

# AN OVERVIEW AND EVALUATION OF STATE BLAINE AMENDMENTS: ORIGINS, SCOPE, AND FIRST AMENDMENT CONCERNS

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*"[I]t is one of the firmest convictions of our time that difference of creed should no longer be allowed to determine a difference of civic rights."*

—Jacob Burckhart<sup>1</sup>

*"Governments have not always been tolerant of religious activity, and hostility toward religion has taken many shapes and forms—economic, political, and sometimes harshly oppressive."*

—Chief Justice Warren Burger<sup>2</sup>

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1. JACOB BURCKHARDT, REFLECTIONS ON HISTORY 164 (Liberty Fund 1979) (1943).

2. *Walz v. Tax Comm'n of N.Y.*, 397 U.S. 664, 673 (1970).

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## I. INTRODUCTION

The issue of the legality of vouchers and other forms of state aid to private religious schools has taken on new life in the states. This renewed interest in state aid to religious schools has been motivated by the groundbreaking Supreme Court decision in *Zelman v. Simmons-Harris* to uphold an Ohio program that provides payments in the form of vouchers to parents who have children in failing public schools.<sup>3</sup> The state program allows parents to use those vouchers to pay for tuition for their children in private schools of either a secular or religious character.<sup>4</sup> Prior to the Court's ruling in *Zelman*, the legality of public vouchers for private education was hotly debated on the national stage. As Kent Greenawalt has noted, vouchers were a

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3. *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002). For a discussion of Establishment Clause issues and vouchers for private religious education, see Michael J. Frank, *The Evolving Establishment Clause Jurisprudence and School Vouchers*, 51 DEPAUL L. REV. 997 (2002).

4. See *Zelman*, 536 U.S. at 644-45.

major issue in the 2000 election—an issue that was, in his words, “connected closely” to religion.<sup>5</sup> While various public policy arguments were raised both for and against vouchers for private education, a primary issue of legal concern was whether such vouchers would pass federal constitutional muster. The Court’s decision provides an affirmative answer to that question.<sup>6</sup> However, while the Court’s ruling in *Zelman* was noted prominently in the media,<sup>7</sup> the Court did not decisively resolve the issue of the legality of state governments’ providing vouchers or other forms of aid to private school students or parents for the private education of their children.<sup>8</sup> The Supreme Court’s ruling was permissive in character, rather than imperative; it permits states, if they choose, to provide such vouchers, but they are not required to do so.<sup>9</sup> The Court’s decision also does not mandate that parents have the option to use the tuition vouchers to send their children to private religious schools; it simply states that programs allowing parents to do so do not run afoul of the Establishment Clause of the First Amendment.<sup>10</sup> The Court’s ruling, therefore, casts the issue of vouchers and other forms of aid to private religious schools back to the states, leaving it to state governments, in accord with the political will and the constitutions of those states, to

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5. Kent Greenawalt, *Religion and American Political Judgments*, 36 WAKE FOREST L. REV. 401, 402 (2001).

6. See *Zelman*, 536 U.S. at 643-44.

7. See Charles Lane, *Court’s Term Brought Dramatic Shifts in Law: Vouchers, Death Penalty Top Issues*, WASH. POST, June 30, 2002, at A06; Rod Paige, *A Win for America’s Children*, WASH. POST, June 28, 2002, at A29; David G. Savage, *School Vouchers Win Backing of High Court*, L.A. TIMES, June 28, 2002, at A1; Anne Gearan, *Supreme Court OKs School Vouchers*, ASSOCIATED PRESS, June 27, 2002, available at LEXIS; see also Jeffrey Rosen, *The Refining of Religious Neutrality*, N.Y. TIMES, June 28, 2002, at A27.

8. *Zelman* 536 U.S. 639. Significant questions regarding the proper scope of state voucher programs have erupted since the *Zelman* decision was handed down. See Clint Bolick, *High Court Hands Vouchers a Victory*, FOX NEWS, June 27, 2002 at <http://www.foxnews.com/printerfriendlystory/0,3566,56444,00.html>; Sean Salai, *Vouchers Backers Plan More Challenges*, WASH. TIMES, July 10, 2002, at A04, available at 2002 WL 2913948 (last visited March 18, 2003); Karen Thomas, *School Voucher Supporters Take Fight to Maine*, USA TODAY, Sept. 18, 2002, at 8D, available at 2002 WL 4733725 (last visited March 18, 2003); Steve Centanni, *Activists Ready to Battle Over School Vouchers*, FOX NEWS, at <http://www.foxnews.com/story/0,2933,60069.00.html> (last visited March 8, 2003); Jo Becker, *Voucher Debate Entwined with a Century-Old Fight*, ST. PETERSBURG TIMES, July 6, 1999, at 4B, available at 1999 WL 3329359 (last visited March 18, 2003).

9. See *Zelman*, 536 U.S. at 643-45, where the Court’s holding found only that the Ohio program did not violate the Establishment Clause. See also Richard John Neuhaus, *The Public Square*, 2002 FIRST THINGS 126 (Oct. 2002): 83-108, available at <http://www.firstthings.com/ftissues/ft0210/public.html>. (noting strong state-based opposition to school vouchers for religious schools by “forces defending the status quo”).

10. *Zelman*, 536 U.S. at 651-53.

decide whether vouchers or other forms of aid should be given to parents to pay tuition at private schools, whether secular or religious.<sup>11</sup>

The importance of state law in evaluating the overall legality of vouchers or other forms of aid for private religious schools should not be underestimated. States provide most of the funding for education in our society, and according to general estimates, eighty-five percent of all private schools are affiliated with religious groups or denominations.<sup>12</sup> If such schools are excluded as options for parents under enacted state voucher programs, the school voucher movement will be effectively dead as a serious option in reforming education.<sup>13</sup> And the strongest legal argument at the state level against providing vouchers to parents to send their children to private religiously-based schools is a collection of state constitutional provisions known collectively and generically as "Blaine Amendments." Around thirty states have such Blaine provisions as part of their state law.<sup>14</sup> The

11. A large majority of states already provide some limited kinds of aid to religiously-affiliated private schools. See Joseph P. Viteritti, *Choosing Equality: Religious Freedom and Educational Opportunity Under Constitutional Federalism*, 15 YALE L. & POL'Y REV. 113, 148-49 (1996) (citing and discussing JOSEPH E. BRYSON & SAMUEL H. HOUSTON, JR., *THE SUPREME COURT AND PUBLIC FUNDS FOR RELIGIOUS SCHOOLS: THE BURGER YEARS, 1969-1986* 51-130 (1990)).

12. Bruce Cooper, *The Changing Universe of U.S. Private Schools*, in *COMPARING PUBLIC AND PRIVATE SCHOOLS* (Thomas James & Henry M. Levin eds., 1988), cited in Frank R. Kemerer, *The Constitutional Dimension of School Vouchers*, 3 TEX. F. ON C.L. & C.R. 137, 137 n.1 (1998). According to Yale constitutional law scholar Stephen L. Carter, at least 85% of students in private schools attend educational institutions that are religious in character. See STEPHEN L. CARTER, *THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION* 194 (1993).

13. Kemerer, *supra* note 12, at 137. As Stephen L. Carter puts it, "a voucher program that omits religious education would leave out most of the parents who most need it." CARTER, *supra* note 12, at 194.

14. See Toby J. Heytens, Note, *School Choice and State Constitutions*, 86 VA. L. REV. 117, 134 (2000) (noting that approximately thirty states had passed such constitutional provisions by the early twentieth century); Joseph P. Viteritti, *Blaine's Wake: School Choice, The First Amendment, and State Constitutional Law*, 21 HARV. J.L. & PUB. POL'Y 657, 673, 673 n.78 (1998) (citing Steven K. Green, *The Blaine Amendment Reconsidered*, 36 AM. J. LEGAL HIST. 38, 43 (1992) (placing the number at twenty-nine by 1890)). For some examples of state Blaine Amendments, see ALA. CONST. art. XIV, § 263; ALASKA CONST. art. VII, § 1; ARIZ. CONST. art. IX, § 10; ARK. CONST. art. XIV, § 2; COLO. CONST. art. V, § 34; DEL. CONST. art. X, § 3; FLA. CONST. art. I, § 3, art. IX, § 6; GA. CONST. art. I, § 2, para. 7; HAW. CONST. art. X, § 1; IDAHO CONST. art. IX, § 5; IND. CONST. art. I, § 6; KY. CONST. §§ 186, 189; MASS. CONST. amend. XVIII, § 2; MICH. CONST. art. I, § 4, art. VIII, § 2; MINN. CONST. art. I, § 16, art. XIII, § 2; MISS. CONST. art. VIII, § 208; MO. CONST. art. I, § 7, art. IX, §§ 5, 8; NEB. CONST. art. VII, § 11; NEV. CONST. art. XI, § 2; N.J. CONST. art. VIII, § 4, para. 2; N.M. CONST. art. XII, § 3; N.Y. CONST. art. XI, § 3; N.C. CONST. art. V, § 12, art. IX, § 6; N.D. CONST. art. VIII, § 1; OKLA. CONST. art. II, § 5, art. XI, § 5; S.D. CONST. art. VIII, § 16; TEX. CONST. art. VII, § 5; VA. CONST. art. VIII, § 10; WASH. CONST. art. I, § 11, art. IX, § 4; WIS. CONST. art. X, § 6; WYO. CONST. art. VII, § 12.

language of these Blaine provisions typically prohibits state governments from providing financial support to “religious worship, exercise or instruction,”<sup>15</sup> and mandates that schools receiving public support be “forever free from sectarian control or influence.”<sup>16</sup> Such provisions in state law make it likely that the courts in states with Blaine Amendments in their constitutions may be tempted to strike down aid programs that provide funds, either directly or indirectly, to religiously affiliated private schools.<sup>17</sup>

This Article provides an examination of state Blaine Amendment language, paying particular attention to the motivation that birthed the original Blaine Amendment, the varying scope of the state versions of that amendment, and First Amendment concerns raised by a zealous application of those amendments on the state level. Section II explores the well-established history of state Blaine Amendments from their origin as a failed amendment to the federal Constitution to their enactment on the state level, using Washington State as an example of the implementation of Blaine provisions within a state constitution. This section will show that the Blaine amendments were motivated by a desire to preserve an unofficial Protestant establishment in public education, and to ensure that minority religions—Catholicism, in particular—would be unable to officially challenge that unofficial establishment. Section III provides a survey of Blaine Amendments on the state level, providing an evaluation of Blaine language in the various state constitutions, as well as an overview of significant state case law interpreting those Blaine provisions. This section will demonstrate that there is a great deal of diversity in the wording of state Blaine Amendments, along with a varying degree of severity regarding the restrictions those amendments place on both direct and indirect aid to private religious education. Section IV evaluates the constitutionality of state Blaine Amendments in light of the First Amendment’s guarantees of religious liberty and free speech.<sup>18</sup> This section shows that the Blaine

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15. WASH. CONST. art. I, § 11.

16. WASH. CONST. art. IX, § 4.

17. See, e.g., *Sheldon Jackson Coll. v. Alaska*, 599 P.2d 127 (Alaska 1979); *Gallwey v. Grimm*, 48 P.3d 274 (Wash. 2002); *Witters v. State of Wash. Comm’n for the Blind*, 771 P.2d 1119 (Wash. 1989); but see *Kotterman v. Killian*, 972 P.2d 606 (Ariz. 1999); *Jackson v. Benson*, 578 N.W.2d 602 (Wis. 1998). For a reasonably up-to-date overview of the major state cases dealing with both direct and indirect government aid to private schools, see Emily F. Thigpen, Recent Development, *Constitutional Law—Public Vouchers and the Private School System*, 23 AM. J. TRIAL ADVOC. 425 (1999).

18. For an additional approach to First Amendment problems with the Blaine Amendment, see Joseph P. Viteritti’s groundbreaking law review article *Blaine’s Wake*:

Amendments that exist in various state constitutions are not themselves free from constitutional taint.<sup>19</sup> The thesis of section IV is that many, if not most, state Blaine Amendments violate the First Amendment's provisions regarding religious liberty and free speech because they unlawfully discriminate against religious believers.<sup>20</sup>

## II. WHAT IS THE BLAINE AMENDMENT?

### A *The National Blaine Amendment*

Before exploring the constitutional problems with many Blaine Amendment provisions in state law, it is necessary to provide some background to the Blaine Amendment and its origins. The original Blaine Amendment was a proposed amendment to the federal Constitution.<sup>21</sup> The amendment took its name from its sponsor and originator, Representative James Blaine of Maine, who introduced the amendment on December 14, 1875.<sup>22</sup> The text of his proposed amendment reads as follows:

No State shall make any law respecting an establishment of religion or prohibiting the free exercise thereof; and no money raised by taxation in any State for the support of public schools, or derived from any public fund therefore, 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.<sup>23</sup>

The overarching purpose to the Blaine Amendment, as its plain text

*School Choice, The First Amendment, and State Constitutional Law*, *supra* note 14, at 660-61, 699-716.

19. While section IV of this article explores possible First Amendment objections to state Blaine provisions, Toby J. Heytens has argued that "many of the Blaine Amendments violate the Equal Protection Clause of the Federal Constitution" as well. Heytens, *supra* note 14, at 140.

20. This article is limited to examining First Amendment objections to state Blaine Amendments. Innovative work on equal protection issues involving state Blaine Amendments has already been done in Toby J. Heytens' Note, *School Choice and State Constitutions*, *supra* note 14. For an exhaustive overview of Supreme Court case law on the topic of aid to religion in general, see Philip Manns, *Charting the Spectrum of Prohibited and Permitted Aid to Religion*, 2001 UTAH L. REV. 319 (2001).

21. See Frank J. Conklin & James M. Vachè, *The Establishment Clause and the Free Exercise Clause of the Washington Constitution—A Proposal to the Supreme Court*, 8 U. PUGET SOUND L. REV. 411, 431-33 (1985); Heytens, *supra* note 14, at 132; Viteritti, *supra* note 14, at 670-72.

22. H.R.J. Res. 1, 44th Cong., 1st Sess., 4 CONG. REC. 205 (1875) (statement of Rep. Blaine); see also Conklin & Vachè, *supra* note 21, at 431; Green, *supra* note 14, at 53; Viteritti, *supra* note 14, at 670-71.

23. H.R.J. Res. 1, 44th Cong., 1st Sess., 4 CONG. REC. 205 (1875), *quoted in* Conklin & Vachè, *supra* note 21, at 431-32.

demonstrates, was to control the development of government involvement in religious issues at the state level in two critical ways. First, it would have applied the religion clauses of the First Amendment directly to the states.<sup>24</sup> Prior to the development of the incorporation doctrine by the Supreme Court in the twentieth century the provisions of the Bill of Rights (the first ten amendments to the United States Constitution) were not applied to the states by the courts.<sup>25</sup> In Blaine's day, the states were yet to be restrained by the First Amendment; Blaine saw this as a deficiency<sup>26</sup> and sought to remedy this situation by amending the Constitution to directly apply the religion clauses of the First Amendment to the states.<sup>27</sup> The second effect of Blaine's amendment would have been to prohibit state governments from supporting private religious schools with funds from the public treasury.<sup>28</sup>

### B. Blaine's Motivation

Blaine's motivation for proposing his amendment was centered on his own political ambitions.<sup>29</sup> Blaine, a Republican and former Speaker of the federal House of Representatives,<sup>30</sup> was actively seeking the GOP's 1876 presidential nomination.<sup>30</sup> He proposed his amendment to the Constitution after then-President Grant delivered an 1875 speech touching on the issue of public education.<sup>31</sup> Grant's Republican administration was mired in scandal and it was difficult for the GOP to get any political traction in the face of growing opposition to government corruption.<sup>32</sup> The rival Democratic Party had made strong gains against the Republicans in the mid-term elections of 1874,<sup>33</sup> gains that were significant enough to recapture control of the House of Representatives and thereby deprive Blaine of

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24. Green, *supra* note 14, at 38.

25. See *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833); see also Viteritti, *supra* note 14, at 671.

26. Viteritti, *supra* note 14, at 670.

27. *Id.* at 671; F. William O'Brien, *The States and "No Establishment": Proposed Amendments to the Constitution Since 1798*, 4 WASHBURN L.J. 183, 188 (1965); see also Green, *supra* note 14, at 50.

28. Green, *supra* note 14, at 38; Viteritti, *supra* note 14, at 671.

29. See Green, *supra* note 14, at 38; Viteritti, *supra* note 14, at 670-71.

30. See Green, *supra* note 14, at 38; Viteritti, *supra* note 14, at 670.

31. See Green, *supra* note 14, at 47-48; Viteritti, *supra* note 14, at 670.

32. See Green, *supra* note 14, at 49. According to Green, Grant's "administration was racked by corruption and his political future, as well as that of the Republican party, depended on diverting public attention away from [scandal]." *Id.*

33. *Id.* The Democrats gained seven Senate seats and control over the House of Representatives. *Id.*

his speaker's chair.<sup>34</sup> Grant, in an effort to cast himself as a reformist politician, delivered his address on public education to a gathering of Civil War veterans,<sup>35</sup> a friendly audience due to Grant's glorious pre-presidential career as commander of the Union armies during the War Between the States.

In his speech, Grant laid out an agenda for, among other things, "good common school education."<sup>36</sup> He attacked government support for "sectarian schools" run by private religious organizations,<sup>37</sup> and issued a rousing call for the defense of public education "unmixed with sectarian, pagan or atheistical dogmas."<sup>38</sup> Grant concluded his discussion of education by declaring that "Church and State" should be "forever separate."<sup>39</sup> Religion, he declared, should be left to families, churches, and private schools devoid of public funds.<sup>40</sup> With this speech, Grant created a buzz around the subject of religious and public education,<sup>41</sup> and Blaine took advantage of the attention to grab the national spotlight.<sup>42</sup> Seizing on the common school issue, Blaine crafted his proposed amendment to effectuate President Grant's political vision for public education.<sup>43</sup>

### C. The Common School Issue

Blaine's decision to use the common school issue for political gain did not occur *sua sponte*.<sup>44</sup> In the U.S. Senate, two previous proposals for similar constitutional amendments had been made, but with little

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34. *Id.*

35. *Id.* at 47. The speech was delivered in Des Moines, Iowa, at a meeting of the Society of the Army of the Tennessee. *Id.* See also Robert F. Utter & Edward J. Larson, *Church and State on the Frontier: The History of the Establishment Clauses in the Washington State Constitution*, 15 HASTINGS CONST. L.Q. 451, 462 (1988).

36. Green, *supra* note 14, at 47-48 (citing INDEX (New York), Oct. 28, 1875, at 513).

37. *Id.* at 47.

38. *Id.*

39. *Id.* at 48.

40. *Id.* at 47-48.

41. *Id.* at 48 ("Newspapers throughout the country reprinted Grant's speech and its affect [*sic*] was immediate.").

42. *Id.* at 49-50; see also Conklin & Vaché, *supra* note 21, at 431; Utter & Larson, *supra* note 35, at 463.

43. Green, *supra* note 14, at 49-50.

44. Utter & Larson, *supra* note 35, at 463 n.55. "Even before Grant formally called for a constitutional amendment prohibiting the use of state school funds for sectarian schools, Blaine had favored an amendment *extending* the Establishment Clause to cover state as well as federal action and *expanding* the scope of the restriction so that 'all possibility of hurtful agitation on the school question should be ended also.'" *Id.* (emphasis in original) (quoting C. BALESTIER, JAMES G. BLAINE: A SKETCH OF HIS LIFE 58 (1884)).

success.<sup>45</sup> The political activity surrounding the common schools is understandable if their critical role in shaping the American citizenry is kept in mind. The common schools, apart from providing a free education in basic subjects, were used to assimilate immigrants and their children into American society by enculturating them with American values and attitudes.<sup>46</sup> Central to this enculturation was moral education grounded in Protestant religiosity.<sup>47</sup> While professing to be free of sectarianism, the common schools were actually propagators of a generic Protestantism that, in the words of Professor Joseph Viteritti, “was intolerant of those who were non-believers.”<sup>48</sup> Readings from the Protestant King James Bible were a common part of the curriculum, and even Horace Mann, in his work as Massachusetts’ education secretary, proposed that Protestant religious devotional exercises be held in public school classrooms.<sup>49</sup> Attacks on the Catholic faith were commonplace, as were slurs against the Irish ethnicity of many of the new immigrants.<sup>50</sup> The prevalent condemnations on “sectarian” education were directed toward the Catholic Church; as the Supreme Court has recently noted, “it was an open secret that ‘sectarian’ was code for ‘Catholic.’”<sup>51</sup> The reason for this overt fusion of Protestant faith with public education has been explained by Steven K. Green in a definitive article on the history of the Blaine Amendment:

Most nineteenth century Americans believed that morality and Christianity were inseparable and that both were necessary for the preservation of republican society. However, too many people failed to attend church to risk leaving the instruction of morality to religious institutions. Thus the common school quickly became the primary institution for inculcating public morality. In all levels of education, both public and private, primary through collegiate, the moral teachings of the Bible were taught and, to varying degrees, religious services were conducted. But public schools did more than serve as surrogates for church instruction. The entire curriculum centered on general assumptions of God’s existence, the sense of His universe, and the “spirituality” of human nature. Schools were the primary promulgators of this Protestant way of

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45. Green, *supra* note 14, at 43-44.

46. Viteritti, *supra* note 14, at 668.

47. *Id.* at 666-68.

48. *Id.* at 666.

49. *Id.*

50. *Id.* at 667.

51. *Mitchell v. Helms*, 530 U.S. 793, 828-29 (2000) (plurality opinion) (citing generally to Green, *supra* note 14).

life.<sup>52</sup>

Because of the fusion of civic virtue and Protestant religiosity, the Protestantism of the common schools was seen as a defense of democratic values, rather than the values of a particular religious tradition.<sup>53</sup> Understandably, Catholics and other minority religionists protested this Protestant atmosphere in the common schools,<sup>54</sup> and sought to fight the dominant Protestant bias in two ways.<sup>55</sup> First, there was a move to de-Protestantize the common schools by removing the King James Bible from the curriculum and ending Protestant devotional activity in the classrooms.<sup>56</sup> Second, there was a concerted effort on the part of Catholic leaders and politicians to obtain government funding for Catholic parochial education.<sup>57</sup> This effort was, at its core, a quest for equity. Catholics were forced to pay taxes to support the Protestant common schools, and it was only fair, from the Catholic perspective, that Catholic schools also be eligible for public funding.<sup>58</sup> In lieu of direct public funding for parochial schools, an appeal was made for Catholic parents to receive tax rebates equal to the amount of their tax bills that went to fund the Protestant common schools.<sup>59</sup>

At first, Catholic attempts to combat the Protestant indoctrination of the common schools were not very successful.<sup>60</sup> Early nineteenth century America was awash in anti-Catholic sentiment, as evidenced by the popularity of such salacious anti-Catholic literature as *The Awful Disclosures of Maria Monk*.<sup>61</sup> However, as Catholic numbers grew, Catholic political power increased accordingly. The mid-nineteenth century saw America experiencing an explosive growth in the number and religious diversity of immigrants arriving in the United States.<sup>62</sup> As Toby Heytens has noted, prior to the 1820s the overwhelming majority of Americans were Protestant Christians; at

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52. Green, *supra* note 14, at 45.

53. See Viteritti, *supra* note 14, at 668.

54. See *id.* at 667-68.

55. *Id.*; see also Green, *supra* note 14, at 41-44, 48.

56. Viteritti, *supra* note 14, at 668; see also Green, *supra* note 14, at 44.

57. Green, *supra* note 14, at 42-44.

58. *Id.* at 41, 48.

59. *Id.* at 48.

60. *Id.* at 44.

61. For a detailed overview of anti-Catholic efforts in the early to mid-nineteenth century, see RAY ALLEN BILLINGTON, *THE PROTESTANT CRUSADE, 1800-1860: A STUDY OF THE ORIGINS OF AMERICAN NATIVISM* (1938).

62. Viteritti, *supra* note 14, at 669; Green, *supra* note 14, at 42.

the time of independence, for example, less than 1% of Americans were of the Roman Catholic faith.<sup>63</sup> However, starting in the 1820s a stream of Catholic emigration out of Europe began to have an effect on the United States. And the explosion in Catholic numbers only picked up steam. Between independence and 1840, Catholic numbers more than tripled, going from less than 1% of the population to over 3%.<sup>64</sup> Catholic Christians numbered over half a million, concentrated in the major urban centers of the northeast.<sup>65</sup> This rate of increase continued through the 1860s. By 1866 roughly 10% of the American population was Catholic.<sup>66</sup> Eventually, by 1891, it would climb to almost 13% of all Americans, over eight million people.<sup>67</sup>

Efforts in the 1840s and 1850s to secure protection for Catholic identity in education met largely with failure. In one often-noted 1842 incident, the Catholic bishop of New York advocated public funding of the parochial school system in that state.<sup>68</sup> In response a mob burned down his house and state troops had to be called out to defend the bishop's cathedral from attack.<sup>69</sup> In 1851 a case was brought before the New York courts whereby Catholics attempted to obtain a share in the public funds set aside for common schools, but the court ruled against them.<sup>70</sup> In 1853 Michigan Catholics tried to get the legislature to pass a bill providing support for church schools and were branded by their opponents as part of a Jesuit conspiracy to "destroy public education."<sup>71</sup> In 1854 Bridget Donahue, a Catholic public school student in Maine, was expelled from her common school because she would not read from the Protestant Bible.<sup>72</sup> She brought suit to stop the common schools there from reading the King James Bible in the common schools, arguing that the practice of forcing her to read the Protestant Bible violated her right to religious liberty.<sup>73</sup> The Supreme Court of Maine upheld the practice of reading from the Protestant Bible, declaring that the reading of the King

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63. Heytens, *supra* note 14, at 135.

64. *Id.*

65. *Id.* at 135-36.

66. *Id.* at 135.

67. *Id.*

68. Viteritti, *supra* note 14, at 669.

69. *Id.*

70. *People ex rel. Roman Catholic Orphan Asylum Soc'y v. Bd. of Educ.*, 13 Barb. 400 (N.Y. Gen. Term 1851), *cited in* Green, *supra* note 14, at 42.

71. Viteritti, *supra* note 14, at 669.

72. *Donahoe v. Richards*, 38 Me. 376, 379 (1854). For additional discussion of this case, *see also* Green, *supra* note 14, at 44.

73. Green, *supra* note 14, at 44.

James Version could not be regarded as sectarian.<sup>74</sup> In that same year, the Massachusetts legislature fell under the control of the fanatically anti-Catholic Know Nothing Party.<sup>75</sup> The legislature quickly passed a groundbreaking state law prohibiting public aid to sectarian schools.<sup>76</sup>

Catholic failures in the 1840s and 1850s were followed by Catholic successes as their numbers grew. By the late 1860s Catholics had sufficient political clout, particularly in urban areas, to garner some success in their efforts to protect their religious and cultural traditions from the Protestant hegemony of the common schools.<sup>77</sup> In New York, where Catholic efforts to combat the Protestantism of the public schools failed miserably in the 1840s and 1850s, Catholic efforts began to have noticeable effects. In 1871 the Catholic diocese of New York petitioned the city government to remove the King James Bible from the common schools;<sup>78</sup> at the same time the diocese was allocated \$700,000 in public aid for its parochial system.<sup>79</sup> In that same year the legislature in New York passed a bill prohibiting aid to sectarian schools, but four years later the Catholic diocese was still receiving over \$370,000 a year through indirect state aid.<sup>80</sup>

In Ohio, Catholics had dramatic success in getting the Protestant Bible removed from the common school curriculum. In 1869 the school board of Cincinnati prohibited the reading of the Bible in the common schools of the city, and also eliminated religious instruction from the public schools as well.<sup>81</sup> Some local Protestants obtained an injunction against the school board's decision, and soon the case was appealed to the state supreme court.<sup>82</sup> The Ohio Supreme Court threw out the injunction and upheld the school board's authority to remove the Protestant Bible from the common schools.<sup>83</sup> In support of its ruling the court reasoned that the union of Protestantism with the state that undergirded the common school movement was dangerous to liberty.<sup>84</sup> After the case was handed down, both the New York and

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74. *Id.*

75. Viteritti, *supra* note 14, at 669.

76. *Id.*

77. *See Green, supra* note 14, at 42-47.

78. *Id.* at 43.

79. *Id.*

80. *Id.*

81. *Id.* at 46.

82. *See Bd. of Educ. v. Minor*, 23 Ohio St. 211 (Ohio 1872); *see also Green, supra* note 14, at 46.

83. *See Minor*, 23 Ohio St. 211; *see also Green, supra* note 14, at 46 & n.52.

84. *See Minor*, 23 Ohio St. at 246-248; *see also Green, supra* note 14, at 46.

Chicago city school boards followed Cincinnati's lead and prohibited Bible reading in the common schools.<sup>85</sup> By 1875, Buffalo and Rochester had followed suit, and Catholic efforts to stop Protestant religious exercise in the public schools spread to Michigan and several other states.<sup>86</sup>

The effect of this push to de-Protestantize the common schools was felt far beyond the areas where it was successful; as Steven Green has put it, “[f]or the first time, many Protestants became aware of challenges to the cultural and religious hegemony in America.”<sup>87</sup> This new awareness on the part of many Protestants led to fierce attacks on the rise of Catholic influence. A torrent of vitriol poured out of the Protestant press in the wake of the Ohio court decision.<sup>88</sup> As Green has noted in his law review article *The Blaine Amendment Reconsidered*, several Protestant publications attacked the efforts to remove “Christian thought” from the public schools.<sup>89</sup> The *Presbyterian Quarterly and Princeton Review*, for example, criticized the decision, stating that Protestants universally desired “that the Bible, the Lord’s Prayer, the recognition and assertion of fundamental moral and religious truth shall not be *prohibited* in our public schools on any pretext whatsoever.”<sup>90</sup> Anti-Catholic sermons were commonplace in Protestant churches, and anti-Catholic organizations began to sprout up, dedicated to continuing the Protestant character of the common schools and united in their opposition to government aid for parochial education.<sup>91</sup> In 1870 one former New York judge even went so far as to push for the criminalization of Roman Catholicism by prohibiting “any foreign hierarchical power in this country, founded on principles or dogmas antagonistic to republican

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85. Green, *supra* note 14, at 47.

86. *Id.*

87. *Id.*

88. *See id.* at 46 n.55

89. *See id.* at 46-47.

90. *Id.* at 46 n.55.

91. *See* John C. Jeffries, Jr. & James E. Ryan, *A Political History of the Establishment Clause*, 100 MICH. L. REV. 279 (2001). In summarizing the overall motivation behind organized Protestant efforts in opposition to aid to private religious schools, Jeffries and Ryan write: “[w]ith few exceptions, Protestant denominations, churches, and believers vigorously opposed aid to religious schools. For many Protestant denominations, this position followed naturally from the circumstances of their founding. It was strongly reinforced, however, by hostility to Roman Catholics and the challenge they posed to the Protestant hegemony, which prevailed throughout the nineteenth and early twentieth centuries. In its political origins and constituencies, the ban against aid to religious schools aimed not only to prevent an establishment of religion but also to maintain one.” *Id.* at 282.

institutions.”<sup>92</sup>

Congress was not immune to the rising tide of anti-Catholic feeling. In 1871 two constitutional amendments were submitted to prevent government aid to religious schools.<sup>93</sup> The first, by Senator Willard Warner of Alabama, sought to keep public funds or property from being given to religious groups,<sup>94</sup> but the amendment died in the Senate Judiciary Committee.<sup>95</sup> A more viable amendment was proposed by Nevada Senator William Stewart.<sup>96</sup> This amendment read as follows:

There shall be maintained in each State and Territory a system of free and common schools; but neither the United States nor any State, Territory, county, or municipal corporation shall aid in the support of any school wherein the peculiar tenets of any religious denomination are taught.<sup>97</sup>

A careful reading of Stewart’s amendment shows it had the benefit of appearing neutral while at the same time effectively targeting only the Catholic schools. The common schools, most of which taught generic Protestantism, avoided the careful language of the amendment that only prohibited funding to schools that taught the beliefs and values of a particular denomination. After a considerable amount of strategic maneuvering on the Senate floor, the amendment was sent to the Senate Judiciary Committee, which gave it a negative report,<sup>98</sup> effectively preventing it from further consideration.

Both the Democrats and the Republicans sought to take advantage of the situation regarding the common schools for their benefit.<sup>99</sup> The Republican Party degenerated into gross anti-Catholicism to such an extent that the *St. Louis Republican* newspaper noted that it appeared that Republican leaders were seeking “a general war against the Catholic Church.”<sup>100</sup> In Ohio, the hotly contested re-election race of Republican Governor (and future President) Rutherford B. Hayes was

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92. E. P. HURLBUT, A SECULAR VIEW OF RELIGION IN THE STATE, AND THE BIBLE IN THE PUBLIC SCHOOLS 5 (1870), quoted in Philip Hamburger, *Illiberal Liberalism: Liberal Theology, Anti-Catholicism, & Church Property*, 12 J. CONTEMP. LEGAL ISSUES 693, 708 (2002).

93. Green, *supra* note 14, at 43-44.

94. *Id.* at 43.

95. *Id.*

96. *Id.*

97. *Id.*

98. *See id.* at 43-44.

99. *See id.* at 44 & n.39.

100. *Id.* at 44 (quoting N. Y. TRIBUNE, July 8, 1875, at 4 and THE INDEX (New York), Aug. 5, 1875, at 365).

marred by the incumbent's assertions that the Democratic Party was conspiring with the Catholic Church.<sup>101</sup> In a letter to Blaine, Hayes specifically lamented the fact that "Catholic foreigners" had become a majority in his state, though he felt that the Republicans would "crowd them on the school and other state issues."<sup>102</sup> It was into this atmosphere of anti-Catholicism as a political weapon in the hands of the Republican Party that President Grant issued his call to prevent government aid to "sectarian" schools, a move which, in the words of Steven Green, "clearly aligned the Republican Party with the Protestant cause."<sup>103</sup> And it was this anti-Catholic sentiment on which Republican Representative James Blaine sought to capitalize with his proposed constitutional amendment.<sup>104</sup>

#### *D. The Blaine Amendment in Congress*

In early December 1875, President Grant provided Congress with his annual message; in this address, Grant seized upon the education issue and called for a constitutional amendment to resolve the common school issue once and for all.<sup>105</sup> The president proposed a constitutional amendment that would require each state:

to establish and forever maintain free public schools adequate to the education of all the children in the rudimentary branches within their respective limits, irrespective of sex, color, birthplace, or religions; forbidding the teaching in said schools of religious, atheistic, or pagan tenets; and prohibiting the granting of any school funds or taxes, or any part thereof, either by the legislative, municipal, or other authority, for the benefit or in aid, directly or indirectly, of any religious sect or denomination, or in aid or for the benefit of any other object of any nature or kind whatever.<sup>106</sup>

Grant's call was well-received by a number of major newspapers.<sup>107</sup> Blaine, aware of the favorable reaction to Grant's message in the press, launched his constitutional amendment within a

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101. *Id.* at 49.

102. *Id.* at 49 n.73.

103. *Id.* at 48.

104. See Viteritti, *supra* note 14, at 670-71 (stating that Blaine "fully appreciated the wide political appeal of the nativist and anti-Catholic rhetoric" surrounding Grant's appeal on the common school issue).

105. Green, *supra* note 14, at 52.

106. *Id.* (quoting Ulysses S. Grant, *Seventh Annual Message, December 7, 1875*, in ULYSSES S. GRANT, 1822-1885, at 92 (Philip R. Moran ed., 1968); CHIC. TRIB., Dec. 8, 1875, at 4; INDEX (New York), Dec. 16, 1875, at 593).

107. See *id.* at 52-53.

week of Grant's proposal.<sup>108</sup> The Protestant press for the most part supported the amendment, particularly as a means of "curbing the Catholic influence on school boards."<sup>109</sup> The Catholic press was understandably opposed to the measure.<sup>110</sup> Its popularity was so great, however, that even congressional Democrats were expected to support it.<sup>111</sup> Soon, however, the press began to connect Blaine's political ambitions with his amendment. *The Nation* magazine accused Blaine of trying to "catch anti-Catholic votes" by pushing an amendment "directed against the Catholics."<sup>112</sup> In response to this withering criticism, Blaine asserted that he was not motivated by anti-Catholicism, but that his purpose was to depoliticize the common school issue.<sup>113</sup>

As the Blaine Amendment was debated, Democratic politicians were caught between a rock and a hard place.<sup>114</sup> They had no desire to alienate Catholic voters—a key voting block for the Democratic Party—but they had no desire to appear to be too closely connected with the Catholic Church either.<sup>115</sup> One of Blaine's supporters, the Reverend Samuel Burchard, had denounced the Democrats as the party of "rum, Romanism and rebellion,"<sup>116</sup> all referring to the Democratic Party's opposition to prohibition, its strong identification with Catholicism, and the party's then-solid base in the former Confederate states of the American South. So, the Democrats had to tread lightly. In an attempt to kill the Blaine Amendment, Democrats submitted an alternative version of the Blaine Amendment to the House of Representatives.<sup>117</sup> This alternative version incorporated much of Blaine's own language, but included a strong statement that no religious tests could be required for office (thus protecting Catholics who served on school boards and in other elected offices)

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108. *See id.* at 53.

109. *Id.*

110. *See Green, supra* note 14, at 53-54.

111. *See id.* at 53 (citing N. Y. TRIB., Dec. 15, 1875, at 4).

112. *Id.* at 54 (citing NATION (New York), Mar. 16, 1876, at 173).

113. *Id.* at 54. Green contends that Blaine was not an anti-Catholic bigot, but rather a political opportunist, pointing to "his total disregard for the proposal once he had lost the [Republican] nomination" for the presidency as evidence of his lack of religious bigotry. *Id.* However, according to Robert F. Utter and Edward J. Larson, "Blaine continued to support an amendment during the remainder of his long political career." Utter & Larson, *supra* note 35, at 464. This assertion by Utter and Larson undermines Green's contention, and again opens up the issue of Blaine's true motivation in proposing his amendment.

114. *See id.* at 55.

115. *See id.*

116. *See Conklin and Vachè, supra* note 21, at 433.

117. Green, *supra* note 14, at 55.

while at the same time prohibiting ordained ministers from holding office.<sup>118</sup> The alternative amendment was roundly attacked in the press, however, and it was killed off in the House Judiciary Committee.<sup>119</sup>

As the winter of 1876 turned into spring, the Blaine Amendment was only creeping through Congress.<sup>120</sup> Then came the Republican and Democratic conventions in June. Blaine entered the Republican convention as the front-runner and had a plurality of the delegates at its start.<sup>121</sup> Unfortunately for Blaine, his plurality never converted into a majority.<sup>122</sup> Opposed by Senator Roscoe Conkling of New York, Blaine was unable to get the necessary votes to win the nomination.<sup>123</sup> The convention deadlocked, and a compromise candidate—Rutherford B. Hayes, the recently re-elected governor of Ohio—received the party's nod for president.<sup>124</sup> The Republican platform contained a strong plank advocating the preservation of the common school system and prohibiting public aid to "any school or institution under sectarian control."<sup>125</sup> The plank was so popular that after it was read to the convention, the delegates demanded that it be read to them a second time!<sup>126</sup>

After the convention season was over, work on the Blaine Amendment sped up. Prior to the party conventions, the Democrats, who still controlled the House of Representatives, refused to report the amendment out of the Judiciary Committee, in hopes of delaying the amendment until after the November elections.<sup>127</sup> Pressure was coming from the Democratic presidential nominee, Samuel Tilden, however, for the Congress to vote on the amendment in order to remove the issue of Catholicism from public debate.<sup>128</sup> The House took up Blaine's proposal, but the Democrats inserted a limiting clause<sup>129</sup> in the amendment stating that it "shall not vest, enlarge, or

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118. *Id.*

119. *Id.*

120. *Id.* at 56.

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.* (quoting 1 DONALD BRUCE JOHNSON, NATIONAL PARTY PLATFORMS 53-54 (Revised ed. 1978)).

126. *Id.*

127. *Id.* at 57.

128. *Id.* at 58.

129. *Id.*

diminish legislative power in the Congress.”<sup>130</sup> This addition to Blaine’s amendment effectively reduced the amendment to a statement of principles.<sup>131</sup> Safely neutered, the Blaine Amendment roared through the House of Representatives by a vote of 180 to 7.<sup>132</sup>

The Republican-controlled Senate, however, had no desire to ratify a gelded common school amendment. When the Blaine Amendment reached the Senate, proposals were made to expand it considerably.<sup>133</sup> In light of these proposals, the Senate Judiciary Committee reported out a significantly revised version of the Blaine Amendment that read as follows:

No State shall make any law respecting an establishment of religion, or prohibiting the free exercise thereof; and no religious test shall be required as a qualification to any office or public trust under any State. No public property and no public revenue, nor any loan of credit by or under the authority of the United States, or any State, Territory, District, or municipal corporation, shall be appropriated to or made or used for the support of any school, educational or other institution under the control of any religious or anti-religious sect, organization, or denomination, or wherein the particular creeds or tenets shall be taught. And no such particular creed or tenets shall be read or taught in any school or institution supported in whole or in part by such revenue or loan of credit; and no such appropriation or loan of credit shall be made to any religious or anti-religious sect, organization, or denomination or to promote its interests or tenets. This article shall not be construed to prohibit the reading of the Bible in any school or institution, and it shall not have the effect to impair the rights of property already vested.<sup>134</sup>

The Senate version of the Blaine Amendment, while appearing to be uniform in its desire to remove the issue of religion from the common schools, still left the door open in its closing provisions regarding Bible reading, thus preserving the dominant Protestant character of the common schools. Not only private religious schools but all private, religious institutions—hospitals, asylums, orphanages—were prohibited from receiving public aid; this while the common schools, Protestant in orientation, were still able to feed at the public trough.

When examining the Senate version of the Blaine Amendment, a

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130. *Id.* (citing 4 CONG. REC. 5189 (1876)).

131. *See id.* at 58-59.

132. *Id.* at 59.

133. *See id.* at 59-60.

134. Green, *supra* note 14, at 60, citing 4 CONG. REC. 5453 (1876).

natural question arises regarding its proponent's support of Protestantism within the nation's public schools and that support's intersection with the requirements of the First Amendment. If Blaine's supporters were so concerned about preserving public institutions from religious control, why did they turn such a blind eye to Protestant dominance in many of those public institutions? Was it simple anti-Catholic or anti-Semitic bigotry? Or was there something else at work? Nineteenth century American life was deeply infused with evangelical Protestant values and public religiosity. This strong cultural and social religious atmosphere was an unstated assumption in much of the legal, political, and moral life of the country. Political scientist Stephen V. Monsma has written that there simply "were no systematic attempts to develop or elaborate a theory of church-state relations to support nineteenth-century church-state developments."<sup>135</sup> The social and political saturation of evangelical religiosity in the nineteenth century resulted in a *de facto* establishment of Protestantism,<sup>136</sup> where "Protestant Christianity and government were closely linked in mutually supportive relationships."<sup>137</sup> As a consequence, Monsma explains, there was no serious attempt to harmonize this *de facto* establishment with the principle of separation of church and state developed by the Founding generation.<sup>138</sup> This led to the simultaneous existence of a privileged position for Protestantism in the nation's public institutions and the principle of the separation of church and state.<sup>139</sup> Protestantism was part of the web and woof of American society in the nineteenth century, and the rights of other religionists were, as Monsma points out, compromised as a result.<sup>140</sup>

The Senate debate on the Blaine Amendment was colorful, to say the least. Objections to the proposal revolved around two key points. Some Senators, many from the South, voiced opposition to the amendment on the grounds that it would expand federal authority

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135. STEPHEN V. MONSMA, POSITIVE NEUTRALITY: LETTING RELIGIOUS FREEDOM RING 124 (1993).

136. See Andrew J. King, *Sunday Law in the Nineteenth Century*, 64 ALB. L. REV. 675, 677 (2000); Ronald F. Thiemann, *Religion and Legal Discourse: An Indirect Relation*, 81 MARQ. L. REV. 289, 290 (1998); see generally Stuart Buck, *The Nineteenth-Century Understanding of the Establishment Clause*, 6 TEX. REV. L. & POL. 399 (2002); Steven D. Smith, *Legal Discourse and the De Facto Disestablishment*, 81 MARQ. L. REV. 203 (1998).

137. MONSMA, *supra* note 135, at 124.

138. *Id.* at 124-26.

139. *Id.*

140. *Id.*

over the states and undermine the traditional control that local governments had over educational issues.<sup>141</sup> Another objection was raised by a Democratic Senator who saw the amendment as a partisan ploy to tie the Democratic Party to the Catholic Church for election year purposes.<sup>142</sup> A significant component of this second objection focused on the overt anti-Catholicism of the Blaine Amendment and its supporters.<sup>143</sup> This charge of anti-Catholicism was often reinforced by the comments made by amendment supporters on the Senate floor.

The centrality of anti-Catholicism in the debate over the Blaine Amendment can be demonstrated by even a short examination of the Congressional Record. In his attack on the proposal, Senator Whyte of Maryland, who identified himself on the floor as a Protestant, denounced the amendment as an attack on the loyalty of the Catholic citizenry.<sup>144</sup> This set off a strong response by the amendment's supporters, who countered by reference to Pope Pius IX's Syllabus of Errors, in which the pontiff had criticized certain relativistic tendencies in some democratic regimes.<sup>145</sup> Senator Morton, another supporter of the amendment, launched into an attack on the Catholic citizenry. Without mentioning Catholics by name, Morton discussed a "large and growing class of people in this country who are utterly opposed to our present system of common schools, and who are opposed to any school that does not teach their religion."<sup>146</sup>

After some further debate, Senator Edmunds began an extended attack on the Catholic Church. "The liberty of conscience," he thundered, ". . . is universal in every church but one[.]"<sup>147</sup> After then praising the common schools as the "very life-blood of intelligent and progressive republicanism," Edmunds launched into a tirade against Pope Pius IX.<sup>148</sup> Reading extensively from papal documents and the statement of a Catholic archbishop in the United States, Senator Edmunds insisted that the senators present had a "duty . . . to resist" the teachings of the Catholic Church "by every constitutional amendment and by every law in our power."<sup>149</sup> Edmunds ended his

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141. *E.g.*, 4 CONG. REC. 5580, 5584 (1876) (statement of Sen. Kernan).

142. *Id.* at 5589 (statement of Sen. Bogy).

143. *Id.* at 5583 (statement of Sen. Whyte).

144. *Id.* (statement of Sen. Whyte).

145. *Id.* at 5583 (statement of Sen. Edmunds).

146. *Id.* at 5585 (statement of Sen. Morton).

147. *Id.* at 5587 (statement of Sen. Edmunds).

148. *Id.* at 5587-88 (statement of Sen. Edmunds).

149. *Id.* at 5588 (statement of Sen. Edmunds). This kind of overt anti-Catholic bigotry, calling for official government sanction against the Catholic Church, while shocking to the

attack by stating that the Blaine Amendment would not prohibit the teaching of the general principles of religion in the common schools and other public institutions, only the teaching of “particular tenets or creed of some denomination.”<sup>150</sup> The moral principles of religion, Edmunds declared, and general invocations of God found in the kind of opening prayers given before Congress, would not be prohibited.<sup>151</sup>

With this, Edmunds sought to distinguish religion—the general principles of morality and faith that could be attributed to the kind of generic Protestantism that had formed the common schools from the beginning—from sectarianism, i.e., Catholicism. In short, desacralized Protestantism, would remain welcome in the common schools and other public institutions.

Two more Senators rose to speak, both attacking the Blaine Amendment as anti-Catholic.<sup>152</sup> Senator Stevenson, a Democrat, spoke against the amendment on the basis of states’ rights and local control of education, but also because the amendment was an attempt:

to go to the Pope of Rome to scare the people of the free thirty-seven States of this confederacy that they cannot manage their schools and their religion and their various instrumentalities within their States and which was reserved to themselves<sup>153</sup> when the Constitution was formed of managing in their own way.

Senator Bogy began his address by ridiculing Edmunds and his fixation on Catholicism.<sup>154</sup> Bogy then described the real motivation behind the Blaine Amendment as anti-Catholicism, pure and simple.<sup>155</sup> While Catholics did oppose the common schools, Bogy admitted, they did so because the common schools were Protestant in orientation.<sup>156</sup> Catholics were not opposed to paying taxes for schools, nor were they opposed to the principle of free education; rather, Catholics were opposed to paying taxes and sending their children to schools that would indoctrinate their children in Protestant sectarianism.<sup>157</sup> Bogy then disputed Edmunds’ attempt to separate

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modern reader, was widespread in late nineteenth century America. As Philip Hamburger discusses in a recent law review article, several proposals had been made by the nativist activists to use the government “to destroy the internal authority of the Catholic Church.” Hamburger, *supra* note 92, at 708-09.

150. 4 CONG. REC. at 5588 (1876) (statement of Sen. Edmunds).

151. *Id.* (statement of Sen. Edmunds).

152. *Id.* at 5589-91.

153. *Id.* at 5589 (statement of Sen. Stevenson).

154. *Id.* (statement of Sen. Bogy).

155. *Id.* (statement of Sen. Bogy).

156. *Id.* at 5590 (statement of Sen. Bogy).

157. *Id.* (statement of Sen. Bogy).

religion from sectarianism, arguing that the distinction between the two was too fine to be drawn.<sup>158</sup>

After Senator Bogy finished speaking, Senator Morton again took the floor.<sup>159</sup> He resumed quoting Pope Pius IX, and afterward insisted that education should not be left up to the states because the states were vulnerable to takeover by local Catholic majorities.<sup>160</sup> Senator Eaton next spoke, disputing Morton's assertions concerning the danger of majority rule in the states, and then accusing Blaine of political motivation in proposing his amendment in the first place.<sup>161</sup> Eaton delivered a strong defense of the Catholic Church and its role in American life and history:

It will not do for the Senator from Vermont [Edmunds] to tell me or to tell anybody else that the Catholic religion is to be stamped under foot by the people of the United States. I am not a Catholic; my ancestors were not such; but I thank God for one thing, and that is this: I recognize the great good that the Catholic people have done in my own town, in my own State, and therefore I stand here, a representative of puritan Connecticut, to defend the action of the Catholic religionists in my State.<sup>162</sup>

In light of this rousing defense of the Catholic people, Morton began to back track.<sup>163</sup> He rose to the floor of the Senate and denied that anyone in the Senate had attacked the Catholic Church.<sup>164</sup> Morton went on to argue that it was imperative to pass the amendment to prevent states from establishing religion at the local level.<sup>165</sup> Ignoring Senator Edmunds' earlier statement on the permissibility of generic religion in the common schools under the Blaine Amendment, Morton insisted that the amendment would work no disadvantage to Catholics, but would actually put them on an equal playing field as far as the common schools went: the amendment "protects catholicism [sic] as it protects protestantism [sic]."<sup>166</sup> Just as the law prevents both rich men and beggars from sleeping under bridges, as the old quip goes, so too the Blaine Amendment guaranteed Catholics and Protestants equal rights in the public schools.

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158. *Id.* (statement of Sen. Bogy).

159. *Id.* at 5591.

160. *See id.* (statement of Sen. Morton).

161. *Id.* at 5592 (statement of Sen. Eaton).

162. *Id.* at 5593 (statement of Sen. Eaton).

163. *Id.* (statement of Sen. Morton).

164. *Id.* (statement of Sen. Morton).

165. *Id.* at 5594 (statement of Sen. Morton).

166. *Id.*

The Senate debate drew to a close, and a vote was taken. The yeas were 28 and the nays were 16, with 27 senators absent,<sup>167</sup> including, ironically enough, James Blaine himself who had been appointed to the Senate a month prior to the vote.<sup>168</sup> This tally was short of the necessary two-thirds majority for passage and submission to the states, killing the proposed amendment to the federal Constitution. Dead though it might be as a federal amendment, Blaine's proposal was to experience a resurrection in the states.

*E. The Adoption of Blaine Amendment Language in the States*

The Blaine Amendment might have been expected to fade away into oblivion after its rejection by the Senate, but the opposite occurred. After its defeat on the national level, the Blaine Amendment took on new life in the states. Within a year of the defeat of Blaine's proposal, fourteen states had legislation on the books preventing state funds from being used in support of religious schools.<sup>169</sup> By the 1890s, roughly thirty states would incorporate Blaine-style amendments into their constitutions.<sup>170</sup> This trend continued into the twentieth century; even as late as the 1950s, Alaska and Hawaii would incorporate Blaine-style language into their state charters.<sup>171</sup>

Most of the states that adopted Blaine language did so without pressure from the federal government. In other situations, however, Congress did compel the inclusion of Blaine Amendment language in some state constitutions, particularly for territories seeking admission to the Union as new states.<sup>172</sup> A textbook example of this compulsion may be found in the 1889 Enabling Act that welcomed the Dakotas, Montana, and Washington State into the Union.<sup>173</sup> Under the express terms of the Act, the constitutional convention in each new state was required to include Blaine Amendment provisions in its state constitution.<sup>174</sup> Each state was required by the Act to provide for the "establishment and maintenance of systems of public schools which

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167. *Id.* at 5595.

168. Green, *supra* note 14, at 67-68.

169. Viteritti, *supra* note 14, at 673.

170. *Id.* (citing Steven K. Green, *The Blaine Amendment Reconsidered*, 36 AM. J. LEGAL HIST. 38, 43 and LLOYD P. JORGENSEN, *THE STATE AND THE NON-PUBLIC SCHOOL, 1825-1925*, 114 (1987)).

171. See ALASKA CONST., art. VII, § 1; HAW. CONST. of 1950, art. IX, § 1.

172. Viteritti, *supra* note 14, at 673.

173. *Id.* (citing Act of February 22, 1889, ch. 180, 25 Stat. 676 (1889)); see also Utter & Larson, *supra* note 35, at 458-69.

174. Conklin & Vache, *supra* note 21, at 436.

shall be open to all the children of said States and free from sectarian control.”<sup>175</sup> New Mexico was forced to comply with a similar requirement when it sought admission to the Union.<sup>176</sup> These state-drafted Blaine Amendments could not, by the terms of the Enabling Act, be altered without express congressional consent.<sup>177</sup> And the effect of the Enabling Act was clear: as one law review article put it, the states were required to “outlaw any form of public assistance to schools under sectarian control or influence.”<sup>178</sup>

While the wording of the Enabling Act, like the wording of the original Blaine Amendment itself, appears neutral, those words were intended to reinforce the generic Protestantism of the common schools.<sup>179</sup> This is evidenced by the comments of Senator William Blair on the Senate floor in support of the Act. Blair was the only Senator to speak on the Act’s impact on public education. He spoke out in favor of educating pupils in the basic moral principles of religion, the kind of instruction that was a hallmark of the generic Protestantism of the common schools.<sup>180</sup> According to Blair, the Enabling Act was intended to promote instruction in the principles of Christianity while refraining from fostering sectarianism.<sup>181</sup>

The impact of the Enabling Act is evident by looking at the Washington State Constitution.<sup>182</sup> Washington was one of the states required by the Enabling Act to include Blaine provisions in its constitution.<sup>183</sup> The Washington State Constitutional Convention was dominated by Republicans friendly to Blaine.<sup>184</sup> The Washington territorial delegation to the Republican national convention had supported Blaine for president not only in 1876, but also in 1880 and

175. *Id.*

176. Viteritti, *supra* note 14, at 673.

177. Act of February 22, 1889, ch. 180, § 4, 25 Stat. 676, 677 (1889). The Act of February 22, 1889 is commonly referred to as the 1889 Enabling Act.

178. Conklin & Vache, *supra* note 21 at 441.

179. *See id.* at 436-40 n.126 (quoting 20 Cong. Rec. 2100-01 (1889) (statement of Sen. Blair)).

180. *Id.*

181. Utter & Larson, *supra* note 35, at 462.

182. *See* WASH. CONST. art. I, § 11 (“No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment.”); *see also* WASH. CONST. art. IX, § 4 (“All schools maintained or supported wholly or in part by the public funds shall be forever free from sectarian control or influence.”).

183. Utter & Larson, *supra* note 35, at 458 (citing Act of February 22, 1889, ch. 180, § 4, 25 Stat. 676-77 (1889)).

184. *Id.* at 468.

1884;<sup>185</sup> after Washington became a state, its delegates would again support Blaine in 1892.<sup>186</sup> In addition to supporting his political ambitions, the Washington Republican Party supported Blaine's position regarding religion and the common schools.<sup>187</sup> In the provisions of the Washington Constitution dealing with religious freedom, the framers specifically stated that: "[n]o public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment."<sup>188</sup> They also mandated, in accord with the explicit language of the Enabling Act, that public schools must "be forever free from sectarian control or influence."<sup>189</sup> This last point was reiterated in another constitutional provision regarding universal access to public education "free from sectarian control."<sup>190</sup>

Despite their ardent desire to preserve public education from the scourge of sectarianism, the Washington State framers did not want to prejudice generic religion in the new state constitution.<sup>191</sup> Like Blaine and those who supported the Blaine Amendment, they believed in a robust religious presence in the public square, so long as that religious presence was compatible with broad Protestant devotional sentiment. This can be seen in the preamble to the state constitution.<sup>192</sup> The first proposed preamble to the Washington Constitution simply read that the people of the state, in order to preserve their rights "do ordain this constitution."<sup>193</sup> There was a strong move by the delegates to revise this text in order to include religious language. Judge George Turner, a delegate to the convention and an ardent Blaine supporter, rose in support of the revision, stating that "[w]hile I am opposed to sectarianism, I believe in recognizing the supremacy of God."<sup>194</sup> The delegates worked on a statement on the religious foundation of the Washington Constitution that was consonant with this religious but

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185. *Id.*

186. *Id.* at 468-69.

187. *Id.* at 469.

188. WASH. CONST. art. I, § 11.

189. WASH. CONST. art. IX, § 4.

190. Conklin & Vache, *supra* note 21, at 442 (quoting WASH. CONST. art. XXVI).

191. Utter & Larson, *supra* note 35, at 477 ("[F]ar from being hostile to religion, the framers viewed religion as an important component of a stable society.").

192. See WASH. CONST. pmbl. ("We, the people of the State of Washington, grateful to the Supreme Ruler of the Universe for our liberties, do ordain this constitution.").

193. Utter & Larson, *supra* note 35, at 469 (quoting JOURNAL OF THE WASHINGTON STATE CONSTITUTIONAL CONVENTION 1889, at 492 (Beverly Paulik Rosenow ed., 1962)).

194. *Id.* at 470 (quoting TACOMA DAILY NEWS, July 29, 1889, at 1, col. 4).

non-sectarian approach to God's lordship.<sup>195</sup> They finally agreed to provide a statement of thanksgiving to "the Supreme Ruler of the Universe" for the rights and liberties guaranteed under the state constitution.<sup>196</sup> At least in Washington, the drafters of the state constitution had no intention of separating generic religiosity from government policy, providing a strong anchor for such religiosity in both the language of the constitution's preamble and in the constitution's property tax provisions.<sup>197</sup> But the drafters were intent on making sure that sectarianism was kept out of the public schools, and that public monies not be used in support of private sectarian education. As Professor Edward Larson and former Washington State Supreme Court justice Robert Utter have noted, the state constitutional convention was "squarely within the common school movement, which maintained that public schools should present wholesome, nonsectarian religious influence by teaching about general religious principles."<sup>198</sup> In this, the state constitution followed precisely the purpose and intent of the national Blaine Amendment.

### III. A SURVEY OF STATE BLAINE AMENDMENTS

As noted previously, Blaine Amendments are found in roughly thirty state constitutions.<sup>199</sup> The language and scope of the state Blaine provisions vary widely, however. Some states adopted Blaine-like provisions prior to the formal proposal of the national Blaine Amendment. Other states, both in the 19th and 20th centuries, willingly adopted Blaine provisions after the national Blaine Amendment failed. Still other states had Blaine provisions forced upon them as a condition of entering the Union. It should therefore come as no surprise that the Blaine provisions in the states evidence a considerable diversity in language and scope. In order to give the reader some background on the shape and effect of the various state Blaine Amendments, this Article will now explore some of the variations in Blaine language and jurisprudence on the state level.

It is beyond the scope of this particular article to examine in detail every single instance of Blaine language in the constitutions of the various states; however it is possible to provide a general overview of

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195. *Id.* at 469-71.

196. WASH. CONST. pmbl.

197. Utter & Larson, *supra* note 35, at 477-78.

198. *Id.* at 477.

199. See Heytens, *supra* note 14, at 134; Viteritti, *supra* note 14, at 673 (placing the number at twenty-nine by 1890).

the spectrum of state Blaine language and jurisprudence.<sup>200</sup> One way to approach this material is to think about the state Blaine Amendments and their supporting case law on a continuum. On one end of the continuum are those states whose constitutional provisions and court rulings are narrowly cast to limit the restrictive scope of the Blaine Amendment. On the other end of the continuum are those states whose basic charters and judicial decisions cast a broad net over state government decisions to provide direct and indirect aid to religiously-affiliated schools. In the middle is a hodgepodge of states with Blaine provisions that permit some form of government aid to religious schools but prohibit overt funding.

#### *A. Less Restrictive Blaine Provision*

The first group of state Blaine provisions to be examined are those that place the narrowest restrictions on state government actions to provide some indirect assistance or aid to private religious or sectarian education. Examples of these kinds of Blaine Amendments can be seen in both New Jersey and Massachusetts.<sup>201</sup> For the most part, these Blaine provisions demonstrate two basic concerns. First, they seek to ensure that primary and secondary public education remains free of sectarian instruction. Second, they usually make certain that public educational funds will not be used to directly support private religious schools. Outside of these two concerns, however, the states with less restrictive Blaine provisions allow some very limited government assistance either with basic transportation or higher education.<sup>202</sup> The New Jersey Constitution permits its legislature to provide busing “to and from any school,” for students in primary and secondary grades.<sup>203</sup> Massachusetts’ Constitution, while broadly prohibiting state aid to any religious institution (including charities),<sup>204</sup> specifically allows the state government to provide “grants-in-aid to private higher educational institutions or to students

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200. See Viteritti, *supra* note 14, at 674-75 (discussing Frank Kemerer’s classification of state Blaine provisions into three categories: restrictive, permissive, and uncertain).

201. See N.J. CONST. art. VIII, § 4, par. 3 and 4; MASS. CONST., art. CIII (amending MASS. CONST. arts. XVIII, § 2, XLVI).

202. See, e.g., N.J. CONST. art. VIII, § 4, para. 3 ; MASS. CONST., art. CIII (amending MASS. CONST. arts. XVIII, § 2, XLVI).

203. N.J. CONST. art. VIII, § 4, para. 3. The courts in New Jersey have ruled that a statute providing for busing of parochial students is authorized by the state constitution’s language. See *W. Morris Reg’l Bd. of Educ. v. Sills*, 265 A.2d 162 (N.J. Super. Ct. Ch. Div. 1970) , *rev’d on other grounds* 279 A.2d 609 (N.J. 1971), and *cert. denied*, 404 U.S. 986 (1971).

204. MASS. CONST., art. CIII (amending MASS. CONST. arts. XVIII, § 2, XLVI).

or parents or guardians of students attending such institutions.”<sup>205</sup> While such aid may appear to violate the Blaine Amendment’s core principle that no aid to sectarian institutions should be provided, in reality the aid is targeted to provide assistance not to the school directly, but to students who are using a particular state service, whether it is school transportation as in the case of New Jersey, or a university tuition grant program as in Massachusetts. In this manner these state constitutions uphold one of the fundamental purposes of the Blaine Amendment while providing some limited assistance directly to students who may be attending private educational institutions.

### B. Moderate Blaine Provisions

While the states discussed in the previous section have relatively liberal Blaine provisions in their state constitutions, other states have more stringent limitations on government aid to religious schools. While not as permissive as the less restrictive states and not as draconian as the most restrictive states, these states fall into a great middle ground regarding Blaine provisions. Most of these states’ Blaine Amendments prohibit direct funding of religious institutions or schools, but leave open, at least within their constitutional texts, the question of whether or not indirect state funding, such as vouchers, are permissible.<sup>206</sup> The language used in this intermediate tier of Blaine states varies considerably from state to state, as even brief examination of the state charters will demonstrate.

The Utah Constitution, which reflects church-state concerns unique to that state,<sup>207</sup> contains two provisions dealing with public funding of religious education.<sup>208</sup> The first, found at Article 1, Section 4 of the state charter, mandates that “[n]o public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or for the support of any ecclesiastical establishment.”<sup>209</sup> The second Utah Blaine provision, found at Article 10, Section 9, forbids any direct aid to all religious schools: “[n]either the state of Utah nor its political subdivisions may make any appropriation for the

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205. *Id.*

206. *See, e.g.*, ALA. CONST., art. XIV, § 263; DEL. CONST., art. X, § 3; KY. CONST., §§ 186, 189; MINN. CONST., art. XIII, § 2; MISS. CONST., art. VIII, § 208; NEB. CONST., art. VII, § 11; TEX. CONST., art. 1, § 7; art. VII, § 5; UTAH CONST., art. I, § 4; art. X, § 9.

207. *See, e.g.*, UTAH CONST., art. XXIV, § 2 (prohibiting polygamy).

208. UTAH CONST., art. I, § 4; art. X, § 9.

209. UTAH CONST., art. I, § 4.

direct support of any school or educational institution controlled by any religious organization.”<sup>210</sup> Other states have Blaine-style provisions of similar effect, although the wording is different. Delaware, which in 1897 included a Blaine provision in its state constitution, has an extensive section in its fundamental charter prohibiting direct aid: “No portion of any fund now existing, or which may hereafter be appropriated, or raised by tax, for educational purposes, shall be appropriated to, or used by, or in aid of any sectarian, church or denominational school[.]”<sup>211</sup>

Alabama, a state of the Old Confederacy, included a Blaine Amendment provision in its state constitution in 1901.<sup>212</sup> This provision prohibits the use of state educational funds to support “any sectarian or denominational school.”<sup>213</sup> Kentucky includes a similar provision in its state constitution, but also includes additional language that prohibits the use of money from the state school fund for any purpose other than the “maintenance of the public schools.”<sup>214</sup> Mississippi words its state Blaine Amendment, revised in 1890, as follows:

No religious or other sect or sects shall ever control any part of the school or other educational funds of this state; nor shall any funds be appropriated toward the support of any sectarian school, or to any school that at the time<sup>215</sup> of receiving such appropriation is not conducted as a free school.

Texas included two Blaine provisions in its state constitution in 1876, the same year that the national Blaine Amendment was debated before the Senate.<sup>216</sup> The first of these disallows the use of state funds “for the benefit of any sect, or religious society, [or] theological or religious seminary.”<sup>217</sup> The second provision constrains the state from providing any aid to sectarian schools out of the state educational fund.<sup>218</sup>

Moving north and west, state constitutional provisions maintain

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210. UTAH CONST., art. X, § 9.

211. DEL. CONST., art. X, § 3.

212. ALA. CONST., art. XIV, § 263.

213. *Id.*

214. KY. CONST., § 186 (prohibiting the use of school funds for any purpose other than public school maintenance); KY. CONST., § 189 (prohibiting the use of educational funds to support religious schools).

215. MISS. CONST., art. VIII, § 208.

216. TEX. CONST., art. I, § 7, VII, § 5, cl. a.

217. TEX. CONST., art. I, § 7.

218. TEX. CONST., art. VII, § 5, cl. a..

strong prohibitions on direct government aid for religious schools. The Nebraska Constitution, while it acknowledges the necessity of “[r]eligion, morality, and knowledge” for “good government,”<sup>219</sup> contains a strong prohibition on direct funding of sectarian schools.<sup>220</sup> Article VII, Section 11 of Nebraska’s state charter clearly and unambiguously states that public funds may not be allocated to any school or institution of learning that is not owned and operated by state or local government. The same provision mandates that public schools must be “free of sectarian instruction.”<sup>221</sup> New Mexico has equivalent requirements in Article XII, Section 3 of its constitution:

The schools, colleges, universities and other educational institutions provided for by this constitution shall forever remain under the exclusive control of the state, and no part of the proceeds arising from the sale or disposal of any lands granted to the state by congress, or any other funds appropriated, levied or collected for educational purposes, shall be used for the support of any sectarian,<sup>222</sup> denominational or private school, college or university.

The moderate Blaine language used by these states, while varied in expression, affirms the same fundamental principle: direct government aid for expressly sectarian education is prohibited, and for the most part, so is sectarian influence in public educational programs.<sup>223</sup> The strength of this affirmation can be seen in the case of *Fiscal Court of Jefferson County v. Brady*.<sup>224</sup> There, the Kentucky Supreme Court upheld a lower court ruling that struck down a state statute permitting county governments to establish programs to provide for the busing of students in religious or other private schools.<sup>225</sup> Jefferson County had previously instituted a subsidy program that paid a direct sum to private schools to pay for the transportation of students.<sup>226</sup> The private schools funded were overwhelmingly religious in character, and nearly half a million dollars was expended by the county through its subsidy program.<sup>227</sup> The Kentucky Supreme Court found that the private schools involved

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219. NEB. CONST., art. I, § 4.

220. NEB. CONST., art. VII, § 11.

221. *Id.*

222. N.M. CONST., art. XII, § 3.

223. See *supra* notes 207, 209-22 and accompanying text.

224. 885 S.W.2d 681 (Ky. 1994).

225. *Id.* at 682.

226. *Id.* at 683.

227. *Id.* at 682.

in the subsidy program combined their own transportation funds with the county subsidy, providing the schools with control over government assets.<sup>228</sup> The court noted specifically that the “financial aid is provided to the school rather than a transportation service to the child,” and found that there was a constitutionally significant distinction between providing general transportation for all students and “providing direct payment to selected eligible schools.”<sup>229</sup>

While it is clear that direct aid to overt sectarian education is prohibited by moderate Blaine Amendment language, there is some uncertainty among the states as to the boundary of that prohibition. Two situations in particular have arisen that have called on some state courts to examine the outer margins of the prohibition on public funds used to support private religious schools. The first of these situations concerns the provision of state aid to universities with religious affiliation. The second concerns the issue of state aid that directly benefits students attending religious or private schools rather than the schools themselves.

In *College of New Rochelle v. Nyquist*,<sup>230</sup> a New York appeals court clearly addressed the issue of state aid to religiously affiliated universities. In that case, the court considered the constitutionality of a direct state grant to a Catholic university under New York’s Blaine provisions.<sup>231</sup> The New York Blaine Amendment prohibits the use of state funds to support “any school or institution of learning wholly or in part under the control or direction of any religious denomination.”<sup>232</sup> It also prohibits state funding of schools or institutions “in which any denominational tenet or doctrine is taught.”<sup>233</sup> The state legislature enacted a law permitting the government to provide direct financial support to private colleges and universities throughout the state.<sup>234</sup> The state Commissioner of Education had ruled that the College of New Rochelle, a Roman Catholic institution, could not receive the statutory funds because it was a religious institution and was therefore ineligible for direct aid from the state under the New York Constitution.<sup>235</sup> The college

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228. *Id.* at 684.

229. *Id.* at 685.

230. 326 N.Y.S.2d 765 (N.Y. App. Div. 1971).

231. *Id.* at 769-71.

232. N.Y. CONST., art. XI, § 3.

233. *Id.*

234. N.Y. EDUC. LAW § 6401 (McKinney 2001).

235. *College of New Rochelle*, 326 N.Y.S.2d at 768.

sought to have the Commissioner's ruling set aside and the case was eventually brought before the appellate court.<sup>236</sup>

The court examined the state program in light of New York's Blaine provisions. After discussing the structure of New York's Blaine Amendment and case law interpreting it, the court ruled that the College of New Rochelle was not prohibited by the Blaine Amendment from receiving funds.<sup>237</sup> The court stated that while as a factual matter the college did teach required courses in religion, it did not as a matter of course "teach a doctrine of a particular religious denomination to the exclusion of other denominations."<sup>238</sup> The court also found that while the college was run by an order of Roman Catholic nuns, that connection alone was insufficient to establish that the Blaine Amendment prohibited funding.<sup>239</sup> The court reasoned that "[m]ere affiliation or a sharing of administrative control" was not sufficient by itself to subject the college to the restrictions of the Blaine Amendment.<sup>240</sup> For the state Blaine provisions to apply, the college or institution receiving funding must be organized so that the sponsoring religious organization is able to attempt to "propagate and advance" its religious views.<sup>241</sup> The court found that in the case before it, the state had not demonstrated that such a situation of religious control existed at the College of New Rochelle, and that the Blaine Amendment did not, therefore, prevent direct grants of government aid to the institution.<sup>242</sup>

The second significant issue for states with moderate Blaine Amendment language is the permissibility of indirect aid to private religious schools in the form of vouchers or tax credits.<sup>243</sup> The

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236. *Id.*

237. *Id.* at 770-72.

238. *Id.* at 770.

239. *Id.* at 771-72.

240. *Id.* at 771.

241. *Id.*

242. *Id.* at 772.

243. See generally *Kotterman v. Killian*, 972 P.2d 606 (Ariz. 1999) (holding tax credit program allowing donations to school tuition organizations did not violate the state constitutions); *Jackson v. Benson*, 578 N.W.2d 602 (Wis. 1998) (holding that the Milwaukee Parental Choice Program, which provided vouchers for use in private schools, did not violate the Wisconsin Constitution); *Sheldon Jackson Coll. v. Alaska*, 599 P.2d 127 (Alaska 1979) (holding that tuition grant program providing subsidies to students attending in-state private colleges with lower tuition costs than public colleges in the same area was a direct benefit to private educational institutions and therefore violated the state constitution); *Spears v. Honda*, 449 P.2d 130 (Haw. 1969) (holding that bus transportation subsidies to sectarian and private school students violated the state constitution). For a more exhaustive listing of cases on this topic by jurisdiction, see Emily F. Thigpen, *supra* note 17.

Arizona Supreme Court ruled in *Kotterman v. Killian*<sup>244</sup> that such indirect aid was not a violation of the state constitution's prohibition on public funding of private education.<sup>245</sup> The Arizona State Constitution contains standard Blaine language prohibiting the "appropriation of public money" for the "aid of any church, or private or sectarian school."<sup>246</sup> The constitution also prohibits public funds from being used to support any "religious worship, exercise, or instruction."<sup>247</sup> In 1997 the state enacted a tax credit program whereby individuals could receive up to a \$500.00 credit which they then in turn could donate to "school tuition organization[s]."<sup>248</sup> Such organizations were defined by statute as recognized section 501(c)(3) non-profit corporations that provide "at least ninety percent of [their] . . . annual revenue for educational scholarships or tuition grants" to enable children to attend the private school of their parents' choice.<sup>249</sup> Plaintiffs in the case brought suit claiming that the law violated both the federal Establishment Clause of the First Amendment and the Arizona Constitution's Blaine Amendment provisions.<sup>250</sup>

The Arizona Supreme Court, after a fairly detailed examination, found that the tax credit program did not violate the federal Establishment Clause.<sup>251</sup> It then turned its attention to the Arizona Constitution's Blaine Amendment language. After deciding that the tax credit program was not a public expenditure of money,<sup>252</sup> the court examined the Blaine Amendment and its incorporation into the Arizona Constitution.<sup>253</sup> The court, in a somewhat strained portion of its decision, distanced Arizona's constitutional provision from the Blaine Amendment. The court also declined to accept that the requirements of the Arizona constitution were stricter than those of the First Amendment's Establishment Clause.<sup>254</sup> However, in dicta the court blasted the federal Blaine Amendment bill for its anti-Catholicism and noted the problematic nature of applying Blaine Amendment provisions because of the difficulty in "divorc[ing] the

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244. 972 P.2d 606 (Ariz. 1999).

245. *Id.* at 625.

246. ARIZ. CONST., art. IX, § 10.

247. ARIZ. CONST., art. II, § 12.

248. ARIZ. REV. STAT. ANN. § 43-1089(a) (West 1998).

249. ARIZ. REV. STAT. ANN. § 43-1089(e)(2) (West 1998).

250. *Kotterman*, 972 P.2d at 610.

251. *Id.* at 616.

252. *Id.* at 620-21.

253. *Id.* at 624-25.

254. *Id.* at 621-22.

amendment's language from the insidious discriminatory intent that prompted it."<sup>255</sup> The court went on to uphold the validity of the Arizona tax rebate program under the state constitution.<sup>256</sup>

Another state case that upheld government aid to third parties who then participated in private sectarian schools is *Jackson v. Benson*, a 1998 Wisconsin Supreme Court ruling.<sup>257</sup> In that case a teachers' union brought suit challenging the constitutionality of the Milwaukee Parental Choice Program, a school choice program that allowed parents to send their children to private secular or religious schools at public expense.<sup>258</sup> The teachers' union alleged that such a program violated both the First Amendment's Establishment Clause and the Wisconsin Constitution's Blaine provision.<sup>259</sup> The Wisconsin Supreme Court found no Establishment Clause violation, and then discussed in-depth the state constitutional issues.<sup>260</sup> After dealing with some preliminary questions involving the nature of the statute under the Wisconsin Constitution, the court rejected the argument that the Milwaukee school choice program violated the state constitution.<sup>261</sup> Relying on precedent, the court held that the Blaine Amendment provision of the Wisconsin Constitution "provides not a ceiling but a floor" to the educational opportunity of school children in that state.<sup>262</sup> The school choice program, the court found, did not violate the state's constitution because it did nothing more than provide certain disadvantaged students with the ability to "take advantage of alternative educational opportunities in addition to those provided by the State[.]"<sup>263</sup>

The end result of the *Jackson* decision, like the *Kotterman* decision from Arizona, is to permit students and parents to use existing state voucher programs to pay for private religious education. That outcome, however, is not guaranteed in other states with moderate Blaine language in their state constitutions. In Alaska, a state which included Blaine language in its constitution when it petitioned for admission to the Union in the 1950's, the state supreme court has struck down government attempts to provide indirect aid to religious

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255. *Id.* at 624.

256. *Id.* at 625.

257. 578 N.W.2d 602 (Wis. 1998).

258. *Id.* at 607-08.

259. *Id.* at 609.

260. *Id.* at 620-32.

261. *Id.* at 632.

262. *Id.* at 628.

263. *Id.*

schools through tuition grants to students;<sup>264</sup> this, despite the fact that the explicit wording of the Blaine-style provision in the state constitution only prohibits the use of government funds “for the direct benefit of any religious or other private educational institution.”<sup>265</sup> In *Sheldon Jackson College v. Alaska*,<sup>266</sup> the court held that tuition grants had the effect of providing a direct benefit to the private school in violation of the Constitution.<sup>267</sup> In making its ruling, the court examined three different issues.<sup>268</sup> First, it looked at the nature of the class that received the benefit of the tuition grant.<sup>269</sup> The court found that only “private colleges and their students” would benefit from the program.<sup>270</sup> Based on this finding, the court ruled that the tuition grant program was not a neutral educational program, but instead was solely designed to create an incentive for students to attend a private university.<sup>271</sup> Second, the court looked at the use of public funds in the program and determined that the use of state resources constituted “nothing less than a subsidy” of private education.<sup>272</sup>

The third issue examined by the court is of particular importance for understanding the scope of the Alaska Constitution’s Blaine-type provisions.<sup>273</sup> The court looked at the mechanism used by the state to transfer the tuition grant money from the state to the qualifying private school.<sup>274</sup> The court found that even though the tuition grant was paid directly to the student (who then transferred the grant to the private school); the grants had the *effect* of being a direct benefit to the school.<sup>275</sup> The impact of this last point should not be overlooked. In essence, the court held that even aid given to third parties that eventually winds up being used for private religious or even secular education is direct state assistance to that educational institution. This expansive reading of the state constitution’s prohibition on direct assistance to private schools likely renders any tuition assistance for private school students (religious or not) impermissible under the

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264. See *Sheldon Jackson Coll. v. Alaska*, 599 P.2d 127 (Alaska 1979).

265. ALASKA CONST., art. VII, § 1.

266. 599 P.2d 127 (Alaska 1979).

267. *Id.* at 132.

268. *Id.* at 131-32.

269. *Id.* at 131.

270. *Id.*

271. *Id.*

272. *Id.*

273. *Id.* at 132.

274. *Id.*

275. *Id.*

state's constitution.<sup>276</sup>

The Alaska Supreme Court is not alone in its expansive reading of state Blaine-style language. As long ago as 1969,<sup>277</sup> the Hawaii Supreme Court ruled that its state constitutional provisions, adopted at statehood in the 1950s, prohibited public funding of sectarian or private schools. In *Spears v. Honda*,<sup>278</sup> the Hawaii Supreme Court struck down provisions of the state statutory code that authorized transportation subsidies to students attending sectarian and private schools. The court specifically rejected the notion that such a subsidy would be permissible under the state constitution because the funding provided support to students rather than direct aid to private or sectarian schools.<sup>279</sup> In 1970, Montana followed suit when its supreme court ruled in *State ex rel. Chambers v. School District 10 of Deer Lodge County* that both direct and indirect aid to religious schools was prohibited by the state constitution.<sup>280</sup>

This view regarding the link between support for students at private schools and support of those schools themselves is echoed in *California Teachers Association v. Riles*.<sup>281</sup> In that case a teacher's union brought suit challenging a California law that allowed the state superintendent of public instruction to loan textbooks used in public schools to students attending private schools.<sup>282</sup> The California Supreme Court ruled that the textbook loan program was an unconstitutional violation of the provisions of the state charter.<sup>283</sup> In making its decision, the court reasoned that permitting aid to students attending private religious schools would obliterate any serious constitutional prohibitions against state funding of sectarian education.<sup>284</sup> The *Riles* case in combination with the *Sheldon v. Jackson College* and *Spears v. Honda* cases convincingly demonstrate that even moderately-phrased state Blaine Amendments may have widely restrictive effects beyond what the strict wording of the provision might suggest.

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276. *Id.*

277. *See Spears v. Honda*, 449 P.2d 130 (Haw. 1969).

278. *Id.*

279. *Id.* at 133-34.

280. 472 P.2d 1013 (Mont. 1970).

281. 632 P.2d 953 (Cal. 1981).

282. *Id.* at 953-54.

283. *Id.* at 964.

284. *Id.* at 960.

*C. Most Restrictive Blaine Provisions*

## 1. General Overview

The last group of state Blaine provisions to be examined uses language that places the broadest restrictions on government aid to religious schools and organizations. These Blaine provisions often go far beyond the prohibition of direct aid to schools by preventing indirect aid as well. In addition, many of the states include wording in their constitutions prohibiting aid not only to schools, but also to any religious or “sectarian” institution.<sup>285</sup> Florida, for instance, combines a mandate that its state educational fund be used solely for “the support and maintenance of free public schools,”<sup>286</sup> with an absolute prohibition on the use of any state revenues “directly or indirectly in aid of any church, sect, or religious denomination or in aid of any sectarian institution.”<sup>287</sup> This sterner approach to direct or indirect government aid to religious schools or institutions is paralleled by several other states. Missouri’s constitution prohibits the state from giving anything in aid to support:

any religious creed, church or sectarian purpose, or to help to support or sustain any private or public school, academy, seminary, college, university, or other institution of learning controlled by any religious creed, church or sectarian denomination whatever; nor shall any grant or donation of personal property or real estate every be made by the state, or any county, city, town, or other municipal corporation,<sup>288</sup> for any religious creed, church, or sectarian purpose whatever.

Like Florida, Missouri teams an extensive prohibition on government aid to religious bodies and religious schools with another constitutional provision that mandates that the state educational fund be used only for the establishment and maintenance of “free public schools.”<sup>289</sup>

While some state Blaine provisions only target education, some go much further. Oklahoma’s constitution includes not only the familiar prohibition on support for sectarian educational institutions, but also

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285. See, e.g., COLO. CONST., art. V, § 34; FLA. CONST., art. I, § 3; GA. CONST., art. I, § 2, para. VII; IDAHO CONST., art. IX, § 5; IND. CONST., art. I, § 6; MICH. CONST., art. VIII, § 2; MO. CONST., art. I, § 7; NEV. CONST., art. XI, § 2; OKLA. CONST., art. II, § 5; WASH. CONST., art. IX, § 4.

286. See FLA. CONST., art. IX, § 6.

287. See FLA. CONST., art. I, § 3.

288. MO. CONST., art. IX, § 8.

289. See MO. CONST., art. I, § 7; MO. CONST., art. IX, § 5.

includes a prohibition on any government aid in support of any "sectarian institution as such."<sup>290</sup> The Indiana Constitution, in a one sentence article, prevents the state from allocating any funds from the treasury "for the benefit of any religious or theological institution."<sup>291</sup> The Georgia State Constitution includes a similar article, expressly mandating that the state refrain from direct or indirect funding "of any sectarian institution."<sup>292</sup> Colorado's state charter, ratified in the same year that the national Blaine Amendment was voted on in the Senate, contains—along with the standard Blaine provisions prohibiting public funding of sectarian schools—a prohibition on state funding for any "charitable, industrial, educational or benevolent purposes" not controlled completely by the state, as well as any "denominational or sectarian institution or association."<sup>293</sup> The Idaho Constitution, ratified in 1890 at the peak of the movement for inclusion of Blaine language in state constitutions, includes a lengthy article banning the allocation of "anything in aid" to religious schools or to religiously-affiliated "literary or scientific institution[s],"<sup>294</sup> while at the same time containing a caveat allowing the state to provide some assistance to non-profit "health facilities" operated by religious groups.<sup>295</sup> Nevada's constitution simply states that the state government cannot provide "funds of any kind or character" for sectarian purposes.<sup>296</sup> The language of all of these provisions extend the standard Blaine provision's prohibition on direct aid to private sectarian schools to include any type of aid to virtually every sort of religiously-controlled institution.

## 2. Michigan's Unique Situation

Michigan provides another example of an extensive approach to Blaine-style provisions in the state constitution.<sup>297</sup> Michigan's state charter, Article 8, § 2, deals with state aid to private schools. The section, added by voter referendum in 1970,<sup>298</sup> prohibits any direct or indirect aid to private pre-schools, primary schools, or secondary

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290. OKLA. CONST., art. II, § 5.

291. IND. CONST., art. I, § 6.

292. GA. CONST., art. I, § 2, para. VII.

293. COLO. CONST., art. V, § 34.

294. IDAHO CONST., art. IX, § 5.

295. *Id.*

296. NEV. CONST. art. XI, § 10.

297. *See* MICH. CONST., art. VIII, § 2.

298. *See* Frank R. Kemerer, *supra* note 12, at 162.

schools, whether those schools are religious or not.<sup>299</sup> This in itself is something unusual in the world of state Blaine provisions, which for the most part only prohibit state aid to sectarian schools. However, the article goes further in including a list of specific types of aid that are prohibited:

No payment, credit, tax benefit, exemption or deductions, tuition voucher, subsidy, grant or loan of public monies or property shall be provided, directly or indirectly, to support the attendance of any student or the employment of any person at such nonpublic school or at any location or institution where instruction<sup>300</sup> is offered in whole or in part to such nonpublic school students.

The article closes by permitting the state to provide transportation to students who are going to either public or private school.<sup>301</sup> This language of this provision's prohibition on state funding of private educational institutions is the broadest and most extensive of any state constitution: it specifically targets vouchers and other forms of indirect aid, including tax deductions or grants, permitted in other jurisdictions, not only to religious schools, but to secular ones as well.<sup>302</sup>

The Michigan Supreme Court has looked at Article 8, § 2 in two major cases. The first was *In re Proposal C*.<sup>303</sup> In that case the court ruled on the overall constitutionality of the section, holding that the provision was largely constitutional. It did strike down the language in the section that prohibited the use of state funds to educate nonpublic school students in "any location or institution where instruction is offered,"<sup>304</sup> holding that such a prohibition prevented nonpublic school students from attending classes in public schools and thereby violating the Free Exercise Clause of the First Amendment and the equal protection guarantees of the federal Constitution.<sup>305</sup> This flaw in the Michigan Constitution did not render the whole section unconstitutional, however; the court found that the provision was severable and could be removed "without altering the purpose and effect of the balance of the sentence and section."<sup>306</sup>

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299. MICH. CONST., art. VIII, § 2.

300. *Id.*

301. *Id.*

302. MICH. CONST., art. VIII, § 2; *see also* Kemerer, *supra* note 12.

303. 185 N.W.2d 9 (Mich. 1971).

304. *Id.* at 19.

305. *Id.*

306. *Id.*

In a 1997 case the Supreme Court of Michigan revisited Article 8, § 2 in *Council of Organizations and Others for Education About Parochial, Inc. v. Engler*.<sup>307</sup> The court examined what constituted a public school for purposes of the Michigan Constitution.<sup>308</sup> In that case the plaintiff brought suit alleging that a charter school program set up by the state violated Article 8, § 2.<sup>309</sup> The court ruled that the charter school program did not violate the state constitution because the charter schools were public in nature, as evidenced by the state's control over the approval process for a charter school, the state's control of funding for the schools, and the application of the state School Code to the charter schools.<sup>310</sup> While the charter school case was a significant one in terms of opening up some educational diversity in Michigan, it was also a strong reaffirmation by the court of the necessity for state funds to be expended only on public education.<sup>311</sup> Nothing in either the *Parochial* case or the *In re Proposal C* case indicate that the strong prohibition in the Michigan Constitution on state aid to private schools of any kind is in any danger of being watered down by the state high court.

### 3. Washington State's Blaine Jurisprudence

Washington has a uniquely developed body of Blaine Amendment jurisprudence. As noted earlier in this Article, in order to gain admission to the Union, Washington was required by the federal government to incorporate Blaine language into its state constitution.<sup>312</sup> Found in Article 1, § 11 and Article 9, § 4, the Washington Constitution's Blaine provisions target public funding of "any religious worship, exercise or instruction," and "sectarian control or influence" over public schools.<sup>313</sup> These Blaine provisions, on their face, are considerably more liberal than many other state Blaine Amendments. For example, they contain no explicit prohibitions on direct or indirect aid to religious schools or other religious institutions. While Article 1, § 11 does contain a prohibition on state funds being used in "support of any religious

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307. 566 N.W.2d 208 (Mich. 1997).

308. *Id.*

309. *Id.* at 211.

310. *See id.* at 216.

311. *Id.* at 216-17.

312. *See supra* notes 172-78, 183 and accompanying text.

313. WASH. CONST., art. I, § 11; WASH. CONST., art. IX, § 4.

establishment,”<sup>314</sup> such a prohibited establishment is left undefined by the terms of the constitution.<sup>315</sup> In addition, Article 1, § 11 was amended in 1904 to expressly permit the legislature to employ chaplains for a variety of public institutions like prisons and hospitals.<sup>316</sup> However, despite the fairly restrictive version of the Blaine Amendment incorporated into Washington’s Constitution, the Washington courts have generally interpreted the state Blaine provisions in a staunchly restrictive manner, traditionally giving a broad reading to the state’s prohibition on sectarian influence in the public schools.<sup>317</sup> The Washington Supreme Court has also targeted indirect state aid for students attending religious school, viewing such funding as prohibited state support for religious “instruction.”<sup>318</sup>

The Washington Supreme Court’s approach to the state’s Blaine provisions has a well-defined ancestry. That pedigree begins with the 1918 case of *State ex rel. Dearle v. Frazier*,<sup>319</sup> a case that revolved around public school students receiving credit for extra-curricular Bible study.<sup>320</sup> The school district of the City of Everett had set up a program whereby students who were engaged in outside study of the Bible could receive course credit in the state common schools.<sup>321</sup> Credit could only be given if the student passed an exam dealing with the Bible’s “historical, biographical, narrative and literary features.”<sup>322</sup> The school district defended the program by noting that the religious or doctrinal teaching of the text was not subject to examination for credit.<sup>323</sup> In addition, there was no overt use of public funds to support “any religious worship, exercise or instruction,” nor was there any money spent in “aid or support of any religious establishment.”<sup>324</sup> The court disagreed, finding the fact that credit in the public schools was given for such Bible study in violation of the state’s Blaine Amendment.<sup>325</sup>

The court began its examination of the issue by noting the purpose

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314. WASH. CONST. of 1889, art. I, § 11 (amended 1958).

315. *Id.*

316. *See State ex rel. Dearle v. Frazier*, 173 P. 35, 40 (Wash. 1918).

317. Find material.

318. *Witters v. State Comm’n for the Blind*, 771 P.2d 1119 (Wash. 1989) (emphasis omitted).

319. 173 P. 35 (Wash. 1918).

320. *See id.* at 36.

321. *See id.*

322. *Id.*

323. *Id.* at 38.

324. *Id.* at 36.

325. *Id.* at 38.

of the Washington Constitution's Blaine provisions.<sup>326</sup> The purpose was not simply to prevent public funds from being subject to sectarian control or influence; it was to ensure that such a prohibition on sectarian control or influence "should not be overcome by changing sentiments or opinions."<sup>327</sup> The court stated that under the provisions of Washington's charter, not only are public funds prohibited from supporting overtly religious behavior, they are also prohibited from supporting the "natural consequence" of such behavior: "religious discussion and controversy."<sup>328</sup> The court found that the secular components of the Bible—its history, literary composition, and the like—could not be taught without encouraging such discussion and controversy.<sup>329</sup> The court determined, on the basis of "common knowledge," that the purpose of the framers of the state constitution was to avoid the "evils" of religious controversy, the "diversion of school funds to denominational schools and institutions," and attendant litigation.<sup>330</sup> Controversy could not help but be engendered by the fact that the school board policy did not identify which version of the Bible, Protestant or Catholic, was to be used for credit study.<sup>331</sup> The court noted that the state Blaine Amendment had been amended in 1904 to permit the hiring of chaplains by public institutions, evidencing the ability of the people themselves to amend the state constitution if the implications of the state Blaine Amendment were contrary to their sentiments.<sup>332</sup>

Other judicial decisions in Washington have in general affirmed the strong position taken by the court in *Dearle*. In *Perry v. School District 81*,<sup>333</sup> the state supreme court declared unconstitutional a release time program whereby students could leave public schools in order to attend religious classes off-grounds.<sup>334</sup> While acknowledging the theoretical viability of such a release time program, the court struck down the program in *Perry* because the public schools distributed cards for students to fill out if they sought to participate in

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326. *Id.* at 36.

327. *Id.*

328. *Id.* at 37.

329. *Id.* at 38.

330. *Id.* at 39.

331. *Id.*

332. *Id.* at 40.

333. 344 P.2d 1036 (Wash. 1959); see also Thomas D. Cochran, Comment, *State Aid to Private Sectarian Education in Washington—Is the Coffin Nailed Shut?*, 9 GONZ. L. REV. 791, 799-805 (1974) (an overview of Washington state case law dealing with the Blaine Amendment starting with *Perry* and ending in 1974).

334. See *Perry*, 344 P.2d 1036.

the program.<sup>335</sup> In addition, both religious and public school teachers announced the program to students.<sup>336</sup> The court found such actions by the public school and its personnel constituted a violation of both Article 1, § 11 and Article 9, § 4 of the state constitution.<sup>337</sup> In both *Mitchell v. Consolidated Sch. Dist. 201*<sup>338</sup> and *Visser v. Nooksack Valley Sch. Dist.*,<sup>339</sup> the state supreme court struck down programs that allowed private school students to use state-operated school buses for transit to and from their private schools. While similar programs had been viewed by the U.S. Supreme Court as being merely indirect aid, the Washington Supreme Court found that the program was a “direct, substantial, and continuing public subsidy to the [private] schools,” and hence unconstitutional on state grounds.<sup>340</sup>

The Washington high court liberalized its Blaine jurisprudence slightly in *Calvary Bible Presbyterian Church of Seattle v. Board of Regents of the University of Washington*.<sup>341</sup> The University of Washington offered a course in the Bible as literature as part of its ordinary, for-credit curriculum.<sup>342</sup> Calvary Bible church brought suit against the university, arguing that teaching such a course violated the state constitution’s Blaine provisions as interpreted by *State ex rel. Dearle*.<sup>343</sup> The court began its discussion of the case by noting that the resolution of the issue hinged on the “purpose and character” of the teaching in question.<sup>344</sup> Relying on the trial court’s determination of the facts, the supreme court found that the course offered by the university dealt with the literary and historical aspects of the Bible and that the course was offered “as part of a secular program of education to advance the knowledge of students and the learning of mankind.”<sup>345</sup> The court found that while the state constitution prohibits “religious instruction and indoctrination in specific religious beliefs or dogma,” critical and “scholarly examination” of the Bible was not in and of itself prohibited.<sup>346</sup> The court distinguished the

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335. *Id.* at 1042-43.

336. *Id.* at 1043.

337. *Id.*

338. 135 P.2d 79 (Wash. 1943).

339. 207 P.2d 198 (Wash. 1949).

340. *Visser*, 207 P.2d at 203.

341. 436 P.2d 189 (Wash. 1968).

342. *Id.* at 190.

343. *See id.* at 190, 194.

344. *Id.* at 191.

345. *Id.*

346. *Id.* at 193 (emphasis omitted).

ruling in *Dearle* by noting the existence of factual differences between the two cases and by claiming that much of the *Dearle* court's reasoning was not essential to its holding and constituted dicta.<sup>347</sup>

While the court did not note how the facts of the two cases were different, the obvious difference between *Dearle* and *Calvary Bible* is the level of the educational institution impacted. *Dearle* dealt with Bible instruction involving primary and secondary schools—the old common school grades that constituted the core educational tier of concern for the original Blaine Amendment<sup>348</sup>—while *Calvary Bible* dealt with the type of classes that could be taught in the context of a secular, state-funded university.<sup>349</sup> As early as 1916 the state supreme court had ruled that universities were distinct from common schools as far as the state constitution was concerned.<sup>350</sup> Thus, the court in *Calvary Bible* was willing to provide greater deference to the University of Washington regarding the application of state Blaine provisions to its literature curriculum.<sup>351</sup> This approach to limiting the impact of the state's Blaine provisions at the collegiate level was extended in the 1973 case *DeFunis v. Odegaard*,<sup>352</sup> where the court held that a non-Blaine provision of Article 9 of the state constitution applied only to primary and secondary public schools, not to state institutions of higher learning.<sup>353</sup>

The first major post-*Calvary Bible* decision dealing with the issue of public aid to religious school students was in the 1973 case of *Weiss v. Bruno*.<sup>354</sup> The state legislature had set up a program that made tuition grants available to students attending either public or private primary or secondary schools.<sup>355</sup> All students in the state were eligible for the program, provided that they were financially disadvantaged.<sup>356</sup> Payments were made out, by check, to a particular student and sent to the school that the student was attending.<sup>357</sup> The

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347. *Id.* at 194.

348. *State ex rel. Dearle ex al. v. Frazier*, 173 P. 35 (Wash. 1918).

349. *Calvary Bible*, 436 P.2d at 190.

350. *See Litchman v. Shannon*, 155 P. 783, 784-85 (Wash. 1916).

351. *See Calvary Bible*, 436 P.2d at 194-95.

352. 507 P.2d 1169 (Wash. 1973).

353. *Id.* at 1188.

354. 509 P.2d 973 (Wash. 1973), *overruled by State ex rel. Gallwey v. Grimm*, 48 P.3d 274, 284 (Wash. 2002).

355. *Weiss*, at 976.

356. *Id.*

357. *Id.* at 977.

student would then sign the check, turn it over to the school, and the school would then spend the money for secular purposes.<sup>358</sup> The court struck down the program as unconstitutional on state grounds, finding that the private schools involved in the program were largely sectarian in character, and that the aid provided by the program was “obviously” in support of the school.<sup>359</sup> The court obliterated any distinction between direct and indirect aid in its ruling, finding that “[a]ny use of public funds that benefits schools under sectarian control or influence”—even aid that is indirectly provided to the school or is of incidental benefit—is a violation of the state’s Blaine provisions.<sup>360</sup>

In a ruling consolidated with *Weiss v. Bruno*, the court in *Weiss v. O’Brien*<sup>361</sup> struck down a state program to provide tuition assistance to students in private universities within Washington State.<sup>362</sup> Under this program, students filled out application forms at their school, which then sent the forms on to the Washington State Council of Higher Education.<sup>363</sup> The council then awarded funds to the school on behalf of the students receiving a grant.<sup>364</sup> However, there was no restriction on the funds’ eventual use.<sup>365</sup> The state supreme court found that the private colleges that worked with the grant program were under sectarian influence and that the grants constituted direct aid to those schools.<sup>366</sup> The *Weiss-O’Brien* rule was upheld the following year in *Washington State Higher Education Assistance Authority v. Graham*.<sup>367</sup>

The next major application of the state’s Blaine provisions occurred in the 1980s in a series of cases involving the same plaintiff,

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358. *Id.*

359. *See id.* at 977, 984.

360. *Id.* at 981.

361. *Weiss v. Bruno*, 509 P.2d 973 (Wash. 1973) (O’Brien was consolidated with Bruno in a single decision), *overruled by State ex rel. Gallwey v. Grimm*, 48 P.3d 274, 284 (Wash. 2002).

362. *Weiss*, 509 P.2d at 990.

363. *Id.* at 987.

364. *Id.*

365. *Id.* at 990.

366. *See id.* In the wake of the *Weiss* cases, the Washington legislature attempted to amend the state constitution to allow vouchers and tuition assistance for students in private schools. While the amendment passed both houses of the state legislature, it failed on popular vote with the people. *See* Journal of Senate, Fifty-Second Day, March 5, 1975. *See also* Washington Attorney General Opinion, AGLO 1975 No. 22 (1975), *available at* [http://www.wa.gov/ago/opinions/AGLOs/1975/opinion\\_1975\\_022.html](http://www.wa.gov/ago/opinions/AGLOs/1975/opinion_1975_022.html) (last visited March 19, 2003).

367. 529 P.2d 1051 (Wash. 1974), *overruled by State ex rel. Gallwey v. Grimm*, 48 P.3d 274, 284 (Wash. 2002).

a student named Larry Witters. Mr. Witters, a legally blind student, sought aid from a state program set up to provide vocational assistance to individuals who were “visually handicapped.”<sup>368</sup> Witters sought to use monetary aid from the program to help him pay the costs of studying for a career in religious ministry.<sup>369</sup> Witters met the medical and physical requirements of the program, but was denied aid by the Washington State Commission for the Blind.<sup>370</sup> The commission based its decision directly on the Blaine provisions in the Washington Constitution.<sup>371</sup> Mr. Witters appealed the decision both administratively and judicially. Both appeals were unsuccessful, and Mr. Witters appealed his case to the state supreme court.<sup>372</sup> In *Witters v. State*,<sup>373</sup> commonly called *Witters I*, the state high court did not directly touch upon Blaine Amendment issues at this stage of the case.<sup>374</sup> Instead, the court ruled that granting Witters aid for seminary education would violate the federal Establishment Clause “because it would have the primary effect of advancing religion.”<sup>375</sup> The court further ruled that denying Witters such aid did not violate his right to freely exercise his religion<sup>376</sup> or his right to equal protection of the laws.<sup>377</sup>

One member of the court, Justice Utter, issued a strong dissent taking issue with the majority’s analysis,<sup>378</sup> arguing that federal jurisprudence involving the Establishment Clause did not preclude the state from providing aid to persons in Mr. Witters’ situation.<sup>379</sup> He further disputed the majority’s assertion that Witters’ free exercise of religion rights had not been infringed.<sup>380</sup> Utter believed that the majority, by forcing Witters to choose between pursuing theological studies and receiving state aid that was available to individuals engaged in secular studies, the state was essentially coercing him to

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368. *Witters v. State Comm’n for the Blind (Witters I)*, 689 P.2d 53, 55 (Wash. 1984) (quoting WASH. REV. CODE § 74.16.181).

369. *Id.* at 55.

370. *Id.* at 55.

371. *Id.* at 55.

372. *Id.* at 55.

373. 689 P.2d 53 (Wash. 1984).

374. *Id.* at 58.

375. *Id.* at 57.

376. *Id.* at 57.

377. *Id.* at 57-58.

378. *Id.* at 58-68 (Utter, J., dissenting).

379. *Id.* at 62 (Utter, J., dissenting).

380. *Id.* at 62-64.

abandon his vocation.<sup>381</sup> “[B]ecause the State has conditioned the exercise of one [right] on the surrender of the other,” Utter reasoned, the state was punishing him for exercising his faith.<sup>382</sup> Utter then discussed the state’s Blaine provisions, and argued that the plain language of the provisions and their primary purpose did not prohibit the type of aid that Mr. Witters sought.<sup>383</sup> The state Blaine provisions, Utter contended, were intended “to prohibit sectarian religious instruction in the public schools, and to prevent direct public subsidies to parochial schools.”<sup>384</sup> The *Witters* case not only did not deal with public schools; there also was no evidence in the record, according to Utter, that the school he was seeking to attend provided “religious instruction!”<sup>385</sup> Given those facts, Utter reasoned, the concerns that underlie the Washington Blaine provisions simply were not present in Witters’ case.<sup>386</sup> Utter concluded his critique of the majority’s opinion by noting that at least part of the state’s Blaine provisions, Article 9, § 4, prohibiting public funds from falling under sectarian control or influence, and the state supreme court’s own holding in *Weiss v. Bruno*,<sup>387</sup> violated Witters’ free exercise rights and were therefore unconstitutional under the First Amendment and the Supremacy Clause of the U.S. Constitution.<sup>388</sup>

As the majority’s ruling in *Witters I* was based on federal constitutional concerns, an avenue of appeal remained open. Mr. Witters took advantage of that opportunity and sought review by the U.S. Supreme Court. The Supreme Court granted *certiorari*,<sup>389</sup> and arguments were heard. In *Witters v. Washington Department of Services for the Blind*,<sup>390</sup> the federal high court ruled that the First Amendment did not prohibit Witters from receiving vocational assistance from the state to further his ministerial studies.<sup>391</sup> The Court found that the aid was paid directly to the student, rather than to the school, and that allowing Witters to receive aid would not

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381. *Id.* at 62-63.

382. *Id.* at 62 (quoting *McDaniel v. Paty*, 435 U.S. 618, 626 (1978)).

383. *Witters I*, 689 P.2d at 64-67.

384. *Id.* at 67.

385. *Id.* at 67-68.

386. *Id.* at 68.

387. 509 P.2d 973 (Wash. 1973) (holding that providing such aid would violate Article 9, § 4 of the Washington Constitution).

388. *Witters I*, 689 P.2d at 68 (Utter, J., dissenting).

389. *Witters v. Wash. Dep’t of Services for the Blind*, *cert. granted*, 471 U.S. 1002 (1985).

390. 474 U.S. 481 (1986).

391. *Id.* at 482.

unconstitutionally aid or foster sectarian education.<sup>392</sup> Since the aid flowed directly to Mr. Witters, rather than to the school, there was no danger that a message would be conveyed that the state endorsed religion: “[i]n this case, the fact that aid goes to individuals means that the decision to support religious education is made by the individual, not by the State.”<sup>393</sup> The Court declined, however, to decide whether the Free Exercise Clause of the First Amendment required Washington to provide vocational assistance to Witters.<sup>394</sup> Instead, the Court remanded the decision noting that the Washington courts were “of course free to consider the applicability of the ‘far stricter’ dictates of the Washington State Constitution.”<sup>395</sup> By this ruling, the Supreme Court left the door open for the state supreme court to strike down aid to Witters under Washington’s Blaine provisions.<sup>396</sup> And that is exactly what the state supreme court eventually did.

In *Witters v. State Commission for the Blind*,<sup>397</sup> called for clarity’s sake *Witters II*, the Washington Supreme Court again examined Mr. Witters’ situation, this time in light of the U.S. Supreme Court’s remand.<sup>398</sup> The Washington high court acknowledged the federal Supreme Court’s rejection of its Establishment Clause analysis, and examined Witters’ case on three grounds.<sup>399</sup> First, did the Blaine provisions in the state constitution preclude the state from providing assistance to Witters?<sup>400</sup> Second, if the state constitution did prevent such aid, does the denial of such aid constitute a violation of the Free Exercise Clause of the First Amendment?<sup>401</sup> Third, if the state constitution did not allow the state to provide aid to Witters, does that constitute a violation of Witters’ equal protection rights under the Fourteenth Amendment?<sup>402</sup> Not surprisingly, the state supreme court ruled that Witters was precluded by the state constitution from receiving aid, and that his preclusion did not violate either the Free Exercise Clause of the First Amendment or the Equal Protection

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392. *Id.* at 488.

393. *Id.*

394. *Id.* at 489-90.

395. *Id.* at 489 (1986) (quoting *Witters I*, 689 P.2d at 55).

396. *Id.* at 489.

397. 771 P.2d 1119 (Wash. 1989).

398. *Id.* at 1121.

399. *Id.*

400. *Id.*

401. *Id.*

402. *Id.*

Clause of the Fourteenth Amendment.<sup>403</sup>

In dealing with the state constitution's Blaine provisions, the court noted that Washington's charter prohibits the application of "public moneys to any religious instruction."<sup>404</sup> The court determined that since Witters was planning on attending a Christian seminary to study for "a career promoting Christianity," his course of study by its very nature included religious "indoctrination."<sup>405</sup> In such a situation, for the state to provide him with funds to pursue his education would violate the state constitution because public funds "would be applied to religious instruction."<sup>406</sup> The court noted that article 1, § 11 of the state constitution prohibiting public funding for religious instruction was "sweeping and comprehensive," prohibiting not only the "appropriation" of such funds, "but also the application of public funds to religious instruction."<sup>407</sup>

The court quickly disposed of the remaining federal issues in the case.<sup>408</sup> Affirming its earlier finding in *Witters I* on the free exercise issue, it found that Witters' right to the free exercise of religion had not been infringed by the state's decision not to provide him with vocational assistance.<sup>409</sup> The state was not violating his free exercise rights by refusing to subsidize his efforts to obtain a seminary education.<sup>410</sup> The court reasoned that the state was not requiring him to violate his religious principles, nor was he being denied benefits because he was seeking to behave in a manner commanded by his religion.<sup>411</sup> Instead, he was simply being denied the right to exact funds from the government.<sup>412</sup> The court then examined Witters' equal protection argument; it ruled that the state's refusal to grant aid to students pursuing religious studies was in furtherance of the state's compelling interest in preserving the separation of church and state.<sup>413</sup> Given that compelling interest, the court stated that Witters' "individual interest in receiving a religious education must therefore

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403. *Id.* at 1121-24.

404. *Id.* at 1121.

405. *Id.* at 1122.

406. *Id.*

407. *Id.* (quoting *State ex rel. Dearle v. Frazier*, 173 P. 35, 37 (Wash. 1918)).

408. *Id.* at 1122-24.

409. *Id.* at 1122.

410. *Id.* at 1123.

411. *Id.*

412. *Id.* at 1123 (quoting *Sherbert v. Verner*, 374 U.S. 398, 412 (1963)).

413. *Id.* at 1123.

give way to the state's greater need to uphold its constitution."<sup>414</sup>

Justice Utter renewed his dissent to the court's reasoning and outcome, arguing vociferously that the state's decision to deny aid to Witters constituted an infringement of his free exercise of religion rights.<sup>415</sup> After examining the nature of the state vocational assistance program for the visually disabled, Utter noted that the purpose of the state Blaine provisions was to "constrain state government actions not individual decisions."<sup>416</sup> He then renewed his observation that there was simply no evidence in the record to indicate that Witters' course work at seminary would constitute "religious instruction"; the majority's conclusion that it would rested "on no more than speculation."<sup>417</sup> Justice Utter then argued, based on a series of factors that the Washington courts use to determine whether the state constitution should be interpreted differently than the federal Constitution, that article 1, § 11 of the state charter should not be construed in a more stringent manner than the federal Establishment Clause.<sup>418</sup> He pointed out that scholarly examination of article 1, § 11 indicated that the rigid adherence to the state's Blaine provisions in previous opinions of the court was a product of 19th century religious bigotry.<sup>419</sup> Utter continued to insist, in line with his dissent in *Witters I*, that the purpose of the Blaine Amendment provisions in the state constitution was only to prevent both sectarian instruction in the public schools and public financing of parochial schools, concerns that simply were not present in the case before the court.<sup>420</sup> After an exhaustive examination of the constitutional history of Washington State on this point, Utter maintained that there was no evidence that the state's Blaine provisions were meant to deny the kind of aid that Witters was seeking.<sup>421</sup>

Justice Dolliver,<sup>422</sup> along with Justice Durham,<sup>423</sup> dissented as well, arguing that the majority's ruling deprived Witters of the free exercise of his religion. In addition, Dolliver found that the denial of benefits also constituted an act of viewpoint discrimination prohibited by the

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414. *Id.*

415. *See id.* at 1124-27 (Utter, J., dissenting).

416. *Id.* at 1126.

417. *Id.* at 1127.

418. *Id.* at 1127-32.

419. *Id.* at 1129 (citing Conklin & Vache, *supra* note 21).

420. *Witters II*, 771 P.2d at 1132.

421. *See id.* at 1129-32.

422. *Id.* at 1132 (Dolliver, J., dissenting).

423. *Id.* at 1136 (Durham, J., dissenting).

Free Speech Clause of the First Amendment.<sup>424</sup> The state, once it decided to set up a public program of funding for vocational assistance for the visually disabled, could not discriminate in the disbursement of funds based on the religious content of Witters' application.<sup>425</sup> Dolliver went on to argue that the state's interest in the separation of church and state, while certainly rational, failed to meet the threshold requirement of being a compelling state interest sufficient to justify a violation of Witters' free exercise rights.<sup>426</sup> Finally, Dolliver attacked the exclusion of religious students from the state program at issue in the case, contending that the program was not applied in a facially neutral manner, therefore triggering strict scrutiny by the court.<sup>427</sup>

However ardently presented, the dissents by Justices Utter, Dolliver, and Durham did not carry the day. The majority of the state court voted to uphold the denial of benefits to Witters.<sup>428</sup> Mr. Witters sought another federal appeal of the state supreme court's second decision in his case, but to no avail. The federal Supreme Court turned down his petition for certiorari,<sup>429</sup> leaving the state supreme court decision to stand. It was not until June of 2002 that the state supreme court would revisit the impact of the state Blaine provision on the funding of educational assistance for students attending private, religious institutions of higher learning. In *State ex rel. Gallwey v. Grimm*,<sup>430</sup> the state supreme court upheld the core of *Witters II* while at the same time permitting students attending private religious universities to receive some state financial assistance, so long as those students are not enrolled in courses that involve "religious worship, exercise, or instruction."<sup>431</sup>

#### D. Overall Impact of the Blaine Amendment

As the preceding material demonstrates, the narrowly-defeated push for a national Blaine Amendment has had a wide-ranging effect on most state constitutions. States, willingly or by command of the

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424. *Id.* at 1134.

425. *See id.* at 1134.

426. *Id.* at 1135.

427. *Id.* at 1136.

428. *Id.* at 1124.

429. *Witters v. Wash. Dep't of Services for the Blind*, *cert. denied*, 493 U.S. 850 (1989).

430. 48 P.3d 274 (Wash. 2002).

431. *Id.* at 285 (citing former WASH. REV. CODE § 28B.101.040 (1993)).

federal government, incorporated Blaine provisions into their charters. This move to include Blaine provisions in state constitutions extended into the twentieth century. The overall effect of these Blaine-style provisions, by their express wording or through later judicial interpretations, was usually to preclude both the direct or indirect transfer of state funds to religious or sectarian schools and institutions. The motivation behind the Blaine Amendment was two-fold. First, there was a high degree of hostility towards the teaching and practice of the Roman Catholic Church, and correspondingly there existed a strong desire to ensure that Catholics would be precluded from using the resources of the government to support their parochial schools and other religious institutions.<sup>432</sup> Second, there was an almost imperative desire on the part of the proponents of the Blaine Amendment to protect generic Protestant religiosity in the common schools and the public square.<sup>433</sup> State courts in the twentieth century, with a few exceptions already discussed,<sup>434</sup> rigorously enforced Blaine language to preclude direct, and in many cases indirect, aid and assistance to religious schools or those who wish to attend such schools.<sup>435</sup>

State Blaine provisions do not exist in a constitutional vacuum, however. And while there is no question that states are free to decline to provide money or other forms of aid to private non-governmental entities across the board, there is a significant question as to whether or not the First Amendment allows states to preclude both direct and indirect funding to private religious institutions if those institutions are simply seeking equal access to state funding programs that are open to other private institutions that are of a non-religious character. This Article will now explore that question.

#### IV. FIRST AMENDMENT OBJECTIONS TO BLAINE AMENDMENT LANGUAGE

##### A. *The First Amendment as a Limitation on State Blaine Provisions*

The language and history of the Blaine Amendment raise serious constitutional issues under the First Amendment, but before

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432. See generally *supra* notes 44-51, 162-87 and accompanying text.

433. See generally *supra* notes 46-52, 179-98 and accompanying text.

434. See generally *supra* notes 230-63 and accompanying text (discussing *Coll. of New Rochelle v. Nyquist*, 326 N.Y.S.2d 765 (N.Y. App. Div. 1971), *Kotterman v. Killian*, 972 P.2d 606 (Ariz. 1999), and *Jackson v. Benson*, 578 N.W.2d 602 (Wis. 1998)).

435. See generally *supra* notes 224-431 and accompanying text.

addressing those issues it is necessary to first explore a threshold issue: namely, that First Amendment considerations are controlling when evaluating the constitutionality of state Blaine provisions.<sup>436</sup>

This issue was raised by the state of Washington in the case of *Davey v. Locke*.<sup>437</sup> In that case, a plaintiff brought suit alleging that a Washington state program that denied tuition assistance to college students engaged in the study of theology violated the Free Exercise Clause of the First Amendment.<sup>438</sup> One of the defenses raised by the state on appeal was that its state Blaine provision provided sufficient justification for the state to refuse to provide the scholarship assistance to the plaintiff.<sup>439</sup> The Ninth Circuit Court of Appeals rejected this defense, finding that the reach of the state's Blaine provision was curtailed by the First Amendment.<sup>440</sup>

The court of appeals' finding in *Davey v. Locke* is not an unusual ruling, although at first sight it may so appear. After all, states are given a wide degree of latitude in crafting their own constitutional provisions, and if a state should seek to preclude its funds from aiding private religious education either directly or indirectly, what business is that of the federal courts? This certainly was the case almost to the very end of the nineteenth century, the century when the controversy over common schools was at its height, the national Blaine Amendment was proposed, and Blaine language began to be incorporated into state constitutions. Beginning with the landmark case of *Barron v. Baltimore*,<sup>441</sup> the U.S. Supreme Court held that the provisions of the Bill of Rights applied to the federal government only and not to the states.<sup>442</sup> This situation remained judicially

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436. *Davey v. Locke*, 299 F.3d 748, 759 (9<sup>th</sup> Cir. 2002).

437. *See Davey*, 299 F.3d 748.

438. *Id.* at 750.

439. *Id.* at 758.

440. *See id.* at 759-60.

441. 32 U.S. (7 Pet.) 243 (1833).

442. *Id.* at 247. The Court, in an opinion by Chief Justice Marshall, was unambiguous in its refusal to apply the Bill of Rights to the states. As Marshall writes:

The question thus presented is, we think, of great importance, but not of much difficulty. The constitution was ordained and established by the people of the United States for themselves, for their own government, and not for the government of the individual states. Each state established a constitution for itself, and, in that constitution, provided such limitations and restrictions on the powers of its particular government as its judgment dictated. The people of the United States framed such a government for the United States as they supposed best adapted to their situation, and best calculated to promote their interests. The powers they conferred on this government were to be exercised by itself; and the limitations on power, if expressed in general terms, are naturally, and, we think, necessarily applicable to the government created by the instrument. They are limitations of power granted in the instrument itself; not of distinct governments, framed by different persons and for

unchanged until 1897 when the federal Supreme Court first began to apply some of the provisions of the Bill of Rights to the states through the Fourteenth Amendment.<sup>443</sup> This process, known as “selective incorporation,”<sup>444</sup> began with the case of *Chicago, Burlington & Quincy Railroad Co. v. Chicago*, where the Court held that the Fourteenth Amendment of the federal Constitution, adopted soon after the Civil War, mandated that states follow the Takings Clause provision of the Fifth Amendment.<sup>445</sup> The process of selective incorporation continued slowly but surely to include the First Amendment. In *Gitlow v. New York*<sup>446</sup> in 1925 and in *Stromberg v. California* in 1931,<sup>447</sup> the Supreme Court incorporated the Free Speech Clause of the First Amendment to the states through the Fourteenth Amendment. The Free Exercise Clause was incorporated in 1940 in the case of *Cantwell v. Connecticut*,<sup>448</sup> and the Establishment Clause in the landmark case of *Everson v. Board of Education* in 1947.<sup>449</sup>

To say that the process of partial incorporation has had a significant impact on constitutional law is an understatement of the first order.<sup>450</sup>

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different purposes.

*Id.*

For an overview of the judicial and political development of the concept of federalism up until 1945, see Edward S. Corwin, *The Dissolving Structure of Our Constitutional Law*, 20 WASH. L. REV. 185 (1945). For a robust defense of the initial concept of federalism as outlined by the Court in *Barron v. Baltimore*, see Overton G. Ellis, *Dual Sovereignty and the Supreme Court*, 1 WASH. L. REV. 1 (1925).

443. For an overview of the early history of the incorporation of the Bill of Rights to the States, see Walz v. Tax Comm'n of New York, 397 U.S. 664, 701-02 (1970) (Douglas, J. dissenting); see also ERWIN CHERMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 6.3.3, at 478-80 (2d ed. 2002) for additional discussion of early incorporation cases. For an interesting snap-shot of the legal debate involving the nature of the Bill of Rights that occurred during the chronological mid-point in the process of selective incorporation, see Kenneth C. Cole, *Some Observations on the Significance of the American Bill of Rights*, 18 WASH. L. REV. 90 (1943).

444. For an overview of the process and impact of selective incorporation of the Bill of Rights to the states through the Fourteenth Amendment, see JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 10.2, at 368-70 (6th ed. 2000); for a discussion of the limitations of original intent when dealing with First Amendment issues being applied to the states through the doctrine of partial incorporation, see *Thomas v. Review Bd. of Ind. Employment Sec. Div.*, 450 U.S. 707, 722-23 (1981) (Rehnquist, J., dissenting).

445. *Chicago, Burlington & Quincy R.R. Co. v. Chicago*, 166 U.S. 226 (1897), discussed in *Walz v. Tax Comm'n*, 397 U.S. 664, 702 (1970) (Douglas, J., dissenting).

446. 268 U.S. 652 (1925), discussed in *Walz*, 397 U.S. at 702 (Douglas, J., dissenting).

447. 283 U.S. 359 (1931), discussed in *Walz*, 397 U.S. at 702 (Douglas, J., dissenting).

448. 310 U.S. 296 (1940), discussed in *Walz*, 397 U.S. at 702 (Douglas, J., dissenting).

449. 330 U.S. 1 (1947), discussed in *Walz*, 397 U.S. at 702 (Douglas, J., dissenting). The incorporation of the Establishment Clause was reaffirmed by the Supreme Court in *Wallace v. Jaffree*, 472 U.S. 38 (1985).

450. Cf. CHERMERINSKY, *supra* note 443, § 6.3, at 482-86 for a detailed overview of the current status of incorporated provisions of the Bill of Rights.

Prior to the Supreme Court's adoption of selective incorporation of the Bill of Rights to the states, the states were largely free to craft their own constitutional provisions, limited only by the express limitations on their authority contained within the original Articles of the federal Constitution.<sup>451</sup> The federal government operated under its Constitution, and the states largely operated under their own constitutions, with a relatively minimal amount of overlap.<sup>452</sup> However, with the advent of the doctrine of selective incorporation, state laws and constitutional practices have been subjected to scrutiny under the provisions of the Bill of Rights, including the First Amendment.<sup>453</sup> This necessitated a re-thinking of the principles of federalism, a re-thinking that was typified in the work of the late Justice Brennan, who expounded a theory of federalism known as "neo-federalism."<sup>454</sup>

The concept behind this theory is that the federal Constitution provides a basic "floor" or minimum standard of rights that the states cannot violate, while the state may provide a "ceiling" setting the maximum extent of rights.<sup>455</sup> Put more simply, a state may provide greater rights to its citizenry than those protected by the federal Constitution, but it cannot provide fewer or more restricted rights.<sup>456</sup>

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451. See *Barron*, 32 U.S. (7 Pet.) at 247; see also NOWAK & ROTUNDA, *supra* note 444, § 10.2, at 368.

452. See *Barron*, 32 U.S. (7 Pet.) at 247.

453. See NOWAK & ROTUNDA, *supra* note 444, § 10.2; CHEMERINSKY, *supra* note 443, § 6.3 (listing both the Establishment Clause and the Free Exercise Clause as First Amendment provisions incorporated to the states through the Fourteenth Amendment).

454. See William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977). It should be noted that while Brennan identified and explained the development of neo-federalism, he by no means created the principle. Rather, he described and discussed a trend that was already occurring on the state level. See Robert F. Utter, *State Constitutional Law, the United States Supreme Court, and Democratic Accountability: Is There a Crocodile in the Bathtub?*, 64 WASH. L. REV. 19, 30 (1989). For an examination of one state's approach to the complex jurisprudence surrounding the relationship of federal and state constitutional guarantees under the doctrine of neo-federalism, see Linda White Atkins, *Recent Development: Federalism, Uniformity, and the State Constitution—State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986), 62 WASH. L. REV. 569 (1987); Daryl R. Hague, Note, *New Federalism and "Occupation of the Field": Failing to Maintain State Constitutional Protections Within a Preemption Framework—Alverado v. Washington Public Power Supply System*, 111 Wash. 2d 424, 759 P.2d 427 (1988), cert. denied, 109 S.Ct. 163, 64 WASH. L. REV. 721 (1989).

455. Brennan, *supra* note 454, at 495, 502; see also Utter, *supra* note 454, at 30.

456. Utter, *supra* note 454, at 30; see also *Delaware v. Van Arsdall*, 475 U.S. 673, 706-07 (1986) (Stevens, J., dissenting). The dual nature of our constitutional system, with the federal government setting a minimal constitutional standard, should not be construed as rendering state constitutions irrelevant. As Justice Stevens writes:

[s]tate constitutions preceded the Federal Constitution and were obviously intended to have independent significance. The frequent amendments to state

Under the doctrines of selective incorporation and neo-federalism the protections provided by the national Constitution to all citizens, whether religious or not, are relevant to the issue of whether religious persons may be discriminated against in the context of state Blaine provisions. The doctrines render unconstitutional any state limitations on fundamental rights that violate the protections granted to all citizens under the federal Constitution.<sup>457</sup> Hence, if state Blaine provisions or the judicial decisions applying such provisions violate the federally protected constitutional rights of religious believers, those Blaine provisions and the judicial decisions applying them are themselves unconstitutional.<sup>458</sup>

## B. First Amendment Problems with State Blaine Language

### 1. Overview

There are two provisions of the First Amendment that are directly relevant to the issue of the constitutionality of state Blaine provisions. The first of these are the Religion Clauses of the First Amendment; the second is the Free Speech Clause. The Religion Clauses constitute the first portion of the First Amendment and read simply that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof[.]”<sup>459</sup> While it is far beyond the scope of this article to provide an exhaustive critique of federal Religion Clause jurisprudence, three particular areas of that jurisprudence are of critical importance when it comes to understanding the constitutionally problematic nature of most state Blaine provisions. First, as already explained, the federal courts have been clear that the Religion Clauses apply not only to the Congress and the other branches of the federal government, but to the states as

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constitutions likewise presuppose their continued importance. Thus, whether the national minimum set by the Federal Constitution is high or low, state constitutions have their own unique origins, history, language, and structure—all of which warrant independent attention and elucidation. State courts remain primarily responsible for reviewing the conduct of their own executive branches, for safeguarding the rights of their citizenry, and for nurturing the jurisprudence of state constitutional rights which it is their exclusive province to expound.

*Id.* at 706-707 (Citations omitted).

457. See NOWAK & ROTUNDA, *supra* note 444, at 368-369.

458. See Viteritti, *supra* note 14, at 715 (“[e]ven though [the Rehnquist] Court has been sympathetic to the prerogatives of state governments in defining the proper boundaries of federalism, it has not hesitated to intervene in cases where it finds that the States have trampled upon rights protected by the Constitution”).

459. U.S. CONST. amend. I.

well.<sup>460</sup> This means that a state cannot shield a Religion Clause violation from judicial scrutiny by hiding the violation behind its own state charter. Second, the U.S. Supreme Court has a dim view of laws that assign to religious groups or individuals legal disabilities that are not also assigned to members of the public as a whole.<sup>461</sup> For the most part, the courts will skeptically examine laws designed to single out religious believers and religious institutions for differential treatment based on behavior that other non-religious individuals or entities are allowed to engage in without fear of sanction.<sup>462</sup> Finally, the Supreme Court has a very dim view of laws that seek to discriminate against religious believers based on their status as religionists.<sup>463</sup> While the states may seek to punish individuals engaging in certain types of religious behavior that offend generally applicable criminal laws, states cannot target religionists per se for discrimination in the public square.<sup>464</sup> These basic principles all cast serious doubts on the constitutional validity of state Blaine provisions, as this Article will now explain.

## 2. Liberalism, Neutrality, and the Problem of Religious Profiling<sup>465</sup>

With some notable exceptions, state Blaine provisions specifically target religious institutions for disparate treatment from other private organizations and individuals.<sup>466</sup> Through this disparate treatment, Blaine provisions mandate government profiling of religious

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460. See *supra* notes 436-58 and accompanying text.

461. See generally *McDaniel v. Paty*, 435 U.S. 618 (1978); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995); *Agostini v. Felton*, 521 U.S. 203 (1997); *Mitchell v. Helms*, 530 U.S. 793 (2000).

462. See generally *McDaniel*, 435 U.S. 618; *Church of the Lukumi*, 508 U.S. 520; *Rosenberger*, 515 U.S. 819; *Agostini*, 521 U.S. 203; *Mitchell*, 530 U.S. 793. One recent scholarly article has summarized the general requirements of current precedent as holding “that the Religion Clauses generally command that religion can be burdened or aided consistently with analogous secular activity, but cannot be uniquely targeted or benefited.” Manns, *supra* note 20, at 320.

463. See generally *McDaniel*, 435 U.S. 618; *Church of the Lukumi*, 508 U.S. 520; *Rosenberger*, 515 U.S. 819; *Agostini*, 521 U.S. 203; *Mitchell*, 530 U.S. 793.

464. See generally *McDaniel*, 435 U.S. 618; *Church of the Lukumi*, 508 U.S. 520; *Rosenberger*, 515 U.S. 819; *Agostini*, 521 U.S. 203; *Mitchell*, 530 U.S. 793. See also *Employment Div. v. Smith*, 494 U.S. 872 (1990).

465. I am borrowing the concept of religious profiling from Ashley Woodiwiss, *Ecclesial Profiling*, 36 WAKE FOREST L. REV. 557 (2001). While Woodiwiss uses the concept of religious profiling in her discussion of the treatment of religion in the realm of politics and political theory, it is every bit as applicable to the discussion over attempts to deny religionists access to the same governmental programs and benefits available to purely secular recipients.

466. See *supra* notes 241-431 and accompanying text.

individuals and institutions in a manner analogous to racial profiling in the criminal justice context. While other groups or individuals are free to petition and receive both direct and indirect assistance from state governments, Blaine provisions usually restrict religionists and religious organizations from being able to do the same.<sup>467</sup> This disparate treatment raises significant Religion Clause concerns in that it singles out religious institutions like schools and hospitals and those who benefit from their services from being treated by the state in the same manner as similarly situated but secular private entities.<sup>468</sup> This is particularly true when the differential treatment is based on a person or institution's very status as a religious believer or institution.

Of course, no provision of the federal Constitution requires states to provide funds to private educational schools, be they religious or secular in nature.<sup>469</sup> However, if a state chooses to provide aid to private educational institutions or their students, it would seem that the principle of nondiscrimination requires states to extend that aid to organizations and persons who identify themselves as religious.<sup>470</sup> As Yale law professor Stephen Carter writes:

The proposition that government should not be the adversary of the religions is sufficient to resolve the matter. If neutrality means that the government cannot take steps to treat religious schools better than other schools, it surely means as well that the government cannot take steps to treat religious schools worse.<sup>471</sup>

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467. See *supra* notes 201-431 and accompanying text.

468. Neutrality is a key concern underlying much of the modern jurisprudence concerning both the Free Exercise Clause and Establishment Clause. For the importance of government neutrality under the Free Exercise Clause, see *McDaniel*, 435 U.S. 618 (1978); *Church of the Lukumi*, 508 U.S. 520 (1993). For the importance of neutrality under the Establishment Clause, see *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971) (citing Bd. of Educ. of Cent. Sch. Dist. Number 1 v. Allen, 392 U.S. 236, 243 (1968) (holding that the second prong of the Lemon test incorporates the principle of neutrality by requiring that the "principal or primary effect" of government action "must be one that neither advances nor inhibits religion"). See also *Mitchell*, 530 U.S. 793, 811-813 (overview of the principle of neutrality under the Establishment Clause by the plurality of the Court); *Mitchell*, 530 U.S. at 838-39 (citing *Agostini*, 521 U.S. 203, 228, 231-32 (1997); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 10 (1993); *Witters v. Washington Dep't of Services for the Blind*, 474 U.S. 481, 487-88 (1986); *Witters*, 474 U.S. at 493 (O'Connor, J., concurring in part and concurring in judgment); *Mueller v. Allen*, 463 U.S. 388, 397-99 (1983)) (O'Connor, J., concurring). O'Connor notes that while neutrality is an important factor in evaluating cases involving government aid programs under the Establishment Clause, she does not avow that it is dispositive. *Mitchell*, 530 U.S. at 839 (O'Connor, J., concurring).

469. CARTER, *supra* note 12, at 199 ("the right to send children to a private school does not entail a requirement of state subsidy"). In support of Carter's point, see *Norwood v. Harrison*, 413 U.S. 455, 462-63 (1973), cited in Carter, *supra* note 12, at 199 n.25.

470. CARTER, *supra* note 12, at 200.

471. *Id.* at 200.

If the government opens up its coffers to provide aid to secular private schools or their students, the principle of religious neutrality requires that they should also allow religionists and religious schools to participate in such aid programs.<sup>472</sup> Indeed, Carter argues that for the government not to do so is unconstitutional because it “would make religious schools more costly and would thus constitute a government-created disincentive to use them.”<sup>473</sup> This same basic objection was raised by Washington Supreme Court Justice Dolliver in his dissent to the *Witters II* decision.<sup>474</sup> Dolliver argued that enforcement of the state’s Blaine Amendment created an “indirect burden” on a student seeking aid to study theology, and that by withholding aid to the student, the government was infringing on his rights to the free exercise of his religion.<sup>475</sup> This concern was paralleled by Washington State Supreme Court Justice Utter in his dissent in *Witters II*. Justice Utter concisely maintained that it was a violation of the federal right to the free exercise of religion for the state to limit the kind of vocational assistance available to recipients pursuing religious careers.<sup>476</sup>

The principle of nondiscrimination has a deep resonance in the fundamental principle of equality of citizenship found at the heart of liberal democracy.<sup>477</sup> “The promise of democracy,” as philosopher Paul Weithman notes in a recent law review article, “is the promise of equality.”<sup>478</sup> While the character of such equality “is [a] matter of political and philosophical debate,”<sup>479</sup> the fundamental point remains the same: “citizens of a liberal democracy are free equals.”<sup>480</sup> As he goes on to explain, equal citizenship may have a variety of connotations, including both a particular legal relationship to the state recognized by law and a particular quality of relationship.<sup>481</sup> To be a full citizen is not simply to have the title of “citizen,” but imparts to the holder of that title a right not to be treated as a “second-class” citizen, not only in regard to politics, but in “society’s common

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472. *Id.* at 200.

473. *Id.* at 200.

474. See *Witters II*, 771 P.2d at 1132-36 (Dolliver, J., dissenting).

475. *Id.* at 1134.

476. *Id.* at 1124 (Utter, J., dissenting).

477. See Paul Weithman, *Religious Reasons and the Duties of Membership*, 36 WAKE FOREST L. REV. 511, 512 (2001)

478. *Id.* at 520.

479. *Id.* at 520.

480. *Id.* at 512.

481. *Id.* at 515.

project.”<sup>482</sup> While the principle of equality of citizenship cannot tell us what specific rights and duties should be bestowed upon citizens,<sup>483</sup>—for example, whether the state should provide aid to private schools or the students attending such schools—the principle does tell us that if a state decides to make such a choice, it must make that opportunity available to all citizens living under the authority of that state.<sup>484</sup> If the rights of citizenship were to include the right to aid for private education, then this right must include the right to choose private religious education. Otherwise, religious believers would be placed in the condition of being second-class citizens within their respective political and social communities. Such a result is deeply offensive to the theory of equal citizenship.

The position that would deny equal rights to religionists in public affairs or governmental programs is usually, although inaccurately, described as liberal. While there is no exhaustive or even universally recognized definition of “liberalism” within a jurisprudential context,<sup>485</sup> one particularly influential definition has been provided by Professor H. Jefferson Powell of Duke Law School.<sup>486</sup> According to Powell, liberalism is “the tradition of thought and action which originates in the Enlightenment and which regards the individual, understood as an autonomous center of will and reason, as logically and morally prior to any community and all moral commitments.”<sup>487</sup> The typical liberal argument against equal treatment for religionists in civic life centers on the exclusivity of religious faith. Individuals, this liberal position asserts, can only enjoy equality of rights and status if government bases its fundamental allocation of rights and duties on principles that are universally accessible to all citizens within a given polity.<sup>488</sup> Since religious faith, especially in its particular manifestations, is not such a universally accessible principle, allowing individuals to exercise rights or claim benefits based on religious

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482. *Id.*

483. *Id.* at 516-17.

484. *See id.* at 517.

485. *See* MICHAEL J. GERHARDT ET AL., CONSTITUTIONAL THEORY: ARGUMENTS AND PERSPECTIVES 245-46 (2d ed. 2000); *See also* Philip Hamburger, *supra* note 92, at 693 (“liberality or what is now called ‘liberalism’ can be difficult to define with precision, and there have been divergent, evolving versions of it”).

486. MICHAEL J. GERHARDT ET AL., *supra* note 485, at 245 (citing H. JEFFERSON POWELL, THE MORAL TRADITION OF AMERICAN CONSTITUTIONALISM 6 n.16 (1993)).

487. *Id.*

488. *See* Weithman, *supra* note 477, at 512 (providing an overview of the typical liberal concept of civic discourse).

conviction becomes problematic.<sup>489</sup>

This liberal argument is susceptible to several objections. First, there is a fundamental error in the premise of this argument. Just because religious conviction transcends human reason or accepts certain propositions on faith does not mean that religion in general, or even its particular manifestations, is necessarily closed-off from being comprehensible or accessible to non-believers. Most human beings possess sufficient empathy and rational capacity to be able to grasp and comprehend ideas with which they disagree. Religion as a generalized worldview that motivates behavior is no more incomprehensible to those who disagree with it than are other similarly encompassing worldviews that find a warm embrace within modern liberalism.<sup>490</sup> (Radical feminism is one example of such a worldview.) As Weithman contends, the liberal argument in favor of excluding religious reasons from the same consideration enjoyed by others in the political sphere is subject to fatal objections.<sup>491</sup> Many liberal objections to equality of citizenship for religionists seem predicated not on a principled approach to religious liberty, but on the supposed threat to society posed by the social and political integration of large groups of religious believers—often characterized as “fundamentalists”.<sup>492</sup> Basing the rights and privileges of citizenship on such fear is the antithesis of the kind of rational allocation of rights and duties that forms the basis of traditional liberal methodology. Instead, it is more akin to bigotry, the exact sort of thing that liberalism in both its classic and modern manifestations usually

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489. *Id.*

490. See Thomas C. Berg, *Religious Liberty in America at the End of the Century*, 16 J.L. & RELIGION 187, 188 (2001) (contending that Supreme Court jurisprudence for the last two decades has been moving towards seeing religion as meriting the same sort of constitutional protections as other ideas and activities.) Berg writes: “[i]n the 1980s and 1990s, however, the Court began to move gradually from church-state separation, with its distinctive treatment of religion, toward an emphasis on the equality of religion with other ideas. The Court began permitting, and sometimes even requiring, the government to treat religion the same as other ideas and activities: what Professor Douglas Laycock has called ‘formal neutrality’ between religion and nonreligion. Decisions by the early 1990s had firmly established rights of equal treatment for religious speech by individuals in public schools, under the Free Speech Clause. The Court also began, little by little, to approve programs of financial aid under which religious institutions benefited on the same terms as others” *Id.* (citations omitted). See also Noah Feldman, *From Liberty to Equality: The Transformation of the Establishment Clause*, 90 CAL. L. REV. 673, 678 (2002) (arguing that the principle of equal treatment of religion could conceivably justify vast increases in government funding of religion).

491. See Weithman, *supra* note 477, at 512-14.

492. See Ashley Woodiwiss, *Ecclesial Profiling*, 36 WAKE FOREST L. REV. 557, 569-70 (2001).

derides as illiberal.<sup>493</sup> As such, it is profoundly offensive to any attempt to understand the nature of citizenship in a liberal democracy.

A second problem with the liberal attempt to differentiate between religionists and non-religionists when it comes to civic rights and privileges is that such an attempt violates the fundamental commitment of liberalism to evaluating individual rights as existing prior, in Professor Powell's words, to "any community and all moral commitments."<sup>494</sup> Unless one is willing to postulate that religious believers are ontologically different from non-believers, the only way to single out religious believers for differential treatment from non-religionists is by their commitment to faith communities and the moral and spiritual commitments that go along with membership in those faith communities. In other words, a discriminatory approach to religionists mandates that the civic polity sees religious believers primarily in terms of their membership in faith communities, rather than as human persons who affirm religious principles and engage in certain religious and moral practices. Yet reference to community and morality as a basis for an individual's rights violates that basic definition of liberalism provided by Powell, which attempts to determine rights and duties apart from reference to community and morality. The liberal attempt to exclude religionists from an equal share in the rights and privileges of civic society therefore violates the core of liberalism itself. It is a profoundly illiberal notion.

A third problem with the liberal objection to the principle of equality of rights between religionists and non-religionists is found in the principle of distributive justice. As John Courtney Murray argued in his groundbreaking book *We Hold These Truths: Catholic Reflections on the American Proposition*,<sup>495</sup> distributive justice mandates that public support be available to institutions, whether governmental or private, which participate in the common social task of education.<sup>496</sup> Murray, one of the premier liberal theorists of modern Roman Catholic thought and a decisive influence on Catholicism's

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493. For the notion that liberalism rejects bigotry and prejudice, see Hamburger, *supra* note 92, at 693 ("liberalism has consistently been understood to transcend narrow self-interest or bigotry.").

494. MICHAEL J. GERHARDT ET AL., *supra* note 485, at 245 (citing H. JEFFERSON POWELL, *THE MORAL TRADITION OF AMERICAN CONSTITUTIONALISM* 6 n.16 (1993)).

495. JOHN COURTNEY MURRAY, S.J., *WE HOLD THESE TRUTHS: CATHOLIC REFLECTIONS ON THE AMERICAN PROPOSITION* (1960); *see also* Daniel J. Morrissey, *The Separation of Church and State: An American-Catholic Perspective*, 47 CATH. U. L. REV. 1, 47-48 (1997).

496. *See* MURRAY, *supra* note 495, at 146-47.

current approach to church-state relations, grounds his argument both in the prevalence of religiously-affiliated educational institutions in society,<sup>497</sup> along with the fundamental “moral norm” of distributive justice.<sup>497</sup> Murray describes the moral principle of distributive justice as follows:

This moral norm requires that government, in distributing burdens and benefits within the community, should have in view the needs, merits, and capacities of the various groups of citizens and of society in general. The operation of this norm is visible in many fields—income tax laws, selective service, social security, labor laws, etc. It ought likewise to control the action of government in support of schools.<sup>498</sup>

According to Murray, the government should ensure the availability of a “proportionally just measure of public support”<sup>499</sup> to schools regardless of their nature—public or private, religious or secular.<sup>500</sup> This distributive pattern of aid to educational institutions is justified, in Murray’s view, both by the abstract principle of distributive justice and sociological changes in American society that have rendered it more pluralistic: “as the pattern of society has altered and assumed a new pluralistic structure, so too would the pattern of the school system.”<sup>501</sup>

The exclusion of religious believers and their institutions from full equality of rights is not only offensive to fundamental principles of equality of citizenship, liberalism, and distributive justice, but also deeply offensive to the Constitution’s guarantee of religious liberty. Although there is considerable scholarly debate over the intention of our Constitution’s framers regarding the First Amendment’s Religion Clauses, what is agreed upon is the Founders’ conviction that government should refrain from imposing burdens or denying generally available benefits to individuals based on their religious affiliation or lack thereof.<sup>502</sup> As Edward McGlynn Gaffney, Jr. has pointed out, the purpose of the First Amendment’s religion provisions was to prevent the government “from promoting or advancing a national orthodoxy about what to believe or a national orthopraxy

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497. *Id.* at 146

498. *Id.*

499. *Id.*

500. *Id.* at 147.

501. *Id.*

502. *See infra* notes 503-13 and accompanying text.

about how to behave.”<sup>503</sup> Far from seeking to banish religion from civic life, the Constitution’s guarantee of religious freedom makes sure that religious diversity and pluralism “can thrive in America as almost nowhere else in the world.”<sup>504</sup> According to Gaffney, this robust religious climate is fostered and enabled by the Constitution because the First Amendment’s Religion Clauses provide that the government cannot “privileg[e] one community over another.”<sup>505</sup> This prohibition on privileging—a profoundly liberal prohibition, by the way—does not simply extend between different religions, but also extends between religion and non-religion,<sup>506</sup> and by so doing it forms the core of the principle of nondiscrimination on the basis of religion.

This principle of religious nondiscrimination can be seen at work in two critical writings by two giants of the Founding generation: James Madison and Thomas Jefferson.<sup>507</sup> In 1785, prior to the ratification of either the Constitution or the Bill of Rights, James Madison objected to a bill before the Virginia legislature that would have provided direct state funding to certain religious organizations, but not to others.<sup>508</sup> In his objection, known as the *Memorial and Remonstrance Against Religious Assessments*, he discussed the issue of equality of citizenship for believers and non-believers alike:

Because, the Bill violates that equality which ought to be the basis of every law, and which is more indispensable, in proportion as the validity or expediency of any law is more liable to be impeached. If “all men are by nature equally free and independent,” all men are to be considered as entering into Society on equal conditions; as relinquishing no more, and therefore retaining no less, one than another, of their natural rights. Above all are they to be considered as retaining an “equal title to the free exercise of Religion according to the dictates of conscience.” Whilst we assert for ourselves a freedom to embrace, to profess and to observe the Religion which we believe to be of divine origin, we cannot deny an equal freedom to those whose minds have not yet yielded to the evidence which has convinced us. If this freedom be abused, it is

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503. Edward McGlynn Gaffney, Jr., *Curious Chiasma: Rising and Falling Protection of Religious Freedom and Gender Equality*, 4 U. PA. J. CONST. L. 394, 400 (2002).

504. *Id.* at 400.

505. *Id.*

506. *See id.* at 400-01.

507. For an overview of the impact of Madison and Jefferson on the constitutional dialogue on law and religion, see David Reiss, *Jefferson and Madison as Icons in Judicial History: A Study of Religion Clause Jurisprudence*, 61 MD. L. REV. 94 (2002).

508. See James Madison, *Memorial & Remonstrance Against Religious Assessments* (1785), reprinted in RELIGION AND THE CONSTITUTION 63-68 (Michael W. McConnell, John H. Garvey & Thomas C. Berg eds., 2002).

an offence against God, not against man: To God, therefore, not to men, must an account of it be rendered. As the Bill violates equality by subjecting some to peculiar burdens; so it violates the same principle, by granting to others peculiar exemptions. Are the Quakers and Menonists the only sects who think a compulsive support of their Religions unnecessary and unwarrantable? Can their piety alone be entrusted with the care of public worship? Ought their religions to be endowed above all others, with extraordinary privileges by which proselytes may be enticed from all others? We think too favorably of the justice and good sense of these denominations, to believe that they either covet preeminences over their fellow citizens, or that they will be seduced by them, from the common opposition to the measure.<sup>509</sup>

Madison's fundamental point is that equality of citizenship for people of faith and people of no faith mandates that each share equally the burdens and benefits of being participants in a free society.<sup>510</sup> This principle was also defended by Thomas Jefferson in his proposed statute on religious liberty, entitled *An Act For Establishing Religious Freedom*.<sup>511</sup> Jefferson's statute sought to guarantee equality of citizenship both for believers and non-believers, particularly in the arena of government taxation and expenditure.<sup>512</sup> Jefferson noted in the preamble to his bill that government attempts to influence either in favor of or against religion by use of "temporal punishments or burdens, or by civil incapacitations, tend only to beget habits of hypocrisy and meanness."<sup>513</sup>

Madison's and Jefferson's strong stances against a differential scope of rights based on religion were affirmed by the United States Supreme Court in the landmark 1978 case *McDaniel v. Paty*.<sup>514</sup> In that case, a plurality of the Court ruled that a Tennessee law disqualifying religious ministers from serving in the state legislature violated the Free Exercise Clause of the First Amendment.<sup>515</sup> The Court found that the law discriminated against ministers on the grounds of their "status" as ordained clergy, and that such status discrimination

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509. *Id.* at 64-65.

510. *Id.*

511. See Thomas Jefferson, *An Act For Establishing Religious Freedom* (1786), reprinted in THE ESSENTIAL THOMAS JEFFERSON 44-46 (John Gabriel Hunt, ed., 1996). Jefferson, incidentally, was the Founder who coined the phrase "a wall of separation between Church and State," in his *Letter to A Committee of the Danbury Baptist Association* (1802), reprinted in McConnell et al., *supra* note 508, 54-55.

512. See *id.* at 44-45

513. *Id.* at 44.

514. *McDaniel v. Paty*, 435 U.S. 618 (1978).

515. See *id.* at 629.

violated the First Amendment's protections for religious believers.<sup>516</sup> In a concurring opinion joined by Justice Marshall, Justice Brennan went further and found that the Tennessee law discriminated on the basis of religious belief. Brennan found that the Tennessee statute in question set up an unconstitutional scheme of religious classification that had the effect of imposing a "unique disability" on religious believers who were also ordained ministers.<sup>517</sup> He asserted that under precedent Tennessee was prohibited from barring a minister from elective office.<sup>518</sup> Brennan also found that the Establishment Clause was implicated in Tennessee's actions: "Religionists no less than members of any other group," he wrote, "enjoy the full measure of protection afforded speech, association, and political activity generally."<sup>519</sup> The Establishment Clause, properly understood, is a shield against any attempt by government to inhibit religion."<sup>520</sup> The Establishment Clause must not, Brennan stressed, "be used as a sword to justify repression of religion or its adherents from any aspect of public life."<sup>521</sup>

Under both the plurality's decision and Brennan's concurrence, a state action that classifies people according to religion and then dictates their civic rights accordingly is constitutionally problematic. And that is precisely the sort of classification that lies at the heart of modern Blaine amendment jurisprudence. While Nineteenth Century Blaine provisions targeted specific sectarian religions, most modern court opinions interpreting state Blaine amendments, like the *Witters II* decision from Washington State, strike not just at particular faiths, but at all faiths.<sup>522</sup> Indeed the *Witters II* decision has strong parallels to the situation in *McDaniel v. Paty*. In *Witters II*, a citizen of Washington was denied vocational financial aid from the state on the basis of his choice to pursue a career in religious ministry.<sup>523</sup> In *McDaniel v. Paty*, an ordained minister was denied the right to hold office in Tennessee on the basis of his decision to pursue a career in religious ministry.<sup>524</sup> In both cases, an individual was discriminated against by the state not because of the beliefs that he or she held, but

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516. *Id.* at 627.

517. *Id.* at 631-32 (Brennan, J., concurring).

518. *See id.* at 632-35.

519. *Id.* at 641.

520. *Id.*

521. *Id.*

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

523. *See id.* at 1120-21.

524. *See McDaniel v. Paty*, 435 U.S. 618 (1978).

because of the very fact that the individual was involved in either the preparation for or practice of the ministry. This being the case, it is difficult to see how the status-based targeting common to state Blaine jurisprudence can survive challenge in light of the Court's holding in *McDaniel v. Paty*. Such religious profiling is simply constitutionally prohibited.

A more recent case that demonstrates the applicability of this principle to state Blaine Amendment provisions is the aforementioned *Davey v. Locke*.<sup>525</sup> In *Davey*, the state of Washington sought to justify its refusal to provide a theology student at a private university with a state scholarship under a state program to provide such scholarships to students who met certain general criteria.<sup>526</sup> The state argued, in line with the *Witters II* decision, that its Blaine provisions required the differential treatment of individuals who were planning on studying theology.<sup>527</sup> The Ninth Circuit Court of Appeals, no friend to religion in the public sphere,<sup>528</sup> rejected the state's argument, and ruled that the Free Exercise Clause of the First Amendment prohibits the state from treating religionists unequally from non-religionists.<sup>529</sup> By requiring Davey to give up his religious calling in order to get a scholarship, the Ninth Circuit reasoned, the state was discriminating on the basis of religion in a manner analogous to Tennessee's action in *McDaniel*.<sup>530</sup> And just as Tennessee's action was unconstitutional, so too was that of the state of Washington.<sup>531</sup>

### 3. *Free Speech and Viewpoint Discrimination*

#### a. *An Overview of Viewpoint Discrimination Doctrine*

The Religion Clauses pose significant problems for state Blaine Amendments, but they are not the sole First Amendment texts that are implicated by Blaine language. The Free Speech Clause also comes

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

526. *See id.* at 750-51.

527. *See id.* at 758.

528. The hostility of the Ninth Circuit Court of Appeals to religion in the public sphere was demonstrated by its recent decision finding that the recitation of the phrase "one nation under God" by public school children as part of the national Pledge of Allegiance violated the separation of church and state. *See Newdow v. U.S. Congress*, 292 F.3d 597 (9th Cir. 2002).

529. *See Davey*, 299 F.3d at 750.

530. *See id.* at 759.

531. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993).

into play regarding the constitutional legitimacy of state Blaine provisions. One particular aspect of the judiciary's interpretation of the Free Speech Clause is particularly relevant: the doctrine that prohibits the government from engaging in viewpoint discrimination.<sup>532</sup> Under the classic formulation of this doctrine, once the government establishes a public forum, it is not allowed to regulate aspects of that forum on the basis of individuals' perspectives on various issues.<sup>533</sup> Under this doctrine, the Court views as "axiomatic"<sup>534</sup> that the government may not regulate speech "based on its substantive content or the message it conveys."<sup>535</sup> This is true even in situations where the speech in question is of a religious character.<sup>536</sup>

#### b. Viewpoint Discrimination and Government Funding of Religious Groups

While the Supreme Court's viewpoint discrimination doctrine protects religious groups and believers from government restriction of the substantive content of their speech, how does such protection impact state Blaine Amendments? The Supreme Court in the landmark case of *Rosenberger v. Rector and Visitors of the University of Virginia*<sup>537</sup> ruled that the Free Speech Clause of the First Amendment does not allow state governments to discriminate against religious organizations seeking aid generally available to other private parties, so long as the religious organization falls within the scope of the government aid program.<sup>538</sup> In that case, a university denied funds to a student group that published a campus newspaper that examined

532. For a brief overview of viewpoint discrimination doctrine, see David K. DeWolf, Stephen C. Meyer & Mark Edward DeForrest, *Teaching the Origins Controversy: Science, or Religion, or Speech?*, 2000 UTAH L. REV. 39, 103-6 (2000).

533. See *id.* at 103 n.331, citing *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819, 828 (1995) (plurality opinion) (citing *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 641-43 (1994); see also *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394 (1993).

534. *Id.* at 103, (quoting *Rosenberger*, 515 U.S. at 828).

535. *Rosenberger*, 515 U.S. at 828; for a short overview of judicial developments leading up to *Rosenberger*, see Viteritti, *supra* note 14, at 710-11.

536. *Rosenberger*, 515 U.S. at 828; see also DeWolf et al., *supra* note 532, at 103.

537. 515 U.S. 819 (1995). For an overview of *Rosenberger* that is critical of the Court's decision, see Kristine Kuenzli, *Opportunity Wasted: The Supreme Court's Failure to Clarify Religious Liberty Issues in Rosenberger v. Rector and Visitors of the University of Virginia*, 32 GONZ. L. REV. 85 (1996/97). For an overview of *Rosenberger* that places the case in the overall context of the Court's "access-to-facilities case[s]," see Manns, *supra* note 20, at 333-35.

538. See *Rosenberger*, 515 U.S. at 837.

stories from an evangelical Protestant perspective.<sup>539</sup> The student group brought suit, alleging that the university's actions constituted unlawful viewpoint discrimination.<sup>540</sup> A plurality of the Supreme Court, in an opinion written by Justice Kennedy, ruled that the university's denial of funds to the newspaper constituted viewpoint discrimination.<sup>541</sup> The Court found that the university had created a limited public forum for student publications, and that the university was therefore required to administer that forum in accord with constitutional principles.<sup>542</sup> While the forum created, in the Court's words, was more "'metaphysical' than . . . 'spatial,'" the rules regarding government restrictions on expression still applied.<sup>543</sup>

In its defense, the university had initially argued that funding the newspaper would violate the separation of church and state, but later abandoned this argument.<sup>544</sup> The Court's plurality rejected the argument anyway, holding that so long as the funding program operated by the university was neutral in accord to religion, funding the student newspaper would not constitute a violation of the Establishment Clause.<sup>545</sup> The university also argued that while viewpoint discrimination doctrine may well apply to situations involving access to government facilities, it should not apply to funding issues because of the limited financial resources available to public entities.<sup>546</sup> The Court stated strongly that viewpoint discrimination is impermissible based "on the economic fact of scarcity."<sup>547</sup>

The Court's opinion in *Rosenberger*, while groundbreaking, seemed somewhat unstable due to the nature of the vote on the case by the members of the Court. The decision itself was 5-4, but the official opinion was signed by only four justices; the fifth justice—O'Connor—concurred in the result but not the reasoning. However, the Court's decision in *Rosenberger* received validation in the year 2000 with the Court's 6-3 decision in *Board of Regents of the University of Wisconsin System v. Southworth*.<sup>548</sup> In that case a group

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539. *Id.* at 825-26.

540. *Id.* at 827-28.

541. *Id.* at 845.

542. *Id.* at 829.

543. *Id.* at 830.

544. *Id.* at 837-38.

545. *Id.* at 839-40.

546. *Id.* at 832-33.

547. *Id.* at 845.

548. 529 U.S. 217 (2000).

of students brought suit alleging that the university's collection of mandatory student fees violated their First Amendment rights.<sup>549</sup> The students maintained that the fees were used to fund groups that engaged in "political and ideological speech,"<sup>550</sup> that they disagreed with.<sup>551</sup> The Court ruled that the university program was constitutional.<sup>552</sup> In its ruling, the Court addressed the applicability of the requirement of viewpoint neutrality in university funding situations.<sup>553</sup> It found that a student activities fund was not a "public forum" in a traditional sense, but that case law regarding public fora was controlling "by close analogy."<sup>554</sup>

Although it deals with government funding outside the context of education, the case of *Legal Services Corp. v. Velazquez*<sup>555</sup> also provides helpful guidance in understanding the application of the federal Constitution's requirement of viewpoint neutrality to government funding decisions. In that case Legal Services Corporation attorneys challenged congressional restrictions preventing them from advocating, in the course of their representation of clients, for changes in federal welfare laws or arguing that such laws were invalid.<sup>556</sup> The Supreme Court looked at its viewpoint discrimination precedent in evaluating the constitutionality of Congress' restriction on the corporation,<sup>557</sup> finding that since a government subsidy was involved, the Court's limited forum jurisprudence provided "some instruction" as to the resolution of the case.<sup>558</sup> The Court determined that in order for viewpoint discrimination doctrine to apply in a government funding context, it is necessary for the government to first create a public forum and then allocate funds within that forum in regard to viewpoint.<sup>559</sup> This test for applying viewpoint discrimination constitutes the Court's latest word on its methodology in applying viewpoint discrimination doctrine to government funding decisions.

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549. *Id.* at 221.

550. *Id.*

551. *Id.* at 230.

552. *Id.*

553. *Id.* at 229-30.

554. *Id.*

555. 531 U.S. 533 (2001).

556. *Id.* at 538.

557. *Id.* at 540-44.

558. *Id.* at 544.

559. *Id.* at 540-44.

c. Application of Viewpoint Discrimination Doctrine to  
State Blaine Provisions

The Supreme Court's rulings in *Rosenberger* and *Southworth* provide strong evidence that the courts will likely apply viewpoint discrimination doctrine in evaluating the restrictive characteristics of state Blaine Amendments. That being the case, there are two basic questions that must be addressed in order to determine whether the First Amendment's prohibition on viewpoint discrimination will be fatal to state Blaine provisions. First, has the basic test set out by the Court in *Velasquez* for evaluating viewpoint discrimination in funding been met? Second, if that test has been met, is there any defense that a state could use to justify viewpoint discrimination against religious groups or individuals? This Article will now explore these two questions.

The question of whether the *Velasquez* test has been met will revolve around the facts of a given case. Under *Velasquez*, in order for viewpoint discrimination doctrine to apply in a government funding context, it is necessary for the government to first create a public forum<sup>560</sup> and then allocate funds within that forum in regard to viewpoint.<sup>560</sup> Hence the critical factual question that has to be resolved is whether or not the state government has opened up its funding process to parties seeking assistance for private education, and if it has done so, whether it excludes religious institutions or believing individuals from funding on the basis of their religious identity or perspective. If a state prohibits any private institutions or individuals from accessing state money to assist in private educational expenses, the *Velasquez* test will not be satisfied and a finding of viewpoint discrimination would be highly unlikely. But if the state does allocate funds to private educational entities, either directly or indirectly through vouchers or grants to parents or students, while excluding religious schools, such an action would like run afoul of the principle at the foundation of the *Velasquez* ruling. In such a case, the exclusion of religious institutions or individuals from participation in such a program, open to non-religionists and non-religious institutions, renders it constitutionally problematic under the doctrine of viewpoint discrimination.<sup>561</sup>

Such a determination, however, does not end the constitutional inquiry. Instead, it raises the second question in this analysis; namely,

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<sup>560</sup>. *Id.*

<sup>561</sup>. See *Davey v. Locke*, 299 F.3d 748, 755 (9th Cir. 2002).

do Blaine states have an affirmative defense that could be raised to justify viewpoint discrimination against religious groups or individuals in the educational funding context? In answering this question, it is critical to note that the Supreme Court has recognized that Establishment Clause violations constitute a compelling state justification for content-based restrictions against religious speech.<sup>562</sup>

Applying this exception by analogy to the issue of funding, it is not difficult to see that an attempt to use viewpoint discrimination doctrine to overturn state constitutional provisions prohibiting direct funding of private religious schools could be challenged on Establishment Clause grounds, particularly if the school is “pervasively sectarian.”<sup>563</sup>

Such a challenge would be supported by the case of *Columbia Union College v. Clarke*.<sup>564</sup> In that case, the Fourth Circuit Court of Appeals was asked to decide whether a private religious college was constitutionally entitled to funds from a Maryland grant program.<sup>565</sup>

The appellate court ruled that while denying funds to a “pervasively sectarian” school would constitute viewpoint discrimination, such discrimination would be justified if necessary to avoid a violation of the Establishment Clause.<sup>566</sup> The U.S. Supreme Court declined to review the appellate court’s ruling, effectively upholding the appellate court’s decision.<sup>567</sup>

While the *Columbia Union College* case provides Blaine states with a strong Establishment Clause defense against attack on the grounds of viewpoint discrimination, that case has been significantly weakened by the Supreme Court’s later ruling in *Mitchell v. Helms*.<sup>568</sup> That case dealt with the constitutionality of government programs that were used to provide direct aid to private religious schools in

562. See *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 761-62 (1995) (citing *Lamb’s Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394-95 (1993); *Widmar v. Vincent*, 454 U.S. 263, 271 (1981)).

563. *Columbia Union Coll. v. Clarke*, 159 F.3d 151, 154-55 (4th Cir. 1998).

564. 159 F.3d 151 (4th Cir. 1998), *cert. denied*, 527 U.S. 1013 (1999).

565. *Id.* at 154-55.

566. *Id.* at 155-57. See also *Tilton v. Richardson*, 403 U.S. 672, 678-82 (1971) (setting out the factors in the test for government aid to religiously-affiliated educational institutions under the Establishment Clause); *Hunt v. McNair*, 413 U.S. 734, 742-43 (1973) (adopting the factors from *Tilton* to determine whether an institution is “pervasively sectarian”).

567. *Columbia Union Coll. v. Clarke*, *cert. denied*, 527 U.S. 1013 (1999).

568. *Mitchell v. Helms*, 530 U.S. 793 (2000). For a discussion of the impact of this case on the education system, see Mark Walsh, *Supreme Court Upholds Aiding Religious Schools*, EDUCATION WEEK (June 28, 2000) available at <http://www.edweek.org/ew/ewstory.cfm?slug=41helmsweb.h19>.

Louisiana.<sup>569</sup> The aid was restricted, however, in its scope: funds given to the schools could only be used for “secular, neutral, and nonideological” purposes.<sup>570</sup> Suit was filed challenging the program on federal Establishment Clause grounds.<sup>571</sup> In a plurality opinion, the Court upheld the government program providing direct aid to the religious schools, finding no Establishment Clause violation.<sup>572</sup> In making its ruling, the Court indicated that the key issue regarding the direct use of government funds by private religious school is “whether any religious indoctrination that occurs in those schools could reasonably be attributed to governmental action.”<sup>573</sup> The Court indicated further that examination of that issue involves looking at the neutrality of the aid program in question.<sup>574</sup> So long as government aid is “offered to a broad range of groups or persons without regard to their religion[,]” the plurality held, the funding scheme will be neutral and constitutional.<sup>575</sup> Neutrality is also assured, the Court noted, when aid to private religious schools is the result of individual choice, rather than “unmediated” government action.<sup>576</sup>

It is critical to note, however, that the Court’s opinion in *Mitchell* was joined only by a plurality of the justices. Justice O’Connor, joined by Justice Breyer, concurred with the plurality’s result, but not with its reasoning.<sup>577</sup> O’Connor believed that the plurality’s reasoning went too far in opening the door to direct government aid to private religious schools.<sup>578</sup> While agreeing that the principle of neutrality was a critical factor in evaluating the constitutionality of government aid programs under the Establishment Clause, Justice O’Connor did not believe that neutrality alone was sufficient to guarantee the constitutionality of such an aid program.<sup>579</sup> While deeply skeptical of the constitutionality of “direct monetary subsidies” by government to private religious schools,<sup>580</sup> Justice O’Connor still upheld the

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569. *Mitchell*, 530 U.S. at 801.

570. *Id.* at 802, (quoting 20 U.S.C. § 7372(a)(1)).

571. *Id.* at 803-04.

572. *Id.* at 808.

573. *Id.* at 809, (citing *Agostini v. Felton*, 521 U.S. 203, 226 (1997) (quoting *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 10 (1993))).

574. *Id.*

575. *Id.*

576. *Id.* at 810, quoting *Sch. Dist. of Grand Rapids v. Ball*, 473 U.S. 373, 395, n.13 (1985).

577. *Id.* at 836-37 (O’Connor, J., concurring).

578. *Id.* at 844 (O’Connor, J., concurring).

579. *Id.* at 838-40 (O’Connor, J., concurring).

580. *Id.* at 843-44 (O’Connor, J., concurring).

constitutionality of indirect government aid to private religious schools, particularly if such aid was the result of “a true private-choice program.”<sup>581</sup>

Both the plurality and concurring opinions in *Mitchell v. Helms* significantly weaken the availability of the Establishment Clause as a defense against claims that state Blaine Amendments mandate unlawful viewpoint discrimination. While states could still argue that their Blaine Amendments are permissible in order to prevent aid to “pervasively sectarian” activities at private religious schools, the plurality decision by the Court undercuts the ability of the states to use the Establishment Clause to defend Blaine Amendment discrimination against private religious school programs that would use state funds for non-sectarian purposes.<sup>582</sup> In addition, the plurality decision when taken together with the concurrence by Justice O’Connor and Justice Breyer, provides a solid six-vote majority on the court affirming the constitutional legitimacy of indirect aid to private religious schools. Such a solid majority drastically undercuts any federal constitutional justification for state Blaine prohibitions on indirect aid—aid provided by the government to parents or students who then provide the aid to a religious school. Such forms of aid have traditionally been upheld by the Supreme Court in the face of attack under the Establishment Clause,<sup>583</sup> and both the plurality decision and O’Connor’s concurrence in *Mitchell v. Helms* continue that trend.<sup>584</sup> Indeed, it is likely that the import of the *Mitchell* case has only grown stronger in light of the Supreme Court’s recent ruling in *Zelman v. Simmons-Harris*,<sup>585</sup> where the Court found no Establishment Clause violation in a state voucher program aiding private religious

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581. *Id.* at 842-43 (O’Connor, J., concurring).

582. *See id.* at 822 (“Where the aid would be suitable for use in a public school, it is also suitable for use in any private school.”).

583. *See* *Tilton v. Richardson*, 403 U.S. at 679, citing *Everson v. Bd. of Education*, 330 U.S. 1 (1947); *Bd. of Educ. of Cent. Sch. Dist. No. 1 v. Allen*, 392 U.S. 236 (1968); *Walz v. Tax Comm’n*, 397 U.S. 664 (1970); *Bradfield v. Roberts*, 175 U.S. 291 (1899).

584. *See* *Walsh*, *supra* note 568; *see also Mitchell*, 530 U.S. at 816 (“If aid to schools, even ‘direct aid,’ is neutrally available and, before reaching or benefiting any religious school, first passes through the hands (literally or figuratively) of numerous private citizens who are free to direct the aid elsewhere, the government has not provided any ‘support of religion[.]’”). Justice O’Connor issued a concurring opinion, joined by Justice Breyer, asserting that the plurality went too far in sanctioning direct aid to religious schools. *See id.* at 838. However, O’Connor’s concurrence continued to support aid to religious schools so long as that aid was indirect and part of “a true private-choice program.” *Id.* at 842-44.

585. 536 U.S. 639 (2002).

schools.<sup>586</sup> This is not to say that a state could be mandated to provide aid to private religious schools of either a direct or indirect nature. Rather, it is simply to say that states cannot discriminate against religious schools or individuals if the state sets up a program to aid private education, either through direct aid to private schools, or through indirect aid given to parents or students attending private schools.

#### V. CONCLUSION

As the issue of government aid to private religious schools takes on greater prominence in the wake of the Supreme Court's decision in *Zelman v. Simmons-Harris*, the discussion of whether or not to provide vouchers and other forms of government aid to parents, students, and private religious schools has shifted to the states. In light of this shift, a number of state constitutional provisions known as Blaine Amendments are taking center-stage in the debate over such aid. These Blaine Amendments have their roots in nineteenth century anti-Catholic bigotry and the political opportunism of certain leaders within the Republican Party. Adopted by at least thirty states, these Blaine Amendments are now the primary legal barrier on the state level standing in the way of vouchers and other forms of government aid to private religious schools, students, and parents. These Blaine Amendments have differing language and effect, with some versions of the amendment taking a moderate view towards state aid to private religious education, while other versions harshly prohibit all forms of aid. Court decisions interpreting state Blaine provisions also run the gamut between decisions permitting some forms of indirect aid, and other decisions prohibiting all aid to private schools, even those that are secular in orientation.

State Blaine Amendments do not exist in a constitutional vacuum, however, but are subject to the provisions of the First Amendment. It is likely that most state Blaine provisions violate both the Religion Clauses and the Free Speech Clause of the First Amendment. Many state Blaine provisions violate the Religion Clauses by impeding on religious liberty by mandating differential treatment for religionists and non-religionists. Such differential treatment violates liberal theory, original intent, and the Supreme Court's own jurisprudence expressed in *McDaniel v. Paty*. Most state Blaine Amendments also violate the

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586. *Id.*

Free Speech Clause's guarantee against viewpoint discrimination. The Supreme Court's jurisprudence, as developed in the cases of *Rosenberger v. Rector and Visitors of the University of Virginia* and *Velasquez v. Legal Services Corporation*, prohibits state governments from denying religious persons and organizations access to funds that are available to non-religious entities. While no state is required to provide grants or aid for students attending private schools, if a state does decide to provide such aid, it simply cannot discriminate against religious believers and institutions and still comply with the requirements of the First Amendment.