STATE BLAINE AMENDMENTS: ORIGINS, HISTORY, AND EDUCATION POLICY IMPLICATIONS FOLLOWING *MITCHELL*, *ZELMAN*, AND *LOCKE*

By

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To Mom: You did it!

It just took me a while longer to do my part.

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My study examined the implications for state legislatures, courts, and educational policy makers of the 2004 U.S. Supreme Court decision in *Locke v. Davey* as it applies to state "Blaine Amendments." The *Locke* decision upheld the denial of a Promise Scholarship to Joshua Davey because he chose to declare a major in preparation for Christian ministry. Davey's supporters argued that the denial of the scholarship represented discrimination against religion based on the Article I, Section 11 of the Washington constitution; a so-called "Blaine Amendment." Blaine Amendments are found in at least thirty state constitutions, and Blaine opponents argue that these clauses are legacies of Nineteenth Century anti-Catholic hostility and should be declared unconstitutional. Many state constitutions contain Blaine language, and those clauses often influence state funding programs such as school voucher programs and faith-based initiatives, therefore, the Court's determination that the Washington clause in question was not a "Blaine Amendment" despite using Blaine language has important implications for state policy makers.

In light of *Locke*, I examined all 169 state constitutions written between 1776 and 1920, as well as the fifty modern state constitutions to identify those with Blaine language. Second I analyzed the history of the Blaine Amendments, the wording of the amendments, constitutional

debate at the time of adoption, patterns of ratification, and other factors that may shed light on the legislative intent behind these clauses. Third, I demonstrated that while there was significant anti-Catholic hostility animating the Blaine period, numerous other, constitutionally legitimate, issues and goals also informed the adoption of those clauses.

Finally, I argue that, as a result of the *Locke* decision, the Blaine Amendment controversy must now devolve to the states, and that advocates on both sides of the Blaine debate will ultimately need to fight state-by-state challenges because the constitutionality of these clauses will depend largely on the circumstances of adoption in each state and specifically whether an identifiable legacy of anti-Catholic bias can be attributed to legislative intent in adopting the clause in the past as well as in modern state constitutions

CHAPTER 1
INTRODUCTION

On February 25, 2004 the United States Supreme Court presented its decision in the case *Locke v. Davey*.[1] Among the many issues present before the Court in Locke were the state constitutional clauses known generally as "Blaine Amendments." These Amendments, adopted during the Nineteenth Century, state that state funds may not be delivered to "sectarian" schools. However, it is now being argued by Blaine opponents, "sectarian" was a "code word" for anti-Catholic; therefore these clauses are unconstitutional. On the other hand, Blaine supporters argue these clauses are not unconstitutional; that whatever the origins, the modern clauses no longer bear any anti-Catholic "taint" and that these clauses are legitimate exercises of state efforts to avoid the excessive entanglement of church and state

In contemporary state constitutions these clauses have the potential to inhibit the flow of tax dollars into religious institutions in schools. "Potential" is the key word; because current practice is different among the states in that some states that have Blaine clauses in the state constitutions allow religious institutions to receive tax dollars while other states with Blaine clauses do not. As a result of divergent state constitutional interpretation and practice, it was hoped by many that the U.S. Supreme Court in *Locke* would clarify once and for all the Constitutionality of these Blaine Amendments.

The First Amendment to the United States Constitution contains five clauses, of which two relate to religion: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ."[2] These are known as the Establishment and Free Exercise Clauses.

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[1] 540 U.S. 712 (2004).

[2] US Const, Amend I, § 1.

These clauses frame the American legal structure behind the concept of "separation of church and state" and the wide variety of ways in which religious life and political life interact. While each clause seems clear and succinct, the two clauses taken together have been the source of numerous legal and judicial controversies; because taken to logical extremes, each clause tends to conflict with the other.[3]

In writing these clauses, the founding fathers of the United States were aware not only of the history of religious strife in Europe, but also the diversity of religious sects and belief among the former colonies. When the Constitution was presented to the public, many people complained that the document had slighted God, for it contained "no recognition of his mercies to us . . . or even of his existence."[4] The Constitution said nothing about religion for two primary reasons: first, many delegates believed that if any power to legislate on religion existed at all, it lay within the domain of the states, not the national, government;[5] second, many delegates believed introducing a politically volatile issue such as religion into the Constitution would generate significant controversy making it much harder to ratify.[6] Many of the individual states had been founded with specific religious intent and, as a result, religious differences were abundant. Massachusetts, indeed most of New England, for example, was dominated by Calvinist Puritans who had established themselves as the Congregational Church.[7] Maryland was

[3] *School Dist. V. Schempp*, 374 U.S. 203, 247 (1963). See also *Walz v. Tax Commission of the City of New York*, 397 U.S. at 668-669 (1970).

[4] "Religion and the Founding of the American Republic." In Library of Congress Exhibit [online]. Available from http://www.loc.gov/exhibits/religion/rel06.html.

[5] *Id*.

[6] *Id*.

[7] Morison, et al. *The Growth of the American Republic*, Vol 1, 7th ed. (New York: Oxford University Press, 1980). p. 215.

predominantly Catholic along the coast and Presbyterian inland.[8] Pennsylvania was largely Quaker,[9] Virginia was predominately Anglican (later Episcopalian) and discriminated against other Protestants through the Anglican Church monopoly on performing marriages;[10] and Georgia was being influenced by the appearance of Methodism.[11] Furthermore, the new rational thinking of the Enlightenment influenced many of the Founding Fathers, typified by Thomas Jefferson, who are best considered Deists or even Agnostics.[12] One of the great questions of the post-Revolutionary period, then, was simply how to balance the competing claims of these religious movements. Furthermore, colonial efforts to legally enforce religious practice and morality had been notably ineffective,[13] influencing considerations of how to address religion in the Constitution.

As a result of deep religious differences, the founding fathers largely ignored religion in the new Constitution, perhaps because they were aware that the constitutional deliberations could easily deadlock and fail on the subject of religion. Their silence, while wise on one hand, makes it difficult for modern legal scholars and historians to determine "original intent" that might guide present understandings.[14]

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[8] *Id*.

[9] *Id*. p. 74-75.

[10] *Id*. p.107.

[11] *Id*.

[12] Library of Congress, *supra*. http://www.loc.gov/exhibits/religion/rel02.html.

[13] See e.g. David Flaherty, "Law and the Enforcement of Moral in Early America" in *American Law and the Constitutional Order: Historical Perspectives*. (Harvard University Press, 1978).

[14] For example, see the October 18, 1996 speech, "A Theory of Constitution Interpretation" by Justice Antonin Scalia, remarks at The Catholic University of America Washington, D.C. Oct. 18, 1996. advocating original intent. See also the discussions of the related "Legislative Intent" in *Legislative Analysis and Drafting,* 2nd edition 1984 by William Statsky, pages 3, 40, 75, 76, 118, 119, 152, 153 and N. Singer, *Sutherland on Statutory Construction*, Section 46.07 on the "Limits of Literalism" and the case notes following CCP Sec. 1859 and Evidence Code Sec. 462 (c) in the West or Deering annotated codes. See also Terry Bouton, "Whose Original Intent? Expanding the

The doctrine of separation of church and state arose from that constitutional silence. The nature of that separation has varied widely throughout the history of the United States as a result of the deep yet conflicting role played by religion in American society. Alexis de Tocqueville, in his *Journey to America*, observed that Americans were a "religious people"[15] and the nature of religious diversity and public debate, not to mention the role of the religious right in contemporary politics suggest this is still true today; [16] though arguably to a lesser extent.

At the same time, cultural and social changes beginning in the middle of the Twentieth Century made the nation more diverse both in terms of the peoples that made up the country and in terms of religious beliefs and attitudes, including the absence or rejection of religion.[17] Historians agree that diversity characterizes a great deal of late-Twentieth Century American

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Concept of the Founders." *Law and History Review*, Vol. 19, No. 3. Fall 2001. In this review of Saul Cornell, *The Other Founders: Anti-Federalism and the Dissenting Tradition in America, 1788–1828,* Brendan McConville, *These Daring Disturbers of the Public Peace: The Struggle for Property and Power in Early New Jersey,* and Woody Holton, *Forced Founders: Indians, Debtors, Slaves, and the Making of the American Revolution in Virginia,* Bouton discusses the problem of exactly who the "Founders" were and how historical understandings of "original intent" might change based on how this critical term is defined. To further confound the problem, Susan Jacoby argues in *Freethinkers: A History of American Secularism* that it was America's secularist "freethinkers" who were actually the primary influences upon which our nation was built raising further problems in determining "original intent."

[15] Alexis de Tocqueville, *Journey to America*, trans. George Lawrence, ed. J.P. Mayer (New York, Anchor Books, 1971), xv-xvi.

[16] *See, e.g.* Theodore Caplow, *All Faithful People: Change and Continuity in Middletown's Religion* (Minnesota: University of Minnesota Press (1983); George Gallup, Jr. and Jim Castelli, *The People's Religion: American Faith in the 90s,* Macmillan Publishing Company (1989); Stephen L. Carter, *The Culture of Disbelief: How American Law and Politics Trivialize Religious Devotion,* New York: Anchor Books (1994); Robert Bella, et al. *Habits of the Heart: Individualism and Commitment in American Life* (University of California Press (1996).

[17] See, *e.g.* William R. Hutchison, *Religious Pluralism in America: The Contentious History of a Founding Idea*, Yale University Press (2004); George M. Marsden, *Fundamentalism and American Culture*, *2nd* ed. Oxford University Press (2006); Edwin Gaustad, *The Religious History of America: The Heart of the American Story from Colonial Times to Today*, Harper (2004); Catherine Albanese, *America: Religions and Religion*, 3rd ed. Wadsworth Publishing (1998); Mary Farrell Bednarowski, *New Religions and the Theological Imagination of America*, Indiana University Press (1995).

religious life, but how much attention should be given and where to begin speaking of the diversity remain contested issues.[18]

As a result of this religious milieu, most parents want their children raised in environments that reflect their personal philosophies and values.[19] At the same time, many parents want limited exposure of their children to competing value systems while they are young and impressionable.[20] As a result, the schools are expected to inculcate "values" into students; but woe betides the school that finds itself teaching the "wrong" values.[21] That contradictory impulse contributes to the constant appearance of religious issues and the schools before the courts. But this is not new. As a result of the original constitutional silence religion clause jurisprudence has been a lively arena of law for more than two centuries. Nowhere is this more clearly illustrated than in the relatively recent changes to Supreme Court interpretations of the proper relationship between church and state and of the two religion clauses.[22]

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[18] Joanne C. Beckman, *Religion in Post-World War II America*. Retrieved online at http://www.nhc.rtp.nc.us:8080/tserve/twenty/tkeyinfo/trelww2.htm.

[19] Mark Schneider & Jack Buckley, "What Do Parents Want From Schools? Evidence From the Internet," *Educational Evaluation and Policy Analysis*, Vol. 24, No. 2, 133-144 (2002).

[20] *Id.*

[21] See e.g. Mary Breasted, *Oh! Sex Education*, Praeger Publishing Company (1979); Lawrence J. Haims, *Sex Education and the Public Schools*, Lexington Books (1973); James Hottois and Neal A. Milner, The *Sex Education Controversy: A Study of Politics, Education and Morality*, Lexington Books (1975); Richard Kerckhoff & Family Coordinator Panel, *Community Experiences with the 1969 Attack on Sex Education*, The Family Coordinator, #19, 104-110. (1970). See also Vivian T. Thayer, *The Attack Upon the American Secular School*, Beacon Press (1951) (arguing that attacks on public schools were becoming more organized and increasingly determined to break down the wall of separation between Church and State – and interesting argument from 1951 given its relevance to the present); Robert C. Fuller, *Naming the Anitchrist: The History of an Obsession*, Oxford University Press (1996) (discussing the political and social "demonising" of adversaries as they relate to nativism, anti-Communist crusades, and religious attacks on secularism); Tim LaHaye & David Noebel, *Mind Siege: The Battle for Truth in the New Millennium, Word Publishing* (2000) (a religious attack on secularism that identifies "secular humanism" which "dominates schools" as a religion that has undermined the moral fabric of America.); Barbara Forrest & Paul Gross, *Creationism's Trojan Horse: The Wedge of Intelligent Design*, Oxford University Press (2007) (asserts that intelligent design rejects the methodology of modern science and represents an attack on secular public education).

[22] See e.g. Matthew Jones, "Who Converted the Court?: Explaining Changes in Establishment Clause Legal Policy Outcomes." (paper presented at the annual meeting of the Western Political Science Association, Hyatt Regency

The role of the courts in affecting, perhaps even determining, the religious or non-religious nature of public institutions cannot be overstated. State and local courts field challenges to the policies and practices of local schools and school boards. Regardless of these decisions, however, parents, teachers, students, taxpayers, and anyone else holding a stake in the public schools can continue their challenge through the courts, regardless of prevailing precedent Eventually, a small number of these court cases will be selected to appear before the U.S. Supreme Court, the final decision maker regarding the constitutionality of any policy, practice, program, or legislation. But the Supreme Court does not only rule on particular cases, it attempts to develop and articulate constitutional doctrine[23] to guide the lower courts specifically and federal, state and local government generally.

One of the consistent topics before the courts is the flow of tax dollars into religious institutions. On this point, the U.S. Supreme Court has been inconsistent, complicating any attempt to understand constitutional limits in church-state relations as they manifest in education. This lack of predictability has created problems for lower courts, legislatures, and other policy-making organizations.[24] For example, in *Mueller v. Allen*,[25] *Witters v. Deptartment of Services for the Blind*,[26] and *Zobrest v. Catalina Foothills*,[27] the Court allowed tax dollars to be used to

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Albuquerque, Albuquerque, New Mexico, Mar 17, 2006). Online at http://www.allacademic.com/meta/p97439_index.html

[23] Charles Fried, "Constitutional Doctrine," 107 *Harv. L. Rev.* 1140 (1994).

[24] *See, e.g.* Thomas C. Berg, "Religion Clause Anti-Theories," 72 *Notre Dame L. Rev.* 693 (1997); "Religion Symposium," 7 *J. Contemp. Legal Issues* 275 (1996); "The Supreme Court – Leading Cases: Establishment Clause," 111:1 *Harv. L. Rev.* 279.

[25] *Mueller v. Allen*, 463 U.S. 388, 1983 (upholding a Minnesota statute allowing all parents to deduct actual costs for tuition and other education expenses from state income tax).

[26] *Witters v. Dept. of Services for the Blind*, 474 U.S. 481 (1986) (First Amendment does not preclude the use of public rehabilitation funds for an eligible blind person to prepare for the ministry).

[27] *Zobrest v. Catalina Foothills*, 509 U.S. 1 (1993) (sustaining section of IDEA providing all disable children with necessary aid).

provide certain services in religious schools. On the other hand, use of tax dollars was deemed unconstitutional in *School District of Grand Rapids v. Ball,*[28] and *Aguilar v. Felton.*[29] Of course, specific details and circumstances in each case have led to these apparent conflicts; but perceived inconsistencies have made it difficult for educational policy makers to establish clear and practical guidelines to be used by legislatures and school boards for determining ahead of an offense whether a particular policy or practice is constitutional.

The problems emerging from changing church-state jurisprudence have been examined extensively. One line of criticism of the Court has focused on its frequent invocation of "original intent."[30] According to Lawrence Tribe, a focus on original intent forces the Court to assume the role of "constitutional historian;"[31] but in this role the Court has failed to identify a single "original intent" for the Establishment Clause and, in fact, has produced both the "wall of separation" advocated by Justice Black in *Everson,*[32] the radically different "accommodation" idea proposed in dissent by Justice Rehnquist in *Wallace v. Jaffree,*[33] and the current principle of "neutrality" advocated in *Mitchell*[34] and *Zelman.*[35]

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[28] *School Dist. of Grand Rapids v. Ball,* 473 U.S. 373 (1985) (shared time and community programs for nonpublic schools students have the primary effect of advancing religion).

[29] *Aguilar v. Felton,* 473 U.S. 402 (1985) (using federal funds to pay the salaries of public school teachers in parochial schools violates the establishment clause).

[30] See e.g. the debate between Justices Stevens and Scalia across *Van Orden* v. *Perry,* 351 F.3d 173 (2005) (Stevens, dissenting) and *McCreary County, Ky v. the American Civil Liberties Union of Kentucky* , 354 F.3d 438 (2005) (Scalia dissenting); see also the extensive discussion of original intent recorded in *Alden v. Maine,* 527 U.S. 706 (1999).

[31] Laurence H. Tribe, *American Constitutional Law. (West Publishing Company, 1978)* p. 817.

[32] Justice Black in *Everson v. Board of Education,* 330 U.S. 1 at 16 (1947) ("The clause against establishment of religion by law was intended to erect 'a wall of separation between Church and State;'" quoting from Thomas Jefferson's *Letter to the Danbury Connecticut Baptist Association* in 1802*)*.

[33] 475 U.S. 38, 91-106 (Rehnquist, J., dissenting). In his dissent, Rehnquist concluded that there is no historical foundation for the wall of separation idea, and that the Establishment Clause at the time of its adoption had "acquired a well-accepted meaning: it forbade establishment of a national religion, and forbade preference among religious sects." *Id*. at 106. According to Rehnquist, "the Establishment Clause did not require government neutrality

Likewise, some scholars have argued that the whole concept of original intent is flawed and that once the Court incorporated the Bill of Rights, and in particular the Religion Clauses against the states, original intent was invalidated: "The grand searches for original intent seen in *Everson*, *Wallace*, and other opinions are futile once it is understood that, while the Framers of the First Amendment might have had an intention regarding the application of the Religion Clauses to the national government, they had no such intention regarding application of the clauses to the states except that the clauses were not intended to apply to the states."[36] As a result, until the Supreme Court chooses to discard the incorporation of the Religion Clauses, "it is improper for the Court to use the intention of the Framers of the Religion Clauses to color the limitations imposed by those clauses on state action."[37] Obviously, the Court disagrees.[38]

Another key problem has been the use of historical practice to decide cases. This can be seen in several Establishment Clause cases, where the Court has reviewed various traditions under which state governments have supported religion and religious practices.[39] In these cases,

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between religion and irreligion nor did it prohibit the Federal Government from providing non-discriminatory aid to religion."

[34] M*itchell v. Helms*, 530 U.S. 793 (2000).

[35] *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).

[36] Stuart Poppel, "Federalism, Fundamental Fairness, and the Religion Clauses." 25 *Cumb. L. Rev*. 247 (1995). See also Harold Berman, "Religion and Law: The First Amendment in Historical Perspective," 35 *Emory L.J.* 777, 778 (1986) note 19, at 778. (To speak, then, of the history of the first amendment, and of the intent of the Framers - as courts and writers continually insist that we must do if we are to understand what the Constitution requires in the sphere of "Church and State" - is to run up against the plain facts that the first amendment left the protection of religious liberty at the state level to the states themselves and that the Framers expressed no intent concerning how the states should exercise their responsibilities in the matter).

[37] *Id.*

[38] See e.g. Justice Antonin Scalia, "A Theory of Constitution Interpretation." Address given at The Catholic University of America Washington, D.C. (October 18, 1996). Transcript online at http://www.courttv.com/archive/legaldocs/rights/scalia.html.

[39] See, e.g., *Marsh v. Chambers*, 463 U.S. 783, 786-91 (1983) (upholding Nebraska's practice of paying for a chaplain to provide prayers for its legislative body); *Walz v. Tax Comm'n*, 397 U.S. 664, 676-78 (1970) (providing tax exemptions for religious properties); *McGowan v. Maryland*, 366 U.S. 420, 431-36 (1961) ("blue laws" do not

members of the Court have argued that long-standing government involvement with religious practices serves as *prima facie* evidence of its constitutionality.[40] *Marsh v. Chambers*[41] and *Walz v Tax Commiss'n*[42] are obvious, though not the only, illustrations of this practice.[43] In, *Marsh*, for example, the Court observed chaplains have been employed by legislatures since the First Congress. Therefore they concluded, "from colonial times through the founding of the Republic and ever since, the practice of legislative prayer has coexisted with the principles of disestablishment and religious freedom."[44] However, as Poppel points out, whether a religious practice was allowed under state law in the past became irrelevant once the Religion Clauses were incorporated against the states:

> It is wrong to say, as Justice Kennedy once did, that, '[a] test for implementing the protections of the Establishment Clause that, if applied with consistency, would invalidate longstanding traditions cannot be a proper reading of the Clause.'[45] It is wrong because the current equation of the standards for state and national governments does not leave room for the consideration of peculiar state historical practices,[46] that is, until the Court begins to create historical exceptions under the First Amendment. We

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violate the Free Exercise Clause because plaintiffs alleged only economic disadvantage not infringement of their religious practices).

[40] See Poppel, *supra*: "It appears as though the Court has created a "historic exception" to the Establishment Clause." See also Thomas R. McCoy & Gary A. Kurtz, "A Unifying Theory for the Religion Clauses of the First Amendment," 39 *Vand. L. Rev*. 249, 252 (1986). It should be noted that the Court has given little weight on the free exercise side to the history of a particular religion that is claiming a free exercise violation. See, e.g., *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 451-52 (1988).

[41] 463 U.S. 783, 786-91 (1983).

[42] 397 U.S. 664, 676-78 (1970); see e.g. *McGowan v. Maryland*, 366 U.S. 420, 431-36 (1961).

[43] See, e.g. Scalia in *Lee v. Weisman*, 112 S. Ct. 2649, 2679 (1992) (Scalia, J., dissenting) (criticizing Court for invalidating the reading of a prayer at a public school graduation), and *Texas Monthly v. Bullock*, 489 U.S. 1, 29-34 (1989) (Scalia, J., dissenting) (criticizing the Court for invalidating a sales tax exemption for religious publications).

[44] *Marsh*, supra at 786

[45] *Allegheny v. ACLU*, 492 U.S. 573, 670 (1989) (Kennedy, J., concurring in part and dissenting in part).]

[46] Thirty years ago, Howe made a similar argument when he criticized the Court for mixing the traditions seen at the federal level in the Eighteenth Century with those seen at the state level in the Nineteenth and Twentieth centuries, and for confusing the histories of the First and Fourteenth Amendments. Mark DeWolfe Howe, *The Garden and the Wilderness: Religion and Government in American Constitutional History*, (University Of Chicago Press, 1965), p. 16.

> have to ensure that we do not infuse the historical practices of states into the standards for the national government, and vice-versa; in short we need to use the proper history in its proper place.[47]

In the last few years, these inconsistencies have multiplied as the Rehnquist Court abandoned the "*Lemon* Test" in favor of a thus far less clearly defined principle of "neutrality." The *Lemon* Test, which for twenty-five years served as the key test of constitutionality where religious affairs were concerned, takes its name from *Lemon v. Kurtzman* [48] in which the Supreme Court determined that to be constitutional government actions that impinge upon religion must demonstrate that they are 1) neutral in legislative intent, 2) do not have the primary effect of either advancing nor inhibiting religion, and 3) do not excessively entangle government in religious affairs. However, advocates for increasing the flow of tax dollars into religious institutions and programs have argued that the *Lemon* test resulted in overly restrictive judicial decisions that disfavored religion. The Rehnquist Court has agreed and has articulated a principle of "neutrality" the limits of which have not yet been fully developed.

The willingness of the Rehnquist Court to see unconstitutional restrictiveness where previous Courts have not has led advocates of increased tax support for programs in religious institutions to mount a multi-faceted attack on apparent impediments to the flow of tax dollars into religious organizations.

One key result of this trend is that church-state jurisprudence has devolved to the states as the U.S. Supreme Court has removed previous federal barriers to the flow of tax dollars into religious organizations but state level funding programs have run afoul of state provisions

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[47] Slightly paraphrasing a phrase used by Professor Albert Ehrenzweig in the choice of law field. Albert A. Ehrenzweig, "A Proper Law on A Proper Forum: A Restatement of the 'Lex Fori Approach'," 18 *Okla. L. Rev.* 340 (1965).

[48] *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

barring such use of tax dollars. These state constitutional provisions are being called "Blaine Amendments," "Baby Blaines," and "Little Blaines"[49] and are becoming increasingly important as the Supreme Court has progressively lowered federal constitutional barriers to religious access to public funds.[50]

"Blaine Amendments" are the result of an informal movement initiated by Nineteenth Century speaker of the House of Representatives and later U.S. senator, James G. Blaine. Congressman James Blaine represented the state of Maine in the House of Representatives from 1863-1876 and in the Senate from 1876-1881. He also ran for president three times. However, his sole claim to lasting fame resulted from an attempt to amend the U.S. Constitution. In 1875 Blaine introduced before the House of Representatives a Constitutional amendment barring tax support for sectarian institutions.[51] The amendment was edited in the House and passed, but it failed in the Senate.[52] While the proposal failed as a federal amendment, for roughly three decades Congress required that each new state incorporate similar language in its constitution as a condition for joining the union.[53]

There is no universally agreed-upon definition of exactly what constitutes a Blaine Amendment. As a result, it is unclear how many state constitutions contain these clauses. For

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[49] Jill Goldenziel, "Blaine's Name in Vain?: State Constitutions, School Choice, & Charitable Choice." *Denver University Law Review,* Vol. 83, No. 1, Fall 2005

[50] Kyle Duncan, "Secularism's Laws: State Blaine Amendments and Religious Persecution." 72 *Fordham L Rev* 493 (2003).

[51] 4 *Cong. Rec*. 5172, 5191 (1876)

[52] 4 *Cong. Rec*. 5558, 5596 (1876)

[53] See, e.g., Act of Feb. 22, 1889, ch. 180, Sec. 4, 25 Stat. 676, 677 (1889) (enabling act for North Dakota, Montana, South Dakota, and Washington); Act of 3 July, 1890, ch. 656, Sec. 8, 26 Stat. 215, 216 (1890) (enabling act for Idaho); Act of June 20, 1919, ch. 310, sec. 2, 36 Stat. 557, 559 (1910) (enabling act for Arizona and New Mexico); See also 20 Cong. Rec. 2080, 2100 (1889) (statement of Sen. Blair arguing in favor of enabling act requirement that state constitutions). Cited in Nathan Adams, "Pedigree of an Unusual Blaine Amendment: Article I, Section 3 Interpreted and Implemented in Florida Education." 30 *Nova L. Rev.* 1 (2005).

example, Gedicks identifies thirty-seven states with Blaine Amendments,[54] Komer identifies thirty-six states,[55] Rogers asserts there are thirty states with such clauses,[56] Kinzer lists twenty-four states[57] while Kirkpatrick lists only twenty.[58] This study focuses on the suspect word "sectarian" and identifies thirty states with Blaine Amendments (see Appendix A). Regardless of the number, however, Blaine Amendments are now under attack because, it is asserted, the denial of state funds to religious institutions fails the test of religious neutrality. However, this blanket condemnation of "Blaine Amendments" is problematic given the unclarity surrounding what exactly constitutes a "Blaine Amendment." Likewise there are legitimate questions regarding which, if any of these clauses are truly rooted primarily in anti-Catholic bigotry or whether other, valid legislative motives could be behind adoption of these clauses. Additionally, so-called "Blaine Amendments" have been examined, evaluated and re-adopted in many present-day constitutions and it may no longer be valid to invest the modern clauses with putative Nineteenth Century attitudes. Finally, the principle of neutrality articulated by the Court does not eliminate all barriers in the relationship between Church and State; thus, there must still be some constitutional limitations on the flow of tax dollars into religious institutions.

These issues all come together in *Locke v. Davey*.[59] Examination of two recent cases, *Mitchell v. Helms*,[60] and *Zelman v. Simons-Harris*[61] will provide the background for

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[54] Frederick Gedicks, "Reconstructing the Blaine Amendments." 2 *First Amend. L. Rev*. 85 (2003).

[55] *Id.*

[56] Remarks of Melissa Rogers, "Separation of Church and States: An Examination of State Constitutional Limits on Government Funding for Religious Institutions, Session 1." The Pew Forum on Religion and Public Life, http://pewforum.org/events/index.php?EventID=45

[57] Donald L. Kinzer, *An Episode in Anti-Catholicism: The American Protective Association,* (University of Washington Press, 1964) p. 11-12.

[58] David Kirkpatrick, "The Pain of Blaine (Amendments) is on the Wane," U.S. Freedom Foundation, 2003, http://www.freedomfoundation.us/blaine_amendments___part_3

[59] *Locke v. Davey*, 540 U.S. 712 (2004).

understanding the Court's emerging principle of neutrality; and a detailed examination of *Locke v. Davey* will illustrate the increasing attention being paid to those Blaine Amendments and set the stage for an examination of the state constitutional clauses at the heart of the controversy.

Locke v. Davey in particular struck right at that intersection of the Establishment and Free Exercise clauses and is therefore a key case for trying to understand the contemporary issues of church-state relations as they are viewed by the United State Supreme Court. But *Locke v. Davey* not only implicates the "separation of church and state" and the religion clauses, it has further implications for a wide array of issues including federalism, public aid to pervasively sectarian schools, school voucher programs and other educational reform programs, government funding for faith based social services, and virtually all areas where religion and public life intersect. But nowhere do religion and public life intersect more heatedly than in the schools.

The Supreme Court decision in *Locke* upholding the Washington Promise Scholarship Program complicates the picture hoped for by Blaine opponents. At the same time, it does not simplify the picture for Blaine supporters because the Supreme Court's decision paradoxically agreed with Blaine opponents that Blaine Amendments were expressions of anti-Catholic animus but then observed that because there was no such animus documented in Washington therefore, the Washington amendment in question, Article 1, section11, was not a "Blaine Amendment." This decision has significant policy implications for state legislatures and educational policy-makers because the future will now require state-by-state examination of Blaine clauses with attendant court challenges to determine whether or not a state clause is a Blaine Amendments. Regardless of which way this determination falls, state legislatures and educational policy-

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[60] *Mitchell v. Helms*, 530 U.S. 793 (2000).

[61] *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002)

makers will then be required to analyze the implications for local school funding programs

Research Questions

This study seeks to answer two critical question for state legislators, courts, and educational policy makers: 1) In general, are the state constitutional clauses commonly labeled "Blaine Amendments" primarily expressions of anti-Catholic legislative intent, and 2) are they therefore to be considered unconstitutional "Blaine Amendments" as defined by the Court in *Locke*?

This study answers both questions in the negative, and argues that while Nineteenth Century anti-Catholic animus quite possibly played a role in the passage of some state clauses, there were numerous legitimate motives for adoption of these state constitutional amendments including responding to growing religious turmoil over religious practices in schools as exemplified on the Cincinnati "Bible Wars" of 1869-1873.

The analysis supporting this conclusion encompasses three major components. The first is tracing the trajectory of recent Supreme Court decisions that have moved these putative Blaine Amendments from the periphery of Court attention to its center. The second component is an examination of state constitutions to identify those with clauses that have the potential to affect the flow of tax dollars into religious institutions and that also use the term "sectarian," which, it has been argued, is the primary indicator of anti-Catholic intent. Finally, this study analyzes the general history of the Federal and state Blaine language: the wording of the amendments, constitutional debate at the time of adoption, patterns of ratification, and other factors that may shed light on the legislative intent behind these amendments that have come to be grouped together and identified as "Blaine Amendments."

This study ultimately concludes first, that most, if not all, state constitutional clauses typically identified as "Blaine Amendments" are not such amendments at all as defined in the

Locke ruling; and second, that as a result of the *Locke* decision, the Blaine Amendment controversy must now devolve to the states, and that advocates on both sides of the debate will ultimately need to fight state-by-state challenges because the constitutionality of these amendments will depend largely on the specific circumstances of adoption in each state; that the amendments as a whole can legitimately be neither upheld or overruled as a matter of federal constitutional law.

Significance of the Study

Currently, the state constitutional clauses known as Blaine Amendments exist in at least thirty state constitutions [Appendix A]. As a result, the conclusions of this analysis have nation-wide implications. Because the U.S. Supreme Court identified the Washington Promise Scholarship Program as falling into the "Play in the Joints"[62] between the Establishment and Free Exercise Clauses, and because the Court rejected the argument of anti-Catholic intent lying behind the Article I, Section 11 of the Washington Constitution, this clause, and similar clauses in other state constitutions, will continue to affect whether religious institutions can participate in certain government programs. Therefore, the presence or absence of Blaine language in a particular state also has the potential to impact how state legislatures, courts, and educational policy makers -- and perhaps local governments and school boards -- develop and implement initiatives such as school voucher programs and provide various kinds of services for the poor and disadvantaged, particularly in programs analogous to the federal faith based initiatives. Because these so-called Blaine Amendments operate at the state level, and in *Locke* the Supreme Court has recently allowed Blaine language to pass Constitutional scrutiny, this study is intended

[62] The concept of "play in the joints" originated in *Walz v. Tax Comm'n of City of New York*, 397 U. S. 664, 669 (1970) and recognizes that, "there are some state actions permitted by the Establishment Clause but not required by the Free Exercise Clause." The majority opinion in *Locke* repeatedly asserts the applicability of this principle to this case.

to inform state policy makers in this analysis of both the history of state clauses containing Blaine-like language as well as to state Supreme Court jurisprudence as they seek to design and implement educational improvement and funding programs.

Method of the Study

This study employed standard legal research methodologies to identify relevant Supreme Court cases and to identify state constitutional clauses at issue for this study. Traditional legal research focuses on a particular subject and asks, "what is the law?" While that question will discussed in this dissertation, the law *per se* is not be the focus of discussion, but rather the focus is how the principle of neutrality has emerged and been applied in recent cases, how the Supreme Court addressed the Blaine Amendment issue in *Locke*, and the likely implications of the *Locke* decision for future policy consideration; particularly in terms of state Blaine Amendments. This type of policy analysis "investigates the incidents and cases which led to a particular court decision, a state statute or a school board policy."[63] Likewise, examination of selected state constitutional convention records was undertaken to illustrate the difficulties of determining "original intent" of legislatures at the time of adoption as well as to suggest that the public narrative about Blaine Amendments and any putative anti-Catholic origin is severely over-simplified. The synthesis of this information forms the basis for the conclusions of this study and its implications for both supporters and opponents of Blaine Amendments.

Statement about Sources

The primary source for the definitions of all legal terms use in this study is *Black's Law Dictionary*.[64] State Constitutions were examined using Benjamin Pearly Poore's *The Federal*

[63] Patricia F. First, (1996). "Researching Legal topics from a Policy Studies Perspective," in Schimmel, D. S., ed., *Research that makes a Difference: Complementary methods for examining legal issues in education.* NOLPE Monograph Series #56, 1996. p. 94.

[64] *Black's Law Dictionary,* 8th ed. (Thomson West, 2004)

and State Constitutions, Colonial Charters, and Other Organic Laws of the United States,[65] and William Swindler, ed., *Sources and Documents of United States Constitutions.*[66]

Limitations of the Study

This study is not intended to provide a comprehensive examination of all state constitutions or even of the deliberations around all of the clauses known as "Blaine Amendments." Instead, this study is designed to identify and discuss the historical and legal complications that make Blaine Amendments too complex for blanket generalizations about constitutionality or lack thereof. As a result, further study will be required on a state-by-state basis to elucidate the specific legislative deliberations, social movements, and legal interpretations to determine constitutionality of each Blaine Amendment. Furthermore, this study will discuss how different state supreme courts have already interpreted those clauses with the result that Blaine Amendments do not affect the flow of tax dollars into religious institutions in any consistent fashion across the fifty states. As a result, this study can point legislatures and courts inclined to interpret a Blaine Amendment in a particular fashion to states where divergent interpretations are already operative. These divergent interpretations may also provide "strategic direction" to advocates on both sides of this issue.

Organization of the Study

Chapter II set the legal backdrop for *Locke v. Davey* showing the "trajectory" that brought the Blaine Amendment issue before the Court. Examining *Mitchell v. Helms* and *Zelman v. Simmons-Harris* in which Blaine Amendments were discussed, if only briefly demonstrated the increasing importance and controversy surrounding these state constitutional clauses.

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[65] Benjamin P. Poore, *The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the United States*, 2nd ed. (Burt Franklin, 1972)

[66] William Swindler, ed., *Sources and Documents of United States Constitutions*, 11 vols. (Oceana Publications, 1973-1988)

Chapter III analyzed the case, *Locke v. Davey*, in which Blaine Amendments played a prominent role in the briefs of both plaintiff and respondent because the briefs present the arguments for and against the constitutionality of these amendments. The analysis of the briefs demonstrated that both sides saw this case as a test of the Washington Blaine Amendment specifically, and Blaine Amendments in general. In the context of the debates in brief, the history of the Blaine period and Amendments was presented, as was an analysis of the decision of the U.S. Supreme Court in *Locke* that placed the Washington Blaine Amendment in the context of "Play in the Joints."

Chapter IV presented an analysis of state constitutions from the Nineteenth and early Twentieth centuries. This analysis looks at wording of the clauses, patterns of adoptions, and examines state-level debates about the meaning and possible effects of those clauses during the period of their adoption.

Finally, Chapter V presented the conclusions of this analysis along with policy implications and recommendations for further research.

CHAPTER 2
LITERATURE REVIEW

The Supreme Court ruling in *Locke* defined an interesting pair of precedents. First, this ruling seems to accept the argument that Blaine Amendments are expressions of anti-Catholic bias and are, therefore, unconstitutional. However, whether or not a particular state "Blaine Amendment" will pass Court scrutiny is not yet clearly defined because on the *Locke* ruling the Court found no anti-Catholic history behind Article I, Section 11 of the Washington Constitution the Court and therefore determined that the Washington clause is not a "Blaine Amendment." Therefore, a state clause would appear to qualify as a "Blaine Amendment" only if anti-Catholic intent can be documented.

Second, it is clear from this ruling that many state constitutional clauses affecting the flow of tax dollars to religious programs and institutions will be affected by the declaration that some limitations on such flow will fall into the "play in the joints" between the Establishment and Free Exercise clauses of the United States Constitution. Therefore, state legislators, courts, and educational policy makers will need to understand the implications of Blaine Amendment history in light of the *Locke* decision in order to develop funding programs that will meet the test of constitutionality.

As is true for any historical event or movement, the effort by James G. Blaine to amend the United States Constitution did not occur in a vacuum, but was influenced by numerous causes and currents of the late Nineteenth Century. Many of these issues arose largely in the mid to late 1800s in response to bitter strife between an established Protestant majority and a growing Catholic minority that sought equal access to public funding for Catholic schools.[1]

[1] Kyle Duncan, "Secularism's Laws: State Blaine Amendments and Religious Persecution." 72 *Fordham L Rev* 493 (2003).

Seventeenth and Eighteenth Century colonial charters were often characterized by explicit assertions of a government's responsibility to craft a moral citizenry, as defined by prevailing religious belief. Likewise, established churches received preferential treatment including public funding of churches[2] and making religious affiliation a prerequisite for voting and office-holding.[3] However, in the Revolutionary and Post-Revolutionary periods, as states created constitutions, there was a "marked shift in the way legal documents approached the relationship between church and state.[4]

In the first half of the Nineteenth Century there were many judicial decisions addressing religious beliefs and practices supported by state law. For example, Sunday closing laws were common in most states prior to the Civil War. But by the 1860s, courts began to justify such laws, not on religious grounds, but as valid civil regulations.[5] This mirrored broader trends in attitudes toward church-state relations reflected by the universal abandonment of state established religions. As a result, "by the time the Fourteenth Amendment was adopted, freedom to exercise religion had come to mean that states would not impose religious views on their citizens."[6]

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[2] See e.g. Conn. Const. of 1818, Art. VII, § 1 and Md. Const. of 1776, Art. I, § 33. Maryland had been founded as a Catholic colony but come to be dominated by the Church of England when the lords Baltimore converted to Protestantism. Samuel Morison, et al., *The Growth of the American Republic*, Vol. 1, 7th ed. (Oxford University Press, 1980) p. 107.

[3] See e.g. Mass. Const. of 1780, Part II, chapter II, § 1, art. II.

[4] Laura Scalia, "Constituting a People: The Role of State Constitutions in Citizen Character Formation." (Political Theory Workshop presented at the University of Chicago, 1998), http://ptw.uchicago.edu//scalia98.pdf

[5] See *Lindenmuller v. People*, 33 Barb. 548, (1861); see also Kurt T. Lash, "The Second Adoption of the Establishment Clause: The Rise of the Nonestablishment Principle," 27 *Ariz. St. L.J.* 1085 (1995) (reviewing the development of ideas and judicial decisions addressing state-established religions prior to the adoption of the Fourteenth Amendment), cited in Robert R. Baugh, *Applying the Bill of Rights to the States: A Response to William P. Gray, Jr.* (University of Alabama Press , 1982), http://www.law.ua.edu/lawreview/baugh.htm.

[6] Baugh *supra.*

The change in attitude toward religion manifests itself in two major trends: first, a decline in preferential language giving privileges to a particular denomination or belief, and second, the increasing rejection of compulsory support for a particular religion. For example, while "practically every foundational document … illustrates [a] religious communal component,"[7] by 1800 clauses stipulating that no person can be compelled to support a church or clergyman are found in the constitutions of eleven of sixteen states [Table 2-1].[8] By 1850, this number increases to twenty-five of twenty-eight state constitutions [Table 2-2].

Other constitutional language also appears that further asserts an increasing position of governmental neutrality. In contrast to statements that "every sect or denomination of people ought to observe the Sabbath, or the Lord's day, and keep up, and support, some sort of religious worship, which to them shall seem most agreeable to the revealed will of God,"[9] statements that government shall show no preference to any religious sect appear first in North Carolina,[10] Pennsylvania[11] and Delaware[12] in 1776, Kentucky[13] in 1792, and Tennessee[14] in 1796. By 1860, seventeen state constitutions contained this clause [see Table 2-3].

[7] Scalia *supra* p. 5.

[8] See Appendix A for the fifty states and dates of statehood.

[9] Vt. Const. of 1777. Chapter 1, Art. 3.

[10] N.C. Const. of 1776, art. II, § 34.

[11] Pa. Const. of 1776, Preamble.

[12] De. Const. of 1776, art. 29.

[13] Ky. Const. of 1792, art. XII, § 3.

[14] Tn. Const. of 1796, art. IX, § 3.

While Americans were undoubtedly just as religious after declared independence as they were before it,[15] the shift in constitutional language reflects a transition from states conceiving themselves as religious societies to secular communities "committed to traditional liberal aims."[16] In fact, "Every state constitution written during the late eighteenth century (sic) granted its members the right to free conscience, and several prohibited their (sic) government from compelling religious worship or church support."[17]

The increasing separation of church and state also impacted funding for education. While universal public education was still a long way from having a role in public policy, prior to 1800 seven state constitutions included language identifying education as a fundamental state concern.[18] The lack of language defining this "concern" only served to affirm the status quo; but the appearance of this language presaged the increasingly important role government would come to play in public education.

During the early Nineteenth Century, many states re-evaluated and substantially revised constitutional language. Once again, "many of the changes during this period symbolize a new way of understanding popular government."[19] In particular, the popularity of Jacksonian egalitarianism and the Great Awakening, a religious revival that swept across America, changed America's thinking about church and state. The Great Awakening was characterized by an

[15] Barry Shain, *The Myth of American Individualism: The Protestant Origins of American Political Thought*, (Princeton University Press, 1994); cited in Scalia *supra* at p. 10.

[16] *Id.*

[17] *Id.* at 13

[18] *Id.* at 17. See e.g. N.H. Const. of 1793, art. II, § 83; Penn. Const. of 1790, art. VII, § 1-2.

[19] *Id.* at 27.

emphasis on appealing to the emotions and an affective, direct relationship between humanity and God[20] that could not be compelled, but only encouraged through repentance and conversion.

One manifestation of this changed understanding was increasing suspicion of the ability of government to compel proper behavior.[21] Furthermore, this revival was dominated by new denominational movements such as the Methodists and Baptists, with the result that most constitutions moved away from provisions directing support toward particular Christian beliefs.[22] As a result, in 1822 Virginia added a constitutional clause prohibiting the legislature from providing funds or passing legislation that would support one denomination over another**.** But no state "fully gave up its Christian character entirely,"[23] and that "character" was predominantly Protestant.

During 1800s, immigration from Western Europe resulted in a dramatic increase in the number of Catholics in America. In 1850 Catholics made up only 5 percent of the total U.S. population. By 1906, they made up 17 percent of the total population (14 million out of 82 million people).[24] As a result of this growth, Catholicism came to constitute the single largest religious denomination in the country.[25] Increasing Catholic numbers also meant increasing conflicts between Catholics and Protestants, among other things over the role of religion in schools. In particular, Catholics objected to Protestant devotional practices such as readings from the King James Bible and hymn singing and they began to insist that public funds should be

[20] Russell Kirk, *The Roots of the American Order,* (Open Court, 1974), p. 344.

[21] See e.g. Flaherty, *supra*.

[22] Morison, et al., *supra*, p. 512.

[23] Scalia *supra* at 14.

[24] Julie Byrne, "Roman Catholics and Immigration in Nineteenth-Century America*."* National Humanities Center, November, 2000. [online]. http://www.nhc.rtp.nc.us:8080/tserve/nineteen/nkeyinfo/nromcath.htm.

[25] Lash, supra., note 29, at 1123, 27 Ariz. St. L.J. 1085 (1995) citing Tyler Anbinder, *Nativism and Slavery,* (Oxford University Press, 1992), p. 6-7.

made available to support Catholic devotional practices in Catholic private schools. Of course, Catholics were not the only religious minority; Jews were also increasing in numbers and objected to Protestant religious practices in public schools as did Atheists and Freethinkers.[26, 27]

But it was not just non-Christians who objected to religious practices in schools; even some Protestant leaders urged that "any and all religion be taken out of public education."[28] As one advocate of this position put it,

> Cannot the church send out its ministers? Or are they too busy, day after day, in their studies, preparing to dole out dogmatic theology Sunday after Sunday, to the tired ears of their wearied congregations? Cannot they send out their missionaries . . . ? Must we say that the church has grown idle and lazy, and can only hobble on its crutches, and therefore that our school directors must set themselves up as teachers of religious truth?[29]

One increasingly popular response to this conflict was a growing recognition that "states, as well as the national government, should maintain a 'hands off' approach to religion."[30] For example, in *Board of Education v. Minor*,[31] the Supreme Court of Ohio addressed complaints by Catholics over religious instruction and Bible reading in Cincinnati's public schools. Responding to complaints, in 1869 the Cincinnati school board prohibited religious instruction in the city's public schools. The no religious instruction policy was then challenged in the courts and the trial

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[26] Ward McAfee, "The Historical Context of the Failed Federal Blaine Amendment of 1876," 2 *First Amend. L. Rev.* 1 (2003). p. 2-3. Available at http://falr.unc.edu/volume2-1/McAfee.pdf.

[27] It is also interesting to note that, perhaps as a response to growing atheism and secularism, the new Texas Constitution of 1876 changed Art. 1, Section 4 to state, "No religious test shall ever be required as a qualification to any office, or public trust, in this State; nor shall any one be excluded from holding office on account of his religious sentiments, provided they acknowledge the existence of a Supreme Being." Earlier state constitutions had not included this last clause.

[28] *Id.*

[29] *Id*. at 3; citing John D. Minor, *The Bible in the Public Schools*, (1870). Robert G. McCloskey, ed., (Da Capo Press 1969).

[30] Baugh, *supra*.

[31] *Board of Education of Cincinnati v. Minor*, 23 Ohio St. 211 (1872).

court supported the religious instruction and ordered its restoration. However, the Supreme Court of Ohio disagreed asserting that the Ohio Constitution and principles that were "as old as Madison"[32] and required the schools to end its religious practices. The court further observed,

> *Legal* Christianity is a solecism, a contradiction of terms. When Christianity asks the aid of government beyond mere *impartial protection*, it denies itself. Its laws are divine, and not human. Its essential interests lie beyond the reach and range of human governments. United with government, religion never rises above the merest superstition; united with religion, government never rises above the merest despotism; and all history shows us that the more widely and completely they are separated, the better it is for both.[33]

The Court further wrote, "there is no question before of the wisdom or unwisdom of having "the Bible in the schools," or of withdrawing it therefrom" making it clear that, as early as 1869, the questions surrounding Bible reading in schools were already widely recognized.[34]

As a result of this type of religious foment, originating well before the 1870s and the federal Blaine Amendment, both the states and the federal government found itself grappling with religious controversy on a variety of issues and solutions were desperately being sought. One solution, which had both Protestant and Catholic advocates, was a separation of government and religion.[35] "This separation was based upon protecting each group's ability to hold its own beliefs without interference from the government. Thus, religious liberty was promoted by the disestablishment of religion from government."[36] As Kurt Lash observes:

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[32] *Minor*, 23 Ohio St. at 253; see e.g. Rob Boston, "The Blaine Game," *Church & State* (Americans United for Separation of Church and State: September 2002) [online]. http://www.au.org/churchstate/cs9021.htm.

[33] *Id.* at 248 (emphasis in original).

[34] *Id*. See also J. F. McClear, *Church and State in the Modern Age: A Documentary History*, (Oxford University Press, 1995), p. 261 (*Minor* reflects the "growing attack on the wide-spread practice of Scripture readings in schools . . .").

[35] Lash, *supra* note 29, at 1130.

[36] Baugh, *supra.*

> In this way, the Establishment Clause came to represent a personal freedom. Over time, popular interpretation of the Clause focused not on the principle of federalism, but on the principle of 'nonestablishment.' By Reconstruction, the common interpretation of the Establishment Clause and its "counterparts" in the states was that no government had any legitimate power over religion as religion: the state could neither establish a preferred religion, nor could it visit 'disadvantages or penalties' upon disfavored religious beliefs. Citizens by right were immune from such religious-based persecutions.[37]

Likewise, in the early 1870s, Reverend Samuel T. Spear, a liberal Protestant minister argued that Protestant religious practices needed to be taken out of public education. His concern was that "the precedent of Protestant practices in public education was being used by Roman Catholics to justify the creation of their own Catholic public schools, which already existed in a few urban school districts, where Catholic voters constituted a majority."[38] "Spear lamented that most of his fellow Protestants did not yet appreciate what their own educational/religious preferences might later encourage by way of precedent."[39]

It should also be noted that the increasing advocacy for the principle of separation in the common schools was articulated by many as a religious imperative. As Felix Frankfurter noted in *McCollum v. Board of Education*,

> Horace Mann was a devout Christian, and the deep religious feeling of James Madison is stamped upon the Remonstrance. The secular public school did not imply indifference to the basic role of religion in the life of the people, nor rejection of religious education as a means of fostering it. The claims of religion were not minimized by refusing to make the public schools agencies for their assertion. The non-sectarian or secular public school was the means of reconciling freedom in general with religious freedom.[40]

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[37] Lash, *supra* note 29, at 1135.

[38] McAfee *supra* at 3.

[39] *Id.*

[40] *McCollum v. Board of Education*, 333 U.S. 203 at 216 (1948).

Thus, by the 1850s we see three issues critical for this study coming together in public debate. First, a general climate supporting the separation of church and state was emerging.[41] Second, Americans were well aware that religious practices in the schools were a source of social and political conflict. And third, while there may have been a tendency to think of minority religions, Catholicism in particular, as "sectarian," Americans also recognized that Protestant denominations were also Christian sects; and therefore that constitutional provisions barring the flow of state funds into "sectarian" institutions would affect Protestant practices in public schools and not just Catholic practices. In this light it seems hard to maintain that the later Blaine clauses were intended to be fundamentally, if not entirely, anti-Catholic when it was already understood that impeding the flow of public funds into "sectarian schools" would likely affect all schools, not just Catholic schools. Thomas Jefferson's "wall of separation between church and state"[42] was finally becoming a reality.

President Ulysses S. Grant provided critical support for this move toward the elimination of Protestant practices in public schools in his famous speech before a convention of the Society of the Army of Tennessee given in September of 1875. Grant proposed that the United States should,

> Encourage free schools, and resolve that not one dollar, appropriated for their support, shall be appropriated to the support of any sectarian schools. Resolve that neither the state nor the nation, nor both combined, shall support institutions of learning other than those sufficient to afford to every child growing up in the land the opportunity of a good

[41] This will be discussed more extensively in Chapter IV in the context of "No Compulsory Support" clauses.

[42] Thomas Jefferson, *Wall of Separation Letter to the Danbury Baptist Association, 1802*. Library of Congress, Available at http://www.loc.gov/loc/lcib/9806/danpost.html. The critical paragraph of this letter reads, "Believing with you that religion is a matter which lies solely between man & his god, that he owes account to none other for his faith or his worship, that the legitimate powers of government reach actions only, and not opinions, I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should make no law respecting an establishment of religion, or prohibiting the free exercise thereof, thus building a wall of separation between church and state. Adhering to this expression of the supreme will of the nation in behalf of the rights of conscience, I shall see with sincere satisfaction the progress of those sentiments which tend to restore to man all his natural rights, convinced he has no natural right in opposition to his social duties."

> common school education, unmixed with sectarian, pagan or atheistical dogmas. Leave the matter of religion to the family altar, the church and the private school, supported entirely by private contributions. Keep the church and state forever separate.[43]

Continuing this call, three months later, in a December 1875 message to Congress, Grant again suggested a constitutional amendment" . . . making it the duty of each of the several states to establish and forever maintain free public schools adequate to the education of all children…[and] forbidding the teaching in said schools of religious, atheistic or pagan tenets."[44] In this speech as well as in the former, Grant also called for a provision barring tax aid to religious schools. It is noteworthy, however, that his call to remove religious teaching and observance from public schools and to leave religious instruction to the family is, arguably, a call for religious neutrality. Taking up Grant's proposal, former speaker of the House and presidential aspirant, Republican James G. Blaine quickly introduced a proposed constitutional amendment to eliminate public support for religious education. Blaine's proposed amendment stated:

> 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 land so devoted be divided between religious sects or denominations.[45]

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[43] Rob Boston, "The Blaine Game: Supporters Of Government Aid To Religious Schools Are Trying To Eliminate State Constitutional Provisions That Stand In Their Way." (Americans United for Separation of Church and State. September, 2002) [online]. http://www.au.org/site/News2?abbr=cs_&page=NewsArticle&id=5547&security=1001&news_iv_ctrl=1079.

[44] *Id.*

[45] H.R.J. Res. 1, 44th Cong., 1st Sess., 4 Cong. Rec. 205 (1875), *quoted in* Frank J. Conklin & James M. Vache, "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) at 431-32.

According to Ward McAfee, the fundamental problem with Blaine's proposal was that it was written like a typical constitutional amendment and was too open to interpretation.[46] For Blaine's contemporaries, the key problem with the apparent flexibility of interpretation was that the original language was neutral and would fail to protect established, Protestant devotional practices in the public schools. Therefore, both Republicans and Democrats tried to make the proposed amendment more to their liking; but they sought radically different objectives with their proposed edits.

As a result, Blaine's proposed amendment exposed and activated numerous major cleavages in Nineteenth Century American politics and society. Catholic versus Protestant tensions, Federal versus State issues, and nativist versus immigrant hostility all overlapped and reinforced each other along with dozens of other currents including North versus South issues the aftermath of the Civil War and the failure of Reconstruction, "the darkest page in the saga of American history."[47] But the end of the Civil War and Reconstruction also engendered a "national state possessing vastly expanded authority and a new set of purposes . . . Originating in wartime exigencies, the activist state (paralleled at the local level both North and South) came to embody the reforming impulse deeply rooted in postwar politics."[48] Part of that reforming impulse was public education.

The ongoing debate regarding education funding split the two political parties. Republicans called for a universal system of public schools with a federal mandate on the states.

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[46] The Pew Forum on Religion & Public Life, "Separation of Church and States: An Examination of State Constitutional Limits on Government Funding for Religious Institutions," Session 1. (2003) [online]. http://pewforum.org/events/index.php?EventID=45.

[47] This was the interpretation of the Dunning School, identified with William Dunning, *Reconstruction: Political and Economic, 1865-1877*, (New York, 1907) [online]. http://www.questia.com/PM.qst?a=o&d=16224153; See e.g. Walter Fleming, *The Sequel of Appomattox*, (Yale Univ. Press, 1919), Claude Bowers, *The Tragic Era*, (Simon Publications, 1929), E. Merton Coulter, *The South During Reconstruction, 1865-1877*, (LSU Press, 1947).

[48] Eric Foner, *Reconstruction: America's Unfinished Revolution 1863-1877*, (Harper and Row, 1988), p. xxvi.

Democrats resisted, asserting the concept of states' rights. "Part of the drive for Blaine amendments came from Republicans, who wanted to ensure that there would be universal, free and non-sectarian public education," according to Green. "To try to tar the Blaine amendment solely as anti-Catholic is short-sighted. To be sure, there was some of that in the debate, but that was not the only factor."[49]

To what extent was it recognized that barring state funding for "sectarian education" had the potential to change the Protestant nature of the public schools? A close examination of the Massachusetts debates over school funding makes it clear that this possibility was widely understood.

Massachusetts is was the first state to make public education a government priority. Beginning with the General School Act of 11 November 1647, more popularly known as the "Ye Olde Deluder Satan Act,"[50] Massachusetts required towns with fifty or more families to establish a grammar school and towns with one hundred families or more, to establish a grammar school that will prepare it's students for the university. The purpose of this act was fundamentally religious: to equip all people to be able to read the Bible. By 1780, the Massachusetts constitution provided for funding education of the public.[51] However, by the 1850s, Irish Catholic immigration was raising questions about the old system including whether or not state

[49] Steven K. Green, "The Blaine Amendment Reconsidered," 36 *Am. J. Legal Hist.* 38 (1992).

[50] Records of the General Court of Massachusetts Bay, 11 November l647. Available online at http://en.wikipedia.org/wiki/Ye_olde_deluder_satan_act.

[51] Ronald M. Peters, Jr., *The Massachusetts Constitution of 1780: A Social Compact*. (University of Massachusetts Press, 1978), p 193.

funds could support Catholic parochial schools and whether readings from the King James version of the Bible, objected to by Catholics, would be continued.[52]

In 1853 Massachusetts convened a Constitutional Convention. A number of issues were debated in this convention; however, it must be noted that twenty years before the Blaine attempt to amend the federal Constitution, two of the critical issues debated at this convention included the definition of sectarian schools and whether or not state funding should support sectarian schools.[53]

The Massachusetts delegates who supported the practice of funding sectarian schools argued that a provision forbidding such funding would undermine the purpose of education to inculcate moral and civic values. A Mr. Keyes went so far as to wonder if the effort to bar funding was "aimed at Catholics or not," but went on to argue that the rejection of state funding for sectarian schools was equal to closing down all schools because there were no schools that did not have one denominational connection or another.[54] A Mr. Upham went even farther, arguing that to prevent support for sectarian schools "is to prevent the reading of the Protestant Bible and the saying of prayers."[55]

At the same time, a relatively new and interesting concept was introduced into the debate. A supporter of the proposed provision, Mr. Blagden of Boston, argued that the resolution was designed to benefit the public common schools, "where the children of all religious sects can meet together and where the modified influence which arises from a common education can

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[52] Elwood Cubberly, *A Brief History of Education: A History of the Practice and Progress and Organization of Education*, (Cambridge, Mass: Houghton-Mifflin, 1922), p. 382-384.

[53] Oscar Handlin, and Mary Handlin, eds. *The Popular Sources of Political Authority. Documents on the Massachusetts Constitution of 1780, Vol. II*, (Belknap Press of Harvard University Press, 1966), pp. 544-545; cited in Scalia, *supra*, p. 39.

[54] *Id.*

[55] *Id.*

reach all children …"[56] Likewise, another supporter argued that public schools are intended to bring students "together on common ground, as children of the state, to be educated together in mutual respect, forbearance and good will."[57]

Thus there was widespread recognition that the pervasive Protestantism of the common schools made them arguably "sectarian," despite the efforts by some to narrowly define "sectarian" to mean only those schools that accepted applicants based on common beliefs, a characteristic of Catholic schools.[58] Over time, the broader definition of "sectarian" would prevail, serving as a rallying point for those who opposed the provision barring state funding of sectarian schools.

So Grant's suggestion, subsequently adopted by Blaine, while undoubtedly attractive to anti-Catholic elements, was also an attractive proposal to a wide variety of reformers for other political and policy reasons; and it drew on a two decade tradition of debates regarding public school funding and a recognition that "sectarian" did not mean only "Catholic" and that proposals such as Grant's would affect Protestant practices in schools and not merely prevent Catholic practices.

Blaine's original proposal stated: "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

[56] *Id.* p. 40.

[57] *Id.*

[58] Scalia *supra*, p. 38.

shall any money so raised or land so devoted be divided between religious sects or denominations."[59]

Grant's neutral formulation is evident in the language of the original Blaine proposal, and the proposed amendment passed the House, with an addendum specifying that it did not "vest, enlarge, or diminish legislative power in the Congress,"[60] In the Senate, however, some senators expressed significant concerns about the language and the scope of the amendment.

For example, Senator Frelinghuysen of New Jersey supported the amendment for its ability to do away with religious qualification tests that still existed in some states arguing, "Thus the article . . . prohibits the States, for the first time, from the establishment of religion, from prohibiting its free exercise, and from making any religious test a qualification to office."[61] Later in the debate, Senator Kernan of New York essentially replied that states would eventually "see the light" without the coercion of the amendment,

> That provision [the proposed amendment] has my most hearty commendation; but for all that it is not necessary to put it in the Federal Constitution. That matter was discussed in the convention that made the Constitution, and it was not thought wise to put in any such provision, but to leave it to the States. . . . There is a provision in the constitution [of New Hampshire] that no one can be elected governor unless he is of the Protestant religion, and so as to members of the Legislature of the State. But I am willing to trust that to the people of that State, believing that very soon in this age of ours and in this country of ours they will adopt the liberal provisions which are found in the constitutions of the other States on the subject of the sacred rights of conscience.[62]

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[59] H.R.J. Res. 1, 44th Cong., 1st Sess., 4 Cong. Rec. 205 (1875), *cited in* Conklin & Vache, *supra*, 431-32.

[60] See 4 Cong. Rec. 5189-92 (1876); See e.g. Jay S. Bybee and David W. Newton, "Of Orphans and Vouchers: Nevada's "Little Blaine Amendment" and the Future of Religious Participation in Public Programs," 2 *Nev. L.J.* 551, 574 (2002) note 9, at 557 & n.32; Green, *supra* note 34, at 58-59.

[61] 4 Cong. Rec. 5261; cited in "Governor Fob James' 1998 Petition to the U.S. Supreme Court Rejecting The Court's Authority In Church-State Cases," (1997) [online] http://www.fobjames.com/governor_fob_james_supreme_court_petition.htm; hereafter known as "*James*."

[62] 4 Cong. Rec. 5581; cited in *James.*

Senator Bogy of Missouri, an opponent of the amendment, raised the issues of Federalism and the rights and powers of the states arguing that,

> [A]mong the most sacred of these rights, lying at the *supra* very foundation of all liberty, was that of freedom of conscience and the right to worship God according to the dictates of each one's individual conviction. That was left to the States, and was not placed in the hands or under the control of the Federal Government. The attempt here to exercise this power takes from the States that right and gives it to the Federal Government . . . Mr. President, the safety of this Government is in the denial of all such powers to the Federal Government. Keep it where the fathers placed it, in the States, and maintain it there.[63]

But Senator Morton of Indiana, a supporter of the amendment, suggested that the states may not necessarily be trusted to do the right thing asserting,

> What guarantee have we in the States? A majority of the people of a State can change the Constitution of that State and according to the doctrines we have heard here tonight, doctrines I think that will startle this nation, we are told that the States must be left free, if they desire to do so, to establish a church, to establish denominational schools, and maintain them at public expense. . . . What is the reason the States cannot do it? He will say that in most of the constitutions there are provisions preventing them; but my friend knows very well that the majority who made those constitutions can unmake them.[64]

Out of these debates the Senate subsequently proposed a stronger version of the Blaine Amendment that would have prohibited any "public property," "public revenue" or "loan of credit" from being "appropriated to or made or used for the support of any school or other institution under the control of any religious or anti-religious sect, organization, or denomination" or where the "creed or tenets" of such groups were taught.[65]

The final version of the amendment read, *supra*

> 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

[63] 4 Cong. Rec. 5591, cited in *James.*

[64] 4 Cong. Rec. 5591-5592, cited in *James.*

[65] See 4 Cong. Rec. 5453 (1876); Bybee and Newton, *supra* note 9, at 558 & n.37 (discussing the text of the Senate proposal); see John C. Jeffries, Jr. & James E. Ryan, "A Political History of the Establishment Clause," 100 *Mich. L. Rev*. 279, 337-39 (2001), note 15, at 302 (stating that "the [Senate's] final version laboriously attempted to close every possible loophole through which public money might flow to religious schools").

> 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 particular creeds or tenets shall be taught. And no particular creeds 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 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.[66]

Most notably, the Senate also altered the last line stating that the amendment "shall not be construed to prohibit the reading of the Bible in any school or institution." This last provision was added at the behest of the National Reform Association, a Christian Coalition-style organization active during the post-Civil War period. It probably sealed the measure's defeat.[67] The Senate version failed to garner the required two-thirds majority by a mere four votes - twenty-eight to sixteen (with twenty-seven members not present, including Blaine himself) - and failed.[68]

The language of Blaine's original proposed amendment is, to the modern reader, religiously neutral and the amended language is patently not neutral. However, opponents of the Blaine Amendments argue that the use of the term "sectarian" in both versions was a code word for "anti-Catholic." For example, in *Mitchell v. Helms* Justice Thomas' plurality opinion asserts, "It was an open secret that 'sectarian' was code for 'Catholic.'"[69] At the same time, other

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[66] See 4 Cong. Rec. 5453 (1876).

[67] Bouton, *op. cit.*

[68] 4 Cong. Rec. 5595 (1876).

[69] *Mitchell v. Helms*, 530 U.S. 793, 828 (2000) (plurality opinion). See e.g. Green, s*upra* at 41-43 (1992); *Zelman v. Simmons-Harris*, 536 U.S. 639, 721 (2002) (Breyer, J., dissenting) (noting the purpose of federal and state Blaine amendment movements was "to make certain that government would not help pay for 'sectarian' (i.e. Catholic) schooling for children"); Douglas Laycock, "The Underlying Unity of Separation and Neutrality," 46 *Emory L. J.* 43, 50 (1997) ("[N]ineteenth century opposition to funding religious schools drew heavily on anti-Catholicism"); Ira

scholars argue that the historical situation was not that simple. For example, Douglas Laycock, a Blaine opponent, admits that in the Nineteenth Century Blaine debates,"… there were legitimate arguments to be made on both sides."[70] Thus, at least for some Nineteenth Century public policy leaders, the desire to prevent the flow of tax dollars into religious institutions was not necessarily fundamentally driven by anti-Catholic intent.

While anti-Catholic elements undoubtedly supported the amendment to ensure no state funds would go to Catholic schools, Blaine himself denied any anti-Catholic motivations and explained in an open letter that his proposal was merely designed to suppress religious conflict by definitively settling the school funding controversy.[71] In fact, Blaine's own mother was Catholic and whose daughters went to Catholic boarding schools.[72] It should also be pointed out that "the Catholic World praised Grant's proposed amendment for seeking "to take the religious issue out of politics."[73]

Furthermore, while anti-Catholic sentiment in the 1830s through the 1850s was a potent force almost exclusively articulated by nativist Protestants, the 1860s and 1870s saw the growth of a new religious ideology in the emergence of "secularists" also known then as "Liberals." This

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C. Lupu, "The Increasingly Anachronistic Case Against School Vouchers," 13 *Notre Dame J. L. Ethics & Pub. Policy* 375, 386 (1999) ("From the advent of publicly supported, compulsory education until very recently, aid to sectarian schools primarily meant aid to Catholic schools.").

[70] Laycock, *supra* at 50. See also Charles Glenn, Jr. *The Myth of the Common School* (University of Massachusetts Press, 1988), p. 253 (mentioning the nineteenth century recognition that Blaine's amendment would require the States to set up public schools devoid of religious practices).

[71] Green *supra*, note 34, at 49-50, 54 & n.103.

[72] Duncan, *supra*.

[73] People for the American Way, "The Blaine Diversion: The Voucher Debate's Red Herring," [online]. http://www.pfaw.org/pfaw/general/default.aspx?oid=8024.

amorphous group united a wide variety of liberal protestant, atheists, theists, and spiritualists in a common resentment and mistrust of Christianity's influence on government.[74]

The secularists are best exemplified by the National Liberal League founded by Francis Ellingwood Abbot for the purpose of supporting "the absolute separation of church and state" toward which he advocated a wide variety of secularizing counter-proposals.[75] One of his motivations was an unsuccessful effort by the Protestant National Reform Association to pass a "Christian Amendment" to the U.S. Constitution.[76] Abbot also distilled Liberal philosophy into the 1872 publication, *The Demands of Liberalism*, which accurately predicted many of the most difficult church-state issues that the Supreme Court would face in the Twentieth Century, including church tax exemptions, chaplains in the legislature, Sunday closing laws, and Bible reading in public schools.[77] Significantly, Abbot also insisted that both the United States Constitution as well as state constitutions should assert that, "all public appropriations for sectarian educational and charitable institutions shall cease;" that "no privilege or advantage shall be conceded to Christianity or any other special religion" and that "our entire political system shall be founded and administered on a purely secular basis."[78] Secularist support for blocking the use of tax funds for all religious purposes, Protestant and Catholic alike, as well as Abbot's use of "sectarian" in its widest sense of "religious" and not merely as anti-Catholic illustrates the diversity of opinion and advocacy and mitigates against simplistic assumptions that anti-Catholicism as the only motive for the federal Blaine Amendment.

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[74] Philip Hamburger, *Separation of Church and State*, (Harvard University Press, 2002). p. 288-90.

[75] *Id*. at 290-93.

[76] Steven Keith Green, *The National Reform Association and the Religious Amendments to the Constitution, 1864-1876*, (University of North Carolina at Chapel Hill, 1987) p. 1-2.

[77] See *id.* at 294-95 n.21.

[78] *Id.*

Despite the failure of the Blaine Amendment, the issues meant to be addressed by the failed amendment did not, however, go away, and quickly returned when western territories sought admission to the Union as states requiring both houses of Congress to approve or disapprove the new constitutions. While the two parties had not been able to agree on the federal Blaine amendment, they did agree to require that states admitted to the union after 1876 were to put some provision in its constitution stating that it would maintain a public school system "free from sectarian control." For example, Congress required Blaine language in the enabling acts for North Dakota, Montana, South Dakota, and Washington;[79] Idaho;[80] and Arizona and New Mexico.[81] Specifically, the 1889 Enabling Act for North Dakota, South Dakota, Montana and Washington stipulated that those states' constitutional conventions "provide, by ordinances irrevocable without the consent of the United States and the people of said States . . . for the establishment and maintenance of systems of public schools, which shall be open to all the children of said States, and free from sectarian control."[82] The same requirement was contained in the Enabling Acts authorizing the statehood of Utah,[83] Oklahoma,[84] New Mexico,[85] and Arizona.[86] Likewise, Wyoming never had an enabling act prior to admission but the Act of Admission itself asserted that "The schools, colleges, and universities provided for in this act

[79] Act of Feb. 22, 1889, 25 Stat. 676, ch. 180 (1889).

[80] Act of July 3, 1890, 26 Stat. 215 Sec. 8, ch. 656 (1890).

[81] Act of June 20, 1910, 36 Stat. 557 § 26 (1910).

[82] Enabling Act, 25 Stat. 676, February 22, 1889, as Amended. See *McCollum v. Bd. of Educ*., 333 U.S. 203, 220 n.9 (1948) (Frankfurter, J., concurring).

[83] Act of July 16, 1894, ch. 138, 28 Statutes at Large 107.

[84] Act of June 16, 1906, 34 Stat. at L. 267, chap. 3335.

[85] Act of June 20, 1910, 36 Stat. at L. 557, chap. 310.

[86] June 20, 1910, c. 310, 36 US Stat. 557, 568—579.

shall forever remain under exclusive control of said state, and no part of the proceeds arising from the sale or disposal of any lands herein granted for educational purposes shall be used for the support of any sectarian or denominational school, college, or university"[87] and the state incorporated this prohibition into its initial Constitution.[88]

Advocates for the elimination of Blaine Amendments often point out that Congress passed these enabling acts for new states requiring that they include language almost identical to the failed federal Blaine Amendment.[89] In fact, the language actually utilized in those state constitutions is consistently closer to the original neutral language.[90]

Thus, it is apparent that there were many purposes behind these conflicting versions of the Blaine Amendment. Likewise, it seems clear that while many Nineteenth Century supporters of the Blaine Amendment were undoubtedly motivated by anti-Catholic attitudes, others could easily have been convinced by the more neutral policy approach advocated by the President of the United States, and still others were undoubtedly motivated by the growing support for entirely separating church and state. This is important because it raises questions about the extent to which anti-Catholic attitudes influenced the eventual fate of the Blaine Amendments at the federal and state levels.

Despite controversial origins, these state constitutional clauses have largely languished in obscurity until recently when they have appeared before the U.S. Supreme Court on three

[87] Act of July 10, 1890, Stat. at L. 222, chap. 664.

[88] Wyo. Const. of 1889, Ordinances, 5.

[89] John C. Jeffries, Jr. & James E. Ryan, "A Political History of the Establishment Clause," 100 *Mich. L. Rev.* 279 (2001), n. 1, at 305.

[90] This will be detailed in Chapter 4.

separate occasions in four years;[91] in *Mitchell v. Helms,*[92] *Zelman v. Simmons-Harris,*[93] and *Locke v. Davey*.[94] In the first two of these cases different Justices raised questions about the relevant state Blaine Amendments, but the Blaine issues were largely tangential to the case and were thus not properly before the Court. In *Locke*, however, the Washington Blaine Amendment appeared to be at the heart of the case and therefore played a prominent of both sides in the dispute; and despite previously expressed judicial hostility, survived the challenge – a surprising ruling with profound implications for state legislatures, courts and educational policy makers..

That the so-called Blaine amendments are suddenly before the Supreme Court is no accident and reflects the combination of increasing legal challenges to long-established precedent as Supreme Court appointments have taken the Court in a much more "conservative" direction, plus a systematic reinterpretation of church-state relations reflected in a lowering of the Constitutional barriers affecting the flow of tax dollars into religious institutions, as well as a systematic attempt to place the Blaine Amendments before the Supreme Court in the hope that they would be ruled unconstitutional, opening the doors for dramatically expanded flow of state tax dollars into religious institutions.[95] Likewise, elements that favor an increasing role for the "Judeo-Christian tradition" in public life continually agitate for lowering the wall of federal and

[91] Blaine Amendments have been before the Court previously, but typically were either incidental to the case or were not at issue due to previously more restrictive federal limits on the flow of tax dollars into religious institutions. See e.g. *Abington v. Shempp*, 374 U.S. 203 (1963), fn 22.

[92] *Op. cit.*

[93] *Op. cit.*

[94] *Op. cit.*

[95] See e.g. Brandi Richardson, "Eradicating Blaine's Legacy of Hate: Removing the Barrier to State Funding of Religious Education," 52 *Cath. U.L. Rev.* 1041 (2003) ("The language of these amendments varies throughout the United States, but their primary function is to block state funding of religious education.").

state separation.[96] *Mitchell* and *Zelman* are discussed to illustrate the changing nature of Court jurisprudence as it has moved away from the *Lemon* test and religious separatism opening the doors to new legal challenges that implicate the Blaine Amendments.

Mitchell v. Helms

In *Mitchell*, Blaine Amendments appeared as marginal *obiter dictum*. At the same time, it is clear that at least some members of the Court have accepted the arguments of Blaine opponents that these clauses are unconstitutional exercises in anti-Catholic animus. Because as many as thirty-three state constitutions contained the Blaine clauses, each of which had the potential to affect decisions made regarding school vouchers and other state educational funding programs, not to mention faith-based initiatives, the implications of a decision finding Blaine Amendments to be unconstitutional could dramatically reshape educational funding throughout the nation.

Mitchell v. Helms was the culmination of fifteen years of litigation arising in Louisiana from a Chapter 2 program of federal aid to state and local agencies which lend materials and equipment to public and private schools.[97] The Louisiana program was guided by two key principles: 1) allocation of resources was based solely on the number of children served in a school and, 2) the materials to be loaned must be secular, neutral, and non-ideological.

[96] See e.g. Francis J. Beckwith, "Gimme That Ol' Time Separation: A Review Essay Philip Hamburger, Separation of Church and State," 8 *Chap. L. Rev.* 309 (2005) (reviewing Hamburger, supra: "[A] government within the United States may pass laws providing public approval and sustenance to moral understandings that are consistent with, congenial to, or have their grounding in certain religious traditions, and which, simultaneously, are thought to advance the public good without offending the First Amendment religion clauses."); see also *McCreary County, Ky v. the American Civil Liberties Union of Kentucky* , 354 F.3d 438, Justice Antonin Scalia (dissenting) ("Besides appealing to the demonstrably false principle that the government cannot favor religion over irreligion … it is entirely clear from our Nation's historical practices that the Establishment Clause permits this disregard of polytheists and believers in unconcerned deities, just as it permits the disregard of devout atheists.")

[97] *Mitchell v. Helms*, 530 U.S. 793, 2000. Available at http://supct.law.cornell.edu/supct/html/98-1648.ZS.html.

Nevertheless, the program was challenged as an Establishment Clause violation in that it provided support to religious, primarily Catholic, institutions.

The district court determined the program to be unconstitutional arguing that the program was a violation of *Lemon* Test because the Catholic schools receiving aid were "pervasively sectarian." In making this determination, the Chief Judge of the District Court relied primarily on *Meek v. Pittenger*[98]and *Wolman v. Walter.*[99]

Shortly after issuing an order permanently excluding pervasively sectarian schools in the parish from receiving any Chapter 2 materials or equipment, he retired. Another judge then reversed that order finding no violation and relying on "several significant changes in the legal landscape over the previous seven years."[100] The court asserted that case law revived the principle of *Board of Education v. Allen*[101] and *Everson v. Board of Education*[102] that "state benefits provided to all citizens without regard to religion are constitutional."[103]

The case was then appealed to the Fifth Circuit where the materials loan program was also found to be unconstitutional. But other Court rulings since 1997 changed precedent.[104]

Regardless of these changes, the Fifth Circuit ruled that while *Agostini* had rejected the rule that, "all government aid that directly assists the educational function of religious schools is

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[98] *Meek v. Pittenger*, 421 U.S. 349 (1975).

[99] *Wolman v. Walter*, 433 U.S. 229 (1977).

[100] *Helms v. Cody, App. to Pet. for Cert. 79A* (1997), WL 35283 (1997).

[101] *Board of Educ. of Central School Dist. No. 1 v. Allen*, 392 U.S. 236 (1968).

[102] *Everson v. Board of Educ. of Ewing*, 330 U.S. 1 (1947).

[103] *Mitchell v. Helms*. 1997, 46 F3d at 1465 (1997).

[104] See e.g. *Agostini v. Felton*, 521 U.S. 203 (1997) (allowing Title I teachers to teach remedial classes in private schools, including religious schools. This overruled *Aguilar v. Felton* (473 U.S. 402 (1985) and partially overruled S*chool Dist. of Grand Rapids v. Ball* (473 U.S. 373) which dealt with a shared time program.

invalid,"[105] nonetheless *Agostini* had not overruled *Meek* and *Wolman* nor had it rejected the distinction between textbooks and other in-kind aid. Thus, the Fifth Circuit ruled that *Meek* and *Wolman* still applied and the Chapter 2 aid was unconstitutional.

Mitchell was then appealed to the U.S. Supreme Court which overruled the two lower courts and held the aid program to be constitutional. The Supreme Court asserted that the *Lemon* test, had been redefined in *Agostini* to ask, 1) does a program result in governmental indoctrination? 2) does it define program recipients by reference to religion? and, 3) does in create excessive entanglement?[106] Furthermore, the Court limited the factors defining excessive entanglement.

As a result of these changes, the Court ruled that the Chapter 2 program, in light of more recent case law "does not result in governmental indoctrination, define its recipients by reference to religion, or create an excessive entanglement. Nor can this carefully constrained program reasonably be viewed as an endorsement of religion."[107] Therefore, the Court declared, "[t]o the extent that *Meek* and *Wolman* conflict with the foregoing analysis, they are overruled."[108]

According to the Court, the key question in *Mitchell*, brought forward from *Agostini*, is 'whether any religious indoctrination that occurs in those schools could reasonably be attributed to governmental action.'[109] In *Mitchell,* therefore, the key principles for constitutionality were

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[105] *Agostini*, 521 U.S. At 237.

[106] 521 U.S. At 237.

[107] *Mitchell supra* at 28-29.

[108] *Id*. at p. 37-38.

[109] See *Agostini* at 266 quoting *Zobrest* 509 U.S. at 10; also *Rosenberger v. University of Virginia*, 515 US 819, at 841-842 (1995); *Witters v. Washington Dept. of Servs. for Blind*, 474 US 481, 488-489 (1986); *Mueller v. Allen*, 463 US 388, 397 (1983); and *Corporation of Presiding Bishop of Church of Jesus Christ of Latter Day Saints v. Amos*, 483 US 327, 337 (1987); "For a law to have forbidden 'effects' under *Lemon*, it must be fair to say that the government itself has advanced religion through its own activities and influence."

'neutrality' and private choice: 'In distinguishing between indoctrination that is attributable to the state and indoctrination that is not, we have consistently turned to the principle of neutrality, upholding aid that is offered to a broad range of groups or persons without regard to their religion.'[110] Furthermore, 'private choices helped ensure neutrality, and neutrality and private choices together eliminated any possible attribution to the government.'[111] Likewise,

> Any aid … that ultimately flows to religious institutions does so only as a result of the genuinely independent and private choices of aid recipients, Washington's program is made available generally without regard to the sectarian-nonsectarian or public-nonpublic nature of the institution benefited and … creates no financial incentive for students to undertake sectarian education. … [T]he fact that aid goes to individuals means that the decision to support religious education is made by the individual, not by the state."[112] "The principles of neutrality and private choice, and their relationship to each other, were prominent not only in *Agostini* … but also in *Zobrest*, *Witters*, and *Mueller*.[113]

Mitchell also rejected the issue of divertability, the concern that tax dollars that flow into religious organizations, even if not directly spent for religious purposes, would free up other funds for those religious purposes, thus providing an indirect aid to religion:

> So long as the governmental aid is not itself 'unsuitable for use in the public schools because of religious content'[114] and eligibility for aid is determined in a constitutionally permissible manner, any use of that aid to indoctrinate cannot be attributed to the government and is this not of constitutional concern.[115] … Quite clearly, then, we did not … think that the use of governmental aid to further religious indoctrination by the government or that such use of aid created any improper incentives.[116] … The issue is not divertability of aid but rather whether the aid itself

[110] *Mitchell, supra* at 9.

[111] *Id*. at 10. cf. *Witters v. Washington Dept. of Servs. for Blind*, 474 US 481 (1986).

[112] *Id*. at 12-13.

[113] *Id*. at 11, citing Agostini *supra*, at 225-226, 228, 230-232.

[114] *Board of Education of Central School District No. 1 v. Allen*, 392 US 236, at 245 (1968).

[115] *Mitchell* at 21.

[116] *Id*. at 22.

> has impermissible content. Where the aid would be suitable for use in a public school, it is also suitable for use in any private school. Similarly, the prohibition against the government providing impermissible content resolves the Establishment Clause concerns that exist, if aid is actually diverted to religious uses."[117]

Likewise, the Court stated, "… [W]e have not accepted the recurrent argument that all aid is forbidden because aid to one aspect of an institution frees it to spend its other resources on religious ends."[118]

Finally, a key component of the plaintiff's argument that the aid program should be found unconstitutional was the clause in the Louisiana Constitution forbidding the use of tax funds in religious institutions. According to the plurality opinion of Justice Thomas, in which Thomas, Rehnquist, Scalia, and Kennedy joined " … hostility to aid to pervasively sectarian schools has a shameful pedigree that we do not hesitate to disavow."[119] Furthermore, Thomas asserted,

> [O]pposition to 'sectarian' schools acquired prominence in the 1870's with Congress's consideration (and near passage) of the Blaine Amendment, which would have amended the Constitution to bar any aid to sectarian institutions. Consideration of the amendment arose at a time of pervasive hostility to the Catholic Church and to Catholics in general, and it was an open secret that 'sectarian' was code for 'Catholic.'[120]

Finally, Thomas asserted "In short, nothing in the Establishment Clause requires the exclusion of pervasively sectarian schools from otherwise permissible aid programs, and other doctrines of this Court bar it. This doctrine, born of bigotry, should be buried now."[121]

The four justices who shared in these Blaine Amendment comments were joined in a concurring opinion by Justices O'Connor and Breyer, thus *Mitchell* became law; but because the Blaine comments themselves are the opinion of a minority of the Court, they have no binding

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[117] *Id*. at 23.
[118] *Id*. at 26; citing *Committee for Public Education v. Regan*, 444 U.S. 646, at 658 (1980) quoting *Hunt v. McNair*, 413 U.S. 734, 743 (1973).

[119] *Id*. at 30; citing *Chicago v. Morales*, 527 U.S. 41, 53-54, n20 (1999).

[120] *Id*. at 30; See also Greene, *supra* p. 23.

[121] *Id*. at 31.

force of law or precedent. However, it is clear that Justice Thomas at least, has been convinced by anti-Blaine advocates that the Blaine Amendments are deeply, if not entirely rooted in anti-Catholic attitudes and therefore are unconstitutional.

With *Mitchell*, then, Blaine Amendment supporters and opponents were placed on notice that at least some members of the Court were apparently open to a Constitutional challenge that would place these clauses on the docket. As observed earlier, this had vast implications for educational funding policy as well as other state funding programs.

Zelman v. Simmons-Harris

In *Zelman v. Simmons-Harris*,[122] still more Justices joined the growing chorus of apparent Blaine opponents; this despite the fact that the Ohio Blaine Amendment issue had been rendered moot in by the Ohio Supreme Court which had ruled that the Ohio Blaine clause did not affect the Pilot Project Scholarship Program. Therefore, the Ohio Blaine Amendment was not before the U.S. Court for consideration. Regardless, in *Zelman* Blaine Amendments move a step closer to the heart of Supreme Court jurisprudence.

On June 28, 1995, the Ohio legislature adopted House Bill 117, the biennial operating appropriations bill for fiscal years 1996 and 1997. Among the numerous provisions of that bill were those establishing the Pilot Project Scholarship Program.[123] The school voucher program required the State Superintendent of Public Instruction to provide scholarships to students residing only within the Cleveland City School District.[124] Students could use those scholarships to attend a registered private school or a public school in an adjacent school district. These scholarships were made available in the form of checks paid either to the student's parents, if the

[122] Zelman v. Simmons-Harris, 536 U.S. 639 (2002).

[123] Ohio Rev. Code 3313.974 – 3313.979 [online] http://orc.avv.com/title-33/sec-3313/sec-3313.974.htm.

[124] Ohio R.C. 3313.975(A).

child would be attending a private school, or to the adjacent public school district. In 1996 the program was challenged on the grounds that student use of vouchers at religious institutions violated the Establishment Clause of the First Amendment to the United States Constitution as well as various clauses of the Ohio Constitution including the Establishment Clause,[125] the School Funds Clause,[126] and the Uniformity Clause.[127] In May 1999, the Ohio Supreme Court ruled the program unconstitutional and this ruling was appealed to the United States Supreme Court.

In its ruling, the Ohio Court determined that the Cleveland voucher program did not violate the Establishment Clause of the First Amendment. They noted that in *Cantwell v. Connecticut* (1940)[128] the U.S. Supreme Court stated that "[t]he Fourteenth Amendment has rendered the legislatures of the state as incompetent as Congress to enact such laws," therefore that the compelling authority for Ohio became *Lemon v. Kurtzman*. The Court further observed that while the *Lemon* Test has come under recent reinterpretation and that its validity had been challenged;[129] "*Lemon* remains the law of the land, and we are constrained to apply it."[130] It then determined that on all three points of the *Lemon* test, the Ohio program passed muster. The case was then appealed to the United States Supreme Court.

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[125] Ohio Const. Art. I, § 7.

[126] Ohio Const. Art. VI, Sec. 2.

[127] Ohio Const. Art. VII, Sec. 26.

[128] *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

[129] Citing *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993); *Allegheny County v. American Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U.S. 573 (1989); and *Westside Community Schools Board of Education v. Mergens*, 496 U.S. 226 (1990).

[130] *Simmons-Harris v. Zelman*, 234 F.3d 945 (6th Cir. 2000), p. 6.

The Supreme Court also upheld the Ohio Program in *Zelman v. Simmons-Harris*.[131] The Court ruled first that because the program was enacted for the valid secular purpose of providing educational assistance to poor children in a demonstrably failing public school system, the key question at issue was whether the program nonetheless has the forbidden effect of advancing or inhibiting religion.[132] The decision of the Court asserted that the Court's jurisprudence makes clear that a government aid program is not readily subject to challenge under the Establishment Clause if it were neutral with respect to religion and provides assistance directly to a broad class of citizens who, in turn, direct government aid to religious schools wholly as a result of genuine and independent private choice.[133] Under such a program, government aid reaches religious institutions only by way of the private choices of numerous individual recipients.[134] Therefore, the incidental advancement of a religious mission, or the perceived endorsement of a religious message, is reasonably attributable to the individual aid recipients not the government,[135] whose role ends with the disbursement of benefits.

Second, the Court argued that the Ohio program was one of true private choice, consistent with the *Mueller* line of cases, and thus constitutional. It is neutral in all respects toward religion,[136] and is part of Ohio's general and multifaceted undertaking to provide educational opportunities to children in a failed school district. It confers educational assistance directly to a broad class of individuals defined without reference to religion and permits

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[131] *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).
[132] See *Agostini* v. *Felton*, 521 U.S. 203, 222—223.

[133] See, *e.g.*, *Mueller* v. *Allen*, 463 U.S. 388.

[134] *Zelman* at 10; see *Agostini supra* at 226.

[135] *Zelman* at 10.

[136] *Id*. at 11.

participation of all district schools–religious or nonreligious–and adjacent public schools.[137] The only preference in the program is for low-income families, who receive greater assistance and have priority for admission.[138]

Despite viewing data regarding voucher choices from Cleveland presented by the plaintiffs suggesting that the program created a financial incentive to attend religious schools, the Court rejected this argument and instead asserted that the program creates financial disincentives: Private schools receive only half the government assistance given to community schools and one-third that given to magnet schools, and adjacent public schools would receive two to three times that given to private schools.[139] Families too have a financial disincentive, for they have to co-pay a portion of private school tuition, but pay nothing at a community, magnet, or traditional public school.[140] The Court argued that no reasonable observer would think that such a neutral private choice program carries with it the imprimatur of government endorsement.[141] Nor is there evidence that the program fails to provide genuine opportunities for Cleveland parents to select secular educational options: Their children may remain in public school as before, remain in public school with funded tutoring aid, obtain a scholarship and choose to attend a religious school, obtain a scholarship and choose to attend a nonreligious private school, enroll in a community school, or enroll in a magnet school.[142]

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[137] *Id.*

[138] *Id.*

[139] *Id.* at 11-12.

[140] *Id.* at 12.

[141] *Id.* at 8.

[142] *Id.* at 12.

According to the Court, the Establishment Clause question of whether Ohio is coercing parents into sending their children to religious schools must be answered by evaluating *all* options Ohio provides Cleveland schoolchildren, only one of which is to obtain a scholarship and then choose a religious school.[143] Cleveland's preponderance of religiously affiliated schools did not result from the program, but is a phenomenon common to many American cities. Eighty-two percent of Cleveland's private schools are religious, as are 81 percent of Ohio's private schools. To attribute constitutional significance to the 82 percent figure would lead to the absurd result that a neutral school-choice program might be permissible in parts of Ohio where the percentage is lower, but not in Cleveland, where Ohio has deemed such programs most sorely needed.[144] Likewise, an identical private choice program might be Constitutional only in states with a lower percentage of religious private schools.[145] Respondents' additional argument that constitutional significance should be attached to the fact that 96 percent of the scholarship recipients have enrolled in religious schools was flatly rejected in *Mueller:*[146] "The constitutionality of a neutral educational aid program simply does not turn on whether and why, in a particular area, at a particular time, most private schools are religious, or most recipients choose to use the aid at a religious school."[147]

Finally, the Court ruled that contrary to respondents' argument, *Committee for Public Education & Religious Liberty* v. *Nyquist*[148]-- a case that expressly reserved judgment on the sort

[143] *Id.* at 14.
[144] *Id.* at 15-16.

[145] *Id.* at 16.

[146] *Id.*

[147] *Id.* at 17.

[148] 413 U.S. 756.

of program challenged in *Zelman* -- does not govern neutral educational assistance programs that offer aid directly to a broad class of individuals defined without regard to religion.[149]

> As in *Mitchell*, Justice Breyer recorded his dissent citing the history of the Blaine Amendments. He argued that in deciding the Twentieth Century Establishment Clause cases, the Court recognized that earlier in United States history, society 'perceived a less clear-cut church/state separation compatible with social tranquility.'[150] As a result, Protestant devotional practices were common: students recited Protestant prayers, read the King James version of the Bible, and learned Protestant religious ideals.[151] Those practices undoubtedly discriminated against members of minority religions, but given the small number of such individuals, this did not threaten serious social conflict.[152]

In the Twentieth Century however, the Court recognized that immigration and growth had changed the situation.[153] As their numbers increased, members of non-Protestant religions, particularly the Catholics, "began to resist the Protestant domination of the public schools."[154] "Scholars report that by the mid-Nineteenth Century religious conflict over matters such as Bible reading "grew intense," as Catholics resisted and Protestants fought back to preserve their domination."[155] Fearing Catholic domination, native Protestant mobs "terrorized Catholics."[156]

Breyer argued that The Twentieth Century Court was "aware that political efforts to right the wrong of discrimination against religious minorities in primary education had failed; in fact

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[149] *Id.* at 20.

[150] Breyer, dissent at 4.

[151] See, *e.g.*, D. Tyack, "Onward Christian Soldiers: Religion in the American Common School," in *History and Education*, P. Nash ed., (Random House, 1970), p. 217.

[152] See Barry Kosmin & Seymore Lachman, *One Nation Under God: Religion in Contemporary American Society*, (Three Rivers Press, 1994), p. 45.

[153] Citing John Jeffries & James Ryan, "A Political History of the Establishment Clause," 100 *Mich. L. Rev.* 279, 299-300 (Nov. 2001) (discussing the increasing number of Catholics in America); and Kosmin & Lachman, *supra*, at 45 (discussing increasing numbers of Jewish immigrants).

[154] Breyer *supra* at 4-5.

[155] *Id*. at 5; citing Jeffries, *supra* at 300.

[156] *Id*. at 5; citing Hamburger, *supra* at 219 (2002); See e.g. Jeffries *supra.*

they had exacerbated religious conflict."[157] Catholics demanded equal government support for the education of their children to be taught in private, Catholic schools. The Protestant response according to Breyer, "was that public schools must be 'nonsectarian' (which was usually understood to allow Bible reading and other Protestant observances) and public money must not support 'sectarian' schools (which in practical terms meant Catholic)."[158] This policy then played a significant role in the Blaine movement that sought to ensure that government would not help pay for "sectarian" (*i.e.*, Catholic) schooling for children.[159]

The Supreme Court upheld the Ohio scholarship program; but once again the Blaine movement was cited on both sides of the decision. Both sides agreed with anti-Blaine advocates that the motivation for these state constitutional clauses was anti-Catholicism. Based on this, Justice Thomas, speaking for the plurality, concluded that the Blaine amendments were unconstitutional expressions of hostility to a particular religion, while Breyer saw the Blaine amendments as reflecting the religious strife inherent when government, particularly though its funding practices, becomes entangled in schools.

Thus, in the *Mitchell* plurality opinion four Justices, Thomas, Rehnquist, Scalia, and Kennedy had asserted the opinion that Blaine Amendments were to be "disavowed"[160] and "buried."[161] Now, in their *Zelman* dissent, Justices Breyer, Stevens, and Souter expressed concern about increasing religious intolerance and social turmoil[162] identified the putative anti-

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[157] *Id.*

[158] *Id.* citing Jeffries at 301.

[159] *Id.* citing Jeffries at 301.305, and Hamburger, *supra*, at 287.

[160] *Mitchell supra* at 30.

[161] *Id.* at 31.

[162] Breyer, *supra* at 10.

Catholic intent of the Blaine Amendments as an example of how allowing tax dollars to flow into religious institutions has a negative impact on society to which the Court should be responsive.[163] Thus, seven of the nine Justices of the United States Supreme Court appeared to be in agreement that the Blaine Amendments were anti-Catholic in original intent and were, therefore, presumably unconstitutional. As a result, it appeared that the days of the Blaine Amendments were numbered and that educational funding guidelines, not to mention the frameworks of many government funding programs, were about to face a potentially dramatic change.

[163] *Id*. at 4-5.

Table 2-1. First appearance of no compulsory attendance or support in state constitutions, 1776 to 1800.

State	Date	Clause	State	Date	Clause
Maryland	1776	Art. 1 § 33	New Hampshire	1784	Art. I, § 6
New Jersey	1776	Art. 18	Georgia	1789	Art. 4, § 5
North Carolina	1776	Art. I, § 34	Delaware	1792	Art. I, § 1
Pennsylvania	1776	Art. I, § 2	Kentucky	1792	Art. 12, § 3
Vermont	1777	Ch I, § 3	Tennessee	1796	Art. XI, § 3
South Carolina	1778	Art. 38			

Table 2-2. First appearance of no compulsory attendance or support in state constitutions, 1776 to 1850.

State	Date	Clause	State	Date	Clause
Maryland	1776	Art. 1 § 33	Connecticut	1818	Art. 7, § 1[164]
New Jersey	1776	Art. 18	Illinois	1818	Art. 8, § 3
North Carolina	1776	Art. I, § 34	Alabama	1819	Art. 1, § 3
Pennsylvania	1776	Art. I, § 2	Maine	1820	Art. 1, § 3
Vermont	1777	Ch I, § 3	Missouri	1820	Art. 13, § 4
South Carolina	1778	Art. 38	Virginia	1830	Art. 3, § 11
New Hampshire	1784	Art. I, § 6	Michigan	1835	Art. 1, § 4
Georgia	1789	Art. 4, § 5	Arkansas	1836	Art. 2, § 3
Delaware	1792	Art. I, § 1	Rhode Island	1842	Art. 1, § 3
Kentucky	1792	Art. 12, § 3	Texas	1845	Art. 1, § 4
Tennessee	1796	Art. XI, § 3	Iowa	1846	Art. 1, § 3
Ohio	1802	Art. 8, § 3	Wisconsin	1848	Art. 1, § 18
Indiana	1816	Art. I, § 3			

[164] The Connecticut phrasing is unusual: "And each and every society or denomination of Christians in this State shall have and enjoy the same and equal powers, rights, and privileges; and shall have power and authority to support and maintain the ministers or teachers of their respective denominations, and to build and repair houses for public worship by a tax on the members of any such society only, to be laid by a major vote of the legal voters assembled at any society Meeting …" Conn. Const. of 1818, Art. 7, § 1. Note that intra-religious group support apparently could be compelled; extra-group support, however, could not.

Table 2-3. Adoption of no preference clauses

State	Date	Clause	State	Date	Clause
North Carolina	1776	Art. I, § 34	Maine	1820	Art. I, § 3
Pennsylvania	1776	Art. IX, § 3	Missouri	1820	Art. XIII, § 5
Delaware	1776	Art. 29	Virginia	1830	Art. 3, § 11[165]
Kentucky	1792	Art. XII, § 3	Arkansas	1836	Art. II, § 3
Tennessee	1796	Art. XI, § 3	Florida	1838	Art. I, § 3
Ohio	1802	Art. VIII, § 3	Texas	1845	Art. I, § 4
Indiana	1816	Art. I, § 3	Wisconsin	1848	Art. I, § 18
Mississippi	1817	Art. I, § 4	Kansas	1855	Art. I, § 7
Illinois	1818	Art. VIII, § 3			

[165] "And the Legislature shall not prescribe any religious test whatever; nor confer and peculiar privileges or advantages on any one sect or denomination …" Va. Const. of 1830, Art. 3, § 11.

CHAPTER 3
THE WASHINGTON PROMISE SCHOLARSHIP PROGRAM AND LOCKE V. DAVEY[1]

The Washington legislature established the Promise Scholarship Program to assist academically gifted students with postsecondary education expenses.[2] The program was designed to subsidize tuition and other educational expenses during the first two years of college for eligible students[3] enrolled at least half-time in an accredited college, including religiously affiliated colleges. In accordance with Article I, Section 11 of the Washington Constitution, as applied to the scholarship program through Wash. Rev. Code 28B.10.812, students receiving the scholarship could take religion classes but could not major in theology.[4] The relevant part of Article I, Section 11 of the Washington Constitution states,

> RELIGIOUS FREEDOM. Absolute freedom of conscience in all matters of religious sentiment, belief, and worship, shall be guaranteed to every individual, and no one shall be molested or disturbed in person or property on account of religion; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness or justify practices inconsistent with the peace and safety of the state. 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.[5]

To ensure that the Promise Scholarships met the provision that "no one shall be molested or disturbed in person or property on account of religion" the law governing state-level financial aid required that scholarships be awarded, "without regard to the applicant's … religion."[6] To ensure no public funds were appropriated "for religious worship, exercise or instruction," state

[1] *Locke v. Davey* 540 U.S. 712 (2004).

[2] Wash Rev. Code, § 28B.119.005 (2004)

[3] *Id*. at § 28B.119.010

[4] *Id*. c.f. Wash. Admin Code § 250-80-020(13) (2004)

[5] Wash. Const. Article I, § 11

[6] Washington Revised Code, § 28B.10.812

law also mandated that "[n]o aid shall be awarded to any student who is pursuing a degree in theology."[7] It should be noted that the statute did not define "theology;" however, as interpreted by the Washington Supreme Court, the term was defined as, "instruction that resembles worship and manifests a devotion to religion and religious principles in thought, feeling, belief and conduct, i.e. instruction that is devotional in nature and designed to induce faith and belief in the student."[8] As a result of this interpretation, Article I, Section 11 as implemented through Wash. Rev. Code 28B.10.812 understood "theology" as training to become a clergy member, but it did not include studies of religion or religious topics in which the student learns about more than one religion; for example, in a comparative religions class or even a religious studies degree.[9]

Joshua Davey was awarded a Promise Scholarship and chose to attend Northwest College, an accredited private college affiliated with the Assemblies of God that is eligible under Promise Scholarship Program guidelines. When he enrolled, Davey chose a double major in pastoral ministries and business management/administration. Neither side in the case disputed that the pastoral ministries degree is devotional. After learning that because of his declared major he would not receive his scholarship Davey sued under 42 U.S. C. §1983 seeking an injunction and damages, arguing that the denial of his scholarship violated, *inter alia,* the First Amendment's Free Exercise and Establishment Clauses. Before the District Court both parties requested summary judgment, whereupon the court rejected Davey's claims and issued a summary judgment for the State. Davey appealed and the Ninth Circuit Court of Appeals reversed the lower court decision.[10] Arguing that the state's exclusion of theology majors was

[7] Wash. Rev. Code, § 28B.10.814

[8] *Calgary Bible Presbyterian Church v. Bd. Of Regents of the Univ. of Wash.*, 436 P.2d 189, 193 (Wash. 1967)

[9] See Brief *Amicus Curiae* of the American Civil Liberties Union, et al., p. 4

[10] *Davey v. Locke*, 299 F.3rd 748 (9th Cir. 2002)

not narrowly tailored to achieve a compelling state interest under *Church of Lukumi Babalu Aye, Inc.* v. *Hialeah,*[11] the court concluded that religion had been singled out for unfavorable treatment by the State. Finding that the State of Washington's antiestablishment concerns were not compelling, the Circuit Court declared the unconstitutional the denial of the scholarship to Davey. The State of Washington appealed and the U.S. Supreme Court agreed to take the case.

Because the U.S. Supreme Court had already ruled in another Washington case, *Witters v. Washington Department of Services for the Blind*, that the establishment Clause of the First Amendment does not preclude the use of public tax money to prepare for the ministry,[12] the fundamental issue in *Locke* was the next logical question: Does a more stringent state anti-establishment clause impair protected rights? In this case, the specific question was, if the state makes scholarship aid available for students who pursue all other majors, can those pursuing pastoral studies, "theology," be denied the aid? In addressing this question, Davey's attorneys were arguing that the state restriction violated the Free Exercise Clause's prohibition of practices that impair religious belief in the absence of a compelling government interest;[13] that the state action represented hostility toward religion in violation of the establishment clause;[14] that it violated the Free Speech Clause which protects individuals against viewpoint discrimination,[15] and that it violated the Equal Protection Clause of the Fourteenth Amendment[16] because "theology" majors were singled out for disfavor.

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[11] 508 U.S. 520

[12] *Witters v. Wash. Dep't of Serv. For the Blind*, 474 U.S. 481 (1986)

[13] *Locke*, 124 S. Ct. at 1311

[14] *Id*. at 1314-1314

[15] *Id*. at 1313, n3

[16] *Id*. at 1311, 1313, n3. The First Amendment is applied against the states through the Fourteenth Amendment, which has been interpreted as incorporating First Amendment guarantees. See *Everson v. Bd. Of Educ.*, 330 U.S. 1,

As *Locke* came before the U.S. Supreme Court, judicial support for the principle of nondiscriminatory government neutrality toward religion seemed to be the dominant paradigm.[17] Apparently in line with recent Supreme Court jurisprudence, Davey's attorneys were arguing that the scholarship program was not religiously neutral if pastoral studies majors could be treated differently. Thus, many observers of the Supreme Court expected Davey to prevail.

Twenty two briefs were filed before the Supreme Court: fifteen in support of Davey,[18] and seven supporting Locke.[19] In those briefs, five states joined supporting Davey[20] and five states supported Locke.[21]

15-16 (1947); *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) "Incorporation" emerged from the Fourteenth Amendment which states, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." The "Privileges and Immunities Clause" has been interpreted as applying the federal Constitution, especially the Bill of Rights, which lists the privileges and immunities of the citizens, to the states.

[17] McCarthy, *supra* at 468

[18] Becket Fund for Religious Liberty, Catholic League for Religious and Civil Rights, and Historians and Legal Scholars; Black Alliance for Educational Options; Common Good Legal Defense Fund, and Your Catholic Voice Foundation; United States Conference of Catholic Bishops, North Park Theological Seminary, Worldwide Church of God, Clifton Kirkpatrick as Stated Clerk of the Presbyterian Church (U.S.A.); Council for Christian Colleges & Universities, Association of Catholic Colleges & Universities, Association of Southern Baptist Colleges & Schools, Center for Public Justice, Family Research Council, Focus on the Family, Christian Legal Society; Fairness Foundation; Institute for Justice, Center for Education Reform, Cato Institute, Citizens for Educational Freedom, Goldwater Institute; Landmark Legal Foundation; Liberty Counsel; National Jewish Commission on Law and Public Affairs; Religious Universities and Colleges; Solidarity Center for Religion and Justice; State of Alabama; State of Florida; States of Texas, Mississippi, and Utah.

[19] American Civil Liberties Union, American Civil Liberties Union of Washington, Americans United for Separation of Church and sate, People for the American Way Foundation, Lambda Legal Defense & Education Fund; American Jewish Congress; Anti-Defamation League; Hadassah, the Women's Zionist Organization of America, Jewish Council for Public Affairs, Commission on Social Action of Reform Judaism; Historians and Law Scholars; National Education Association; National School Boards Association, Arizona School Boards Association, Michigan Association of School Boards, Minnesota School Boards Association, New York State School Boards Association, Pennsylvania School Boards Association, Utah School Boards Association, Virginia School Boards Association, American Association of School Administrators, Horace Mann League, and Public Education Network; Briefs of the States of Vermont, Massachusetts, Missouri, Oregon, and South Dakota and of he Commonwealths of the Northern Marianna Islands and Puerto Rico.

[20] Alabama, Florida, Texas, Mississippi, and Utah.

[21] Vermont, Massachusetts, Missouri, Oregon, and South Dakota.

A review of the briefs filed before the Court finds broad agreement that Article I, § 11 of the Washington Constitution was a Blaine Amendment and that the Promise Scholarship Program operationalizes that Amendment by denying scholarships to ministerial students.[22] Sixteen of the twenty-two briefs refer the Washington "Blaine Amendment," and two briefs primarily argue that the Promise scholarship reflects a Blaine Amendment. No brief disputes the assertion that the Washington clause is such an Amendment.

Given near universal agreement that the denial of the scholarship to Davey reflected the Washington Blaine Amendment, and given the past negative comments made by seven of nine Supreme Court Justices concerning Blaine Amendments, it appeared to many observers that the Washington Blaine Amendment, and probably Blaine Amendments in general, were likely to be ruled unconstitutional.

Briefs *Amicus Curiae* in Support of Davey

In general, the briefs supporting Davey present seven key arguments addressing 1) the First Amendment Establishment Clause; 2) the First Amendment Free Exercise Clause; 3) the First Amendment Free Speech Clause; 4) the Equal Protection Clause of the Fourteenth Amendment; 5) Conflict between state and federal protections of rights; 6) Excessive Entanglement; and 7) Blaine Amendment History.

The First Amendment states, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a

[22] Wash. Rev. Code, § 28B.10.814

redress of grievances."[23] The first three phrases of that amendment are the relevant texts for this case. Likewise, Section 1 of the Fourteenth Amendment states,

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

First Amendment Establishment Clause

The Establishment Clause arguments revolve around the assertion that denying the Promise Scholarship to Davey amounts to a religiously motivated denial of a public benefit. While on one hand, the Establishment Clause clearly prevents the federal, and by incorporation, the state governments from declaring a particular religion to be the "official" religion, long-standing jurisprudence has also argued that this clause places limits on direct governmental funding of religious activities. However, Davey's supporters argue that the denial of the scholarship represents the opposite violation: that because, "[o]nly students who take their religion seriously enough to devote a significant portion of their college education to the pursuit of religious study in a religious setting are disqualified" this constitutes "a degree of hostility to religion that is unconstitutional."[24] Furthermore, by

> tilting the playing field in favor of students who are willing to pursue secular counseling, education, or social work degrees from postsecondary educational institutions, the State of Washington provides non-theistic scientific or ethical viewpoints with a discriminatory advantage in the marketplace of ideas pertaining to the maintenance of the fabric of society."[25]

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[23] U.S. Const., Amend. I.

[24] Br. National Jewish Commission on Law and Public Affairs, p. 5, *Locke v. Davey*, No. 02-1315 (U.S. Supreme Court, Feb 25, 2004). See also Br. State of Florida, p. 7.

[25] Br. Solidarity Center for Religion and Justice, p. 26, *Locke v. Davey*, No. 02-1315 (U.S. Supreme Court, Feb 25, 2004).

According to Davey supporters, this kind of discriminatory denial of funding violates both the establishment clause and substantive neutrality by inhibiting religion.[26] Furthermore, denial of funding interferes with voluntary choices and commitments in religious matters.[27] Supporters argue that the no establishment requirement is fulfilled when a program is neutral among religious sects, between religion and non-religion, and does not deter any religious belief. Furthermore, they point out that "brooding and pervasive devotion to the secular and a passive, or even active, hostility to the religious" is prohibited.[28]

At the same time, Davey's supporters recognize that federalist principles previously elucidated by the Court may compel some "play in the joints" between what the establishment clause requires and what it permits.[29] However, they argue, ordinarily that "play in the joints will favor religious freedom" and that the States may not "impede free exercise rights or any other individual religious liberty interest" in the name of federalism, or separation of church and state, or any other legal concept of similar abstraction.[30] The Landmark Legal Foundation even goes so far as to argue that the Founding Fathers never intended the Establishment Clause to remove religion from the public square.[31] The famous "Wall of Separation" they assert, is a "misleading

[26] Br. Council for Christian Colleges & Universities, et al., p. 9-10, *Locke v. Davey*, No. 02-1315 (U.S. Supreme Court, Feb 25, 2004). See also Br. Fairness Foundation, p. 7-8; Br. Justice, et al., p. 19; and Br. Landmark Legal Foundation, p. 4.

[27] Br. Council for Christian Colleges & Universities, et al, p. 25, *Locke v. Davey*, No. 02-1315 (U.S. Supreme Court, Feb 25, 2004).

[28] Br. Fairness Foundation, p. 7, *Locke v. Davey*, No. 02-1315 (U.S. Supreme Court, Feb 25, 2004), citing Goldberg, J. concurring decision in *Abington v. Schempp*, 374 U.S. 203, 305-306 (1963)]

[29] *Norwood*, 413 U.S. at 469

[30] Br. State of Alabama, p. 8, *Locke v. Davey*, No. 02-1315 (U.S. Supreme Court, Feb 25, 2004), citing *Zelman*, 536 U.S. at 678-79.

[31] Br. Landmark Legal Foundation, p. 8, *Locke v. Davey*, No. 02-1315 (U.S. Supreme Court, Feb 25, 2004).

metaphor"[32] and religion has long been entwined in public life. Therefore, the federal and state Establishment Clauses merely represent, "an agreement among the states that no single church should receive national sponsorship."[33] Because of this, the Establishment Clause does not require neutrality between religion and irreligion but allows the favoring of religion;[34] and obviously Davey's scholarship.

First Amendment Free Exercise Clause

While barring the establishment of religion, the First Amendment also asserts that no law may prevent the free exercise of religion. Two hundred years of case history have defined this clause from a narrow reading presented in the 1878 case *Reynolds v. United States* which argued that the clause only protected religious beliefs and not practices[35] to a broader reading that allows limiting certain kinds of religious practices only if there is some compelling state interest.[36] Absent a compelling state interest Davey's supporters argued, discrimination against religious education in otherwise comprehensive state funding programs is prohibited by the Free

[32] *Id.*. citing *Wallace v. Jaffree*, 472 U.S. 38, 92 (1985)

[33] *Id.*, p. 11

[34] *Id.*.

[35] 98 U.S. 145 (1878): "Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices. Suppose one believed that human sacrifices were a necessary part of religious worship, would it be seriously contended that the civil government under which he lived could not interfere to prevent a sacrifice? Or if a wife religiously believed it was her duty to burn herself upon the funeral pile of her dead husband, would it be beyond the power of the civil government to prevent her carrying her belief into practice? So here, as a law of the organization of society under the exclusive dominion of the United States, it is provided that plural marriages shall not be allowed. Can a man excuse his practices to the contrary because of his religious belief? The permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances…"

[36] This is currently a lively legal arena. The "compelling state interest" test is exemplified in *Sherbert v. Vernier*, et al. 374 U.S. 398 (1963). While case law was moving away from that test, the 1993 Religious Freedom Restoration Act has somewhat reactivated that principle within the subsequent constraints of *City of Boerne v Flores* (1997), in which the Court ruled that RFRA was unconstitutional, at least as applied to state and local governments. The Court concluded that neither the Constitution nor § 5 of the Fourteenth Amendment, gave power to Congress to overrule the Court's Fourteenth Amendment interpretations; and that the RFRA had the intent of substituting Congressional interpretation of the Free Exercise Clause for that of the Supreme Court.

Exercise Clause of the First Amendment.[37] Furthermore, Davey's supporters argued, Washington cannot compel a choice "between the exercise of a First Amendment right and participation in an otherwise available public program."[38]

First Amendment Free Speech Clause

In law, denying a scholarship to a student on religious grounds becomes a free speech issue if the state's action were intended or has the effect of inhibiting a person's freedom of speech or expression even if the state's action is not itself related to speech. Thus, this argument asserts that when a state has chosen to fund both public and private school education as part of a comprehensive program with neutral qualifying criteria, the provision of a scholarship to a qualifying individual who then applies that funding to a religious institution cannot be characterized as a form of state speech in favor of that institution or religion.[39] At the same time, because the individual student chooses where and how to apply the money, any actions by the state to restrict that choice based on religious grounds is by definition inhibiting, therefore the rule prohibiting viewpoint discrimination should apply.[40]

Viewpoint discrimination arguments arise most recently out of *Rosenberger v. University of Virginia*.[41] In this case the University refused to pay the expenses of a student-run religious newspaper when it paid print costs for other student publications. A five to four Court

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[37] Br. Black Alliance for Educational Options, p. 9, *Locke v. Davey*, No. 02-1315 (U.S. Supreme Court, Feb 25, 2004). See also Br. United States Conference of Catholic Bishops, et al., p. 3-4; Br. Council for Christian Colleges & Universities, et al., p. 12-13; and Br. Fairness Foundation, 10-12.

[38] Br. Council for Christian Colleges & Universities, et al., p. 27, *Locke v. Davey*, No. 02-1315 (U.S. Supreme Court, Feb 25, 2004).; and Br. Fairness Foundation, p. 9, citing *Thomas v. Review Bd. Of Ind. Employment § Div*., 450 U.S. 707, 716 (1981).

[39] see *Rust v. Sullivan*, 500 U.S. 173 (1991), and *Regan v. Taxation With Representation of Wash*., 461 U.S. 540 (1883).

[40] Br. Black Alliance for Educational Options, p. 10-13, *Locke v. Davey*, No. 02-1315 (U.S. Supreme Court, Feb 25, 2004). See also Br. United States Conference of Catholic Bishops, p. 5-6, and Br. State of Florida, p. 14-17.

[41] 515 U.S. 819 (1995).

determined this to be unconstitutional and a denial of the affected students' free speech rights arguing,

> A central lesson of our decisions is that a significant factor in upholding governmental programs in the face of Establishment Clause attack is their neutrality towards religion. We have held that the guarantee of neutrality is respected, not offended, when the government, following neutral criteria and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse. More than once have we rejected the position that the Establishment Clause even justifies, much less requires, a refusal to extend free speech rights to religious speakers who participate in broad-reaching government programs neutral in design.[42]

This ruling is extended to Davey by arguing that by denying Promise scholarships to certain theology majors, the state of Washington used a viewpoint-based restriction to regulate private expression between teachers and students in a manner that is aimed at suppressing the interchange of ideas for bringing about political and social changes thought inimical to the State of Washington's own interests.[43]

The argument is also presented that the disqualification of Davey represents a state assertion of "suppression of dangerous ideas" which cannot legitimately be applied to religion,[44] and that the viewpoint discrimination engaged in by the state of Washington is not narrowly tailored to proscribe unlawful advocacy or any other violence-inciting expression on the part of students pursuing theology degrees.[45] Furthermore,

> The sweeping scope of the Washington Blaine Amendment's prohibition on the appropriation of public money or property for *any* religious worship, exercise, or instruction (even in cases where comparable secular activities are publicly

[42] http://www.law.cornell.edu/supct/html/94-329.ZO.html

[43] Br. Solidarity Center for Religion and Justice; p. 5, *Locke v. Davey*, No. 02-1315 (U.S. Supreme Court, Feb 25, 2004).

[44] Br. United States Conference of Catholic Bishops, et al. p. 5-6, *Locke v. Davey*, No. 02-1315 (U.S. Supreme Court, Feb 25, 2004).

[45] Br. Solidarity Center for Religion and Justice, p. 15ff.

> funded) blurs the distinction, recently articulated by this Court, between engaging in 'constitutionally proscribable' speech and engaging in 'core political speech.[46]

Equal Protection

Seven briefs for Davey argue that the First Amendment through the Equal Protection Clause of the Fourteenth Amendment[47] forbids singling out religious instruction from an otherwise comprehensive state funding of all other private alternatives.[48] While recognizing that direct public funding of religious instruction would be unconstitutional, in *Locke* it was argued that because public money reaches private, religious schools as the result of a "true private choice" by Davey, his use of scholarship funds to pursue religious education passes constitutional muster.[49] Failure to extend the scholarship to Davey also violates the standard of "neutrality" as articulated by the Court.[50] Finally, and anticipating the historical arguments about Blaine Amendments, two briefs point out that the Equal Protection Clause invalidates state constitutional provisions rooted in hostility toward a particular group.[51]

Conflict between State and Federal protections of rights

Davey's supporters also discuss the potential for state and federal laws to conflict when it comes to the protection of individual rights. While the United States Constitution is "the supreme

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[46] *Id*., p. 16; citing *Virginia v. Black*, 123 S.Ct. 1536, 1551 (2003)

[47] The legal doctrine of "incorporation" applies the Federal Bill of Rights against the states through the Equal Protection Clause of the Fourteenth Amendment which states in part, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." This clause was used to apply the Bill of Rights to the states in a series of cases in the 1940s, 50s, and 60s. Wikipedia has a strong entry on Incorporation at http://en.wikipedia.org/wiki/Incorporation_(Bill_of_Rights).

[48] See for example, Br. Black Alliance for Educational Options, p. 7.

[49] Br. Black Alliance for Educational Options. p. 13; and Br. Fairness Foundation, p. 9. cf. *Zelman v. Simmons-Harris*, 536 U.S. 639, 649 (2002)).

[50] Br. State of Texas, et. al. The entire brief is built around the concept of neutrality. See also Br. State of Florida, pp. 4 – 11; Br. Conference of Catholic Bishops, p. 4.

[51] Br. Black Alliance for Educational Options, p. 13-19; and Br. Fairness Foundation, p. 15-19.

law of the land"[52] and supersedes any state constitution, state constitutions can be more protective of individual rights than the U.S. Constitution, but states cannot abridge rights granted by federal law.[53] Given this, it is argued that a State has no constitutional obligation to set up a scholarship program, but once it chooses to do so the State has a federal constitutional obligation not to exclude citizens from the program on the basis of their religious choices.[54]

It was also argued that the Washington legislature's denial of the scholarship was an effort to "control and channel the free and independent choices of individuals with respect to religion" which violated the United State Constitution.[55] Specifically, it was asserted that the State has no compelling justification for discriminatory exclusion of theology degrees.[56]

Davey's supporters recognized that the Washington legislature did assert a constitutional value for this discrimination, specifically to avoid compelling support for religious study;[57] however they asserted that eliminating discrimination against religion would provide more, not less, separation of church and state.[58] Furthermore, while "avoidance of governmentally compelled support for religion contrary to a taxpayers" [sic] own religious views and avoidance of governmentally established churches are legitimate values, … they are scarcely threatened by awarding Promise Scholarships in a religiously nondiscriminatory manner.[59]

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[52] U.S. Const, Art. VI.

[53] Br. Common Good Legal Defense Fund, and Your Catholic Voice Foundation, p. 11; Br. Landmark Legal Foundation, et al., p. 3.

[54] Br. State of Alabama, p. 1;.

[55] Br. Institute for Justice, et al., p. 13ff

[56] Br. United States Conference of Catholic Bishops, et al., p. 6-8; Br. Fairness Foundation, p. 24 ff.

[57] This argument will be discussed in detail below.

[58] Br. Fairness Foundation, p. 28-30.

[59] Br. United States Conference of Catholic Bishops, et al., p. 8.

Finally, Davey's supporters argued, whenever the No Establishment and Free Exercise Clauses are in conflict, "the individual liberty interest protected by the Free Exercise Clause should govern over the more ethereal treats to Establishment Clause state interests.[60]

Excessive Entanglement

The legal principle of excessive entanglement refers to an ill-defined conditioned under which church and state become dangerously involved. This principle is first presented in *Walz v. Tax Commission of the City of New York* which determined that tax exemptions for religious institutions did not violate the United States Constitution[61] in part because such exemptions create only a "minimal and remote involvement between church and state and far less than taxation of churches."[62] The principle of excessive entanglement became an important element of Supreme Court jurisprudence in *Lemon v. Kurtzman* which determined that Pennsylvania's Nonpublic Elementary and Secondary Education Act of 1968, under which the state reimbursed non-public schools (predominantly religious schools) for teacher salaries, textbooks and instructional materials, violated the Establishment Clause.

Locke once again raised the issue that tax dollars could be utilized for religious purposes, ministerial training, in this case. Supporters of Davey however argued that "non-discriminatory funding of secular functions by religious institutions is fundamentally different from the preferential funding of religious functions that the Founders rejected."[63] Instead, they asserted, it is when states involve themselves in identifying "theology" degrees as opposed to non-

[60] Br. Common Good Legal Defense Fund, and Your Catholic Voice Foundation, p. 14.

[61] 397 U.S. 664 (1970)

[62] *Walz*, 397 U.S. at 676. Michael Ryan provides a good discussion of excessive entanglement in his article, "A Requiem for religiously based property tax exemptions," *Georgetown Law Journal*, June 2001 [online] http://findarticles.com/p/articles/mi_qa3805/is_200106/ai_n8975239/pg_1.

[63] Br. Council for Christian Colleges & Universities, et al., p. 19.

devotional religion degrees that excessive entanglement occurs.[64] Furthermore, the scholarship program violates the autonomy of schools by creating an incentive to change teaching to allow students to receive scholarship.[65]

Finally, Davey's supporters argued that constitutional nondiscrimination "in no way prevents government from taking into account the centrality, vitality, and diversity of religion in contemporary American life. So long as the government acts even-handedly, the political branches are free to take steps to relieve religious groups from the special burdens sometimes imposed by the law."[66]

Blaine Amendment History

The final arguments presented by the briefs filed in support of Davey relate to the supposed history of the Blaine Amendments. The fundamental argument is simply that the original Blaine Amendment and its state-level progeny, including the Washington Provision at issue in *Locke*, were animated by religion-based hostility and fear.[67] In support of this argument, Locke's supporters cite the statement from *Mitchell v. Helms* that Blaine Amendments result from, "a hostility to aid to pervasively sectarian schools [that] has a shameful pedigree that [the Court does] not hesitate to disavow"[68] as well as the later assertion, "the exclusion of pervasively sectarian schools from otherwise permissible aid programs" – precisely the purpose and effect of

[64] *Id*, p. 16-17.

[65] *Id.* p. 18.

[66] Br. Fairness Foundation, p. 14; citing *Corporation of Presiding Bishop v. Amos*, 483 U.S. at 344-35: "government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause;" itself citing *Hobbie v. Unemployment Appeals Comm'n of Fla*., 480 U.S. 136, 144 -145 (1987).

[67] This is the argument of the Br. Becket Fund for Religious Liberty, et al.

[68] *Mitchell v Helms*, 530 U.S. 793, at 828. Cited in Br. Becket Fund, p. 4; Br. Black Alliance, p. 7; Br. Institute for Justice, p. 9; and Br. State of Texas, et al., p. 25.

the Blaine Amendments – represented a "doctrine, born of bigotry, [that] should be buried now."[69]

This argument is revolves around the Nativist movement of the Nineteenth Century and the strong anti-Catholic and anti-immigrant bias of that movement.[70] According to Davey's supporters, prior decisions of the U.S. Supreme Court established that the U.S. and state Blaine amendments were animated by Nativism.[71] Furthermore, they assert, "[a] large and growing historical record establishes conclusively that the Federal and State Blaine Amendments were animated by Nativism."[72]

In this reading of history, "Nativist hostility to European immigrants and their religions produced fierce, organized opposition to 'sectarian' schools, culminating in the movement to pass the U.S. and state Blaine Amendments."[73] Specifically, it is asserted, "sectarian" became a code word for "Catholic" because Protestant practices such as readings from the King James Bible were not considered sectarian.[74] The conclusion of purposeful anti-Catholicism is underscored, Davey's supporters argued, by a number of Nineteenth Century judicial interpretations of the various state Blaine Amendments that confirmed and established their nativist purpose.[75] Thus, the Nineteenth Century Common Schools, as public schools were

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[69] Id. at 829.

[70] For a good history of nineteenth century nativism, see John Higham, *Strangers in the Land: Patterns of American Nativism, 1860-1925* (Rutgers University Press, March 2002), especially Chapter 4.

[71] Br. Becket Fund, citing *Mitchell v Helms*, 530 U.S. 793, at 828 and *Zelman v. Simmons-Harris*, 536 U.S. 639, at 721.

[72] *Id*.. at 8. See also Common Good, pp. 2-11; and Institute for Justice, pp. 9-12.

[73] *Id*. at p. 10.

[74] Br. Common Good, p. 4. See also Steven K. Green, "The Blaine Amendment Reconsidered," 36 *Am. J. Legal Hist.* 38 (1992).

[75] Br. Becket Fund, p.15 – 18, citing a number of rulings that determined the King James version of the Bible was not "sectarian" and therefore did not run afoul of state Blaine Amendments.

called, inculcated the Protestant "common religion," which was acceptable to society and the courts because it was not "sectarian;"[76] and Blaine Amendments were "intended to preserve the Protestant status quo in public schools."[77]

Briefs *Amicus Curiae* in Support of Locke

In response, the briefs supporting Locke present six primary arguments: 1) that the Free Exercise and Establishment Clauses leave room for "play in the joints," allowing states some discretion in policies designed to guarantee religious liberty; 2) that the permissibility of state funds going to religious institutions cannot become a requirement to provide religious schools all aid allowed; 3) that denial of a subsidy to a constitutionally protected activity is not an unconstitutional penalty; 4) that the public forum precedents are not applicable to this case; 5) that a ruling in favor of Davey will flood states with litigation; and, once again, 6) historical arguments about the origins and purposes of the Blaine Amendments.[78]

"Play in the Joints"

In the 1970 case, *Walz v. Tax Commission of the City of New York*, the U.S, Supreme Court pointed out that the religion clauses tend to conflict with each other if carried to their

[76] Br. Common Good, p. 3 – 4. See also Br. Becket Fund, p. 12 citing *Lemon*, 403 at 628 ("Early in the 19th century the Protestants obtained control of the New York school system and used it to promote reading and teaching of the Scriptures as revealed in the King James version of the Bible.").

[77] Br. Landmark Legal Foundation, p. 14.

[78] Br. American Civil Liberties Union, American Civil Liberties Union of Washington, Americans United for Separation of Church and State, People for the American Way Foundation, Lambda Legal Defense & Education Fund; American Jewish Congress; Br. Anti-Defamation League, Hadassah, The Women's Zionist Organization of America, Jewish Council for Public Affairs, Commission on Social Action of Reform Judaism; Br. Historians and Law Scholars; Br. National Education Association; Br. National School Boards Association, Arizona School Boards Association, Michigan Association of School Boards, Minnesota School Boards Association, New York State School Boards Association, Pennsylvania School Boards Association, Utah School Boards Association, Virginia School Boards Association, American Association of School Administrators, Horace Mann League, and Public Education Network; Br. States of Vermont, Massachusetts, Missouri, Oregon, and South Dakota and of the Commonwealths of the Northern Marianna Islands and Puerto Rico.

logical extreme.[79] This potential has been recognized in a number of subsequent rulings[80] and requires "play in the joints"[81] in which it is the Court's responsibility to determine if the law in question falls into that gap where there might be space for legislative action neither compelled by the Free Exercise Clause nor prohibited by the Establishment Clause.[82] Locke's supporters argued that the Washington restriction on Promise Scholarships falls into this category in which states have some discretion in policies designed to guarantee religious liberty.[83]

Washington's policy to provide greater anti-establishment protections than the United States Constitution is presented in Article I, § 11 of the Washington Constitution.[84] According to Locke's supporters, this provision was "created to protect religious freedom, not prevent it."[85] Because no public funds are to be appropriated for "religious worship, exercise or instruction," Washington taxpayers are not "[p]ut in the position of paying for the religious instruction of aspirants to the clergy with whose religious views they disagree."[86] In this argument, this case is not a conflict between the federal Free Exercise rights of one individual and a state establishment

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[79] *Walz*, 397 U.S. at 668-669. See also *Sch. Dist. V. Schempp*, 374 U.S. 203, 247 (1963) (Brennan, J. concurring).

[80] See e.g. *Widmar v. Vincent*, 454 U.S. 263, 271-274 (1981); *Norwood v. Harrison*, 413 U.S. 455, 469 (1973); *Tilton v. Richardson*, 403 U.S. 672, 677 (1971).

[81] *Walz v. Tax Comm'n of City of New York*, 397 U.S. 664, 669. ("The course of constitutional neutrality in this area cannot be an absolutely straight line; rigidity could well defeat the basic purpose of these provisions, which is to insure that no religion be sponsored or favored, none commanded, and none inhibited. The general principle deducible from the First Amendment and all that has been said by the Court is this: that we will not tolerate either governmentally established religion or governmental interference with religion. Short of those expressly proscribed governmental acts there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference.")

[82] See Esbeck, Carl H., "'Play in the Joints Between the Religion Clauses' and Other Supreme Court Catachreses". *Hofstra Law Review*, Vol. 34, p. 1331, 2006 Available at: http://ssrn.com/abstract=934410 (arguing that this conflict is a logical impossibility but providing a good overview of the issue).

[83] Br. American Civil Liberties Union, et al, p. 8.

[84] See *supra*, pg. 65.

[85] Br. Anti-Defamation League et al. p. 20, citing, *Gallwey v. Grimm*, 48 P.3d 274, 295 (Wash. 2002), also *Perry v. Sch. Dist. No. 81*, 344 P.2d 1036 (Wash. 1959).

[86] *Witters v. state Comm'n for the Blind*, 711 P.2d 1119, 1120 (Wash. 1989).

clause. Rather, this case is at the intersection of free exercise rights of one individual and the overall free exercise rights of the people of an entire state, as evinced by their chosen state constitution.[87]

For these reasons, the intersection between the Washington Constitution and the Promise Scholarship provision in question falls into this "play in the joints" because the Washington Constitution provides greater protection for both free exercise and non-establishment than does the U.S. Constitution: "[T]he Washington Courts have interpreted [the state constitution] to provide broader protection for free exercise of religion than its federal counterpart, yet simultaneously to provide a greater separation of church and state."[88]

Along with this "play in the joints" the Court has explicitly recognized that a state may guarantee stricter separation of church and state than the Establishment Clause requires: "Within our federal system the substantive rights provided by the Federal Constitution define only a minimum."[89] Furthermore, "state courts are absolutely free to interpret state constitutional provisions to accord greater protections to individual rights than do similar provisions of the United States Constitution."[90] Likewise, in reviewing state action challenged as unconstitutional, the Court has shown particular solicitude for state constitutional guarantees. For example, in *Gregory v. Ashcroft*,[91] the Court stated: "In this case, we are dealing not merely with government action, but with a state constitutional provision approved by the people of Missouri as a whole.

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[87] *Id.* p. 21

[88] Br. American Jewish Congress, p. 4 and Br. Anti-Defamation League, p. 16 citng R.F. Utter and H.D. Spitzer. *The Washington State Constitution: A Reference Guide*, (Greenwood Press, 2002).

[89] Br. National School Boards Association, et al., citing *Mills v. Rogers*, 457 U.S. 291, 300 (1982)

[90] *Id*., citing *Arizona v. Evans*, 514 U.S. 1, 8 (1995).

[91] 501 U.S. 452 (1991)

This constitutional provision reflects both the considered judgment of the sate legislature that proposed it and that of the citizens of Missouri who voted for it."[92]

Locke's supporters also argued that "states have a vital interest in setting appropriate limits on the use of public monies to support religion and in the proper accommodation of religious practices. States have come to differing conclusions an how best to balance these competing concerns to achieve religious liberty."[93] Thus, the decision of the Ninth Judicial Circuit was incorrect:

> In the Ninth Circuit's judicial world, State decisions concerning religious liberty are either mandated or prohibited; no space is left between the Free Exercise Clause and the Establishment Clause for States to enact reasonable legislation. Such a rule federalizes and eliminates any meaningful role for the States in establishing church-state policy.[94]

But the states do have an important role in guaranteeing religious liberties: "[Some States] erect a higher wall between church and state than exists under the federal Constitution, not as a form of discrimination, but as a reflection of their peoples' belief that government support of religious activities is, ultimately, damaging both to religion and government."[95] They also seek to address a significant governmental concern over compelling citizens to subsidize religious beliefs and practices with which they may stringently disagree.[96] "States could rightly

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[92] *Id.*. at 471

[93] Br. States of Vermont, et al., p. 20

[94] *Id.*., p. 21 citing Ira C. Lupu & Robert W. Tuttle, "Zelman's Future: Vouchers, Sectarian Providers, and the Next Round of Constitutional Battles," 78 *Notre Dame L. Rev*. 917, 965 (2003).

[95] See *McCollum*, 333 U.S. at 212.

[96] Br. Vermont, et al., p. 25, citing See *Everson*, 330 U.S. at 9, 13 ("early settlers came here from Europe to escape the bondage of laws which compelled them to support and attend government favored churches.").

conclude that forcing such payments might breed animosity and resentment toward religion. Such concern is neither insignificant nor constitutionally suspect.[97]

In addition to the legitimate state role in preserving religious liberty, "play in the joints" is also appropriate in this case because mere differential treatment of religion has never been held by the Supreme Court to violate the Free Exercise Clause; some kind of coercive burden must be imposed on religious exercise.[98] "The protections of the Free Exercise Clause pertain only if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons."[99]

Finally, the U.S. Supreme Court's acknowledgement of state authority to extend protections beyond those required by the federal constitution is consistent with recognizing the "federalism prerogatives of the states,"[100] and with the need, exemplified by this case, to avoid "handcuff[ing] the state's ability to experiment with education."[101] In *Locke v. Davey*, not only are issues of federalism at stake, these is a certain "wisdom of allowing States greater latitude in dealing with matters of religion and education."[102] Although Justice Thomas may have been calling for greater flexibility for states to fashion benefits programs that include religious recipients, the principle of "greater latitude" provided state constitutional laboratories must

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[97] *Id*, p. 28. See also Abner Greene, "Why Vouchers are Unconstitutional and Why They're Not," 13 *Notre Dame J.L. Ethics & Pub. Policy* 397, 401-02 (1999)(compelling persons to pay for religious schools akin to forced speech); Kathleen Sullivan, "Parades, Public Squares and Voucher Payments: The Problems of Government Neutrality," 28 *Conn. L. Rev*. 243, 256 (1996) (noting danger of forcing citizens to fund religious messages with which they disagree); Michael McConnell, "The Selective Funding Problem: Abortions and Religious Schools," 104 *Harv. L. Rev*. 989 (1991) (requiring taxpayers to fund religions they do not accept "is understood to violate their religious conscience."

[98] Br. Anti-Defamation League, et. al, p. 7.

[99] *Id*., citing *Lukumi*, 508 U.S. at 532

[100] *Zelman v. Simmons-Harris*, 536 U.S. 639, 679 (2002) (Thomas, J. concurring),

[101] Br. National Education Association, citing *Zelman* at 680

[102] *Zelman v. Simmons-Harris*, 536 U.S. 639, 680 (2002) (Thomas, J. concurring).

extend in both directions."[103] Implicit in the Court's decision in *Zelman* is both the understanding that separation of church and state does not require a national constitutional provision precluding any and all uses of public money to fund religious education and the recognition that the First Amendment's Religion Clauses contain no mandate that the States must fund religious education that overrides constitutional provisions such as Washington's Article I, Section 11.[104]

"Is aid permissible?" cannot become "is aid compulsory?"[105]

In addition to "play in the joints" Locke's supporters argued that there must be a critical distinction made between what is permitted and what is required by the U.S. Constitution. In other words, simply because the Constitution allows something, it does not automatically require it. In this case, the U.S. Constitution allows aid to be extended to students pursuing religious vocations, however it does not require it: the Court's recognition that "the religion clauses of the First amendment are not an either/or proposition – that is, it is not the case that whatever is not forbidden (or mandated) by one clauses is mandated (or forbidden) by the other."[106]

This road has been well-traveled by the Court, Locke's supporters argued. "To the extent the Religion Clauses of the First Amendment do not prohibit … financial aid, they do not require that it be given."[107] Specifically, in *Brusca v. Missouri* the Court had affirmed a district court's rejection of a claim that parents had a right to tax-raised funds for the purpose of affording a

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[103] Br. Historians and Law Scholars, p. 14-15

[104] Br. National Education Association, p. 20

[105] Br. American Jewish Congress , p.1, Br. National Education Association, p.1, Br. National School Boards Association, p.11

[106] Br. American Jewish Congress, p. 1 citing *Norwood v Harrison* 413 U.S. 455, 462 (1973) (states not required to provide religious schools all aid allowed)

[107] *Id*, p. 3, citing *Brusca v. Missouri, ex rel. State Bd of Educ*, 332 F.Supp 275, 276 (E.D. Mo. 1971), aff'd 405 U.S. 1050 (1972). See also Br. National School Boards Association, p. 6

religious [private school] education to their children when the State provided children a secular public school education.[108]

"In general, the Bill of Rights to the United states Constitution places negative constraints on actions by the government – including governmental action to facilitate a private individual's activity – but does not place affirmative obligations on the government to take action – either to facilitate a private individual's activity or otherwise."[109] States have broad latitude in public funding choices, as long as legislation does not infringe upon constitutionally protected rights or "discriminate invidiously in its subsidies in such as way as to aim at the suppression of dangerous ideas."[110] As Justice Douglas noted,

> The fact that the government cannot exact from me a surrender of one iota of my religious scruples does not, of course, mean that I can demand of government a sum of money, the better to exercise them. For the Free Exercise Clause is written in terms of what government cannot do to the individual, not in terms of what the individual can exact from the government.[111]

Still again, as Judge M. Margaret McKeown had argued in dissent from the Ninth Circuit Majority, in *Maher v. Roe*[112] the Court has held that the denial of funding by a state for abortions does not so burden that right - even when the individual is indigent or otherwise qualified for medical benefits.[113] In *Maher* an indigent woman had sued Edward Maher, the Commissioner of Social Services in Connecticut arguing that because the state funded full-term childbirth the

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[108] *Brusca v. Missouri* at 276-277

[109] Br. National Education Association, p. 5

[110] Br. National School Boards Association, p. 12 and Br. Vermont, et al. p. 6, citing *Regan v. Taxation with Representation*, 461 U.S. 540, 548 (1983) itself quoting *Cammarano v. United States*, 358 U.S. 498, 513 (1959).

[111] Br. Vermont, et al. *p. 7*, citing *Sherbert v. Verner*, 374 U.S. 398, 412 (1963) (Douglas, J., concurring). See also *Lyng v. Northwest Indian Cemetary Ass'n*, 485 U.S. 439, 451 (1988) (noting same).

[112] *Maher v. Roe*, 432 U.S. 464 (1977).

[113] *Davey v. Locke*, 299 F.3d 748 (9th. Cir. 2002), p. 10167-8. McKeown dissenting, citing *Maher v. Roe*, 432 U.S. 464, 474 (1977).

restriction on funding for abortion was unconstitutional. In a 6-to-3 decision, the Court held that the Connecticut statute placed no obstacles in the pregnant woman's path to an abortion but maintained her in her current, admittedly poverty stricken condition requiring financial assistance for an abortion. The Court noted that there was a distinction between direct state interference with a protected activity and "state encouragement of alternative activity consonant with legislative policy."[114] Holding that financial need alone did not identify a suspect class under the Equal Protection Clause, the Court found that the law was "rationally related" to a legitimate state interest and survived scrutiny under the Fourteenth Amendment.[115]

In the same fashion, the Washington legislature's refusal to fund Davey's religious education does not interfere with his right to freely exercise his religion. Because the policy does not "penalize" Davey's constitutional right to the free exercise of religion, cases like *Sherbert v. Verner*[116] and *McDaniel v. Paty*[117] do not apply.[118] Likewise, Washington's decision not to fund education for religious vocations legitimately furthers such purposes as:

> (i) honoring the Jeffersonian principle that taxpayers should not be compelled to support any religious exercise whatsoever, and its corollary that, with respect to financing, religion should be wholly voluntary and the government should neither help nor interfere; (ii) avoiding religiously based social conflict;[119] and (iii) maintaining religious institutions as independent, self-governing bodies.[120]

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[114] *Maher* at 476.

[115] *Id*. at 479.

[116] 374 U.S. 398 (1963).

[117] 435 U.S. 618 (1978).

[118] Br. National Education Association, p. 3.

[119] In a separate brief, the ACLU noted that scholarships supporting clergy training would by default be unequal across religions due to differences across clergy training practices. p. 18.

[120] Br. National Education Association, p. 3. See also Breyer's dissenting opinion in *Zelman v. Harris*, supra 536 U.S. 717-29. See also e.g. *Everson v. Board of Educ. Of Ewing*, 330 U.S. 1, 53 (1947) (Rutledge, J., dissenting): "Public money devoted to payment of religious costs, educational or other, brings the quest for more. It brings too the struggle of sect against sect for the larger share or for any. Here one by numbers alone will benefit most, there another."

As a result, in constitutional terms, there is significant difference between a state legislature's refusal to provide public funding for an individual's training for the priesthood or ministry, consistent with *Maher* and its progeny; and a legislature's refusal to provide a secular benefit to a priest or minister because of that individual's religious status or activities, contrary to *Sherbert* and *McDaniel.*[121] Furthermore, Washington legislature's decision not to apply tax money to clergy training is an acceptable practice in church-state relationships;[122] and it is clear that the Founding Fathers did not intend the Fee Exercise Clause to mandate state-funded clergy training or other support for religious education.[123]

Locke's supporters recognized that there are some circumstances when denial of a benefit can be discriminatory; but they argued that this was not the case with the Washington Promise Scholarship. That program does not discriminate on the basis of religion allowing scholarship recipients to attend any accredited school including pervasively religious schools.[124] The program does not prohibit religious exercise.[125] The Promise Scholarship program does not engage in viewpoint discrimination because it is a neutral prohibition against any form of clergy training.[126]

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[121] *Id.*., p. 17.

[122] Br. American Civil Liberties Union, p. 14; Br. Vermont et al., p. 4.

[123] Br. American Civil Liberties Union, p. 14; Br. National Education Association, p. 1; Br. National School Boards Association, p. 6.

[124] Br. American Civil Liberties Union, p. 20.

[125] *Id*., noting that there are three categories of discrimination against religious exercise: a) Laws that criminalize religious practice are almost always unconstitutional: *Lukumi* 508 US at 523 (animal sacrifice); b) Laws that make it legally impermissible to exercise secular rights are usually unconstitutional: *McDaniel v. Paty* 435 U.S. 618 at 621 (1978) [const'l right to seek public office; *Bowen v. Roy*, 476 U.S. 693 (1986) [no constitutional right to withhold SSN yet receive poverty benefits]; and 3) Laws that make a religious exercise more expensive are generally constitutional. *Braunfeld v. Brown*, 366 U.S. 599 (1961) [Orthodox Jewish objections to Sunday closing laws because they have to close on Saturday rejected].

[126] *Id*., p. 22.

> Washington is not seeking to suppress religious ideas. A student is not denied a scholarship for taking religion courses or attending a college whose curriculum is permeated with religious ideas. The state only withholds a subsidy for theological training as such; it has not committed religious ideas to an ideological gulag.[127]

Finally, the goal of the Washington policy is not to "communicate disfavor" of religion, as alleged by the Ninth Circuit Court,[128] but to "further an interest in neutrality among religions and the promotion of religious liberty for all taxpayers.[129] Washington's scholarship program is not designed to "suppress dangerous ideas,"[130] nor are laws to ensure the separation of church and state aimed at the suppression of religion. "Countless decisions of the Court have relied upon the Establishment Clause to invalidate laws, not with a goal of squelching religion, but out of a legitimate desire to maintain church-state separation."[131]

Denial of a subsidy to a constitutionally protected activity is not an unconstitutional penalty

This argument is closely related to the previous issue. On one had, what is the relationship between permissible and mandatory; specifically, if scholarship aid were allowed, is it required? Locke's supporters argued permitted aid is not mandatory. On the other hand is the question whether denial of aid to a constitutionally protected activity is an unconstitutional penalty against that activity. Thus, does the refusal to provide a scholarship for ministerial training create an unconstitutional penalty upon such training? Locke's supporters, citing *U.S. v. American Library Ass'n,*[132] *Rust v. Sullivan,*[133] and *Regan v. Taxation without Representation,*[134] again argued that denial of a benefit does not constitute a penalty.

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[127] Br. American Jewish Congress, p. 7.

[128] *Davey v. Locke*, 299 F.3d 748 (9th. Cir. 2002), p. 10153.

[129] Br. American Civil Liberties Union, p. 27; Br. American Jewish Congress, p. 5.

[130] *Regan*, 461 U.S. at 550.

[131] Br. Vermont, et al. p. 8-9. See, e.g. *School Dist. of Abington Twp. V. Schemp*, 374 U.S. 203, 217-21 (1963).

[132] 123 S.Ct 2297 (2003).

In *U.S. v. American Library Ass'n* the issue at hand was the Children's Internet Protection Act (CIPA) that implemented federal funding restrictions on libraries that failed to install software to block obscene or pornographic images and to prevent minors from accessing material harmful to them. The plaintiffs on the case, a group of libraries, patrons, Web site publishers, and related parties, sued the government, challenging the constitutionality of CIPA's filtering provisions arguing that they violated the First Amendment because the filtering software requirement constituted a content-based restriction on access to a public forum.[135] This argument was upheld by the United States District Court for the Eastern District of Pennsylvania but reversed by the U.S. Supreme Court which asserted instead that,

> … a library provides Internet access for the same reasons it offers other library resources: to facilitate research, learning, and recreational pursuits by furnishing materials of requisite and appropriate quality. The fact that a library reviews and affirmatively chooses to acquire every book in its collection, but does not review every Web site that it makes available, is not a constitutionally relevant distinction.[136]

Denying funding to libraries that failed to implement Internet filters was not unconstitutional because, "A public library does not acquire Internet terminals in order to create a public forum for Web publishers to express themselves, any more than it collects books in order to provide a public forum for the authors of books to speak. It provides Internet access, not to "encourage a diversity of views from private speakers,"[137] but for the same reasons it offers other library resources: to facilitate research, learning, and recreational pursuits by furnishing

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[133] 500 U.S. 173 (1991).

[134] 461 U.S. 540 (1983).

[135] *Am Library Ass'n v. U.S.* United States District Court For The Eastern District Of Pennsylvania, NO. 01-1303. Available online at http://www.paed.uscourts.gov/documents/opinions/02d0415p.pdf .

[136] *U.S. v. Am Library Ass'n*, 123 S.Ct 2297 (2003). Available online at http://supct.law.cornell.edu/supct/html/02-361.ZO.html.

[137] Citing *Rosenberger*, *supra,* at 834.

materials of requisite and appropriate quality." While patrons might be temporarily blocked from viewing certain sites, they could easily request that blocking be removed temporarily.[138] The District Court viewed unblocking and disabling as inadequate because some patrons may be too embarrassed to request them.[139] But, the Court opined, the Constitution does not guarantee the right to acquire information at a public library without any risk of embarrassment.[140] Thus, denial of funding under CIPA is not unconstitutional. In the same way, denying funding to ministerial students is not unconstitutional.

Rust v. Sullivan addressed Section 1008 of the Public Health Service Act which specified that none of the federal funds appropriated under the Act's Title X for family-planning services "shall be used in programs where abortion is a method of family planning."[141] Here the Court ruled that "the Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternate program which seeks to deal with the problem in another way."[142] Furthermore, the Court stated, within broad limits, "when the Government appropriates public funds to establish a program it is entitled to define the limits of that program."[143] In then end, Section 1008 was upheld because, "the government is not denying a benefit to anyone, but is

[138] *Id.*

[139] 201 F. Supp. 2d, at 411.

[140] *Supra, U.S. v. Am Library Ass'n.*

[141] 500 U.S. 173 (1991). Available at http://supct.law.cornell.edu/supct/html/89-1391.ZS.html.

[142] *Id.*

[143] *Id.*, citing *Rust* v. *Sullivan*, 500 U.S. 173, 194 (1991).

instead simply insisting that public funds be spent for the purposes for which they were authorized."[144]

Finally, *Regan v. Taxation Without Representation* addressed the application by the organization Taxation Without Representation (TWR), a nonprofit corporation organized to promote its view of the "public interest" in the area of federal taxation, to the IRS for a nonprofit tax exemption.[145] The application was denied by the IRS, because it appeared that a substantial part of TWR's activities would consist of attempting to influence legislation.[146] TWR sued arguing this was unconstitutional.

In its ruling the Court again observed, "TWR is certainly correct when it states that we have held that the government may not deny a benefit to a person because he exercises a constitutional right.[147] But,

> The [tax] Code does not deny TWR the right to receive deductible contributions to support its nonlobbying activity, nor does it deny TWR any independent benefit on account of its intention to lobby. Congress has merely refused to pay for the lobbying out of public moneys. This Court has never held that Congress must grant a benefit such as TWR claims here to a person who wishes to exercise a constitutional right.[148]

So denial of funding is not unconstitutional. Furthermore, Locke's supporters argued, funding is not required even if the lack of funding puts some restrictions on the actual exercise of a constitutional right.[149] Citing *Harris v McRae*[150] the National Education Association argued, "Although the liberty protected by the Due Process Clause affords protection against

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[144] *Id.*

[145] See § 501(c)(3) of the Internal Revenue Code of 1954.

[146] *Regan v. Taxation without Representation,* 461 U.S. 540.

[147] See *Perry v. Sindermann*, 408 U.S. 593, 597 (1972).

[148] *Regan*, *supra*.

[149] Br. Anti-Defamation League, p. 11.

[150] 448 U.S. at 297.

unwarranted government interference with freedom of choice in the context of personal decisions, it does not confer an entitlement to such funds as may be necessary to realize all the advantages of that freedom."[151]

Ultimately, the Free Exercise Clause is written in terms of what the "government cannot do to the individual, not what the individual can exact from government."[152] Davey has not been harmed by the state's policies, which neither burdens his religious activity nor suppresses religious expression. Davey is still fully able to study for the ministry, but is not being subsidized to do so.[153] Because Davey was able to continue his studies in the absence of the scholarship, he is unable to argue that his religious exercise was suppressed.

Davey's situation can be contrasted with the situation in *Sherbert v. Verner*[154] which involved a "substantial" burden on Free exercise rights, when a Seventh Day Adventist employee was fired for refusing to work on Saturday. She was subsequently unable to obtain other employment because she would not work on Saturday, and she filed a claim for unemployment compensation benefits. The State Commission then denied appellant's application on the ground that, due to her religious observance of Saturdays, she would not accept suitable work when offered, and its action was sustained by the State Supreme Court. The U.S. Supreme Court disagreed, however, asserting that the South Carolina statute abridged appellant's right to the free exercise of her religion. Because the statute actively penalized Sherbert's religious behavior the Court ruled in her favor.

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[151] Br. National Education Association, p. 11.

[152] Br. American Jewish Congress, p. 6-7, citing *Lyng v. Northwestern Indian Protection Ass'n*, 485 U.S. 439 (1988).

[153] Br. Anti-Defamation League, p. 9; Br. National School Boards Association, p. 14.

[154] *Sherbert v. Verner*, 374 U.S. 398 (1963) (a Seventh-Day Adventist was fired by her employer because she would not work on Saturday).

In Davey's case, however, as Judge McKeown observed in her dissent, "Davey has sustained no substantial burden; he continues to pursue his double major in Pastoral Studies and Business Management;"[155] therefore, none of his religious behavior was penalized or even significantly impeded. Unlike the plaintiff in *Sherbert*, who was left unemployed, uncompensated, and ultimately unemployable, the only way in which respondent "suffers" is that the state will not pay for his continuing religious vocational training. The Court has previously distinguished the government's refusal to subsidize particular protected activity from *Sherbert's* "broad disqualification from receipt of public benefits."[156]

Another possible precedent rejected by Locke's supporters was *McDaniel v. Paty*.[157] Paty, a candidate for delegate to a Tennessee constitutional convention, sought to have an opponent who was a Baptist minister disqualified from serving as delegate under a Tennessee statute that made the qualifications of constitutional convention delegates as the identical to those for membership in the State House of Representatives, thus invoking a Tennessee constitutional provision barring "[m]inister[s] of the Gospel, or priest[s] of any denomination whatever.[158] "In *McDaniel*, the plaintiff was forced to choose between the free exercise of his religious beliefs and the exercise of his constitutional right to hold public office. Respondent has not been forced to choose between two competing constitutional rights.[159]

Once again in contrast, Washington's program left Davey free to pursue religious instruction. That he must do so using private funds does not render the state's program

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[155] App. 39a (dissenting opinion)..

[156] *Id*. See also *Harris v. McRae*, 448 U.S. 297 (1980) at 317 n.19.

[157] *McDaniel v. Paty*, 435 U.S. 618.

[158] Tn. Const., Art. 9, § 1.

[159] See 435 U.S. at 626 ("[T]he State has conditioned the exercise of one on the surrender of the other.").

unconstitutional.[160] Therefore, “[a]t most, Washington’s law fails to reduce the monetary cost of Davey’s studies. But, such a consequence presents no Free Exercise problem.[161] In addition, Davey can both obtain the benefits of the scholarship and pursue his theology degree. He may seek one degree with his scholarship money while pursuing a theology degree at a different school utilizing his own funds. This is closely analogous to *Regan*, where TWR could maintain its tax-exempt status if it incorporated a separate entity to perform its lobbying activities.[162] As in *Regan*, Davey can obtain the benefits of the program and exercise his religious beliefs. That such a choice may be difficult or less financially attractive, does not present a concern of constitutional dimension.[163] Furthermore, the reasoning of these decisions is simple: "although government may not place obstacles in the path of a [person's] exercise of . . . freedom of [speech], it need not remove those not of its own creation."[164]

The Promise Scholarship Program does not establish a public forum, so public forum rulings do not apply to this case

Davey’s supporters had argued that the denial of the Promise Scholarship functioned as a de facto restraint on Davey’s ability to express his faith by pursuing the ministry and that this denial was a violation of the Limited Public Forum rulings related to religious communications.[165] In response, Locke’s supporters argued that the free speech issue of “limited public forum” does not apply to this situation. According to the public-forum doctrine, government officials have less authority to restrict speech in places that by tradition have been

[160] Br. National School Boards Association , p. 15; Br. Vermont, et al. p. 5 and p, 10-12.

[161] Br. Vermont, et al. p. 7 citing *Braunfield v. Brown*, 366 U.S. 599, 605 (1961).

[162] *Regan*, fn. 6.

[163] Br. Vermont, et al. p. 8.

[164] *Harris*, *supra* at 316.

[165] Br. Black Alliance, p. 10-13; Br. United States Conference of Catholic Bishops, p. 5-6; Br. Florida, p. 14-17.

open for free expression. In *Perry Education Ass'n v. Perry Local Educators Ass'n*, the Supreme Court stated, "In places which by long tradition or by government fiat have been devoted to assembly and debate, the rights of the state to limit expressive activity are sharply circumscribed."[166] In a limited public forum, federal, state, or local government designates a place for expressive purposes. When the government designates such a forum, it is generally subject to the same free-speech standards as a traditional public forum.[167] Regardless, the limited public forum doctrine applies only to speech and expressive behavior that are not implicated in this case.[168]

Locke's supporters argued that the benefit received by Davey is not access to a forum, but a paid theological education. Thus, public forum decisions such as *Rosenberger* do not apply.[169] According to the National Education Association,

> there is no basis in either *Rosenberger* or *Velasquez*,[170] in any decision of this Court, in accepted practice, or in reason, for the proposition that where, as here, a State decides to establish a college scholarship program, the State is required to publicly fund in all the myriad fields of higher education, and that its determination not to fund religious college education 'distorts' the overall scholarship program or interferes with "the usual and proper functioning of" the program.[171]

In creating the Promise Scholarship, goal of the Washington legislature was not to facilitate private speech or create a public forum. To create a non-traditional public forum, "the government must make an affirmative choice to open up its property for use *as* a public

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[166] *Perry Ed. Assn. v. Perry Local Educators' Assn*., 460 U.S. 37 (1983).

[167] For a detailed discussion of public forum doctrines, see L. Jacobs, "The Public Sensibilities Forum," 95 *Nw. U. L. Rev.* 1357, 1370 (2001).

[168] Br. Anti-Defamation League, p. 11; Br. Vermont, et al. p. 13.

[169] Br. American Jewish Congress , p. 7; Br. National School Boards Association, p. 17.

[170] 531 U.S. 542-44.

[171] Br. National Education Association , p. 4.

forum."[172] "The government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a non-traditional forum for public discourse."[173] Instead, the Washington legislature created the program to help qualified applicants obtain college degrees.[174]

Finally, Locke's supporters further argued that rather than *Rosenberger* the appropriate precedent was *American Library Ass'n.* Like the Internet access provided in that case the Washington program provides scholarships "not to 'encourage a diversity of views from private speakers' but … to facilitate research and learning."[175]

Accepting Davey's position will flood states with litigation

According to Locke's supporters, the interests at stake in the case are not limited to Washington, but will affect the laws, regulations, and policies of a large number of states beyond Washington having similar constitutional provisions.[176] An examination of state constitutions leads one to the conclusion that of the states with such clauses, at least twelve[177] have a stricter standard of separation than the First Amendment of the U.S. constitution;[178] and these states would be profoundly affected by accepting the arguments of Davey's supporters.

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[172] *Am. Library Ass'n*, 123 S.Ct, at 2305 (emphasis in source).

[173] *Id*., quoting *Cornelius v. NACCP Legal Def. & Educ. Fund*, 473 U.S. 788, 802 (1985).

[174] Br. National School Boards Association, p. 17.

[175] Br. National School Boards Association , p. 18, citing *American Library Ass'n* 123 S. Ct. at 2305 (quoting *Rosenberger*, 515 U.S. at 834 (1995).

[176] Br. Anti-Defamation League, p. 22.

[177] Alaska, California, Delaware, Hawaii, Idaho, Michigan, Minnesota, Missouri, Nebraska, South Dakota, Virginia, and Washington.

[178] Br. Anti-Defamation League, p. 23, fn10; see also Viteritti, J. "Blaine's Wake: School Choice, The First Amendment and State Constitutional Law," 21 *Harv. J.L. & Pub. Pol'y* 657, 681 n.110 (1998).

For example, budget limitations at the state level would make it impossible to fund all programs; thus states would have to fund some programs and not others. This will force the courts to define the boundaries of such decision-making and allocation to ensure neutrality.[179] Many states might then have no choice but to shut down distribution of funds entirely to avoid litigation.[180]

Furthermore, a ruling in favor of Davey could "endanger[] the heart of the nation's social services system."[181] For example, the "Charitable Choice" movement allows religious groups to compete for government funding alongside other providers. But the dominance of majority religious groups in the US indicates that it will be "functionally impossible for governments to administer such programs without violating both the Establishment Clause and the Free Exercise Clause."[182] The potential for social conflict among religions related to charitable choice programs are very real. According to the 2001 Pew Research Center for the People and the Press report *Faith Based Funding Backed, But Church-State Doubts Abound*, Americans generally support faith-based groups receiving tax dollars to provide social services but that support does not extend to all religious groups equally. Forty-six percent of those surveyed opposed Muslim or Buddhist groups receiving government funding and forty-one percent also opposed the participation of the Mormon Church in government aid programs. The survey showed both a clear bias for "traditional" Judeo-Christian groups as well as serious reservations regarding participation by non-Judeo-Christian organizations in government-funded programs.[183]

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[179] *Id*., p. 15

[180] *Id*.

[181] *Id*., p. 13

[182] *Id*., p. 14

[183] Pew Research Center for the People and the Press, "Faith Based Funding Backed, But Church-State Doubts Abound," Apr. 10, 2001, pp 12-13, at http://people-press.org/reports/display.php3?ReportID=15.

Blaine Amendment History

As stated earlier, the briefs in support of Locke generally accept the claim that the Washington Promise Scholarship Program provision denying aid to ministerial students reflects Article I, Section 11 of the Washington Constitution – that state's "Blaine Amendment." Locke's supporters, however, saw a very different history of this clause than did Davey's supporters.

First, Locke's supporters point out that the so-called "Blaine Amendment" language originated long before Blaine's failed amendment. "Michigan adopted a no-funding provision in its 1835 constitution even though the state lacked a significant number of Catholic parochial schools and the enactment came before the wave of Catholic immigration.[184] Furthermore, "Catholic and Presbyterian clergy were instrumental in the movement to establish universal nonsectarian schooling at both the collegiate and common school levels."[185]

The fact that the language of the Blaine Amendments pre-dates the Blaine period is telling. According to Locke's supporters, Washington Constitution Article I, Section 11, along with other similar clauses in state constitutions, reflects, among other sources, Virginia's *Act for Establishing Religious Freedom* of 1786. This Act asserts:

> … that to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical; that even the forcing him to support this or that teacher of his own religious persuasion, is depriving him of the comfortable liberty of giving his contributions to the particular pastor whose morals he would make his pattern, and whose powers he feels most persuasive to righteousness, and is withdrawing from the ministry those temporal rewards, which proceeding from an approbation of their personal conduct, are an additional incitement to earnest and unremitting labors for the instruction of mankind.[186]

And later,

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[184] Br. Historians and Law Scholars, p. 27, n40 citing Cooley, T., *Michigan: A History of Governments*, 8th ed., 1897, p. 306-329.

[185] *Id*. at 309-311.

[186] Va. Code Ann. § 57-1. Online at http://religiousfreedom.lib.virginia.edu/sacred/vaact.html.

> Be it therefore enacted by the General Assembly, That no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested, or burdened in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief; but that all men shall be free to profess, and by argument to maintain, their opinions in matters of religion, and that the same shall in nowise diminish, enlarge, or affect their civil capacities.[187]

Thomas Jefferson and James Madison, authors of this *Act*, were responding to an attempt by the Virginia Assembly to impose a tax to support of houses of worship and teachers of religion, including teachers in private religious schools.[188] The *Act* gradually gained support from Baptists, Presbyterians, Jews, a few Anglicans, people who were tired of religious conflict and freethinkers among others.[189] James Madison's *Memorial and Remonstrance* of 1785[190] presented before the Virginia General Assembly garnered support for Jefferson's bill. Among other principles, the Memorial declared,

> Because we hold it for a fundamental and undeniable truth, 'that religion or the duty which we owe to our Creator and the manner of discharging it, can be directed only by reason and conviction, not by force or violence.' The Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate. This right is in its nature an unalienable right.[191]

Somewhat amended,[192] the Virginia Assembly adopted the *Act* on January 16th, 1786.

According to Locke's supporters, foundational principles and documents were not the only source for the kind of no compulsory support principle embodied in Article 1, § 11 of the

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[187] Va. Code Ann. § 57-1 cited in Br. American Civil Liberties Union, p. 15; Br. Historians and Law Scholars, p. 16-17. The text of the Act is available online at http://religiousfreedom.lib.virginia.edu/sacred/vaact.html.

[188] *Id*. at 17, citing Douglas Laycock, "'Nonpreferential' Aid to Religion: A False Claim About Original Intent," 27 *Wm & Mary Rev*. 875, 897 & n.108 (1986); Thomas Buckley, *Church and State in Revolutionary Virginia, 1776-1787* (Charlottesville: University Press of Virginia, 1977), p. 133.

[189] E.S. Gaustad, *Faith of Our Fathers: Religion and the New Nation*, Harper & Row, New York NY, (1987), P. 141-149.

[190] http://religiousfreedom.lib.virginia.edu/sacred/madison_m&r_1785.html.

[191] James Madison, *A Memorial and Remonstrance*, June 20, 1785. Available online at http://www.law.ou.edu/ushistory/remon.shtml.

[192] Gaustad, *supra*, p. 149-151.

Washington Constitution; real world situations showed communities grappling with religious funding issues and ultimately abandoning the practice of allowing state funds to flow to religious institutions. For example: In 1822 Bethel Baptist Church in New York secured a state grant to build a school. The Free School Society, officially "nonsectarian" though Protestant influenced, objected that the grant "impose[d] a direct tax on our citizens for the support of religion."[193] After considering the challenge, the New York legislative Committee on Colleges, Academies and Common Schools recommended in 1824 that the legislature discontinue funding for denominational schools.[194] The Legislature accepted this recommendation.[195] As the Historians and Law Scholars observe, "what is significant about this example is that opposition to funding of sectarian schools arose in the context of a request made by a Protestant school."[196]

In another interesting example from 1830, again in New York, the Methodist Charity School and the Roman Catholic Orphan Asylum each petitioned for a share of the school fund to support their respective programs.[197] The Free School Society once again objected arguing, "one of the objects aimed at in all such schools is to inculcate the particular doctrines and opinions of the sect having management of them."[198] The Common Council approved payment to the Catholic Orphan Society on the apparent theory that the funds primarily supported the care of the

[193] Br. Historians and Law Scholars, p. 21.

[194] *Id.*, p. 22.

[195] William O. Bourne, *History of the Public School Society of the City of New York* (London: Wm. Wood and Co. 1870), p. 70 – 72, cited by Historians, p. 22. See also John W. Pratt, *Religion, Politics, and Diversity: The Church-State Theme in New York History* (Ithaca, NY: Cornell University Press, 1967), p. 167.

[196] Br. Historians and Law Scholars, p. 22.

[197] *Id.*., p. 23.

[198] "Memorial and Petition of the Mayor, Alderman, and Commonality of the city of New York," in Bourne, *supra*, at 66, cited by Historians at n.30, p. 23.

orphans not their education; however, the Methodist request was denied on the grounds that public funds could not pay for sectarian education.[199]

These examples raise a related point: opponents of the so-called Blaine Amendments assert that the term "sectarian" functioned in the latter half of the Nineteenth Century as a "code word" for "Catholic.[200] However, in these examples, the term sectarian is clearly applied to both Catholic and Protestant activities alike. Therefore, the assertion of the Blaine opponents that "sectarian" was a term of anti-Catholic animus is not always correct. Instead, according to the Historians and Law Scholars, the popular understanding of the time is that "a sectarian school was any religious school in which particular doctrines were taught."[201] Specifically, they observe, referring to the events of 1830, "[t]he episode again indicates that all parties viewed the notion of sectarian education and the accompanying bar on its funding in generic terms, applying to all religious schools."[202]

In fact, as the Historians brief observes, in states such as Wisconsin the common school movement, the debate over "sectarian" practices in those schools, and the appearance of a "Blaine Amendment" in the state constitution all pre-date the appearance of parochial schools.[203] Even critics of the common schools who might be looking for grounds to support their criticisms documented no anti-Catholic hostility during the development of the Wisconsin school

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[199] *Id*. at 145, 148 cited by Historians, p. 24.

[200] Thomas, J. *Mitchell v. Helms*, 530 U.S. 793 (2000) 151 F.3d 347, p.30 citing Steven K. Green, "The Blaine Amendment Reconsidered," 36 *Am. J. Legal Hist.* 38 (1992). See also Br. Common Good, p. 4; Br. Becket Fund, p.15 – 18, citing a number of rulings that determined the King James version of the Bible was not "sectarian" and therefore did not run afoul of state Blaine Amendments.

[201] Br. Historians and Law Scholars, p. 23.

[202] *Id*. p. 24.

[203] I. p. 27 citing Alice E. Smith, *1 The History of Wisconsin*, 588-589 (1985); Richard N. Current, *2 The History of Wisconsin*, 162-169 (1976); Joseph A. Ranney, "'Absolute Common Ground': The Four Eras of Assimilation in Wisconsin Education Law," *Wis. L. Rev*. 791, 793, 796-97 (1998).

system.[204] This pattern was also true in Michigan where at the same time as the drafting of its 1835 constitution the Protestant Home Missionary Society was reporting that Catholic activity was not a concern in the upper Midwest.[205] Furthermore, Catholic as well as Protestant clergy were both involved in the drive to establish nonsectarian education as the norm at the common school and college levels.[206]

A third reason for disavowing the connection between the Washington clause and Nineteenth Century anti-Catholicism is that the appearance of no-funding clauses pre-dates the era of anti-Catholicism. For example, "Michigan incorporated a “Blaine Amendment” provision in its 1835 constitution[207] even though there were few Catholic parochial schools in Michigan and the wave of Catholic immigration had yet to take place.[208] The Michigan Constitution and its “Blaine Amendment” then served as the model for similar clauses in Wisconsin (1848),[209] Indiana (1851),[210] Minnesota (1857),[211] and Oregon (1857),[212] “all states without significant

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[204] *Id*., citing Lloyd P. Jorgenson, *The Founding of Public Education in Wisconsin*, (Madison, WI: State Historical Society of Wisconsin, 1952), p. 68-93.

[205] Ray Allen Billington, *The Protestant Crusade, 1800-1860* (Peter Smith Publishers, 1938), n28, at 130; cited in Br. Historians, p. 27.

[206] Tomas M. Cooley, *Michigan: A History of Governments*, 8th Edition,. (NY: Houghton, Mifflin and Co., 1897), p. 306 – 329; cited in Historians, p. 27.

[207] “Mich. Const. of 1835, Art. I, § 5. “No money shall be drawn from the treasury for the benefit of religious societies, or theological or religious seminaries.”

[208] Br. Historians and Law Scholars, p. 26.

[209] Wisc. Const. of 1848, Art. 1, § 18: “The right of every man to worship Almighty God according to the dictates of his own conscience, shall never be infringed, nor shall any man be compelled to attend, erect, or support any place of worship, or to maintain any ministry against his consent; nor shall any control or interference with the rights of conscience be permitted, or any preference be given by law to any religious establishments or modes of worship, nor shall any money be drawn from the treasury for the benefit of religious societies or theological or religious seminaries.”

[210] Ind. Const. of 1851, Art. 1, §. 2-4: “All men shall be secured in the natural right to worship *Almighty God*, according to the dictates of their own consciences. No law shall, in any case whatever, control the free exercise and enjoyment of religious opinions, or interfere with the rights of conscience. No preference shall be given, by law, to any creed, religious society, or mode of worship; and no man shall be compelled to attend, erect, or support, any place of worship, or to maintain any ministry, against his consent.”

conflicts over parochial school funding at the time;[213] and, it should be noted, 20-plus years prior to Blaine's failed federal amendment.

In Washington the first Constitution was ratified by the people of Washington in 1878 but because the Washington territory did not become a state that year, that Constitution was superseded by statehood and the Constitution of 1889.[214] However, the 1878 Constitution contains Washington's first statement of a no-compulsory support clause in Art. 5, § 4:

> All persons have a natural and indefeasible right to worship God according to the dictates of their own consciences. No person shall be compelled to attend, erect, or support any place of worship against his consent; and no preference shall be given by law to any religious society; nor shall any interference with the rights of conscience be permitted.[215]

Likewise, the first official Washington State Constitution of 1889 contains a similar clause:

> Absolute freedom of conscience in all matters of religious sentiment, belief, and worship, shall be guaranteed to every individual, and no one shall be molested or disturbed in person, or property, on account of religion; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness, or justify

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[211] Minn. Const. of 1857, Art. 1, § 16: "The right of every man to worship God according to the dictates of his own conscience shall never be infringed; nor shall any man be compelled to attend, erect or support any place of worship, or to maintain any religious or ecclesiastical ministry, against his consent; nor shall any control of or interference with the rights of conscience be permitted, or any preference be given by law to any religious establishment or mode of worship; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness or justify practices inconsistent with the peace or safety of the state, nor shall any money be drawn from the treasury for the benefit of any religious societies or religious or theological seminaries."

[212] Ore. Const. of 1857, Art. 1, § 2-6: "All men shall be secure in the natural right, to worship Almighty God according to the dictates of their own consciences. No law shall in any case whatever control the free exercise, and enjoyment of the religious opinions, or interfere with the rights of conscience. No religious test shall be required as a qualification for any of trust or profit. No money shall be drawn from the Treasury for the benefit of any religious, or theological institution, nor shall any money be appropriated for the payment of any religious services in either house of the Legislative Assembly. No person shall be rendered incompetent as a witness, or juror in consequence of his opinions on matters of religion; nor be questioned in any Court of Justice touching his religious belief to affect the weight of his testimony. "

[213] Br. Historians and Law Scholars, p. 27.

[214] See Meany & Condon, "Washington's First Constitution," 9 *Wash.Hist.Q.* 145 (1918), reprinted in E. Meany & J. Condon, *Washington's First Constitution, 1878, and Proceedings of the Convention* 19 (1924).

[215] Wash. Const. of 1879, Art. 5, § 4.

> practices inconsistent with the peace and safety of the state. 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. No religious qualification shall be required for any public office, or employment, nor shall any person be incompetent as a witness, or juror, in consequence of his opinion on matters of religion, nor be questioned in any court of justice touching his religious belief to affect the weight of his testimony.[216]

That each of these clauses from Michigan through Washington spanning 1835 to 1889 employ very similar language suggests a pattern of origins and influence much larger than anti-Catholicism in the last half of the Nineteenth Century.

This no-funding principle is based on concepts of religious liberty and liberty of conscience that arose prior to and independently of the beginnings of Catholic schooling or the rise of the nativist movement in the United States.[217] In fact, it is a product of the same Eighteenth Century political thinking that gave rise to the Declaration of Independence and the Constitution of the United States. As such, the no-funding principle is deeply embedded in the American Constitutional tradition.

Fourth, simply labeling Washington's constitutional provision a "Blaine Amendment" does not make it constitutionally suspect. While some supporters of the Blaine Amendments generally and the Washington clause specifically may have desired to prevent public funds from supporting parochial schools, these clauses have a broader and non-discriminatory scope.[218] The Washington clause in particular, the subject of this case, reflects a "lack of hostility toward

[216] Wash. Const. of 1889, Art. 1, § 11.

[217] Br. Historians and Law Scholars, p. 15-16.

[218] Br. Vermont, p. 28, n. 12; citing *State ex rel. Frazier*, 173 P. at 35 (Washington, 1918); Derek Green, "Note, Does Free Exercise Mean Free State Funding? In Davey v. Locke, the Ninth Circuit Court Undervalued Washington's Vision of Religious Liberty," 78 *Wash L. Rev*. 653, 680 n.271 (2003).

religion generally"[219] and there is no evidence that the framers of Article I, section 11 were motivated by anti-religious or Catholic animus.[220] Although hostility toward Catholic immigrants and parochial schools may have motivated some supporters of Blaine's proposed Amendment, that hostility was not the only basis for the amendment nor the only rationale for supporting it. Similarly, there is a lack of evidence that anti-Catholic animus was behind the passage of the Enabling Act of 1889."[221]

As with any historical event, it is easy to identify one current out of myriad historical streams and to attribute causation. We see this in the assertion that the Blaine Amendments are the products of anti-Catholic animus. However, this kind of uni-casual assertion fails, because Art. I, section 11 of the Washington Constitution, like many similar clauses in other state constitutions enacted during the latter half of the Nineteenth Century, arose out of "a complex dynamic of forces that intersected over the issue of American public schooling" and cannot legitimately be identified as the product of only one cause or factor.[222]

According to the brief for Locke of the Historians and Law Scholars, the events that culminated in Blaine's proposed amendment to the U.S. Constitution emerged from a controversy in Cincinnati, Ohio over an 1869 decision by the school board to eliminate daily Bible readings from the King James Bible followed by a moment for prayer. Watched by the entire country,[223] "the Cincinnati 'Bible War' reignited a debate over the religious character of

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[219] *Id*., citing Robert Utter and Edward Larson, "Church State on the Frontier: The History of the Establishment Clause in the Washington Constitution," 15 *Hastings Const. L.Q.* 451, 472 (1988).

[220] Historians, p. 38ff.

[221] *Id*., p. 13.

[222] *Id*., p. 12.

[223] *Nation*, IX (November 18, 1869), 430, cited in Helfman, H. M, *The Cincinnati "Bible War," 1869-1870*. (*Ohio History: The Scholarly Journal of the Ohio Historical Society*, Volume 60, No.4, October 1951).

public schooling – over whether schools should retain their Protestant nonsectarian complexion or whether they would become truly secular and open to all faiths and nationalities."[224] This religious neutrality paradigm is seen clearly in the closing speech of John Stallo, one of the attorneys defending the school board's decision:

> The spires will point to the heaven, the unmuffled church bells will speak of God, as before; the 'free Bible' will have free sway; but in a free State, in free churches or religious schools, by the side of free secular schools. And I hope my friend will not regard it as a calamity if the son of a Presbyterian or Methodist, after his intercourse with the child of a Jew, Catholic, or unbeliever, should turn to the Scriptures with the feeling that the truth is broader than the leaves of any book… [225]

Following the Cincinnati case, the New York and Chicago school boards prohibited Bible reading and religious instruction in their respective schools, with similar bans being adopted in Michigan and other northern states.[226] So the problems of prayer and Bible reading as well as public funding of religious activities in the common schools are once again seen to pre-date Blaine.

The Blaine Amendment itself was "the culmination of eight years of heightened attention to and conflict over the 'School Question.'"[227] Arising in the years following the Civil War, the School Question involved more than just concerns about tax dollars going to Catholic schools; instead, that issue was part of a larger debate over what role the federal government should have in public education, over whether public education should be available for all social and economic classes and races, over deciding how to provide adequate ongoing funding of the new common school systems, and over whether the content of public education should be "secular,

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[224] Br. Historians and Law Scholars, *supra* at 31-32.

[225] Stephan F. Brumberg,, "The Cincinnati Bible War (1869-1873) and its Impact on the Education of the City's Protestants, Catholics, and Jews" *The American Jewish Archives Journal*, LIV, No. 2, 11-46. (2003).

[226] *New York Times*, Dec. 9, 1872, at 8; cited in Brumberg at 32.

[227] *Id.*, at 30.

nonsectarian (i.e., watered-down Protestantism), or be more religious."[228] Regarding his own proposal, James Blaine himself, said that the amendment he put forth, which putatively formed the basis for the state Blaine Amendments, was meant to be "fair alike to Protestant and Catholic, to Jew and Gentile, leaving the religious faith and conscience of every man free and unmolested."[229]

Interestingly enough, the Solidarity Center, in its brief for Davey cited the leading Secularist and Freethinker, Robert Green Ingersoll, who gave the famous "Plumed Knight" speech in support of the Presidential nomination of this close friend, U.S. Senator James G. Blaine, at the 1876 Republican National Convention. In the speech, Ingersoll remarked that the Republicans of the United States "demand a man who believes in the eternal separation and divorcement of church and school."[230] The Solidarity Center then observed, "[i]t is likely that, over the course of their seven-year friendship prior to Blaine's 1875 campaign for a Constitutional ban on the allocation of public school funds to religious institutions, Ingersoll (one of history's most persuasive orators) influenced Blaine to adopt a strictly secularist attitude toward the public financing of education."[231] This statement from a Davey support and Blaine Amendment opponent clearly seems to support the argument that the Blaine Amendment and its supposed progeny were neutral in intent and that it was not anti-Catholic hostility that inspired Blaine and other supporters of Blaine-type amendments.

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[228] Ward M. McAfee, *Religion, Race, and Reconstruction: The Public School in the Politics of the 1870s.* (State University of New York Press, 1998), p. 105-124.

[229] Robert F. Utter & Edward Larson, "Church and State on the Frontier: The History of the Establishment Clauses in the Washington State Constitution," 15 *Hastings Const. L. Q.* 451 at 473 n.110 (quoting C. Balestier, *James G. Blaine: A Sketch of His Life* (New York: R. Worthington, 1884), p. 59; cited in Br. Anti-Defamation League, p. 24, fn 11.

[230] Robert Ingersoll, "Speech at Cincinnatti," *The Works of Robert G. Ingersoll*, Vol 9, 58 (1900); cited in Br. Solidarity Center for Religion and Justice, p. 23.

[231] *Id*. p. 23.

Locke's supporters also argued that "it is inaccurate to speak of *a* Blaine Amendment, particularly as a concept or model for the Enabling Act or state constitutional provisions." Instead, the last quarter of the Nineteenth Century saw numerous education-related proposals for constitutional amendments addressing religious practice in public schools and religion-based school funding: President Ulysses Grant's strict neutrality proposal; James G. Blaine's original proposal; an alternative proposed by Democrats; secularist proposals and ultra-conservative religious proposals; the version passed by the House; and the failed Senate version – all of which contained different wording and intents and all of which received different levels of opposition and support.[232]

Locke's supporters also agreed that the Washington Constitutional Provision "emerged as part of the 19th century controversy over funding Catholic education," but they argued that "it does not follow that it was impermissibly motivated by anti-Catholicism."[233] The Catholic Church in the Nineteenth Century was officially opposed to church-state separation.[234] This led to the fear that the growing population of Catholics, theoretically required to place obedience to the church above obedience to the state, posed a threat to the still insecure Republic.[235] In this context, the American Jewish Congress brief argued that while "The Catholic Church had every right to advance its political positions,"[236]… "opponents of this ordering of church-state relations

[232] Br. Historians and Law Scholars, *supra* at 31.

[233] Br. American Jewish Congress, p. 2.

[234] Pope Pius VII, "On a Return to Gospel Principles," 15 May 1800, Para. 18; Pope Gregory XVI, "On Liberalism and Religious Indifferentism, "15 August 1832, Para. 20; Pope Pius IX, "Condemning Current Errors," 8 December 1864, Para. 3; Pope Pius IX, "Syllabus of Errors," 8 December 1864, Para. 55; Pope Leo XIII, "On Christians as Citizens," 10 January 1890, Para. 10. See also Appendix C.

[235] Recall that the Blaine "period" was just a decade away from the Civil War and Reconstruction in the South which had ended in failure in 1877. See Eric Foner, *Reconstruction: America's Unfinished Revolution, 1863 – 1877*. (Harper and Row, 1988).

[236] American Jewish Congress, p. 9.

were entitled to forestall the possibility of a drastic reordering of the American church-state settlement with stringent anti-aid provisions without being condemned, retroactively, as bigots."[237] "Nineteenth Century efforts to restate and reinforce the Madisonian separation of church and state were not railing against a will-o-the-wisp, responding to the overheated imagination of demagogues, or scapegoating the innocent."[238] They were responses to "a legitimate fear – which only in hindsight can be dismissed as unfounded – that the Catholic Church sought exclusive political power, and that, if it could, it would establish itself as the sole official church."[239] [See Appendix C]

Finally, regardless of possible anti-Catholic origins, the relationship of the past to the present is an appropriate reason to refuse to consider the origin of these Amendments as either the sole issue or even as the critical issue for determining the Constitutionality of the so-called "Blaine Amendments: specifically, "[a]ny initial animus in the amendments has been purged by years of Washington's reaffirmation to the principles of separation of church and state."[240] The provision before the Court in *Locke v. Davey*, Article I, section 11 was amended in 1903, 1957, and again in 1993. Having been "reconsidered and reauthorized, the amendment is purged of whatever taints may have existed in the 1880s."[241] "Moreover, the mere fact that a law originally may have had a discriminatory purpose should not be permitted to abrogate the neutral role those laws have come to play in our poly-theistic society."[242]

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[237] *Id*.. at 2.

[238] *Id*. at 8.

[239] *Id*. at 9.

[240] Br. Anti-Defamation League, *supra*, at 25.

[241] *Id*. at 25.

[242] *Id*. at 25. See also *McGowan v. Maryland*, 366 U.S. 420, 445(1961) ("the present purpose and effect of most [Sunday closing laws] is to provide a uniform day of rest for all citizens; the fact that this day is Sunday, a day of

As can be seen from this analysis of the arguments presented to the Court, both sides agreed that the denial of the scholarship to Davey was the direct result of the Washington legislature's understanding of Article I, Section 3 of the state constitution – the state's Blaine Amendment. That understanding was written into the rules of the Promise Scholarship Program leading to the rule denying state funding for ministerial education, even to a person otherwise qualified for the scholarship attending a school otherwise qualified to participate in the program. Clearly, the Washington Blaine Amendment here has adversely impacted one avenue by which state funds might flow to religious schools. As a result, however the Supreme Court ruled in *Locke* was going to have significant consequences for educational funding and state funding policies in general.

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particular significance for the dominant Christian sects, does not bar the State from achieving it secular goals. To say that the States cannot prescribe Sunday as a day of rest for these purposes solely because centuries ago such laws had their genesis in religion would give a constitutional interpretation of hostility to the public welfare rather than one of mere separation of church and State.").

CHAPTER 4
THE SUPREME COURT DECISION IN LOCKE AND AN ANALYSIS OF STATE CONSTITUTIONS

With widespread agreement that the denial of the Promise Scholarship to Davey resulted from the Washington state Blaine Amendment, and with seven of nine Justices on record as questioning the validity of state Blaine Amendments, *Locke v. Davey*, which placed the Blaine Amendment at the heart of the case, was widely anticipated as the "swan song" for Blaine Amendments.[1] This anticipation, however, was premature.[2]

On February 25, 2004 the Supreme Court delivered its decision in *Locke* determining that Washington's exclusion of the pursuit of a devotional theology degree from its otherwise-inclusive scholarship aid program did not violate the Free Exercise Clause. The Court asserted that this case involves the "play in the joints" between the Establishment and Free Exercise Clauses;[3] that the Washington Promise Scholarship Program prohibition of ministerial study falls into the realm of state action that is permitted by the former but not required by the latter.

The Court rejected Davey's contention that, under *Lukumi*,[4] the program is presumptively unconstitutional because it is not facially neutral with respect to religion asserting that accepting this claim would extend *Lukumi* and related cases "well beyond their facts and reasoning."[5] This was because in *Locke* the state's disfavor of religion[6] is of a far milder kind than in *Lukumi*, where the ordinance criminalized the ritualistic animal sacrifices of the Santeria religion.

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[1] Martha McCarthy, **"**Room for 'Play in the Joints' - Locke v. Davey." *Journal of Law and Education;* Oct 2004; 33, 4; pg. 457.

[2] McCarthy, 459.

[3] *Walz v. Tax Comm'n of City of New York*, 397 U.S. 664, 669.

[4] C*hurch of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U. S. 520 (1993).

[5] Rehnquist, W. Decision of the Court in *Locke v. Davey* at p. 6.

[6] *Id*. The decision also questioned whether the Washington program could even be considered to disfavor religion.

Washington's program imposed neither criminal nor civil sanctions on any type of religious activity. Likewise, the Washington program does not deny to ministers or to ministerial students the right to participate in community political affairs;[7] nor does it require students to choose between their religious beliefs and receiving a government benefit.[8] In this program, the Court asserted, the State has simply chosen not to fund a distinct category of instruction.[9]

The Court further observed that even though the differently worded Washington Constitution draws a more stringent line than does the Federal Constitution, "the interest it seeks to further is scarcely novel."[10] The Court rejected Justice Scalia's argument in dissent that because generally available benefits are part of the "baseline against which burdens on religion are measured"[11] and because the Promise Scholarship Program funds training for all secular professions, the State must also fund training for religious professions.[12] Instead, the majority asserted that "training for religious professions and training for secular professions are not fungible."[13] Training someone to lead a congregation, the Court noted, is an essentially religious endeavor,[14] and majoring in devotional theology is akin to a religious calling as well as an academic pursuit.[15]

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[7] See *McDaniel v. Paty*, 435 U.S. 618.

[8] See, e.g., *Hobbie v. Unemployment Appeals Comm'n of Fla*., 480 U.S. 136 (1987).

[9] Rehnquist, *supra*, p. 7.

[10] *Id*. p. 8.

[11] Scalia, dissenting opinion, p. 2.

[12] *Id*.

[13] Rehnquist, *supra* at 7.

[14] *Id*.

[15] *Id*. See also *Calvary Bible Presbyterian Church* v. *Board of Regents*, 72 Wash. 2d 912, 919, 436 P. 2d 189, 193 (1967) (holding public funds may not be expended for "that category of instruction that resembles worship and manifests a devotion to religion and religious principles in thought, feeling, belief, and conduct.); App. 40 (Davey stating his "religious beliefs [were] the only reason for [him] to seek a college degree").

In fact, the Court declared, there are few areas more significant for a State's anti-establishment interests. Since the founding of the United States, there have been popular uprisings against procuring taxpayer funds to support church leaders, which was characteristic of "established" religion. Perhaps the most famous example of such public backlash is the defeat of the 1784 *Bill Establishing A Provision for Teachers of the Christian Religion* in the Virginia Legislature which sought to assess a tax for "Christian teachers."[16] This bill stipulated that the collectors of this tax were to record both the assessment paid and the "society of Christians the person from whom he may receive the same" so the funds (minus a collection fee) could be given to a religious teacher from the same sect.[17] Against this bill, James Madison penned his famous *Memorial and Remonstrance Against Religious Assessments* in 1785 arguing that compulsory support for religious organizations was a violation of individual conscience.[18]

Following public outcry, the bill was rejected; and instead, in 1786, the *Virginia Bill for Religious Liberty*, drafted by Thomas Jefferson, was enacted. This bill asserted,

> ... that to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical; that even the forcing him to support this or that teacher of his own religious persuasion, is depriving him of the comfortable liberty of giving his contributions to the particular pastor whose morals he would make his pattern, and whose powers he feels most persuasive to righteousness…[19]

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[16] Reprinted in *Everson* v. *Board of Ed. of Ewing*, 330 U. S. 1, 74 (1947) (supplemental appendix to dissent of Rutledge, J.); see also *Rosenberger*, *supra*, at 853 (Thomas, J., concurring) (purpose of the bill was to support "clergy in the performance of their function of teaching religion").

[17] Patrick Henry, *A Bill Establishing a Provision for Teachers of the Christian Religion.* Virginia House of Delegates, December 24, 1784, Broadside Manuscript Division, Library of Congress (133). [Online] http://www.loc.gov/exhibits/religion/f0504s.jpg.

[18] Online at http://press-pubs.uchicago.edu/founders/documents/amendI_religions43.html. See also *Everson* v. *Board of Ed. of Ewing*, 330 U. S. 1, 65, 68 (1947) (appendix to dissent of Rutledge, J.) (noting the dangers to civil liberties from supporting clergy with public funds).

[19] Thomas Jefferson, *Virginia Bill for Religious Liberty* (1786). Online at http://1stam.umn.edu/main/historic/Virginia Bill for Religious Liberty.htm.

and guaranteed "that no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever."[20]

Virginia was not alone dealing with this issue. Most Eighteenth Century state legislatures struggled with the issue of established religion; and most decided to avoid such establishment and placed in their state constitutions prohibitions against using tax funds to support the ministry[21] [See Table 4-1]. For the Supreme Court in *Locke*, that is a critical point: "That early state constitutions saw no problem in explicitly excluding *only* the ministry from receiving state dollars reinforces the conclusion that religious instruction is of a different ilk from other professions."[22]

Moreover, the Court observed, taken as a whole the Promise Scholarship Program goes a long way toward including religion in its benefits, since it permits students to attend pervasively religious schools so long as they are accredited, and students are still eligible to take devotional theology courses under the program's current guidelines. The Court also observed that nothing in the history or the text of the Washington Constitution or in the program's operation suggests hostility towards religion. In fact, Washington was identified as "solicitous in ensuring that its constitution is not hostile toward religion."[23] Furthermore, the Court asserted, it found nothing in

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[20] "A Bill for Establishing Religious Freedom," reprinted in *2 Papers of Thomas Jefferson 546* (J. Boyd ed. 1950). See also See R. Butts, *The American Tradition in Religion and Education* 15.17, 19.20, 26.37 (1950); F. Lambert, *The Founding Fathers and the Place of Religion in America* 188 (2003) ("In defending their religious liberty against overreaching clergy, Americans in all regions found that Radical Whig ideas best framed their argument that state-supported clergy undermined liberty of conscience and should be opposed").

[21] Rehnquist, *supra* at 9.

[22] *Id*. at 9-10.

[23] Citing *State ex rel. Gallwey* v. *Grimm*, 146 Wash. 2d 445, 470, 48 P. 3d 274, 286 (2002) ("[I]t was never the intention that our constitution should be construed in any manner indicating any hostility toward religion." (citation omitted)), and at least in some respects, its constitution provides greater protection of religious liberties than the Free Exercise Clause, see *First Covenant Church of Seattle* v. *Seattle*, 120 Wash. 2d 203, 223.229, 840 P. 2d 174, 186.188 (1992) (rejecting standard in *Employment Div., Dept. of Human Resources of Ore.* v *Smith*, 494 U. S. 872 (1990), in favor of more protective rule); *Munns* v. *Martin*, 131 Wash. 2d 192, 201, 930 P. 2d 318, 322 (1997) (holding a city ordinance that imposed controls on demolition of historic structures inapplicable to the Catholic

Washington's overall approach that indicates it "single[s] out" anyone "for special burdens on the basis of . . . "religious callings" as Justice Scalia contended.[24] As a result, "[g]iven the historic and substantial state interest at issue, it cannot be concluded that the denial of funding for vocational religious instruction alone is inherently constitutionally suspect. Without a presumption of unconstitutionality, Davey's claim must fail."[25] Therefore, "the State's interest in not funding the pursuit of devotional degrees is substantial, and the exclusion of such funding places a relatively minor burden on Promise Scholars. If any room exists between the two Religion Clauses, it must be here."[26]

Thus, Davey's petition for state funding was lost; a decision with major implications for policy-makers in all fifty states. Likewise, this decision, in determining that Article I, Sec. 11 of the Washington Constitution was not a Blaine Amendment opens up new possibilities – and challenges – for educational funding programs and policies many had deemed closed.

The *Locke* decision was a surprise to many.[27] In the earlier *Mitchell* and *Zelman* rulings, a substantial majority of the sitting Justices had already raised questions about the validity of Blaine Amendments; and some had actively called for the abolition of these clauses. *Locke* seemed ideally positioned to give to those Justices an opportunity to rule decisively on the Blaine Amendments. Instead, Chief Justice Rehnquist – previously on record as a Blaine opponent – closed the door on a sweeping determination of unconstitutionality by declaring that the Washington clause in question was not a Blaine Amendment:

Church's plan to demolish an old school building and build a new pastoral center because the facilities are intimately associated with the church's religious mission).

[24] Rehnquist, *supra* at 10-11 citing Scalia (dissent) at 6.

[25] *Id*. at 11-12.

[26] *Id*. at 12.

[27] McCarthy, *supra*. P. 459.

> The amici contend that Washington's Constitution was born of religious bigotry because it contains a so-called "Blaine Amendment," which has been linked with anti-Catholicism. As the State notes and Davey does not dispute, however, the provision in question is not a Blaine Amendment. The enabling Act of 1889, which authorized the drafting of the Washington Constitution, required the state constitution to include a provision "for the establishment and maintenance of systems of public schools, which shall be . . . free from sectarian control." This provision was included in Article IX, §4, of the Washington Constitution ("All schools maintained and supported wholly or in part by the public funds shall be forever free from sectarian control or influence"), and is not at issue in this case. Neither Davey nor amici have established a credible connection between the Blaine Amendment and Article I, §11, the relevant constitutional provision. Accordingly, the Blaine Amendment's history is simply not before us.[28]

In *Locke*, Blaine amendments generally and the Washington Blaine Amendment specifically, were placed before the Court. However, in its majority opinion, the Court declared that because there was no history of anti-Catholic animus evident in adoption history the Washington state adoption of Article 1, Section 11 therefore that clause, operationalized in the Washington Promise Scholarship program was not a Blaine Amendment. Thus, the constitutionality of "Blaine Amendments" is now tied to the presence or absence of anti-Catholic motives on the part of state legislatures. Therefore, determining whether or not a particular state clause is an unconstitutional "Blaine amendment" will require state-by-state historical analysis and legal challenge; and the results of those state level analyses and challenges may give substantial flexibility to legislatures and policymakers and thereby have a powerful impact on educational and other funding programs on the issue of religious participation in those programs.

[28] Rehnquist, *Opinion of the Court*, p. 10, fn 7, references removed. However, Article I, § 11 states, "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" a phrase also implicated in Blaine language; and it is this clause that is implemented in the Washington Promise Scholarship statute (Wash. Rev. Code § 28B.10.814, "No aid shall be awarded to any student who is pursuing a degree in theology.").

Central to the arguments being put forth against Blaine Amendments, an argument ultimately accepted by the Court, is that such clauses are unconstitutional because they were implemented in the last quarter of the Nineteenth Century specifically to bar the flow of tax dollars into Catholic schools. That argument further asserts that as exercises of legislative prerogative designed to adversely impact a specific religious group, these clauses violate the First Amendment to the Constitution and the principle of religious neutrality that has been articulated in recent Supreme Court decisions.[29]

It is unquestionable that a clause specifically targeting a particular religious group or practice for penalty is unconstitutional barring some compelling State interest. Thus, an examination of Nineteenth Century state constitutions is required to determine whether or not the clauses being categorized as "Blaine Amendments" originate in the context of anti-Catholic political activity, or if they contain clearly anti-Catholic wording demonstrating unconstitutional intent, or if it can be demonstrated that the primary intent behind adopting the clause were manifestly anti-Catholic in intent. Unfortunately for Blaine opponents, it is clear from previous discussion[30] that there were many "currents" driving the adoption of "Blaine Amendments," most of which were deliberately neutral in language and, we have to assume under the circumstances, intent.

The neutral language proposed by Grant and promulgated by Blaine was discussed in Chapter 2. Likewise, the decidedly non-neutral language proposed by Congress – the language that subsequently failed to be adopted – makes clear the fear of some that the neutral language would prove a threat to the generalized Protestant practices common in public schools. Thus,

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[29] e.g. *Zelman v. Simmons-Harris,* 536 U.S. 639 (2002), 234 F.3d 945, reversed. See also *Everson v. Board of Education,*133 N.J.L. 350, 44 A.2d 333. Available online at http://www.law.cornell.edu/supct/html/historics/USSC_CR_0330_0001_ZO.html.

[30] See Chapter 2.

while anti-Catholic attitudes undoubtedly influenced the passage of some Blaine Amendments, a religiously neutral formulation of policy toward public schools also played an explicit role, thus invalidating any blanket statement that all such Amendments were – or are, in the modern context – derived from non-neutral legislative intent. Finally, other clauses in Nineteenth Century state constitutions related to the relationship between church and state make clear that many constitutional policy makers worked diligently to strike a balance between the role played by government and the religious sentiments of the vast majority of Americans, which were conflicting and sometimes mutually exclusive.

The categorization of a particular state constitutional provision as a "Blaine Amendment" can be plausibly approached from various perspectives such as when the provision was adopted, whether it is directly traceable to the aftermath of the failed attempt to amend the federal constitution, how state courts have interpreted it, and so on. This variety of definitional perspectives probably explains why different treatments of the subject find different numbers of state "Blaine Amendments."[31] Likewise, Blaine Amendments are not the only possible restriction on the flow of tax dollars into religious institutions and, in fact, the so-called Blaine Amendments are arguably a subset of clauses limiting the delivery of state resources to religious organizations.

In light of the *Locke* ruling, this analysis of state constitutional clauses having the potential to adversely affect the flow of tax dollars into religious institutions focuses on clauses most likely to be considered "Blaine Amendments." For this study, 169 state constitutions spanning the period 1776 to 1920 were examined for this study. This date range encompasses the beginning of the American constitutional period following independence and extends to the end

[31] See, e.g., Toby J. Heytens, "School Choice and State Constitutions," 86 *Va. L. Rev.* 117, 140-52 (2000) note 38, at 123 & n.32 (discussing counting discrepancies); see also *supra* notes 91, 95.

of the decade of Arizona statehood, which ends the period of territorial expansion following the Civil War [see Appendix B for a list of states and dates of statehood]. In addition, all 50 current state constitutions were examined for the modern context of potential Blaine Amendments. During the first pass reading, all clauses touching upon religion were identified. From this index, clauses were identified that specifically implicated church-state funding concerns. These clauses were then evaluated and categorized by wording into categories selecting for those clauses having greatest potential to affect the transfer of state tax dollars to religious institutions [Table 4-2]. Of particular interest for this study were clauses containing the word "sectarian;" a putatively anti-Catholic code word deemed by both opponents and supporters alike to be characteristic of a "Blaine Amendment" [Appendix A].

The language of both the Unites States Constitution and of state constitutions was profoundly affected by Eighteenth and early Nineteenth Century struggles to both assert the critical role played by Christianity in the early colonies while at the same time to clearly delineate the proper relationship between church and state. This balance was critical, because the intertwining of church and state was, for many American colonists, characteristic of the despotisms they had escaped.[32] In particular, American constitutional language sought to clearly repudiate the practices of established churches common in Sixteenth and Seventeenth Century Europe.

Of particular importance in the early United States was the principle of no compulsory support for religion – language critical in the development of many state Blaine Amendments. An established church is a church officially sanctioned and supported by the government of a country; a situation that makes "membership of the political community coincident with

[32] Morison, *supra*, p. 210.

submission to the locally dominant creed.[33] Perhaps the key characteristic of an established church is compulsory support through the collection of tax revenues by the government which are then given to a church, to many churches, or to different religious organizations.

Against this model of an established church was the model of church-state separation and the toleration or other religious traditions. Pleas for religious toleration and the right of individual conscience emerge very early in American colonial history; and the seriousness of the struggle for tolerance plays an important rule throughout the Eighteenth and Nineteenth Centuries and influences much state constitutional language.

For example, in 1657, Peter Stuyvesant, Governor of New Netherlands (now New York) issued an edict forbidding anyone in the colony allow a Quaker meeting to be held in his house or even to accept a Quaker as a guest, under penalty of a large fine. When a colonist in the town of Flushing held such a meeting, he was arrested, fined and banished from the colony. These events generated a written protest from the citizens of Flushing known as *The Flushing Remonstrance*, "perhaps the earliest demand for freedom of religion made by American colonists to their political superiors."[34] [See Appendix D] Among many elements of the *Flushing Remonstrance* stand the assertions that:

> Wee are bounde by the law to do good unto all men, especially to those of the household of faith. And though for the present we seem to be unsensible for the law and the Law giver, yet when death and the Law assault us, if wee have our advocate to seeke, who shall plead for us in this case of conscience betwixt God and our own souls; the powers of this world can neither attach us, neither excuse us, for if God justifye who can condemn and if God condemn there is none can justifye.
>
> . . .

[33] John T. S. Madeley, "A Framework for the Comparative Analysis of Church-State Relations in Europe." *West European Politics*, vol. 26. #1 (2003). p. 27.

[34]. New York Yearly Meeting of the Religious Society of Friends, *A History of Flushing Meeting.* [online] http://www.nyym.org/flushing/history.html.

> The law of love, peace and liberty in the states extending to Jews, Turks and Egyptians, as they are considered sons of Adam, which is the glory of the outward state of Holland, soe love, peace and liberty, extending to all in Christ Jesus, condemns hatred, war and bondage. And because our Saviour sayeth it is impossible but that offences will come, but woe unto him by whom they cometh, our desire is not to offend one of his little ones, in whatsoever form, name or title hee appears in, whether Presbyterian, Independent, Baptist or Quaker, but shall be glad to see anything of God in any of them, desiring to doe unto all men as we desire all men should doe unto us, which is the true law both of Church and State; for our Saviour sayeth this is the law and the prophets.
>
> . . .
>
> Therefore if any of these said persons come in love unto us, we cannot in conscience lay violent hands upon them, but give them free egresse and regresse unto our Town, and houses, as God shall persuade our consciences, for we are bounde by the law of God and man to doe good unto all men and evil to noe man. And this is according to the patent and charter of our Towne, given unto us in the name of the States General, which we are not willing to infringe, and violate, but shall houlde to our patent and shall remaine, your humble subjects, the inhabitants of Vlishing.[35]

Of course, there were, across the early United States, many different opinions on the right of establishment vs. non-establishment; but over time, the non-establishment position became the dominant paradigm in the United States. In Virginia, as discussed earlier, after a ten-year struggle, which included the publication in 1785 of the famous *Memorial and Remonstrance Against Religious Assessments.*[36] [Appendix E] The *Memorial* was promulgated in opposition to a movement in the Virginia legislature to pass, *A Bill establishing a provision for Teachers of the Christian Religion*. Among its principles the *Memorial* declared,

> The Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate,[37]
>
> [T]he same authority which can establish Christianity, in exclusion of all other Religions, may establish with the same ease any particular sect of Christians, in exclusion of all other Sects. [T]hat the same authority which can force a citizen to

[35] *The Flushing Remonstrance*, December 27, 1657. New York Yearly Meeting of the Religious Society of Friends, online at: http://www.nyym.org/flushing/remons.html.

[36] http://religiousfreedom.lib.virginia.edu/sacred/madison_m&r_1785.html.

[37] *Id*. § 1.

> contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever;[38] and,
>
> 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.[39]

The *Memorial* was successful and, in response, the legislature finally passed Thomas Jefferson's *Statute of Religious Liberty* [Appendix F] which declared, "no man shall be compelled to frequent or support any religious worship, place or ministry whatsoever."[40]

The principles of religious toleration and liberty won support at the highest levels of government. In 1790, the Jewish Congregation of Newport Rhode Island sent to newly inaugurated President George Washington a letter praising him and the principles of religious freedom established with the new government:

> Deprived as we heretofore have been of the invaluable rights of free Citizens, we now with a deep sense of gratitude to the Almighty disposer of all events behold a Government, erected by the Majesty of the People -- a Government,
>
> which to bigotry gives no sanction, to persecution no assistance -- but generously affording to all Liberty of conscience, and immunities of Citizenship: -- deeming every one, of whatever Nation, tongue, or language equal parts of the great governmental Machine: -- This so ample and extensive Federal Union whose basis is Philanthropy, Mutual confidence and Public Virtue, we cannot but acknowledge to be the work of the Great God, who ruleth in the Armies of Heaven, and among the Inhabitants of the Earth, doing whatever seemeth him good . . .
>
> For all these Blessings of civil and religious liberty which we enjoy under an equal benign administration, we desire to send up our thanks to the Ancient of Days, the great preserver of Men . . .[41]

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[38] *Id*. § 2.

[39] *Id*. § 4.

[40] http://www.uark.edu/depts/comminfo/www/tj.html.

[41] Letter from Moses Seixas of the Touro Synagogue in Newport Rhode Island to President George Washington (1790). Available online at http://www.au.org/site/DocServer/Washingtons_Letter_To_Touro_Synagogue.pdf?docID=146.

To which Washington responded emphasizing freedom of conscience and asserting that religious liberty must go beyond simply a condescending tolerance:

> The Citizens of the United States of America have a right to applaud themselves for having given to mankind examples of an enlarged and liberal policy: a policy worthy of imitation. All possess alike liberty of conscience and immunities of citizenship. It is now no more that toleration is spoken of, as if it was by the indulgence of one class of people, that another enjoyed the exercise of their inherent national gifts. For happily the Government of the United States, which gives to bigotry no sanction, to persecution no assistance requires only that they who live under its protection should demean themselves as good citizens, in giving it on all occasions their effectual support.[42]

Thus, the principle of religious liberty won widespread support through the new states except in much, though not all, of New England. Ironically, given the commonly told story of Massachusetts Pilgrims seeking religious liberty, New England states were, on the whole, the last holdouts of established religions against the trend toward religious freedom. There were passionate advocates of religions liberty in New England such as Thomas Witherspoon[43] who was "forever preaching that mere toleration was not enough, since toleration implied superiority and condescension; the only proper principle for a republic was complete liberty to worship how one choose, or not at all; and every church should be supported by its members or invested funds without help from the taxing power of the state."[44] But Witherspoon was far from the only voice in the debate. Arrayed against him were statesmen and clergy who supported the established order who argued, as did Reverend Nathaniel Ward of Massachusetts, "He that is willing to tolerate any Religion, or discrepant way of Religion besides his own, unless it be in matters entirely indifferent, either doubts of his own, or is not sincere in it. He that is willing to tolerate

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[42] Letter from President George Washington to the Touro Synagogue Congregation (1790). Online at http://www.au.org/site/DocServer/Washingtons_Letter_To_Touro_Synagogue.pdf?docID=146. Note that this letter precedes ratification of the Bill of Rights.

[43] John Witherspoon was a signer of the Declaration of Independence representing New Jersey. He was the only active clergyman to sign the Declaration.

[44] Morrison, S.E., et al., *The Growth of the American Republic*, Volume I, 7th Edition. NY, Oxford, 1980, p. 215.

any unsound Opinion, that his own may also be tolerated, though never so sound, will for a need hang God's Bible at the Devil's girdle."[45]

For a time, Congregational clergy successfully argued that "the town church, like the town meeting and the town school, had made New England great, and should be equally respected."[46] While Rhode Island had always enjoyed religious liberty and Vermont quickly adopted that principle, Massachusetts, Connecticut, and New Hampshire "set up a sort of quasi-establishment, according to which everyone had to pay a tax to the Congregational church of the parish within which he lived, unless he belonged to a recognized dissenting church. In that case, the dissenting pastor received the tax."[47] But the debate continued and the established churches of New England did not last long: until 1817 in New Hampshire, 1818 in Connecticut, and 1833 in Massachusetts.[48]

Regardless, this struggle over church-state relations in the early United States had at its core the issue of compulsory support for religion; and by the end of the second decade of the Nineteenth Century, clauses asserting that there would be no compulsory support for religious institutions were triumphant. For example, prior to 1800, ten of sixteen states included no compulsory support clauses in the state constitutions; and five of those states had reiterated this statement in multiple constitutions [Table 4-3]. By 1825 seven additional states (seventeen of twenty-four states) had adopted this principle [Table 4-4]; and by 1850 four more states had also

[45] Perry G. E. Miller, "The Contribution of the Protestant Churches to Religious Liberty in Colonial America," *Church History*, (1935), p. 2.

[46] Morrison, 215-216.

[47] *Id.*, 216.

[48] *Id.*

accepted this principle [Table 4-5]. Thus, by 1850, well before any anti-Catholic hysteria, much less Blaine's influence, 23 of 30 states had made this principle a part of their constitutions.

Taking a different approach, the Ohio Constitution of 1851 required that "no religious or other sect, or sects, shall ever have any exclusive right to, or control of, any part of the school funds of this state."[49] In 1855, Massachusetts added to its constitution a statement that funds raised for "common" schools "shall never be appropriated to any religious sect for the maintenance exclusively of its own schools."[50] In 1859 Kansas added its own similar language providing that "no religious sect or sects shall ever control any part of the common-school or University funds of the State."[51] Oregon did the same later the same year asserting that "no money shall be drawn from the Treasury for the benefit of any religeous [sic], or theological institution" and forbidding that "any money be appropriated for the payment of any religeous [sic] services in either house of the Legislative Assembly."[52]

The fifteen years from 1850 - 1875 saw similar clauses adopted by South Carolina,[53] Illinois,[54] Pennsylvania,[55] Missouri,[56] Alabama[57] and Nebraska.[58] The Pennsylvania and

[49] Ohio Const. Art. VI, 2 (added 1851).

[50] Mass. Const. Art. XVIII (1855).

[51] Kansas Const. Art. VI, § 8 (1859). This language was preserved and moved to Art. VI, § 6 in 1966

[52] Ore. Const. Art. I, § 5.

[53] S.C. Const. Art. X, § 5 (1868) (providing that "no religious sect or sects shall have exclusive right to or control of any part of the school-funds of the State"), renumbered and amended by S.C. Const. Art. XI, 4 (1973).

[54] Ill. Const. Art. VIII, § 3 (1870) (forbidding, inter alia, appropriation of public funds for "anything in aid of any church or sectarian purpose") (renumbered art. X, 3 (1970).

[55] Pa. Const. Art. III, § 18 (1874) (forbidding appropriations "for charitable, educational or benevolent purposes . . . to any denominational or sectarian institution, corporation or association"); id. art. III, 29 (1967).

[56] Mo. Const. Art. XI, § 11 (1875) (forbidding any payment of public funds "in aid of any religious creed, church or sectarian purpose" and to any school "controlled by any religious creed, church or sectarian denomination whatever") (renumbered art. IX, 8).

Nebraska Constitutions were further amended in 1963 and 1976, respectively, to impose more specific restrictions against the use of public funds for religious purposes.[59] Illinois also adopted an unusually detailed provision barring any payments "in aid of any church or sectarian purpose, or to help support or sustain any school, academy, seminary, college, university, or other literary or scientific institution, controlled by any church or sectarian denomination whatever" and also forbidding any grant of "land, money, or other personal property . . . to any church or for any sectarian purpose."[60] Thus, roughly half the state constitutions containing what is now labeled "Blaine Amendments" had those clauses in place prior to Blaine's failed federal amendment. Likewise, in each of these examples, the language is clearly speaking of all religions and denominations and not solely denying state funds to Catholic institutions.

In the latter half of the 1870s, the period most closely associated with the failed federal Blaine Amendment, seven more states, Colorado,[61] Texas,[62] Georgia,[63] New Hampshire,[64]

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[57] Ala. Const. Art. XIII, § 8 (1875) (forbidding educational funds being "appropriated to, or used for, the support of any sectarian or denominational school"); id. art. XIV, 263 (amended 1901).

[58] Neb. Const. Art. VIII, § 11 (1875) (forbidding "sectarian instruction . . . in any school or institution supported in whole or in part by [public school funds]" and state acceptance of any grant of property "to be used for sectarian purposes"); id. art. VII, 11 (amended 1976).

[59] Neb. Const. Art. VII, sec.11 (amended 1976); Pa. Const. art. III, 29 (added 1963)

[60] Ill. Const. Art. VIII, § 3 (1870) (renumbered art. X, 3 (1970).

[61] Colo. Const. Art. IX, § 7 (adopting an anti-funding provision identical to article VIII, 3 of the 1870 Illinois Constitution, article 8, § 33 (1874)); id. art. V, 34 (1876) (prohibiting "charitable, industrial, educational or benevolent" appropriations to any "denominational or sectarian institution or association," much like article III, § 18 of the 1874 Pennsylvania Constitution (1874).

[62] Tex. Const. Art. I, § 7 (providing that "no money shall be appropriated, or drawn from the Treasury for the benefit of any sect, or religious society, theological or religious seminary"); id. art. VII, 5(a) (barring school funds from "ever being appropriated to or used for the support of any sectarian school").

[63] Ga. Const. Art. I, § 1, para. XIV (1877) (including a similar prohibition).

[64] N.H. Const. Pt. 2, Art. LXXXIII (1877) (enacting the same type of provision).

Minnesota,[65] California,[66] and Louisiana[67] also adopted anti-funding provisions. The provisions in the Georgia and Minnesota Constitutions are unusually detailed about the range and character of excluded institutions. The Georgia Constitution states, "no money shall ever be taken from the public Treasury, directly or indirectly, in aid of any church, sect, cult, or denomination of religionists, or of any sectarian institution."[68] Likewise, the Minnesota Constitution states, "In no case shall any public money or property be appropriated or used for the support of schools wherein the distinctive doctrines, creeds or tenets or any particular Christian or other religious sect are promulgated or taught."[69]

From 1880 to the end of the century another thirteen states adopted religiously sensitive anti-funding provisions. For instance, in 1880 Nevada added Article XI, section 10 to its constitution, providing that "no public funds of any kind or character whatever, State, County or Municipal, shall be used for sectarian purpose."[70] In 1885, Florida asserted in its Declaration of Rights that no public revenue "shall ever be taken from the public treasury directly or indirectly in aid of any church, sect or religious denomination or in aid of any sectarian institution."[71]

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[65] Minn. Const. Art. XIII, § 2 (enacting the same provision).

[66] Cal. Const. Art. IV, 3§ 0 (1879) (providing that no governmental body "shall ever . . . grant anything to or in aid of any religious sect, church, creed, or sectarian purpose"); Cal. Const. art. XVI, 5, art. IX, 8 (amended 1966).

[67] La. Const. Art. LI (1879) (providing that "no money shall ever be taken from the public treasury, directly or indirectly in aid of any church, sect or denomination of religion, or in aid of any priest, preacher, minister or teacher thereof"); id. Art. CCXXVIII (providing that no school funds "shall be appropriated to or used for the support of any sectarian schools"); cf. La. Const. Art. CXL (1868) (prohibiting appropriation to "any private school or any private institution of learning whatever" but lacking any reference to "sectarian" schools). Louisiana's anti-funding provisions were deleted from its constitution in the 1974 revision. See La. Const. art. I, 8 (paralleling federal religion clauses).

[68] Ga. Const. Art. I, § 1, para. 14 (1877).

[69] Minn. Const. Art. XIII, § 2.

[70] Nev. Const. Art. XI, § 10 (added 1877).

[71] Fla. Declaration of Rights 6 (1885), amended by Fla. Const. Art. I, § 3.

Therefore, as Justice Rehnquist noted in the majority opinion in *Locke*, "[m]ost States that sought to avoid an establishment of religion around the time of the founding placed in their constitutions formal prohibitions against using tax funds to support the ministry.[72] The plain text of these constitutional provisions prohibited *any* tax dollars from supporting the clergy."[73] This trend continued throughout the Nineteenth Century. Thus, the precursors of the so-called "Blaine Amendments" predate the development of, and are therefore not driven by, anti-Catholic hostility in the last half of the Nineteenth Century. What then explains the patterns of adoption of these phrases denying tax dollars to religious institution? Perhaps the best way to answer this question is to analyze the pattern itself, identifying when states adopted particular clauses and examining the geographic distribution pattern of such adoption.

A key pattern emerges when looking at state constitutional clauses declaring that there can be no public support for religious institutions. On the surface, no public support clauses appear closely related to the no compulsory support clauses. However, with one exception, such public support clauses appear only in the Nineteenth Century and were not as widely adopted [Table 4-6] as statements explicitly rejecting "compulsory" support [Tables 4-3 to 4-5]. For example, Article 18 of the New Jersey Constitution of 1776 states, "...nor shall any person, within this Colony, ever be obliged to pay tithes, taxes, or any other rates, for the purpose of building or repairing any other church or churches, place or places of worship, or for the

[72] e.*g.*, Ga. Const., Art. IV, §5 (1789), reprinted in *2 Federal and State Constitutions, Colonial Charters and Other Organic Laws* 789 (F. Thorpe ed. 1909) (reprinted 1993) (.All persons shall have the free exercise of religion, without being obliged to contribute to the support of any religious profession but their own.); Pa. Const., Art. II (1776) in 5 *id.*, at 3082 (.[N]o man ought or of right can be compelled to attend any religious worship, or erect or support any place of worship, or maintain any ministry, contrary to, or against, his own free will and consent.); N. J. Const., Art. XVIII (1776), in *id.*, at 2597 (similar); Del. Const., Art. I, §1 (1792), in 1 *id.*, at 568 (similar); Ky. Const., Art. XII, §3 (1792), in 3 *id.*, at 1274 (similar); Vt. Const., Ch. I, Art. 3 (1793), in 6 *id.*, at 3762 (similar); Tenn. Const., Art. XI, §3 (1796), in *id.*, at 3422 (similar); Ohio Const., Art. VIII, §3 (1802), in 5 *id.*, at 2910 (similar).

[73] Justice William Rehnquist, *Locke v. Davey*, *Opinion of the Court*, p. 9.

maintenance of any minister or ministry." After New Jersey, from 1830 to 1875 a series of states, beginning with Virginia and then clustering in the mid-West (Michigan, Wisconsin, Indiana, Minnesota, and Missouri), adopt no public support language, with Oregon doing so somewhat later. Another geographic cluster can be identified in the northwest, in 1889 (Idaho, South Dakota, Washington, and Wyoming). This geographic cluster also reflects the partitioning of the northwest and Congressional attention to territorial statehood in the aftermath of the Civil War and Reconstruction; but sharing of constitutional concepts and phrases in a regional cluster is nonetheless clear.

Closely related to the more general "no compulsory support" phrasing is the specific statement that government shall make no appropriation for church schools [Table 4-7]. For example, the Pennsylvania Constitution of 1874 states, "No appropriation shall be made to any charitable or educational institution not under the absolute control of the Commonwealth . . ."[74] Similar clauses appears only seven times beginning first in 1873 in Pennsylvania and being infrequently adopted but moving slowly East to West until once again we see a small Northwest cluster in 1889. While in isolation, these clauses could be seen as targeting Catholic schools, when seen in context with other No Compulsory Support Clauses the overall impact of these clauses is clearly tied to the ongoing efforts to effectively delineate church and state relations and is therefore, decidedly more neutral.

A similar, though less definitive pattern is seen with the clauses stating that there shall be no grant of land or aid to religious institutions. For example, the Illinois Constitution of 1870 states, "nor shall any grant or donation of land, money or other personal property ever be made

[74] Article 3, § 17.

by the State or any such public corporation to any church or for any sectarian purpose."[75] This language was adopted by only six states and also starts to the east and moves fitfully across the country to the northwest [Table 4-8].

Yet another interesting cluster shows up starting with the 1851 Ohio clause that, "The general Assembly shall make such provisions by taxation, or otherwise, as with the income arising from the school trust fund, will secure a thorough and efficient system of common schools throughout the State, but no religious or other sect or sects shall ever have any exclusive right to, or control of, any part of the school funds of this State."[76] This "exclusive right phrasing was used only in five states funds [Table 4-9], but all cluster toward the center of the country along the Mississippi River.

Still another infrequently used constitutional provision uses a variety of different phrasings to state that public schools are to be kept free of sectarian influences [Table 4-10]. This type of clause is evidenced from the Nevada constitution of 1864 which reads,

> "The Legislature shall provide for a uniform system of common schools, by which a school shall be established and maintained in each school district at least six months in every year, and any school district neglecting to establish and maintain such a school, or which shall allow instructions of a sectarian character therein, may be deprived of its proportion of the interest of the public school fund during such neglect or infraction."[77]

Used by only six states, as before the general trend is adoption from east to west, but this time exclusively west of the Mississippi River and with the now common cluster in the northwest.

Interestingly enough, these last two clauses, taken in isolation, leave open the possibility of some distribution of state funds to a variety of religious institutions, and thus no "exclusive

[75] Art. VIII, § 3.

[76] Art. VI, § 2.

[77] Art. XI, § 2.

right." However, a majority (six of ten)[78] of the states using these clauses also have no compulsory support clauses in the state constitutions complicating this possibility.

The pattern of these constitutional words and phrases demonstrates conclusively that state legislatures throughout the country and throughout the Nineteenth Century were wrestling with the issue of church state relations as manifested in the question of whether or not tax dollars should be allowed to flow to religious institutions. The controversy over the 1876 Blaine Amendment and its purported "progeny" must be seen in this context and cannot be localized either in time to periods of anti-Catholic activity or in spirit to anti-Catholic intent.

Of course, the East to West pattern is, on one hand, the natural result of the growth of the United States which also moves generally from the East coast of North American to the West coast. However, the different geographical distribution of the clusters associated with different clauses suggests that some additional cause or causes are operating. In fact, these different temporal and geographic clusters demonstrate that states are sharing ideas, either intentionally or simply as a result of news traveling across the states; an idea that seem quite obvious: why "re-create the wheel" when your neighbor has already created the template? This suggests a better understanding of and impetus for the state "Blaine Amendments" than the oft-asserted accusation of anti-Catholic animus.

Indeed, this type of "diffusion of innovation" has significant support in political science literature. DiMaggio and Powell[79] posit a theory called "institutional isomorphism" which asserts that organizations functioning in large institutionalized networks such as politics deal with

[78] Arkansas, Kansas, Montana, Nebraska, Ohio, and South Dakota.

[79] P. DiMaggio & W. Powell, "The iron cage revisited: Institutional isomorphism and collective rationality in organizational fields." *American Sociological Review*, 48, 147-160 (1983).

uncertain environments by copying from each other.[80] In a similar vein, Everett Rogers had noted, 'This dependence on the communicated experience of near peers suggests that the heart of the diffusion process consists of the modeling and imitation by potential adopters of their network partners who have adopted previously."[81]

Likewise, Michael Mintrom and Sandra Vergari, in analyzing education reform efforts note, "… [M]ost potential adopters base their judgments of an innovation on information from those who have sound knowledge of it and who can explain its advantages and disadvantages."[82] Thus they ask, "How do policy entrepreneurs develop and sell their ideas to others? This is where the role of policy networks becomes paramount… [P]olicy entrepreneurs operating at the state level will most often develop their ideas for policy innovation through their conversations and interactions with members of *interstate or external policy networks.*[83] According to Mintrom and Vergari, the results of their study "show that the deliberations of legislatures in neighboring states increases the likelihood of legislative consideration of school choice;"[84] though it is important to note it is the deliberations in neighboring states that matters, not whether or not the neighbor adopts the policy.[85] Thus, political policy innovations often flow from one state to the next through formal and informal networks. Indeed, if one legislature takes up a discussion the

[80] *Id*, p. 152; "Organizations tend to model themselves after similar organizations in their field that they perceive to be more legitimate or successful."

[81] Everett Rogers, *Diffusion of Innovations*, 4th ed. (New York: Free Press, 1995) cited in Michael Mintrom and Sandra Vergari, "Policy Networks and Innovation Diffusion: The Case of State Education Reforms." *The Journal of Politics*, Vol. 60, No. 1 (Feb. 1998), p. 128.

[82] *Id*.

[83] *Id*., p. 130. Emphasis mine.

[84] *Id*., p. 144.

[85] *Id*., p. 145.

chance that nearby legislatures will both take up the same discussion and pass the associated legislation both increase.[86]

At the same time, given the preoccupation of the advocacy literature in opposition to the so-called "Blaine Amendments" with the assertion that the word "sectarian" was code for "Catholic"[87] that word should play the dominant or defining role in state Blaine clauses; but this is not the case. Instead, "sectarian" is most commonly used in concert with other words and phrases, the net result of which is decidedly neutral and not surreptitiously anti-Catholic in either the Nineteenth or the Twentieth centuries.

The word "sectarian" also has its own history in American constitutional language. The term first appears in state constitutional language in Nevada in 1864. It is used again in 1868 in Georgia and South Carolina and becomes common after that, being used in eighty-five times in fifty-one constitutions adopted by twenty-seven states [Table 4-11].

The word sectarian, however, replaces the word "sect" used in earlier constitutions and it plays the identical role. "Sect" is first used in 1776 in Maryland, New Hampshire, and New Jersey and by Vermont in 1777. The word largely fades out by 1890 but lingers in Connecticut to 1955, Kansas to 1966 and Maine to 1988 [Table 4-12]. In clauses where both terms occur the overlapping meaning is apparent. For example, Article X, Sec. 5 of the South Carolina constitution of 1868 reads, "No religious sect or sects shall have exclusive right to, or control of any part of the school funds of the State, nor shall sectarian principles be taught in the public school." Here as in other examples, sectarian is simply an adjective drawing on the previous use of the term "sect."

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[86] *Id.*

[87] See The Beckett Fund discussion of the South Dakota case *Puckett v. Rounds* as but one of many examples of this assertion being made: http://www.becketfund.org/index.php/case/13.html.

This transition from "sect" to "sectarian" is important because the word "sect," as used in the Eighteenth and Nineteenth Century constitutions very clearly refers to the variety of Protestant denominations found in the American colonies. For example, the Maryland Constitution of 1776 repeatedly refers to, "any minister, public teacher, or preacher of the gospel, as such, or to any religious sect, order or denomination."[88] Likewise, the Vermont Constitution of 1777 states,

> That all men have a natural and unalienable right to worship ALMIGHTY GOD, according to the dictates of their own consciences and understanding, regulated by the word of GOD; and that no man ought, or of right can be compelled to attend any religious worship, or erect, or support any place of worship, or maintain any minister, contrary to the dictates of his conscience; . . . nevertheless, every sect or denomination of people ought to observe the Sabbath, or the Lord's day, and keep up, and support, some sort of religious worship, which to them shall seem most agreeable to the revealed will of GOD.[89]

In fact, the New Hampshire Constitution of 1776 authorizes the collection of taxes to support churches stating,

> The people of this state have a right to impower, and do hereby fully impower the legislature to authorize from time to time, the several towns, parishes, bodies-corporate, or religious societies within this state, to make adequate provision at their own expence, for the support and maintenance of public protestant teachers of piety, religion and morality: Provided notwithstanding, That the several towns, parishes, bodies-corporate, or religious societies, shall at all times have the exclusive right of electing their own public teachers, and of contracting with them for their support and maintenance. And no portion of any one particular religious sect or denomination, shall ever be compelled to pay towards the support of the teacher or teachers of another persuasion, sect or denomination. And every denomination of christians demeaning themselves quietly, and as good subjects of the state, shall be equally under the protection of the law: and no subordination of any one sect or denomination to another, shall ever be established by law.[90]

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[88] Md. Const. of 1776, § 34.

[89] Vermont Constitution of 1777, Chap. I, §3.

[90] N. H. Const. of 1776, Art. I, § VI.

Use of the term "sect" is similar through American history and the last use is nearly identical to the first: the Maine Constitution or 1988 reads,

> All men have a natural and unalienable right to worship Almighty God according to the dictates of their own consciences, and no one shall be hurt, molested, or restrained in his person, liberty, or estate for worshipping God in the manner and season most agreeable to the dictates of his own conscience, nor for his religious professions or sentiments, provided he does not disturb the public peace, nor obstruct others in their religious worship; and all persons demeaning themselves peaceably, as good members of the State, shall be equally under the protection of the laws, and no subordination nor preference of any one sect or denomination to another shall ever be established by law, nor shall any religious test be required as a qualification for any office or trust under this State; and all religious societies in this State, whether incorporate or unincorporate, shall at all times have the exclusive right of electing their public teachers, and contracting with them for their support and maintenance.[91]

So it is incontrovertible that the word "sect" refers to the variety of Protestant denominations.

The Word "sectarian" appears for the first time in the 1864 Nevada Constitution:

> The Legislature shall provide for a uniform system of common schools, by which a school shall be established and maintained in each school district at least six months in every year, and any school district neglecting to establish and maintain such a school, or which shall allow instructions of a sectarian character therein, may be deprived of its proportion of the interest of the public school fund during such neglect or infraction; and the Legislature may pass such laws as will tend to secure a general attendance of the children in each school district upon said public school. [92]

Likewise, Article XI, Sec. 9 reads, "No sectarian instruction shall be imparted or tolerated in any school or university that may be established under this Constitution."[93]

Four years later, in 1868, the Georgia Constitution adopts this new wording stating, "No vote, resolution, law, or order, shall pass, granting a donation, or gratuity, in favor of any person,

[91] Me. Const. of 1988, Art. I, § 3.

[92] Nev. Const. of 1864, Art. XI, §2.

[93] Nev. Const. of 1864, Art. XI, §9.

except by the concurrence of two-thirds of each branch of the General Assembly, nor, by any vote, to a sectarian corporation or association,"[94]

These uses of the term "sectarian" might seem to support the theory of anti-Catholic intent if taken in isolation; but the South Carolina Constitution, also of 1868, states, "No religious sect or sects shall have exclusive right to, or control of any part of the school funds of the State, nor shall sectarian principles be taught in the public school."[95] Thus, the juxtaposition of "sect" and "sectarian" carries forward the neutral stance of earlier constitutions. "Sects" is clearly plural, referring to the variety of Christian denominational groups and "sectarian" must be read in that light as referring back to those "sects" not suddenly interjecting anti-Catholic animus.

It is this trend that continues through the remainder of the Nineteenth Century. The Alabama Constitution of 1875 states, "No money raised for the support of the public schools of the state shall be appropriated to, or used for, the support of any sectarian *or denominational* school."[96] The Colorado Constitution of 1876 similarly states, "No appropriation shall be made for charitable, industrial, educational, or benevolent purposes to any person, corporation, or community not under the absolute control of the State, nor to any denominational or sectarian institution or association."[97] The Idaho Constitution of 1890 rejects, "aid of any church or sectarian, or religious society, or for any sectarian or religious purpose … controlled by any church or sectarian or religious denomination whatsoever;"[98] and similar language is used in the

[94] Ga. Const of 1864, Article III, § 6.2.

[95] S. C. Const. of 1868, Art X, § 5.

[96] Ala. Const. of 1875, Art. XIII, § 8 (emphasis mine).

[97] Col. Const. of 1876, Art. IX, § 7.

[98] Idaho Const. of 1890, Art. 9, § 5.

Florida Constitution of 1885 which states: "No preference shall be given by law to any church, sect or mode of worship, and no money shall ever be taken from the public treasury directly or indirectly in aid of any church, sect or religious denomination, or in aid of any sectarian institution."[99] In fact, the unquestionably neutral statement that "no preference" shall be given to any religious group is employed by twenty-three states between 1776 and 1889 [Table 4-13].

Furthermore, in some states potentially non-neutral language found in one section is "neutralized" in another. For example, the Oklahoma Constitution of 1907 in Article I, Section 5 states, "Provisions shall be made for the establishment and maintenance of a system of public schools, which shall be open to all the children of the State and free from sectarian control;" a clause refined by Article II, Section 5 which reads,

> No public money or property shall ever be appropriated, applied, donated, or used, directly or indirectly, for the use, benefit, or support of any sect, church, denomination, or system of religion, or for the use, benefit or support of any priest, preacher, minister, or other religious teacher or dignitary, or sectarian institution as such.

Similarly, the Arizona Constitution of 1912, Art. XI, Section 7 reads,

> No sectarian instruction shall be imparted in any school or state educational institution that may be established under this Constitution, and no religious or political test or qualification shall ever be required as a condition of admission into any public educational institution of the state, as teacher, student, or pupil; but the liberty of conscience hereby secured shall not be so construed as to justify practices or conduct inconsistent with the good order, peace, morality, or safety of the state, or with the rights of others;

however, Article IX, Section 10 rejects aid to, "any church, or private or sectarian school, or any public service corporation," Likewise, the North Dakota Constitution of 1981 states in Article VIII, Section 1, that the government shall "make provision for the establishment and maintenance of a system of public schools which shall be open to all children of the state of

[99] Fl. Const. of 1885, Art. I, § 6.

North Dakota and free from sectarian control," again raising the specter of non-neutral intent; but Article VIII, Sec. 5 then reads,

> All colleges, universities, and other educational institutions, for the support of which lands have been granted to this state, or which are supported by a public tax, shall remain under the absolute and exclusive control of the state. No money raised for the support of the public schools of the state shall be appropriated to or used for the support of any sectarian school,

suggesting a much less inimical intent.

In a similar vein, any perception of anti-Catholic "code words" in the South Dakota Constitution of 1889, in which Art. VIII, Section 16, Art. XXII, Section 1, and Art. XXVI, Section 18 all use the word "sectarian" unmodified must be qualified by Article VI, Section 3 which precedes them:

> The right to worship God according to the dictates of conscience shall never be infringed. No person shall be denied any civil or political right, privilege or position on account of his religious opinions; but the liberty of conscience hereby secured shall not be so construed as to excuse licentiousness, the invasion of the rights of others, or justify practices inconsistent with the peace or safety of the State. No person shall be compelled to attend or support any ministry or place of worship against his consent, nor shall any preference be given by law to any religious establishment or mode of worship. No money or property of the state shall be given or appropriated for the benefit of any sectarian or religious society or institution.

The elegant defense of the rights of conscience and the assertion of no compulsory support as well as the clear repudiation of preference to one religious group over another would seem to make clear that the "sectarian or religious" institutions of the final phrase encompass all religions and Christian denominations; and in this light must the rest of the state Constitution be understood. Thus, in each of these examples, apparently biased clauses must be read in the light of the rest of the document; which then make clear the neutral intent of each Constitution taken as a whole.

Overall, of the twenty-seven states in which the constitutions use the term "sectarian" from Nevada in 1864 to Texas in 2003, spanning eighty-five clauses and fifty-one constitutions, the term "sectarian" is refined by such neutral language in forty-five of the eighty-five specific clauses (51.7%) and neutral formulations characterize twenty-four of the twenty-nine states (82.75%). Thus, it must be concluded that the term "sectarian," at least as it is used in state constitutions, is not some code word for "Catholic;" and that the vast majority of so-called Blaine Amendments reflect neutral religious intent.

It is also instructive to note that earlier Supreme Court rulings recognized the neutrality of the terms "sect" and "sectarian." For example, in it's 1899 decision in *Bradfield v. Roberts*, the Court ruled,

> Whether the individuals who compose the corporation under its charter happen to be all Roman Catholics, or all Methodists, or Presbyterians, or Unitarians, or members of any other religious organization, or of no organization at all, is of not the slightest consequence with reference to the law of its incorporation, nor can the individual beliefs upon religious matters of the various incorporators be inquired into. Nor is it material that the hospital may be conducted under the auspices of the Roman Catholic Church . . . That the influence of any particular church may be powerful over the members of a nonsectarian and secular corporation, incorporated for a certain defined purpose and with clearly stated powers, is surely not sufficient to convert such a corporation into a religious or sectarian body.[100]

Later in the same ruling the Court determined, "The act of Congress, however, shows there is nothing sectarian in the corporation, and 'the specific and limited object of its creation' is the opening and keeping a hospital in the city of Washington for the care of such sick and invalid persons as may place themselves under the treatment and care of the corporation."[101] Thus, an explicitly Roman Catholic hospital, run by the Sisters of Charity is "nonsectarian" because, it "does not limit the exercise of its corporate powers to the members of any

[100] *Bradfield v. Roberts,* 175 U.S. 291, at 298 (1899).

[101] *Id.* at 300 .

particular religious denomination, but, on the contrary, those powers are to be exercised in favor of anyone seeking the ministrations of that kind of an institution."[102]

The 1908 case *Quick Bear v. Leupp,*[103] upholding payment to Catholic schools on a South Dakota Sioux reservation, provides another interesting example. In *Quick Bear*, the Court ultimately determined that monies paid under treaty provision are not "appropriations" of tax funds but "[i]t is the Indians' money, or, at least, is dealt with by the government as if it belonged to them, as morally it does;"[104] thus use in "sectarian" schools does not violate Constitutional limits. However, the Court clearly again employed the term "sectarian" referring to the variety of denominations and not simply Catholic schools. The Court cited the 1896 Appropriation Act statement, ""it is hereby declared to be the settled policy of the government to hereafter make no appropriation whatever for education in any sectarian school,'"[105] but pointed out that, "it is contended that the spirit of the Constitution requires that the declaration of policy that the government 'shall make no appropriation whatever for education in any sectarian schools' should be treated as applicable, on the ground that the actions of the United States were to always be undenominational, and that, therefore, the government can never act in a sectarian capacity."[106]

The Court also observed that, "'Some time before 1895 opposition developed to these contracts with denominational schools, on the ground that the public moneys of the United States, raised by taxation, should not be used for education in sectarian institutions."[107] Thus, the

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[102] *Id*. at 299.

[103] 210 U.S. 50 (1908).

[104] *Id*. at 80.

[105] *Id*. at 79.

[106] *Id.* at un-numbered fn. Available online at http://caselaw.lp.findlaw.com/scripts/getcase.pl?navby=case&court=US&vol=210&page=50

[107] *Id*.

Court uses the terms "sectarian," and "denominational" as equivalents and prefers "undenominational" to "non-sectarian."[108] This is important because the Court also refers to "different denominational schools" and "different denominations"[109] observing that Lutheran as well as Catholic schools were involved n Indian education on the Rosebud reservation. Thus, "sectarian," in this instance, clearly refers to denominational schools of any kind and not simply Catholic schools.

In still another example, Felix Frankfurter, in his concurring opinion in *McCollum v. Board of Education* wrote,

> The non-sectarian or secular public school was the means of reconciling freedom in general with religious freedom. The sharp confinement of the public schools to secular education was a recognition of the need of a democratic society to educate its children, insofar as the State undertook to do so, in an atmosphere free from pressures in a realm in which pressures are most resisted and where conflicts are most easily and most bitterly engendered. Designed to serve as perhaps the most powerful agency for promoting cohesion among a heterogeneous democratic people, the public school must keep scrupulously free from entanglement in the strife of sects. The preservation of the community from divisive conflicts, of Government from irreconcilable pressures by religious groups, of religion from censorship and coercion however subtly exercised, requires strict confinement of the State to instruction other than religious, leaving to the individual's church and home, indoctrination in the faith of his choice.[110]

Furthermore, in his *McCollum* dissent, Justice Stanley Forman Reed also understood the term "sectarian" to represent a diversity of religious organizations. Making reference to the Champaign Council on Religious Education, which included Jewish, Roman Catholic, and a number of Protestant churches, Reed wrote:

> When actual church services have always been permitted on government property, the mere use of the school buildings by a non-sectarian group for religious education ought not to be condemned as an establishment of religion. For a non-sectarian organization to

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[108] *Id*. at 81.

[109] *Id.* at un-numbered fn. *supra*.

[110] Felix Frankfurter, *McCollum v. Board of Education*, 333 U.S. 203 at 216-7 (1948) (concurring).

> give the type of instruction here offered cannot be said to violate our rule as to the establishment of religion by the state.[111]

Thus, "non-sectarian" describes an organization representing many religions including the Roman Catholic Church.

At this point, it also becomes possible to suggest that the entire concept of "Blaine Amendment," as currently used, is fundamentally flawed. While Blaine's failed federal amendment establishes a particular point in time and historical context for a specific expression of Constitutional thinking related to the flow of tax dollars into religious institutions, an examination of state constitutions makes clear that there is little legitimacy to localizing the "Blaine" issues to the latter quarter of the Nineteenth Century. As a part of the long-standing Constitutional tradition wrestling with the separation of Church and State, the "Blaine Amendments" are nothing more, and nothing less, than a legitimate continuance of that tradition. This point was clearly recognized by the *Locke* majority.

This analysis of state constitutional clauses identified as potential Blaine Amendments suggests that proving anti-Catholic motive for any given clause will be difficult at best. First, it is clear that the use of the term "sectarian" emerges from earlier use of "sect" and that both terms are clearly presented as indicating the multiplicity of Christian denominations and not the singling out of any one group.

Second, the failed federal Blaine Amendment emerged from religiously neutral impulses responding to religious controversy in schools and supported by the emergence of atheist and secularist, not to mention Liberal Christian, movements. Furthermore, it is clear that many Blaine clauses, such as the Washington clause at issue in *Locke*, were included in state

[111] Justice Stanley Reed, *McCollum v. Board of Education*, 333 U.S. 203 at 255 (1948) (concurring).

constitutions not out of anti-Catholic animus but out of Federal requirements that such language be included in new state constitutions.

Furthermore, the Blaine clauses at both Federal and state levels emerged from many reasons not single causes. Thus, even where anti-Catholic animus may have played a role in state adoption of a "Blaine Amendment" other, legitimate, motives also undoubtedly played a role. As a result, it may be hard to argue that an unconstitutional motive embedded with numerous other constitutionally acceptable motives should invalidate a state constitutional clause unless it can be shown that the unconstitutional motive was the primary intent of adoption. In addition, it must be recognized that state constitutional adoption and revision in the Twentieth Century, a period less fraught with anti-Catholicism than the Nineteenth Century has great potential to eliminate anti-religious bias as grounds for invalidation.

Finally, and undoubtedly most importantly, the Supreme Court has accepted the argument that "Blaine Amendments" are characterized by anti-Catholic intent and, somewhat paradoxically declared that a state constitutional clause devoid of such animus is not, therefore, a "Blaine Amendment." This means that as a result of the difficulty of proving anti-Catholic intent as a primary legislative priority, as suggested by the argument presented here, many, if not most, state clauses impacting the flow of tax dollars into religious institutions are likely to survive U. S. Supreme Court scrutiny. Thus, it will devolve to state courts to decide whether or not a state clause should be considered a Blaine Amendment and, if not, whether or not the state clause, like that of Washington, falls into the "play in the joints" once again articulated in *Locke*.

As a result of this devolution, state legislatures and educational policy makers will be required to engage in analysis of local amendments to determine whether anti-Catholic motives of the past were primary drivers for the adoption of their Blaine clauses; and it seems likely that

many, if not most, state Blaine Amendments would survive constitutional challenge. Thus, legislatures, courts, and other participants in the crafting of state funding programs will have to make their own determination of what role a state clause will play in educational and other funding decisions.

Table 4-1. Eighteenth century state constitutional provisions rejecting state support for clergy

State	Article	Text
Georgia	Art. IV, §5 (1789)	"All persons shall have the free exercise of religion, without being obliged to contribute to the support of any religious profession but their own."
Pennsylvania	Art. II (1776)	"[N]o man ought or of right can be compelled to attend any religious worship, or erect or support any place of worship, or maintain any ministry, contrary to, or against, his own free will and consent."
New Jersey	Art. XVIII (1776)	"That no person shall ever, within this Colony, be deprived of the inestimable privilege of worshipping Almighty God in a manner agreeable to the dictates of his own conscience; nor, tinder any pretence whatever, be compelled to attend any place of worship, contrary to his own faith and judgment; nor shall any person, within this Colony, ever be obliged to pay tithes, taxes, or any other rates, for the purpose of building or repairing any other church or churches, place or places of worship, or for the maintenance of any minister or ministry, contrary to what he believes to be right, or has deliberated or voluntarily engaged himself to perform."
Delaware	Art. I, §1 (1792)	". . . yet no man shall or ought to be compelled to attend any religious worship, to contribute to the erection or support of any place of worship or to the maintenance of any ministry, against his own free will and consent;"
Kentucky	Art. XII, §3 (1792)	"that no man of right can be compelled to attend, erect, or support any place of worship, or to maintain any ministry against his consent; that no human authority can in any case whatever control or interfere with the rights of conscience;"
Vermont	Ch. I, Art. 3 (1793)	"that no man ought to, or of right can be compelled to attend any religious worship, or erect or support any place of worship, or maintain any minister, contrary to the dictates of his conscience, nor can any man be justly deprived or abridged of any civil right as a citizen, on account of his religious sentiments, or peculiar mode of religious worship; and that no authority can, or ought to be vested in, or assumed by, any power whatever, that shall in any case interfere with, or in any manner controul the rights of conscience, in the free exercise of religious worship."

Table 4-1. Continued

State	Article	Text
Tennessee	Art. XI, §3 (1796)	"that no man can of right be compelled to attend, erect, or support any place of worship, or to maintain any ministry against his consent; that no human authority can in any case whatever control or interfere with the rights of conscience;"
Ohio	Art. VIII, §3 (1802)	"that no human authority can, in any case whatever, control or interfere with the rights of conscience; that no man shall be compelled to attend, erect, or support any place of worship, or to maintain any ministry, against his consent;"

Source: Thorpe, ed. *Federal and State Constitutions, Colonial Charters and Other Organic Laws*. (1909) (reprinted 1993).

Table 4-2. General categories of state constitutional clauses having the potential to affect the transfer of tax dollars into religious institutions

No compulsory attendance or support
No preference for any group
No "exclusive right" to state educational funds
Government to protect all denominations
No appropriations for church schools
No grant of land or aid to religious institutions
No public support for religious institutions
Public schools to be free of sectarian influence

Table 4-3. No compulsory support clauses in state constitutions, 1776 to 1799

State	First Adoption	Reiterations
Maryland	1776	
North Carolina	1776	
Pennsylvania	1776	1790
South Carolina	1776	1778, 1790
Vermont	1777	1786, 1793
New Hampshire	1784	1792
Delaware	1792	
Kentucky	1792	1799
Tennessee	1796	
Georgia	1798	

Table 4-4. No compulsory support clauses in state constitutions, 1800 to 1825

State	First Adoption
Ohio	1802
Indiana	1816
Connecticut	1818
Illinois	1818
Alabama	1819
Maine	1820
Missouri	1820

Table 4-5. No compulsory support clauses in state constitutions, 1826 to 1850

State	First Adoption
Virginia	1830
Michigan	1835
Arkansas	1836
Rhode Island	1842
Texas	1845
Wisconsin	1848

Table 4-6. No public support clauses in state constitutions, 1776 to 1900

State	First Adoption
New Jersey	1776
Virginia	1830
Michigan	1835
Wisconsin	1848
Indiana	1851
Minnesota	1857
Oregon	1857
Missouri	1875
Idaho	1889
South Dakota	1889
Washington	1889
Wyoming	1889

Table 4-7. No appropriation for church schools clauses in state constitutions, 1776 to 1900

State	First Adoption
Pennsylvania	1873
Nebraska	1875
Colorado	1876
Montana	1889
North Dakota	1889
Wyoming	1889
Utah	1895

Table 4-8. Clauses in state constitutions stating there shall be no grant of land or aid to religious institutions, 1776 to 1900

State	First Adoption
Illinois	1870
Colorado	1876
Texas	1876
Idaho	1889
South Dakota	1889
Utah	1895

Table 4-9. Clauses in state constitutions stating that no religious institution shall have an exclusive right to state educational funds, 1776 to 1900

State	First Adoption
Ohio	1851
Kansas	1855
Nebraska	1866
Arkansas	1868
Mississippi	1868

Table 4-10. Clauses in state constitutions stating public schools are to be free from sectarian influence, 1776 to 1900

State	First Adoption
Nevada	1864
Nebraska	1875
Montana	1889
North Dakota	1889
South Dakota	1889
Washington	1889

Table 4-11. Use of the term “sectarian” in context in nineteenth and twentieth century state constitutions

State	Date	Location
Alabama	1875	Art. XIII, Sec. 8
	1901	Art.XIV, Sec. 263
Alaska	1959	Art. VII, Sec. 1
Arizona	1912	Art. IX, Sec. 10
		Art. XI, Sec. 7
		Art. XX, Sec. 7
California	1879	Art. IV, Sec. 30, Amend. 548
		Art. IX, Sec. 8
		Art. IX, Sec. 9, Amend. 123
		Art. XIII, Sec. 24
		Art. XVI, Sec. 16
Colorado	1876	Art. V, Sec. 34
		Art. IX, Sec. 7
		Art. IX, Sec. 8, Amend. 187
Delaware	1897	Art. X, Sec. 3
Florida	1887	Art. 9002, Sec. 6
		Art. XII, Sec. 13
	1968	Art. I, Sec. 3
Georgia	1868	Art. 3, Sec. 6.2
	1983	Art. I, Sec. II, Para. VII
Hawaii	1959	Art. 9, Sec. 1
	1968	Art. 9, Sec. 1
	1978	Art. 10, Sec. 1, Amend. 21
Idaho	1890	Art. 9, Sec. 5
		Art. 9, Sec. 6
	1980	Art. 9, Sec. 5, Amend. 96
Illinois	1870	Art. VIII, Sec. 3
	1970	Art. IX, Sec. 3
Kentucky	1891	Sec. 189
Louisiana	1879	Art. 9007, Sec. 228
	1898	Art. 9007, Sec. 253
	1921	Art. XII, Sec. 13
Mississippi	1890	Art. IV, Sec. 66
		Art. VIII, Sec. 208
Montana	1889	Art. V, Sec. 35
		Art. XI, Sec. 8
		Art. XI, Sec. 9
	1973	Art. X, Sec. 6.1
		Art. X, Sec. 7
Nevada	1864	Art. XI, Sec. 2
		Art. XI, Sec. 2, Amend 31
		Art. XI, Sec. 9
	1880	Art. XI, Sec. 10
New Mexico	1911	Art. XII, Sec. 3
		Art. XXI, Sec. 4

Table 4-11. Continued

State	Date	Location
North Dakota	1889	Art. VIII, Sec. 147
		Art. VIII, Sec. 152
	1981	Art. VIII, Sec. 1
		Art. VIII, Sec. 5
Oklahoma	1907	Art. I, Sec. 5,
		Art. II, Sec. 5
		Art. XI, Sec. 5
	1978	Art. I, Sec. 5, Amend. 1
New Mexico	1911	Art. XII, Sec. 3
Pennsylvania	1874	Art. III, Sec. XVIII
		Art. III, Sec. XVIII, Amend. 33
		Art. III, Sec. XVIII, Amend. 43
		Art. III, Sec. XVIII, Amend. 70
		Art. X, Sec. 2
	1969	Art. III, Sec. 15
		Art. III, Sec. 29
	1975	Art. VIII, Sec. 17(a), Amend. 10
		Art. VIII, Sec. 17(a), Amend. 12
South Carolina	1868	Art. X, Sec. 5
	1895	Art. XI, Sec. 9
South Dakota	1889	Art. VI, Sec. 3
		Art. VIII, Sec. 16
		Art. XXII, Sec. 1
		Art. XXVI, Sec. 18
Texas	1876	Art. VII, Sec. 5
	1891	Art. VII, Sec. 5, Amend. 23
	1964	Art. VII, Sec. 5, Amend. 199
	1983	Art. VII, Sec. 5, Amend. 385
	1988	Art. VII, Sec. 5, Amend. 449
	1989	Art. VII, Sec. 5, Amend. 467
	2003	Art. VII, Sec. 5(c), Amend. 730
Utah	1895	Art. X, Sec. 1
	1947	Art. III, Sec. 4, Amend. 33
	1987	Art. X, Sec. 1, Amend. 184
Virginia	1902	Art. IX, Sec. 141
Washington	1889	Art. IX, Sec. 4
		Art. XXVI
Wyoming	1889	Art. I, Sec. 19
		Art. III, Sec. 36
		Art. VII, Sec. 8
		Art. VII, Sec. 12
N= **27**	**51**	**85**

Table 4-12. Use of the term “sect” in context in nineteenth and twentieth century state constitutions

State	Date	Clause
Alabama	1801	Art. 1, Sec. 3
Arkansas	1868	Art. IX, Sec. 1
Connecticut	1818	Art. I, Sec. 4
	1955	Art. 1, Sec. 4
Kansas	1859	Art. VI, Sec. 8
	1966	Art. VI, Sec. 6(c)
Maine	1819	Art. I, Sec. 3
	1988	Art. I, Sec. 3
Maryland	1776	Sec. 34
	1795	Sec. 36, Amend 2
	1798	Sec. 36, Amend 5
	1825	Sec. 6, Amend 47
	1851	Sec. 35
	1864	Sec. 38
	1867	Art. I, Sec. 38
Massachusetts	1780	Art. I, Sec. 3
		Art. XVIII
		Art. XI
Michigan	1850	Art. IV, Sec. 39-41
Minnesota	1877	Art. VIII, Sec. 3, as Amended
Missouri	1820	Art. III, Sec. 13
	1820	Art. XIII, Sec. 5
	1865	Art. I, Sec. 13
	1875	Art. II, Sec. 7
Nebraska	1864	Art. VII, Sec. 1
New Hampshire	1776	Art. I, Sec. VI
	1792	Art. I, Sec. VI
	1902	Part II, Art. 82
New Jersey	1776	Art. XIX
	1844	Art. I, Sec. 4
Ohio	1851	Art. VI, Sec. 2
Tennessee	1790	Art. VII, Sec. 7
Vermont	1777	Chap. 1, Art. 3
	1786	Chap. 1, Art. 3
	1793	Chap. 1, Art. 3
Virginia	1830	Art. III, Sec. 15
	1864	Art. IV, sec. 15
	1870	Art. V, sec. 14
	1902	Art. Iv, Sec. 58
West Virginia	1862	Art. II, Sec. 9
	1872	Art. III, Sec. 15

Table 4-13. Clauses stating that no preference shall be given to any religious group, 1776 to 1799

State	First Adoption	Reiteration
North Carolina	1776	
Pennsylvania	1776	1790, 1873
Delaware	1792	1831
Tennessee	1796	1834, 1870
Ohio	1802	
Indiana	1816	1851
Kentucky	1792	1799, 1850
Mississippi	1817	1832, 1868
Illinois	1818	1848, 1870
Maine	1820	
Missouri	1820	1865, 1875
Virginia	1830	1850, 1864
Massachusetts[1]	1833	
Arkansas	1836	1864, 1874
Florida	1838	1865
Texas	1845	1866, 1868, 1876
Wisconsin	1848	
Kansas	1857	1859
West Virginia	1861	1872
Nebraska	1866	1875
Colorado	1876	
Idaho	1889	
South Dakota	1889	

[1] Massachusetts Constitutional Amendments of 1833.

CHAPTER 5
CONCLUSIONS, POLICY IMPLICATIONS, AND FUTURE RESEARCH

This study sought to answer two critical question for state legislators, courts, and educational policy makers: 1) In general, are the state constitutional clauses commonly labeled "Blaine Amendments" primarily expressions of anti-Catholic legislative intent, and 2) are they therefore to be considered unconstitutional "Blaine Amendments" as defined by the Court in *Locke*? This study argued that the answer to both questions is "no."

The origins, wording, and history of clauses in Nineteenth Century state constitutions may seem like an esoteric study for policy makers engaged in educational funding decisions. Yet, the *Locke* ruling has made this kind of analysis critical to state legislatures, courts, departments of education, school boards, and others who need to make intelligent and informed decisions concerning educational and other funding programs. As a result of *Locke,* many, perhaps most so called **"**Baby Blaines,"[1] or state constitutional clauses related to restricting the flow of tax dollars into religious institutions, might perhaps be more accurately identified as **"**No Compulsory Support clauses." In the absence of clear anti-Catholic legislative intent, such clauses are now recognized as legitimate constitutional exercises of state desire to maintain a separation of Church and State.

For Blaine opponents, *Locke* provides little comfort. On one hand, the Court has clearly accepted the argument that Blaine Amendments are expressions of anti-Catholic intent. At the same time, as this research demonstrates, by declaring Article I, Sec. 11 of the Washington constitution not a Blaine Amendment the Court has made it very difficult, if not impossible, for

[1] Goldenziel, Jill I., "Blaine's Name in Vain?: State Constitutions, School Choice, & Charitable Choice." *Denver University Law Review*, Vol. 83, No. 1, Fall 2005.

Blaine opponents to make the case that any particular state clause will be an unconstitutional Blaine Amendment.

This is so because, first, “No Compulsory Support Clauses,” with roots in Seventeenth and Eighteenth Century Colonial assertions of the right of conscience, long predate and therefore cannot be attributed solely to mid-Nineteenth Century nativism or anti-Catholic hysteria. Each clause of the failed Federal Blaine Amendment itself, and of its putative progeny at the state level, is found in numerous state constitutions that pre-date – by as much as a century – the Blaine period.

Second, the No Compulsory Support Clauses reflect the long tradition of struggle by the states to seek an appropriate relationship between church and state and a desire to avoid entanglement, specifically compulsory support of religion. Thus, the so-called Blaine Amendments are actually best understood as a continuation of the No Compulsory Support tradition. This was also demonstrated in the examination of dozens of state constitutional statements denying funding to all religious institutions, Catholic and Protestant alike. This denial of religious funding emerged primarily as opposition to compulsory support which was a particular concern to the Founding Fathers such as Madison and Jefferson. Thus, it is no accident that all components of the later “Blaine Amendments” originate decades prior to Blaine's failed Amendment and later adoptions of earlier and neutral language also shared by Blaine.

Third, No Compulsory Support clauses are not anti-Catholic in their origins, as is frequently argued, but are, in fact, the product of religiously neutral intent to remove religious practice in general from state-supported schools. Even before the word “sectarian” appeared in any state constitution, the deliberations of the Massachusetts' constitutional convention of 1853-54 clearly recognized that language denying funding to religious practices in schools would

adversely impact the generic Protestant practices in public schools such as reading from the King James version of the Bible.

This, along with the growth of secularism and the free-thinkers movement, became the context for Grant's 1875 speech to the Army of Tennessee reunion. That speech, considered the impetus for Blaine's failed Amendment, is clearly neutral in language and intent. The neutrality of the proposed Amendment is underscored by the efforts in Congress to amend the language of the original proposal, reflecting an explicit desire to protect Protestant practices in schools; but the amended, decidedly non-neutral, language failed.

Likewise, the historical context for both the proposed Blaine Amendment to the United States Constitution, the precursor clauses in state constitutions, and the "Blaine progeny" that were adopted by new states at the direction of Congress in the latter quarter of the Nineteenth Century are all clearly products of numerous social, political, and religious currents active during the time. These currents range from earlier struggles to define the relationship of church and state, anti-immigrant nativism, the rise of a reactionary papacy issuing proclamations condemning the American democratic experiment [see Appendix C], the growth of the free-thinker, secularist, and atheist movements in American society, Westward expansion, the Civil War, Reconstruction and new statehood, and the emergence of the "Common School" movement, among myriad others. In such a complex milieu, ascribing the "Blaine Amendments" to the single cause of anti-Catholic animus simply cannot be sustained.

Fourth, the large majority of states that implemented No Compulsory Support clauses in the post-Blaine period chose the religiously neutral language used in earlier state constitutions and preserved by Blaine, demonstrating a religiously neutral intent. These choices of language may also demonstrate an awareness that it was only a mater of time until Protestant practices in

public schools were challenged under these clauses and that those challenges were likely to be successful. As a result, as we have seen, both Protestant and Catholic leaders supported both these No Compulsory Support clauses as well as the move to make common schools religiously neutral.

Fifth, the examination of the key words "sect" and "sectarian" in State constitutions demonstrated how the former was gradually, though not entirely, replaced by the latter. Likewise, the examination of how the word sect was used in context in state constitutions demonstrated that this word unquestionably denotes the variety of Christian denominations. Likewise, this study demonstrated that the word "sectarian," also read in textual context, is nearly always paired with qualifiers that again emphasize the variety of Christian churches rather than functioning as the oft-asserted "code word" for Catholic.

Finally, many of the No Compulsory Support clauses adopted during the very real periods of nativism and anti-Catholicism have passed through Constitutional revision and re-adoption during times not so associated; thus clauses to which anti-Catholic animus could be ascribed may well be considered disassociated from such attitudes in the modern period. For example, the Texas Constitution of 1876 asserts that, "no law shall ever be enacted appropriating any part of the permanent or available school-fund to any other purpose whatever; nor shall the same or any part thereof ever be appropriated to or used for the support of any sectarian school." Unlike many constitutions examined here, there are no modifiers in this constitution to clearly establish neutrality. However, the Texas Constitution has been revised and ratified in 1891, 1964, 1983, 1988, 1989, and 2003. At each constitutional revision, the unmodified use of "sectarian" has been preserved; and unless one were to accuse Texans in 1983, 1988, 1989, and

2003 of pervasive anti-Catholicism, one must accept that the term "sectarian" no longer connotes anti-Catholic intent.

Future Litigation

Ultimately, however, the Supreme Court ruling in *Locke* has not closed the door to future challenges; but the constitutionality of state-level Blaine Amendments must now be decided on a state-by-state basis. In his opinion of the majority, Rehnquist asserted that:

> The amici contend that Washington's Constitution was born of religious bigotry because it contains a so-called 'Blaine Amendment,' which has been linked with anti-Catholicism. As the State notes and Davey does not dispute, however, the provision in question is not a Blaine Amendment. The enabling Act of 1889, which authorized the drafting of the Washington Constitution, required the state constitution to include a provision 'for the establishment and maintenance of systems of public schools, which shall be . . . free from sectarian control.' This provision was included in Article IX, §4, of the Washington Constitution, and is not at issue in this case. Neither Davey nor amici have established a credible connection between the Blaine Amendment and Article I, §11, the relevant constitutional provision. Accordingly, the Blaine Amendment's history is simply not before us.[2]

Thus, there are two possible avenues for Blaine Amendments to appear again before the Court. The first would be a similar case where the state Blaine Amendment is more explicitly implicated. Even in such a case, the bar has been raised by *Locke* in the Court's insistence that "we find neither in the history or text of Article I, §11 of the Washington Constitution, nor in the operation of the Promise Scholarship Program, anything that suggests animus towards religion."[3] Therefore, "[g]iven the historic and substantial state interest at issue, we therefore cannot conclude that the denial of funding for vocational religious instruction alone is inherently constitutionally suspect.[4]"

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[2] Justice William Rehnquist, L*ocke v. Davey*, 540 U.S. 712, 2004. Opinion of the Court, p. 10, fn 7, (citations omitted).

[3] *Id*, p. 11

[4] *Id*.

A second possible way for a particular Blaine Amendment to appear before the Court would be if specific, legislative anti-Catholic intent can be identified in the deliberations of a State in its enactment of a specific Blaine Amendment. But even such a "smoking gun" will also have its difficulties given that most state constitutions have been revised and re-ratified in the years since the nativism of the Nineteenth Century and it will likely be the intent of the most recent legislative review that will matter most.

In this context, States can learn much from this ruling, specifically from the Court majority assertion that:

> Far from evincing the hostility toward religion which was manifest in *Lukumi*, we believe that the entirety of the Promise Scholarship Program goes a long way toward including religion in its benefits. The program permits students to attend pervasively religious schools, so long as they are accredited . . . In short, we find neither in the history or text of Article I, §11 of the Washington Constitution, nor in the operation of the Promise Scholarship Program, anything that suggests animus towards religion. Given the historic and substantial state interest at issue, we therefore cannot conclude that the denial of funding for vocational religious instruction alone is inherently constitutionally suspect.[5]

Likewise, the Court observed,

> Washington has also been solicitous in ensuring that its constitution is not hostile towards religion, and at least in some respects, its constitution provides greater protection of religious liberties than the Free Exercise Clause. We have found nothing in Washington's overall approach that indicates it "single[s] out" anyone "for special burdens on the basis of . . . religious callings.[6]

Thus, at the state level, the question of whether or not the origins of a particular Blaine Amendment lie in an unconstitutional anti-Catholic bias, or upon any other suspect grounds, will undoubtedly be raised. However, given the incomplete nature of Nineteenth Century records, proving an unconstitutional motive for enactment of a Blaine Amendment will be difficult at

[5] *Id*., p. 10-11 (citations omitted)

[6] *Id*, p. 10-11, fn 8. (citations omitted)

best. As such, it would appear that Blaine Amendments will stand, at least until such time when, and if, the makeup of the U.S. Supreme Court changes to include more Justices who interpret these issues in a significantly different fashion.

Policy Implications

For policy makers, the implications of *Locke* are similar. Black's Law Dictionary defines policy as, "The general principles by which a government is guided in its management of public affairs, or the legislature in its measures."[7] The general principles emerging from Locke are simple; implementing them is much more controversial.

First, the series of cases examined, *Mitchell v. Helms, Zelman v. Simmons-Harris*, and *Locke v. Davey* all state that if a legislature opens a funding program to private institutions, it cannot restrict religious institutions from participating, even "pervasively" religious institutions. However, tax dollars cannot flow directly from the State to religious institutions, but must pass through the independent decisions of parents or other recipients of state money delivered in the form of vouchers, scholarships, and the like. Thus, policy-makers need to understand this when designing funding programs.

Second, funding programs need to be structured and administered in a religiously neutral fashion to pass constitutional muster. Anti-religious discrimination, directed at a particular religion or religion in general, will doom a program to be struck down by the Court. Likewise, state legislation that favors religious groups will also be viewed as suspect.[8]

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[7] Black's Law Dictionary, 6th ed., 1990.

[8] See Alexander, *supra*. p. 146. ("The courts have been forced to respond to a consistent and seemingly endless array of attempts by legislatures, in states with large percentages of parochial school students, to circumvent separation barriers in efforts to allow tax funds to flow to religious schools"). In this context, the efforts of certain religious groups to insert theistic creation into school curricula is instructive. See also *Edwards v. Aguillard*, 482 U.S. 578 (1987) (a Louisiana law requiring that "creation science" be taught in public schools whenever evolution was taught is unconstitutional, because the law was specifically intended to advance a particular religion); and *Kitzmiller v.*

Third, both supporters and opponents of the participation of religious schools and institutions in State funding programs need to understand the principles of their State Constitutions when arguing about the Constitutionality of a program. The Supreme Court has made it clear that religiously neutral programs that allow and restrict the flow of tax dollars to religious institutions can both stand in the "play in the joints" between the Free Exercise and No Establishment Clauses of the Federal Constitution.

Fourth, both supporters and opponents of the participation of religious schools and institutions in State funding programs need to examine the histories of their States and to evaluate the influence of religious prejudice on their Constitutions. While it will be difficult to find and clearly establish an anti-religious bias, such a task is not impossible; and successful documentation of bias could substantially change the nature of a future Supreme Court ruling.

Fifth, both supporters and opponents of the participation of religious schools and institutions in State funding programs need to look at their own Constitutional histories to determine how the State Supreme Courts have framed their "Blaine Amendments" and other clauses having the potential to affect the flow of tax dollars into religious institutions. As Frank Kemerer shows in a 1997 article,[9] many state courts limit of the amount of church-state interaction permissible under their Constitutions. Kemerer examines the Establishment Clauses in all fifty state constitutions and identifies seventeen states as being "restrictive" regarding state aid to religious schools.[10] Each of these seventeen state constitutions also contains a Blaine

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Dover, Case 4:04-cv-02688-JEJ, (2004-2005) (declaring the Dover mandate was unconstitutional, and barring "intelligent design" from being taught in Pennsylvania's Middle District public school classroom.)

[9] Frank R. Kemerer, "State Constitutions and School Vouchers," 120 *West's Educ. L. Rep.* 1, 20-39 (1997).

[10] *Id*., n41, at 39-40, tbl.1. The states are Alaska, California, Delaware, Florida, Hawaii, Idaho, Kansas, Kentucky, Massachusetts, Michigan, Missouri, North Dakota, Oklahoma, South Dakota, Virginia, Washington, and Wyoming.

Amendment.[11] Kemerer identifies fourteen states as "permissive," either because the state constitution has no provision regarding church-state relations or because of a "supportive legal climate."[12] Of these “permissive” states, eight also have Blaine Amendments.[13] Finally, nineteen states,[14] ten of which have Blaine Amendments,[15] are classified as "uncertain."[16] Therefore, Kemerer's work argues that at least seventeen “restrictive” states “would be inclined to view a voucher program involving religious schools with a skeptical eye.”[17]

In this context, it is important to note that both the Wisconsin and Ohio State Constitutions contain Blaine language, but in *Jackson v Benson*[18] the Wisconsin Supreme Court upheld the Milwaukee Parental Choice Program declaring the program acceptable under both the Wisconsin and United States Constitutions despite provisions allowing tax dollars to go to religious institution. In 1998, the U.S. Supreme Court chose not to hear the appeal of the

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[11] Toby Heytens, “School Choice and State Constitutions,” February, 86 *Va. L. Rev.* 117, n45 (2000). “Professor Kemerer classifies only thirteen of the seventeen restrictive states as containing restrictive constitutional language. He excludes Alaska, Idaho, South Dakota, and Washington from the list. See *id*. Professor Kemerer acknowledges, however, that his classifications "should be viewed as approximations" because "of the complexity of this task and the subjectivity inherent in making these determinations."

[12] Kemerer, *supra* note 41, at 23.

[13] *Id*., n32. “Professor Kemerer lists Alabama, Maine, Maryland, Nebraska, Pennsylvania, Rhode Island, and Vermont as having permissive constitutional language. See id. Nevertheless, two of these states' constitutions - Nebraska's and Pennsylvania's - also contain Blaine Amendments. See Neb. Const. art. VII, 11; Pa. Const. art. III, 29. Additionally, the Arizona, New Hampshire, New York, South Carolina, Utah, and West Virginia constitutions contain Blaine Amendments.” Heytens, n47

[14] *Id.*, n41, at 39-40 tbl.1. “The states are Arkansas, Colorado, Connecticut, Georgia, Illinois, Indiana, Iowa, Louisiana, Minnesota, Montana, Nevada, New Jersey, New Mexico, North Carolina, Ohio, Oregon, Tennessee, Texas, and Wisconsin. Of course, since both the Milwaukee, Wisconsin and Cleveland, Ohio voucher programs have been upheld against state constitutional attack, see *Simmons-Harris v. Goff*, 711 N.E.2d 203, 207 (Ohio 1999); *Jackson v. Benson*, 578 N.W.2d 602, 632 (Wis.), cert. denied, 525 U.S. 997 (1998), neither of those states is uncertain any longer.” Heytens, n. 48

[15] Colorado, Georgia, Illinois, Indiana, Minnesota, Montana, New Mexico, Oregon, Texas, and Wisconsin. See *id.* n32 (listing Blaine Amendments).

[16] *Id*., n41, at 37.

[17] Heytens, *supra*, at 127.

[18] 218 Wis. 2d 835 (1998).

Wisconsin ruling. On the other hand, in Ohio, the State Court of Appeals found the Pilot Project Scholarship Program[19] unconstitutional, declaring that the program had the primary effect of advancing religion in violation of the Establishment Clause.[20] It was this ruling the United States Supreme Court overruled in *Zelman v. Simmons-Harris*.[21] Thus, after *Locke*, it would appear that it is the inclinations of particular state courts rather than the presence of Blaine language in a state constitution that will determine whether or not state tax dollars will be allowed to flow to religious institutions. But even then, it is clear that the United States Supreme Court finds limited impediments to religious institutions receiving tax funds; and any attempt by States to create such limits must be carefully crafted to fulfill the rather imprecise requirements of "neutrality."

The implications of *Locke* are already being seen in Florida where advocates for the increased participation of religious organizations in state funding programs were recently thwarted. In 2006 the Florida Supreme Court declared the state's Opportunity Scholarship Program unconstitutional because it included private secular and religious schools.[22] In *Bush v. Holmes*, the Florida court asserted in a five to two decision that the voucher program violated the state constitution's provision requiring a "uniform" system of public schools for all students. Chief Justice Barbara J. Pariente wrote in the majority opinion that the voucher program "diverts public dollars into separate, private systems … parallel to and in competition with the free public schools."[23] It is instructive to note that this ruling was not based on Florida's "Blaine

[19] Ohio Rev. Code Ann. §§3313.974—3313.979.

[20] 528 U.S. 983 (1999).

[21] 234 F.3d 945 (2002).

[22] *John Ellis "Jeb" Bush v. Ruth D. Holmes*, 919 So. 2d 392, 412-13 (Fla. 2006).

[23] Erik W. Robelen, "Florida Voucher Ruling Roils School Choice Waters," *Education Week*, 17 January 2006. Available online at http://www.edweek.org/ew/articles/2006/01/18/19vouchers.h25.html.

Amendment,"[24] but instead on the clause requiring a "uniform, efficient, safe, secure, and high quality system of free public schools."[25] This illustrates the argument previously presented that "Blaine Amendments" and "No Compulsory Support" clauses are not the only state constitutional clauses having the potential to affect the flow of tax dollars into private and religious institutions.

In part, as a result of the *Bush v. Holmes* ruling, a recent state tax commission[26] attempted to place before Florida voters as part of the 2008 election cycle a constitutional amendment to repeal the state's Blaine language stating, "No revenue of the state or any political subdivision or agency thereof shall ever be taken from the public treasury directly or indirectly in aid of any church, sect or religious denomination or in aid of any sectarian institution." That language was to be replaced by the statement that, "Individuals or entities may not be barred from participating in public programs because of religion."[27] The proposed amendments were then challenged before the Florida Supreme Court in *Ford v. Browning* [28] and in September 2008 the high court ruled seven to zero in favor of the challengers, striking the proposed amendments from the ballot because they both exceeded the constitutional authority of the tax commission[29]

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[24] Fla Const., Art. I, Sec. 3.

[25] Fla. Const., Art. IX, Sec. 1(a).

[26] Information on the Florida Taxation and Budget Reform Commission is available online at http://www.floridatbrc.org/.

[27] Americans United for Separation of Church and State, "Florida Tax Commission Urges Repeal of Strict Church-State Provisions." *BNET Business Network* (May 2008). Available online at http://findarticles.com/p/articles/mi_qa3944/is_200805/ai_n25502298.

[28] No. SC08-1529, September 15, 2008. The proposed amendments were originally challenged and upheld before the Florida Circuit Court (*Ford v. Browning*, No. 08-1905, Aug. 4, 2008) and then appealed to the Florida Supreme Court.

[29] *Id*. This is the focus of the *Opinion of the Court* written by Justice Wells, available online at http://www.floridasupremecourt.org/decisions/2008/sc08-1529.pdf.

and were presented in language designed to mislead voters regarding the real purpose and effect of the changes.[30]

As the litigation surrounding the Florida Tax Commission's proposed constitutional amendments illustrates, policy makers need to be aware of the myriad strategies available for changing and circumventing constitutional and statutory policies. Likewise, policy makers need to be aware of the legal implications of opening – or closing -- funding programs to religious participation.[31] Thus, the involvement of religious institutions in State funded programs opens a veritable "Pandora's Box" of doors to a variety of legal dilemmas that will undoubtedly be explored in our increasingly litigious society.

Future Research

By nature, this type of study opens up as many directions for further research as it closes others. Many of these directions have been mentioned earlier including a deeper examination of state No Compulsory Support clause adoption to identify the role and level of anti-Catholic and other anti-religious bias, if any, in State adoption of the variety of clauses potentially affecting the flow of tax dollars into religious institutions.

Another topic would be the level of awareness that neutral No Compulsory Support language would affect Protestant religious practice in public schools. As discussed previously,

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[30] *Id*. This is the focus of the *Opinion of the Court* written by Justice Lewis. T

[31] Derek Davis, "Mitchell v. Helms and the Modern Cultural Assault on the Separation of Church and State," 43 *B.C. L. Rev 1054*, (September, 2002). Davis lists such questions as how will the parents of a student whose application to a religious school is rejected respond when they realize that "their tax money now subsidizes certain "secular" functions of the school that rejects their child?" How does the State monitor return on investment or the required qualifications of teachers when tax dollars disappear into the budgets of religious schools? What if a religious school's students consistently fail to meet minimum standards on assessments? Can the State even require religious schools to administer State assessments of academic progress? How can the government intervene where problems are identified and documented? "If the government does demand accountability, will the school be able to defend its policies and practices using the First Amendment or will it be forced to acquiesce to the government's will and/or popular opinion?" and "Will the public stomach government support even of secular functions in schools that also teach the traditions of witchcraft, or Rastafarianism, or Zoroastrianism, or the Branch Davidians?"

Massachusetts legislators were clearly aware of this possibility as early as 1853. How widely that awareness spread and what influence that awareness may have had on future legislation would be a valuable study.

Continued analysis of how state courts interpret and apply state constitutional No Compulsory Support clauses will also be important; for the will shape the new, emerging patterns of church-state relations.

Continued attention to future U.S. Supreme Court cases related to government funding and religious institutions will also be necessary. Likewise, the changing constituency of the Court always has the attention to raise now questions and establish new doctrines and tests that can dramatically change the nature of even well-settled law.

Finally, the ongoing efforts of some groups and churches to further lower the barriers between church and state and increase the flow of state funds into religious institutions will continue to clash against ongoing efforts by some to restore the “high wall of separation;” undoubtedly resulting in frequent legal and political fireworks, will continue to provide additional topics for future analysis.

APPENDIX A
BLAINE CLAUSES IN CURRENT STATE CONSTITUTIONS

State	Clause	Text
Alabama	Art. XIV, Sec. 263	No money raised for the support of the public schools, shall be appropriated to or used for the support of any sectarian or denominational school.
Alaska	Article VII, Sec. 1	Public Education. The legislature shall by general law establish and maintain a system of public schools open to all children of the State, and may provide for other public educational institutions. Schools and institutions so established shall be free from sectarian control. No money shall be paid from public funds for the direct benefit of any religious or other private educational institution.
Arizona	Art. IX, Sec. 10	No tax shall be laid or appropriation of public money made in aid of any church, or private or sectarian school, or any public service corporation.
	Art. XI, Sec. 7	No sectarian instruction shall be imparted in any school or state educational institution that may be established under this Constitution, and no religious or political test or qualification shall ever be required as a condition of admission into any public educational institution of the state, as teacher, student, or pupil; but the liberty of conscience hereby secured shall not be so construed as to justify practices or conduct inconsistent with the good order, peace, morality, or safety of the state, or with the rights of others.
	Art. XX, Sec. 7	Provisions shall be made by law for the establishment and maintenance of a system of public schools which shall be open to all the children of the state and be free from sectarian control, and said schools shall always be conducted in English. The state shall never enact any law restricting or abridging the right of suffrage on account of race, color, or previous condition of servitude.
Arkansas		*No use of "sectarian"*

These are only clauses using the word "sectarian." Many state constitutions contain other clauses that may affect the flow of tax dollars into religious institutions. For example, the Kentucky State Constitution, Sec. 184 reads, "The interest and dividends of said fund, together with any sum which may be produced by taxation or otherwise for purposes of common school education, shall be appropriated to the common schools, and to no other purpose." While this phrase can influence whether or not state funds can flow to religious schools, it is not counted in this research as a "Blaine Amendment."

California	Art. IX, Sec. 8	No public money shall ever be appropriated for the support of any sectarian or denominational school, or any school not under the exclusive control of the officers of the public schools; nor shall any sectarian or denominational doctrine be taught, or instruction thereon be permitted, directly or indirectly, in any of the common schools of this State.
	Art. XVI, Sec. 5	Neither the Legislature, nor any county, city and county, township, school district, or other municipal corporation, shall ever make an appropriation, or pay from any public fund whatever, or grant anything to or in aid of any religious sect, church, creed, or sectarian purpose, or help to support or sustain any school, college, university, hospital, or other institution controlled by any religious creed, church, or sectarian denomination whatever; nor shall any grant or donation of personal property or real estate ever be made by the State, or any city, city and county, town, or other municipal corporation for any religious creed, church, or sectarian purpose whatever; provided, that nothing in this section shall prevent the Legislature granting aid pursuant to Section 3 of Article XVI.
Colorado	Art. V, Sec. 34	No appropriation shall be made for charitable, industrial, educational, or benevolent purposes to any person, corporation, or community not under the absolute control of the State, nor to any denominational or sectarian institution or association.
	Art. 9, Sec. 7	Neither the general assembly, nor any county, city, town, township, school-district, or other public corporation shall ever make any appropriation, or pay from any public fund or moneys whatever, anything in aid of any church or sectarian society, or for any sectarian purpose, or to help support or sustain any school, academy, seminary, college, university, or other literary or scientific institution controlled by any church or sectarian denomination whatsoever; nor shall any grant or donation of land, money, or other personal property ever be made by the State, or any such public corporation, to any church or for any sectarian purposes.
	Art. 8, Sec. 8, Amend. 187	Religious test and race discrimination forbidden sectarian tenets. No religious test or qualification shall ever be required of any person as a condition of admission into any public educational institution of the state, either as a teacher or student; and no teacher or student of any such institution shall ever be required to attend or participate in any religious service whatsoever. No sectarian tenets or doctrines shall ever be taught in the public school, nor shall any distinction or classification of pupils be made on account of race or color, nor shall any pupil be assigned or transported to any public educational institution for the purpose of achieving racial balance. [As amended, December 20, 1974.]
Connecticut		*No use of "sectarian"*

Delaware	Art. 10, Sec. 3	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; provided, that all real or personal property used for school purposes, where the tuition is free, shall be exempt from taxation and assessment for public purposes.
Florida	Art. I, Sec. 3	Religious freedom. There shall be no law respecting the establishment of religion or prohibiting or penalizing the free exercise thereof. Religious freedom shall not justify practices inconsistent with public morals, peace or safety. No revenue of the state or any political subdivision or agency thereof shall ever be taken from the public treasury directly or indirectly in aid of any church, sect, or religious denomination or in aid of any sectarian institution.
Georgia	Art. I, Sec. 2, Para. Vii	Separation of church and state. No money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect, cult, or religious denomination or of any sectarian institution.
Hawaii	Art. 10, Sec. 1, Amend. 21	The State shall provide for the establishment, support and control of a statewide system of public schools free from sectarian control, a state university, public libraries and such other educational institutions as may be deemed desirable, including physical facilities therefor. There shall be no discrimination in public educational institutions because of race, religion, sex or ancestry; nor shall public funds be appropriated for the support or benefit of any sectarian or private educational institution, except that proceeds of special purpose revenue bonds authorized or issued under section 12 of Article VII may be appropriated to finance or assist not-for-profit corporations that provide early childhood education and care facilities serving the general public.
Idaho	Art. IX, Sec. 5, Amend. 96	Neither the legislature nor any county, city, town, township, school district, or other public corporation, shall ever make any appropriation, or pay from any public fund or moneys whatever, anything in aid of any church or sectarian or religious society, or for any sectarian or religious purpose, or to help support or sustain any school, academy, seminary, college, university or other literary or scientific institution, controlled by any church, sectarian or religious denomination whatsoever; nor shall any grant or donation of land, money or other personal property ever be made by the state, or any such public corporation, to any church or for any sectarian or religious purpose; provided, however, that a health facilities authority, as specifically authorized and empowered by law, may finance or refinance any private, not for profit, health facilities owned or operated by any church or sectarian religious society, through loans, leases, or other transactions. [Ratified November 4, 1980]

	Art. IX, Sec. 6,	No religious test or qualification shall ever be required of any person as a condition of admission into any public educational institution of the State, either as teacher or student; and no teacher or student of any such institution shall ever be required to attend or participate in any religious service whatever. No sectarian or religious tenets or doctrines shall ever be taught in the public schools, nor shall any distinction or classification of pupils be made on account of race or color. No books, papers, tracts or documents of a political, sectarian or denominational character shall be used or introduced in any schools established under the provisions of this article, nor shall any teacher or any district receive any of the public school moneys in which the schools have not been taught in accordance with the provisions of this article.
Illinois	Art. X, Sec. 3	Neither the General Assembly nor any county, city, town, township, school district, or other public corporation, shall ever make any appropriation or pay from any public fund whatever, anything in aid of any church or sectarian purpose, or to help support or sustain any school, academy, seminary, college, university, or other literary or scientific institution, controlled by any church or sectarian denomination whatever; nor shall any grant or donation of land, money, or other personal property ever be made by the State, or any such public corporation, to any church, or for any sectarian purpose.
Indiana		*No use of "sectarian"*
Iowa		*No use of "sectarian"*
Kansas		*No use of "sectarian"*
Kentucky	Part. 2, Sec. 189	No portion of an fund or tax now existing, or that may hereafter be raised or levied for educational purposes, shall be appropriated to, or used by, or in aid of, any church, sectarian or denominational school.
Louisiana		*No use of "sectarian"*
Maine		*No use of "sectarian"*
Maryland		*No use of "sectarian"*
Massachusetts		*No use of "sectarian"*
Michigan		*No use of "sectarian"*
Minnesota		*No use of "sectarian"*
Mississippi	Art. IV, Sec. 66, Amend 3	No law granting a donation or gratuity in favor of any person or object shall be enacted except by the concurrence of two-thirds of the members elect of each branch of the legislature, nor by any vote for a sectarian purpose or use.

	Art. VIII, Sec. 208	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 towards the support of any sectarian school; or to any school that at the time of receiving such appropriation is not conducted as a free school.
Missouri	Art. IX, Sec. 8	Neither the general assembly, nor any county, city, town, township, school district or other municipal corporation, shall ever make an appropriation or pay from any public fund whatever, anything in aid of 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 ever be made by the state, or any county, city, town, or other municipal corporation, for any religious creed, church, or sectarian purpose whatever.
	Art. I, Sec. 7	That no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect or denomination of religion, or in aid of any priest, preacher, minister or teacher thereof, as such; and that no preference shall be given to nor any discrimination made against any church, sect or creed of religion, or any form of religious faith or worship.
Montana	Art. X, Sec. 6.1	The legislature, counties, cities, towns, school districts, and public corporations shall not make any direct or indirect appropriation or payment from any public fund or monies, or any grant of lands or other property for any sectarian purpose or to aid any church, school, academy, seminary, college, university, or other literary or scientific institution, controlled in whole or in part by any church, sect, or denomination.
Nebraska	VII-11	Notwithstanding any other provision in the Constitution, appropriation of public funds shall not be made to any school or institution of learning not owned or exclusively controlled by the state or a political subdivision thereof; PROVIDED, that the Legislature may provide that the state or any political subdivision thereof may contract with institutions not wholly owned or controlled by the state or any political subdivision to provide for educational or other services for the benefit of children under the age of twenty-one years who are handicapped, as that term is from time to time defined by the Legislature, if such services are nonsectarian in nature. All public schools shall be free of sectarian instruction. The state shall not accept money or property to be used for sectarian purposes; PROVIDED, that the Legislature may provide that the state may receive money from the federal government and distribute it in accordance with the terms of any such federal grants, but no public funds of

		the state, any political subdivision, or any public corporation may be added thereto. A religious test or qualification shall not be required of any teacher or student for admission or continuance in any school or institution supported in whole or in part by public funds or taxation.
Nevada	Art. II, Sec. 2	The legislature shall provide for a uniform system of common schools, by which a school shall be established and maintained in each school district at least six months in every year, and any school district which shall allow instruction of a sectarian character therein may be deprived of its proportion of the interest of the public school fund during such neglect or infraction, and the legislature may pass such laws as will tend to secure a general attendance of the children in each school district upon said public schools.
	Art. II, Sec. 10	No public funds of any kind or character whatever, State, County or Municipal, shall be used for sectarian purpose.
New Hampshire		*No use of "sectarian"*
New Jersey		*No use of "sectarian"*
New Mexico	Art. XII, Sec. 3	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, denominational, or private school, college, or university.
	Art. XXI, Sec. 4	Provision shall be made for the establishment and maintenance of a system. of public schools which shall be open to all the children of the State and free from sectarian control, and said schools shall always be conducted in English.
New York		*No use of "sectarian"*
North Carolina		*No use of "sectarian"*
North Dakota	Art. VIII, Sec. 1	A high degree of intelligence, patriotism, integrity and morality on the part of every voter in a government by the people being necessary in order to insure the continuance of that government and the prosperity and happiness of the people, the legislative assembly shall make provision for the establishment and maintenance of a system of public schools which shall be open to all children of the state of North Dakota and free from sectarian control. This legislative requirement shall be irrevocable without the consent of the United States and the people of North Dakota.
	Art. VIII, Sec. 5	All colleges, universities, and other educational institutions, for the support of which lands have been granted to this state, or which are supported by a public tax, shall remain under the

		absolute and exclusive control of the state. No money raised for the support of the public schools of the state shall be appropriated to or used for the support of any sectarian school.
Ohio		*No use of "sectarian"*
Oklahoma	Art. I, Sec. 5	Provisions shall be made for the establishment and maintenance of a system of public schools, which shall be open to all the children of the state and free from sectarian control; and said schools shall always be conducted in English: Provided, that nothing herein shall preclude the teaching of other languages in said public schools. [As Amended, November 7, 1978]
	Art. II, Sec. 5	No public money or property shall ever be appropriated, applied, donated, or used, directly or indirectly, for the use, benefit, or support of any sect, church, denomination, or system of religion, or for the use, benefit or support of any priest, preacher, minister, or other religious teacher or dignitary, or sectarian institution as such.
	Art. XI, Sec. 5	**. . .** Such educational institutions shall remain under the exclusive control of the State and no part of the proceeds arising from the sale or disposal of any lands granted for educational purposes, or the income or rentals thereof, shall be used for the support of any religious or sectarian school, college, or university, and no portion of the funds arising from the sale of sections thirteen or any indemnity lands selected in lieu thereof, either principal or interest, shall ever be diverted, either temporarily or permanently, from the purpose for which said lands were granted to the State.
Oregon	Art. I, Sec. 5	No money shall be drawn from the Treasury for the benefit of any religeous [sic], or theological institution, nor shall any money be appropriated for the payment of any religeous [sic] services in either house of the Legislative Assembly
Pennsylvania	Art. III, Sec. 15	No money raised for the support of the public schools of the Commonwealth shall be appropriated to or used for the support of any sectarian school.
	Art. III, Sec. 29	No appropriation shall be made for charitable, educational or benevolent purposes to any person or community nor to any denomination and sectarian institution, corporation or association: Provided, That appropriations may be made for pensions or gratuities for military service and to blind persons twenty-one years of age and upwards and for assistance to mothers having dependent children and to aged persons without adequate means of support and in the form of scholarship grants or loans for higher educational purposes to residents of the Commonwealth enrolled in institutions of higher learning except that no scholarship, grants or loans for higher educational purposes shall be given to persons enrolled in a theological seminary or school of theology.

	Art. 8, Sec. 17, Amend. 10	Notwithstanding any provisions of this Constitution to the contrary, the General Assembly shall have the authority to enact laws providing for tax rebates, credits exemptions, grants-in-aid, State supplementations, or otherwise provide special provisions for individuals, corporations, associations or nonprofit institutions, including nonpublic schools (whether sectarian or nonsectarian) in order to alleviate the danger, damage, suffering or hardship faced by such individuals, corporations, associations, institutions or nonpublic schools as a result of Great Storms or Floods of September 1971, of June 1972, or of 1974, or of 1975. [Source: 1975 Pa. Laws 622]
	Art. 8, Sec. 17, Amend. 12	Notwithstanding any provisions of this Constitution to the contrary, the General Assembly shall have the authority to enact laws providing for tax rebates, credits exemptions, grants-in-aid, State supplementations, or otherwise provide special provisions for individuals, corporations, associations or nonprofit institutions, including nonpublic schools (whether sectarian or nonsectarian) in order to alleviate the danger, damage, suffering or hardship faced by such individuals, corporations, associations, institutions or nonpublic schools as a result of Great Storms or Floods of September 1971, of June 1972, or of 1974, or of 1975 or of 1976.
Rhode Island		*No use of "sectarian"*
South Carolina	Art. XI, Sec. 4	No money shall be paid from public funds nor shall the credit of the State or any of its political subdivisions be used for the direct benefit of any religious or other private educational institution.
South Dakota	Art. VI, Sec. 3	The right to worship God according to the dictates of conscience shall never be infringed. No person shall be denied any civil or political right, privilege or position on account of his religious opinions; but the liberty of conscience hereby secured shall not be so construed as to excuse licentiousness, the invasion of the rights of others, or justify practices inconsistent with the peace or safety of the State. No person shall be compelled to attend or support any ministry or place of worship against his consent, nor shall any preference be given by law to any religious establishment or mode of worship. No money or property of the state shall be given or appropriated for the benefit of any sectarian or religious society or institution.
	Art. VIII, Sec. 16	No appropriation of lands, money or other property or credits to aid any sectarian school shall ever be made by the state, or any county or municipality within the state, nor shall the state or any county or municipality within the state accept any grant, conveyance, gift or bequest of lands, money or other property to be used for sectarian purposes, and no sectarian instruction shall be allowed in any school or institution aided or supported by the state.

	Art. XXII, Sec. 1	**. . .** Fourth, That provision shall be made for the establishment and maintenance of systems of public schools, which shall be opened to all the children of this state, and free from sectarian control.
	Art. XXVI, Sec. 18	**. . .** Fourth - That provision shall be made for the establishment and maintenance cf systems of public schools which shall be opened to all the children of this state and free from sectarian control.
Tennessee		*No use of "sectarian"*
Texas	Art. I, Sec. 7	Appropriations for Sectarian Purposes. No money shall be appropriated, or drawn from the Treasury for the benefit of any **sect**, or religious society, theological or religious seminary; nor shall property belonging to the State be appropriated for any such purposes.
	Art. VII, Sec. 5	The available school fund shall be applied annually to the support of the public free schools. Except as provided by this section, the legislature may not enact a law appropriating any part of the permanent school fund or available school fund to any other purpose. The permanent school fund and the available school fund may not be appropriated to or used for the support of any **sectarian** school. The available school fund shall be distributed to the several counties according to their scholastic population and applied in the manner provided by law.
Utah	Art. III, Sec. 4, Amend. 33	Fourth: The Legislature shall make laws for the establishment and maintenance of a system of public schools, which shall be open to all the children of the state and be free from sectarian control. (Amended 1/1/1947)
	Art. X, Sec. 1, Amend. 184	The Legislature shall provide for the establishment and maintenance of the state's education systems including: (a) a public education system, which shall be open to all children of the state; and (b) a higher education system. Both systems shall be free from sectarian control. (Amended 7/1/1987)
Vermont		*No use of "sectarian"*
Virginia	Art. IV, Sec. 16	The General Assembly shall not make any appropriation of public funds, personal property, or real estate to any church or sectarian society, or any association or institution of any kind whatever which is entirely or partly, directly or indirectly, controlled by any church or sectarian society. Nor shall the General Assembly make any like appropriation to any charitable institution which is not owned or controlled by the Commonwealth; the General Assembly may, however, make appropriations to nonsectarian institutions for the reform of youthful criminals and may also authorize counties, cities, or towns to make such appropriations to any charitable institution or association.

	Art. VIII, Sec. 11	The General Assembly may provide for loans to, and grants to or on behalf of, students attending nonprofit institutions of higher education in the Commonwealth whose primary purpose is to provide collegiate or graduate education and not to provide religious training or theological education. The General Assembly may also provide for a State agency or authority to assist in borrowing money for construction of educational facilities at such institutions, provided that the Commonwealth shall not be liable for any debt created by such borrowing. The General Assembly may also provide for the Commonwealth or any political subdivision thereof to contract with such institutions for the provision of educational or other related services. [As Amended January 1, 1975]
Washington	Art. IX, Sec. 4	All schools maintained or supported wholly or in part by the public funds shall be forever free from sectarian control or influence.
	Art. XXVI	**. . .** Provision shall be made for the establishment and maintenance of systems of public schools free from sectarian control, which shall be open to all the children of said state.
West Virginia		*No use of "sectarian"*
Wisconsin	Art. X, Sec. 3	The legislature shall provide by law for the establishment of district schools, which shall be as nearly uniform as practicable; and such schools shall be free and without charge for tuition to all children between the ages of 4 and 20 years; and no sectarian instruction shall be allowed therein; but the legislature by law may, for the purpose of religious instruction outside the district schools, authorize the release of students during regular school hours. [As amended April 1972]
	Art. X, Sec. 6	Provision shall be made by law for the establishment of a state university at or near the seat of state government, and for connecting with the same, from time to time, such colleges in different parts of the state as the interests of education may require. The proceeds of all lands that have been or may hereafter be granted by the United States to the state for the support of a university shall be and remain a perpetual fund to be called "the university fund," the interest of which shall be appropriated to the support of the state university, and no sectarian instruction shall be allowed in such university.
Wyoming	Art. I, Sec. 19	No money of the State shall ever be given or appropriated to any sectarian or religious society or institution.
	Art. III, Sec. 36	No appropriation shall be made for charitable, industrial, educational or benevolent purposes to any person, corporation or community not under the absolute control of the State, nor to any denominational or sectarian institution or association.

	Art. VII, Sec. 8, Amend. 48	Provision shall be made by general law for the equitable allocation of such income among all school districts in the state. But no appropriation shall be made from said fund to any district for the year in which a school has not been maintained for at least three (3) months; nor shall any portion of any public school fund ever be used to support or assist any private school, or any school, academy, seminary, college or other institution of learning controlled by any church or sectarian organization or religious denomination whatsoever.
	Art. VII, Sec. 12	Sectarianism prohibited. No sectarian instruction, qualifications or tests shall be imparted, exacted, applied or in any manner tolerated in the schools of any grade or character controlled by the State, nor shall attendance be required at any religious service therein, nor shall any sectarian tenets or doctrines be taught or favored in any public school or institution that may be established under this constitution.
	Art. XXI , Sec. 28	The legislature shall make laws for the establishment and maintenance of systems of public schools which shall be open to all the children of the State and free from sectarian control.

APPENDIX B
THE FIFTY STATES AND THEIR DATES OF STATEHOOD

#	State	Date of Statehood	#	State	Date of Statehood
1	Delaware	December 7, 1787	26	Michigan	January 26, 1837
2	Pennsylvania	December 12, 1787	27	Florida	March 3, 1845
3	New Jersey	December 18,1787	28	Texas	December 29, 1845
4	Georgia	January 2, 1788	29	Iowa	December 28, 1846
5	Connecticut	January 8, 1788	30	Wisconsin	May 29, 1848
6	Massachusetts	February 6, 1788	31	California	September 9, 1850
7	Maryland	April 28, 1788	32	Oregon	February 14, 1859
8	South Carolina	May 23, 1788	33	Kansas	January 29,1861
9	New Hampshire	June 21, 1788	34	West Virginia	June 20, 1863
10	Virginia	June 25, 1788	35	Nevada	October 31, 1864
11	New York	July 26,1788	36	Nebraska	March 1, 1867
12	North Carolina	November 21, 1789	37	Colorado	August 1, 1876
13	Rhode Island	May 29, 1790	38	North Dakota	November 2, 1889
14	Vermont	March 4, 1791	39	South Dakota	November 2, 1889
15	Kentucky	June 1, 1792	40	Montana	November 8, 1889
16	Tennessee	June 1, 1796	41	Washington	November 11, 1889
17	Ohio	March 1, 1803	42	Idaho	July 3, 1890
18	Louisiana	April 30, 1812	43	Wyoming	July 10, 1890
19	Indiana	December 11, 1816	44	Utah	January 4, 1896
20	Mississippi	December 10, 1817	45	Oklahoma	November 16, 1907
21	Illinois	December 3, 1818	46	New Mexico	January 6, 1912
22	Alabama	December 14, 1819	47	Arizona	February 14, 1912
23	Maine	March 15, 1820	48	Alaska	January 3, 1959
24	Missouri	August 10, 1821	49	Hawaii	August 21, 1959
25	Arkansas	June 15, 1836	50	Oregon	February 14, 1859

APPENDIX C
NINETEENTH CENTURY PAPAL DECREES EXPRESSING HOSTILITY TO AMERICAN IDEOLOGY AND POLITY

While it is not directly within the scope of this study, to understand some of the attitudes of nineteenth century anti-Catholicism, it is important to recognize the role played by the rise of reactionary conservatism in the Catholic Church of that era. Throughout the nineteenth century, a series of Popes promulgated a series of letters and pronouncements declaring their opposition to many of the political currents of that century including freedom of conscience, freedom of the press, and democracy that were enshrined in the American political tradition. These pronouncements, especially when coupled with the dogma of Papal Infallibility adopted by the First Vatican Council (8 Dec. 1869 – 20 Oct. 1870), fueled American Protestant and secularist fears produced by the influx of immigrants from predominantly Catholic countries.

A quick survey of relevant passages from Papal encyclicals and letters illustrates Papal claims of infallibility, rejection of fundamental elements of the American democratic tradition, and demands for Catholic obedience to church over state that played into Protestant fears and anti-Catholic hysteria.

Pope Pius VII*, On a Return to Gospel Principles*, 15 May 1800

Para. 18: . . . For it is certain that it is beneficial for their own affairs, as God has laid down, for kings to submit their will to the priests of Christ when God's business is in question, rather than imposing it.

Pope Gregory XVI, *On Liberalism and Religious Indifferentism*, 15 August 1832

Para. 5: We speak of the things which you see with your own eyes, which We both bemoan. Depravity exults; science is impudent; liberty, dissolute . . . The divine authority of the Church is opposed and her rights shorn off. She is subjected to human reason and with the greatest injustice exposed to the hatred of the people and reduced to vile servitude; **Para. 14**: This shameful font

of indifferentism gives rise to that absurd and erroneous proposition which claims that liberty of conscience must be maintained for everyone; **Para. 15**: Here We must include that harmful and never sufficiently denounced freedom to publish any writings whatever and disseminate them to the people, which some dare to demand and promote with so great a clamor; **Para. 19**: These beautiful examples of the unchanging subjection to the princes necessarily proceeded from the most holy precepts of the Christian religion. They condemn the detestable insolence and improbity of those who, consumed with the unbridled lust for freedom, are entirely devoted to impairing and destroying all rights of dominion while bringing servitude to the people under the slogan of liberty; **Para. 20**: Nor can We predict happier times for religion and government from the plans of those who desire vehemently to separate the Church from the state, and to break the mutual concord between temporal authority and the priesthood.

Pope Pius IX, *On The Need For Civil Sovereignty*, January 19, 1860

Para. 12: Do you, therefore, defend this cause and inflame more and more daily the faithful entrusted to your care so that under your leadership they do not cease either defending the Catholic Church and this Holy See or protecting the civil dominion of the same See and the patrimony of St. Peter. Together with your faithful pray that God may command the winds and the water and come to the benefit of Us and His Church. Pray also that He may enlighten enemies to bring them back to the paths of truth, justice, and salvation.

Pope Pius IX, *On Promotion of False Doctrines*, 10 August 1863

Para. 8: Also well known is the Catholic teaching that no one can be saved outside the Catholic Church. Eternal salvation cannot be obtained by those who oppose the authority and statements of the same Church and are stubbornly separated from the unity of the Church and also from the successor of Peter, the Roman Pontiff, to whom "the custody of the vineyard has been committed by the Savior." **Para.12**: You are certainly aware, our beloved sons and venerable brothers, that

every kind of impious and deceitful writing, lies, calumny, and blasphemy has been let loose from hell. No pain has been spared to transfer schools to non-Catholic teachers …

Pope Pius IX, *Condemning Current Errors*, 8 December 1864

Para. 3: . . . Which false and perverse opinions are on that ground the more to be detested, because they chiefly tend to this, that that salutary influence be impeded and (even) removed, which the Catholic Church, according to the institution and command of her Divine Author, should freely exercise even to the end of the world -- not only over private individuals, but over nations, peoples, and their sovereign princes; and (tend also) to take away that mutual fellowship and concord of counsels between Church and State which has ever proved itself propitious and salutary, both for religious and civil interests. For you well know, venerable brethren, that at this time men are found not a few who, applying to civil society the impious and absurd principle of "naturalism," as they call it, dare to teach that "the best constitution of public society and (also) civil progress altogether require that human society be conducted and governed without regard being had to religion any more than if it did not exist; or, at least, without any distinction being made between the true religion and false ones." . . . From which totally false idea of social government they do not fear to foster that erroneous opinion . . . that "liberty of conscience and worship is each man's personal right, which ought to be legally proclaimed and asserted in every rightly constituted society; and that a right resides in the citizens to an absolute liberty, which should be restrained by no authority whether ecclesiastical or civil, whereby they may be able openly and publicly to manifest and declare any of their ideas whatever, either by word of mouth, by the press, or in any other way."

Pope Pius IX, *Syllabus of Errors*, 8 December 1864

The following propositions are condemned . . . **Para. 15**: Every man is free to embrace and profess that religion which, guided by the light of reason, he shall consider true. **Para. 18**:

Protestantism is nothing more than another form of the same true Christian religion, in which form it is given to please God equally as in the Catholic Church. **Para. 22**: The obligation by which Catholic teachers and authors are strictly bound is confined to those things only which are proposed to universal belief as dogmas of faith by the infallible judgment of the Church. **Para. 24**: The Church has not the power of using force, nor has she any temporal power, direct or indirect. **Para. 42**: In the case of conflicting laws enacted by the two powers, the civil law prevails. **Para. 45**: The entire government of public schools in which the youth of a Christian state is educated, except (to a certain extent) in the case of episcopal seminaries, may and ought to appertain to the civil power, and belong to it so far that no other authority whatsoever shall be recognized as having any right to interfere in the discipline of the schools, the arrangement of the studies, the conferring of degrees, in the choice or approval of the teachers. **Para. 4:** The best theory of civil society requires that popular schools open to children of every class of the people, and, generally, all public institutes intended for instruction in letters and philosophical sciences and for carrying on the education of youth, should be freed from all ecclesiastical authority, control and interference, and should be fully subjected to the civil and political power at the pleasure of the rulers, and according to the standard of the prevalent opinions of the age. **Para. 48**: Catholics may approve of the system of educating youth unconnected with Catholic faith and the power of the Church, and which regards the knowledge of merely natural things, and only, or at least primarily, the ends of earthly social life. Kings and princes are not only exempt from the jurisdiction of the Church, but are superior to the Church in deciding questions of jurisdiction. **Para. 55**: The Church ought to be separated from the State, and the State from the Church. **Para. 57**: The science of philosophical things and morals and also civil laws may and ought to keep aloof from divine and ecclesiastical authority. **Para. 77**: In the present day it is no longer

expedient that the Catholic religion should be held as the only religion of the State, to the exclusion of all other forms of worship.

Pope Leo XIII, *On the Evils of Society,* 21 April 1878

Para. 6: Furthermore, that kind of civilization which conflicts with the doctrines and laws of holy Church is nothing but a worthless imitation and meaningless name . . . **Para. 13**: It is your duty, venerable brothers, sedulously to strive that the seed of heavenly doctrine be sown broadcast in the field of God, and that the teachings of the Catholic faith may be implanted early in the souls of the faithful, may strike deep root in them, and be kept free from the ruinous blight of error. The more the enemies of religion exert themselves to offer the uninformed, especially the young, such instruction as darkens the mind and corrupts morals, the more actively should we endeavor that not only a suitable and solid method of education may flourish but above all that this education be wholly in harmony with the Catholic faith in its literature and system of training, and chiefly in philosophy, upon which the direction of other sciences in great measure depends.

Pope Leo XIII, *On Christians as Citizens*, 10 January 1890

Para. 7: As to which should be preferred no one ought to balance for an instant. It is a high crime indeed to withdraw allegiance from God in order to please men, an act of consummate wickedness to break the laws of Jesus Christ, in order to yield obedience to earthly rulers, or, under pretext of keeping the civil law, to ignore the rights of the Church; "we ought to obey God rather than men." **Para. 10**: But, if the laws of the State are manifestly at variance with the divine law, containing enactments hurtful to the Church, or conveying injunctions adverse to the duties imposed by religion, or if they violate in the person of the supreme Pontiff the authority of Jesus Christ, then, truly, to resist becomes a positive duty, to obey, a crime; a crime, moreover, combined with misdemeanor against the State itself, inasmuch as every offense leveled against

religion is also a sin against the State. Here anew it becomes evident how unjust is the reproach of sedition; for the obedience due to rulers and legislators is not refused, but there is a deviation from their will in those precepts only which they have no power to enjoin. **Para. 42**: . . . It is, then, incumbent on parents to strain every nerve to ward off such an outrage, and to strive manfully to have and to hold exclusive authority to direct the education of their offspring, as is fitting, in a Christian manner, and first and foremost to keep them away from schools where there is risk of their drinking in the poison of impiety.

Pope Leo XIII, *Concerning New Opinions, Virtue, Nature and Grace, with regard to Americanism,* 22 January 1899

Para. 15-16: These dangers, viz., the confounding of license with liberty, the passion for discussing and pouring contempt upon any possible subject, the assumed right to hold whatever opinions one pleases upon any subject and to set them forth in print to the world, have so wrapped minds in darkness that there is now a greater need of the Church's teaching office than ever before, lest people become unmindful both of conscience and of duty. We, indeed, have no thought of rejecting everything that modern industry and study has produced; so far from it that we welcome to the patrimony of truth and to an ever-widening scope of public well-being whatsoever helps toward the progress of learning and virtue. Yet all this, to be of any solid benefit, nay, to have a real existence and growth, can only be on the condition of recognizing the wisdom and authority of the Church.

Para. 33: From the foregoing it is manifest, beloved son, that we are not able to give approval to those views which, in their collective sense, are called by some "Americanism." But if by this name are to be understood certain endowments of mind which belong to the American people, just as other characteristics belong to various other nations, and if, moreover, by it is designated your political condition and the laws and customs by which you are governed, there is no reason

to take exception to the name. But if this is to be so understood that the doctrines which have been adverted to above are not only indicated, but exalted, there can be no manner of doubt that our venerable brethren, the bishops of America, would be the first to repudiate and condemn it as being most injurious to themselves and to their country. For it would give rise to the suspicion that there are among you some who conceive and would have the Church in America to be different from what it is in the rest of the world.

APPENDIX D
THE FLUSHING REMONSTRANCE

Introduction

Written in 1657 by the English citizens of the Long Island village of Flushing, the Remonstrance asserted their right to freedom of conscience against the autocracy of the governor of their colony of New Netherland.

The Flushing Remonstrance protested Governor Peter Stuyvesant's arrest, torture and expulsion of a Quaker preacher for defying his ban on all religions but Dutch Reformed Protestantism. The 30 signatories were also Dutch Reformed Protestants, but demanded that in the new colony: "If any persons . . . Presbyterian, Independent, Baptist or Quaker . . . come in love to us, we cannot in conscience lay violent hands upon them;" and that "the law of love, peace and liberty . . . [extends] to Jews, Turks and Egyptians." Furthermore, the citizens of Flushing wrote: "Let every man stand or fall to his own Master."

Stuyvesant replied by arresting and expelling John Bowne, a Flushing resident, who had allowed his house to be used by Quakers. Bowne then appealed to the board of the Dutch West India Company in Holland and won their support. The company overruled Stuyvesant and asserted that there would be liberty of conscience in its American territories. When the Bill of Rights was adopted in 1791 the freedom of conscience presented in the Flushing Remonstrance became a part of the American constitution.[1]

[1] See also, *The Flushing Remonstrance*, December 27, 1657. New York Yearly Meeting of the Religious Society of Friends, online at: http://www.nyym.org/flushing/history.html; and Simon Jenkins, "Remembering the Flushing Remonstrance," *Times*, Dec 16, 2007. Available online at http://www.ocnus.net/artman2/publish/Analyses_12/Remembering_the_Flushing_Remonstrance.shtml

Remonstrance of the Inhabitants of the Town of Flushing to Governor Stuyvesant, December 27, 1657[2]

Right Honorable

You have been pleased to send unto us a certain prohibition or command that we should not receive or entertain any of those people called Quakers because they are supposed to be, by some, seducers of the people. For our part we cannot condemn them in this case, neither can we stretch out our hands against them, for out of Christ God is a consuming fire, and it is a fearful thing to fall into the hands of the living God.

Wee desire therefore in this case not to judge least we be judged, neither to condemn least we be condemned, but rather let every man stand or fall to his own Master. Wee are bounde by the law to do good unto all men, especially to those of the household of faith. And though for the present we seem to be unsensible for the law and the Law giver, yet when death and the Law assault us, if wee have our advocate to seeke, who shall plead for us in this case of conscience betwixt God and our own souls; the powers of this world can neither attach us, neither excuse us, for if God justifye who can condemn and if God condemn there is none can justifye.

And for those jealousies and suspicions which some have of them, that they are destructive unto Magistracy and Ministerye, that cannot bee, for the Magistrate hath his sword in his hand and the Minister hath the sword in his hand, as witnesse those two great examples, which all Magistrates and Ministers are to follow, Moses and Christ, whom God raised up maintained and defended against all enemies both of flesh and spirit; and therefore that of God will stand, and that which is of man will come to nothing. And as the Lord hath taught Moses or the civil power to give an outward liberty in the state, by the law written in his heart designed for the good of all, and can truly judge who is good, who is evil, who is true and who is false, and

[2] Online at: http://www.nyym.org/flushing/remons.html

can pass definitive sentence of life or death against that man which arises up against the fundamental law of the States General; soe he hath made his ministers a savor of life unto life and a savor of death unto death.

The law of love, peace and liberty in the states extending to Jews, Turks and Egyptians, as they are considered sons of Adam, which is the glory of the outward state of Holland, soe love, peace and liberty, extending to all in Christ Jesus, condemns hatred, war and bondage. And because our Saviour sayeth it is impossible but that offences will come, but woe unto him by whom they cometh, our desire is not to offend one of his little ones, in whatsoever form, name or title hee appears in, whether Presbyterian, Independent, Baptist or Quaker, but shall be glad to see anything of God in any of them, desiring to doe unto all men as we desire all men should doe unto us, which is the true law both of Church and State; for our Saviour sayeth this is the law and the prophets.

Therefore if any of these said persons come in love unto us, we cannot in conscience lay violent hands upon them, but give them free egresse and regresse unto our Town, and houses, as God shall persuade our consciences, for we are bounde by the law of God and man to doe good unto all men and evil to noe man. And this is according to the patent and charter of our Towne, given unto us in the name of the States General, which we are not willing to infringe, and violate, but shall houlde to our patent and shall remaine, your humble subjects, the inhabitants of Vlishing.

APPENDIX E
MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS,
20 JUNE 17851

To the Honorable the General Assembly of the Commonwealth of Virginia
A Memorial and Remonstrance

We the subscribers, citizens of the said Commonwealth, having taken into serious consideration, a Bill printed by order of the last Session of General Assembly, entitled "A Bill establishing a provision for Teachers of the Christian Religion," and conceiving that the same if finally armed with the sanctions of a law, will be a dangerous abuse of power, are bound as faithful members of a free State to remonstrate against it, and to declare the reasons by which we are determined. We remonstrate against the said Bill,

1. Because we hold it for a fundamental and undeniable truth, "that Religion or the duty which we owe to our Creator and the manner of discharging it, can be directed only by reason and conviction, not by force or violence." [Virginia Declaration of Rights, art. 16] The Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate. This right is in its nature an unalienable right. It is unalienable, because the opinions of men, depending only on the evidence contemplated by their own minds cannot follow the dictates of other men: It is unalienable also, because what is here a right towards men, is a duty towards the Creator. It is the duty of every man to render to the Creator such homage and such only as he believes to be acceptable to him. This duty is precedent, both in order of time and in degree of obligation, to the claims of Civil Society. Before any man can be considered as a member of Civil Society, he must be considered as a subject of the Governour of the Universe: And if a member of Civil Society, who enters into any

[1] James Madison, *The Papers of James Madison.* William T. Hutchinson et al. Eds. Chicago and London: University of Chicago Press, 1962--77 (vols. 1—10), 8:298—304. Available online at http://press-pubs.uchicago.edu/founders/documents/amendI_religions43.html

subordinate Association, must always do it with a reservation of his duty to the General Authority; much more must every man who becomes a member of any particular Civil Society, do it with a saving of his allegiance to the Universal Sovereign. We maintain therefore that in matters of Religion, no mans right is abridged by the institution of Civil Society and that Religion is wholly exempt from its cognizance. True it is, that no other rule exists, by which any question which may divide a Society, can be ultimately determined, but the will of the majority; but it is also true that the majority may trespass on the rights of the minority.

2. Because if Religion be exempt from the authority of the Society at large, still less can it be subject to that of the Legislative Body. The latter are but the creatures and vicegerents of the former. Their jurisdiction is both derivative and limited: it is limited with regard to the co-ordinate departments, more necessarily is it limited with regard to the constituents. The preservation of a free Government requires not merely, that the metes and bounds which separate each department of power be invariably maintained; but more especially that neither of them be suffered to overleap the great Barrier which defends the rights of the people. The Rulers who are guilty of such an encroachment, exceed the commission from which they derive their authority, and are Tyrants. The People who submit to it are governed by laws made neither by themselves nor by an authority derived from them, and are slaves.

3. Because it is proper to take alarm at the first experiment on our liberties. We hold this prudent jealousy to be the first duty of Citizens, and one of the noblest characteristics of the late Revolution. The free men of America did not wait till usurped power had strengthened itself by exercise, and entangled the question in precedents. They saw all the consequences in the principle, and they avoided the consequences by denying the principle. We revere this lesson too much soon to forget it. Who does not see that the same authority which can establish

Christianity, in exclusion of all other Religions, may establish with the same ease any particular sect of Christians, in exclusion of all other Sects? that the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever?

4. Because the Bill violates that equality which ought to be the basis of every law, and which is more indispensible, 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," [Virginia Declaration of Rights, art. 1] 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." [Virginia Declaration of Rights, art. 16] 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 an offence against God, not against man: To God, therefore, not to man, 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 pre-eminences over their fellow citizens or that they will be seduced by them from the common opposition to the measure.

5. Because the Bill implies either that the Civil Magistrate is a competent Judge of Religious Truth; or that he may employ Religion as an engine of Civil policy. The first is an arrogant pretension falsified by the contradictory opinions of Rulers in all ages, and throughout the world: the second an unhallowed perversion of the means of salvation.

6. Because the establishment proposed by the Bill is not requisite for the support of the Christian Religion. To say that it is, is a contradiction to the Christian Religion itself, for every page of it disavows a dependence on the powers of this world: it is a contradiction to fact; for it is known that this Religion both existed and flourished, not only without the support of human laws, but in spite of every opposition from them, and not only during the period of miraculous aid, but long after it had been left to its own evidence and the ordinary care of Providence. Nay, it is a contradiction in terms; for a Religion not invented by human policy, must have pre-existed and been supported, before it was established by human policy. It is moreover to weaken in those who profess this Religion a pious confidence in its innate excellence and the patronage of its Author; and to foster in those who still reject it, a suspicion that its friends are too conscious of its fallacies to trust it to its own merits.

7. Because experience witnesseth that ecclesiastical establishments, instead of maintaining the purity and efficacy of Religion, have had a contrary operation. During almost fifteen centuries has the legal establishment of Christianity been on trial. What have been its fruits? More or less in all places, pride and indolence in the Clergy, ignorance and servility in the laity, in both, superstition, bigotry and persecution. Enquire of the Teachers of Christianity for the ages in which it appeared in its greatest lustre; those of every sect, point to the ages prior to its incorporation with Civil policy. Propose a restoration of this primitive State in which its Teachers depended on the voluntary rewards of their flocks, many of them predict its downfall.

On which Side ought their testimony to have greatest weight, when for or when against their interest?

8. Because the establishment in question is not necessary for the support of Civil Government. If it be urged as necessary for the support of Civil Government only as it is a means of supporting Religion, and it be not necessary for the latter purpose, it cannot be necessary for the former. If Religion be not within the cognizance of Civil Government how can its legal establishment be necessary to Civil Government? What influence in fact have ecclesiastical establishments had on Civil Society? In some instances they have been seen to erect a spiritual tyranny on the ruins of the Civil authority; in many instances they have been seen upholding the thrones of political tyranny: in no instance have they been seen the guardians of the liberties of the people. Rulers who wished to subvert the public liberty, may have found an established Clergy convenient auxiliaries. A just Government instituted to secure & perpetuate it needs them not. Such a Government will be best supported by protecting every Citizen in the enjoyment of his Religion with the same equal hand which protects his person and his property; by neither invading the equal rights of any Sect, nor suffering any Sect to invade those of another.

9. Because the proposed establishment is a departure from that generous policy, which, offering an Asylum to the persecuted and oppressed of every Nation and Religion, promised a lustre to our country, and an accession to the number of its citizens. What a melancholy mark is the Bill of sudden degeneracy? Instead of holding forth an Asylum to the persecuted, it is itself a signal of persecution. It degrades from the equal rank of Citizens all those whose opinions in Religion do not bend to those of the Legislative authority. Distant as it may be in its present form from the Inquisition, it differs from it only in degree. The one is the first step, the other the last in the career of intolerance. The magnanimous sufferer under this cruel scourge in foreign Regions,

must view the Bill as a Beacon on our Coast, warning him to seek some other haven, where liberty and philanthrophy in their due extent, may offer a more certain repose from his Troubles.

10. Because it will have a like tendency to banish our Citizens. The allurements presented by other situations are every day thinning their number. To superadd a fresh motive to emigration by revoking the liberty which they now enjoy, would be the same species of folly which has dishonoured and depopulated flourishing kingdoms.

11. Because it will destroy that moderation and harmony which the forbearance of our laws to intermeddle with Religion has produced among its several sects. Torrents of blood have been spilt in the old world, by vain attempts of the secular arm, to extinguish Religious discord, by proscribing all difference in Religious opinion. Time has at length revealed the true remedy. Every relaxation of narrow and rigorous policy, wherever it has been tried, has been found to assuage the disease. The American Theatre has exhibited proofs that equal and compleat liberty, if it does not wholly eradicate it, sufficiently destroys its malignant influence on the health and prosperity of the State. If with the salutary effects of this system under our own eyes, we begin to contract the bounds of Religious freedom, we know no name that will too severely reproach our folly. At least let warning be taken at the first fruits of the threatened innovation. The very appearance of the Bill has transformed "that Christian forbearance, love and charity," [Virginia Declaration of Rights, art. 16] which of late mutually prevailed, into animosities and jealousies, which may not soon be appeased. What mischiefs may not be dreaded, should this enemy to the public quiet be armed with the force of a law?

12. Because the policy of the Bill is adverse to the diffusion of the light of Christianity. The first wish of those who enjoy this precious gift ought to be that it may be imparted to the whole race of mankind. Compare the number of those who have as yet received it with the

number still remaining under the dominion of false Religions; and how small is the former! Does the policy of the Bill tend to lessen the disproportion? No; it at once discourages those who are strangers to the light of revelation from coming into the Region of it; and countenances by example the nations who continue in darkness, in shutting out those who might convey it to them. Instead of Levelling as far as possible, every obstacle to the victorious progress of Truth, the Bill with an ignoble and unchristian timidity would circumscribe it with a wall of defence against the encroachments of error.

13. Because attempts to enforce by legal sanctions, acts obnoxious to so great a proportion of Citizens, tend to enervate the laws in general, and to slacken the bands of Society. If it be difficult to execute any law which is not generally deemed necessary or salutary, what must be the case, where it is deemed invalid and dangerous? And what may be the effect of so striking an example of impotency in the Government, on its general authority?

14. Because a measure of such singular magnitude and delicacy ought not to be imposed, without the clearest evidence that it is called for by a majority of citizens, and no satisfactory method is yet proposed by which the voice of the majority in this case may be determined, or its influence secured. "The people of the respective counties are indeed requested to signify their opinion respecting the adoption of the Bill to the next Session of Assembly." But the representation must be made equal, before the voice either of the Representatives or of the Counties will be that of the people. Our hope is that neither of the former will, after due consideration, espouse the dangerous principle of the Bill. Should the event disappoint us, it will still leave us in full confidence, that a fair appeal to the latter will reverse the sentence against our liberties.

15. Because finally, "the equal right of every citizen to the free exercise of his Religion according to the dictates of conscience" is held by the same tenure with all our other rights. If we recur to its origin, it is equally the gift of nature; if we weigh its importance, it cannot be less dear to us; if we consult the "Declaration of those rights which pertain to the good people of Virginia, as the basis and foundation of Government," it is enumerated with equal solemnity, or rather studied emphasis. Either then, we must say, that the Will of the Legislature is the only measure of their authority; and that in the plenitude of this authority, they may sweep away all our fundamental rights; or, that they are bound to leave this particular right untouched and sacred: Either we must say, that they may controul the freedom of the press, may abolish the Trial by Jury, may swallow up the Executive and Judiciary Powers of the State; nay that they may despoil us of our very right of suffrage, and erect themselves into an independent and hereditary Assembly or, we must say, that they have no authority to enact into law the Bill under consideration. We the Subscribers say, that the General Assembly of this Commonwealth have no such authority: And that no effort may be omitted on our part against so dangerous an usurpation, we oppose to it, this remonstrance; earnestly praying, as we are in duty bound, that the Supreme Lawgiver of the Universe, by illuminating those to whom it is addressed, may on the one hand, turn their Councils from every act which would affront his holy prerogative, or violate the trust committed to them: and on the other, guide them into every measure which may be worthy of his blessing, may redound to their own praise, and may establish more firmly the liberties, the prosperity and the happiness of the Commonwealth.

APPENDIX F
JEFFERSON'S BILL FOR ESTABLISHING RELIGIOUS FREEDOM WHICH BECAME THE VIRGINIA STATUTE FOR RELIGIOUS FREEDOM, 1779

SECTION I. Well aware that the opinions and belief of men depend not on their own will, but follow involuntarily the evidence proposed to their minds; that Almighty God hath created the mind free, and manifested his supreme will that free it shall remain by making it altogether insusceptible of restraint; that all attempts to influence it by temporal punishments, or burthens, or by civil incapacitations, tend only to beget habits of hypocrisy and meanness, and are a departure from the plan of the holy author of our religion, who being lord both of body and mind, yet chose not to propagate it by coercions on either, as was in his Almighty power to do, but to extend it by its influence on reason alone; that the impious presumption of legislators and rulers, civil as well as ecclesiastical, who, being themselves but fallible and uninspired men, have assumed dominion over the faith of others, setting up their own opinions and modes of thinking as the only true and infallible, and as such endeavoring to impose them on others, hath established and maintained false religions over the greatest part of the world and through all time: That to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhors, is sinful and tyrannical; that even the forcing him to support this or that teacher of his own religious persuasion, is depriving him of the comfortable liberty of giving his contributions to the particular pastor whose morals he would make his pattern, and whose powers he feels most persuasive to righteousness; and is withdrawing from the ministry those temporary rewards, which proceeding from an approbation of their personal conduct, are an additional incitement to earnest and unremitting labours for the instruction of mankind; that our civil rights have no dependance on our religious opinions, any more than our opinions in physics or geometry; that therefore the proscribing any citizen as unworthy the public confidence by laying upon him an incapacity of being called to offices of trust and emolument, unless he

profess or renounce this or that religious opinion, is depriving him injuriously of those privileges and advantages to which, in common with his fellow citizens, he has a natural right; that it tends also to corrupt the principles of that very religion it is meant to encourage, by bribing, with a monopoly of worldly honours and emoluments, those who will externally profess and conform to it; that though indeed these are criminal who do not withstand such temptation, yet neither are those innocent who lay the bait in their way; that the opinions of men are not the object of civil government, nor under its jurisdiction; that to suffer the civil magistrate to intrude his powers into the field of opinion and to restrain the profession or propagation of principles on supposition of their ill tendency is a dangerous falacy, which at once destroys all religious liberty, because he being of course judge of that tendency will make his opinions the rule of judgment, and approve or condemn the sentiments of others only as they shall square with or differ from his own; that it is time enough for the rightful purposes of civil government for its officers to interfere when principles break out into overt acts against peace and good order; and finally, that truth is great and will prevail if left to herself; that she is the proper and sufficient antagonist to error, and has nothing to fear from the conflict unless by human interposition disarmed of her natural weapons, free argument and debate; errors ceasing to be dangerous when it is permitted freely to contradict them.

SECT. II. WE the General Assembly of Virginia do enact that no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested, or burthened in his body or goods, nor shall otherwise suffer, on account of his religious opinions or belief; but that all men shall be free to profess, and by argument to maintain, their opinions in matters of religion, and that the same shall in no wise diminish, enlarge, or affect their civil capacities.

SECT. III. AND though we well know that this Assembly, elected by the people for the ordinary purposes of legislation only, have no power to restrain the acts of succeeding Assemblies, constituted with powers equal to our own, and that therefore to declare this act irrevocable would be of no effect in law; yet we are free to declare, and do declare, that the rights hereby asserted are of the natural rights of mankind, and that if any act shall be hereafter passed to repeal the present or to narrow its operation, such act will be an infringement of natural right.

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