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THE BLAINE TAIN'T AIN'T IMPUTED – HOW CRITICS OF BLAINE AMENDMENTS ARE
GRASPING AT HISTORICALLY NON-EXISTENT STRAWS
by
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Submitted in partial fulfillment of the requirements of the
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THE BLAINE TAINT AIN’T IMPUTED – HOW CRITICS OF BLAINE AMENDMENTS ARE GRASPING AT
HISTORICALLY NON-EXISTENT STRAWS

*Todd J. Skowronski**

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INTRODUCTION

Any study of the school choice or voucher movement in the United States will eventually run into questions regarding Blaine Amendments.¹ These provisions, sometimes called no-

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¹ Jill Goldenziel, *Blaine’s Name in Vain?: State Constitutions, School Choice, and Charitable Choice*, 83 DEN. U. L. REV. 57, 63 (2005); Mark Edward DeForrest, *An Overview and Evaluation of State Blaine Amendments: Origins, Scope, and First Amendment Concerns*, 26 HARV. J. L. & PUB. POL’Y 551, 554 (2003); There is scholastic debate, however, over what provisions are rightly called “Blaine Amendments,” and whether ascribing the term “Blaine Amendment” to these types of provisions is accurate in light of the historical record. *See* Goldenziel, *supra* note 1, at 66. *See also* Goldenziel, *supra* note 1, at 69 n. 98 (listing the following thirty-eight states as having no-funding provisions: “ALA. CONST. art. XIV § 263 (1901); ALASKA CONST. art. VII § 1 (1956); ARIZ. CONST. art. IX, § 10, art. II, § 12 (1910); CAL. CONST. art. IX, § 8, art. XVI, § 5 (1879); COLO. CONST. art. V, § 34, art. IX § 7 (1876); DEL. CONST. art. X, § 3 (1897); FLA. CONST. art. I, § 3 (1838); GA. CONST. art. I, § 1 ¶ XIII (1877); HAW. CONST.

funding provisions,² generally bar a state from directing funding towards religious organizations.³ Towards the purported end of giving students stuck in under-performing schools freedom to attend superior private schools, proponents of school choice programs seek to provide such students either direct funds in the form of a check, or indirect incentives in the form of tax credits.⁴ Students then leave the public school system and enter a private school - often a parochial school⁵ - with his or her tuition subsidized in part by the state.⁶ These efforts received the imprimatur of the United States Supreme Court in *Zelman v. Simmons-Harris*,⁷ upholding the constitutionality of a program in Cleveland, Ohio, specifically approving of the fact that the voucher program in that case offered only indirect aid to religious organizations.⁸ School choice proponent's victory in *Zelman* was tempered somewhat, however, by the Court's holding in *Locke v. Davey*⁹ that a state constitution could prohibit post-secondary state aid from funding a college student's devotional studies.¹⁰

art. I, § 4 (1959); IDAHO CONST. art. IX, § 5 (1890); ILL. CONST. art. 10 § 3 (1870); IND. CONST. art. 1, § 6 (1816); KAN. CONST. art. VI § 6 (C) (1859); KY. CONST. § 189 (1891); MASS. CONST. art. XVIII (1919); MICH. CONST. art. I, § 4 (1850); MINN. CONST. art. I, § 16 (1857), art. XIII, § 2 (1857); MISS. CONST. art. IV, § 66 (1890), art. 8, § 208 (1890); MO. CONST. art. I, § 7 (1875), art. IX, § 8 (1875); MONT. CONST. art. X, § 6 (1889); NEB. CONST. art. VII, § 11 (1875); NEV. CONST. art. XI, § 10 (1880); N.H. CONST. pt. 2, art. 83 (1877); N.M. CONST. art. XII, § 3 (1911); art. XII, § 4 (1911); N.Y. CONST. art. XI, § 3 (1846); N.D. CONST. art. VIII, § 5 (1889); OHIO CONST. art. VI, § 2 (1851); OKLA. CONST. art. I, § 5, art. XI, § 5 (1907); OR. CONST. art. I, § 5 (1857); PA. CONST. art. III, § 15 (1874), art. III, § 29 (1874); S.C. CONST. art. XI, § 4 (1889); S.D. CONST. art. VI, § 3, art. VIII, § 16; TEX. CONST. art. I, § 7 (1876), art. VII, § 5 (C) (1876); UTAH CONST. art. I, § 4 (1895), art. X, § 9 (1895); VA. CONST. art. IV, § 16 (1830); art. VIII, § 10 (1830); WASH. CONST. art. I, § 11 (1889), art. IX, § 4 (1889); WIS. CONST. art. I, § 18 (1848); WYO. CONST. art. I, § 19, art. III, § 36, art. VII, § 8 (1890)).

² See, e.g., Brief for Historians and Law Scholars as Amici Curia Supporting Petitioner, *Locke v. Davey*, 540 U.S. 712 (2004) (No. 02-1315), 2003 WL 21697729.

³ See generally *id.*

⁴ See, e.g., *Zellman v. Simmons-Harris*, 536 U.S. 639 (2002).

⁵ *Id.* at 647 (2002) (noting that a Cleveland, Ohio voucher program resulted in students utilizing vouchers opting to attend a religiously affiliated school 82% of the time).

⁶ *Id.* at 645-646 (detailing Cleveland, Ohio voucher program).

⁷ *Zellman v. Simmons-Harris*, 536 U.S. 639 (2002).

⁸ *Id.* at 652.

⁹ *Locke v. Davey*, 540 U.S. 712 (2004).

¹⁰ See *id.* at 719.

The impact of no-funding provisions was not at issue in either *Zelman* or *Locke*, and in fact the Supreme Court has not directly ruled on the constitutional validity of such provisions. The reason that concerns about state constitutional no-funding provisions arise in discussions of school choice programs is that school choice programs almost invariably result in students flocking to private parochial schools.¹¹ For the adamant church-state separatist, the prospect of state dollars ending up in the coffers of private religious schools is deeply offensive to long-established Federal Constitutional prohibition against government support of any religious organization. For the school choice proponent, the ultimate goal of improving the quality of children's education is paramount, and they argue that incidental benefits to religious organizations should not be viewed as state endorsement of religion.¹²

State no-funding provisions present a major obstacle to establishing school choice programs in many states, however. These states' constitutions - depending upon how the no-funding provisions are interpreted by courts - stand in the way of voucher programs, as they generally prevent the state from funneling state funds to religious groups.¹³ School choice proponents counter, however, that many no-fund provisions are actually the result of anti-Catholic bigotry; that the true target of no-funding provisions was specifically Catholic schools; and that the taint of bigotry is so severe that such no-funding provisions cannot withstand constitutional challenge due to violation of the Free Exercise and Equal Protection clauses.¹⁴ In support of their argument, anti-Blaine Amendment critics point to a well documented and

¹¹ See *supra* note 5.

¹² See, e.g., *Zelman*, 536 U.S. at 652.

¹³ See generally Brief for Historians and Law Scholars as Amici Curia Supporting Petitioner, *Locke v. Davey*, 540 U.S. 712 (2004) (No. 02-1315), 2003 WL 21697729.

¹⁴ See Goldenziel, *supra* note 1, at 61 n. 27.

damning history surrounding the failed attempts to amend the federal constitution with no-funding language.¹⁵

The problem, however, is that while this extensive history surrounding the Federal Blaine Amendment supports the proposition that *some* advocates for the amendment were motivated in part by anti-Catholic bigotry, many no-funding provisions in state constitutions lack such history.¹⁶ Some states had enacted constitutional no-aid provisions prior to the time when efforts began to enact the Federal Blaine Amendment.¹⁷ Further, what critics deem Blaine Amendments lack uniform language,¹⁸ have been passed over a wide span of time by different states,¹⁹ and many have been reaffirmed by their respective states under circumstances that do not suggest awareness of the anti-Catholic controversy surrounding the federal Amendment.²⁰ Instead, the best argument anti-Blaine amendment advocates have is that the tainted efforts to pass the Federal Blaine amendment may serve as evidence that at least some states added no-funding

¹⁵ See *infra* Section I.A.

¹⁶ See *infra* Section I.B.; Steven K. Green, *The Insignificance of The Blaine Amendment*, 2008 B.Y.U. L. REV. 295, 312-315 (2008) (noting that “many states adopted these express provisions in the absence of any controversy over Catholic schooling or any nativist agitation. 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 to the state. . . . The Michigan Constitution served as an example for similar no-funding provisions in Wisconsin (1848), Indiana (1851), Ohio (1851), and Minnesota(1857) - all states without significant conflicts over parochial school funding at the time.). After noting the absence of evidence of anti-Catholic bias in the historical record surrounding various state’s enactments of no-funding provisions, Green concludes “the no-funding principle was already established as a constitutional principle before the Know Nothings of the 1850s, the advent of the Civil War, or the controversy over the Blaine Amendment.” *Id.* at 315.

¹⁷ See *infra* Section I.B.; see *supra* note 16.

¹⁸ See *infra* Section I.B.; Goldenziel, *supra* note 1, at 67 (“Some states’ provisions do not even have language similar to the original Blaine Amendment, but are dubbed ‘Blaine Amendments’ because they prohibit public funding of religious schools.”).

¹⁹ See *infra* Section I.B.; compare Goldenziel, *supra* note 1, at 66 (“Many of these so-called ‘Blaine Amendments’ and related provisions were enacted before the Federal Blaine Amendment debate began. Wisconsin’s constitution, for example, contains language nearly identical to the Federal Blaine Amendment, but it was adopted in 1848.”), with Goldenziel, *supra* note 1, at 67 (noting that federal legislation enabling Oklahoma to join the Union, which also required inclusion of a no-funding provision in the state constitution, was enacted in 1906).

²⁰ See *infra* Section I.B; see, e.g., Goldenziel, *supra* note 1, at 67 (noting “Michiganians, who refused to repeal their no-funding provision in a 1970 voter proposition, were not affected by the same anti-Catholic prejudice as Blaine and many of his supporters when reaffirming their so-called ‘Blaine Amendment.’”); see Green, *supra* note 16, at 312-15.

language as a result of anti-Catholic bigotry, and as such, those amendments violate the Federal First Amendment.²¹

However, these arguments are doomed to fail. The historical evidence is too tenuous. Modern jurisprudence is too well developed to impart the admitted taint of anti-Catholic bias surrounding the failed Federal Blaine Amendment to all state no-funding provisions. On the contrary, no-funding provisions are entirely in keeping with the doctrine of the separation of church and state.²² As Steven K. Green has argued, it may be the case that “as a constitutional event, the Blaine Amendment is insignificant.”²³

This Note will proceed in Part I by providing an overview of the effort to add the Blaine Amendment to the Federal Constitution. This Part will also discuss state level no-funding provisions, focusing on what connections, if any, state efforts have with the efforts to pass the Federal Blaine Amendment. Part II will review the Blaine Amendment as discussed by the modern United States Supreme Court. Part III will examine how one might challenge a state no-funding provision based on a history of anti-Catholic bias, and Part IV will argue that the historical record does not support the inference that anti-Catholic bias apparent in the Federal Blaine Amendment debate fatally taints state constitutional no-funding provisions.

²¹ See, e.g., Brief for the Becket Fund for Religious Liberty, *Locke v. Davey*, 540 U.S. 712 (2004) (No. 02-1315), 2003 WL 21697729.

²² See *infra* Part IV.

²³ See Green, *supra* note 16, at 332-33.

I. THE FEDERAL BLAINE AMENDMENT AND STATE NO-FUNDING PROVISIONS

A. Federal Blaine Amendment Efforts

The history surrounding the efforts to add the Blaine Amendment to the Federal Constitution is well documented, and shall be summarized here.²⁴ Maine Representative James Blaine offered the amendment on December 14, 1875,²⁵ which read as follows:

No State shall make any law respecting an establishment of religion or prohibiting the free exercise thereof; and no money raised by taxation in any State for the support of public schools, or derived from any public fund therefore, nor any public lands devoted thereto, shall ever be under the control of any religious sect, nor shall any money so raised or lands so devoted be divided between religious sects or denominations.²⁶

By its terms, the amendment would appear to accomplish two things: apply the First Amendment's religion provisions to the states, and prohibit the expenditure of public funds on any school run by a religious denomination or sect.²⁷ However, as one commentator argues, a close reading of the phrasing reveals one notable gap - while no money may be given to any "religious sect[] or denomination," the door is left open to the teaching of *non-denominational generic Protestantism*.²⁸

²⁴ See DeForrest, *supra* note 1, at 556-573; Joseph P. Viteritti, *Blaine's Wake: School Choice, The First Amendment, and State Constitutional Law*, 21 HARV. J.L. & PUB. POL'Y 657, 670-72 (1998); see also Steven K. Green, *Blaming Blaine: Understanding the Blaine Amendment and the No-Funding Principle*, 2 FIRST AMENDMENT L. REV. 107 (2004).

²⁵ H.R.J. Res. 1, 44th Cong., 1st Sess., 4 Cong. Rec. 205 (1875).

²⁶ *Id.*

²⁷ DeForrest, *supra* note 1, at 557; Viteritti, *supra* note 24, at 670.

²⁸ See DeForrest, *supra* note 1, at 564. DeForrest notes that a prior amendment offered in the Senate in 1871, which sought to "prevent government aid to religious schools," utilized similar language that "had the benefit of appearing neutral while at the same time effectively targeting only the Catholic schools. The common schools, most of which taught generic Protestantism, avoided the careful language of the amendment that only prohibited funding to schools that taught the beliefs and values of a particular denomination." *Id.*; see *id.* at 570-71. However, as shall be argued in

The decision to introduce the amendment has its roots in Blaine’s own political aspirations, which may best be understood by a review of how common schools of the time, while purporting to embody non-sectarian teaching philosophies, in fact openly taught Protestant ideology.²⁹ In response to mounting Catholic protests, in 1872 school boards in several major cities banned the reading of the bible in classrooms,³⁰ as was common practice at the time.³¹ Although American common schools espoused a non-sectarian educational philosophy, in fact the schools were “propagators of a generic Protestantism.”³² This meant that in practice, students attending public schools were constantly subject to Protestant religious practices, including reading the King James Bible, as well as anti-Catholic rhetoric.³³ One motivation behind having generic Protestantism taught in the schools was to assimilate the increasing numbers of immigrants in the “American” way of life - with “American” here meaning Protestant.³⁴ However, the fact that the common schools were supported by taxes raised from both Protestant and non-Protestants alike was offensive to Catholics, Jews, as well as some Protestants.³⁵ This climate, as well as scandal amongst then Republican President Grant’s

this Note, this inference, which appears to undergird much of the argument DeForrest makes, is not substantial enough proof to demonstrate that many, if not all, no-funding amendments that share similar language are tainted by anti-Catholic animus.

²⁹ DeForrest, *supra* note 1, at 557; Viteritti, *supra* note 24, at 670.

³⁰ Viteritti, *supra* note 24, at 670 (noting that the school boards of Cincinnati, Chicago, and New York all voted to ban the reading of the bible and religious exercises in common school classrooms).

³¹ DeForrest, *supra* note 1, at 559; Viteritti, *supra* note 24, at 666.

³² DeForrest, *supra* note 1, at 559.

³³ *Id.*

³⁴ See Viteritti, *supra* note 24, at 669 (“Protestantism had been so entrenched within the mainstream of American culture that it was difficult for many people to understand the concerns of religious minorities. The common school was designed to function as an instrument for the acculturation of immigrant populations, rendering them good productive citizens in the image of the ruling majority.”)

³⁵ Viteritti, *supra* note 24, at 668 (“Pleas by Catholics to eliminate the King James Bible from public-school curricula were joined increasingly by Jews and Protestants who were also offended by the custom.”)

administration, provided the impetus for the move towards barring public funds for “sectarian” (read: Catholic³⁶) schools as a means to distract the public.³⁷

President Grant, in his annual message to Congress, proposed amending the Federal Constitution to “establish and forever maintain free public schools” for all children, forbidding the teaching of “religious, atheistic, or pagan tenets” in such schools, and banning the expenditure of all public funds “in aid, directly or indirectly, of any religious sect or denomination.”³⁸ Following President Grant’s lead, Rep. Blaine proposed his amendment, which, while initially popular, was eventually criticized as “directed against the Catholics.”³⁹ Rep. Blaine, however, denied that he was motivated by anti-Catholic bias.⁴⁰ Instead, he insisted that his motivation was to “depoliticize the common school issue.”⁴¹ Blaine’s true motivations are subject to scholastic debate, highlighting the difficulty with proving a legislator’s motivation for decisions made over a century ago.⁴²

Regardless of historian’s abilities to prove Blaine’s motivations with certainty, what is certain is that introduction of the amendment allowed Blaine to secure a plurality of delegate votes during the Republican convention in June of 1876.⁴³ Blaine was ultimately unsuccessful at securing the nomination, but the notion of the party running on a platform of barring public

³⁶ Mitchell v. Helms, 530 U.S. 793, 828-29 (2000) (plurality opinion) (citing Steven K. Green, *The Blaine Amendment Reconsidered*, 36 AM. J. LEGAL HIST. 38 (1992)) (noting “it was an open secret that ‘sectarian’ was code for ‘Catholic.’”).

³⁷ DeForrest, *supra* note 1, at 557.

³⁸ Ulysses S. Grant, *Seventh Annual Message, December 7, 1875*, in ULYSSES S. GRANT, 1822-1885, at 92 (Philip R. Moran ed., 1968); DeForrest, *supra* note 1, at 565.

³⁹ NATION (New York), Mar. 16, 1876, at 173; DeForrest, *supra* note 2, at 565.

⁴⁰ Green, *supra* note 36, at 54; DeForrest, *supra* note 24, at 566.

⁴¹ DeForrest, *supra* note 24, at 566.

⁴² *Id.* at 566, n. 113. DeForrest notes that Green argues that rather than being “an anti-Catholic bigot,” Blaine was instead “a political opportunist,” *id.*, noting Blaine’s “total disregard for the proposal once he had lost the [Republican] nomination’ for the presidency.” *Id.* (quoting Green, *supra* note 36, at 54). However, Robert F. Utter and Edward J. Larson counter, “Blaine continued to support an amendment during the remainder of his long political career.” *Id.* (quoting Robert F. Utter & Edward J. Larson, *Church and State on the Frontier: The History of the Establishment Clauses in the Washington State Constitution*, 15 HASTINGS CONST. L.Q. 451, 464 (1988)).

⁴³ DeForrest, *supra* note 1, at 567; Green, *supra* note 36, at 56.

funding to any “school or institution under sectarian control” proved wildly popular among delegates at the convention.⁴⁴ Congressional progress on the amendment then picked up, in part due to the Democratic presidential nominee’s insistence that the vote be resolved to “remove the issue of Catholicism from public debate.”⁴⁵ Following addition of a Democratic amendment that “effectively reduced [Blaine’s amendment] to a statement of principles,” Blaine’s amendment passed in the House and moved into the Republican controlled Senate.⁴⁶ The Senate revised the amendment, adding a provision that would allow the reading of the Bible in school.⁴⁷

Review of debate in the Senate illustrates that Democrats objected to the amendment in part due to allegations that the Republicans were attempting to portray the Democratic Party as sympathetic with Catholics.⁴⁸ Some supporters of the amendment were not bothered with reading the King James Bible in schools, nor the *de facto* reality that common schools of the time taught a sort of generic Protestantism.⁴⁹ Instead, supporters of the amendment were most adamant that public funds not be given to sectarian schools.⁵⁰ Following Senate debate in which the specter of anti-Catholic bias was a recurring theme,⁵¹ the Senate ultimately rejected the amendment.⁵²

⁴⁴ DeForrest, *supra* note 1, at 567.

⁴⁵ *Id.*

⁴⁶ *Id.* at 568.

⁴⁷ *Id.*

⁴⁸ *Id.* at 570.

⁴⁹ *See generally id.* at 570-73; *compare id.* at 570-71 (“[Sen.] Edmunds ended his attack [on the Catholic Church] by stating that the Blaine Amendment would not prohibit the teaching of the general principles of religion in the common schools and other public institutions, only the teaching of ‘particular tenets or creed of some denomination.’”), *with supra* note 28 and accompanying text. DeForrest argues that what motivated proponents of the amendment was anti-Catholic animosity, and not, as the text of the Blaine Amendment itself might suggest, a true concern with removing all religious oriented instruction from the common schools. *Id.*

⁵⁰ *Id.*

⁵¹ *See id.* at 570-72.

⁵² *Id.* at 573 (noting the “yeas were 28 and the nays were 16, with 27 senators absent, including . . . James Blaine himself.”).

B. The Tenuous Connection Between the Federal Blaine Amendment and State No-Funding Provisions

Despite the failure of the Blaine Amendment at the federal level, many state constitutions contain no-funding provisions. However, there is some debate as to the true number of state constitutions containing provisions rightly called “Blaine Amendments,” with numbers ranging from twenty-nine to thirty-eight state constitutions.⁵³ The circumstances surrounding the enactment of no-funding provisions in state constitutions vary widely.⁵⁴ There is even some controversy surrounding the use of the term “Blaine Amendment,” as it connotes a connection with the Federal Blaine Amendment efforts despite a lack of evidence, in many cases, of a direct or implicit connection.⁵⁵ While opponents of Blaine Amendments seek to paint every state constitutional no-funding provision as tainted,⁵⁶ supporters note that the prejudicial import of the term “Blaine Amendment” may be used “rhetorically” to conjure notions of anti-Catholic bias that otherwise is absent from the historical record at the state level.⁵⁷

⁵³ See Constitutions cited *supra* note 1; see DeForrest, *supra* note 1, at 554 n. 14 (noting varying estimate from twenty-nine to around thirty states); see Goldenziel, *supra* note 1, at 66 n. 75 (citing Toby J. Heytens, Note, *School Choice and State Constitutions*, 86 VA. L. REV. 117, 123 n. 32 (2000)) (noting “the divergent conclusions of several law review articles of the number of state constitutional provisions properly called ‘Blaine Amendments’”); see Goldenziel, *supra* note 1, 69 n. 98; see The Becket Fund for Religious Liberty, *What Are Blaine Amendments?*, <http://www.blaineamendments.org/Intro/whatis.html> (placing the number of state constitutions with Blaine Amendments at thirty-seven) (last visited March 29, 2010).

⁵⁴ See *supra* notes 17-20 and accompanying text.

⁵⁵ Goldenziel, *supra* note 1, at 66.

⁵⁶ See generally The Becket Fund for Religious Liberty, *Blaine Amendments*, <http://www.blaineamendments.org/> (last visited March 29, 2010); see also Goldenziel, *supra* note 1, at 66 (noting that “activists seem to apply the Blaine name and taint indiscriminately to rhetorically reinforce their argument that all of these provisions have prejudicial origins”).

⁵⁷ See Goldenziel, *supra* note 1, at 66; see also Brief for Historians and Law Scholars as Amici Curia Supporting Petitioner at *2, *Locke v. Davey*, 540 U.S. 712 (2004) (No. 02-1315), 2003 WL 21697729 (“Such arguments [that the debate surrounding the Federal Blaine Amendment taints state no-funding provisions] oversimplify the history and purposes of the no-funding principle while they indict valid constitutional provisions based on the possible motivations of a limited number of individuals.”).

Regardless of debates over proper application of the term “Blaine Amendment,” the fact remains that no-funding provisions in state constitutions lack uniformity.⁵⁸ Some states included no-funding provisions before the federal debate surrounding Blaine’s Amendment in 1875-76, under circumstances that indicated no significant anti-Catholic motivation.⁵⁹ In fact, it was common practice for states seeking admission to the Union to borrow language from the constitutions of other recently admitted states, in order to expedite their own admission.⁶⁰ Other states were required by the federal government to include no-funding provisions in their constitutions as a pre-requisite to admission to the Union.⁶¹ Still, most other states that enacted no-funding provisions did so *sua sponte*, without federal pressure.⁶² This broad range of circumstances surrounding enactment of disparate no-funding constitutional provisions further complicates efforts to paint most no-funding provisions as tainted with anti-Catholic bias.

As further evidence of the lack of uniformity in state no-funding provisions, one can characterize no-funding provisions on a continuum as “less restrictive,” “moderate,” and “most restrictive.”⁶³ The least restrictive provisions address two main issues: (1) ensuring “that primary and secondary public education remains free of sectarian instruction,” and (2) ensuring “that public educational funds will not be used to directly support private religious schools.”⁶⁴ These least restrictive provisions - exemplified by the New Jersey and Massachusetts Constitutions - tend to allow some indirect aid to religious schools, such as student bussing in

⁵⁸ See *supra* note 18.

⁵⁹ See *supra* note 16-17 and accompanying text.

⁶⁰ See, e.g., *Kotterman v. Killian*, 972 P.2d 606, 624 (Ariz. 1999) (noting that Arizona borrowed constitutional language from the constitutions of several states admitted before it).

⁶¹ Goldenziel, *supra* note 1, at 67, 67 n. 80-89 (listing North Dakota, South Dakota, Montana, Washington, Arizona, New Mexico, Utah, Idaho, and Oklahoma).

⁶² DeForrest, *supra* note 1, at 573 (“Most of the states that adopted Blaine language did so without pressure from the federal government.”); *id.* at 576.

⁶³ DeForrest, *supra* note 1, at 577-78, 587.

⁶⁴ DeForrest, *supra* note 1, at 577.

New Jersey or financial aid for college students in Massachusetts.⁶⁵ The moderate provisions, while restricting direct aid to sectarian institutions, do not directly speak to whether indirect aid is permissible.⁶⁶ The moderate provisions “var[y] considerably” from state to state,⁶⁷ further complicating efforts to speak of “Blaine Amendments” as if they are all tainted by the same historical record. The most restrictive provisions tend to restrict both direct and indirect aid to sectarian institutions.⁶⁸ Along the continuum, these provisions are interpreted in light of each state’s unique jurisprudence,⁶⁹ making broad generalizations regarding different no-funding provisions difficult.

What is notably lacking in the historical record at the state level is anti-Catholic testimony or statements from proponents of the no-funding provisions, as was well documented in the federal debate.⁷⁰ Of the few state court decisions touching on the issue of the relation between the Federal Blaine Amendment and state no-funding provisions, none has struck down their state’s no-funding provision due to the troubling historical background of the federal

⁶⁵ DeForrest, *supra* note 1, at 577, 577 n. 203-04; N.J. Const. art. VIII, § 4, para. 3; Mass. Const., art. CIII (amending Mass. Const. arts XVIII, § 2, XLVI).

⁶⁶ DeForrest, *supra* note 1, at 578 (citing as examples “ALA. CONST., art XIV, § 263; DEL. CONST., art. X, § 3; KY. CONST., §§ 186, 189; MINN. CONST., art. XIII, § 2; MISS. CONST., art. VIII, § 208; NEB. CONST., art. VII, § 11; TEX. CONST., art. 1, § 7; art. VII, § 5; UTAH CONST., art. I, § 4; art. X, § 9.”).

⁶⁷ DeForrest, *supra* note 1, at 578; *see also id.* at 580 (“The moderate Blaine language used by these states, while varied in expression, affirms the same fundamental principle; direct government aid for expressly sectarian education is prohibited, and for the most part, so is sectarian influence in public educational programs.”).

⁶⁸ DeForrest, *supra* note 1, at 285 (citing as examples “COLO. CONST., art. V, § 34; FLA. CONST., art. I, § 3; GA. CONST., art. I, § 2, para. VII; IDAHO CONST., art. IX, § 5; IND. CONST., art. I, § 6; MICH. CONST., art. VIII, § 2; MO. CONST., art. I, § 7; NEV. CONST., art. XI, § 2; OKLA. CONST., art. II, § 5; WASH. CONST., art. IX, § 4.”).

⁶⁹ DeForrest, *supra* note 576-602 (including a survey of various state no-funding provisions, as well as notable case law, highlighting the variation along the continuum of provisions).

⁷⁰ Compare DeForrest, *supra* note 1, at 556-73 (detailing federal debate, including anti-Catholic remarks), *with id.* at 576-601 (surveying state no-funding provisions, without noting similar anti-Catholic evidence as exists at the federal level); *see also* Brief for Historians and Law Scholars as Amici Curia Supporting Petitioner, *Locke v. Davey*, 540 U.S. 712 (2004) (No. 02-1315), 2003 WL 21697729, at *5 (arguing in part that “[t]he legal rule against public funding of religious enterprises, activities, instruction and worship is based on principles of religious liberty and rights of conscience that found expression in the struggle for independence from Great Britain and the founding of the national and state governments,” and arose independently of anti-Catholic animus.); *see Mitchell v. Helms*, 530 U.S. 793, 828-829 (2000) (plurality opinion) (“[H]ostility to aid to pervasively sectarian schools has a shameful pedigree that we do not hesitate to disavow. . . . This [Blaine Amendment] doctrine, born of bigotry, should be buried now,” but citing only the federal debate.); *see Green supra* note 16, at 312-15.

amendment.⁷¹ One particular case that contains an extended discussion of the Blaine controversy is *Kotterman v. Killian*,⁷² a case from the Arizona Supreme Court.⁷³ After finding that a state tax credit scheme allowing individuals to donate \$500.00 to their child's private school to help cover tuition did not run afoul of the Federal Establishment Clause,⁷⁴ the Arizona Supreme Court went on to discuss the background of the Blaine Amendment and its impact - or lack thereof - on Arizona's no-funding provision.⁷⁵ After noting that anti-Catholic bias clearly influenced the federal debate,⁷⁶ the court went on to say that "[t]here is . . . no recorded history directly linking the [Blaine] amendment with Arizona's constitutional convention. In our judgment, it requires significant speculation to discern such a connection. In any event, we would be hard pressed to divorce the amendment's language from the insidious discriminatory intent that prompted it."⁷⁷ The court here appears to be saying that were there evidence of state level anti-Catholic bias comparable to that found in the debate at the federal level, it would be "hard pressed" not to find the state provision tainted by "insidious discriminatory intent."⁷⁸ In absence of evidence "directly linking" the Federal Blaine Amendment controversy with Arizona's no-funding provision, however, the court did not appear troubled with Arizona's provision.

⁷¹ See, e.g., *Kotterman v. Killian*, 972 P.2d 606 (Ariz. 1999); see also The Becket Fund for Religious Liberty, *Recent Cases*, <http://www.blaineamendments.org/recent%20cases/cases.html> (last visited March 29, 2010) (noting that "federal cases have acknowledged that Blaine Amendments are rooted in nativist bigotry," and that "recent state court decisions have interpreted Blaine Amendments narrowly to avoid constitutional violation," and listing cases implicating Blaine Amendments).

⁷² *Kotterman v. Killian*, 972 P.2d 606 (Ariz. 1999).

⁷³ *Id.*

⁷⁴ *Id.* at 616.

⁷⁵ *Id.* at 624-25.

⁷⁶ *Id.* at 632-33.

⁷⁷ *Id.* at 624.

⁷⁸ *Id.* This passage seems to have engendered varying interpretations. One commentator reads the passage as implying the state high court "deemed its no-funding provisions irrelevant because of [their] prejudicial past." Goldenziel, *supra* note 1, at 81. Another commentator read the passage as implicating difficulty in interpreting *all* Blaine-type provisions "because of the difficulty in 'divorc[ing] the amendment's language from the insidious discriminatory intent that prompted it.'" DeForrest, *supra* note 1, at 583-84. However, this Note reads the passage as follows: *If* there is any direct evidence of anti-Catholic bias behind enactment of a no-funding provision, *then* the court would be "hard pressed to divorce the amendment's language from the insidious discriminatory intent that prompted it." *Kotterman*, 972 P.2d at 624. However, absent such evidence, linking the anti-Catholic sentiment expressed in the federal debate to enactment of the Arizona provision requires "significant speculation." *Id.*

The court further noted the irony that “the anti-Catholic bigotry that inspired the Blaine Amendment was displaced in many of those states [that enacted Blaine-type constitutional provisions] by a principled commitment to strict separation between church and state in education.”⁷⁹ Lastly, in rejecting the dissent’s call to lend credence to decisions from other state high courts interpreting similar language, the Arizona court said “[i]t is difficult, if not impossible, to apply the intent of one group of constitutional framers to another operating at a different time and place.”⁸⁰ The Arizona court thus explicitly rejected the notion that the anti-Catholic taint surrounding the Federal Blaine Amendment debate could be imputed to the Arizona no-funding provision, specifically citing the lack of “recorded history” linking the federal amendment to the state constitutional convention.⁸¹

A further example from the Ohio Supreme Court highlights how a court may avoid finding that a voucher program conflicts with a no-funding provision. In *Simmons-Harris v. Goff*,⁸² the Ohio Supreme Court upheld a Cleveland voucher program, specifically finding no conflict with Ohio’s no-funding provision⁸³ because any state aid reached sectarian institutions only “as the result of independent decisions of parents and students.”⁸⁴ In its discussion of the no-funding provision, the court made no mention of the history of its enactment; perhaps, as one

⁷⁹ *Kotterman*, 972 P.2d at 633.

⁸⁰ *Id.* at 625.

⁸¹ *Id.* at 624.

⁸² *Simmons-Harris v. Goff*, 711 N.E.2d 203 (Ohio 1999).

⁸³ Ohio Const. art. VI, § 2 (“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.”).

⁸⁴ *Simmons-Harris*, 711 N.E.2d at 212; *see also* Goldenziel, *supra* note 1, at 71-74.

commentator notes, due to the fact that the historical record is devoid of discussions regarding passage of the no-funding provision.⁸⁵

The Wisconsin Supreme Court also had the opportunity to interpret Wisconsin's no-funding provision⁸⁶ in *Jackson v. Benson*⁸⁷ - a decision lacking any reference to Blaine Amendments or the anti-Catholic controversy surrounding the Blaine Amendment debate. Similar to the Arizona high court in *Kotterman*, the court in *Jackson* upheld a state program that provided public funding for parents to send their children to private schools, some of which were sectarian in nature.⁸⁸ The court found nothing controversial about the no-funding provision, and interpreted the provision as but one aspect of the state's Establishment Clause.⁸⁹ In fact, the court interpreted the state's Establishment Clause (which contains the no-funding provision) as carrying the "same import" as the Federal First Amendment.⁹⁰ "[The Wisconsin Constitution's benefits clause and compelled support clause are both] intended and operate to serve the same dual purpose of prohibiting the 'establishment' of religion and protecting the 'free exercise' of religion."⁹¹

Wisconsin has a long pedigree of interpreting its no-funding provision in this way. In 1890, the Wisconsin Supreme Court decided *State ex rel. Weiss v. District Board of School-District No. 8 of Edgerton*.⁹² In that decision, the court found Wisconsin's no-funding provision

⁸⁵ Goldenziel, *supra* note 1, at 72 (citing JOURNAL OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF OHIO, convened January 9, 1912; adjourned June 7, 1912; reconvened and adjourned without discussion August 26, 1912).

⁸⁶ WIS. CONST. art. I, § 18 ("[N]or shall any money be drawn from the treasury for the benefit of religious societies, or religious or theological seminaries.").

⁸⁷ *Jackson v. Benson*, 578 N.W.2d 602 (Wis. 1998).

⁸⁸ *Id.* at 607-08.

⁸⁹ *Id.* at 620-623.

⁹⁰ *Id.* at 620 (citing *State v. Thompson*, 225 N.W.2d 678, 687-88 (Wis. 1975)).

⁹¹ *Id.* at 620 (quoting *State v. Nusbaum*, 219 N.W.2d 577, 584-85 (1974)).

⁹² *Weiss v. Dist. Bd. of Sch. Dist. No. 8 of Edgerton*, 44 N.W. 967 (1890).

to be a prime example of maintaining church and state separation.⁹³ The court even noted that the no-funding provision could serve to attract people of diverse religious backgrounds to the new state, free from the fear of government run schools promoting religious views.⁹⁴ The historical record surrounding enactment of the Wisconsin constitution is devoid of anti-Catholic bias.⁹⁵ Thus, rather than viewing the state no-funding provision as tainted by anti-Catholic bias, the Wisconsin courts view the no-funding provision as integral to maintaining religious freedom.

Despite claims that state no-funding provisions are tainted by the demonstrable anti-Catholic animus that motivated some supporters of the Federal Blaine Amendment, the historical record at the state level is devoid of comparably incriminating evidence. Aside from having similar language, or from providing similar barriers to those who wish to have the state provide some sort of state funding to religious organizations, state no-funding provisions were enacted by the individual states in highly individualized circumstances. Some were passed pre-Blaine Amendment.⁹⁶ Other were forced to add no-funding provisions to gain statehood,⁹⁷ while still others enacted their provisions in circumstances devoid of reference to anti-Catholic animus.⁹⁸ In fact, some state view their no-funding provisions as in keeping with long held notions of separation of church and state.⁹⁹ Anti-Catholic animus, which admittedly was present in America before, during, and after the time of the Blaine Amendment debates, does not appear in

⁹³ Goldenziel, *supra* note 1, at 68 (quoting *Weiss*, 44 N.W. 967)) (“[T]he Wisconsin Supreme Court has touted its no-funding provision as ‘a more complete bar to any preference for, or discrimination against, any religious sect, organization, or society than any other state in the Union,’ which is hardly a discriminatory interpretation.”).

⁹⁴ Goldenziel, *supra* note 1, at 76 (quoting *Weiss*, 44 N.W. at 974) (“What more tempting inducement to cast their lot with us could have been held out to [new settlers] than the assurance that, in addition to the guaranties of the right of conscience and of worship in their own way, the free district schools in which their children were to be, or might be, educated, were absolute common ground, where the pupils were equal, and where sectarian instruction, and with it sectarian intolerance, under which they had smarted in the old country, could never enter? Such were the circumstances surrounding the convention which framed the constitution.”).

⁹⁵ Goldenziel, *supra* note 1, at 75 (citing Green, *supra* note 24, at 127).

⁹⁶ See, e.g., IND. CONST. art. 1, § 6 (1816).

⁹⁷ Viteritti, *supra* note 24, at 673.

⁹⁸ See *supra*, notes 85, 95 and accompanying text.

⁹⁹ See *supra* note 93 and accompanying text.

the historical record at the state level with the same degree of clarity as is present at the federal level. Absent demonstrable anti-Catholic taint, all that remains are provisions that forbid a state from providing aid to a religious organizations - an idea entirely at home in a country that prides itself on a tradition of keeping government out of religion.

II. THE BLAINE AMENDMENT AND MODERN JURISPRUDENCE

To date, the United States Supreme Court has not directly ruled on the question of whether a no-funding provision in a state constitution violates the Federal Constitution. Research reveals no instance of a state supreme court invalidating its own no-funding provision. As discussed above, state courts interpret their provisions in several ways, with varying consequences for those who wish to avoid their impact. Some states interpret their provisions narrowly, avoiding conflict with indirect aid to religious organizations.¹⁰⁰ Others provisions are moderate, leaving open the question of whether indirect aid is permissible.¹⁰¹ Still others are restrictive, banning all aid, whether direct or indirect.¹⁰² Despite the incongruity of these disparate provisions and the differing jurisprudence surrounding their interpretation, Blaine Amendment critics argue that most, if not all, carry an anti-Catholic taint best evidenced in the Federal Blaine Amendment debate.¹⁰³ However, thus far critics have failed to obtain judgments on the merits for the issue of whether state no-funding provisions are inextricably tainted by anti-Catholic animosity.

¹⁰⁰ See *supra* note 65 and accompanying text.

¹⁰¹ See *supra* note 66 and accompanying text.

¹⁰² See *supra* note 68 and accompanying text.

¹⁰³ See, e.g., The Becket Fund for Religious Liberty, *What Are Blaine Amendments?*, <http://www.blaineamendments.org/Intro/whatis.html>.

The United States Supreme Court has repeatedly noted the controversy surrounding the Federal Blaine Amendment. The modern Court noted the debate in *Mitchell v. Helms*.¹⁰⁴ Justice Thomas, speaking for a plurality of the Court, stated that the “pervasively sectarian” doctrine, “born of bigotry, should be buried now.”¹⁰⁵ The Court noted that the roots of hostility to “pervasively sectarian” institutions could be traced to the debate surrounding the Blaine Amendment.¹⁰⁶ Note, however, that this reference was dicta and not made in the context of adjudication of the constitutionality of a state no-funding provision.¹⁰⁷ The pervasively sectarian doctrine holds that the Federal Establishment Clause is violated when “[r]eligion . . . so permeates [a] whole educational program that ‘direct aid’ to any aspect of that program inescapably aids religion itself.”¹⁰⁸ The problem with the doctrine in the eyes of critics is that it impermissibly requires the government to make intrusive inquiries into religious beliefs and practices.¹⁰⁹ The doctrine may be on its last legs, however, as the Tenth Circuit in 2008 struck down a Colorado statute that gave scholarships to all eligible recipients, except those attending “pervasively sectarian” institutions.¹¹⁰ Thus while it is true that the Court is aware of the controversy surrounding the Blaine Amendment, it is questionable to what extent this dicta in *Mitchell* has any bearing on state no-funding provisions.

¹⁰⁴ *Mitchell v. Helms*, 530 U.S. 793 (2000) (plurality opinion).

¹⁰⁵ *Id.* at 828-29; see The Becket Fund for Religious Liberty, What Are Blaine Amendments?, <http://www.blaineamendments.org/recent%20cases/cases.html>

¹⁰⁶ *Mitchell*, 530 U.S. at 828-29.

¹⁰⁷ *Id.*

¹⁰⁸ Gerard V. Bradley, *An Unconstitutional Stereotype: Catholic Schools as “Pervasively Sectarian”*, 7 TEX. REV. OF L. & POL. 1, 2 (2002). Note however that a recent Tenth Circuit decision invalidated a Colorado statute that prohibited granting scholarships to students attending “pervasively sectarian” schools.

¹⁰⁹ Bradley, *supra* note 108, at 24 (“Civil authorities are competent to decide, within limits, what questions to ask about a religion and its practice in order to protect the common good, but the answers must be those of the faithful, not of the magistrate.”).

¹¹⁰ *Colorado Christian University v. Weaver*, 534 F.3d 1245, 1261 (10th Cir. 2008) (quoting *Mitchell*, 530 U.S. at 828) (citing *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 502 (1979); *Univ. of Great Falls v. NLRB*, 278 F.3d 1335, 1341-42 (D.C. Cir. 2002)).

Justice Breyer, writing in dissent in *Zellman v. Simmons-Harris*,¹¹¹ noted that anti-Catholic “sentiment played a significant role in creating a movement that sought to amend several state constitutions (often successfully), and to amend the United States Constitution (unsuccessfully) to make certain that government would not help pay for “sectarian” (*i.e.*, Catholic) schooling for children.”¹¹² *Zellman* did not involve adjudication of the constitutionality of a no-funding provision. Justice Breyer went on, however, to note that modern jurisprudence had developed a doctrine that drew “fairly clear lines of *separation* between church and state.”¹¹³ When one notes that Justice Breyer was dissenting from a decision that upheld an Ohio voucher program that provided indirect aid to sectarian institutions, his mere acknowledgement of the anti-Catholic history behind the Blaine Amendment is outweighed by the fact that he also acknowledged that modern jurisprudence protected the separation of church and state. Critics of Blaine Amendments do not seem to have any ally in Justice Breyer. Moreover, as noted above, the Ohio Supreme Court had already held that the voucher program at issue in *Zellman* did not conflict with Ohio’s no-funding provision, implicitly upholding the provision itself.¹¹⁴

The United States Supreme Court also addressed the Blaine Amendment controversy in *Locke v. Davey*,¹¹⁵ albeit tangentially. *Locke* involved a challenge to a state statute prohibiting qualified students from using Promise Scholarship funds in pursuit of a degree in devotional studies.¹¹⁶ The plaintiff brought suit under 42 U.S.C. § 1983 seeking to enjoin enforcement of the scholarship statute, alleging violations of the Federal Free Exercise Clause, the Establishment

¹¹¹ 536 U.S. 639 (2002).

¹¹² *Id.* at 721 (citing John C. Jeffries, Jr. & James E. Ryan, *A Political History of the Establishment Clause*, 100 MICH. L. REV. 279, 301-05 (2001)).

¹¹³ *Zellman*, 536 U.S. at 723.

¹¹⁴ *See supra* notes 82-85 and accompanying text.

¹¹⁵ *Locke v. Davey*, 540 U.S. 712 (2004).

¹¹⁶ *Id.* at 718.

Clause, the Free Speech Clauses, and the Equal Protection Clause of the Fourteenth Amendment.¹¹⁷ The Becket Fund for Religious Liberty (“Becket Fund”) submitted an *amicus curie* brief in the case on the subject of the anti-Catholic history of the Blaine Amendment.¹¹⁸ Becket Fund argued that all state constitutional Blaine Amendments are tainted by anti-Catholic bias, and thus the Court should “tear out, root and branch, the state constitutional provisions that have enforced religious discrimination in the funding of education for well over a century.”¹¹⁹ The Court, however, noted that Washington’s no-funding provision¹²⁰ was not at issue in the case, and as such “the Blaine Amendment’s history [was] simply not before us.”¹²¹ Thus, while acknowledging the problematic history of the Federal Blaine Amendment, which the court noted “has been linked with anti-Catholicism,”¹²² the court once again avoided having to directly address a so-called state Blaine Amendment.

In every instance where the modern Court was presented the issue of the Blaine Amendment’s controversial history, the court has found that a state no-funding provision just was not at issue in the case. While the Court has indeed acknowledged the *Federal Blaine* Amendment’s anti-Catholic taint, it has never clearly stated a belief that state level amendments are similarly tainted. As this Note has detailed, there does not appear any clear historical evidence linking anti-Catholic sentiment surrounding the Federal Blaine Amendment. The Supreme Court has never acknowledged a definitive link, and state case law similarly has not acknowledged conclusive links between the Federal Blaine Amendment debate, and state level

¹¹⁷ *Id.*

¹¹⁸ Brief for the Becket Fund for Religious Liberty, *Locke v. Davey*, 540 U.S. 712 (2004) (No. 02-1315), 2003 WL 21697729.

¹¹⁹ *Id.* at 3.

¹²⁰ WASH. CONST. art. IX, § 4 (“All schools maintained or supported wholly or in part by the public funds shall be forever free from sectarian control or influence”).

¹²¹ *Locke*, 540 U.S. at 723 n. 7.

¹²² *Id.*

no-funding provisions. In fact, some states view their no-funding provisions as entirely in keeping with the doctrine of separation of church and state.¹²³

III. REQUIREMENTS FOR A SUCCESSFUL CHALLENGE TO A STATE LEVEL NO-FUNDING PROVISION BASED ON TAINT OF FEDERAL BLAINE AMENDMENT

What might a successful challenge to a no-funding provision look like? Research has disclosed no instance of a state no-funding provision being overturned due to an impermissible link with the federal debate surrounding the Blaine Amendment. In the few instances where a court has spoken directly on the issue, the tenuous link between the history surrounding the Blaine Amendment and the state level history of enactment of the no-funding provision was not significant enough to invalidate the state no-funding provision.¹²⁴

However, federal jurisprudence does contain examples of statutes being overturned due to prejudicial motivations behind their enactment, combined with a disparate impact upon the affected class.¹²⁵ *Romer v. Evans*¹²⁶ involved a challenge to a state constitutional amendment passed by voter referendum in response to certain communities independently passing anti-homosexual discrimination laws, known as “Amendment 2.”¹²⁷ Local governmental entities had taken it upon themselves to protect homosexuals from discrimination “in many transactions and activities, including housing, employment, education, public accommodations, and health and welfare services.”¹²⁸ The constitutional amendment was intended to repeal these provisions, but in fact it did “more than repeal or rescind these provisions. It prohibits all legislative, executive

¹²³ See, e.g., *supra* note 79 and accompanying text.

¹²⁴ See *supra* note 71-81 and accompanying text.

¹²⁵ Goldenziel, *supra* note 1, at 97.

¹²⁶ *Romer v. Evans*, 517 U.S. 620 (1996).

¹²⁷ Goldenziel, *supra* note 1, at 97 (citing *Romer*, 517 U.S. at 635); *Romer*, 517 U.S. at 623-24.

¹²⁸ *Romer*, 517 U.S. at 623-24 (citing Denver Rev. Municipal Code, Art. IV, §§ 28-91 to 28-116 (1991); Aspen Municipal Code § 13-98 (1977); Boulder Rev. Code §§ 12-1-1 to 12-1-11 (1987)).

or judicial action at any level of state or local government designed to protect” homosexuals.¹²⁹ While the State of Colorado sought to justify the provision on the basis that it simply placed homosexuals “in the same position as all other persons,”¹³⁰ i.e., deprived homosexuals the protection of “special rights,”¹³¹ the Court was incredulous.¹³² Instead, the court framed the amendment as withdrawing “from homosexuals, but no others, specific legal protection from the injuries caused by discrimination, and it forbids reinstatement of these laws and policies.”¹³³ The Court noted the wide-ranging effect of Amendment 2, removing the ability from local governments or the courts to protect homosexuals from discrimination in public accommodations, “housing, sale of real estate, insurance, health and welfare services, private education, and employment.”¹³⁴ Amendment 2 further could be read to remove the protections provided by even general laws prohibiting arbitrary discrimination.¹³⁵ When viewed in its entirety, Amendment 2 did far more than deny the state government from providing “special rights,” to homosexuals; instead, the amendment imposed a “specific *disability*” upon homosexuals as a class,¹³⁶ in violation of the Equal Protection Clause.¹³⁷ Importantly for the purposes of this Note, the court noted that the broad yet focused impact upon homosexuals was

¹²⁹ *Id.* at 624. The constitutional amendment was known as “Amendment 2,” and reads as follows: “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.” *Id.*

¹³⁰ *Id.* at 626. Put another way, the State tried to justify the provision on the basis of respect for citizen’s freedom of association rights, i.e., freedom not to associate with people whose lifestyle one finds disagreeable. *Id.* at 635.

¹³¹ *Id.* at 631 (“[The Court] cannot accept the view that Amendment 2’s prohibition on specific legal protections does no more than deprive homosexuals of special rights.”).

¹³² *Id.* at 626.

¹³³ *Id.*

¹³⁴ *Id.* at 629 (citing Aspen Municipal Code §§ 13-98(b), (c) (1977); Boulder Rev.Code §§ 12-1-2, 12-1-3 (1987); Denver Rev. Municipal Code, Art. IV, §§ 28-93 to 28-95, 28-97 (1991)).

¹³⁵ *Id.* at 630.

¹³⁶ *Id.* at 631.

¹³⁷ *Id.* at 631-32.

“inexplicable by anything but animus toward the class it affects; it lacks a rational relationship to legitimate state interests.”¹³⁸ Although the Court did not cite any explicit anti-homosexual motivation behind enactment of Amendment 2, such as public statements by supporters evincing clear discriminatory intent, the Court held that the impact upon homosexuals was so broad that there could be no “rational relationship to legitimate state interests.”¹³⁹ This demonstrates that the Court is willing to strike down laws enacted for no reason other than animus towards a particular, identified class of persons.

The Court also invalidated a racially discriminatory state constitutional provision in *Hunter v. Underwood*.¹⁴⁰ *Hunter* involved a class action 42 U.S.C. § 1983 challenge to an Alabama constitutional provision that disenfranchised those convicted of “any crime . . . involving moral turpitude,” among other crimes.¹⁴¹ The plaintiffs, one of whom was white, the

¹³⁸ *Id.* at 632; *see also id.* at 635 (“Even laws enacted for broad and ambitious purposes often can be explained by reference to legitimate public policies which justify the incidental disadvantages they impose on certain persons. Amendment 2, however, in making a general announcement that gays and lesbians shall not have any particular protections from the law, inflicts on them immediate, continuing, and real injuries that outrun and belie any legitimate justifications that may be claimed for it. We conclude that, in addition to the far-reaching deficiencies of Amendment 2 that we have noted, the principles it offends, in another sense, are conventional and venerable; a law must bear a rational relationship to a legitimate governmental purpose, *Kadrmas v. Dickinson Public Schools*, 487 U.S. 450, 462 (1988), and Amendment 2 does not.”).

¹³⁹ *Id.* at 635 (“We cannot say that Amendment 2 is directed to any identifiable legitimate purpose or discrete objective. It is a status-based enactment divorced from any factual context from which we could discern a relationship to legitimate state interests; it is a classification of persons undertaken for its own sake, something the Equal Protection Clause does not permit. “[C]lass legislation . . . [is] obnoxious to the prohibitions of the Fourteenth Amendment.””).

¹⁴⁰ *Hunter v. Underwood*, 471 U.S. 222 (1985).

¹⁴¹ *Id.* at 224 (citing ALA. CONST. art. VIII, § 182, *repealed by* ALA. CONST. amend. 579). The text of § 182 read: “The following persons shall be disqualified both from registering, and from voting, namely: All idiots and insane persons; those who shall by reason of conviction of crime be disqualified from voting at the time of the ratification of this Constitution; those who shall be convicted of treason, murder, arson, embezzlement, malfeasance in office, larceny, receiving stolen property, obtaining property or money under false pretenses, perjury, subornation of perjury, robbery, assault with intent to rob, burglary, forgery, bribery, assault and battery on the wife, bigamy, living in adultery, sodomy, incest, rape, miscegenation, crime against nature, or any crime punishable by imprisonment in the penitentiary, or of any infamous crime or crime involving moral turpitude; also, any person who shall be convicted as a vagrant or tramp, or of selling or offering to sell his vote or the vote of another, or of buying or offering to buy the vote of another, or of making or offering to make a false return in any election by the people or in any primary election to procure the nomination or election of any person to any office, or of suborning any witness or registrar to secure the registration of any person as an elector.” ALA. CONST. art. VIII, § 182, *repealed by* ALA. CONST. amend. 579.

other black, both had been convicted of writing bad checks, a misdemeanor.¹⁴² At trial, one claim was that the provision was enacted for the purpose of discriminating against blacks, and had in fact done so.¹⁴³ The Court found that although the constitutional provision was facially neutral, it would be held invalid under the Equal Protection Clause if motivated by a racially discriminatory purpose.¹⁴⁴ While noting that “[p]roving the motivation behind official action is often a problematic undertaking,”¹⁴⁵ the Court went on to say that in this case, based on uncontroverted testimony of historians, “neither the District Court nor appellants seriously dispute the claim that this zeal for white supremacy ran rampant at the convention.”¹⁴⁶ It did not matter that the constitutional provision had been “legitimated” in the intervening years; all that mattered was that the original purpose behind enactment was racial discrimination, and that effect continued from enactment until the modern day.¹⁴⁷ Facing clear proof that a constitutional provision was enacted by a legislative body motivated by racial animus, the Court had no trouble striking down the offending provision under the Equal Protection clause.¹⁴⁸

Supreme Court precedent such as *Romer* and *Hunter* can serve as a framework for a successful challenge to a state no-funding provision. Absent explicit evidence of a discriminatory

¹⁴² *Id.* at 224.

¹⁴³ *Id.* at 224 (“The case proceeded to trial on two causes of action, including a claim that the misdemeanors encompassed within § 182 were intentionally adopted to disenfranchise blacks on account of their race and that their inclusion in § 182 has had the intended effect.”).

¹⁴⁴ *Id.* at 227-28 (citing *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264-65 (1977)).

¹⁴⁵ *Id.* at 228 (citing *Rogers v. Lodge*, 458 U.S. 613 (1982)). “Inquiries into congressional motives or purposes are a hazardous matter. When the issue is simply the interpretation of legislation, the Court will look to statements by legislators for guidance as to the purpose of the legislature, because the benefit to sound decision-making in this circumstance is thought sufficient to risk the possibility of misreading Congress’ purpose. It is entirely a different matter when we are asked to void a statute that is, under well-settled criteria, constitutional on its face, on the basis of what fewer than a handful of Congressmen said about it. What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for us to eschew guesswork.” *Id.* at 228 (quoting *United States v. O’Brien*, 391 U.S. 367, 383-384 (1968)).

¹⁴⁶ *Id.* at 228-29.

¹⁴⁷ *Id.* at 232-33 (“[W]e simply observe that its original enactment [was motivated by a desire to discriminate against blacks on account of race and the section continues to this day to have that effect. As such, it violates equal protection under *Arlington Heights*.”).

¹⁴⁸ *Id.*

impact, a court could find implicit religious animus by looking at the actual impact of a no-funding provision, such that the no-funding provision would bear no rational relationship to a legitimate government interest.¹⁴⁹ In cases where clear historical evidence exists to establish improper discriminatory intent on the part of legislators, the court may invalidate a provision despite the fact that the passage of time has “legitimated” the provision, so long as discriminatory impact persists.¹⁵⁰ However, it remains an open question whether the discriminatory intent of federal legislators expressed in debates over a failed federal constitutional amendment may be imputed to state legislators enacting their own no-funding provisions absent direct evidence of the state actors’ intent.

IV. WHY CHALLENGES TO STATE NO-FUNDING CONSTITUTIONAL PROVISIONS ARE LIKELY TO

FAIL

The historical record surrounding the federal debate over the Blaine Amendment lays plain that at least some legislators were motivated by anti-Catholic animus.¹⁵¹ Most common public schools of the time taught a form of “generic Protestantism” that included readings from the Protestant Bible and other Protestant religious rituals.¹⁵² In response, Catholics and others began to petition their local governments to either ban such religious practices, or, alternatively, to allow public funds to support sectarian schools.¹⁵³ Looking for a political distraction, President Grant proposed, and Representative Blaine introduced, a constitutional amendment to ban the expenditure of public funds for any school that taught the religious tenants of a particular

¹⁴⁹ See *supra* notes 125-139 and accompanying text.

¹⁵⁰ See *supra* notes 140-148 and accompanying text.

¹⁵¹ See *supra* Section I.A.

¹⁵² See *supra* notes 30-33 and accompanying text.

¹⁵³ See *supra* notes 35-36 and accompanying text.

religion or sect.¹⁵⁴ This would have had the advantage of barring aid to secular schools while allowing the continued teaching of non-denominational generic Protestantism.¹⁵⁵ However, the federal amendment was not to be.¹⁵⁶

Critics of the Blaine Amendment attempt to use this historical background to demonstrate that similar amendments at the state level were also tainted by anti-Catholic animus.¹⁵⁷ However, attempts to categorize all such state level no-funding provisions as so-called Blaine Amendments give too short shrift to the disparate nature of state no-funding provisions.¹⁵⁸ State no-funding provisions were passed at different times, by independent legislative bodies, for varying reasons.¹⁵⁹ To impute anti-Catholic bias to all no-funding provisions based on debate that took place at the federal level would seem to require far more substantial proof than the fact that each state's no-funding provision accomplished essentially the same thing. There is little evidence in the historical record at the state level to show such troubling legislative motives as were clearly present during the Federal Blaine Amendment debate.¹⁶⁰ In fact no state court decision reviewing the legitimacy of state level no-funding provisions has found evidence of anti-Catholic bias at the state level.¹⁶¹ On the contrary, courts at the state level are likely to view their no-funding provisions as in keeping with long-established principles of separation of church and state.¹⁶² The historical record is too sparse, and the links between the Federal Blaine Amendment and state no-funding provisions too tenuous to support a blanket inference that any

¹⁵⁴ See *supra* notes 38-39 and accompanying text.

¹⁵⁵ See *supra* note 28 and accompanying text.

¹⁵⁶ See *supra* note 43-52 and accompanying text.

¹⁵⁷ See generally *supra* Section I.B.

¹⁵⁸ See generally *supra* Section I.B.

¹⁵⁹ See generally *supra* Section I.B.; see *supra* note 16 and accompanying text.

¹⁶⁰ See generally *supra* note 70 and surrounding text and footnotes.

¹⁶¹ See *supra* notes 71-95 and accompanying text.

¹⁶² See *supra* notes 81, 89 and accompanying text; see also *infra* note 164 and accompanying text.

state level no-funding provision is fatally tainted by anti-Catholic bias as expressed in the Blaine Amendment debates.

No-funding provision critics note that the United States Supreme Court has noted on multiple occasions the anti-Catholic prejudice existent in the historical record of the Federal Blaine Amendment debate.¹⁶³ However, their optimism that Supreme Court recognition of the clear historical record surrounding the *failed* Federal Blaine Amendment will lead to invalidation of state no-funding provisions overlooks the dearth of historical evidence at the state level. In *Zellman* justice Breyer's dissent noted the anti-Catholic animus behind the Blaine Amendment, but at the same time noted that modern jurisprudence had evolved to clearly separate church and state.¹⁶⁴ It seems fair to infer Justice Breyer views state no-funding provisions as entirely in keeping with principles of separation of church and state.

Research disclosed no state level historical record of similar import as that demonstrating anti-Catholic bias in the Blaine Amendment debates. There is no “smoking gun” in state historical records. This lack of a smoking gun at the state level – despite years of debate and research over modern no-funding provisions – should doom efforts to try and demonstrate the requisite discriminatory intent and disparate impact upon religious schools necessary to invalidate a state no-funding provision. In *Hunter v. Underwood*, the Supreme Court invalidated a state constitutional amendment due to undisputed racial bias evidenced by the historical record at the state level.¹⁶⁵ However, as shown herein, no similar evidence exists at the state level for the enactment of no-funding provisions, and no-funding provision critics must then resort to strained attempts to link the Federal Blaine Amendment debate to enactment of state level no-

¹⁶³ See generally The Becket Fund for Religious Liberty, Recent Cases, <http://www.blaineamendments.org/recent%20cases/cases.html> (last visited March 29, 2010); see *supra* Part II.

¹⁶⁴ See *supra* notes 111-113 and accompanying text.

¹⁶⁵ See *supra* notes 140-148 and accompanying text.

funding provisions. Again, this link is simply too tenuous to rise to the level of proof the Court found acceptable in *Hunter*. Absent explicit evidence of prejudicial legislative intent at the state level similar to that shown in *Hunter*,¹⁶⁶ state level no-funding provisions are far more innocuous than the Alabama Constitutional amendment at issue in that case.

Moreover, unlike the Colorado voter approved constitutional amendment at issue in *Romer*,¹⁶⁷ state level no-funding provisions *do* have a rational relationship to a legitimate state level interest – *separation of church and state*. Thus, *Romer v. Evans* should also prove to be a dead end for no-funding provision critics. In that case, the state attempted to justify its voter approved constitutional amendment on the basis of respecting the freedom of association rights of those who disagree with homosexuality.¹⁶⁸ However, the court replied that “[t]he breadth of the amendment is so far removed from these particular justifications that we find it impossible to credit them. We cannot say that Amendment 2 is directed to any identifiable legitimate purpose or discrete objective.”¹⁶⁹

It requires no stretch of logic to understand how state no-funding provisions – banning the expenditure of state funds for religious schools – relate to the permissible government objective of separation of church and state. In the end, one is left with the impression that hostility to so-called Blaine Amendments has more to do with removing constitutional obstacles to school voucher programs, and less to do with anti-Catholic animus dating to the 1870s.¹⁷⁰

¹⁶⁶ See *supra* notes 140-148 and accompanying text.

¹⁶⁷ See *supra* note 138 and accompanying text.

¹⁶⁸ See *supra* note 130.

¹⁶⁹ *Romer v. Evans*, 517 U.S. 620, 635 (1996).

¹⁷⁰ See *supra* note 57 and accompanying text.

Conclusion

No-funding provisions stand in the way of state level efforts to divert money intended for public schools towards religious schools. Supporters of the school voucher movement face a difficult obstacle in state constitution no-funding provisions. In order to cast a cloud over such provisions, critics highlight the well-documented debate surrounding efforts to amend the Federal Constitution with language barring public support for religious institutions, including schools. The federal debate lays plain that some legislators were motivated by anti-Catholic animosity. State level historical records contain no such analog to the federal debate, leaving critics to argue that the federal taint should be imputed to most, if not all, state level no-funding provisions. State no-funding provisions have widely varied language, however, as well as widely varied circumstances surrounding their enactment. It is simply not the case that all no-funding provisions were enacted by legislators or citizens exhibiting anti-Catholic animus. The link between the federal debate and state enactments is far too tenuous to support claims of prejudicial purpose and effect necessary to have a court find state no-funding provisions unconstitutional. On the contrary, no-funding provisions are entirely in keeping with a governmental scheme that seeks to keep separate the church and the state – and to keep public funds out of religious institution’s coffers.