



MILTON & ROSE D. FRIEDMAN
FOUNDATION

Educational
Choice

The Constitutionality of School Choice in New Hampshire

An Analysis By

The Honorable Charles G. Douglas, III
Former New Hampshire Supreme Court Justice

**Historical Considerations Concerning
New Hampshire's Blaine Amendment**

Richard D. Komer
Institute for Justice

May 2004

The Josiah Bartlett Center for Public Policy

The Josiah Bartlett Center for Public Policy is a non-profit, non-partisan, independent think tank focused on state and local public policy issues that affect the quality of life for New Hampshire's citizens. The Center has as its core beliefs individual freedom and responsibility, limited and accountable government, and an appreciation of the role of the free enterprise system. The Center seeks to promote policy that supports these beliefs by providing information, research and analysis.

The Milton and Rose D. Friedman Foundation

The Milton and Rose D. Friedman Foundation, dubbed "the nation's leading voucher advocates" by the *Wall Street Journal*, is a non-profit organization established in 1996. The origins of the foundation lie in the Friedmans' long-standing concern about the serious deficiencies in America's elementary and secondary public schools. The best way to improve the quality of education, they believe, is to enable all parents to have a truly free choice of the schools that their children attend. The Friedman Foundation works to build upon this vision clarify its meaning to the general public and amplify the national call for true education reform through school choice.

Foreword

By Charles M. Arlinghaus

As New Hampshire leaders consider expanding educational opportunity for schoolchildren of modest means, inevitably technical questions arise. Recently some opponents of school choice have raised questions about the constitutionality of some of the choices students might be allowed.

Specifically, while it generally accepted that choice provisions can include private schools, some observers worry that schools with any religious component might have to be excluded. Nationally, the United States Supreme Court has ruled quite clearly that school choice is constitutional as long as the program is religiously neutral and is governed by true individual choice – that is, the parents make the decisions not the government.

Although school choice programs have been upheld in other states with similar constitutional language to New Hampshire's, the New Hampshire Supreme Court has not ruled in a school choice case. However, The Josiah Bartlett Center for Public Policy and The Milton and Rose D. Friedman Foundation asked former New Hampshire Supreme Court Justice Charles Douglas to examine the specific question of constitutionality in New Hampshire in detail. Douglas's comprehensive analysis demonstrates that a choice program is consistent with the Court's few advisory opinions and permissible under the state constitution.

The court has only considered the issue directly in four "advisory opinions" that don't have the benefit of two sides arguing and are not binding on future courts. However, they help define the court's understanding of clauses in the constitution and their application.

Douglas carefully walks us through advisory opinions from 1955, 1967, 1969 and 1992 in which the New Hampshire Supreme Court explained the language of the New Hampshire Constitution and examined many of the same issues the federal courts have worked through. In the end, using language taken from court opinions, Douglas finds that a school choice program in New Hampshire must be religiously neutral and meet two important criteria: (1) It must provide no more than incidental benefits to a religious sect or religion in general and (2) must be brought about as a result of the independent choices of parents who receive the public funds.

It is interesting to note that both federal and state courts insist on true private individual choice that assures parents make a free choice as to the appropriate service provider. In this case,

good constitutional policy is also good public policy. The primary goal of any good choice system is to give parents options instead of one choice presented by government policy.

Following Justice Douglas's groundbreaking exploration of the New Hampshire constitution, we present Richard Komer's description of the background of the so-called Blaine Amendments. Blaine amendments, championed by New Hampshire's Senator Henry Blair, were part of the anti-Catholic backlash of the Nineteenth Century designed to preserve the Protestant character of schools against a perceived Catholic "threat."

In the end, however, the debate over school choice is not about constitutional criteria or religious intolerance. It's about opportunity. Everyone admits that the choices enjoyed by those who can afford them lead to better outcomes for their children. The only debate is whether or not those same choices will be extended to parents and children of lesser means. In education, one size does not fit all, particularly for the 25% of our children who drop out before finishing school. Their options in school were limited and now their options in life are limited. We know that the one local school works for many students but not for all students. What school choice really comes down to is providing students for whom their only current option isn't working the means to find another choice that suits their individual needs - in plain and simple terms, greater opportunity.

An Analysis By

The Honorable Charles G. Douglas, III

Question Presented:

Does a “school choice” program, under which state funds are disbursed on a neutral basis to parents in the form of a voucher to defray the cost of sending their children to a school of their choice, run afoul of the Establishment Clause of the First Amendment to the United States Constitution, or of the New Hampshire Constitution?

Brief Answer:

No. A school choice program that is purposely designed to be neutral with respect to religion, and which provides only incidental and indirect benefits to a religious sect or religion in general, benefits that are purely the result of the choices of individual citizens receiving state funds, does not violate the religion/state separation provisions of either the United States or New Hampshire Constitutions.

I. Background

Both the United States and New Hampshire constitutions contain provisions that were intended to minimize governmental “entanglement” with religion. The First Amendment to the United States Constitution states in part that:

Congress shall make no law respecting an establishment of religion...

This clause of the First Amendment was made binding upon the states through the Fourteenth Amendment. See Zelman v. Simmons-Harris, 536 U.S. 639, 648 (2002). It is commonly referred to as “the Establishment Clause.”

In addition to being bound by this provision of the U.S. Constitution, New Hampshire’s own Constitution contains the following provision at Part II, Article 83:

... no money raised by taxes shall ever be granted or applied for the use of the schools or institutions of any religious sect or denomination.

Additionally, Part I, Article 6 states that: “But no person shall ever be compelled to pay towards the support of the schools of any sect or denomination.”

Both the United States and New Hampshire constitutions have been interpreted to prohibit “a state from enacting laws that have the ‘purpose’ or ‘effect’ of advancing or inhibiting religion.” Zelman, 536 U.S. at 648-49; Opinion of the Justices, 109 N.H. 581 (1969). The United States and New Hampshire Supreme Courts have thus consistently held that direct, unrestrained funding of religiously sectarian institutions by a state government is unconstitutional. See Mitchell v. Helms, 530 U.S. 793 (2000); Opinion of the Justices, 108 N.H. 268 (1968). Given that a school choice program *may* result in the flow of state government money to sectarian educational institutions (albeit indirectly), challenges to such programs based on the religion-state separation provisions of the federal and state constitutions have occurred over the years.

II. School Choice Programs are Constitutional Under the Federal Establishment Clause

In the last twenty years, the United States Supreme Court has decided no fewer than four cases in which publicly provided aid flowing indirectly to parochial schools or their students were challenged by taxpayers. In all four cases, the Establishment Clause challenge was rejected by the Court. See Mueller v. Allen, 463 U.S. 388 (1983); Witters v. Washington Dept. of Servs. for Blind, 474 U.S. 481 (1986); Zobrest v. Catalina Foothills School Dist., 509 U.S. 1 (1993); and Zelman v. Simmons-Harris, 536 U.S. 639 (2002).

In each of these cases, the Supreme Court asked “whether the government acted with the purpose of advancing or inhibiting religion [and] whether the aid [had] the ‘effect’ of advancing or inhibiting religion.” Zelman, 536 U.S. at 649. In all four cases, the Court drew consistent distinctions between “government programs that provide aid directly to religious schools, and programs of true private choice, in which government aid reaches religious schools only as a result of the genuine and independent choices of private individuals.” Id. (citations omitted).

In Mueller, *supra*, the Court rejected an Establishment Clause challenge to a Minnesota Program authorizing tax deductions for various educational expenses, including private school tuition costs. The Court’s decision turned on its analysis of the class of beneficiaries. Because the class receiving state funds included “all parents,” including parents with “children who attend nonsectarian private schools *or* sectarian private schools,” the program was “not readily subject to challenge under the Establishment Clause” of the First Amendment. Mueller, 463 U.S. at 397-399 (emphasis added). Additionally, in the course of rejecting the Establishment Clause challenge in Mueller, the Court emphasized that the amount of government aid indirectly channeled to religious

institutions as a result of the choices of individual aid recipients was not relevant to the constitutional inquiry. *Id.* at 400-01. The Court said: “We would be loath to adopt a rule grounding the constitutionality of a facially neutral law on annual reports reciting the extent to which various classes of private citizens claimed benefits under the law.” *Id.* at 401.

In *Witters, supra*, the Court used identical reasoning to reject another Establishment Clause challenge, this time to a Washington vocational scholarship program that provided tuition aid to a student studying at a religious school to become a pastor. Rather than being consumed by the fact that one student used the aid he received to further his religious education, the Court concentrated on observing the program as a whole. It found that “[a]ny aid ... that ultimately flows to religious institutions does so only as a result of the genuinely independent and private choices of aid recipients.” *Witters*, 474 U.S. at 487. Therefore, because the program was “made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited,” the Court held that it was not inconsistent with the Establishment Clause. *Id.* at 487-89.

The *Zobrest* case involved a challenge to a federal program that permitted sign language interpreters to assist deaf children enrolled in religious schools. The Supreme Court again examined the government program as a whole, and found that it “distribute[d] benefits neutrally to any child qualifying as ‘disabled’” *Zobrest, supra*, 509 U.S. at 10 (emphasis added). Therefore, the statute ensured that “a government-paid interpreter will be present in a sectarian school only as a result of the private decision of individual parents.” *Id.* (emphasis added). As in *Witters*, the Court emphasized that the number of beneficiaries receiving aid under the government program was not relevant to the constitutional analysis. Rather, the focus was the neutrality of the statute’s eligibility criteria, and the principle of private choice. *Id.* at 10-11. Because individual parents were the ones who selected whether to send their child to a sectarian or non-sectarian school, the “circuit between government and religion was broken, and the Establishment Clause was not implicated.” *Zelman*, 536 U.S. at 652 (discussing the *Witters* decision).

In *Zelman v. Simmons-Harris*, certain taxpayers challenged an Ohio pilot voucher program that provided educational choices to families in the failed Cleveland City School District. Under the Ohio program, a prototypical “school choice” plan, the state provided tuition aid for students who chose to attend private schools. Both religious and non-religious schools were allowed to participate in the program. Where the state aid was spent depended solely upon where individual parents chose to enroll their children. *See Zelman*, 536 U.S. at 643-48. The Supreme Court rejected the Establishment Clause challenge in unequivocal terms:

We believe that the program challenged here is a program of true private choice, consistent with Mueller, Witters, and Zobrest, and thus constitutional. As was true in those cases, the Ohio program is neutral in all respects toward religion. It is part of a general and multifaceted undertaking by the State of Ohio to provide educational opportunities to the children of a failed school district. It confers educational assistance to a broad class of individuals defined without reference to religion, *i.e.*, any parent of a school-age child who resides in the Cleveland City School District. The program permits the participation of *all* schools within the district, religious or nonreligious. Adjacent public schools may participate and have a financial incentive to do so. Program benefits are available to participating families on neutral terms, with no reference to religion.

Id. at 653 (emphasis in original).

The Court shot down the assertion that a school choice program like that implemented in Zelman created a “public perception that the State is endorsing religious practices and beliefs.” Id. at 654. The Court responded that:

[W]e have repeatedly recognized that no reasonable observer would think a neutral program of private choice, where state aid reaches religious schools solely as a result of the numerous independent decisions of private individuals, carries with it the *imprimatur* of government endorsement.

Id. at 654-55. Moreover, the Court once again rejected the notion that a school choice program could be rendered unconstitutional merely because the vast majority of parents receiving aid under such a program made the independent decision to enroll their children in sectarian schools:

We need not consider this argument in detail, since it was flatly rejected in Mueller, where we found it irrelevant that 96% of parents taking deductions for tuition expenses paid tuition at religious schools... The constitutionality of a neutral educational aid program simply does not turn on whether and why, in a particular area, at a particular time, most private schools are run by religious organizations, or most recipients choose to use the aid at a religious school.

Id. at 658.

These consistent, well-reasoned holdings by our nation’s highest court remove virtually all doubt. A school choice program is constitutional under the federal Establishment Clause, so long as: (1) it is neutral with respect to religion; (2) it provides no more than incidental benefits to a religious sect or religion in general, and; (3) any incidental benefits to sectarian institutions are brought about purely as a result of the independent choices of individual citizens receiving state funds under such a program. See Zelman, 536 U.S. 649-652.

III. Parental School Choice Voucher Programs are Constitutional Under the New Hampshire Constitution

The New Hampshire Supreme Court has issued only a few opinions since 1950 that shed appreciable light on whether state-funded, but recipient-directed aid to sectarian schools is constitutional under the State Constitution. None have occurred since the Federal standard was redefined by Zelman to specifically differentiate between direct and indirect aid. All of the cases were advisory opinions, reflecting the Justices' view of the constitutionality of proposed legislation. However, by the Court's own standards, advisory opinions do not have the effect of setting legal precedent and thus, none of these opinions places any insurmountable constitutional obstacle in the way of a school choice program. Piper v. Meredith, 109 N.H. 328, 330 (1969).

The first of these advisory opinions was issued in 1955. See Opinion of the Justices, 99 N.H. 519 (1955). In the 1955 case, the proposed legislation at issue was House Bill No. 327, entitled "An Act to provide state aid for nursing education." Id. at 520. The bill provided in Part I for a program of annual scholarships for students of basic and advanced nursing to use at any New Hampshire school. The bill also provided in Part II for a program of annual grants in aid to all charitable hospitals in the State that offered approved training in basic professional nursing. See Id. The language of the bill placed the following condition upon receipt of aid under the program:

No hospital shall be eligible for such aid which imposes any religious or other unreasonable discrimination in the enrollment of student nurses, as determined by the board; and such aid shall be used by each eligible hospital solely and exclusively for defraying the cost of training student nurses in basic professional nursing and for no other kind of instruction or purpose.

Id.

It is interesting to note that the constitutionality of the scholarship element of the bill, which related to recipient directed aid, was not even challenged. Before deciding the constitutionality of Part II of the proposed legislation, the Court provided a brief history of the sectarian-aid prohibition contained in Part II, Article 83 of the New Hampshire Constitution which provides in relevant part:

...[p]rovided, nevertheless, that no money raised by taxation shall ever be granted or applied for the use of the schools or institutions of any religious sect or denomination.

As described by the Court, Article 83 was amended in 1877 to include the proviso barring the appropriation of tax money to aid religiously-affiliated schools. In light of the stated purpose for its enactment, and the peoples' approval of the provision, the Court found that the 1877 amendment to

“Article 83 is purposeful and meaningful and is intended to prevent the use of public funds for sectarian or denominational purposes.” Id. at 521, emphasis added.

However, the Court also construed Part II, Article 83 in light of other provisions contained in the New Hampshire Constitution:

Other provisions of the document, of longer standing, which remained unchanged in 1877, guarantee that “no subject shall be hurt ... for his religious ... persuasion,” and provide for encouragement of instruction in religion.

Id. at 521-22 (citing N.H. Const. Pt. I, Arts. 5th, 6th)(emphasis added). Viewed in this context, the Court concluded that:

What was intended to be forbidden by the amendment in 1877 was support of a particular sect or denomination by the state, at the expense of taxpayers of other denominations or of no denomination. It was not intended that members of a denomination should be deprived of public benefits because of their beliefs.

Id. at 522 (emphasis added). In other words, the Court concluded that Article 83 should not be construed as an “absolute bar” to religious schools receiving direct public aid.

The Court then turned to the particular legislation being challenged. It was noted that determinations of constitutionality under Part II, Article 83 must be made on a case-by-case basis, with particular attention to the “*objectives and methods proposed by the statute.*” Id. The Court held that the aid program proposed by House Bill 327 was constitutional:

The purpose of the grant proposed by House Bill 327 is neither to aid any particular sect or denomination, nor all denominations, but to further the teaching of the science of nursing. No particular sectarian hospital is to be aided, nor are all hospitals of a particular sect. The aid is to be available to all hospitals offering training in nursing without regard to the auspices under which they are conducted or to the religious beliefs of their managements, so long as the aid is used for nurses’ training “and for no other kind of instruction or purpose.”

Id.

The proposed bill’s careful limitation on permissible use of direct State grants was the key to its constitutionality under Article 83:

If the injunction of the proposed statute is followed, as it must be, the public funds will not be applied to sectarian uses. If some denomination incidentally derives a benefit through the release of other funds for other uses, this result is immaterial. The use of the grant is adequately limited by the proposed statute, and the training which will thereby be provided is subject to the supervision of the state. A hospital operated under the auspices of a religious denomination which receives funds under

the provisions of this bill acts merely as a conduit for the expenditure of public funds for training which serves exclusively the public purpose of public health and is completely devoid of sectarian doctrine and purposes. This does not violate the Constitution.

Id. (citations omitted and emphasis added).

With this opinion, the court recognized that even when aid is in the form of a direct grant, as opposed to being recipient directed, it is possible that public funds can be used in religious institutions without advancing sectarian purposes.

As the following advisory opinions demonstrate, the limitation of direct grant public funds to non-sectarian uses (or lack thereof) can determine whether a state-funded education aid program will pass constitutional muster under the New Hampshire Constitution. These opinions make it clear that a school is not automatically barred from receiving public funds simply because it has a religious affiliation. So long as there is no more than incidental and indirect benefit to a religious sect or denomination, religiously affiliated schools may partake in publicly funded programs.

In a subsequent advisory opinion issued by the New Hampshire Supreme Court the proposed legislation ran afoul of the Article 83 prohibition, precisely because those bills did not provide sufficient limitations to insure that state funds could not be directed to sectarian purposes.

At issue in the 1969 opinion were five proposed bills pertaining to various forms of aid for children attending non-public schools. Some of them survived constitutional challenge and others did not. Again, the key to constitutionality was whether the legislation contained appropriate limitations against the use of State funds for expressly religious purposes:

Our State Constitution bars aid to sectarian activities of the schools and institutions of religious sects or denominations. It is our opinion that since sectarian education serves a public purpose, it may be supported by tax money if sufficient safeguards are provided to prevent more than incidental and indirect benefit to a religious sect or denomination.

Opinion of the Justices, 109 N.H. 578, 581 (1969).

The Court pronounced the first challenged bill, Senate Bill 319, would be unconstitutional. S.B.319 proposed a \$50 real estate tax exemption only for parents who enrolled their children in non-public schools. According the Court, this legislation would “produce unconstitutional discrimination,” because it would “make available to the parents funds which they could contribute directly to ... parochial schools, without restricting the aid to secular education.” Id. (emphasis added).

Senate Bill 320 proposed the inclusion of children attending non-public schools in the base for computing foundation aid. The Court found this Act constitutional, because it had no more than an “incidental benefit” to those parents sending their children to sectarian schools. *Id.* at 582. On the other hand, Senate Bill 325, which proposed publicly-funded transportation for children attending non-public schools, failed to make the constitutional grade, again for lack of safeguards against the use of State funding for the benefit of particular sects or denominations:

We believe this bill to be of doubtful constitutionality. This is so primarily because the bill delegates undefined discretion to the school board which is easily subject to discriminatory application.

Id.

Senate Bill 326 provided for the publicly funded furnishing of certain child benefit services, such as school physicians and nurses. *Id.* This bill was constitutional, provided no funds were made available for sectarian purposes. *Id.* Senate Bill 327, which allowed for the loan or sale of public school textbooks to pupils enrolled in non-public schools, was also held to be constitutional, provided the books in question involved purely secular subjects. *Id.* at 582-83. Viewed as a whole, the 1969 case stands for the proposition that even direct grant public funds may constitutionally be permitted to flow to religious schools and institutions, so long as there is no more than incidental and indirect benefit to a religious sect or denomination.

In addition, while the Court does not explicitly say it, another stream of thought seems to run through all of the 1969 opinion. Programs that specifically helped a certain segment of the population (tax rebates and transportation for families already using nonpublic education) were found unconstitutional, while those that impacted all students regardless of whether they attended public or non-public school (base foundation aid, books, and child benefit services) were found to be constitutional. Therefore, it could be argued that a program that is designed to impact all children equally, or at minimum does not favor one group over another, could be found permissible under New Hampshire Constitution.

The final advisory opinion is also the one most on point. Issued by the Justices in 1992, it pertained to a proposed parental school choice program where funds were directed to the schools the parents chose. *See Opinion of the Justices*, 136 N.H. 357, 357-59 (1992). The proposed legislation allowed parents who were “dissatisfied with the instruction at the child’s present school” to enroll their children in any other State approved schools which included religious schools. The student’s resident district would then be required to pay up to 75% of the resident school’s tuition to

the alternative school chose by the student's parents. See Id. at 359. This was an indirect parental voucher program, as the proposal required State funding go to private schools directly from the school district and not from the individual citizen. This distinction was critical, as mentioned in the federal cases above, where the U.S. Supreme Court drew a distinction between "government programs that provide aid directly to religious schools, and programs of true private choice, in which government aid reaches religious schools only as a result of genuine and independent choices of private individuals." Zelman, supra, 536 U.S. at 649.

However, the Justices found the proposed program, as set forth above, to be in violation of Part I, Article 6 of the New Hampshire Constitution. The lack of limitations or restraints on the expenditure of public funds for religious instruction appeared to be the determining factor:

No safeguards exist to prevent the application of public funds to sectarian uses. The resident sending district's payments would constitute an unrestricted application of public money to sectarian schools.

The two previous opinions were consistent with the Federal Establishment Clause standard of their day. However, the Zelman decision in 2002 sets forth a new paradigm for indirect aid, allowing public funds to be used in religious schools provided that the funds arrive at the school solely as the result of "true private choice." Under Zelman, there is no restriction on the nature of the educational program provided.

An additional case, which bears mentioning because it is often misunderstood, is Barksdale v. Town of Epsom, 136 N.H. 511 (1992). In Barksdale, a group of Epsom taxpayers challenged a local school choice tax abatement plan, alleging that it was in violation of RSA 76:16, and Part II, Article 83. While the taxpayers did raise the constitutional challenge, the Supreme Court never ruled on it, because the case could be decided on the basis of the statutory violation alone:

Because we affirm the superior court's finding of a statutory violation, we do not reach the constitutional issues, and relate only those facts relevant to the statutory inquiry.

Id. at 512 (citation omitted). Therefore, while this case has apparently been cited by opponents of school choice programs for the proposition that they are unconstitutional, clearly it cannot be read to support that conclusion. It holds merely that a town needs statutory authority to grant any abatements.

IV. Conclusion

It should be stressed again that the New Hampshire opinions above discussed are largely advisory opinions, which are not precedent setting because there was no adversarial record to review, and, often, two sides were not even presented. As the Court has explained:

Part II, Article 74 of the State Constitution empowers the justices of the supreme court to render advisory opinions, outside the context of concrete, fully-developed factual situations and without the benefit of adversary legal presentations, only in carefully circumscribed situations. When we issue such opinions, we act not as a court, but as individual constitutional advisors to the legislative or executive branches. Piper v. Meredith, 109 N.H. 328, 330 (1969).

Opinion of the Justices, 150 N.H. 355 (2003). Also, the recent federal cases, (such as Zelman) under the First Amendment have not been analyzed by the New Hampshire Court to see if their reasoning and rationale would allow it to further clarify and define parental choice and incidental impact. Also, to date, no advisory opinion has consciously deviated from federal precedents under the Establishment clause of the First Amendment.

The key to constitutionality under the State Constitution lies with a well-designed program which carefully circumscribes the permissible -i.e., secular- uses to which state funds may be put when they are paid to a sectarian institution. If the proposed school choice program provides for no more than incidental and indirect benefit to a religious sect or denomination, it should survive scrutiny under the New Hampshire Constitution.

To conclude, a school choice program will be constitutional, under both the United States and New Hampshire Constitutions, if it abides by the following guidelines:

- (1) It must be neutral with respect to religion; that is, it must have neither the purpose nor effect of advancing or inhibiting a particular religious sect, nor religion in general. Thus, school choice for parents must be the focus, not aid to certain religious schools.
- (2) It must provide no more than incidental benefits to a religious sect or religion in general, and any such incidental benefits must be brought about primarily as a result of the independent choices of parents who receive the public funds.

This opinion was prepared by former New Hampshire Superior Court (1974-76) and Supreme Court Justice (1977-85) Charles G. Douglas, III. Mr. Douglas practices law in Concord, New Hampshire. Web: www.nhlawoffice.com

Historical Considerations Concerning New Hampshire's Blaine Amendment

Richard D. Komer

The New Hampshire Constitution contains several provisions addressing religion. The first of these provisions, a “compelled support” clause, Part I, Art. 6, reads in relevant part: “But no person shall ever be compelled to pay towards the support of the schools of any sect or denomination.” The second provision, a “Blaine Amendment,” in Part II, Art. 83, reads in relevant part: “[N]o money raised by taxes shall ever be granted or applied to the use of the schools or institutions of any sect or denomination.” The older compelled support language clearly prohibited the colonial practice of state government requiring all citizens to pay for the support of an established church¹ and the later variant whereby state government served as a tithe collector for whichever church a citizen belonged to.² The later Blaine Amendment language, adopted in 1877, rebuffed the efforts of the Catholic Church to obtain direct funding for its schools equal to the direct funding provided by the state to the generically Protestant public schools.

Far from being a manifestation of efforts to keep state government religiously-neutral in pursuit of separation of church and state, the Blaine Amendments like New Hampshire's were in fact the product of organized nativist efforts to suppress the cultural threat posed by the growth of Catholic “sectarian” schools and thereby preserve the Protestant character of the “nondenominational” public schools.³ Rather than reflecting a benign separationist ideology, the Blaine Amendments were a bigoted effort to suppress Catholic schools and preserve Protestant hegemony

¹ Like the rest of New England, New Hampshire was dominated by Congregationalists. See, e. g., *Hale v. Everett*, 53 N.H. 9, 11 (1868) (“the great mass of our people ... were Congregationalists Such was their Christianity and their Protestantism, as was that of most of the New England states”).

² Both Part I, art. 6 and Part II, art. 83 recognize the importance of “morality and piety” and religious societies (art .6) and “knowledge and learning” and seminaries and other private educational institutions (art. 83) to the preservation of a free government. Article 83 further commands that “it shall be the duty of the legislators and magistrates, in all future periods of this government, to cherish the interest of literature and the sciences, and all seminaries and public schools ...”. This language as originally formulated in the Constitution of 1784 reflects similar language drafted by John Adams in the Massachusetts Constitution of 1780, under which Massachusetts chartered and endowed a variety of religious schools, as, I suspect, did New Hampshire. For example, *Sisters of Mercy v. Hooksett*, 93 N.H. 301, 42 A.2d 222 (1945), notes that Dartmouth College was a “seminary” and asked for and received a land grant from the New Hampshire legislature in 1789. 93 N.H. at 305, 42 A.2d at 225-26. Dartmouth was, of course, a religious institution founded to “christianize” the Indians.

³ See, for example, R. Freeman Butts, *The American Tradition in Religion and Education* (1950), which explains that American educators like Horace Mann in the first half of the 19th century “came to the conclusion that moral education

generally and the Protestant character of the public schools generally. Their roots thus lie in America's unsavory history of religious bigotry and prejudice.⁴

While the United States Supreme Court has begun to recognize this tainted past, past applications of New Hampshire's Blaine amendment have utterly failed to recognize its antecedents in religious discrimination. The Blaine amendments represent a perversion of the great American tradition of religious freedom and are tainted with a discriminatory motivation, whose pernicious effects no honorable court should extend into the future. Indeed, the Supreme Courts of both Arizona and Wisconsin have refused to apply their Blaine Amendments to strike down parental choice programs permitting the beneficiaries of the challenged programs to select religious schools, among others.⁵

In *Mitchell v. Helms*, 530 U.S. 793 (2000), the four Justice plurality opinion acknowledged and condemned the nativism that led to the Blaine Amendments, stating that "hostility to aid to pervasively sectarian schools has a shameful pedigree that we do not hesitate to disavow." 530 U.S. at 828-29 (plurality opinion of Thomas, J., joined by Rehnquist, C.J., and Scalia and Kennedy, JJ).⁶ The plurality concluded that "the exclusion of pervasively sectarian schools from otherwise permissible aid programs" represented "a doctrine, born of bigotry, [that] should be buried now." *Id.* at 829. The exclusion of religious schools from such programs is precisely what New Hampshire's Blaine Amendment does.⁷

should be based on the common elements of Christianity to which all Christian sects could agree," including Bible reading without comment. *Id.* at 117. Catholic immigrants, however, objected "that what seemed to be 'non-sectarian' to Protestants was actually 'sectarian' to Catholics." *Id.* See also 2 Anson Stokes, Church and State in the United States (1950), examining Horace Mann's understanding that the system of common schools purposefully inculcates Christian morals founded on the basis of religion.

⁴ For a detailed explanation of how American nativism succeeded in backing its hostility to Catholic schools with the force of law, while cloaking that hostility in the rhetoric of religious freedom and the authority of the founding fathers, see Philip Hamburger, Separation of Church and State (2002).

⁵ See *Kotterman v. Killian*, 972 P.2d 606 (Ariz.), *cert. denied*, 528 U.S. 921 (1999); and *Jackson v. Benson*, 578 N.W.2d 602 (Wisc.), *cert. denied*, 525 U.S. 997 (1998).

⁶ The opinion further noted that:

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 Catholics in general, and it was an open secret that "sectarian" was code for "Catholic." See generally Green, *The Blaine Amendment Reconsidered*, 36 Am. J. Legal Hist. 38 (1992).

Mitchell, 530 U.S. at 828.

⁷ *Mitchell*, like the Blaine Amendments it discusses, involved an aid program that provided benefits directly to sectarian schools. New Hampshire's Supreme Court has compounded this discrimination problem by extending the scope of its Blaine Amendment to parental assistance programs in which any "benefit" to religious schools is at most indirect and incidental to the programs' beneficiaries having chosen such a school. This extension has occurred without any meaningful discussion in the relevant opinions.

In *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), Justice Breyer, in a dissent joined by Justices Stevens and Souter, also recognized the Blaine Amendments were enacted as a backlash against the efforts of Catholics “to right the wrong of discrimination against religious minorities in public education.” *Id.* at 721. Relying largely on Jeffries and Ryan’s law review article entitled “A Political History of the Establishment Clause,” 100 Mich. L. Rev. 279 (2001), the dissenters concluded that the efforts to amend the state constitutions to incorporate the Blaine Amendment language were intended “to make certain that the government would not pay for sectarian (*i.e.*, Catholic) schooling for children.” *Id.* Thus, seven sitting Justices of the Supreme Court have reached the conclusion that the Blaine Amendments were a means whereby the states targeted Catholics for special disadvantage.

In *Kotterman v. Killian*, 972 P.2d 606 (Ariz.), *cert. denied*, 528 U.S. 921 (1999), the Arizona Supreme Court rebuffed the plaintiffs request that it interpret its Blaine Amendment language to invalidate an educational aid program assisting families and providing “incidental” aid to religious schools. The Court refused to strike down the program because it “would be hard pressed to divorce the amendment’s language from the insidious discriminatory intent that prompted it.” 972 P.2d at 624. The Court held that the program was consistent with both the federal and state religion clauses.

New Hampshire added its Blaine Amendment to its state constitution in 1877, shortly after Congress failed to obtain the supermajorities required to pass the federal Blaine Amendment the previous year. Moreover, it was New Hampshire Senator Henry Blair who, as chairman of the Senate Education Committee, spearheaded the successful efforts of the U.S. Congress to require all subsequently admitted states to include Blaine Amendment language in their state constitutions as a condition of admission.⁸ Blair understood himself as finishing the work started by James G. Blaine. Long after Blaine’s departure from the Senate, Blair was reintroducing Blaine’s Amendment. Blair was a fervent proponent of the importance of teaching religion in the public schools,⁹ and viewed atheism and the Catholics’ demand for a fair share of the school funds as the “two grave dangers” threatening “the American system of common schools.”¹⁰

⁸ See, for example, the federal Enabling Act of 1889, 25 Stat. 676-77, under which North Dakota, South Dakota, Montana, and Washington became states.

⁹ Upon introducing his amendment to the Enabling Act to require Blaine language, Blair stated the measure was intended to require instruction “in virtue, morality, and the principles of the Christian religion.” 19 Cong. Rec. 434.

¹⁰ 20 Cong. Rec. 2100.

New Hampshire's adoption of its Blaine Amendment in 1877 was thus part and parcel of a nationwide effort to preserve the Protestant monopoly over public school funding. As such, it partakes of the same discriminatory animus underpinning those efforts. None of the New Hampshire Supreme Court's Advisory Opinions interpreting Part II, Art. 83 have ever addressed this sordid history. Nor, as mentioned previously, do these Opinions discuss the direct versus indirect aid distinction recognized in the U.S. Supreme Court's evolving Establishment Clause jurisprudence, although the opinions seem to assume a general parallelism between New Hampshire's religion clauses and their federal counterparts. It is now clear under *Zelman* that the Establishment Clause permits states to create parental choice programs that allow parents to choose their children's schools, even if some parents choose religious schools. Article 83's antecedents in anti-Catholic bigotry counsel that the New Hampshire Supreme Court reach a similar conclusion in interpreting that provision, lest the anti-Catholic nativism of the past be given new life in the 21st century.

Richard "Dick" D. Komer serves as a senior litigation attorney at the Institute for Justice. He litigates school choice cases and employment discrimination cases in both federal and state courts. Several of his current cases involve the constitutionality of allowing school choice programs to include religious schools among the private schools that can participate. www.ij.org

Douglas, Leonard & Garvey, P.C.

Charles G. Douglas III

6 Loudon Road
Concord, NH 03301
Phone: 603-224-1988
Web: www.nhlawoffice.com

Institute for Justice

Dick Komer

Institute for Justice
1717 Pennsylvania Ave., NW, Suite 200, Washington, D.C. 20006
Tel (202) 955-1300 Fax (202) 955-1329
Web: www.ij.org

The Josiah Bartlett Center for Public Policy

7 South State Street
Concord, New Hampshire 03301
Phone: (603)224-4450 Fax: (603)224-4329
Email: jbartlett@jbartlett.org Web: www.jbartlett.org

Milton and Rose D. Friedman Foundation

One American Square, Ste. 1750
Box 82078
Indianapolis, Indiana 46282
Phone: (317) 681-0745 Fax: (317) 681-0945
www.friedmanfoundation.org