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# DICTIONARIES, NEWSPAPERS, AND “BLAINE AMENDMENTS” IN STATE CONSTITUTIONS IN THE 21ST CENTURY

MARY JANE MORRISON<sup>1</sup>

Many American state constitutions have clauses that, in one form or another, ban using public money for religious education. These clauses echo a proposal the House passed in 1876 to amend the federal Constitution to apply the Free Exercise and Establishment Clauses to the states and to ban state appropriations of public money to “religious sects or denominations.”<sup>2</sup> The proposal had originated from House Speaker James G. Blaine.<sup>3</sup> The

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2. The House vote was 180 to 7, with 98 members not voting, and the proposal was:

No State shall make any law respecting an establishment of religion or prohibiting the free exercise thereof; and no money raised by taxation in any State, for the support of public schools, or derived from any public fund therefor, nor any public lands devoted thereto, shall ever be under the control of any religious sect or denomination, nor shall any money so raised, or lands so devoted be divided between religious sects or denominations. This article shall not vest, enlarge, or diminish legislative power in Congress.

4 Cong. Rec. H5190-92 (daily ed. Aug. 4, 1876). Blaine’s original proposal had neither the first “or denomination,” which the House added for uniformity, nor the last sentence. 4 Cong. Rec. H205 (daily ed. Dec. 14, 1875).

3. James G. Blaine was responding to President Grant’s Des Moines call in a speech to Civil War veterans in September 1875, and again in his last State of the Union address in December, for an amendment of this kind. Historians agree Grant and Blaine were aiming at a political issue that would help Republicans retain their two-decade national control in the face of failed Reconstruction efforts, yet avoid directly having to address racial integration issues in public schools. Their solution also would end a long public struggle over public funding for private schools, while taking political advantage of anti-Catholic, anti-Irish, anti-immigrant sentiments and distinguishing Republicans from Democrats, with whom recent immigrant Irish Catholics were finding natural political homes. See, e.g., STEVEN K. GREEN, *THE BIBLE, THE SCHOOL, AND THE CONSTITUTION: THE CLASH THAT SHAPED MODERN CHURCH-STATE DOCTRINE* (Oxford Univ. Press, Inc. 2012) [hereinafter GREEN, *THE BIBLE*]; Steven K. Green, *The Blaine Amendment Reconsidered*, 36 AM. J. LEGAL HIST. 38,

Senate failed to agree with the House, yet the proposal lived on in other forms. Congress put similar conditions in Enabling Acts for territories that sought admission as states to the Union, and states put similar clauses in their constitutions between 1875 and 1900,<sup>4</sup> during a period of renewed nativism that targeted immigrant Catholics. *Romer v. Evans*<sup>5</sup> appears to promise a basis for invalidating those clauses using evidence of an anti-Catholic bias, given that "a bare. . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest."<sup>6</sup> But, although there is no

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40-51 (1992) [hereinafter Green, *The Blaine Amendment*]; JOHN HIGHAM, STRANGERS IN THE LAND: PATTERNS OF AMERICAN NATIVISM, 1860-1925, 28 (Rutgers Univ. Press 1955); WARD M. MCAFEE, RELIGION, RACE AND RECONSTRUCTION: THE PUBLIC SCHOOL IN THE POLITICS OF THE 1870S 6-7, 167-85 (State Univ. of N.Y. Press 1998). *See also, e.g.*, THE CIVIL WAR AND RECONSTRUCTION: A DOCUMENTARY COLLECTION 405 (William E. Gienapp ed., W.W. Norton & Co. 2001); Edward J. Larson, *The 'Blaine Amendment' in State Constitutions*, in THE SCHOOL-CHOICE CONTROVERSY: WHAT IS CONSTITUTIONAL 35 (James W. Skillen ed., Baker Books 1993); Alfred W. Meyer, *The Blaine Amendment and the Bill of Rights*, 64 HARV. L. REV. 939 (1951); F. Williams O'Brien, *The Blaine Amendment, 1875-1876*, 41 U. DET. L. J. 137 (1963).

For a sympathetic biography of Blaine, see DAVID SAVILLE MUZZEY, JAMES G. BLAINE: A POLITICAL IDOL OF OTHER DAYS (Kennikat Press, Inc. 1934). *See also* JAMES G. BLAINE, TWENTY YEARS IN CONGRESS: FROM LINCOLN TO GARFIELD, WITH A REVIEW OF THE EVENTS WHICH LED TO THE POLITICAL REVOLUTION OF 1860, Vols. I & II (Henry Bill Pub. Co. 1884 & 1886), available at [www.gutenberg.org/ebooks/author/9058](http://www.gutenberg.org/ebooks/author/9058).

4. Arguments about the proposed Blaine Amendment, Grant's Des Moines speech, and the Cincinnati Bible Wars "have been touchstones for legal briefs and court decisions since the 1940s." GREEN, THE BIBLE, *supra* note 3, at 226 (citing Supreme Court decisions). For details of the Cincinnati Bible war, see MCAFEE, *supra* note 3, at 27-41. As litigation over religious funding has increased at the state constitutional level, disagreement has emerged about how to count the number of states that have Blaine clauses. Professor Green, for example, counts at most twenty-one states. GREEN, THE BIBLE, *supra* note 3, at 230-31. He also states that the role of the Blaine Amendment in the states in perpetrating a climate of anti-Catholic bias is unclear and notes that seventeen other states had express no-funding clauses that pre-dated Blaine's proposal. *Id.* "Not only was the Blaine Amendment not responsible for these earlier provisions[,] just as important[, the earlier ones] . . . could have served as models for the post-Blaine provisions." *Id.* (citing Jill Goldenziel, *Blaine's Name in Vain?: State Constitutions, School Choice, and Charitable Choice*, 83 DENV. U. L. REV. 57, 66-70 (2005) (in which she cites Professor Green's Brief Amicus Curiae of Historians and Law Scholars on Behalf of Petitioners Gary Locke, et al., *Locke v. Davey*, 540 U.S. 712 (2004) (No. 02-1315), 2003 WL 21697729)).

In spite of the emphasis the Becket Fund puts in documents on the word "sectarian" to argue Blaine clauses were motivated by anti-Catholic bias, the Becket Fund's ultimate conception of Blaine clauses is as "no-funding" clauses, with a consequent count of thirty-eight to forty states, including Alaska and Hawaii. *E.g.*, Brief for the Becket Fund for Religious Liberty, et al. as Amici Curiae Supporting Respondent, *Locke v. Davey*, 540 U.S. 712 (2004) (No. 02-1315); Becket Fund, [www.blaineamendments.org/states.states.html](http://www.blaineamendments.org/states.states.html) [hereinafter Becket Fund, website]. *See also* Statement and Testimony of Anthony R. Picarello, Jr., Vice President & General Counsel for the Becket Fund in UNITED STATES CIVIL RIGHTS COMMISSION ON CIVIL RIGHTS, *School Choice: The Blaine Amendments and Anti-Catholicism* 5 (2007), available at [www.usccr.gov/pubs/BlaineReport.pdf](http://www.usccr.gov/pubs/BlaineReport.pdf) [hereinafter Picarello].

5. *Romer v. Evans*, 517 U.S. 620 (1996) (state constitutional clause singling out sexual orientation for exclusion from state and local human rights laws violated the Equal Protection Clause).

6. *Id.* at 634 (quoting *Department of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973))

question there was rampant anti-Catholic bias in nineteenth century America, that bias is insufficient to invalidate the clauses because they fail to meet the lynchpin analytic requirement for constitutional invalidity: text on the face of the clauses that singles out a class of persons for exclusion from ordinary political processes or protection of the law or singles them out for law-inscribed contempt or scorn, thereby leaving the clauses naked to the chill winds of the lack of legitimate basis.<sup>7</sup>

This paper describes the state constitutional clauses that are under attack, the clauses' origins, and the legal theory of those attacks, but focuses on analyzing why the attacks fail to meet federal constitutional muster for invalidating those state clauses.

A proviso, however, is in order. There always are tangled complications in discussing state constitutional law, let alone crafting legal arguments based on glosses of multiple state clauses. In Vermont's 1793 Constitution, for example,<sup>8</sup> a clause said "previous to any law being made to raise a tax, the purpose for which it is to be raised ought to appear evident to the Legislature to be of more service to the community than the money would be."<sup>9</sup> Yet no Vermont clause, other than a requirement for appropriations to be by law,<sup>10</sup> restricted disbursements of public funds, a phenomenon making Vermont's constitution unlike constitutions drafted in the 1850s to 1890s, by which time constitution-drafters had repeated experience with economic crises, panics, recessions, and depressions and with other states' ruinous involvements with canals, turnpikes, railroads and private businesses, which later, in the nineteenth century, led to extensive constitutional coverage for state and local taxing, spending, and borrowing, including express restrictions as to each of these.<sup>11</sup>

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(emphasis in original).

7. *Id.* at 623, 631-36.

8. Vermont's constitution of 1793 does not have a clause like a Blaine clause in anyone's count. *See generally* VT. CONST. (amended 2010). The only other substantive tax clause in the 1793 document imposes a two-thirds presence in the House for a quorum for conducting business concerning taxes. *Id.* at ch. II, § 9.

9. Vt. Const. ch I, art. 9 (retaining, with minor re-phrasing, a 1777 Vermont Constitution clause). The 1793 Constitution is the current one; this clause remains to this day, still in article 9.

10. Vt. Const. ch I, art. 17 (same in 2013, but in article 27).

11. The Minnesota Constitution, drafted and ratified in 1857, is typical of the era in limiting appropriations and the credit of the state, especially as to private businesses and institutions; specifying exemptions from taxation; banning the state from involvement in works of internal improvement, such as roads, ports, etc.; having super-majority requirements for enacting banking laws; and prohibiting "combinations to affect markets." MARY JANE MORRISON, THE MINNESOTA STATE CONSTITUTION: A REFERENCE GUIDE 169, 228-59, 267-68, 296-97 (Greenwood Press 2002) [hereinafter MORRISON, THE MINNESOTA STATE CONSTITUTION]. *See also* Mary Jane Morrison, *Amending the Minnesota Constitution in Context: The Two Proposals in 2012*, 34 HAMLIN J. PUB. L. & POL'Y 115, 115-16, 116 n.3, 121-22 (2013). Almost all those clauses generated twentieth century fiscal issues that, along with technological and cultural changes, necessitated further constitutional amendments. MORRISON, THE MINNESOTA STATE CONSTITUTION, *supra*, at 246-58, 301-02, 307-08.

The importance of this last point is that, when states included Blaine clauses after 1875 in their constitutions, there already were provisions in many of those constitutions that per force limited the objects of public expenditure, particularly as to private enterprise and, in some cases, particularly as to religion. Minnesota's 1857 Constitution is a case in point. That document in 1857 included a provision that no "preference [shall] be given by law to any religious establishment. . . nor shall any money be drawn from the treasury for the benefit of any religious societies or religious or theological seminaries."<sup>12</sup> The Minnesota Constitution also from day one included generous exemptions from taxation for religious property.<sup>13</sup> For Minnesotans to add by amendment in 1877 a ban on giving public aid to sectarian schools,<sup>14</sup> therefore, might well be—indeed, was—merely a sign the people were closing a door they had not realized was previously left open by the original constitutional clauses.<sup>15</sup>

### I. THE CLAUSES AND THE CHALLENGERS' LEGAL THEORIES

The state clauses in question, widely known as "Blaine Clauses," entered state constitutions primarily between 1875 and 1900 during a turbulent political struggle over the nature of and funding for public schools.<sup>16</sup> In

12. MINN. CONST. art. I, § 16; *see also* MORRISON, *THE MINNESOTA STATE CONSTITUTION*, *supra* note 11, at 119-23.

13. MINN. CONST. art. X, § 1 (exemptions for "public burying grounds, public school houses, public hospitals, academies, colleges, universities, all seminaries of learning, all churches, church property, houses of worship, institutions of purely public charity . . ."). *See also* MORRISON, *THE MINNESOTA STATE CONSTITUTION*, *supra* note 11, at 228-46.

14. MINN. CONST. art. XIII, § 2.

15. Minnesota's story is perhaps more complicated or tangled than is the story in other states, especially in the 1875-1900 era, because of the important presence of John Ireland (in Saint Paul: priest/pastor, 1867; coadjutor bishop, 1875; bishop ordinary, 1884; archbishop, 1888-1918). Much to the ire of other American bishops and dismay of Pope Pius IX, Archbishop Ireland publicly sided with an "American" view of church-state relations, including as to funding religious education. NEIL G. MCCLUSKEY, *CATHOLIC EDUCATION IN AMERICA: A DOCUMENTARY COLLECTION* 127, 141 (Teachers Coll. of Columbia Univ. 1964). McCluskey's 44-page essay therein, *America and the Catholic School*, gives details of the ire and dismay, including details of the Papal Nuncio the Pope sent to America in this connection and the book contains the associated documents. *See also* JAMES W. FRASER, *BETWEEN CHURCH AND STATE: RELIGION AND PUBLIC EDUCATION IN A MULTICULTURAL AMERICA* 60-64 (St. Martin's Press 1999) (noting the Archbishop's recognition of the double burden of two school systems for Catholics).

16. The Catholic-Protestant public struggle began with a Catholic school in New York requesting public funding—a reasonable request given that public funding had been going to a Baptist school. FRASER, *supra* note 15, at 52-53. Bethel Baptist Church schools and schools of the "Free School Society," in which Quakers and local businessmen were involved, had been in direct competition with each other for funds. *Id.* The Free School Society lobbied the legislature to end public funding to sectarian schools and won with the eventual transformation of schools of the Free School Society into public schools. *Id.* This history tipped the scales against Catholic schools later in New York when they requested funding. *See also* MCCLUSKEY, *supra* note 15, at 65-66 (regarding Free School Society) and 65-77 (document: 1840 "Petition of the Catholics of New York

general, the clauses ban using public money, or public money intended for public schools, to support schools of any “religious sect or denomination” or any “sectarian” institution or any private school or institution “not under exclusive control” of public officials.<sup>17</sup>

Constitutional challenges to those clauses recently began picking up steam under a *Romer v. Evans* equal protection theory.<sup>18</sup> *Romer* analysis increasingly has ties to a constitutional analysis that also surfaces in the “dignity” due process liberty decisions of *Lawrence* and *Windsor*.<sup>19</sup> What is at stake is rescuing the promise of *Zelman v. Harris*<sup>20</sup> for “voucher aid” to private schools, including parochial schools, in spite of the decision in *Locke v. Davey*<sup>21</sup> that a state’s constitutional bar to funding scholarships for a degree in “devotional theology” does not violate the Free Exercise Clause.

As is usually true with cutting edge judicial decisions, there are at least two ways to characterize the Court’s analysis in *Romer*. One way is to say that *Romer* is a “facial analysis” decision: text that facially singles out one group of persons by naming noun or identifying characteristic (there, gays/lesbians/bisexuals), for burdensome treatment (there, a Colorado constitutional amendment requiring the group to obtain constitutional repeal before being able to use ordinary political process to seek favorable laws), in an unusual or unprecedented legislative context (there, the law was unprecedented in imposing across-the-board disfavored legal status by denying the group civil rights protection other named groups already enjoyed and by lodging that denial in the constitution), all of which then shifted the burden to the state to justify the classification and burden; and, because the state offered no legitimate rationale for the law, the law was irrational and unconstitutional under the Equal Protection Clause.<sup>22</sup>

Another way to characterize *Romer* analysis is to emphasize the differential and adverse impact the Colorado law had on a disfavored group’s political rights, which then gave rise to triggering a more exacting rational basis scrutiny because the apparent aim or purpose of the law was to burden

for a Share of the Common School Fund”).

The struggle heated up during the “Cincinnati Bible wars,” when Ohioans showed their ears were as deaf as Horace Mann’s were to Catholic complaints about King James Bible readings in public school, as opposed to from the Douai or Challoner Bible. *See, e.g.,* MCAFEE, *supra* note 3, at 27-29. Authorities’ deafness continued into the 1960s as witnessed through the present author’s experience in King George, Virginia.

17. There are, as the text signals, multiple variations in the wording of these clauses. *See supra* explanatory text and sources in note 4. There are only five states that use only “sect” or “sectarian” in their clauses. *See infra* text accompanying note 32.

18. *Romer*, 517 U.S. at 631-36.

19. *Lawrence v. Texas*, 539 U.S. 558 (2003); *United States v. Windsor*, 133 S.Ct. 2657 (2013). *See discussion infra* following note 23.

20. *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).

21. *Locke v. Davey*, 540 U.S. 712 (2004).

22. *Romer*, 517 U.S. at 632-33.



discriminated against Catholics and were a byproduct of anti-Catholic animosity,<sup>30</sup> *even if* the clauses contain “church” or “denomination.”<sup>31</sup> The challengers also sometimes then use the finding of animosity to attack clauses that are no-funding clauses applying to all religious schools, irrespective of whether those clauses also apply to private non-religious schools.<sup>32</sup>

But the trouble is, only some of the states’ clauses use the word “sectarian,” and often the words “private” or “church” or “denomination” are also in the clauses,<sup>33</sup> thereby removing any sting possibly lurking in “sectarian” and making evidence of “bare desire to harm” not relevant to analysis of the vast majority of those clauses. For example, the Hawaii Constitution, from eight decades after Blaine’s proposed amendment,<sup>34</sup> is in terms of “sectarian or nonsectarian private educational institution.”<sup>35</sup> Yet,

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*The Blaine Amendment, supra* note 3. But note Green’s discussion of that 1992 article in his 2012 book. GREEN, *THE BIBLE, supra* note 3.

30. *E.g.*, Picarello, *supra* note 4, *passim*.

31. The prime example of this is the Becket Fund argument in *Mitchell v. Helms*, involving the Massachusetts clause, which was adopted in 1855 and contains neither “sect” nor “sectarian.” Brief for the Becket Fund for Religious Liberty as Amici Curiae Supporting Petitioner, *Mitchell v. Helms*, 120 S.Ct.15 (2000) (No. 98-1648) [hereinafter *Amicus Brief for Mitchell v. Helms*]; MASS. CONST. art. XVIII, § 2 (“No . . . public money . . . for . . . any primary or secondary school, or charitable or religious undertaking which is not publicly owned and under the exclusive control, order and supervision of public officers . . .”). A slightly different example involves Oklahoma’s clause, which contains “sect” and “sectarian” but also contains “church” and “denomination.” OKLA. CONST. art. II, § 5. The Becket Fund, admittedly on the side of angels (disabled children), filed a brief arguing that the clause was unconstitutional because it was motivated by animosity, as “sectarian” witnessed. The Oklahoma Supreme Court ducked the merits, finding the school district did not have standing to challenge a state statute allowing disabled children to have state scholarships to attend even religious private schools. *Indep. Sch. Dist. No. 5 of Tulsa County v. Spry*, 292 P.3d 19 (Okla. 2012).

32. *See, e.g.*, Becket Fund, website, *supra* note 4.

33. In fact, however, only five state constitutions use “sect” or “sectarian” *without also* using a form of “denomination” or “private” or “church.” KAN. CONST. art. VI, § 6(c) (“religious sect or sects . . . public educational funds”); MISS. CONST. art. VIII, § 208 (“religious or other sect or sects . . . educational funds . . . sectarian school”); NEV. CONST. art. XI, §§ 2, 9 (“school district . . . instruction of a sectarian character; sectarian instruction . . . [state] school”); N.D. CONST. art. VIII, § 5 (“money. . . [for] public schools . . . sectarian school”); S.D. CONST. art. VIII, § 16 (“sectarian school . . . sectarian purposes . . . sectarian instruction . . . in [state] school”).

34. This temporal difference for the constitutions of Hawaii, Alaska, and Massachusetts (*see infra* note 35), ought to be enough to disqualify them as possible “Blaine” candidates—except for the contrary insistence of the Becket Fund for Religious Freedom and other groups and individuals, whose ultimate argument is aimed at “no-funding” provisions, for which Blaine clauses are but a vehicle.

35. HAW. CONST. art. X, § 1 (enacted 1959)(“[P]ublic schools free from sectarian control . . . There shall be no discrimination in public [schools] because of . . . religion . . . nor shall public funds be appropriated for . . . any sectarian or nonsectarian private educational institution . . . [with exceptions for certain special revenue bonds].”). (as renewed and amended in 1978, 1994, 2002, adding exceptions). Similarly, the Alaska Constitution does not fit temporally as a Blaine clause, nor does it fit textually: “No money shall be paid from public funds for the direct benefit of any religious or other private educational institution.” ALASKA CONST. art. VII, § 1. (enacted 1956). A Declaration of Rights provision in the 1780 Massachusetts Constitution did allow government exaction of money to fund “public Protestant teachers of piety, religion, and morality.” MASS.



"sectarian or nonsectarian" exhausts the universe, thereby reducing the dividing lines in Hawaii's clause to "private" and "educational institutions," neither of which even remotely gives rise to suspicion of illegitimate legislative purpose. Similarly, clauses that are from after 1875, but that use "private" or "denomination," "denominational" or "church" in combination with "sect" or "sectarian," are not clauses that allow facial challenges because the additional words extend the denotation universe of the clauses to, respectively, all non-public schools or institutions or all church-related schools or institutions, thereby precluding relevance of motivating or purposeful legislative animosity—unless, of course, the courts were to allow evidence of actual disproportionate impact, thereby raising illicit discriminatory intent inferences.<sup>36</sup>

Some challengers therefore gear their arguments, at least in public documents,<sup>37</sup> toward disproportionate impact through stark evidence that

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CONST. of 1780, pt. 1, art. III. But later, Massachusetts added a provision limiting public money raised for public schools to that use alone and specifically prohibiting use of public money for "any . . . primary or secondary school, or charitable or religious undertaking which is not publicly owned and under the exclusive control, order and supervision of public officers . . ." MASS. CONST. art. XVIII, § 2. (added 1855).

36. This is why some public challenges to the constitutional clauses lay heavy emphasis on the nature of public education in the nineteenth century. Note, however:

By the end of [the nineteenth] century, due as much to exhaustion as any thoughtful will, schools had dropped the more obviously religious—and generally Protestant Christian—trappings of the school faith [meaning, the Horace Mann tradition], replacing them with a generic commitment to democracy reinforced by a set of patriotic symbols, including flags and flag salutes and the omnipresent pictures of George Washington and Abraham Lincoln. Some religious symbols—Bible reading and prayer in a minority of states, Christmas carols and pious references in most communities—continued well into the twentieth century. . . . By [twentieth] century's end, most public schools are pretty secular places, but the debates about what is appropriate in these most public of institutions are as heated as ever.

FRASER, *supra* note 15, at 3. Of course, Bible reading was not an insignificant matter, especially when it was from the King James Bible to the exclusion of the Douai or Challoner Bible. In general, challengers correctly describe the Protestant overt and covert teaching in public schools in the early to mid-nineteenth century, when it began to wane. And in some places, "common schools" were, as challengers often say, public schools in which the "common religion" (viz., Protestantism) permeated. *See, e.g.*, FRASER, *supra* note 15, at 2, 25-47. *See also* Kaplan v. Ind. Sch. Dist., 214 N.S. 18 (Minn. 1927) (upholding a law requiring public school teachers to read from the Old Testament of the King James Bible each day, albeit without comment). But in Minnesota in 1857, delegates to the Republican constitutional convention understood "common schools" to be a way of talking about ungraded schools that taught basic reading, writing and arithmetic to children less than 15 years old, in contrast to graded schools, high schools, normal schools (i.e., teachers colleges), and colleges. DEBATES AND PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION FOR THE TERRITORY OF MINNESOTA 231 (G. W. Moore, printer 1858), available at [reflections.mndigital.org/cdm/ref/collection/sll/id/3553](https://reflections.mndigital.org/cdm/ref/collection/sll/id/3553).

37. *See generally*, The Becket Fund for Religious Liberty, BLAINE AMENDMENTS,

public schools in fact were Protestant schools in all but name—King James Bible readings, Protestant hymn singing, Protestant Ten Commandments above blackboards, Protestant Lord’s Prayer beginning the school day<sup>38</sup>—to show a “stark” pattern of taxes collected from everyone but spent on educating almost solely Protestant children because Catholic parents, to protect their children, sent their children to parochial school.<sup>39</sup>

## II. ORIGINS OF THE STATE CLAUSES: THE HEREIN AS TO ANTI-CATHOLIC BIAS

Some scholars and litigants have argued that Blaine clauses do not necessarily embody or reflect anti-Catholic bias because there is scant evidence of sufficient anti-Catholic bias, particularly in constitutional convention records,<sup>40</sup> to count under *Romer* or because the people of some states included those clauses in response to congressional demand.<sup>41</sup> Admittedly, the Supreme Court has recognized that no-funding clauses in some state constitutions resulted from the Enabling Acts.<sup>42</sup> But a congressional mandate would not necessarily cleanse the clauses of anti-Catholic taint: The taint could trace from Congress itself. Moreover, in a state’s agreeing to the clauses, an anti-Catholic bias might have resulted in a willingness to trample Catholics in order to gain admission to the Union, a willingness that surely would need to stem from views that the interests of Catholics were unimportant, if not illegitimate.

If, therefore, there is substantial evidence that anti-Catholicism was prevalent in this country, then the reason for ignoring that evidence in constitutional analysis of the clauses cannot turn on whether voters agreed on their own initiative to having the clauses in their constitutions or were faced with a mandate from Congress as the price for admission to the Union. Instead, the issue becomes one of the extent of the anti-Catholic bias and whether it functioned as a substantial reason animating Blaine clauses in state

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www.blaineamendments.org (see the law review articles and policy papers under the drop-down tab “Scholarship”).

38. See, e.g., Brief for the Becket Fund, *supra* note 4. See also *supra* note 36.

39. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977) (affirming that racially disproportionate impact evidence is not irrelevant but will not trigger strict scrutiny, absent “stark” pattern); see also *Washington v. Davis*, 426 U.S. 229, 242 (1976) (“Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution.”).

40. For some states, there essentially are no debate records for the clauses this article addresses. Goldenziel, *supra* note 4, at 62; see also *Kotterman v. Killian*, 972 P.2d 606, 621-22, 624 (Ariz. 1999) (stating there are no historical records linking the state’s no-funding clause to the proposed Blaine Amendment).

41. E.g., Goldenziel, *supra* note 4, at 80 (speaking of the Arizona clause: “likely that the no-funding provision was simply lifted without thought from the Enabling Act”).

42. *Locke*, 540 U.S. at 723 n.7 (2004) (referring to the Washington Constitution); see also Goldenziel, *supra* note 4, at 61-62.

constitutions, if—but only if—the clauses meet the *Romer* (and *Lawrence/Windsor*) requirements for facial text singling out an identifiable group for exclusion from the polity. Otherwise, the historical evidence is evidence we ought to acknowledge as a matter of truth-telling and of respect for the histories we and our compatriots have endured in this country and as a legacy we ought to disavow. But the evidence would be legally relevant to only a "disproportionate impact" analysis, which currently goes nowhere in federal constitutional law.<sup>43</sup>

So let's be clear: There clearly was anti-Catholic bias in the early decades of the nineteenth century, as the rise of the "Know-Nothing" party witnessed from 1845 to 1855 until it folded into the "American" party between 1855 and 1869 and then into the Republican party (for northern members—Democrat party for southerners) after the Civil War.<sup>44</sup> Notable American public leaders were outspokenly anti-Catholic, including Samuel F.B. Morse, inventor of the telegraph and Morse code and defender of slavery, who flooded newspapers for decades with vitriolic anti-Catholic letters.<sup>45</sup> And from 1875 to 1900, anti-Catholic public discourse clearly was rampant and virulent, rising to the level of animosity, not just bias, as *Harper's Weekly* cartoons witnessed, perhaps particularly Thomas Nast's.<sup>46</sup> Nor was the

43. E.g., *Arlington Heights*, 429 U.S. 252; *Davis*, 426 U.S. 229 (stating that evidence of disproportionate racial impact, standing alone, is inadequate to trigger heightened scrutiny). See also *McClesky v. Kemp*, 428 U.S. 279, 280 (1987) (stating that scientific study of disproportionate racial impact of death penalty is insufficient to overturn a guilty verdict absent evidence of "racially discriminatory purpose").

44. See generally JAMES M. MCPHERSON, *BATTLE CRY OF FREEDOM: THE CIVIL WAR ERA 125-44* (Oxford U. Press 1988) (describing the revival of nativist parties); MUZZEY, *supra* note 3, at 25-39 (describing lucid accounts of the Know-Nothings party and its transformations before the Civil War, the relation to Free-Soilers and Abolitionists after the break-up of the Whig party, and the rise of the Democratic party and, eventually, the Republican party).

45. See SAMUEL F. B. MORSE, *FOREIGN CONSPIRACY AGAINST THE LIBERTIES OF THE UNITED STATES* (American Protestant Society 6th ed. 1844) (letters originally published in *New York Observer*, of which his brother was editor) [hereinafter MORSE, *FOREIGN CONSPIRACY*]; SAMUEL F. B. MORSE, *IMMINENT DANGERS TO THE FREE INSTITUTIONS OF THE UNITED STATES THROUGH FOREIGN IMMIGRATION* (Edward Lind Morse ed., Arno Press 1969) [hereinafter MORSE, *IMMINENT DANGERS*]; SAMUEL F. B. MORSE, *HIS LETTERS AND JOURNALS* (Edward Lind Morse, ed., Houghton Mifflin Co. 1914) [hereinafter MORSE, *LETTERS AND JOURNALS*]; SAMUEL F. B. MORSE, *CONFESSIONS OF A CATHOLIC PRIEST, TO WHICH ARE ADDED WARNINGS TO THE PEOPLE OF THE UNITED STATES BY THE SAME* (D. Van Norstrand 1837) (bearing a motto Morse put on the title page: "American liberty can be destroyed only by the Popish Clergy."—Lafayette," as to which Morse claimed at page ix in the preface that Lafayette expressed the same sentiment to Morse on their last visit in Paris) [hereinafter MORSE, *CONFESSIONS*].

46. See MCAFEE, *supra* note 3, at 48, 59, 72, 77, 153, 193, 201, 217 (reprinting some of Nast's and others' cartoons) at 175-202 ("The Anti-Catholic Antidote" chapter); OHIO STATE UNIVERSITY LIBRARIES, *Thomas Nast Portfolio*, <http://cartoons.osu.edu/nast/portfolio.htm> (reprinting cartoons by Nast and others). The most hateful of the cartoons was titled "The American River Ganges," from September 30, 1871, and showed Tammany Hall politicians on the river bank dropping children into a river filled with "crocodilian" Catholic bishops readied to snap them up. Even without the flag flying upside down in the background, the "un-American" subtext linking Catholic

animosity in that era unique to the United States. Catholicism and Catholics were subjected to persecution in the East and the West during the nineteenth century, including from 1875 to 1900. In the Joseon kingdom of what is now South Korea, for example, there were repeated pogroms against Catholic converts, resulting in the deaths of an estimated 10,000 Catholics, more than a hundred of whom subsequently have been canonized as martyrs.<sup>47</sup> In Bismarck's Prussia from 1871 to 1887, persecution was less deadly, but resulted in the imprisonment of Prussian Catholic bishops, expulsion of Jesuits, government supervision of the education of Catholic clergy, relocation of marriage to civil authorities, and so on, as part of a *Kulturkampf* associated with Bismarck's unified-Germany nation-building efforts.<sup>48</sup>

Just because anti-Catholic sentiment in the United States did not rise to the level of state-sponsored pogroms, widespread political arrests, expulsions, or state-sanctioned appropriations of Catholic property,<sup>49</sup> does not mean the sentiment in the United States was of a polite, gentle, or non-*Kulturkampf* kind,<sup>50</sup> especially as Reconstruction began failing and political

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bishops to a Hindu river would not have been lost on readers of *Harper's Weekly* (whose subtitle was "Journal of Civilization"). In populist humor, the Irish immigrant, or "Paddy," was depicted as "drunken, childlike, indolent, spendthrift controlled by priests," etc.; and popular newspapers and books were full of lurid tales involving Catholic clergy. 1 ENCYCLOPEDIA OF AMERICAN IMMIGRATION 60 (James Ciment ed., Sharpe Reference 2001). Note, however, that the same writing on page 61 says, "Advertisements for jobs frequently included a notice stating 'No Irish need apply.'" This claim has been described, with documentation, as an urban myth. Richard Jensen, "No Irish Need Apply": A Myth of Victimization, 36 J. SOC. HIST. 405, 405 (2002), available at <http://tigger.uic.edu/~rjensen/no-irish.htm> ("No historian, archivist, or museum curator has ever located one; no photograph or drawing exists."). One of the frustrating things about researching history via historians' and sociologists' publications for a person trained in law and analytic philosophy is the loose way some of them write "facts."

47. See ROSEMARY ELLEN GUILLEY, THE ENCYCLOPEDIA OF SAINTS 19-20 (Facts on File, Inc. 2001) (noting a total of 103 beatifications in 1925 and 1968 of Korean martyrs during 1839-46 and 1861-66 and their canonization in 1984); *Jeoldu-san*, WIKIPEDIA.COM, <http://www.en.wikipedia.org/wiki/Jeoldu-san> (last updated Apr. 5, 2013, 7:11 PM) (depicting Jeoldu-san Martyr's Shrine in Seoul, Korea). See generally Don Baker, *A Different Thread: Orthodoxy, Heterodoxy, and Catholicism in a Confucian World*, in CULTURE AND STATE IN LATE CHOSON KOREA 199 (JaHyun Kim Haboush & Martina Deuchler eds., Harvard Univ. Asia Center 2002) (examining the intellectual cultural and religious clashes and noting destruction of Catholic books, persecution campaigns, martyring of Paul Chông Hasang, etc.).

48. See generally MICHAEL B. GROSS, THE WAR AGAINST CATHOLICISM: LIBERALISM AND THE ANTI-CATHOLIC IMAGINATION IN NINETEENTH-CENTURY GERMANY (U. Mich. Press 2005) (especially as to the "May Laws"); RONALD J. ROSS, THE FAILURE OF BISMARCK'S *KULTURKAMPF*: CATHOLICISM AND STATE POWER IN IMPERIAL GERMANY, 1871-87 (Cath. U. of Am. Press 1998).

49. There were Irish-Catholic deaths and destruction of Irish-Catholic property in America too, but they primarily were from clashes resulting from Union militia drafts. Jensen, *supra* note 46, at 406 (describing New York City's four-day Irish draft riots in 1863 that resulted in Lincoln's sending combat troops and cannons; and the clash between Irish Catholics and Scots-Protestants, over an Orange parade in 1871, that resulted in the governor's sending "five armed militia regiments to support 700 policemen protecting 100 marchers. The Catholics attacked anyway, and were shot down by the hundreds."). But see MCPHERSON, *supra* note 44, at 493-95 (describing Civil War era draft riots in some areas of Pennsylvania, Ohio, Indiana, and Wisconsin).

50. But see *Cummings v. Missouri*, 71 U.S. 277, 316-17 (1866). Missouri, in its 1865

leaders struggled over nation-building and America's cultural future here, too.

For scholars to deny or belittle the existence of anti-Catholic animosity in America between 1875 and 1900 does not speak well of the scholars and does not serve current societal interests in our being knowledgeable about past wrongs. Explaining that public animosity had ties to more than mere religious differences over school funding, however, is a different matter. Some of the animosity stemmed in some quarters from the rapid, extensive waves of immigration, particularly from Ireland and Germany from 1820 to 1840 and again from 1860 to 1880, while America was experiencing two depressions following the Panic of 1837 and the Panic of 1873.<sup>51</sup> The immigrants arrived largely uneducated and unskilled, with different patterns concerning family and alcohol, and they were Catholic in an overwhelmingly Protestant land.<sup>52</sup> They crowded into cities, and crime rates soared.<sup>53</sup> Add that some people knew the 1820 to 1840 Irish immigrants had been under-represented among Union forces,<sup>54</sup> and now there is something for anyone who is inclined to nasty prejudice to use as an excuse for having animosity against Catholics between 1875 and 1900. Recognizing these facts is important to our understanding of history. Parsing them to the point of saying anti-Catholic animosity was not a substantial motive for Blaine clauses is to run the legal issues off track at the expense of truth: There was anti-Catholic bias amounting to animosity in this land. It was a motivating factor from 1875 to 1900 in some quarters for adding Blaine clauses in some, if not all, of the

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constitution, had imposed a loyalty oath on exercise of franchise rights, office eligibility, attorney licensure, and on clergy in order for them "to teach, or preach, or solemnize marriages" with fines and imprisonment for engaging in those activities without giving the required oath or falsely swearing. Cummings, a Catholic priest, was convicted and fined; the Supreme Court, by 5 to 4, overturned it, finding the required oath (covering 30 affirmations) was a tyrannical punishment, and holding that the state constitutional clauses were bills of attainder and ex post facto laws.

51. See MCPHERSON, *supra* note 44, at 10, 22, 32, 33, 130-32. See also PETER D. MCCLELLAND & RICHARD J. ZECKHAUSER, *DEMOGRAPHIC DIMENSIONS OF THE NEW REPUBLIC: AMERICAN INTERREGIONAL MIGRATION, VITAL STATISTICS, AND MANUMISSIONS, 1800-1860* (CAMBRIDGE U. PRESS 1982) (tables on immigration as percentage of population, passenger arrivals by country of origin, birth and death rates, etc.). See generally ALASDAIR ROBERTS, *AMERICA'S FIRST GREAT DEPRESSION: ECONOMIC CRISIS AND POLITICAL DISORDER AFTER THE PANIC OF 1837* (Cornell U. Press 2012) (examining the causes and political, social, and economic consequences of America's "first great depression"); M. JOHN LUBETKIN, *JAY COOKE'S GAMBLE: THE NORTHERN PACIFIC RAILROAD, THE SIOUX, AND THE PANIC OF 1873* (U. Okla. Press 2006) (examining America's "Long Depression," which "lasted some five years, [with] economic damage . . . second only to the past century's Great Depression.").

52. MCPHERSON, *supra* note 44, at 9-10, 22-23, 31-33; Jensen, *supra* note 46, at 406-07; MCAFEE, *supra* note 3, at 18.

53. MCPHERSON, *supra* note 44, at 131-32.

54. There were several reasons for the under-representation, almost all of which were unremarkable. *Id.* at 492-93, 601-03, 606-07. But there also were violent anti-draft riots in Irish communities. See *supra* note 49 and accompanying text.

state constitutions that have those clauses. That bias was probably even a substantial motivating factor in some quarters. None of that is on the constitutional legal point, however, when the text of those Blaine clauses also applies on its face to Baptist and Jewish and Muslim schools and institutions.<sup>55</sup>

### III. WHY THE ATTACKS FAIL

#### A. Dictionaries: Perils and Pitfalls

Word usage reflects culture. But culture changes; and meanings of words change over time and following major geo-political or cataclysmic events, including wars and rapid population changes. Standards for polite speech change over time, and speakers who lag behind new standards find themselves ostracized. These reminders are in order because contemporary public speech in America is more polite than it was a few decades ago, or before World War II,<sup>56</sup> let alone in the middle of the nineteenth century when we were in the midst of civil war.<sup>57</sup> Hence, a text from 1875 to 1900 may then have had a denotation or connotation, or both, different from the meanings we would assign it today. To know what the text meant in the former time, consequently, we need to know about the social and political environment of that time and place. Even then, thinking about words requires a deft hand. The Latin derivation of “sect” makes the following phrases “the followers of the Rev. Sun Myung Moon” and “the Moonies sect” equivalent in denotation, but adherents surely will not “feel” that they are equivalent. Readers of today’s *New York Times* or *Washington Post* surely also would be surprised to find a journalist writing the latter phrase or finding the former on an American Nazi Party blog.

Claiming Blaine clauses are unconstitutional under *Romer* or *Lawrence/Windsor* requires first establishing that the clauses facially single out an identifiable segment of society for different, burdensome treatment. Challengers’ first task, therefore, is to show that “sectarian” in these clauses is code for “Catholic.”<sup>58</sup> One of the documents to which challengers naturally

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55. See *Univ. of Cumberlands v. Pennybacker*, 308 S.W.3d 668, 685 (Ky. 2010) (holding that the state’s \$10 million appropriation to build a pharmacy school building on campus of a Baptist college violated Section 189 of the Kentucky Constitution (“No portion of any 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 denomination school.”) and finding that Section 189 did not amount to a discriminatory anti-Catholic “Blaine Amendment”).

56. There always, of course and unfortunately, are clueless speakers, as America discovered about Paula Dean in 2013. And the web and Facebook are forcing us to reconsider what is public speech.

57. Consider, for example, the differences between the intemperate speech patterns Jehovah’s Witnesses used in proselytizing before World War II and their quieter, gentler patterns today.

58. Picarello, *supra* note 4, at 5-7. See also *Amicus Brief for Mitchell v. Helms*, *supra* note 31.



“sectarian” and “religious” meant “non-Protestant,” and especially “Catholic,” whereas “nonsectarian” meant “Protestant,” all of which was to show the Blaine clauses exhibited coded anti-Catholic bias, all of which itself is complicated and thrown in doubt by citing to a 1989 dictionary.<sup>66</sup>

Using dictionaries to make sound arguments about constitutional clauses requires great care. For example, “Webster’s” has been a genericized mark for dictionaries for more than a century; to be a descendant of Noah Webster’s dictionary, the book must be from Merriam—as in “Merriam-Webster’s Dictionary.”<sup>67</sup> Further, definitional entries in one publisher’s dictionary may be from a different publisher’s source, which in turn may be a descendant of a surprising source. This is true of the 1989 *Lexicon*’s incorporation of definitions of 1972 *Larousse*: The latter is an English late-twentieth century descendant of a 20-volume, quarto-sized French encyclopedic dictionary Pierre Larousse began publishing in 1866. An examination of Larousse’s entries for *sectaire* and *secte* strongly suggest that a Larousse exemplar 1890 gloss on “*secte*” has been transposed to definitional status over time.<sup>68</sup> Because that gloss began “*se dit*,” and because the encyclopedic instruction for “*secte*” sends readers to the encyclopedic entry for “*sectaire*,” the latter is essential reading. That very long, detailed encyclopedic entry for *sectaire* includes the statement that *la secte* and *l’hérésie* are often mistakenly confused, that any doctrine contrary to the teachings of the Church—meaning the Catholic Church—is a heresy and, six paragraphs later, that Protestants are heretics and sectarians vis-à-vis Catholics,<sup>69</sup> all of which is a very ordinary and unobjectionable thing for

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66. Picarello, *supra* note 4, at 6-7. His written testimony cited WEBSTER’S DICTIONARY OF THE ENGLISH LANGUAGE, THE NEW LEXICON (Encyclopedic Ed., Lexicon Pub. 1989). *Id.* at 7. In his oral testimony, he spoke in terms of “Webster’s Dictionary.” *Id.* at Transcript of Briefing 16:4. But OCLC’s online World Catalog in 2013 did not have a book with the title and date he cited. OCLC ONLINE COMPUTER LIBRARY CENTER, INC., OCLC.org [hereinafter OCLC]. OCLC did have one from the same publisher and year, and all the same descriptive words that the Becket Fund attorney, Mr. Picarello, used were also in the OCLC title and on the physical book’s cover and title page. i.e., THE NEW LEXICON WEBSTER’S ENCYCLOPEDIC DICTIONARY OF THE ENGLISH LANGUAGE, DELUXE EDITION (Lexicon Publications, Inc., 1989) [hereinafter 1989 LEXICON]. The copyright page names a 1989 copyright to Lexicon Publications, Inc., with the following additional notice: “Main dictionary section © 1972 Librairie Larousse as *The Larousse Illustrated International Encyclopedia and Dictionary*. Revised and updated 1989.” *Id.* (emphasis in original) [hereinafter 1972 LAROUSSE]. OCLC shows there were 1989 revisions and updates by Librairie Larousse to 1972 LAROUSSE. In the text that follows this note, I assume (perhaps unfairly) that the 1989 LEXICON is the book to which Mr. Picarello referred.

67. *G. & C. Merriam Co. v. Ogilvie*, 159 F. 638 (1st Cir. 1908); *Ogilvie v. G. & C. Merriam Co.*, 149 F. 858 (D. Mass. 1907).

68. The gloss was “*se dit particulièrement de ceux comme hérétique*,” i.e., “said particularly of those persons as heretics.” GRAND DICTIONNAIRE UNIVERSEL DU XIXE SIÈCLE 14:460-61 (Administration du Grand Dictionnaire Universel 1875), available at <https://archive.org/stream/LarousGrdictionnXIX14bnff#page/n1/mode/2up> (search for pages 465 and 466 to reach hard copy pages 460 and 461) [hereinafter GRAND DICTIONNAIRE].

69. *Id.* The text continues, in translation, “[b]ut hundreds of protestant churches that exist





injunction decision details the evidence the court heard.<sup>72</sup> Defendants' political-action group's witnesses testified about the plaintiffs' "'homosexual agenda' and the homosexual push for protected status"<sup>73</sup> and about the defendants' efforts "to fend off state-wide militant gay aggression," a phrase the court found a witness uttered "no less than six times in his direct testimony alone."<sup>74</sup> Another defendant witness was a George Mason University law professor, who testified that "the addition of gays to civil rights statutes or ordinances would lessen the public's respect for historic civil rights categories ... and could result in a dilution of governmental resources allocated to protect those traditional civil rights."<sup>75</sup> Plaintiffs' witnesses countered that with testimony from Colorado city officers and a Wisconsin state officer (where a civil rights law had covered gays for the last eleven years), who testified that their respective governments' experiences showed the law professor was factually wrong.<sup>76</sup>

Some of defendants' political-action group's witnesses also testified that "gay rights advocates are seeking to destroy the family," but the court noted the witnesses never defined "family," nor connected protection of family to denial of rights of gays to equal participation in political processes, and therefore ignored the testimony.<sup>77</sup> Some of the defendants' witnesses also testified in connection with defendants' claim that Amendment 2 was supported by a compelling interest in "protecting children," as to which the court cited the plaintiff witness's testimony that pedophiles were "predominately heterosexuals[,] not homosexuals."<sup>78</sup>

Plaintiffs' witnesses, on the other hand, included several doctors, a history professor, and a law professor from Yale, who all testified that

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72. *Evans v. Romer*, No. 92 CV 7223, 1993 WL 518586, at \*1-13 (Colo. Dist. Ct. Jan. 15, 1993) (granting a permanent injunction). The initiated amendment to the Colorado Constitution provides that

No Protected Status Based on Homosexual, Lesbian, or Bisexual Orientation. Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination. This Section of the Constitution shall be in all respects self-executing.

Colo. Const. art. II, § 30b.

73. *Romer*, WL 518586, at \*4.

74. *Id.*

75. *Id.* at \*5.

76. *Id.* at \*5-6.

77. *Id.* at \*8.

78. *Romer*, 1993 WL 518586, at \*9.

"homosexuality or bisexuality is not relevant to the merit of the individual."<sup>79</sup>

What in the world is going on here? Are these just "opinion" witnesses? Is any one of them a *Daubert*-qualified expert-witness?<sup>80</sup> Of course, the challengers to Colorado's Amendment 2 had to establish that the provision singled out a group of people by a single trait for burdensome treatment, and the defenders of the provision had to establish at least a rational basis for the law. Lawyers, being lawyers, if one side's witness says "X," the other side will find a witness who will say "Not X, Your Honor." But has anything risen here above name-calling at its worst?<sup>81</sup> In the absence of a rule that requires facial analysis first, as a necessary condition to introduce evidence of animosity in the nineteenth century against Catholics, Blaine clause litigation will devolve into witnesses testifying in name-calling fashions similar to the witnesses in *Evans v. Romer*'s permanent injunction hearing, where at least there was facial text of the sort *Romer* itself said there had to be for this evidence to be relevant to the constitutional question.<sup>82</sup>

Historians' testimony from the witness stand, trial judges' "findings" of history, and lawyers' history briefs to appellate courts are not merely inadequate means of addressing the federal constitutionality of a state constitutional provision. Rather, constitutional law simply cannot be turned over to the hands of historians, let alone to the hands of lawyers who are untrained in historiography,<sup>83</sup> nor even to courts whose members are well read in relevant history. Truths in accounts of history, after all, are not like weights and measures, nor like truths in mathematics or chemistry or even psychology or sociology. For one thing, history is not a fixed entity. Documents that appear to be complete often turn out not to be. New experience alters perceptions of the past.<sup>84</sup> Nor is there a fixed way of

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79. *Id.* at \*11.

80. *Daubert v. Merrill Dow Pharm. Co.*, 509 U.S. 579, 582-600 (1993).

81. Robert F. Nagel, *Name-Calling and the Clear Error Rule*, 88 NW. U. L. REV. 193 (1993).

82. This already has happened. For example, Justice Breyer quoted a law review article to say Catholic students' endured "beatings or expulsions for refusing to read from the Protestant Bible" as part of the Justice's focus on anti-Catholic attitudes in the nineteenth century. *Zelman*, 536 U.S. at 720 (citing John C. Jeffries, Jr. & James E. Ryan, *A Political History of the Establishment Clause*, 100 MICH. L. REV. 279, 300 (2001)). No doubt public school teachers beat and threatened students in the nineteenth century. Public school teachers I encountered in Florida and Virginia in the 1950s and 1960s beat, shoved, slapped, hit, and threatened me and my classmates if we talked back, ran in the halls, forgot our homework, chewed gum, and so on. In California, teachers in those decades did not hit, at least not the girls; but they felt free to make us stand up in class for a public scolding. Still, are we really going to do constitutional law through the lens of *non-party* individual experiences?

83. Compare, however, expecting lawyers to locate—and use in legal arguments and analysis—constitutions, statutes, judicial decisions, administrative orders and decisions, legislative committee reports, records of legislative and executive speeches and debates, and similar legal documents.

84. For example, generations ago, historians rarely included the lives of women in accounts

accessing or communicating history. Instead, works of history are interpretations and reinterpretations, and there often are disagreements about the “historical evidence” and differences in styles of historiography. Some histories are political histories, focusing on wars, politicians, and diplomacy;<sup>85</sup> others are social or cultural histories;<sup>86</sup> still others are intellectual histories or histories of ideas and focus on the *zeitgeist* of an era or tracing an idea through time.<sup>87</sup> Academic historians have a professional culture and sets of professional norms. Popular historians do not necessarily have either one, although they may have greater impact on public understanding.<sup>88</sup> *Daubert* offers a crude rule in this context.<sup>89</sup>

What historians in the last few decades have said about nineteenth century America reflects the interests of those historians and their historiographies even as the historians are covering the same “facts” and time. Thus, one historian will say that the antagonism that greeted Irish immigrants between 1830 and 1870 in the United States was less about their being Irish and more about some Americans’ anti-Catholic prejudice and concerns that the Irish immigrants were anti-republican.<sup>90</sup> The next historian will say that the anti-Catholic prejudice was more about the perceptions of Irish immigrants as uneducated and unskilled workers who accepted low wages at a time of a contracting economy.<sup>91</sup> A third historian will point out

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of an age or events. *But see* MCPHERSON, *supra* note 44, at 7, 9-10, 13-14, 22-23, 33-38, 449-50, 477-84.

85. Finding a current example of this for 1840 to 1880 America is difficult because of a change of academic standard, as exemplified by Eric Foner’s standard-changing work. *See* ERIC FONER, *RECONSTRUCTION: AMERICA’S UNFINISHED REVOLUTION, 1863-1877* (Henry S. Commager & Richard B. Morris eds., Perennial 2011) (interweaving coverage of political figures with explaining post-war shifts and effects in race relations, economics, and social attitudes and values).

86. *See, e.g.*, LINDA COLLEY, *BRITONS: FORGING THE NATION 1707-1837* (Yale Univ. Press 1992).

87. *See, e.g.*, ARTHUR O. LOVEJOY, *THE GREAT CHAIN OF BEING: A STUDY IN THE HISTORY OF AN IDEA* (Transaction Publishers 1979); ISAIAH BERLIN, *AGAINST THE CURRENT: ESSAYS IN THE HISTORY OF IDEAS* (Viking Press 1980).

88. *See, e.g.*, SHELBY FOOTE, *THE CIVIL WAR: A NARRATIVE* vol. 1-3 (Random House 1958-1974). By “popular historians” I mean only that they are not attached to a university.

89. *Daubert*, 509 U.S. at 582-600.

90. Jensen, *supra* note 46, at 406, 410.

91. MCPHERSON, *supra* note 44, at 15, 18-22, 32. McPherson does say the *Nativist* party was “more anti-Catholic than anti-immigrant.” *Id.* at 33. But he makes plain there was a clash-of-cultures—as to alcohol use, family structures and sizes, Protestant decline, Protestant reaction to speeches by Archbishop John Hughes, etc.—and other factors contributing to anti-Irish attitudes in the Civil War era. *Id.* at 9-10, 34-35, 131-35, 507. “Crime and welfare costs soared. . . Native-born Americans attributed these increases to immigrants, especially the Irish. . .” *Id.* at 131. Fraser notes some of the same things. *See* FRASER, *supra* note 15, at 4. He also notes, however, that the Protestants “looked, spoke, and acted an awful lot like the Protestant establishment that had starved [the Irish] out of their homeland.” *Id.* at 51. Higham notes all the factors McPherson and others note and says, “[n]ativism, therefore, should be defined as intense opposition to an internal minority on the ground of its foreign (i.e., ‘un-American’) connections. . . [T]hrough each separate hostility runs the connecting, energizing force of modern nationalism.” HIGHAM, *supra* note 3, at 4, 7, 9-10, 26. He also says, however, “[a]fter the Civil War religious forces never recovered the commanding

that cultural memories are long and that the Irish were under-represented in Union ranks and resisted the Union draft, sometimes violently; any historian who, however, then failed also to point out that there were politically neutral reasons for the under-representation and for the resistance would be writing unprofessional and inadequate history.<sup>92</sup> But readers would not know that unless they were widely read in that history.

The Supreme Court's rule that facially targeted text is essential to trigger the *Romer* (or *Lawrence/Windsor*) analysis protects constitutional law from being turned over to a bunch of historians or, worse, a bunch of lawyers who are untrained and unlearned in history. There is another reason, too, for ignoring even clear records of what a legislator or constitutional delegate—let alone pundits in the newspaper or on late night TV—said during debate and deliberations: There always, in every group of persons, is an idiot, who says out loud whatever thought comes to mind. If courts were to invalidate legislation, much less constitutional clauses, based on the legislative idiots' exhibitions of idiocy, then all the legislative body has to do is re-enact the law after hog-tying and gagging the idiot. That always would give the legislature the last word, contrary to *Marbury v. Madison*.<sup>93</sup>

Moreover, there is something even more serious to note: Not everything a person says out loud and on the record is something the person believes. Usually we say what we mean and mean what we say, except for slips of the tongue or intentional lies. But politicians—who tend to be found in legislatures and speaking to public media about public events or concerns—sometimes are pretty sly in their talk about what they believe on a given point. A rule that allows overturning statutes or constitutional clauses because of record evidence of what someone says will drive even previously loquacious politicians into silence or empty platitudes or incoherent babble.

Again, the rule requiring facial text of a certain kind for *Romer* analysis is our protective shield not only against turning law over to historians, but also against turning it over to psychologists, "body language" diviners and similar others.

Here is the final reason there is no way to have an analytically sound interpretation of state Blaine clauses by using empirical evidence of bias: The results cannot be consistent. Some clauses predate the empirical evidence of rampant anti-Catholic bias, although those clauses may well rest on

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influence which they had exerted throughout the culture of earlier decades. The Protestant crusade against Rome never again dominated nativist thought as completely as it had in mid-century." *Id.* at 28. See also *id.* at 58-63, 77-87, 108. Yet, those nativists for whom "the Catholic peril loomed largest" were moved by "a matchless fury." *Id.* at 58.

92. McPherson makes the under-representation point, but he also makes those neutral reasons clear. MCPHERSON, *supra* note 44, at 492-94, 601-03, 606-07.

93. *Marbury v. Madison*, 5 U.S. 137 (1803).

Protestant self-centeredness. Some clauses may be in states with no current anti-Catholic bias evidence at all, where citizens have voted in the recent past to retain the clauses, without alteration.<sup>94</sup> In either case, these clauses will be immune to constitutional attack. Yet the very same language in other states' clauses will be invalid or at least subject to constitutional challenge because they are saddled with nineteenth century anti-Catholic bias. Further, there already are states with clauses that do not contain "sectarian" or "sect"—and states whose clauses do contain those words but also have "private," "church," or other words that cancel a Catholics-only objective. If those clauses are valid for lack of facial discrimination, we ought to be wary of viewing clauses that have only "sect" or "sectarian" as unconstitutional because of nineteenth century Protestant animosity toward Catholics, even as we admit and regret that anti-Catholic animosity, because we also know that the no-aid clauses reflect a national consensus on church-state separation that is subject to individualized, targeted exceptions we have been willing to insert into state constitutions in many states in recent decades.<sup>95</sup>

#### CONCLUSION

Some scholars have argued that there was prejudice in the nineteenth century against the Irish, but that the prejudice was really anti-Catholic or rested on perceptions the immigrants were anti-republican.<sup>96</sup> Others admit that there was anti-Catholic and anti-Irish prejudice, but argue that it arose because Irish immigrants were illiterate, unskilled, took low-wage jobs during a sustained period of the nation's contracting economy, and so on<sup>97</sup>—as if prejudice has rational explanations. Still others give a "pox on all your

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94. Indeed, this already is true of several states, the most recent of which is Florida. Since 1885, Florida's Blaine clause has provided that no public money is to be given to "any church, sect, or religious denomination or in aid of any sectarian institution." FLA. CONST. art. I, § 3 (re-ratified in 1968, 1977, and 1997 in votes on constitutional revisions). In the 2012 election, Florida voters were asked to approve an amendment that would have replaced that clause with a clause prohibiting government from "deny[ing] to any other individual or entity the benefits of any program, funding, or other support on the basis of religious identity or belief." H.J. Res. 1471, 2011 Leg., 113th Sess. (Fla. 2011) (known as Amendment 8: Religious Freedom, on the 2012 ballot). Votes fell approximately 5 percent short of meeting the necessary 60 percent "Yes" votes.

California voters also have rejected proposals to remove the state's no-aid constitutional clause. CAL. CONST. art. IX, § 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. . ."). The proposal from the Senate was to allow free textbooks from the state for nonpublic schools; it was defeated in the 1982 general election. CALIFORNIA BALLOT PAMPHLET—GENERAL ELECTION 34 (1982).

95. *E.g.*, MICH. CONST. art. VIII, § 2 (authorizing the legislature to provide for transportation of students to and from any school).

96. Jensen, *supra* note 46, at 407. But he also says, "[t]he evidence suggests that all the criticism of the Irish was connected to one of three factors, their 'premodern' behavior, their Catholicism, and their political relationship to the ideals of republicanism." *Id.* at 406.

97. MCCLUSKEY, *supra* note 15, at 43.

houses" account by adducing ways Catholic leaders flamed the fires,<sup>98</sup> and scholars agree that Republican politicians used Catholic bashing as just one political tool for retaining power for their nation building efforts.<sup>99</sup>

True, to obtain federal and state constitutions between 1776 and 1900, White men compromised other people's interests to save their own immediate political interests. Most of those men were Protestants. Some of the victims of those compromises were slaves, Indians and other persons of color, women, non-Protestants, or non-landholders. Shame on the compromisers, and on us if we continue to walk in the paths they trod. But there is no constitutional infirmity under *Romer* or *Lawrence/Windsor* analysis when the express text of a constitutional clause at its adoption had, and today still has, a wider denotation than merely to the segment of society that, for good or for ill reasons, may have motivated the adoption of that clause. Moreover, we owe to the law that we leave to the next generation a constitutional analysis that accommodates both a devotion to facial analysis and contemporary reaffirmations of constitutional clauses that, even if they may originally have arisen from illicit prejudice, have current applications that are free of prejudice.

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98. A favorite target is Archbishop John Hughes of New York City (b. 1797—d. 1864), whose pre-war stands against Abolition and his 1850 "proselytizing" speech roiled waters. See MCPHERSON, *supra* note 43, at 132, 507.

99. See MCAFEE, *supra* note 3, at 7, *passim*.