The resulting opinion found a divided Supreme Court ruling 5-4 that the Cleveland voucher program was constitutional. Five members of the Court, led by Chief Justice William Rehnquist, observed that the vouchers were given to parents — not schools — who were able to use the voucher at any school participating in the program. Coupling that fact with the religion-neutral criteria both parents and participating schools met, the majority found the voucher program constitutional. Rehnquist summed up the analysis, this way:

"[T]he Ohio program is entirely neutral with respect to religion. It provides 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. The program is therefore a program of true private choice."

Locke v. Davey was seen by voucher supporters as the case that would remove the last remaining obstacles to school-choice programs around the country. While *Zelman* made school vouchers acceptable under the establishment clause, *Davey* had the potential to go a step further by requiring that religious groups be funded any time a state or local government made funds available for private secular groups. In addition, a single federal decision would eliminate the sting of Blaine Amendments or compelled-support provisions in every state constitution.

Davey involved a scholarship program offered by the state of Washington. The program offered financial assistance to underprivileged, academically gifted students pursuing degrees at eligible post-secondary institutions, including religious schools. However, the scholarship excluded any student seeking a degree in devotional theology. The plaintiff in the case sued, arguing that exclusion of devotional theology majors violated his free-exercise rights. The Supreme Court, however, ruled in favor of the state. In doing so, the Court sidestepped principles of equal protection and neutrality between religion and nonreligion that voucher proponents were hoping would provide a victory in the case.

In the 1947 case of *Everson v. Board of Education,* Justice Black penned one of the foundational standards for future establishment-clause jurisprudence. “The ‘establishment of religion’ clause of the First Amendment means at least this… . No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion.” On its face, the language in this case set the wall separating religion and government very high, forbidding direct government funding to religious institutions, including religious schools. It should be noted that while the majority opinion in *Everson* set a stringent standard, five justices found that the facts in the case did not violate this principle. They held the program in question provided transportation assistance to the children, not the school. Since the benefit flowed to the individual instead of the religious institution, no establishment-clause violation occurred.

The **Blaine Amendment** was originally introduced in the U.S. House of Representatives as an amendment to the U.S. Constitution in 1875 by Rep. James Blaine (R-Pa.), then speaker of the House. Inspired by anti-Catholic nativism, this amendment was designed to keep public funds from Catholic parochial schools. Though it passed overwhelmingly in the House, it failed to pass the Senate by four votes. It read:

“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.”

Another approach voucher proponents could use to limit the effect of Blaine Amendments is to argue that the provisions were created as nothing more than state establishment clauses and, as such, should be interpreted identically to the federal establishment clause. In demonstrating this point, scholars have noted that the 44th Congress, which was in session when the federal Blaine Amendment was introduced, did not believe that the federal establishment clause applied to the states.

ARIZONA CHRISTIAN SCHOOL TUITION ORGANIZATION *v.* WINN ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 09–987. Argued November 3, 2010—Decided April 4, 2011*

To obtain a determination on the merits in federal court, parties seeking relief must show that they have standing under Article III of the Constitution. Standing in Establishment Clause cases may be shown in various ways. Some plaintiffs may demonstrate standing based on the direct harm of what is claimed to be an establishment of religion, such as a mandatory prayer in a public school classroom. See *School Dist. of Abington Township* v. *Schempp*, 374 U. S. 203, 224, n. 9 (1963). Other plaintiffs may demonstrate standing on the ground that they have incurred a cost or been denied a benefit on account of their religion. Those costs and benefits can result from alleged discrimination in the tax code, such as when the availability of a tax exemption is conditioned on religious affiliation. See *Texas Monthly, Inc.* v. *Bullock*, 489 U. S. 1, 8 (1989) (plurality opinion).

By helping students obtain scholarships to privateschools, both religious and secular, the STO program might relieve the burden placed on Arizona's public schools. The result could be an immediate and permanentcost savings for the State. See Brief for Petitioner Arizona Christian School Tuition Organization 31 (discussingstudies indicating that the STO program may on net savethe State money); see also *Mueller* v. *Allen*, 463 U. S. 388, 395 (1983) ("By educating a substantial number of students [private] schools relieve public schools of a correspondingly great burden—to the benefit of all taxpayers"). Underscoring the potential financial benefits of the STO program, the average value of an STO scholarship may be far less than the average cost of educating an Arizona public school student.

See *Mueller*, 463 U. S. 388; *Nyquist* v. *Mau- clet*, 432 U. S. 1 (1977); *Hunt* v. *McNair*, 413 U. S. 734 (1973); *Walz* v. *Tax Comm'n of City of New York*, 397 U. S. 664 (1970); cf. *Hibbs* v. *Winn*, 542 U. S. 88

Blaine Amendments

Recent Cases

Recent federal court decisions have acknowledged that Blaine Amendments are rooted in nativist bigotry, and recent state court decisions have interpreted Blaine Amendments narrowly to avoid constitutional violation. Additional cases are pending, and more are on the way. This page will be updated periodically to reflect recent developments.

Cases Pending:

Federal Courts:

Pucket v. Rounds, No. 03-CV-5033 (D.S.D., filed March 29, 2004) (challenging decision based on South Dakota Constitution to deny public busing to students because of their affiliation with religious school). Discovery resumed after stay pending November 2004 election.

Boyette v. Galvin, 311 F. Supp. 2d 237 (D. Mass 2004) (rejecting constitutional challenges to Massachusetts' forerunner of Blaine Amendment, and to state prohibition on referenda to repeal Blaine Amendment), *on appeal sub nom. Wirzburger v. Galvin*, No. 04-1625 (1st Cir., filed May 19, 2004).

State Courts:

Saint Louis University v. Masonic Temple Association, S.W.3d (Mo. 2007), No. SC88075 (Missouri Supreme Court held that the City of St. Louis did not violate the state's "Blaine Amendment" by providing "tax-increment financing" to Saint Louis University, a Jesuit, Catholic University, to assist in the construction of a 13,000-seat arena to be used for secular purposes such as sporting events and graduation ceremonies. While Article IX, Section 8 of the Missouri Constitution forbids state and local government from financially supporting schools "controlled by any religious creed, church or sectarian denomination whatever," the Supreme Court found that the University does not attempt to "indoctrinate the faith" nor is the University controlled by it.)

Bush v. Holmes, 886 So. 2d 340 (Fla. 1st DCA 2004) (finding that Florida's statewide school voucher system violates the Florida Blaine Amendment, and rejecting claim that such an interpretation of the Blaine Amendment violates the state constitution), on appeal, Nos. SC04-2323, SC04-2324, SC04-2325 (Fla. S. Ct., filed Dec. 10, 2004).

California Statewide Communities Development Authority v. All Persons Interested in the Matter of the Validity of a Purchase Agreement, 116 Cal. App. 4th 877 (Cal. Ct. App. 2004) (affirming judgment that proposals for the issuance of tax-exempt bonds for the benefit of religious schools had violated Cal. Const. art. XVI, § 5 and where schools were pervasively sectarian, conduit financing had the direct and substantial effect of aiding religion). Granted review by California Supreme Court.

Barnes-Wallace v. Boy Scouts of America, 275 F. Supp. 2d 1259 (S.D. Cal. 2003) (holding a reasonable observer would perceive an advancement of religion as a result of the failure to use a neutral process in selecting lessees for the parklands. Thus, the city's long-term lease of public parkland to the BSA violated state and federal Establishment Clauses and the state constitution's No Preference and No Aid Clauses.) Granted review by Ninth Circuit. Other issues proceeding in district court.

Anderson v. Town of Durham, (Me. Super. 2003) (No. Civ.A. CV-02-480) (dismissing case for failure to state a claim. State law requires that municipalities contract with a public school outside the municipality or reimburse those students who choose to attend an approved private school, a public school, or a school approved for tuition purposes in another state. School department claimed request for reimbursement for tuition payments made to private Catholic high school claim was barred by statute which excludes the participation of sectarian schools from the state's tuition reimbursement program.) Pending before the Maine Supreme Judicial Court.

Williams v. Georgia, 2005 WL 2156135 (N.D.Ga. Aug 11, 2005) (NO. 105-CV-0427) (involving Plaintiff parents seeking a voucher remedy of the state for its hindering their fundamental liberty rights as parents to control the education of their children, through a variety of restrictive policies. School system claims that Plaintiff's request for funds for children to attend either religious or non-sectarian private schools would require the court to act outside the constitutional limitations of its judicial power).

Cases Decided:

United States Supreme Court:

Locke v. Davey, 540 U.S. 712 (2004) (upholding decision based on Washington State Constitution to rescind state college scholarship because student chose to study religion)("The amici contend that Washington's Constitution was born of religious bigotry because it contains a so-called 'Blaine Amendment,' which has been linked with anti-Catholicism. . . . [H]owever, the provision in question is not a Blaine Amendment. . . . Accordingly, the Blaine Amendment's history is simply not before us.").

Zelman v. Simmons-Harris, 536 U.S. 639 (2002) (dissenting opinion of Breyer, J.) (acknowledging that Protestant efforts to maintain religious dominance in public schools "played a significant role in creating a movement that sought to amend several state constitutions [often successfully], and to amend the United States Constitution [unsuccessfully] to make certain that government would not help pay for 'sectarian' [i.e., Catholic] schooling for children").

Mitchell v. Helms, 530 U.S. 793 (2000) (plurality opinion of Thomas, J.) (describing "pervasively sectarian" doctrine in Establishment Clause jurisprudence as having a "shameful pedigree" rooted in the Blaine Amendment, and concluding that "[t]his doctrine born of bigotry should be buried now").

Other Federal Courts:

Becker v. Granholm, 272 F. Supp. 2d 643 (E.D. Mich. 2003) (granting preliminary injunction against state decision based on Michigan Constitution to rescind state college scholarship because student chose to major in theology, citing Ninth Circuit decision in *Davey v. Locke*). The case was dismissed without prejudice on September 15, 2004.

Winn v. Hibbs, 361 F. Supp. 2d 1117 (D. Ariz. 2005) (finding the Tuition Tax Credit, which tax-exempts student tuition organizations which provide scholarships and tuition grants to students attending qualified private schools, to be neutral on its face and as applied, having a plausible secular purpose, and being "a program of true private choice.").

State Supreme Courts:

Kotterman v. Killian, 972 P.2d 606 (Ariz.), *cert. denied*, 528 U.S. 921 (1999) (interpreting Arizona Constitution so that it does not prohibit neutral tuition tax credit program).

Jackson v. Benson, 578 N.W.2d 602 (Wis.), *cert. denied*, 525 U.S. 997 (1998) (interpreting Wisconsin Constitution so that it does not prohibit neutral school voucher program).