74 (1968) (tracing the historical connection between the Protestant clergy, nativism, and the common school movement in the West).

prohibitions into their constitutions.[69]

A. The Washington Constitution

Between 1881 and 1888 Senator Henry Blair of New Hampshire unsuccessfully introduced five bills in Congress that were designed to aid the states in the development of common schools. Like Congressman Blaine, his former ally in the House of Representatives, Blair's goal was to propagate a system of public schools cultivated around a "non-sectarian" Protestant ethos, while prohibiting aid to religious schools.[70] The bill Blair put forward in 1888 actually included a Blaine-like constitutional amendment. Following the successive defeats of his legislative packages, Blair publicly blamed the Jesuits and denounced them as the "Black Legion," the "enemy of this country," intent on taking control and "destroying the public school system."[71] By the end of the decade, Blaine himself had run for the presidency three times, and was actually the Republican party's standard bearer in 1884, only to be defeated by Grover Cleveland.[72]

In 1889 Congress passed enabling legislation that authorized the territories of North Dakota, South Dakota, Montana, and Washington to draft their own constitutions and seek statehood. The legislation included a provision requiring each state to establish and maintain a system of public schools that was "free from sectarian control."[73] Among the ardent supporters of the legislation was Senator Blair, who remarked about the "great importance" of the provision and argued before Congress:

> [The] conference committee [has] embodied in this great enabling act . . . the very essence of the provision in the constitutional amendment which I have just read, [the Blaine Amendment, as

69. *See* Green, *supra* note 54, at 43. Although many states adopted such statutory provisions by mid-century, during the 1870s constitutional amendments were enacted in Colorado, Illinois, Minnesota, Missouri, Nebraska, New Jersey, Pennsylvania, and Texas. *See* JORGENSON, *supra* note 55, at 114. For an analysis of the development of state religion clauses, see CHESTER JAMES ANTIEAU ET AL., RELIGION UNDER THE STATE CONSTITUTIONS (1965).

70. *See* Frank J. Conklin & James M. Vaché, *The Establishment Clause and the Free Exercise Clause of the Washington Constitution—A Proposal to the Supreme Court*, 8 U. PUGET SOUND L. REV. 411, 436-42 (1985); Utter & Larson, *supra* note 61, at 464-67.

71. JORGENSON, *supra* note 55, at 143.

72. Blaine tried again in 1892 but failed to secure the Republican nomination. *See* GAIL HAMILTON, BIOGRAPHY OF JAMES G. BLAINE 706 (1895).

73. Act of Feb. 22, 1889, Pub. L. No. 50-180, 25 Stat. 677 (1889).

> modified by the Senate] and this feature I most highly commend and I shall look for it in the struggles of the future.[74]

These federal requirements were received well at Washington's state constitutional convention, which was controlled by the Republicans.[75] The territorial delegation from Washington had strongly supported Blaine's candidacy for President at the Republican National Conventions of 1876, 1880, and 1884, as did the state delegation in 1892. The territorial delegation also endorsed Blaine's well-popularized views on religion and education.[76] In fact, at one point during Washington's constitutional convention, the delegates actually debated whether religious institutions should be excluded from the property tax exemption that might be granted to other charitable institutions.[77] By ultimately voting to leave the question to the state legislature, the gathered assembly demonstrated that it was not uniformly anti-religious but rather was driven by a narrower agenda.[78] Drawing an analogy to anti-Catholic motives that had animated the discussion in Congress over the Blaine Amendment a quarter-century earlier, one delegate in Washington pointed out: "If it were not for a certain church organization, very few gentlemen would want to tax church property."[79] It thus comes as no surprise that the constitution Washington adopted in 1889 contains language similar to that which Congressman Blaine tried to insert into the federal Constitution. This event began a long tradition of separation in Washington that lacked any legal mooring in the First Amendment, and in fact was designed to circumvent the First Amendment with a certain spirit of contempt bordering on defiance. Several cases illustrate this approach.

In 1949 the Washington Supreme Court struck down a

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74. 20 CONG. REC. 2101 (1889), *quoted in* Conklin & Vaché, *supra* note 68, at 439-40.

75. Among the delegates were 43 Republicans, 29 Democrats, 2 Labor Party members, and 2 independents. Utter & Larson, *supra* note 61, at 468 n.81 (citing W. Airey, A History of the Constitution and Government of Washington Territory 441-42 (1945) (unpublished thesis, on file with the University of Washington Library)).

76. Utter & Larson, *supra* note 61, at 468-69; *see also id.* at 467-77 (describing deliberations at the state constitutional convention).

77. Conklin & Vaché, *supra* note 68, at 442.

78. Utter & Larson, *supra* note 61, at 474-75. The vote was 42 to 23.

79. *Id.* at 474 (quoting a statement by Delegate S.G. Cosgrove as cited in the *Tacoma Daily News*, Aug. 7, 1889, at 1); *see also* THE JOURNAL OF THE WASHINGTON STATE CONSTITUTIONAL CONVENTION 1889, at 656-57 (Beverly Rosenow ed., 1962) (summarizing Delegate Cosgrove's comments on exempting church property from taxation).

transportation program for school children that included students at public and nonsectarian schools as well as those who attended parochial schools.[80] Finding that the inclusion of the latter group violated a state constitutional ban against aid to religious schools, the court dismissed the fact that the United States Supreme Court had just approved a similar program in Pennsylvania two years earlier.[81] Instead, the Washington court, addressing the differences between federal and state requirements, insisted that:

> Although the decisions of the United States Supreme Court are entitled to the highest consideration as they bear on related questions before the court, we must, in light of the clear provisions of our state constitution and our decisions thereunder, respectfully disagree with those portions of the *Everson* majority opinion which might be construed, in the abstract, as stating that transportation, furnished at public expense, to children attending religious schools, is not *in support* of such schools.[82]

In 1973 the Washington Supreme Court struck down a voucher program that allowed low-income families to send their children to schools of their choice because the program permitted the participation of religious schools.[83] As in *Visser,* the court in *Weiss v. Bruno* failed to give serious consideration to the effect that its stance would have on students attending religious schools, or to concede that such an effect might infringe on their religious rights guaranteed under the First Amendment. For example, the court stated: "The question is not whether a student may attend a religious school, but whether the state may subsidize that attendance. No element of coercion has been suggested by respondents, and the free exercise clause is not involved in these cases."[84] The *Weiss* decision was not surprising following *Visser*, and its understanding of religious rights was arguably consistent with interpretations of the First Amendment coming down from the United States Supreme Court at the time.[85] In

80. Visser v. Nooksack Valley Sch. Dist., 207 P.2d 198 (Wash. 1949).

81. *Id.* at 205; Everson v. Bd. of Educ., 330 U.S. 1 (1947).

82. *Visser*, 207 P.2d at 204-05. The Washington Supreme Court had voided a similar program based on state constitutional standards in 1943, prior to the *Everson* ruling. *See* Mitchell v. Consol. Sch. Dist, 135 P.2d 79 (Wash. 1943).

83. Weiss v. Bruno, 509 P.2d 973 (Wash. 1973).

84. *Id.* at 978 n.2. *But cf.* Malyon v. Pierce County, 935 P.2d 1272 (Wash. 1997) (rejecting an Establishment Clause challenge to a chaplaincy program in the Sheriff's Department of Pierce County, which provided secular counseling and support services to employees and members of the community).

85. *See* Lemon v. Kurtzman, 403 U.S. 602 (1971) (setting a three-point test for review

light of *Mueller*,[86] *Witters*,[87] *Zobrest*,[88] and especially *Zelman*,[89] such harmony no longer exists between the federal and state standards.

In 1987 a group of students in Washington sued in federal court when their high school refused them permission to form a religious club.[90] The students claimed that local officials had violated the Equal Access Act,[91] as well as the students' federal constitutional rights of free speech, free exercise, free association, equal protection, and due process. These claims were denied by the District Court[92] and the Ninth Circuit,[93] both of which noted that the Washington Constitution bars religious organizations from meeting on the grounds of a public school. The U.S. Supreme Court vacated the lower court ruling and remanded the case for reconsideration in light of *Mergens*,[94] which had upheld the constitutionality of the Equal Access Act in 1990.[95] After the district court rejected the students' claims for a second time,[96] the Ninth Circuit reversed the decision.[97] The Ninth Circuit acknowledged that "[m]any states have establishment clauses that are more restrictive than the federal establishment clause."[98] It then ruled: "State constitutions can be more protective of individual rights than the federal Constitution. . . . However, states cannot abridge rights granted by federal law."[99]

It may appear that the *Garnett v. Renton School District* ruling established a clear and consistent line of reasoning on which the Ninth Circuit could decide the federalism question raised in *Davey* nearly a decade later. But such is not the case. In 1999 the Ninth Circuit upheld the enforcement of a state regulation in Oregon that

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as described *supra* note 22); Sloan v. Lemon, 413 U.S. 825, 830, 832 (1973) (applying the Lemon test to strike down a Pennsylvania program that provided a partial tuition reimbursement for children in religious as well as non-religious private schools).

86. Mueller v. Allen, 463 U.S. 388 (1983).

87. Witters v. Wash. Dep't of Servs. for the Blind, 474 U.S. 481 (1986). The Court did, however, recognize state prerogatives to set their own standards for review. *Id.* at 489.

88. Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1 (1993).

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

90. Garnett v. Renton Sch. Dist., 675 F. Supp. 1268 (W.D. Wash. 1987).

91. 20 U.S.C. § 4071(a) (2003).

92. *Garnett*, 675 F. Supp. at 1268.

93. Garnett v. Renton Sch. Dist., 865 F.2d 1121 (9th Cir. 1989), *amended and superseded by* 874 F.2d 608 (9th Cir. 1989).

94. Garnett v. Renton School District, 496 U.S. 914 (1990).

95. Bd. of Educ. v. Mergens, 496 U.S. 226 (1990).

96. Garnett v. Renton Sch. Dist., 772 F. Supp. 531 (W.D. Wash. 1991).

97. Garnett v. Renton Sch. Dist., 987 F.2d 641 (9th Cir. 1993).

98. *Id.* at 646.

99. *Id.*

barred students at religious schools from receiving publicly funded special education services.[100] While acknowledging that the regulation in question was not facially neutral, the appellate court, in recognition of the stricter standard of separation required by the Oregon Constitution, refused to apply strict scrutiny in reviewing the free exercise claim of the students involved.[101] Taken together, these cases not only illustrate a range of discord existing within a single circuit, but signal a larger sense of confusion that *Witters II* has planted nationwide about the application of federalism to religious freedom.

B. Relevant Litigation

American legal history abounds with examples in which activist state judiciaries have drawn on their own constitutions to define religious rights differently from the protections guaranteed in the First Amendment.[102] Many states have specifically rejected the "child benefit" concept, on which the federal courts have relied to distinguish between direct and indirect aid to religious institutions in determining legality.[103] The highest court in New York State rejected the "child benefit" concept in 1938, declaring it "utterly without substance."[104] Commenting on the validity of the concept, a Nebraska

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100. KDM *ex rel.* WJM v. Reedsport Sch. Dist., 196 F.3d 1046, 1050-51 (9th Cir. 1995).

101. *See id.* at 1054 (Kleinfeld, J., dissenting) (noting that "today's majority adopts [the proposition] that plaintiffs must show a 'substantial' or 'impermissible' burden for a Free Exercise challenge"). *But see supra* note 27 (citing *Widmar* and subsequent case law upholding federal constitutional standards against more restrictive state standards).

102. For detailed reviews of state constitutional standards and their application by the courts, see DeForrest, *supra* note 60, at 576-603; Toby J. Heytens, *School Choice and State Constitutions*, 86 VA. L. REV. 117, 118-23, 125-31 (2000); Frank R. Kemerer, *State Constitutions and School Vouchers*, 120 WEST'S EDUC. L. REP. 1, 20-39 (1997); G. Alan Tarr, *Church and State in the States*, 64 WASH. L. REV. 73, 76-80, 84-106 (1989); Note, *Beyond the Establishment Clause: Enforcing Separation of Church and State Through State Constitutional Provisions*, 71 VA. L. REV. 625, 631-53 (1985).

103. This concept was introduced in *Cochran v. Louisiana State Board. of Education*, 281 U.S. 370 (1930), which approved a textbook loan program in Louisiana that made benefits available to children in public, private (nonsectarian), and religious schools. The Supreme Court, construing the benefit of the program as going to the children rather than the schools, stated:

> The appropriations were made for the specific purpose of purchasing school books for the use of the school children of the state, free of cost to them. It was for their benefit and the resulting benefit to the state that the appropriations were made. . . . The schools, however, are not the beneficiaries of these appropriations. They obtain nothing from them, nor are they relieved of a single obligation, because of them. The school children and the state alone are the beneficiaries.

Id. at 374-75.

104. Judd v. Bd. of Educ., 15 N.E.2d 576, 582 (N.Y. 1938).

court described it as "a contention that ignores substance for form, reality for rhetoric. . . ."[105] The South Dakota Supreme Court, reflecting on the origins of its own constitution, declared that its drafters "obviously were not parroting the Establishment Clause."[106] In 1970 Michigan adopted a constitutional amendment prohibiting direct or indirect aid to both private (nonsectarian) and religious schools.[107] Likewise, in striking down a textbook loan program similar to the one upheld by the U.S. Supreme Court in *Allen*,[108] the California Supreme Court emphasized, "it is not the meaning of the First Amendment which is critical to our determination, but . . . the California Constitution."[109] To speak of religious freedom as an American entitlement is thus illusionary; rather, multiple standards of religious freedom operate throughout the states. Many (if not most) of these standards offer less protection for religious freedom than the standards espoused by the United States Supreme Court.

In the past five years, most litigation over state aid has been focused on programs that promote school choice either in the form of tuition vouchers or tax relief.[110] Virtually all of the litigation designed to defeat these programs was initiated in the state courts, underscoring a well-founded assumption on the part of legal strategists that they were more likely to succeed in state rather than federal courts. The outcomes of these contests, however, have been more mixed than school choice opponents had hoped. The state supreme courts of Wisconsin[111] and Ohio[112] have approved voucher programs designed to assist low-income children in Milwaukee and Cleveland,

105. Gaffney v. State Dep't of Educ., 220 N.W.2d 550, 556 (Neb. 1974); *see also* Sheldon Jackson Coll. v. Alaska, 599 P.2d 127 (Alaska 1979) (striking down indirect aid through college tuition grants).

106. McDonald v. School Bd., 246 N.W.2d. 93, 97 n.3 (1976).

107. MICH. CONST. art. VIII, § 2. This provision, adopted as a result of a popular referendum, was upheld by the Michigan Supreme Court. *See In re* Proposal C, 185 N.W.2d 9 (Mich. 1971).

108. Bd. of Educ. v. Allen, 392 U.S. 236 (1968).

109. Cal. Teachers Ass'n v. Riles, 632 P.2d. 953, 964 (Cal. 1981); *see also* Spears v. Honda, 449 P.2d. 130 (Haw. 1968) (striking down transportation subsidies).

110. *See generally* CLINT BOLICK, VOUCHER WARS: WAGING THE LEGAL BATTLE OVER SCHOOL CHOICE 67-201 (2003) (providing a detailed account of the litigation and legal strategies by an attorney who represented children participating in various school choice programs); JOSEPH P. VITERITTI, CHOOSING EQUALITY: SCHOOL CHOICE, THE CONSTITUTION, AND CIVIL SOCIETY 86-116 (1999) (providing an overview of choice programs involving private and religious schools).

111. Jackson v. Benson, 578 N.W.2d 602 (Wis. 1998), *cert. denied,* 525 U.S. 997 (1998).

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

respectively. These courts sustained the disputed laws on the basis of both state and federal constitutional considerations. Similarly, in 1999 the Arizona Supreme Court rejected a challenge to a state law that awarded tax credits to individuals who contribute scholarship aid to students at private and religious schools.[113] Explicitly dissociating itself from the history and intent of state adopted "Blaine amendments," the Arizona court acknowledged that it would be "hard pressed to divorce the amendment's language from the insidious discriminatory intent that prompted it."[114] The Illinois courts have subsequently approved a similar tax relief program in an examination of both federal and state questions.[115]

The long-standing tuition programs in Vermont and Maine, which until recently allowed students in towns without high schools to attend the public, private, or religious schools of their choice with public support, have also been challenged. In 1999 the Vermont Supreme Court ruled that allowing students to use such aid at parochial schools would violate the state constitution, even though it was permitted by the First Amendment.[116] That same year the Maine Supreme Court found that the First Amendment to the U.S. Constitution required it to disqualify religious institutions from participation in the program.[117] Neither Vermont nor Maine has a "Blaine amendment" in its constitution. Both have long histories of religious accommodation and, until recently, allowed religious schools to participate in their respective programs in a neutral fashion.[118] The litigation grew out of policy changes enacted by education officials in the two jurisdictions. Both the Vermont and Maine decisions are under appeal. The Maine appeal is proceeding on the strength of the *Zelman* ruling, which upheld the constitutionality of a similar program in Cleveland.[119] Parents with children at

113. Kotterman v. Killian, 972 P.2d 606 (Ariz. 1999), *cert. denied*, 528 U.S. 921 (1999).

114. *Id.* at 624.

115. *See* Toney v. Bower, 744 N.E.2d. 351 (Ill. App. 4th Dist. 2001); Griffith v. Bower, 747 N.E.2d. 423 (Ill. App. 5th Dist. 2001).

116. Chittenden Town Sch. Dist. v. Dep't of Educ., 738 A.2d. 539 (Vt. 1999).

117. Bagley v. Raymond Sch. Dep't, 728 A.2d 127 (Me. 1999). This ruling was sustained by a federal appellate court. Strout v. Albanese, 178 F.3d 57, 59 (1st Cir. 1999) (finding that Maine's policy of excluding religious schools does not violate the Free Exercise Clause).

118. *See* VITERITTI, *supra* note 108, at 176-78 (reviewing the history of the Vermont and Maine cases).

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

religious schools are also arguing—along the lines of *Davey*—that Maine's restrictive policy discriminates against their children on the basis of religion.[120] Likewise, aggrieved parents in Vermont are claiming that state policy violates their free exercise and equal protection rights guaranteed by the U.S. Constitution.[121]

Two remaining cases concern the school voucher programs in Florida and Colorado. Florida enacted a statewide choice program to provide private and parochial school alternatives for children who attended chronically failing public schools. In addition to challenging the program on the basis of the religion clauses in the federal and state constitutions, opponents claim that the diversion of government funds to nonpublic schools offends a state constitutional provision requiring a uniform and high quality education.[122] In 2000 a state appeals court found that the program under scrutiny was consistent with the goals of public education, and it remanded the case back to the trial court to consider the remaining issues.[123] In 2002, weeks after the U.S. Supreme Court decision in *Zelman*, the Florida appeals court nevertheless confirmed a lower court finding that the choice program violated the religion clause of the Florida Constitution.[124] While acknowledging that the *Zelman* decision had "resolved" the federal question on the basis of the indirect nature of the aid provided to religious schools,[125] the state court went on to reason that, "[t]o hold that this [mechanism of intervening private choice] avoids the [constitutional] prohibition of Article I, § 3 would be the functional equivalent of redacting the word 'indirectly' from this phrase of the constitution. . . . Such an interpretation would amount to a colossal triumph of form over substance."[126] This decision is now being appealed to the Florida Supreme Court.

The Colorado school voucher law of 2003 targets low-performing,

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120. *See* John Gehring, *Legal Battle Over School Vouchers Returns to Maine*, EDUC. WEEK, Sept. 25, 2002, at 17; Tess Nacelewicz, *Six Maine Families Sue Over Vouchers*, PORTLAND PRESS HERALD, Sept. 19, 2002, at 1A.

121. *See* Lisa Rathke, *Washington Group Takes School Choice to Federal Court*, ASSOCIATED PRESS STATE & LOCAL WIRE, Mar. 20, 2003.

122. FLA. CONST. art. IX, § 1.

123. Bush v. Holmes, 767 So. 2d 668 (Fla. 1st Dist. Ct. App. 2000).

124. The Florida Constitution states: "No revenue of the state or any political subdivision or agency thereof shall ever be taken from the public treasury directly or indirectly in aid of any church, sect, or religious denomination or in aid of any sectarian institution." FLA. CONST. art. I, § 3.

125. Holmes v. Bush, No. CV 99-3370, 2002 WL 1809079, at *1 (Fla. Cir. Ct. 2002).

126. *Id.* at *2.

disadvantaged students throughout the state. The program, which has the potential to encompass 20,000 students by the 2007-2008 school year, could become the largest school choice plan in the nation.[127] In a suit filed in the Denver County District Court, however, its detractors allege that the program runs afoul of a state constitutional restriction against aid to schools operated by religious organizations.[128] These restrictive provisions are directly traceable to the Blaine Amendment. Because the Colorado Territory had sided with the Union during the Civil War, President Grant was a strong proponent of the Enabling Act of 1875 that allowed Colorado to seek statehood and had helped arrange for his friend Edward McCook to become governor of the territory.[129] Republican delegates at the constitutional convention dominated Democrats by a margin of 24 to 15,[130] and the public school lobby had a strong role in defining the education agenda. Article IX, section 7 of the Colorado Constitution is almost a word-for-word replication of a resolution adopted at a meeting of public school administrators called by the Superintendent of Public Instruction in anticipation of the state constitutional convention held in 1875-1876.[131]

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127. Nancy Mitchell, *Voucher Program is Law*, ROCKY MTN. NEWS, Apr., 17, 2003, at 13A.

128. One provision states:

> Neither the general assembly, nor any county, city, town, township, school district or other public corporation, shall ever make any appropriation, or pay from any public fund or moneys whatever, anything in aid of any church or sectarian society, or for any sectarian purpose, or to help support or sustain any school, academy, seminary, college, university or other literary or scientific institution, controlled by any church or sectarian denomination whatsoever; nor shall any grant or donation of land, money or other personal property, ever be made by the state, or any such public corporation to any church, or for any sectarian purpose.

COLO. CONST. art IX, § 7. *See* Michael Fletcher, *Rights Coalition Files Suit Over Colo. Vouchers Law*, May 21, 2003, at A13.

129. *See* PERCY STANLEY FRITZ, COLORADO: THE CENTENNIAL STATE 245-67 (1941); *see also Historic Moment for School Choice; Opponents Must Rely on an Unsavory Amendment*, Editorial, ROCKY MTN. NEWS, April, 17, 2003, at 50A (relating the history behind the adoption of Colorado's Blaine Amendment).

130. FRITZ, *supra* note 127, at 245.

131. At a meeting of "superintendents, teachers, and friends of public schools" called in Denver by Horace Hale, Territorial Superintendent of Public Instruction, it was resolved that:

> Neither the General Assembly nor any county, city, town, township, school district, or other public corporation, shall ever make any appropriation, or pay from any public fund whatever, anything in aid of any church or any academy, seminary, college, university or other literary or scientific institution controlled by any church or sectarian denomination whatever; nor shall any grant or donation of land, money or other personal property ever be made by the State for

Two additional Blaine Amendment cases have been brought by the Becket Fund for Religious Liberty and are presently in litigation in the federal courts. One suit challenges a provision in the Massachusetts Constitution that prohibits aid to religious schools.[132] That provision was originally passed during the state constitutional convention of 1854-55 when the nativist Know-Nothing party controlled the legislature and adopted a number of measures designed to discriminate against immigrants, particularly Irish Catholics.[133] Moreover, in 1917-18 a state constitutional convention again modified the Massachusetts charter specifically to bar any citizen initiative petition that "relates to religion, religious practices, or religious institutions."[134] Tailored to solidify the original anti-aid provision, the latter measure specifically excludes questions related to religion from the ordinary process of constitutional amendment through popular referendum.

The second suit by the Becket Fund challenges an action by a school board in Hot Springs, South Dakota, that excludes children who attend religious schools from transportation services that are generally made available to primary and secondary school students.[135] Here the school board had acted on the strength of an advisory opinion written by the South Dakota Attorney General, who found that making bus service available to students at religious schools would violate the state constitution.[136] It should be recalled that the

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any church or for any sectarian purpose.

Harry M. Barrett, *Education in Colorado, in* COLORADO: SHORT STUDIES OF ITS PAST AND PRESENT 127-28 (Junius Henderson et al. eds., 1927).

132. Boyette v. Galvin, No. 98-CV-10377-GAO (D. Mass. filed Mar. 3, 1998). In 1987, the Massachusetts Supreme Judicial Court issued an advisory opinion on a proposed bill that would have provided tax deductions for parents of parochial school parents. Although the provision was similar to the Minnesota measure that the U.S. Supreme Court had upheld in *Mueller* in 1983, the Massachusetts court found that such aid was not allowed under its state constitution. Opinion of the Justices to the Senate, 514 N.E.2d. 353, 358 (Mass. 1987); *see also* Opinion of the Justices to the House of Representatives, 259 N.E.2d. 564 (Mass. 1970) (issuing a similar opinion on a proposed bill that would have granted $100 to every student in the commonwealth whether they attended public, private, or religious schools).

133. *See* MASS. CONST. art. XVIII (amended 1855). In 1854 the Know-Nothing party controlled the governorship, the entire Congressional delegation, the entire state senate, and all but three seats in the state House of representatives. JOHN R. MULKERN, THE KNOW-NOTHING PARTY IN MASSACHUSETTS 76 (1990); *see also* BILLINGTON, *supra* note 57, at 41-47; JORGENSON, *supra* note 55, at 85-98 (tracing the history of the Know-Nothings in Massachusetts).

134. MASS. CONST. art. XLVIII, § 2 (amended 1918).

135. Pucket v. Rounds, No. 03-CV-5033 (D.S.D. filed Aug. 25, 2003).

136. Op. S.D. Att'y Gen. No. 92-04 (July 9, 1992) (discussing S.D. CONST. art. VIII, § 16, and S.D. CONST. art. VI, § 3).

territory of South Dakota applied for statehood on the basis of the same enabling legislation that brought Washington into the Union. Therefore, the delegates to South Dakota's constitutional convention of 1889, who wrote the existing prohibitions against aid to religious schools, were guided by the same Blaine-like requirements.

III. DEFINING RELIGIOUS FREEDOM

Minimally, the outcome of the *Davey* case is likely to influence ongoing litigation in Vermont, Maine, Florida, Colorado, Massachusetts, and South Dakota;[137] but the potential effects of *Davey* are far greater. A recent survey completed by Clint Bolick, the chief litigator for the pro-voucher Institute for Justice, found that forty-seven states have clauses in their own constitutions that are explicitly more restrictive than the First Amendment on the issue of aid to religious institutions.[138] He estimated that thirty-seven of these states have "Blaine Amendments" dating back to the nineteenth century when anti-Catholic animosity was a key motivating factor behind bans on aid or support to religious schools. Twenty-nine state charters, Bolick found, have "compelled support" provisions that do not allow the state to use its taxing authority to support a religious institution. Some states have both "Blaine Amendments" and "compelled support" provisions. Similarly, Professors Ira Lupu and Robert Tuttle have found that thirty-seven state constitutions explicitly prohibit state funding of religious organizations, twenty-nine states explicitly prohibit state funding of religious schools, and ten states extend these restrictions to include both direct and indirect aid.[139]

Professors Lupu and Tuttle traced the history of these constitutional provisions to the ugly nineteenth century battles over aid to Catholic

137. Moreover, in August 2003 a Michigan woman sued when the state revoked her college scholarship after she declared that she was majoring in theology as part of a liberal arts curriculum that is not specifically designed to prepare people for the ministry. A federal District Court in Detroit has issued a preliminary ruling in her favor, holding the scholarship money in escrow pending a trial, which may await a ruling in the *Davey* case. *See* Adam Liptak, *Courts Weighing Rights of States to Curb Aid for Religion Majors*, N.Y. TIMES, Aug. 10, 2003, §1 (Late Edition), at 1.

138. Clint Bolick, School Choice: Sunshine Replaces the Cloud 32 (Oct. 17-18, 2002) (paper presented at the Kennedy School of Government, Harvard University Conference, "What's Next for School Vouchers?") (on file with author).

139. IRA C. LUPU & ROBERT W. TUTTLE, GOVERNMENT PARTNERSHIPS WITH FAITH-BASED SERVICE PROVIDERS: STATE OF THE LAW 37 (2002), *available at* http://www.religionandsocialpolicy.org/docs/legal/reports/12-4_2002_state_of_the_law.pdf.

schools.[140] In a separate article, Lupu and Tuttle assert that the hateful origins of state Blaine Amendments could be a crucial consideration when the federal courts assess their constitutionality.[141] They point to a 1976 ruling by the Supreme Court concerning civil service exams that suggested a showing of a racially discriminatory purpose would render an ostensibly neutral program unconstitutional.[142] They recall a 1985 decision striking down a facially neutral provision in the Alabama Constitution that disenfranchised individuals convicted of a felony because the provision was motivated by a desire to exclude African-Americans from the voting booth.[143] They also mention the Supreme Court's rejection in 1996 of Colorado's constitutional amendment aimed at preventing the passage of laws prohibiting discrimination against gays and lesbians because the amendment was deemed to be motivated by hostility towards homosexuals.[144] The relevance of these prior determinations to state Blaine Amendments is plainly clear. A plurality on the Court has already disavowed the "shameful pedigree" of measures designed to stop aid to "pervasively sectarian schools."[145] This historical observation could prove to be a significant factor (at least for the members of that plurality) in the *Davey* case.

This is not to say that all opposition to aid to religious schools and the children who attend them is motivated by bigotry; nor was it thus so during the last quarter of the nineteenth century. Nonetheless, history informs our understanding that the Blaine Amendment and its

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140. *Id.* at 36.

141. Ira C. Lupu & Robert W. Tuttle, Zelman*'s Future: Vouchers, Sectarian Providers, and the Next Round of Constitutional Battles,* 78 NOTRE DAME L. REV. 917, 967-68 (2003).

142. *Id.* at 968; Washington v. Davis, 426 U.S. 229 (1976).

143. LUPU & TUTTLE, *supra* note 140, at 968; Hunter v. Underwood, 471 U.S. 222, 233 (1985).

144. LUPU & TUTTLE, *supra* note 140, at 968; Romer v. Evans, 517 U.S. 620, 634 (1996); *cf.* Lawrence v. Texas, 123 S.Ct. 2472, 2482, 2484 (2003) (striking down Texas anti-sodomy law and mentioning the finding of "animosity" in *Romer*).

145. Mitchell v. Helms, 530 U.S. 793, 828 (2000). Writing for the plurality in *Mitchell*, Justice Thomas explained:

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

Id. Justice Thomas was joined by Chief Justice Rehnquist and Justices Scalia and Kennedy. *Id.* at 799.

state-derived progeny were written to circumscribe and undermine American constitutional principles designed to protect members of religious minorities, be they Roman Catholic immigrants arriving from Ireland at the height of the nativist movement, or young men pursuing a vocation in the ministry in the heyday of a secularist popular culture. What is at stake here is a choice between two distinct visions of religious freedom. One vision is premised on a secularist world view and requires complete separation of church and state; the other is premised on a more pluralistic/egalitarian world view and calls for neutrality.[146] Religious freedom is so fundamental to the American scheme of democracy that it cannot be defined one way in one state and another way elsewhere.

When *Witters II*[147] was decided in 1986, the Supreme Court was in the early stage of a major shift in thinking about the First Amendment. Notwithstanding the unanimity of the Court's outcome,[148] *Witters II* was a transitional ruling that affirmed the neutralist position articulated in *Mueller*[149] yet allowed states to define church-state relationships on their own terms. Prior to *Mueller*, the stakes of a more ardent federalism perpetrated by the state courts were more benign. Those states that preferred a more restrictive policy of church-state separation were operating according to standards shared by the United States Supreme Court. This agreement no longer exists. With *Mueller, Witters, Zobrest,*[150] and *Zelman,*[151] the Court has defined free exercise rights more generously. The states cannot take it upon themselves to abridge these rights. Under the present regime of First Amendment jurisprudence formulated by the Rehnquist Court, a more restrictive enforcement of church-state separation by the states abridges federally protected rights.

A. The Secular Court

At no time in the last fifty years can it be said that First Amendment jurisprudence proceeded on the basis of either a wholly

146. For a wider discussion comparing the two perspectives, see Viteritti, *Reading Zelman, supra* note 24, at 1119-20, 1157-68.

147. Witters v. Wash. Dep't of Servs. for the Blind, 474 U.S. 481 (1986).

148. Perhaps it was the Court's bifurcated thinking that allowed the compromise needed for unanimity to prevail.

149. Mueller v. Allen, 463 U.S. 388 (1983).

150. Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1 (1993).

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

secular or wholly neutralist paradigm.[152] Even the landmark *Everson* opinion[153] that grounded a generation of secularist case law was a jumble of mixed messages: In one breath it invoked the famous Jeffersonian metaphor envisioning a "wall of separation between church and state;"[154] in another it approved the provision of government-supported transportation services for children at religious schools on an equal par with children in public schools.[155] Despite the extraordinary power of its imagery, the Jeffersonian wall of division did not stand on solid legal grounding either at the threshold of the nineteenth century or in the middle of the twentieth. As legal historian Philip Hamburger has explained, opponents of aid to religious institutions did not formulate originalist arguments to suit their cause until after Blaine and others had failed at amending the Constitution.[156] Professor Hamburger speculates that Justice Black, the author of *Everson,* might have compromised his characteristically separationist leaning in order to defuse charges of anti-Catholicism dating back to his prior association with the Ku Klux Klan.[157] Whatever the motivation behind it, *Everson*, joined with *Lemon*[158] and *Nyquist,*[159] laid the groundwork for a generation of case law that was

152. For a more complete analysis of the case law, see Viteritti, *Reading Zelman, supra* note 24, at 1119-41.

153. Everson v. Bd. of Educ., 330 U.S. 1 (1947).

154. *Id.* at 16 (quoting Reynolds v. United States, 98 U.S. 145, 164 (1878)).

155. See id.

> New Jersey cannot consistently with the "establishment of religion" clause of the First Amendment contribute tax-raised funds to the support of an institution which teaches the tenets and faith of any church. On the other hand, other language in the amendment commands that New Jersey cannot hamper its citizens in the free exercise of their own religion. Consequently, it cannot exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any faith, *because of their faith, or lack of it,* from receiving the benefits of public welfare legislation.

Id.

156. PHILIP HAMBURGER, SEPARATION OF CHURCH AND STATE 335-59 (2002); *see also* John Jeffries, Jr. & James E. Ryan, *A Political History of the Establishment Clause*, 100 MICH. L. REV. 279 (2001) (explaining how judicial interpretation of the Constitution is influenced by politics).

157. HAMBURGER, *supra* note 155, at 422-34, 461-63; *see also* ROGER K. NEWMAN, HUGO BLACK: A BIOGRAPHY 71-121, 233-63 (2d ed. 1994) (describing Black's affiliation with the Klan and the controversy it caused when he was nominated to the Court); Michael W. McConnell, *Religious Freedom at a Crossroads, in* THE BILL OF RIGHTS IN THE MODERN STATE 115, 121-27 (Geoffrey R. Stone et al. eds., 1992) (describing Justice Black's anti-Catholic attitudes).

158. Lemon v. Kurtzman, 403 U.S. 602 (1971).

159. Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756 (1973).

less accommodating to religion than is the present Court. This body of law was very often inconsistent in its requirements, sowing the seeds of legal confusion in the states and the lower federal courts. By and large, these varied interpretations of the Constitution established standards for review that at times were both unreasonable and counterintuitive when seen as potential safeguards for religious freedom.

A year after *Everson,* Justice Black again wrote for the majority when the Court in *McCollum* invalidated a released-time program in which children received religious instruction on the premises of their public school.[160] Although the program was voluntary and paid for by private sources, Black found that the use of public school buildings violated the separation mandate he outlined in *Everson.*[161] He further reasoned, "[t]he State also affords sectarian groups an invaluable aid in that it helps to provide pupils for their religious classes through use of the State's compulsory public school machinery."[162] Notwithstanding its acceptance by generations of separationists, the reasoning is problematic. One could reasonably argue that because students are required by the state to attend school, the government has some sort of an obligation to accommodate the students' desire to practice their religion as they see fit with minimal inconvenience. But instead, eight members of the Supreme Court parleyed the state's authority to mandate compulsory education into an excuse for burdening the religious practices of students who complied with the mandate. There simply was not much heed paid to the needs of the students who wanted the religious training.

In a separate opinion, Justice Frankfurter asserted that the released-time program was divisive because it undermined the public school's function of instilling a common set of public values and because it accentuated feelings of separation between those students who participated in the program and those who did not.[163] Justice Frankfurter was claiming, in no uncertain terms, that a state-imposed uniformity in thinking took precedence over the religious preferences of students desiring religious instruction. Even a generous interpretation of the state's power to develop a common civic culture

160. Illinois *ex rel.* McCollum v. Bd. of Educ., 333 U.S. 203 (1948).
161. *Id.* at 212.
162. *Id.*
163. *Id.* at 216-17, 227-28 (Frankfurter, J., concurring).

through public education[164] does not carry an unlimited prerogative to mold the minds of children, and it certainly does not suspend the right of parents to shape the religious values of their own children.[165] Justice Frankfurter, however, seemed to disagree. Justice Frankfurter also presumed that the discomfort borne by students who chose not to participate in religious instruction was more worthy of judicial concern than was the inconvenience borne by students who might be forced to leave school for instruction they freely chose to take.[166] In this way, the *McCollum* ruling introduced a pattern of thinking on the Court that regularly invoked the Establishment Clause to protect the purported interests of the state in general, or religious non-observers in particular, against the claims of religious observers.[167] All this was done by the Court in the name of religious freedom.

The *Lemon* ruling would supposedly codify a set of criteria for reviewing aid cases, among them that a program "neither inhibits nor advances religion."[168] More often than not the Court, at least through the 1970's, seemed more determined to guarantee that government would not advance religion than to protect individuals from government actions that inhibit religion.[169] Again, even conceding

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164. *See* ROSEMARY C. SALOMONE, VISIONS OF SCHOOLING: CONSCIENCE, COMMUNITY, AND COMMON EDUCATION 197-266 (discussing the role of the common school in inculcating democratic civic values).

165. *See* Wisconsin v. Yoder 205 (1972); Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923) (upholding the right of parents to shape the moral upbringing of their children).

166. Although Justice Jackson concurred with the majority's result in *McCollum*, he differed with Justice Frankfurter on this point:

> A Federal Court may interfere with local school authorities only when they invade either a personal liberty or a property right protected by the Federal Constitution. Ordinarily this will come about in either of two ways: *First.* When a person is required to submit to some religious rite or instruction or is deprived or threatened with deprivation of his freedom for resisting such unconstitutional requirement. We may then set him free or enjoin his prosecution. . . . But here, complainant's son may join religious classes if he chooses and if his parents request, or he may stay out of them. The complaint is that when others join and he does not, it sets him apart as a dissenter, which is humiliating. Even admitting this to be true, it may be doubted whether the Constitution which, of course, protects the right to dissent, can be construed also to protect one from embarrassment that always attends nonconformity, whether in religion, politics, behavior or dress.

McCollum, 333 U.S. at 232-33 (Jackson, J., concurring).

167. Four years later, with Justices Black and Frankfurter dissenting, the Court approved a released-time program that was offered off the premises of the public school. Zorach v. Clauson, 343 U.S. 306 (1952).

168. 403 U.S. 602, 612-13 (1971); *see supra* note 22.

169. There were two notable exceptions to the rule. *See* Walz v. Tax Comm'n, 397 U.S. 664 (1970) (upholding tax exemptions for religious institutions); Bd. of Educ. v. Allen,

that non-observers are entitled to protection against the government's establishment or endorsement of religion as a form of policy—which I do—this is arguably a perverse priority for a constitutional provision that was designed to protect religious freedom. The *Lemon* court had nixed a program that subsidized the salaries of parochial school teachers who taught secular subjects.[170] The Court was concerned that the governmental oversight required to assure that public resources were not diverted into religious programs would create the risk of excessive entanglement, offending the third prong of its three-part test. But again the reasoning of the Court is questionable. If the parochial schools or their students had a legitimate claim to the resources made available to support secular instruction, which satisfies state requirements of compulsory education (and the first prong of the test), why should that claim be compromised because of the state's failure to come up with an appropriate oversight mechanism that is not excessively intrusive? Is the need for oversight itself a form of excessive entanglement? Certainly such oversight is less onerous to religious schools and their students than the loss of the benefit would be. Who exactly is the court protecting from entanglement in such a situation?

The reasoning that guided First Amendment jurisprudence through the 1970's and early 1980's was so incoherent that at times the Court seemed to be acting arbitrarily. In one case it disallowed a program that reimbursed parochial schools for the administrative costs incurred for teacher-prepared achievement tests in compulsory subjects;[171] in another it approved reimbursements of similar costs for standardized tests.[172] It prohibited state funding for staff and materials in auxiliary services such as counseling, guidance, and speech,[173] but permitted aid for diagnostic speech, hearing, and psychological testing.[174] It ruled that while textbook loans are a legitimate benefit to parents and

392 U.S. 236 (1968) (upholding loans of textbooks to private schools).

170. *Lemon*, 403 U.S. at 606-07.

171. Levitt v. Comm. for Pub. Educ. & Religious Liberty, 413 U.S. 472, 480 (1973). For application of this rule, see Marburger v. Pub. Funds for Pub. Sch., 413 U.S. 916 (1973) (mem.), *aff'g* 358 F.Supp. 29 (D.N.J. 1973) (invalidating reimbursement for educational materials); Grit v. Wolman, 413 U.S. 901 (1973) (mem.), *aff'g* Kosydar v. Wolman, 353 F.Supp. 744 (S.D. Ohio 1972) (invalidating tax credits for school expenses).

172. Wolman v. Walter, 433 U.S. 229, 255 (1977), *overruled by* Mitchell v. Helms, 530 U.S. 793, 808 (2000).

173. Meek v. Pittenger, 421 U.S. 349, 372 (1975), *overruled by Mitchell*, 530 U.S. at 808.

174. *Wolman*, 433 U.S. at 244.

their children,[175] loaning instructional equipment had "the unconstitutional primary effect of advancing religion."[176] Although states were allowed to offer students transportation to parochial schools,[177] the states were not permitted to give the same students a ride to a public park or museum.[178] The Court also ruled that public school teachers could not provide government-supported remedial services to disadvantaged children on the premises of their religious schools.[179] The latter decision burdened parochial school children by requiring them to leave the comfort of their own schools to receive much-needed remedial services that the court and most government officials agreed they were entitled to receive and forced public schools to build or rent temporary structures for the provision of the services that otherwise could have been delivered in the children's home schools.[180] Fortunately this decision, like the confused standards associated with the previously mentioned decisions, was overturned by the more accommodationist Rehnquist Court.

In 1974 the Court affirmed without comment a lower federal court's ruling that it is permissible to exclude religious school students from transportation services made available to their public school peers.[181] While recognizing that the provision of these services was permitted under the Establishment Clause, the lower court found that the denial of the same services did not violate the Free Exercise rights of students in religious schools.[182] It further concluded that the strict requirements of church-state separation required by the Missouri Constitution served as a "compelling state interest" justifying "any possible infringement of the Free Exercise Clause."[183] This thirty

175. *Meek*, 421 U.S. at 360.

176. *Id.* at 363.

177. Everson v. Bd. of Educ., 330 U.S. 1, 17-18 (1947).

178. *Wolman*, 433 U.S. at 254.

179. Aguilar v. Felton, 402 U.S. 402, 408 (1985); *see also* Sch. Dist. v. Ball, 473 U.S. 373, 397-98 (1985) (striking down remedial and enrichment programs that supplemented the core curriculum of religious schools). Both decisions were overturned in relevant part by *Agostini v. Felton*, 521 U.S. 203, 234-35 (1997).

180. The New York City School District reportedly spent $16 million per year to transport and house parochial school children entitled to the service. *See* Joseph Berger, *Limit on Remedial Education is Appealed*, N.Y. TIMES, Aug. 31, 1996, at L25; Mark Walsh, *NYC Seeks to Overturn Limits on Title I Regulations at Religious Schools*, EDUC. WKLY., Feb. 28, 1996, at 1.

181. Luetkemeyer v. Kaufman, 419 U.S. 888 (1974) (mem.), *aff'g* 364 F. Supp. 376 (W.D. Mo. 1973).

182. *Luetkemeyer*, 364 F. Supp. at 386.

183. *Id.*

year-old ruling sets a relevant precedent for the South Dakota case now in litigation.[184] The ruling also anticipates the central question raised in *Davey* and accentuates the need for a more definitive ruling that the *Davey* litigation invites.

The precedent-setting *Nyquist* ruling was shaped around particular facts within the case that distinguished it from both *Mueller* and *Zelman*. Because the benefits provided in *Nyquist* were made available only to students at non-public schools,[185] they were found to be in violation of the neutrality standard that guided the two subsequent decisions. As a result, the *Mueller* and *Zelman* courts did not feel obliged to overturn *Nyquist*. A closer examination of *Nyquist*, however, shows that even here the reasoning of the more separationist Burger court was somewhat flawed. The New York law under review in the case was neutral with regard to religion, in the sense that it offered aid to both secular and sectarian private schools and the families associated with them. As in *Mueller* and *Zelman*, those families that sent their children to religious schools did so as a matter of choice. They also had the option to select either public or non-religious private schools.[186] More problematic was the suggestion in *Nyquist*, and its companion case involving a partial tuition reimbursement in Pennsylvania, that the benefits at stake provided families with an unconstitutional incentive to send their children to religious schools.[187] The claim is groundless. Research available on publicly supported voucher programs indicates, to the contrary, that families send their children to religious schools because they believe either that the quality of the academic program is better, or that the school environment is safer, or because they actually prefer a school with a religious program.[188] It is simply ludicrous to assert that the marginal benefits[189] made available by any programs that have come

184. Pucket v. Rounds, No. 05-033, 131 (D.S.D. filed Apr. 23, 2003).

185. The New York law in question involved three types of benefits: maintenance and repair grants for private schools; tuition allotments to low-income families whose children attend private and parochial schools; and tuition tax relief for parents whose children attend private and parochial schools. Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 761-67 (1973).

186. Public schools and their students were not appropriated benefits under this program. *Id.* at 762-65. However, public schools already receive government funding for the kind of maintenance and repair functions that were offered under the program, and there is no reason to offer tuition benefits for public school families that do not pay tuition.

187. Sloan v. Lemon, 413 U.S. 825, 832 (1973).

188. See VITERITTI, *supra* note 108, at 111.

189. From a financial perspective, the state provided families in Cleveland with a

before the courts are the primary incentives operable when parents choose a religious school. Certainly such programs offer options for families who might otherwise be unable to afford tuition at such schools, but these families appear to be acting on preferences they already had before the aid was available.

Some observers, including two dissenting Justices in the *Zelman* case,[190] have suggested that the quality of inner city public schools is so poor that economically disadvantaged parents do not have a reasonable choice when faced with the prospect of sending their children to safer, more academically sound religious schools. But this reasoning is paradoxical. One does not improve the quality of parents' choices or their measure of freedom by reducing their practical options, as strict separationists would. While the better of the available choices might appear obvious to many observers, school choice programs like the one in Cleveland do not compel children to go to religious schools. These programs improve opportunities for children and enhance the freedom of families who participate in them.

B. A Matter of Fairness

The premise of the secularist paradigm, cited most recently by Justice Souter in his *Zelman* dissent,[191] originates with the often quoted Jeffersonian argument that "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhors, is sinful and tyrannical."[192] Although widely accepted, it is a spurious legal argument. It applies the Establishment Clause to compromise rights protected by the Free Exercise Clause as if the two were in conflict. The two clauses are more appropriately understood as cohorts of the same amendment designed to protect an

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disincentive to participate in the voucher program. On a per capita basis, voucher recipients were allocated $2250 in public funding, while those who attended regular public schools got $7746. Children who attended magnet school also got $7746, while those at public charter schools got $4518. Zelman v. Simmons-Harris, 536 U.S. 639, 645-47 (2002).

190. Commenting on the preponderance of religious schools participating in the voucher program, Justice Souter referred to the alternatives as a "Hobson's choice." *Zelman*, 536 U.S. at 707 (Souter, J., dissenting). However, he also cited evidence that the great majority of participating parents who chose religious schools did so because of the academic quality or greater safety provided in them. *Id.* at 704 n.12. During oral argument Justice Breyer volunteered, "[T]he irony is that the better the parochial school, in a sense, the less the freedom of choice. I mean, I—if it were my children and I saw these comparisons, I'd say send them to parochial school." BOLICK, *supra* note 108, at 180.

191. *Zelman*, 536 U.S. at 711 (Souter, J., dissenting).

192. THOMAS JEFFERSON, BILL FOR ESTABLISHING RELIGIOUS FREEDOM (1779), *reprinted in* THE COMPLETE JEFFERSON 946 (Saul Padover ed., 1943).

essential constitutional right. The best formulation of the scheme is offered by Professor Michael Paulsen, who writes:

> [T]he establishment clause protects *religious liberty*; it safeguards much the same interests as the free exercise clause, but in a slightly different way. The free exercise clause defines the important individual liberty of religious freedom while the establishment clause addresses *the limits of allowable state classifications affecting this liberty*. The two clauses, naturally enough, address a single, central value from two different angles: The free exercise clause forbids government *pro*scription; the establishment clause forbids government *pre*scription. Stated narrowly, government can neither keep persons from exercising certain religious beliefs nor may it make them exercise any religion.[193]

When the government distributes educational resources in a neutral fashion for a legitimate public purpose it does not necessarily impose any special burden on a taxpayer who may be a non-believer.[194] Because the federal and state governments have already determined that publicly-supported education is a legitimate public purpose, taxpayers already bear financial responsibility for the payment of such services.[195] As a matter of fact, all states allow parents to satisfy compulsory education requirements by sending their children to religious schools as well as non-sectarian private schools. So long as the cost of supporting a child's attendance at a religious school does not exceed the cost of sending the same child to a public school, there is no tangible burden imposed on the taxpayer as a result of such a program.[196] True, many taxpayers may be unhappy with the prospect of having public dollars find their way (even indirectly) into the

193. Michael A. Paulsen, *Religion, Equality, and the Constitution: An Equal Protection Approach to Establishment Clause Adjudication*, 61 NOTRE DAME L. REV. 311, 313 (1986) (footnotes omitted).

194. I use the term "non-believer" here in reference to anyone who does not subscribe to the teaching of schools participating in a publicly supported choice program, who may or may not subscribe to the teachings of another faith.

195. *See* Michael Heise, *The Courts, Educational Policy, and Unintended Consequences*, 11 CORNELL J.L. & PUB. POL'Y 633, 635, nn.5-7 (2003) (listing state constitutional provisions requiring public support of education).

196. On the whole, per-capita costs at public schools exceed costs at religious schools considerably. The average tuition paid by students in Catholic elementary and secondary schools in the 1999-2000 school year was $3236; the number rises to $4063 for non-Catholic religious schools. NAT'L CTR. FOR EDUC. STATISTICS, U.S. DEP'T. OF EDUC., DIGEST OF EDUCATION STATISTICS 73 (2002), *available at* http://nces.ed.gov/pubs2003/digest02/tables/pdf/table61.pdf. The total average per-capita expenditure for students in public schools during the same period was $8591. *Id.* at 194, *available at* http://nces.ed.gov/pubs2003/digest02/tables/pdf/table166.pdf.

coffers of religious schools that propagate opinions with which they disagree. Such religious opinions, however, are not the opinions of the government, and are therefore not prohibited by the Establishment Clause. These religious opinions are private and voluntary and are protected by the Free Exercise Clause.[197]

The absolute prohibition of aid to students at religious schools imposes a particular burden on devout religious observers who believe that a religious education is essential to the proper upbringing of their children and who are thus obliged to pay tuition while also paying taxes to support public schools. Surely the parents' burden to pay tuition at a school of their choice is more tangible and real than that endured by the disgruntled taxpayer who opposes the publicly supported opportunity of parents to choose a school of their liking. Moreover, as a general rule, the courts have not been receptive to taxpayers' challenges against disagreeable public policies, whether the issue in question involves war and peace or controversial social legislation. In one well-known education case, a federal appeals court was unsympathetic to public school parents who requested that their children be offered an alternative assignment instead of reading material that conflicted with their religious beliefs. The court ruled that the school board was not obliged to accommodate the parents with a less offensive assignment.[198] The courts, however, have responded to secularists' demands to treat expenditures associated with religious institutions with a high level of suspicion and scrutiny.[199]

Throughout the 1970's, judges were quite aggressive in applying the religion clauses of the First Amendment to favor the interests of non-believers over believers, pursuing an unbalanced and at times perverse approach to the protection of religious rights. If I may be

197. Approving the funding of a student publication with a religious message at the University of Virginia, the Court ruled, "the program respects the critical difference 'between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect.'" Rosenberger v. Rectors and Visitors of the Univ. of Va., 515 U.S. 819, 841 (1995) (quoting Bd. of Educ. v. Mergens, 496 U.S. 226, 250 (1990)).

198. *See* Mozert v. Hawkins County Bd. of Educ., 827 F.2d 1058 (6th Cir. 1987). The school board declined the request and their decision was upheld by the federal appeals court. For discussions of the case see SALOMONE, *supra* note 163, at 121-29; STEPHEN BATES, BATTLEGROUND: ONE MOTHER'S CRUSADE, THE RELIGIOUS RIGHT, AND THE STRUGGLE FOR CONTROL OF OUR CLASSROOMS 268-302 (1993); Nomi Maya Stolzenberg, *"He Drew a Circle and Shut Me Out": Assimilation, Indoctrination, and the Paradox of a Liberal Education*, 106 HARV. L. REV. 581, 586-611 (1993).

199. *See supra* Part III.A.

slightly facetious, accepting the secularist approach to religious rights is similar to fashioning freedom of the press around the needs of the illiterate, or orienting free speech to the preferences of the quiet, or the right to assembly around the dispositions of hermits. The secularist approach to the First Amendment works well for all but those who take religion most seriously as a central part of their personal lives. Yet the secularist paradigm defined the Supreme Court's approach to First Amendment jurisprudence for a ten-year period that immediately preceded the *Mueller* decision.[200] In fact, it was in response to questions posed on the basis of a secularist legal agenda that the post-*Mueller* Court defined a more accommdationist First Amendment jurisprudence right up until *Zelman*. Although the *Zelman* Court permitted children in Cleveland to receive public support for tuition at religious schools, the decision was really focused on the rights of those plaintiffs who opposed the Ohio program. The Court was asked to determine whether the program violated the rights of opponents that were allegedly protected by the Establishment Clause. Applying the neutrality standard, the *Zelman* court ruled that the program did not.[201] The *Davey* case is significant because it shifts the Court's focus of attention to the constitutional rights of the religious observer. Again, however, the neutrality standard applies. That standard asks whether the denial of a general public benefit, for which Mr. Davey was otherwise qualified, compromised his religious rights and violated the Free Exercise Clause.

The most compelling argument behind the neutrality standard—whether applied to the Establishment Clause or the Free Exercise Clause—is its indisputable reasonability. It is eminently fair. Simply stated, it requires that religious institutions and their members be treated with neither favor nor disfavor. What was most offensive about the agenda behind the original Blaine Amendment is that it erred on both counts. Its supporters at once sought to discriminate against Catholics (although in a superficially neutral way) and promote Protestantism in the public schools. Even Blaine, Blair, and their allies understood that what they hoped to accomplish was not permitted under the religion clauses of the Constitution without further amendment. Fortunately for us now, the latter problem—

200. *Id.*

201. Zelman v. Simmons-Harris, 536 U.S. 639, 648-54 (2002).

organized religion in the public schools—has been addressed by the federal courts.[202] However, the former problem—religious discrimination—is still very much with us, though in a more contemporary form. Blaine's amendment would have prohibited aid to all religious schools in order to prevent the growth of Catholic institutions, which he and his allies despised. Today many states have similar provisions in their own constitutions that are not designed to disfavor any one religious denomination, but which have the effect of disfavoring all religious institutions and their members in the distribution and enjoyment of general public benefits. There is nothing more repugnant to the notion of civil liberty than to use the religion clauses of the First Amendment as an instrument to discriminate against institutions or individuals on the basis of their religious affiliation.[203] But the application of state constitutional standards to achieve the same effect is no less offensive to religious rights. Joshua Davey qualified for a state scholarship on the basis of his superior academic performance and his economic need. He was denied equal treatment by state authorities because he chose to pursue a career in the ministry.

Although Mr. Davey's case is of immeasurable significance from a legal point of view, his agenda is rather modest. He is not, as some might be led to believe, asking the Court to define public support for religious education as an absolute constitutional right. His claim was triggered by the fact that the State of Washington made the aid in question available to other students who were not pursuing a religious education. He is merely asking that the state be prohibited from discriminating against him on the basis of religion. That is quite reasonably the minimum degree of protection that the religious clauses of the Constitution should guarantee.

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202. Citing the relevant case law, Jeffries and Ryan summarize that between 1947 and 1996, the Supreme Court outlawed religion classes in public schools; officially-sponsored student prayer, Bible-reading, and silent meditation; displaying the Ten Commandments; and laws banning the teaching of evolution and requiring the teaching of creationism. Jeffries & Ryan, *supra* note 155, at 290.

203. One could also argue, as Davey has, that such a position also offends the Equal Protection Clause of the Fourteenth Amendment. Davey v. Locke, 299 F.3d 748, 750 (2002). However, perhaps relief through the Free Exercise Clause of the First Amendment is more direct, and therefore the Court of Appeals was correct to only reach the merits of that argument. *Id.* at 760.

CONCLUSION

The Supreme Court of the United States should uphold the ruling of the Ninth Circuit and grant Mr. Davey relief under the Free Exercise Clause of the First Amendment. In so doing it must revisit its prior ruling in *Witters* and clarify the limits of state prerogatives with regard to religion. State governments—acting on the basis of their own constitutions, laws, and regulations—may take it upon themselves to expand legal rights and protections guaranteed by the United States Constitution, but they may not abridge these rights and protections.