

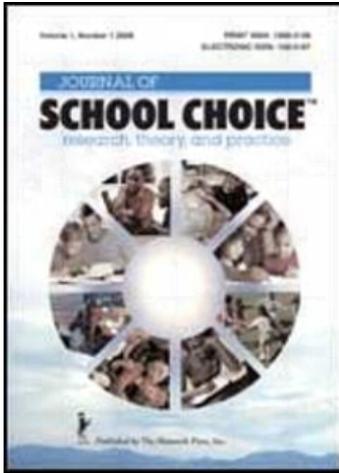
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The National Implications of *Cain v. Horne*

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This commentary addresses the Arizona Supreme Court's legal reasoning in Cain v. Horne, which struck down two voucher programs for special needs children pursuant to one of Arizona's Blaine Amendments and explains that the court both failed to apply a straightforward textual analysis and ignored the analytical framework its prior precedents had properly established. The article then places the decision in a national context by discussing the implications for future school choice programs in states with similar constitutional provisions and demonstrates why Cain is not persuasive legal authority.

KEYWORDS *voucher, Blaine Amendment, school choice, Cain v. Horne, disability*

INTRODUCTION

On May 20, 2009, Arizona governor Jan Brewer called the state legislature into special session to urge lawmakers to pass a tax-credit-funded scholarship program to help children with disabilities and children in foster care attend private schools (Senseman, 2009). The legislature responded by enacting Lexie's Law, a corporate tax credit to fund private school scholarships for these special needs children (Arizona 2nd Special Session Law, 2009). The law is named after Lexie Weck, an eight-year-old girl born with autism, cerebral palsy, and mild mental retardation. Lexie and her mother, Andrea Weck, became the face of school choice in Arizona after intervening in *Cain v. Horne*, a lawsuit involving the constitutionality of two publicly funded private school voucher programs enacted in 2006 to give parents with special needs students the choice of educating their children in either public or private school.

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Lexie had made little social or academic progress in public school, but was thriving in private school. She was able to attend a private school because the Arizona Legislature adopted and then-Governor Janet Napolitano, a Democrat, signed both the Displaced Pupils Grant Program (serving foster children) and the Arizona Scholarships for Pupils with Disabilities Program (Arizona Revised Statutes §15, 2006b). The voucher program for pupils with disabilities placed Andrea Weck on a level playing field with public school district officials in deciding Lexie's educational placement. At the time the Scholarships for Pupils with Disabilities Program was adopted, state law already empowered school district officials to place children in private school and pay the private school's tuition with public funds (Arizona Revised Statutes §15, 2008). Andrea had previously been told by Lexie's school district that they would not place Lexie in a private school, but under the new program Andrea exercised her choice and placed Lexie in the Chrysalis Academy—a private school where more than half of the students attending are placed by public school districts that use public funds to pay the students' tuition (King, 2008).

The Arizona Supreme Court struck down the two parent-directed voucher programs for special needs students without any discussion or attempt to distinguish the school-district-directed private school placement program (*Cain v. Horne*, 2009). However, the *Cain v. Horne* decision did have two positive aspects. First, the court said that the voucher programs had inherent worth and that it was possible for the legislature to find a way to help children like Lexie (*Cain v. Horne*, 2009). Second, the court offered a roadmap to help the legislature find that way by reaffirming a prior Supreme Court decision, *Kotterman v. Killian* (1999), that upheld tax-credit-funded private school scholarships—like Lexie's Law—from an identical legal attack (*Cain v. Horne*, 2009).

Even though *Cain v. Horne* clearly signaled that Lexie's Law passes constitutional muster, the Arizona Education Association's president promised that Lexie's Law would be declared unconstitutional, signaling a forthcoming lawsuit (Committee on Ways and Means, 2009). Perhaps this new case, if filed, will give the Arizona Supreme Court an opportunity to correct the legal errors it made in *Cain v. Horne* before the case becomes entrenched in Arizona's legal traditions and before it is used to attack Arizona's many other publicly funded private school choice programs (Carpenter & Peterson, 2007).

THE ISSUE IN *CAIN V. HORNE*

The Arizona Education Association (AEA), the state's largest teachers' union, along with an alphabet soup of organizations opposed to school choice, such as the American Civil Liberties Union of Arizona and the People for the American Way, filed a lawsuit to halt the scholarship program benefitting children like Lexie, as well as a similar program for children in foster care (Arizona Revised Statutes §15, 2006a). The teachers' union and its allies

alleged the scholarship programs violated Arizona's two Blaine Amendments, which are discussed in greater detail below. For decades, the Arizona Supreme Court has held that those provisions prohibit "the use of public assets for religious purposes" and "were included in the Arizona Constitution to provide for the historical doctrine of separation of church and state" (*Kotterman v. Killian*, 1999, p. 622). According to the court, the main point of this historical doctrine was "to insure that there would be no state supported religious institutions thus precluding governmental preference and favoritism of one or more churches" (*Community Council v. Jordan*, 1967, p. 463). The AEA et al. sought to expand the scope of the Blaine Amendments' reach beyond their limit on governmental actors to also limit decisions by private actors—namely parents who were making decisions pursuant to the publicly funded voucher programs. Andrea Weck and other parents intervened on behalf of their children to defend the programs.

The trial court denied the teachers' union's request to strike down the programs and ruled that the programs were consistent with the Arizona Constitution. The teachers' union appealed, and the intermediate appellate court struck down the programs (*Cain v. Horne*, 2008). The Arizona Supreme Court then agreed to hear the case and granted Andrea Weck's motion to keep the programs running while the court reviewed the case. Ultimately, the court concluded that the scholarship programs violated one, but not necessarily both, of Arizona's Blaine Amendments. Specifically, the court said the scholarship programs violated Article IX, section 10 of the Arizona Constitution, which says that "[n]o tax shall be laid or appropriation of public money made in aid of any church, or private or sectarian school, or any public service corporation."

The court should have applied a straightforward textual analysis by examining the plain language of the provision and applying past precedent to determine whether the scholarship programs were passed "in aid of" private schools or "in aid of" individuals. Had it done so, the scholarship programs would have been upheld as entirely consistent with the text of the provision. However, as will be demonstrated, rather than engaging in a straightforward textual analysis, the court went beyond the plain language to consider the framers' purpose in writing it. Still, an inquiry into the Arizona Constitution's history should also have led the court to uphold the programs. Yet, the court failed to consider the historical evidence that exists to shed light on that purpose. Instead, in its excursion beyond the text, the court made a superficial inquiry that completely ignored the provision's well-documented history and purpose (*Kotterman v. Killian*, 1999).

THE ARIZONA SUPREME COURT'S ANALYSIS

The Arizona Supreme Court began its opinion in *Cain* by laying out its rules for interpreting a constitutional provision. The Court first stated that, when

interpreting a constitutional provision, the court's "primary purpose is to effectuate the intent of those who framed the provision" (*Cain v. Horne*, 2009, p. 1181). The first step in effectuating the framers' intent is to "examine the plain language of the provision" (p. 1181). If the intent is clear from the language, the court will not depart from that language by engaging in any further analysis. If it is not clear, the court may "consider 'the history behind the provision, the purpose sought to be accomplished by its enactment, and the evil sought to be remedied'" (p. 1181). The textual analysis in this case should have ended the inquiry. The court apparently determined the provision's language was not clear because rather than simply applying a textual analysis, the court went on to examine the purpose sought to be accomplished by Article IX, section 10.

The framers' intent with regard to Article IX, section 10 of the Arizona Constitution is not difficult to discern from the text. The provision says that "[n]o tax shall be laid or appropriation of public money made in aid of any church, or private or sectarian school, or any public service corporation." As the court in *Cain* correctly noted, and as all the parties in the case agreed, this provision prohibits direct appropriations of public funds to private or sectarian schools. The text does not, however, prohibit appropriations that result in public funds being paid to private or sectarian schools in exchange for educational services that aid families and children. Arizona school districts routinely use state funds to place children with disabilities in private schools (Arizona Revised Statutes §15, 2008).

As the Arizona Council for Administrators of Special Education pointed out in their amicus brief in opposition to the parent-directed scholarship programs in *Cain v. Horne*, when a public school district "determines that the most appropriate . . . placement for a student is a private residential facility . . . the district applies for a residential special education voucher to access funding from the state" (Lowell-Britt, & Sanchez, 2008, p. 11). In its brief, this anti-school-choice group wrote, "Arizona's Constitution does not prohibit a school district from employing private schools or other independent contractors to provide the public education services that the district is obligated to provide" (Lowell-Britt, & Sanchez, 2008, p. 2). Although correct, the council failed to offer any principled constitutional distinction that would allow public school districts to pay for tuition to private schools while at the same time prohibiting parents from also using public funds to send their children to the same private schools in order to receive the same educational services. Neither contracting with private schools nor using public funds to pay for educational services (tuition payments) violates Article IX, section 10's prohibition of appropriations "in aid of" private and religious schools. As the council's brief explained with regard to public school district placements, public funds used to place students in private schools are best characterized as payments for "education services rather than a[s] appropriation[s] in aid of private school[s], and would fall outside

the scope of the no-funding provision of the Arizona Constitution” (Lowell-Britt, & Sanchez, 2008, p. 11). Nothing in Article IX, section 10’s text prohibits the legislature from providing aid to families in the form of educational scholarships and allowing parents to use the aid at any school they desire, public or private, religious or nonreligious.¹

Quite simply, the language of Article IX, section 10 is addressed to legislative actions. Laying taxes and appropriating money for aid programs are plainly *legislative* acts. The constitutional language is not directed at private actions. A scholarship recipient’s act of choosing a private school at which to use the “aid” is a purely *private* one. Nor does the provision’s language prohibit aid to families. The provision prohibits aid to schools. The words “in aid of” also denote that some inquiry into legislative purpose is appropriate. Who is the legislature intending to aid with its appropriation? Is the appropriation “in aid of” private and religious schools? Here, the families receiving the scholarships are the intended and actual beneficiaries of the aid provided and not the schools they happen to select. This simple, straightforward reading of the constitutional text should have resulted in the challenged scholarship programs being upheld.

In fact, this construction of the text has been recognized by the Arizona Supreme Court’s previous precedents, which all distinguished between programs “in aid of” individuals and programs “in aid of” or “in support of” institutions. In *Community Council v. Jordan* (1967), the Arizona Supreme Court adopted the “true beneficiary” test to examine, under Article IX, section 10, a program that reimbursed the Salvation Army for services provided to indigent Arizonans. Under the true beneficiary test, the issue is whether a challenged program was passed “in aid of” private institutions or whether it was created to benefit private individuals. Here, the scholarship programs were plainly intended to benefit individuals, not institutions. The true beneficiary test originated in educational aid cases like *Cain* and recognizes that “it is not the school or sectarian institution that is receiving the benefits of the appropriation but the child itself” (*Jordan* 1967, p. 467).

The Arizona Supreme Court did try to distinguish *Cain* from *Jordan* by limiting *Jordan* to its specific facts while completely ignoring its logical underpinnings. The court in *Cain* reasoned that because the reimbursements being made to the Salvation Army in *Jordan* were less than 100% of the costs of providing aid to the needy, there was no “aid” to the Salvation Army. Even under this analysis, the two voucher programs should have passed muster as many of the scholarships likewise failed to cover the entire tuition cost—meaning that parents were left covering the difference out of their own pocket. However, *Jordan*’s true beneficiary test was not, as the *Cain* court suggested, dependent on whether the reimbursement or payment was less than 100% of cost, but instead focused on the legislative intent behind the challenged program. The focus then should be on who or what the legislature intended to aid—a focus that is in perfect harmony with

a plain-text analysis because the phrase “in aid of” in Article IX, section 10 clearly suggests that the question is not merely whether the institution receives some benefit from a challenged program but rather whether the program was passed “in aid of” a prohibited institution. The distinction between a program that aids or benefits a private school and a program that is passed “in aid of” a private school is driven home by the school-district-controlled voucher program. Private schools clearly receive a benefit from the public funds districts use to pay for the cost of the private education, but it is the students themselves who are the intended beneficiaries of a district-made private school placement. The same is true when parents are given control over the placement decision. Thus, the most critical question an Arizona court must answer when analyzing a program under Article IX, section 10 is: Who did the legislature intend to help by enacting the challenged program?

The Supreme Court in *Cain*, however, was not content just to examine the plain language and apply past precedent. The court instead resorted to outside sources to determine Arizona’s founders’ purpose for including the provision in the constitution, and the court’s analysis was inconsistent with its prior declarations concerning the provision’s purpose. For more than 30 years prior to *Cain*, the Arizona Supreme Court said Arizona’s Blaine Amendments were “included in the Arizona Constitution to provide for the historical doctrine of separation of church and state” (*Kotterman v. Killian*, 1999, p. 622). The “thrust” of this historical doctrine, according to the Supreme Court, was “to insure that there would be no state supported religious institutions thus precluding governmental preference and favoritism of one or more churches” (*Community Council v. Jordan*, 1967, p. 463). Yet, in *Cain*, the court adopted a never before identified purpose based on a recent law review article. That purpose, according to the court, is “to help insure that the Arizona legislature adequately meets its affirmative obligation . . . to ‘provide for the establishment and maintenance of a general and uniform public school system’” (*Cain v. Horne*, 2009, p. 21).

The court’s discussion of this new purpose was surprisingly superficial, especially considering that it had never before identified ensuring adequate funding as having motivated Arizona’s framers to include Article IX, section 10 in the Arizona Constitution. In declaring this new purpose, the court did not refer to a single historical source. Rather, the court adopted the opinion of a local law professor, whose law review article rested its entire argument on his personal belief that the provision “seems designed” to accomplish this purpose (Bender et al., 2000). The law review article contains no historical evidence to support his view. It offers mere conjecture and nothing more.

Once the court overlaid Article IX, section 10 with its newly minted purpose of ensuring that public money flows to public schools instead of to private schools, it was a simple matter for the court to ignore the fact that

the scholarship programs were not designed, intended, or enacted to aid or support private or religious schools. The simple fact that public money ultimately flowed to private schools was enough to justify striking down the program.

The court's approach to constitutional interpretation in *Cain* is alarming. Instead of letting the text serve as the most important indicator of intent, with reference to relevant historical events or the debates recorded in the constitutional convention, the justices in *Cain* elevated an unsupported speculation about what the provision "seems designed" to accomplish to the level of an authoritative source of the framers' intent. Presumably, the five justices also believed that the provision "seems designed" to effectuate the purpose of protecting public schools. The question is not what the justices or a law professor believe a provision "seems designed" to accomplish. The question is what does the provision's language actually accomplish? If reference to the language alone does not answer the issue, reference to the provision's history and past precedent should guide the court's inquiry.

As previously noted, the Arizona Supreme Court's prior cases recognized a commonsense understanding: Public funds used to purchase goods or services from private institutions are not appropriations "in aid of" the private institutions. When aid recipients direct their scholarship funds to private institutions to buy goods or services, their purchases are not made "in aid of" those institutions any more than when the state buys identical services from the same private schools. Scholarships are no more "in aid" of private schools than food stamps are "in aid" of grocery stores. Article IX, section 10 does not prohibit educational aid programs passed "in aid of" individuals, children, or families, because nothing in the text limits the ability of private individuals to decide where to use their public benefits. The court's extratextual analysis was simply unnecessary. But even had it been necessary, the court erred by looking to a single present day commentary rather than the "history behind the provision" (*Cain v. Horne*, 2009, p. 10).

Justice Feldman noted this history in his dissent in *Kotterman v. Killian* (an earlier Arizona educational aid decision). Justice Feldman traced the provision to the failed federal Blaine Amendment, proposed by James G. Blaine. As Komer discusses in this issue's accompanying article, the federal Blaine Amendment and the state Blaine Amendments that it spawned—such as Arizona's Article IX, section 10—were aimed at a specific target, namely, the efforts of the Catholic Church to obtain direct funding for its parochial schools. Such direct appropriations to Catholic schools had been a controversial part of Arizona's early educational history and set off a firestorm of debate that ultimately led to the adoption of this specific provision.

Justice Feldman documented that the Arizona territorial government's first educational grant was \$250 to a Catholic school—the mission school of San Xavier—in 1866. In 1875, the Territorial Legislative Assembly ordered

that the Sisters of St. Joseph be reimbursed for textbooks used at a Catholic school, St. Joseph's Academy. This issue triggered a vigorous public debate in which Chief Justice Edmund Dunne of the Arizona Territorial Supreme Court championed direct aid to Catholic schools. Arizona's territorial governor, A. P. K. Safford, "known as the father of Arizona education, expressed early concern that sectarian, primarily Catholic, schools would attract public moneys for their support" (*Kotterman v. Killian*, 1999, p. 633). The Safford faction prevailed, and President Ulysses S. Grant (one of the primary backers of the federal Blaine Amendment) removed Chief Justice Dunne from his position that same year. Read in this historical light, it is clear that Article IX, section 10 prevents direct aid to religious and private schools. However, "while the plain language of the provisions now under consideration indicates that the framers opposed direct public funding of religion, including sectarian schools, [there is] no evidence of a similar concern for indirect benefits," wrote the *Kotterman* majority (p. 619).

Unfortunately, the Arizona Supreme Court in *Cain* failed to appreciate the distinction between appropriations in aid of institutions and public programs designed to benefit individuals. The decision wrongly gives the impression that private schools, rather than scholarship recipients, were the primary beneficiaries of the scholarship program. Moreover, the court said in *Cain* that "applying the true beneficiary theory exception would nullify [Article IX, section 10's] clear prohibition against the use of public funds to aid private or sectarian education" (*Cain v. Horne*, 2009, p. 27). But there is simply no truth to the court's assertion.

Examples of prohibited appropriations would include those that sparked the battle that led to the inclusion of Article IX, section 10 in the constitution—the educational grant directly to the mission school of San Xavier and the territorial legislature's decision to directly reimburse the Sisters of St. Joseph for a Catholic school's expenses (*Kotterman v. Killian*, 1999). Other forbidden expenditures would include providing construction funds to private schools or paying salaries of private school teachers. Thus, upholding the challenged scholarship programs certainly would not have read Article IX, section 10 out of the constitution. Arizona's constitution would still have prohibited the very type of appropriations that led to the inclusion of the Blaine Amendment at issue in *Cain*—direct institutional grants.

Essentially, the Arizona Supreme Court in *Cain* expanded Article IX, section 10's reach not just to prohibit governmental actors from appropriating public funds "in aid of" private and religious institutions but to restrict how private individuals benefiting from public aid programs can use their benefits. This expansion jeopardizes no less than six other educational voucher programs in Arizona that serve more than 22,000 students annually, and in particular threatens the state's postsecondary tuition grant programs that help students attend private and religious colleges (Carpenter & Peterson,

2007). And the logic that undergirds *Cain's* expansive reading of Article IX, section 10 is completely inconsistent with these and other public aid programs. For example, Arizona participates in numerous joint federal-state programs that allow aid recipients to select among a full array of religious and nonreligious providers. With respect to K–12 education, Arizona participates in the federal Individuals with Disabilities Education Act (IDEA; Individuals with Disabilities Education Act, 1975). That program provides Arizona with federal financial assistance for the provision of special education services to disabled students—precisely the same class of students that the Arizona Scholarships for Pupils with Disabilities Program served.

As a condition for the receipt of the federal funds, Arizona is obligated to abide by the substantive and procedural requirements of IDEA, a very complex statute with extensive procedural requirements that can be a nightmare for parents to navigate—especially lower-income parents unable to afford a lawyer. One of those requirements is that when a district cannot provide an adequate education to a child with a disability it must place him or her in a school that can, including placing the child in either another public school district or a private school (*Board of Education v. Rawley*, 1982). Arizona has adopted statutes to implement this requirement. Pursuant to these statutes, districts regularly place children in private schools and pay the full tuition. One of those schools is the Chrysalis Academy, which Lexie Weck attends. According to an amicus curiae brief filed in *Cain* by the school's parent association, half of the students at Chrysalis are district placements while the other half were placed there by parents under the now-defunct voucher program (King, 2008).

Under IDEA, in order to convince a school district to place a child in a private school, the parent must persuade school officials that a district placement is inadequate. This is hard for parents to do absent a paid educational consultant and/or a lawyer. Parents who fail to persuade their district of the necessity of a private school education must then prove in federal court that the education offered in the public school is inadequate. Parents of children with disabilities—more often than not—lack the resources to mount such a challenge. The Arizona Scholarships for Pupils with Disabilities Program simply enabled parents to seek a private placement for their children without forcing them to navigate the endless complexities of IDEA. It allowed parents to place their children in the same private schools that they might have ended up in through an IDEA placement but without the red tape.

Another avenue available to parents whose children receive an inadequate public school placement is to unilaterally remove their children from public school and place them in a private school and then sue the district in federal court to reimburse the tuition costs (*School Committee of Burlington v. Massachusetts Department of Education*, 1985). Under these circumstances, federal courts have held that school districts must reimburse tuition to parents who placed their children in religious schools (*Christen G. v.*

Lower Merion School District, 1996; *Matthew J. v. Massachusetts Department of Education*, 1998; *Board of Education v. Jeff S.*, 2002; *L. M. v. Evesham Township Board of Education*, 2003). Arizona is accordingly required to reimburse religious school tuition or withdraw from the program. Of course, as with the appeal process described previously, this avenue is foreclosed to all but the wealthiest of parents. The Arizona Scholarships for Pupils with Disabilities Program was designed to supplement parents' existing opt-out rights under the IDEA.

Even though the plain text, history, and other relevant public aid programs should have led to the conclusion that the Arizona Scholarships for Pupils with Disabilities program passed constitutional muster, the Arizona Supreme Court instead struck down the program. The question thus arises as to what impact this decision will have in other states. Will the Arizona Supreme Court's reasoning persuade other state supreme courts to similarly interpret their Blaine Amendments? The following section will demonstrate why the answer to this question should be a resounding "No."

THE ARIZONA SUPREME COURT'S DECISION AND OTHER STATE SUPREME COURTS

Thirty-seven state constitutions, including Arizona's, contain Blaine Amendments (Komer & Neily, 2007). These notorious provisions were developed during a time of strong anti-immigrant and anti-Catholic bigotry in the late 1800s (Buckley, 2004; Hamburger, 2002; Jorgenson, 1987). At that time, the nation's public schools were predominantly Protestant and generally inhospitable to Catholics. This led many Catholics to seek public funding for their own schools. Determined to prevent such funding, Maine Senator James G. Blaine introduced a federal constitutional amendment to prohibit public funding of any "sectarian" school. It was an open secret that the word "sectarian" was simply code for "Catholic" (*Mitchell v. Helms*, 2000, p. 828). The federal Blaine Amendment failed, but many states included such provisions in their own constitutions. These state Blaine Amendments were aimed at a specific target, namely, the efforts of the Catholic Church to obtain direct funding for its parochial schools. Neither the failed federal Blaine Amendment nor any one of the original state Blaine Amendments addresses aid to families. Only Michigan's Blaine Amendment has been amended to address such aid—and then only after the Michigan Supreme Court held that Michigan's original Blaine Amendment did not prohibit aid to families (*Advisory Opinion re Constitutionality of P.A. 1970*, 1970). All of the Blaine Amendments plainly concern direct aid to religious schools and prevent the government from trying to foster or support them. A few of the Blaine Amendments, including Arizona's Article IX, section 10, also concern direct aid to nonreligious private schools.

Arizona's Article IX, section 10 is fairly unique among state Blaine Amendments because it prohibits appropriations to both sectarian *and* nonsectarian private schools. Only Alaska, Hawaii, New Mexico, and South Carolina have similarly worded provisions.² Most Blaine Amendments prohibit appropriations only to "sectarian" schools, meaning that under most state Blaine Amendments direct appropriations to "nonsectarian" schools would be permissible.³ Of course, that was James Blaine's original intent: allow funding to nonsectarian schools—particularly nondenominational Protestant schools—while prohibiting funding to sectarian (i.e., Catholic) schools. As Komer indicates in this issue's accompanying article, this difference between Arizona's Article IX, section 10 and most Blaine Amendments should not matter because, regardless of any particular provision's scope, the point is that direct aid to institutions is prohibited, not aid to families. Arizona's founders, as well as the framers in Alaska, Hawaii, New Mexico, and South Carolina, sought to prohibit direct funding of all private schools, in addition to prohibiting direct funding of sectarian (Catholic) schools. It does not follow that subsidizing tuition payments is a form of prohibited aid to religious and other private schools. As discussed, "appropriating" is not a term used to describe the act of private individuals paying for the education of their children. Therefore, nothing in the text of any of the 37 Blaine Amendments—including those in the constitutions of Alaska, Hawaii, New Mexico, and South Carolina—limits the ability of state legislatures to appropriate scholarships for students and then allow scholarship recipients to choose from among a full array of public, private, religious, and nonreligious schools at which to use those scholarships (Komer & Neily, 2007).

How will those four states respond to *Cain*? Unfortunately, Alaska and Hawaii have already interpreted their Blaine Amendments in a manner that likely precludes school voucher programs. The Alaska Supreme Court declared unconstitutional a grant program for students attending private colleges and even reasoned that there is no difference between giving money to the student and giving money to the school (*Sheldon Jackson College v. State*, 1979). Hawaii's Supreme Court has also interpreted its Blaine Amendment expansively. The court struck down a statute that authorized transporting private school students at public expense as violating Hawaii's Blaine Amendment (*Spears v. Honda*, 1968). The Arizona Supreme Court's decision in *Cain* will thus not impact the precedents in Alaska or Hawaii. New Mexico and South Carolina, on the other hand, are both states that currently lack school voucher programs and are states whose existing legal precedents are favorable for such programs. *Cain* should not be an impediment in either state, at least not with regard to those states' Blaine Amendments.

Should New Mexico's Supreme Court have the opportunity to consider the constitutionality of a voucher program, it would be the first time the

court has considered this particular issue. There is very little case law in New Mexico interpreting its Blaine Amendment. A 1976 attorney general's opinion concluded that a voucher program for children with exceptional needs would be consistent with New Mexico's Blaine Amendment (Attorney General Opinion, 1976). A later attorney general's opinion came to the opposite conclusion (Attorney General Opinion, 1999). Of course, such opinions carry very little persuasive value. However, just as in Arizona, the text of New Mexico's Blaine Amendment contains nothing that prohibits the legislature from providing educational aid to parents and children. If the New Mexico Supreme Court applied a proper textual analysis, as outlined herein, there is no reason why *Cain's* shallow inquiry into the amendment's purpose should be considered persuasive.

South Carolina's Blaine Amendment jurisprudence, meanwhile, illuminates the depths of *Cain's* failure to apply a straightforward textual analysis. The Arizona Supreme Court relied on the South Carolina Supreme Court's decision in *Hartness v. Patterson* (1971) to conclude that tuition scholarships constitute aid to private schools. In *Hartness*, the South Carolina Supreme Court struck down a publicly funded postsecondary tuition grant program to help students attend private colleges. The court in *Hartness* rejected the argument that a tuition grant "does] not constitute aid to the participating schools" and noted that although a "tuition grant aids the student, it is also of material aid to the institution to which it is paid" (p. 909). The *Hartness* case was not decided under South Carolina's current Blaine Amendment. South Carolina's constitution was amended in 1973, and its Blaine Amendment currently prohibits payments of public funds "for the direct benefit of any religious or other private educational institution" (South Carolina Constitution, art. XI, § 4). At the time *Hartness* was decided in 1971, the state's Blaine Amendment instead prohibited public money from being used "directly or indirectly" in aid of religious schools. Considering that the plain text of South Carolina's pre-1973 Blaine Amendment prohibited indirect aid as well as direct aid, it is understandable why the South Carolina Supreme Court struck down the program.⁴

The 1973 amendment was motivated by a desire "to allow public funds to be used to assist students who independently choose to attend private educational institutions, while still prohibiting direct government subsidization of those institutions" (Komer & Neily, 2007, p. 74). This is crucial because a voucher program is precisely the type of program that the framers of South Carolina's current Blaine Amendment intended to allow. It also means that *Hartness* is no longer relevant. The Arizona Supreme Court's reliance on a case interpreting a provision of the South Carolina Constitution that was later amended to clearly allow aid to families and individuals is of genuine constitutional significance. The constitutional provision in *Hartness* was significantly different than Arizona's Article IX, section 10. South Carolina then amended its constitution so that it essentially mirrored

Article IX, section 10. The Arizona Supreme Court should have taken into account the differences between South Carolina's outmoded Blaine Amendment at issue in *Hartness* and Arizona's Article IX, section 10 and refused to rely on or cite the case. Arizona's Blaine Amendment and South Carolina's current Blaine Amendment prohibit only direct-aid programs.

Considering the amendment to the South Carolina Constitution, South Carolina's legislative history expressly favoring educational grant programs, and the Arizona Supreme Court's citation to a now-defunct South Carolina Supreme Court decision, there is no reason to believe that the *Cain* decision will influence South Carolina's Supreme Court. Any school voucher program enacted in South Carolina and challenged in court should survive constitutional scrutiny.

CONCLUSION

Cain v. Horne demonstrates that even the best intentioned courts can get things wrong. The court's superficial reading of the Arizona Constitution and its failure to abide by its past precedents demonstrates that judges need to be more engaged in the process of constitutional interpretation. What this means for lawyers defending school choice programs in other states is that they must be prepared to thoroughly and proactively address the faulty reasoning and analytical errors made by the Arizona Supreme Court in *Cain*. What it means for legislators considering new school choice programs is that there is no reason why *Cain* should be considered a barrier to voucher programs in other states. And what it means for school choice advocates in Arizona is that until there is a constitutional amendment or another case that presents itself as an opportunity to overrule *Cain*, they will have to be content under *Kotterman v. Killian* to accomplish their goals through the arguably less efficient and more uncertain tax credit programs such as Lexie's Law.

NOTES

1. To the extent that Arizona's founders intended to prohibit certain types of government aid to individuals, they did so in article IX, § 7 of the Arizona Constitution, which says, "Neither the state, nor any county, city, town, municipality, or other subdivision of the state shall ever give or loan its credit in the aid of, or make any donation or grant, by subsidy or otherwise, to any individual, association, or corporation, or become a subscriber to, or a shareholder in, any company or corporation, or become a joint owner with any person, company, or corporation, except as to such ownerships as may accrue to the state by operation or provision of law or as authorized by law solely for investment of the monies in the various funds of the state" (emphasis added). The Arizona Supreme Court, however, has interpreted this provision to permit aid to individuals as long as any challenged program serves a public purpose and adequate consideration is provided for the public benefit conferred (*Kotterman v. Killian*, 1999). The court explained, "This constitutional provision was historically intended to protect against the

extravagant dissipation of public funds by government in subsidizing private enterprises such as railroad and canal building in the guise of public interest. Such evils do not exist here. Neither do we agree with petitioners that a tax credit amounts to a 'gift.' One cannot make a gift of something that one does not own" (*Kotterman v. Killian*, 1999, p. 288).

2. Alaska Constitution article VII, § 1; Hawaii Constitution article X, § 1; New Mexico Constitution article XII, § 4; South Carolina Constitution article XI, § 4. However, some states' Blaine Amendments contain language prohibiting appropriations to schools not under the exclusive control of the state or public school officials. See Alabama Constitution article IV, § 73; California Constitution article IX, § 8; Colorado Constitution article V, § 34; Mississippi Constitution article IV, § 66; Nebraska Constitution article VII, § 11 (1); and Wyoming Constitution article III, § 36.

3. Prohibiting individuals from choosing religious service providers from a religion-neutral public benefit program raises its own constitutional implications (Duncan, 2003; Heytens, 2000).

4. I do not mean to imply that *Hartness* was correctly decided. Aid to students in the form of tuition grants is not even indirect aid, but merely incidental aid at most (*Board of Education v. Allen*, 1967). In *Allen*, the New York Supreme Court upheld a textbook loan program under the State's Blaine Amendment, reasoning that the provision was never intended to prohibit programs that might ultimately entail some benefit to parochial schools.

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