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LOCKE V. DAVEY: THE CONNECTION BETWEEN THE FEDERAL BLAINE AMENDMENT AND ARTICLE I, § 11 OF THE WASHINGTON STATE CONSTITUTION

Mark Edward DeForrest*

What's in a name? That which we call a rose By any other word would smell as sweet.

William Shakespeare[1]

We cannot rule the future. We can only imagine it in terms of the present. And the only way to do that is as thoroughly as possible to know the present.

Jerome Frank[2]

I. INTRODUCTION: DOES THE STATE OF WASHINGTON HAVE BLAINE PROVISIONS IN ITS STATE CONSTITUTION?

In the recent landmark case of *Locke v. Davey*[3] the United States Supreme Court upheld the constitutionality of Washington's practice of denying college scholarship aid to students who were planning on pursuing courses of theological study leading to careers in ordained ministry. In so doing the Court overruled a Ninth Circuit Court of Appeals decision in the same case.[4] The court of appeals had found that Washington's denial of equal access to scholarship funds by students planning to study theology in anticipation of a ministerial career violated the First Amendment's guarantees regarding the free exercise of religion.[5] The Supreme Court held otherwise, finding that there was sufficient "play in the joints"[6] regarding First Amendment jurisprudence to provide constitutional legitimacy to a state's decision to differentially treat students studying theology

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1. William Shakespeare, *The Tragedy of Romeo and Juliet*, act 2, scene 2, ll. 43-44.
2. Jerome Frank, *Law and the Modern Mind* 155 (Brentano's 1930).
3. 540 U.S. 712 (2004).
4. *Davey v. Locke*, 299 F.3d 748 (2002).
5. *Id.* at 759-60.
6. *Davey*, 540 U.S. at 718 (quoting *Walz v. Tax Commn.*, 397 U.S. 664, 669 (1970)).

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with an eye towards pursuing ordained ministry from other students under the federal Establishment Clause.[7]

A number of the amicus briefs submitted to the Court in *Davey* raised an issue involving the characterization of the applicable provisions of the Washington state constitution that were being reviewed for possible conflicts with the federal Constitution.[8] These amici argued that the Washington Constitution's relevant provisions embodied animus against religion, and were reflective of a failed nineteenth-century anti-Catholic attempt to include a prohibition on public funding of "religious sects or denominations"[9] within the federal Constitution. This failed amendment, known as the "Blaine Amendment" after its primary congressional sponsor, James Blaine of Maine, lives on in the text of various state constitutions, including Washington.[10]

The Washington Constitution contains three provisions prohibiting government aid for religious establishment.[11] These three provisions all date from Washington's formal entry into the Union as a state.[12] The first provision, Article I, § 11, guarantees religious freedom for the inhabitants of Washington, while at the same time prohibiting "public money or property" from being used to support religious establishment, "worship, exercise or instruction." The second provision, Article IX, § 4, directly prohibits any "sectarian control or influence" from being exercised over "schools maintained or supported wholly or in part by the public funds." The third provision, often overlooked, is found in Article XXVI, the state compact with the federal government. In that article the state constitution affirms that "[p]rovision shall be made for the establishment and maintenance of systems of public schools free from sectarian control, which shall be open to all the children of [Washington] state."[13] The academic literature examining Washington's pertinent constitutional texts identifies those texts as connected

7. *Id.* at 721.

8. *See e.g.* Br. of Amici Curiae Becket Fund for Relig. Liberty, et al. at 4, *Davey*, 540 U.S. 712 [hereinafter *Becket Br.*]; Br. for Amicus Curiae Teresa M. Becker in Support of Respt., *Davey*, 540 U.S. 712.

9. *Becket Br.*, *supra* n. 8, at 14.

10. H.R. Jt. Res. 1, 44th Cong., 1st Sess. (Dec. 14, 1875) [hereinafter *Joint Resolution*]; Toby J. Heytens, Student Author, *School Choice and State Constitutions*, 86 Va. L. Rev. 117, 134 (2000) (noting that roughly thirty states joined Washington in adopting state Blaine-type constitutional amendments by the early 1900s); Joseph P. Viteritti, *Blaine's Wake: School Choice, the First Amendment, and State Constitutional Law*, 21 Harv. J.L. & Pub. Policy 657, 673 (1998) (placing the number at twenty-nine by 1890) (citing Steven K. Green, *The Blaine Amendment Reconsidered*, 36 Am. J. Leg. History 38, 43 (1992)). For examples of state Blaine amendments, see Ala. Const. art. XIV, § 263; Alaska Const. art. VII, § 1; Ariz. Const. art. IX, § 10; Ark. Const. art. XIV, § 2; Colo. Const. art. V, § 34; Del. Const. art. X, § 3; Fla. Const. art. I, § 3, art. IX, § 6; Ga. Const. art. I, § 2, ¶ 7; Haw. Const. art. X, § 1; Idaho Const. art. IX, § 5; Ind. Const. art. I, § 6; Ky. Const. §§ 186, 189; Mass. Const. art. XVIII; Mich. Const. art. I, § 4, art. VIII, § 2; Minn. Const. art. I, § 16, art XIII, § 2; Miss. Const. art VIII, § 208; Mo. Const. art. I, § 7, art. IX, §§ 5, 8; Neb. Const. art. VII, § 11; Nev. Const. art. XI, § 9; N.C. Const. art. IX, § 6; N.D. Const. art. VIII, § 1; Okla. Const. art. II, § 5, art. XI, § 5; S.D. Const. art. VIII, § 16; Tex. Const. art. VII, § 5; Va. Const. art. VIII, §§ 10, 11; Wash. Const. art. I, § 11, art. IX, § 4; Wis. Const. art. X, § 6; Wyo. Const. art. VII, § 12.

11. Wash. Const. art. I, § 11, art. IX, § 4, art. XXVI; *see also Malyon v. Pierce County*, 935 P.2d 1272, 1279 (Wash. 1997).

12. *Enabling Act of February 22, 1889*, 25 Stat. 676 (1889) [hereinafter *Enabling Act*].

13. Wash. Const. art. XXVI.

both in ideology and purpose to the federal Blaine Amendment.[14] Yet, in its decision in *Davey*, the Court rejected that identification, at least for Article I, § 11 of the state constitution and, without providing any detailed examination of the historical connections between the Washington Constitution and the failed Blaine Amendment, stated instead that a connection between Article I, § 11 of the Washington Constitution and the Blaine Amendment had not been adequately established.[15]

While on the surface such a finding may not seem to be of great importance in the decision, it actually was critical to the characterization of the constitutional issues present before the Court in *Davey*. One of the pivotal constitutional questions that has risen to the forefront in cases involving the public funding of private educational activities is the First Amendment's prohibition on viewpoint discrimination. Since *Rosenberger v. Rector and Visitors of the University of Virginia*,[16] the application of viewpoint discrimination doctrine has become an issue in dealing with the Establishment Clause concerns over providing access to generally available public funds for arguably religious purposes or expression.[17] In particular, viewpoint discrimination doctrine has played a central part in the debate over publicly funded school voucher and scholarship programs for private religious education, and it played a significant role in the appellate court decision that was appealed to the Supreme Court in *Davey*.[18] By asserting that a link between Article I, § 11 of the Washington state constitution and the overtly discriminatory Blaine Amendment from the nineteenth-century had not been established, the Supreme Court effectively dodged the viewpoint discrimination issue, and was able to resolve *Davey* based on the play in the joints that the Court found in the Establishment Clause.[19]

This being the case, the question arises: was the Court correct in its refusal to accept the identification of Article I, § 11 of Washington's constitution as a Blaine amendment? There is no question that Article I, § 11, like the other applicable provisions of the Washington Constitution, is not officially identified in the text as a "Blaine Amendment" in the text of the state constitution.[20] In addition, there is hardly any explicit reference to the Blaine Amendment in Washington's constitutional jurisprudence dealing with the application of Article I, § 11.[21] On the surface, at least, it would appear that the Court's refusal to link Article I, § 11

14. Frank J. Conklin & James M. Vaché, *The Establishment Clause and the Free Exercise Clause of the Washington Constitution—A Proposal to the Supreme Court*, 8 U. Puget Sound L. Rev. 411 (1985); 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 (1988).

15. *Davey*, 540 U.S. at 723 n. 7.

16. *Rosenberger v. Rector and Visitors of the U. of Va.*, 515 U.S. 819 (1995).

17. *See U.S. v. American Library Assn.*, 539 U.S. 194, 206 (2003); *see also Rosenberger*, 515 U.S. at 837.

18. 299 F.3d at 766-68 (McKeown, J., dissenting).

19. 540 U.S. at 719.

20. Article I, § 11 is titled "Religious Freedom"; Article IX, § 4 is titled "Sectarian Control or Influence Prohibited"; and Article XXVI is titled "Compact With The United States."

21. The only overt reference to the Blaine Amendment in Washington's applicable case law is in *Malyon*, 935 P.2d at 1279 n. 13.

to the failed Blaine Amendment is justifiable. Given the lack of explicit textual linkage in the Washington Constitution's actual wording, recognition that Article I, § 11 was in fact an offspring of the Blaine Amendment could seem to be something of an overreach.

There are strong reasons, however, to believe that the Supreme Court made a significant error in its characterization of Article I, § 11 of the Washington Constitution. It is the contention of this article that the history underlying and the jurisprudence applying Washington's constitutional prohibitions on the establishment of religion—found in their entirety in Articles I, § 11; IX, § 4; and XXVI—demonstrate a definitive link to James Blaine and his failed amendment, both in origin and in application. While there is no doubt that the form of Washington's applicable constitutional provisions is different from that of the failed Blaine Amendment, the substance is the same.[22] The purpose of this article is to demonstrate that both the historical and jurisprudential records support the assertion that Washington's constitutional prohibitions on the establishment of religion are positively connected to the failed Blaine Amendment: what the Blaine amendment sought to do on the national level, the Washington Constitution's establishment prohibitions accomplish at the state level, and were so intended to do by the framers of the state constitution. The history and function of Washington's applicable constitutional texts reflect both the hand of the sponsor of the Blaine Amendment and the purpose that motivated his failed attempt to amend the United States Constitution.[23]

This article will explore the link between the Blaine Amendment and the Washington Constitution. Section II will explore the defining characteristics of the Blaine Amendment and how those characteristics were mirrored in Washington's constitution. This section contends that while the language and superficial structure of the various proposed versions of the Blaine Amendment and Washington Constitution differ, the applicable effect of the texts are for all intents and purposes the same. What the different versions of the Blaine Amendment consistently sought to accomplish, Washington's constitution does accomplish. Section III provides an overview of the history of the inclusion of those texts in Washington State's fundamental charter. This section examines the textual connection between the Washington Constitution's Blaine-style provisions and the failed Blaine Amendment. It will also explore the political and ideological connections between the Washington constitutional convention and the political movement that supported both James Blaine and his proposed constitutional amendment. Last, Section IV will argue that key legal cases from Washington demonstrate the link between the various Blaine-style provisions of the Washington Constitution and the failed Blaine Amendment.

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22. *Compare* Wash. Const. art. I, § 11, art. IX, § 4, and art. XXVI *with Joint Resolution*, *supra* n. 10; *Enabling Act*, *supra* n. 12.

23. Conklin & Vaché, *supra* n. 14, at 431-33; Steven K. Green, *The Blaine Amendment Reconsidered*, 36 Am. J. Leg. History 38, 53-54 (1992)); Viteritti, *supra* n. 10, at 670-72.

II. WHAT IS THE DEFINING CHARACTERISTIC OF A BLAINE AMENDMENT?

A. *The Original Federal Blaine Amendment*

In order to accurately discuss the connection between Washington's constitutional provisions on aid to sectarian education and other religious activities on one hand, and the Blaine Amendment on the other, it is first necessary to identify clearly just what the Blaine Amendment was. The term "Blaine Amendment" is used to describe a proposed federal constitutional amendment from the 1870s, sponsored by Representative (later Senator) James Blaine of Maine.[24] Blaine proposed the amendment on December 14, 1875 in an effort to effectuate a proposal by then-President Grant to ensure that public primary and secondary education would remain free from control by "any religious sect."[25] In addition, Blaine wanted to make sure that public funds would never be given directly to "religious sects or denominations."[26] Blaine's original amendment 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 therefor, 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.[27]

Blaine's proposed amendment would have sheltered public education from sectarian control through the use of two separate mechanisms. First, Blaine's amendment would have directly applied the religion clauses of the First Amendment to the states.[28] In the era prior to the incorporation of wide swaths of the Bill of Rights to the states through the Fourteenth Amendment, this was a radical and far-reaching proposal.[29] Second, Blaine's amendment decreed that public monies and property, whether specified for education or other purposes, would remain outside the control of any and all overtly religious institutions.[30]

Although Blaine's amendment was worded generally and seems at first blush to apply to all religious institutions that would seek to receive overt aid from the government, there was a specific religious institution targeted by the amendment, namely, the Roman Catholic Church.[31] The Catholic Church had entered into political controversy over the common school issue.[32] The common schools were the public schools of their day, and had a large role in assimilating and educating

24. *Joint Resolution*, *supra* n. 10.
25. *Id.*
26. *Id.*
27. *Id.*
28. Green, *supra* n. 23, at 38.
29. Viteritti, *supra* n. 10, at 671.
30. *Id.*
31. *Mitchell v. Helms*, 530 U.S. 793, 828-29 (2000) (citing Green, *supra* n. 23).
32. *See* Viteritti, *supra* n. 10, at 667-68; *see also* Green, *supra* n. 23, at 41-44, 48.

the offspring of the immigrants then moving into the United States from Europe.[33] The schools did not simply educate students in the basics of the English language or the Three Rs.[34] Rather, the schools were actively involved in promoting the values and beliefs that were considered part and parcel of the American experience.[35] These values and beliefs were the key tenets of the Protestant religion.[36] While no particular form of the Protestant faith was taught in public schools, generalized Protestantism was.[37] Common use was made of the Authorized King James Version of the Bible, for example, and Protestant devotional activity was widespread, as were denunciations of the Catholic faith.[38] Viewing morality and Christianity as both necessary and connected in a republic, the common schools were, as one scholar has noted, "the primary promulgators of [the] Protestant way of life."[39]

Roman Catholics, naturally enough, often objected to sending their children to such schools.[40] In addition, many Catholics sought public financial support for Catholic parochial education on the theory that it was only fair for Catholic schools to receive such support when the official common schools were engaged in teaching an educational curriculum that was inherently shaped and formed by Protestantism.[41] As Catholic numbers grew, this effort of securing public funds for parochial education became more successful.[42] Efforts were also undertaken to try to secularize the common schools, although this effort met with mixed success.[43] A backlash ensued, against both the move to secularize the common schools and the move to provide public funds for Catholic parochial schools.[44] Soon, a full-fledged political controversy was in play. And in this controversy, the word "sectarian" had a clear and unambiguous meaning—Catholic.[45]

Blaine's efforts to craft a constitutional amendment, building on prior efforts from the early 1870s to amend the Constitution to prohibit government aid to sectarian education, were jolted to life by leaders of the Republican Party who were eager to use the common school issue as a political stalking horse in the elections of 1876.[46] After Blaine submitted his amendment to Congress, it languished until the political convention season in June of 1876. Blaine was running for the GOP nomination for the presidency, but was unable to sway a

33. Viteritti, *supra* n. 10, at 668.
34. *Id.* at 666-68.
35. *Id.*
36. *Id.* at 666.
37. *Id.*
38. Viteritti, *supra* n. 10, at 666-68.
39. Green, *supra* n. 23, at 45.
40. *Id.* at 42-44.
41. *Id.* at 42-47.
42. *Id.* at 43.
43. *Id.* at 46-47; *see also* John C. Jeffries, Jr. & James E. Ryan, *A Political History of the Establishment Clause*, 100 Mich. L. Rev. 279, 282 (2001).
44. Green, *supra* n. 23, at 54 (citing *Two "Favorite Sons,"* 22 Nation 173, 173 (Mar. 16, 1876)).
45. That "sectarian" was used as a code word for "Catholic," was recognized by a plurality in the Court's formal opinion written by Justice Thomas in *Mitchell*, 530 U.S. at 828-29.
46. Green, *supra* n. 23, at 49.

majority of the convention delegates to support him.[47] However, despite Blaine's failure to obtain the GOP nomination, a statement was included within the Republican platform opposing government aid to "any school or institution under sectarian control."[48]

Eventually, the Republicans were able to move Blaine's amendment through the Democrat-controlled House of Representatives.[49] The House version of Blaine's amendment was significantly altered by the addition of a clause that allowed Congress to retain its full scope of legislative authority in regard to the common schools.[50] The Senate, then controlled by the Republicans, found this unacceptable and significantly reworked the amendment, expanding its prohibition on government funding of sectarian schools by including a prohibition on the teaching of "particular creeds" or religious "tenets" in a common school.[51] In addition, Blaine's original prohibition on government funding of religious institutions was broadened to include any religious "institution under the control of any religious or anti-religious sect, organization, or denomination."[52] At the same time, however, the Senate version decreed that the prohibition on the teaching of religious tenets in the common schools did not mandate the removal of Bible reading as part of the curriculum.[53] These added provisions effectively ensured that, had the amendment been enacted, the common schools would have maintained their general Protestant character. However, after heated debate in the Senate, where charges involving overt anti-Catholicism were raised against the amendment,[54] the Senate version of the Blaine Amendment failed to receive the necessary two-thirds vote to be sent on to the states for ratification.[55] But the failure of the Blaine Amendment was only the beginning.

B. Blaine Amendments in the States

The defeat of the Blaine Amendment did not end the effort by the federal government to influence the common school issue. The different versions of Blaine's amendment had received strong support in both the House of Representatives and the Senate.[56] And while that support was insufficient to lead to a successful constitutional amendment, it was more than enough to continue

47. *Id.* at 56.

48. *Id.* (quoting *National Party Platforms* vol. 1, 53-54 (Donald Bruce Johnson comp., rev. ed., U. Ill. Press 1978)).

49. *Id.* at 57-58.

50. *Id.* at 58.

51. Green, *supra* n. 10, at 60 (citing 4 Cong. Rec. 5453 (1876)).

52. *Id.*

53. Mark Edward DeForrest, *An Overview and Evaluation of State Blaine Amendments: Origins, Scope, and First Amendment Concerns*, 26 Harv. J.L. & Pub. Policy 551, 568 (2003) (citing Green, *supra* n. 23, at 60).

54. For a discussion of the Senate debate, see *id.* at 569-73 (citing 4 Cong. Rec. 5580-95 (1876)) (summarizing statements of Senators Bogy, Whyte, Edmunds, Morton, Stevenson, and Eaton).

55. 4 Cong. Rec. at 5595 (1876).

56. *Id.* (reporting the Senate vote was 28 in favor and 16 opposed, with 27 senators absent; thus, the vote did not garner the necessary two-thirds majority for passage); *id.* at 5191 (reporting the Blaine Amendment passed out of the House of Representatives with 180 yeas and only 7 nays).

exercising influence on a national scale. While many states, both before and after the Blaine Amendment's formal rejection by the Senate, had voluntarily enacted prohibitions on state aid to sectarian institutions, there was a growing movement within the Congress to mandate that territories seeking to become states include such provisions in their own constitutions as a condition for statehood.[57] As a consequence, either voluntarily or involuntarily, roughly thirty states now have Blaine-style provisions in their constitutions.[58]

In the 1880s and 1890s, Senator Henry Blair, a congressional ally of Blaine's, introduced legislation to prohibit aid to sectarian schools while protecting the generic Protestant character of the common school system.[59] While his attempts at legislative enactments were unsuccessful, Blair supported successful efforts at mandating the inclusion of Blaine-style language in the constitutions of new states entering the Union.[60] The best known—but not the only—example of such congressional efforts to compel states to include Blaine-style provisions in their constitutions is the 1889 Enabling Act that permitted the North Dakota, South Dakota, Montana, and Washington territories to organize for statehood.[61] As a condition for statehood, the Enabling Act required that those territories include provisions within their proposed state constitutions supporting public schools free from "sectarian control."[62] Without such a prohibition, the territory's bid for statehood was doomed to fail. The language of the Blaine Amendment prohibiting sectarian control of public-funded schools was thereby compulsorily grafted into the fundamental charter of a number of states—Washington among them.

C. *The Question of Identification*

1. What Qualifies as a State Blaine Amendment?

While the history of the Blaine Amendment is well known, and the widespread presence of Blaine-style language in state constitutions is an undisputed fact, a question does arise about the identification of state Blaine-style provisions with the Blaine Amendment. Does the fact that various state constitutional provisions—including Washington's—mirror language used in the various proposed versions of Blaine's amendment justify identifying those state provisions with Blaine's failed proposal to amend the federal Constitution? And what about the language found in Washington's Article I, § 11? The Supreme Court's opinion in *Locke v. Davey*, at least at footnote 7, throws such an

57. Viteritti, *supra* n. 10, at 673.
58. Heytens, *supra* n. 10, at 134.
59. Utter & Larson, *supra* 14, at 464.
60. Conklin & Vaché, *supra* n. 14, at 436 n. 126; *see also* Utter & Larson, *supra* n. 14, at 461-62.
61. Viteritti, *supra* n. 10, at 673.
62. Conklin & Vaché, *supra* n. 14, at 436 (noting that the Enabling Act required "establishment and maintenance of systems of public schools which shall be open to all the children of said States and free from sectarian control").

identification issue into question.[63] While the Court postulated that it is possible the Washington Constitution provisions dealing with prohibiting sectarian control of public education may have a connection to the Blaine Amendment, it rejected the notion that such a characterization had been established regarding Article I, § 11.[64] In particular, the Court found that while Washington's constitutional prohibition regarding "sectarian control" of public education was mandated by the 1889 Enabling Act, it denied that a "credible connection"[65] had been established between the Blaine Amendment and Washington's overt prohibition on the use of "public money or property" in support of "any religious worship, exercise or instruction, or the support of any religious establishment."[66] And it was the application of that later prohibition, found at the tail end of Article I, § 11, that was precisely the issue in *Davey*.

Complicating this inquiry is the simple fact that the identification of state constitutional provisions with the failed Blaine Amendment is an area of the law that has its areas of opacity. Two examples suffice to prove this point. In New York, which has Blaine-style state constitutional prohibitions on state government financing of religious institutions, the courts have clearly recognized such constitutional provisions as Blaine Amendments.[67] However, Arizona—like Washington—was required by Congress to place Blaine-style language in its state constitution as a condition for statehood,[68] but the Arizona Supreme Court has declined to draw such a connection.[69]

In *Kotterman v. Killian*,[70] the Arizona court refused to find that the state's constitutional mandate prohibiting state funding for the "aid of any church, or private or sectarian school," as well as "any religious worship, exercise, or instruction"[71] was an example of a state Blaine amendment. In that case the Arizona court was asked to examine the constitutionality of a 1997 state program that provided a tax credit to Arizona residents who could donate the credit to "school tuition organization[s]."[72] The constitutionality of the program was challenged, with the plaintiffs alleging that the program constituted a violation of both the First Amendment and Arizona's state constitution.[73] The court rejected the plaintiffs' contentions, and upheld the constitutional validity of the program.[74] In its decision, the court did not find a clear and direct link between the applicable

63. *Davey*, 540 U.S. at 723 n. 7.
64. *Id.*
65. *Id.*
66. Wash. Const. art. I, § 11.
67. *See College of New Rochelle v. Nyquist*, 326 N.Y.S.2d 765, 769-71 (N.Y. App. Div. 3d Dept. 1971).
68. *Enabling Act of June 20, 1910*, 36 Stat. 557, 570 (1910) (Arizona); *Enabling Act*, *supra* n. 12 (Washington).
69. *Kotterman v. Killian*, 972 P.2d 606, 621-22 (Ariz. 1999).
70. 972 P.2d 606 (Ariz. 1999).
71. *Id.* at 617 (quoting Ariz. Const. art. II, § 12, art. IX, § 10).
72. *Id.* at 609 (quoting Ariz. Rev. Stat. § 43-1089(A) (1997)).
73. *Id.* at 610.
74. *Id.* at 616, 625.

provisions of the Arizona Constitution and the Blaine Amendment. At the same time, however, the court noted difficulty in applying Blaine Amendment-style requirements because of the failed Blaine Amendment's blatant anti-Catholic "discriminatory intent."[75] Obviously, the court believed there was a connection between the Arizona Constitution and the failed Blaine Amendment—why address the difficulty of applying the Blaine Amendment[76] if there is no Blaine Amendment to apply?—but decided to leave the link obscure.

2. Washington's Blaine-style Provisions and the Enabling Act of 1889

This obscurity regarding state Blaine-style amendments is complicated in the case of Washington's constitution by the simple fact that, as the Supreme Court pointed out in *Davey*, not all of Washington's Blaine-style provisions were mandated by the 1889 Enabling Act.[77] As noted previously, Washington has three major Blaine-style sections in its constitution. Article I, § 11 prohibits state money or property from being allocated for "any religious worship, exercise or instruction, or the support of any religious establishment." Article IX, § 4 contains the prohibition on "sectarian control or influence" over public schools. The compact between the state and the federal government, found in Article XXVI, reiterates, among other things, the requirements of Article IX, § 4 that the state public schools remain free of "sectarian control."

There is no question that the content of Article IX, § 4 and Article XXVI is mandated by the Enabling Act of 1889. The wording of the act itself makes this clear:

> That provision shall be made for the establishment and maintenance of systems of public schools, which shall be open to all the children of said State[] and free from sectarian control.[78]

This language is virtually identical to the operative language contained within Article XXVI.[79] But what about Article I, § 11? There is no mention of the language from Article I, § 11 anywhere in the Enabling Act. Not only is the specific language missing, the Enabling Act does not even raise the issue of the establishment of religion by the state, outside of the specific context of public school education.[80] Hence, the language found in Article I, § 11, language that was the basis of the Washington policy under review in *Davey*, was not mandated, as the Supreme Court's footnote in *Davey* correctly points out, by the 1889

75. *Kotterman*, 972 P.2d at 624.

76. *Id.*

77. 540 U.S. 723 n. 7 (noting that the federal Enabling Act's Blaine-style language was incorporated in Article IX, § 4 of the Washington Constitution, and there is no textual connection between Washington's Article I, § 11 and the Enabling Act).

78. *Enabling Act*, *supra* n. 12.

79. Wash. Const. art. XXVI ("Provision shall be made for the establishment and maintenance of systems of public schools free from sectarian control, which shall be open to all the children of said state.").

80. *Compare* Wash. Const. art. I, § 11 *with Enabling Act*, *supra* n. 12.

Enabling Act.[81] It appears that it was voluntarily included by the territorial delegates who met to draft the Washington Constitution in 1889.[82] This information raises the question as to whether the lack of any mandate in the Enabling Act requiring the language found in Article I, § 11 means that it is improper to characterize that article as a Blaine Amendment provision? The answer to that question, as the next section will demonstrate, is no.

III. THE FAILED FEDERAL BLAINE AMENDMENT AND ARTICLE I, § 11 OF THE WASHINGTON CONSTITUTION

A. *Textual Connections Between Article I, § 11 and the Federal Blaine Amendment*

While it is true that the Enabling Act itself does not require a provision like Article I, § 11, such a provision is part and parcel of the classic versions of the Blaine Amendment that were proposed by Blaine himself, modified and ratified by the House of Representatives, and then later amended and ratified by the Senate. In all three versions of the Blaine Amendment, language was included with similar purpose and effect to the language in Article I, § 11 that was at the center of the constitutional question in *Locke v. Davey*.[83]

The relevant language of Article I, § 11 reads as follows: "No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment." The language from Article I, § 11 parallels language found in all three versions of the Blaine Amendment that were put before Congress in 1875-76.[84] The original amendment drafted and submitted by Blaine contains language that goes beyond the common school issue to include government support for religious institutions as well.[85]

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81. *Davey*, 540 U.S. at 723 n. 7; *see also Enabling Act*, *supra* n. 12.

82. *See supra* n. 78.

83. *See* 540 U.S. 712.

84. *Id. See also* Green, *supra* n. 23, at 60 ("no public revenue . . . shall be appropriated to or made or used for the support of any school, educational or other institution under the control of any religious or anti-religious sect, organization, or denomination, or wherein the particular creeds or tenets shall be taught." (quoting Sen. Jud. Comm. Rpt., 4 Cong. Rec. at 5453)); *id.* at 55 ("No money received 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, nor shall any money so raised nor lands so devoted be divided between religious sects or denominations." (quoting Congressman William J. O'Brien's (D-Md.) alternative to Blaine's original amendment, 4 Cong. Rec. at 440-441)); *id.* at 59 (quoting Sen. Frederick Frelinghuysen's (R-N.J.) version of the Blaine Amendment, 4 Cong. Rec. at 5245, which stated in part, "no money raised by taxation in any State . . . shall be appropriated to any school, educational or other institution, that is under the control of any religious sect or denomination").

85. *Compare* Blaine's original amendment ("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; nor shall any money so raised or lands so devoted be divided between religious sects or denominations."); Green, *supra* n. 23, at 53 (quoting 4 Cong. Rec. at 205) *with* the applicable language from the Washington Constitution's text at Article I, § 11 ("No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment.").

Blaine's original text specifically prohibits states from using public funds or lands to support religious sects or denominations. This prohibition, while differing in specific terminology, mirrors the topics covered by the Washington Constitution's prohibitions in Article I, § 11.[86] Both provisions prohibit the use of public monies or property to support religious institutions. While Washington's text provides a more extensive recitation of the specific activities targeted for exclusion from public support, its provisions do not stand in contradiction to the original Blaine Amendment. This point has been expressly recognized by the Washington Supreme Court in a footnote in *Malyon v. Pierce County,*[87] where the court quotes a scholarly article concluding that Article I, § 11 seeks to "address the basic objective of the Blaine Amendment: preventing state funding for parochial education or activities."[88]

The versions of the Blaine Amendment that were before Congress likewise are linguistically linked to Washington's Article I, § 11. The House version contained language regarding the prohibition on the use of public funds and property identical to that proposed in Blaine's original amendment.[89] The Senate version has even stronger parallels to the language of Article I, § 11. In the Senate version, the appropriation of public funds for, or the guaranteeing of loans to, "any religious or anti-religious sect, organization or denomination" was prohibited absolutely, particularly in regard to activities undertaken by a religious institution to foster or further "its interests or tenets."[90] This language, while again not identical to that contained in Washington's constitution, has a strong topical resonance to the language in Article I, § 11 about prohibiting the use of public funds or property in support of "any religious establishment," "religious worship, exercise or instruction."[91]

Interestingly enough, there is one significant variation between the Senate version of the Blaine Amendment and Washington's Article I, § 11. In the Senate's Blaine Amendment there was specific language to permit "the reading of the Bible in any school or institution."[92] This language is completely lacking in Article I, § 11, as has been noted in a previous scholarly investigation of the Blaine Amendment's influence on the Washington Constitution.[93] Oddly enough, the Washington Supreme Court has had to deal with the impact of this omission in two separate cases involving the interpretation of Article I, §11: *Dearle v. Frazier*[94] and *Calvary Bible Presbyterian Church of Seattle v. Board of Regents of the University of Washington.*[95]

86. *Compare* Wash Const. art. I, § 11 *with Joint Resolution*, *supra* n. 10.
87. 935 P.2d 1272 (Wash. 1997).
88. *Id.* at 1279 n. 13 (quoting Utter & Larson, *supra* n. 14, at 473).
89. *Compare* Wash. Const. art. I, § 11 *with Joint Resolution*, *supra* n. 10.
90. Green, *supra* n. 23, at 60 (quoting 4 Cong. Rec. at 5453).
91. Wash. Const. art. I, § 11.
92. Green, *supra* n. 23, at 60 (quoting 4 Cong. Rec. at 5453).
93. Utter & Larson, *supra* n. 14, at 476.
94. 173 P. 35 (Wash. 1918).
95. 436 P.2d 189 (Wash. 1968).

In *Dearle,* a case dating from 1918, the court addressed whether a school district could provide credit to students who participated in Bible study classes outside of the public school, either in the home or by religious institutions.[96] The City of Everett had established such a program, where students would receive credit for such Bible study but only if they succeeded in passing an exam covering the "historical, biographical, narrative and literary features of the Bible."[97] When the constitutionality of the program was challenged, the school district responded by noting that the exam did not test students regarding the religious content of the Bible, and that there was no direct use of public funds to support religious establishment, "worship, exercise or instruction."[98] The *Dearle* court found that despite the contours of the program, it still ran afoul of Article I, § 11, which provided a "sweeping and comprehensive" prohibition on the use of public money to support "'any religious worship, exercise or instruction.'"[99] The court found that the purpose of Article I, § 11 was not only to prohibit state sponsorship of religious indoctrination and exercise, but also "their natural consequence—religious discussion and controversy."[100] Since the reading of scripture could not help but engender such discussion and controversy, the school district's program was, the court held, in violation of the state constitution's mandate.[101] This was made even more clear, in the court's view, by the fact that the instruction given from the Bible was to be carried out "at the hands of sectarian agents."[102]

After *Dearle*, the Washington Supreme Court revisited the topic of Bible study as a part of government-funded education in *Calvary Bible.*[103] There, the court addressed the issue of whether the teaching of the Bible as literature as part of the curriculum of the University of Washington's English department ran afoul of both Articles I, § 11 and IX, § 4 of the Washington Constitution.[104] The court, after an extensive overview of the nature of the study of the Bible that was included in the curriculum,[105] found that the evidence submitted to the trial court in the case supported the university's contention that the Bible was being taught in an objective and scholarly fashion, not in an attempt to "indoctrinate anyone," but rather as a secular field of study that "was not taught from a religious point of view."[106] Since the university was teaching the Bible in such a manner, without an attempt to promote or advance a particular religious tenet, the court found that neither state constitutional provision was violated.[107]

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96. 173 P. at 35-36.
97. *Id.* at 36.
98. *Id.*
99. *Id.* at 37.
100. *Id.*
101. *Dearle*, 173 P. at 38.
102. *Id.*
103. 436 P.2d 189.
104. *Id.* at 190.
105. *Id.* at 191.
106. *Id.* at 194.
107. *Id.*

The *Dearle* and *Calvary Bible* cases are clearly distinguishable, given the fact that the level and manner of instruction involved in both cases is significantly different. *Dearle* deals with credit being provided in public schools at the pre-collegiate level for essentially private Bible study carried out in the home or within the confines of outside religious organizations.[108] *Calvary Bible*, on the other hand, addresses the question of receiving credit for coursework on the Bible carried out within a university setting, on campus, in classes operating under the control and direction of an established university department.[109] As far back as 1916, the Washington Supreme Court had held that university-level education was distinct from the primary and secondary level of public education for purposes of state constitutional analysis.[110] This distinction between state-funded collegiate and public school educational systems was reinforced after *Calvary Bible* in the case of *DeFunis v. Odegaard*,[111] where the Washington Supreme Court refused to apply a non-Blaine provision of Article IX to state colleges and universities.

Thus, while the differences in outcome between the two cases can be easily explained, there is a deeper commonality at work in the court's approach to constitutional principle in each case. Both cases evidence an overriding concern to avoid allowing public educational money to be used to support sectarian activities. The court in *Calvary Bible* took great care to note in its opinion that the study of the Bible occurring at the University of Washington's English department was neutral and offered "as part of a secular program of education to advance the knowledge of students and the learning of mankind."[112] While the *Dearle* court in its opinion expressed skepticism about whether the study of the Bible could ever be free of religious impulses, its primary concern was the same: to safeguard the public educational system from losing its non-sectarian character.[113] Both decisions, although coming to different conclusions regarding the acceptability of publicly funded study of the Bible, affirm the core value of the Blaine Amendment to prevent sectarian influence or control over government-funded education.

B. The Political and Ideological Influence of Blaine on the Washington Constitutional Convention

Along with Article IX, § 4 and Article XXVI of the Washington Constitution, Article I, § 11 has strong textual and ideological similarities to the versions of the Blaine Amendment that were proposed directly by James Blaine himself, or by the House of Representatives, or the Senate. As one law review article puts it, the main issues that the Washington Blaine-style provisions address

108. 173 P. at 35-36.
109. 436 P.2d at 190-91.
110. *Litchman v. Shannon*, 155 P. 783, 784.
111. 529 P.2d 438 (1974).
112. 436 P.2d at 191.
113. 173 P. at 37-38.

"are the same three issues that the Blaine Amendment addressed."[114] But, as noted by the Supreme Court in *Davey*, while the Enabling Act that permitted Washington to achieve statehood mandated the language found in Article IX, § 4 and Article XXVI, it did not overtly mandate the inclusion of the provisions of Article I, § 11.[115] That being the case, how was Washington influenced to include Blaine material in Article I, § 11? This is a critical question for understanding the pervasive influence of Blaine's ideas over the drafting of Washington's state constitution.

Unfortunately, there is no record of the actual debates or discussions that occurred during the Washington constitutional convention.[116] While minutes of the debates were taken, no money was appropriated to transcribe the minutes.[117] Hence, there is no detailed record of what was actually said on the floor of the state constitutional convention. Even the journal of the state constitutional convention, containing a record of the procedures during the convention, was not published until 1962.[118] Fortunately, there is enough information in the historical record, along with the journal, to flesh out the connection between Blaine and the Washington constitutional convention.

By the time Washington was organizing for statehood, Blaine's political career in Congress was over.[119] However, Blaine remained a national political figure.[120] After the Civil War, Blaine had led congressional efforts to moderate the policies of the Republican Party.[121] He led efforts within the GOP to counter the "Stalwart" or "Radical" Republicans who championed a more vigorous policy on civil rights and a more punitive approach to reconstruction of the southern states after the war. Blaine served as Speaker of the House of Representatives from 1869 until 1875.[122] In 1876 he jumped into the Senate, and then ran for the Republican nomination for the presidency.[123]

Blaine's presidential run was unsuccessful.[124] He failed to secure the nomination, but he remained active in Republican politics.[125] He backed James Garfield's presidential run in 1880 and was rewarded during Garfield's short presidency with an appointment as secretary of state.[126] Both during his service in the administration and afterward, he worked to build the Republican Party as a

114. Utter & Larson, *supra* n. 14, at 468.

115. *Davey*, 540 U.S. at 723 n. 7.

116. *The Journal of the Washington State Constitutional Convention, 1889*, at vii (Beverly Paulik Rosenow ed., Book Publg. 1962) [hereinafter *Journal*].

117. *Id.*

118. *Id.*

119. Utter & Larson, *supra* n. 14, at 463 n. 54.

120. Having served as Speaker of the House for six years, Blaine went on to run for the Republican Presidential nomination four times (securing the nomination in 1884), serve in the Senate, and serve twice as Secretary of State. *Id.*

121. *See id.*

122. *Id.*

123. *Id.*

124. Utter & Larson, *supra* n. 14, at 463 n. 54.

125. *Id.*

126. *Id.*

national entity.[127] His efforts in working with the party bore fruit in the next election cycle when he captured the 1884 Republican presidential nomination.[128] While he was unsuccessful in his bid for the White House, he remained active in national politics.[129] He supported Benjamin Harrison for president in 1888, and after Harrison's victory was again appointed secretary of state.[130] He remained in that position until 1892, when he left due to opposition to Harrison's policies.[131] Blaine died the next year.[132]

Blaine's long stint in the national limelight was partly a consequence of his support within the Republican Party, particularly for party-building. That support was not restricted to the east coast, but reached west as well, and included Washington State.[133] As former Washington Supreme Court Justice Robert F. Utter and historian Edward J. Larson discuss in one of the most detailed explorations of the connections between Washington's constitution and the Blaine Amendment, the majority of the delegates to the Washington constitutional convention were Republicans, and probably were committed to supporting Blaine: "In all likelihood, these [delegates] were Blaine Republicans."[134] The Washington Republican Party had institutionally backed several of Blaine's efforts to secure the GOP's presidential nomination and even supported Blaine in his split with President Harrison in 1892.[135] In addition, and perhaps most importantly for purposes of establishing a connection between the Washington Constitution and the Blaine Amendment, the Washington GOP had, in Utter and Larson's words, "supported Blaine's well-known and long-standing views on religious establishment and common schools."[136]

Thus, while the Washington state constitutional convention delegates were forced by the Enabling Act to include some Blaine provisions in the state constitution, the Republican majority was willing to go farther than the explicit wording of the Blaine Amendment and include the Blaine-style requirements found in Article I, § 11. The GOP's dominance at the state convention was overwhelming. According to the *Journal of the Washington State Constitutional Convention*, only one member of the drafting committee that was in charge of overseeing the formulation of the state Bill of Rights, including Article I, § 11, was a Democrat—its chairman C. H. Warner.[137] This Republican dominance ensured that there would be no significant barrier to the state Bill of Rights being adopted.

127. *Id.*
128. *Id.*
129. Utter & Larson, *supra* n. 14, at 463 n. 54.
130. *Id.*
131. *Id.*
132. *Id.*
133. *Id.* at 468-69.
134. Utter & Larson, *supra* n. 14, at 468.
135. *Id.* at 469 n. 83.
136. *Id.* at 469.
137. *Journal*, *supra* n. 116, at vii.

In its final form, including Article I, § 11, the Bill of Rights was approved by the convention by a staggering margin of 51 to 14.[138]

C. *Religion and the Washington Constitutional Convention*

The Washington state constitutional convention's embrace of the requirements of the Blaine Amendment should not be thought of as expressing hostility to religion in general. The framers of the state constitution were not at all hostile to religion or religious expression in general; in its daily activities the business of the convention was often begun with prayer, and the convention formally received petitions from several different religious organizations and denominations in the course of its work.[139] As the Washington Supreme Court has noted, the state constitution "indicates [that its] framers were men of deep religious beliefs and convictions, recognizing a profound reverence for religion and its influence in all human affairs essential to the well-being of the community."[140] However, the convention was intent on making sure that sectarianism was avoided. For example, the convention also incorporated, by a 55 to 19 vote,[141] explicit and overt religious language into the state constitution's preamble, which gives thanks to "the Supreme Ruler of the Universe"[142] for the rights guaranteed by the Washington Constitution. Such language was adopted deliberately to avoid any hint of sectarian identification of the Deity with any particular religious tradition.[143] The convention combined the preamble's confession of faith in the Deity with works to ensure a property tax exemption for churches and other houses of worship, with statements in the convention emphasizing that such places of worship should qualify for the exemption regardless of their specific religion.[144] In both cases, the overriding concern of the convention was to recognize and protect the role of God and religion, both broadly understood, within civil society while avoiding the overt endorsement of any one religious institution or sect.[145]

This concern regarding the avoidance of sectarianism had its impact on the convention's approach to the Blaine Amendment material it was incorporating into the state constitution. According to the statements of some delegates to the convention, the purpose of Article IX, § 4 was not to prohibit general instruction in religious principles but rather to exclude overt sectarianism in the public schools.[146] Article I, § 11, which in addition to containing Blaine Amendment

138. *Id.*

139. Utter & Larson, *supra* n. 14, at 477 ("Far from being hostile to religion, the framers viewed religion as an important component of a stable society.").

140. *Perry v. Sch. Dist. No. 81*, 344 P.2d 1036, 1043 (1959).

141. Utter & Larson, *supra* n. 14, at 471.

142. Wash. Const. preamble ("We, the people of the State of Washington, grateful to the Supreme Ruler of the Universe for our liberties, do ordain this constitution.").

143. Utter & Larson, *supra* n. 14, at 478.

144. *Id.* at 474-79.

145. *Id.*

146. *Id.* at 477-78.

language also functions as the general establishment clause of the Washington Constitution, was crafted by the convention to be similar to the Blaine Amendment and to hew closely to the established approach of the common school movement regarding the general teaching of religion.[147] In debating a series of amendments to Article I, § 11, the convention overtly rejected attempts to move beyond the Blaine-style language already present in the article in order to erect an even tighter barrier to religious "influence" in the common school system of the state. At least two delegates voiced concern that attempts to exclude religious influence would go too far—they could wind up removing people of faith from the public schools.[148] Instead of such a radical proposal, the convention sought to restrict Article I, § 11's provisions to the core concern of the Blaine Amendment: the prohibition of state funding for parochial education. Thus, the language of Article I, § 11's Blaine-style provision was crafted to prevent the state from supporting "any religious worship, exercise or instruction."[149] As Utter and Larson conclude, the approach of the convention to Article I, § 11 set it "squarely within the common school movement, which maintained that public schools should present wholesome, nonsectarian religious influence by teaching about general religious principles."[150] Far from being hostile to religion in general, the convention sought to prevent the state, through its education system, from supporting one strand of religious faith over another. "[C]hristianity," one delegate noted, "and religion are not necessarily identical."[151]

Such being the case, how then it is possible to reconcile the words and actions of the Washington constitutional convention, with its emphasis on protecting non-sectarian expressions of religiosity, with the common school movement's anti-Catholicism and support for generic Protestantism? The apparent discord between the convention and the common school movement disappears when viewed in the context of the whole concept of sectarianism in the nineteenth-century. As several scholars from various disciplines have noted, American public life in the nineteenth-century was suffused with common Protestant values and rituals. The strong cultural and social influence of Protestantism in general was simply an unstated assumption in the political and legal life of the culture.[152]

During the time when Washington was first stabilized as a territory, and then admitted into the Union, there was for all intents and purposes a de facto Protestant establishment in the United States,[153] an establishment where

147. *Id.* at 472.

148. Utter & Larson, *supra* n. 14, at 476.

149. Wash. Const. art. I, § 11.

150. Utter & Larson, *supra* n. 14, at 477.

151. *Id.* (referring to statement by delegate M.M. Godman).

152. *See* Stephen V. Monsma, *Positive Neutrality: Letting Religious Freedom Ring* 124-26 (Baker Bks. 1993); *see also* Viteritti, *supra* n. 10, at 668.

153. Monsma, *supra* n. 152, at 124; *see* Andrew J. King, *Sunday Law in the Nineteenth Century*, 64 Alb. L. Rev. 675, 677 (2000); *see generally* Stuart Buck, *The Nineteenth-Century Understanding of the Establishment Clause*, 6 Tex. Rev. L. & Pol. 399 (2002); Steven D. Smith, *Legal Discourse and the* De Facto *Disestablishment*, 81 Marq. L. Rev. 203 (1998).

"Protestant Christianity and government were closely linked in mutually supportive relationships."[154] This linkage was so profound that it went unacknowledged and for the most part unnoticed, until it was challenged, as with the Mormon effort to foster the practice of plural marriage, or the Catholic effort to obtain public funding for Catholic parochial schools. Then efforts were made to protect the de facto Protestant establishment, but at the same time to develop a legal and political rhetoric that sought to emphasize the values and religious traditions of the majority as a uniting factor in the social and political fabric of the nation.[155] This was the entire *modus operandi* of the common school movement, which engaged in teaching generic Protestant values and beliefs to students while publicly eschewing that it was teaching Christianity or any sectarian religious belief at all.[156] Such a de facto establishment led to the simultaneous and seemingly contradictory existence of a privileged position for generic Protestantism, properly understood as embodying non-sectarian religious values and practices, in the nation's public institutions and a growing conviction in some kind of formal separation of church and state.[157] Understanding this nineteenth-century reality goes a long way toward making sense of the Washington constitutional convention's strong support for and protection of religion as part of the civic order of society, and its firm actions to make sure that any overt sectarianism was avoided.

IV. AN OVERVIEW AND EVALUATION OF KEY COURT DECISIONS INTERPRETING ARTICLE I, § 11 IN THE AREA OF PUBLIC EDUCATION

A. Introduction

The strong connection between Article I, § 11 and the failed Blaine Amendment is evidenced not only in the historical record of the politics and turmoil of the nineteenth-century.[158] It is also demonstrated by examining key cases from Washington State that apply Article I, § 11 in the context of its prohibition on government funding for religious education.[159] This article has already explored two such decisions concerning efforts to provide academic credit in government-funded educational systems for Bible study, *Dearle* and *Calvary Bible*.[160] Both of those cases, while coming to markedly different conclusions about the constitutional practicability of non-sectarian study of sacred texts for credit within publicly funded education, employed reasoning that exemplified the classic concern that undergirded the Blaine Amendment: preventing sectarian

154. Monsma, *supra* n. 152, at 124.
155. *Id.* at 124-26.
156. *Id.*
157. *Id.*
158. *Compare* Wash. Const. art. I, § 11 *with Joint Resolution*, *supra* n. 10.
159. There are at least two cases in Washington that apply Article I, § 11 to activities outside of the educational sphere: *Malyon*, 935 P.2d 1272 and *Washington Health Care Facilities Authority v. Spellman*, 633 P.2d 866 (Wash. 1981).
160. *Supra* nn. 90-110 and accompanying text.

control over government funded education. However, those two cases are not the only cases in Washington's jurisprudence that demonstrate the effective connection between the Blaine Amendment and Article I, § 11. The case law from the Washington Supreme Court evidences a strong conceptual link between Article I, § 11 and Article IX, § 4.[161] As noted previously, Article IX, § 4 is a provision of the Washington Constitution that is indisputably linked to the Blaine Amendment, both in terms of its language and in terms of its mandatory inclusion in the Washington Constitution via the Enabling Act of 1889. An overview of the case law applying Article I, § 11 in the educational funding context demonstrates that the state supreme court has consistently viewed the two articles as being two sides of the same coin as far as limiting state aid to private sectarian education is concerned.

B. Case Law Through 1973

The first group of cases to be evaluated are those cases decided prior to 1974 where the two central Washington Blaine-style provisions, Article I, § 11 and Article IX, § 4, were applied together as a unit by the state supreme court. In these cases the Washington Supreme Court used the two provisions together to resolve questions regarding permissible and impermissible state funding or aid to religious education.[162] This use of the two constitutional articles in tandem is critical because it serves as a practical example of the close functional link between Article IX, § 4, which is indisputably connected to the Blaine Amendment, and Article I, § 11.[163]

Since both *Dearle* and *Calvary Bible* have been discussed, the first cases to be examined are *Mitchell v. Consolidated School District No. 201*[164] and *Visser v. Nooksack Valley School District No. 506*.[165] These two cases deal with the use of public school transportation by students attending religiously affiliated private schools. In *Mitchell*, the plaintiff brought suit alleging that a state law allowing private and parochial school students to ride on school buses operated by the state violated the state constitution.[166] While there was no change in the routes used by the buses, the court found that there were "substantial" additional expenses incurred by providing public transportation to the private and parochial school students.[167] Based on these additional expenses, the court ruled that the law violated the Washington Constitution because it provided a benefit to private and

161. *See e.g. Malyon*, 935 P.2d at 1278 ("Article IX, section 4 is related to article I, section 11 and adds special and unique emphasis to the subject of religion in public schools.").

162. Decisions considering Washington Constitution Articles I, § 11 and IX, § 4 in tandem include: *State Higher Education Authority v. Graham*, 529 P.2d 1051 (Wash. 1974); *Calvary Bible*, 436 P.2d 189; *Perry*, 344 P.2d 1036; *Visser v. Nooksack Valley School District No. 506*, 207 P.2d 198 (Wash 1949); *Mitchell v. Consolidated School District No. 201*, 135 P.2d 79 (Wash. 1943); *Dearle*, 173 P. 35.

163. *Compare* Wash. Const. art. I, § 11 *with* Wash. Const. art. IX, § 4; *Joint Resolution*, *supra* n. 10.

164. 135 P.2d 79.

165. 207 P.2d 198 (1943).

166. 135 P.2d at 80 (1949).

167. *Id.* at 81.

parochial schools.[168] Such a benefit was a clear violation, the court held, of Articles I, § 11 and IX, § 4.[169] Not only did the court apply both provisions to the case that was before it, it formulated a basic rule of application that seamlessly incorporated both articles into a single application of existing state constitutional law.[170] In effect, while consisting of two separate articles, the Washington Blaine-style provisions were interpreted together as creating a single constitutional rule.[171]

This basic approach to applying Washington's Blaine-style provisions was closely followed by the court six years later in *Visser v. Nooksack Valley School District No. 506.*[172] In *Visser*, the state supreme court ruled against a couple who sought injunctive relief against their local school district in order to obtain the right for their children to use the public school transportation system to travel to and from their religious school.[173] In deciding the case, the court looked at all three of Washington's Blaine-style provisions—Articles I, § 11,. IX, § 4, and XXVI—as well as Article IX, § 2 (a provision mandating that the state should "provide for a general and uniform system of public schools").[174] The court concluded, based on the constitutional provisions at issue, as well as the earlier decision in *Mitchell*, that such an injunction would be contrary to the express provisions of Washington's constitution.[175] Importantly, for purposes of establishing the linkage between Article I, § 11 and Article IX, § 4, the court in *Visser* characterized the *Mitchell* court's approach to the application of Washington's Blaine-style provisions as a holistic one, specifically saying that the court in *Mitchell* "considered" the applicable constitutional articles "as a whole."[176] The court in *Visser* also directly referred to Article I, § 11 and Article IX, § 4 as possessing a singular "viewpoint."[177]

This approach to viewing Article I, § 11 and Article IX, § 4 as linked constitutional provisions continued through later case law. In 1959, the Washington Supreme Court decided *Perry v. School District No. 81*,[178] a case dealing with the constitutionality of a school district release time program for religious education. The court applied Article I, § 11 and Article IX, § 4 together to find that the practice of the school district that was being challenged, namely, the allocation of release time paperwork directly by the school and the use of public facilities to make announcements regarding the release time program, was in violation of the Washington state constitution.[179]

168. *Id.* at 81-82.
169. *Id.* at 81.
170. *Id.* at 81-82.
171. *Mitchell*, 135 P.2d at 81-82.
172. 207 P.2d 198.
173. *Id.* at 205.
174. *Id.* at 200-02.
175. *Id.* at 204.
176. *Id.* at 202.
177. 207 P.2d at 205.
178. 344 P.2d 1036.
179. *Id.* at 1039, 1043.

There was a deviation from the pattern of applying both Washington Blaine-style provisions in the 1973 consolidated cases *of Weiss v. Bruno*[180] and *Weiss v. O'Brien*.[181] In those cases the state supreme court applied only Article IX, § 4 to hold unconstitutional a state program that provided public tuition grants to students attending private primary, secondary, or collegiate educational institutions.[182] The court based its decision to apply only Article IX, § 4 on prudential grounds: "[s]tanding alone, article 9, § 4 is determinative in this case."[183] However, the following year, in *State Higher Education Assistance Authority v. Graham*,[184] the state supreme court returned to form and again used Article I, § 11 and Article IX, § 4 together to declare unconstitutional a state program set up to help provide financial aid to college students, some of whom were attending private religious educational institutions. While the court relied heavily on the precedent set in *Weiss*, its formal basis for rejecting the constitutionality of the challenged program was Articles I, § 11 and IX, § 4 viewed and applied in tandem.[185]

C. *Recent Case Law:* Witters *and* Gallwey

After the Washington Supreme Court decided *Weiss v. Bruno* in 1973, there was a long gap before another case arose that involved the application of Article I, § 11 in the context of public education. While the court did address the application of Article I, § 11 in the context of a publicly-funded chaplaincy program at a private, religiously affiliated hospital,[186] there was no educational funding case before the state supreme court involving Article I, § 11 until the mid-1980s.

Larry Witters, a visually disabled student, applied for funds under a state program designed to provide financial assistance for visually disabled students seeking vocational training.[187] Witters sought aid to attend a university to pursue a course of study to qualify for a career in the clergy.[188] His initial request for aid was denied, and he brought suit in 1982 challenging the initial denial of aid.[189] The case made its way before the Washington Supreme Court, which in 1984 issued a ruling upholding the denial of aid on First Amendment Establishment Clause grounds.[190] Since a federal constitutional provision stood as the basis of the state high court's decision, Witters was able to appeal that decision to the U.S. Supreme

180. 509 P.2d 973 (Wash. 1973).

181. *Id.* (*O'Brien* was consolidated with *Bruno* in a single decision), *overruled*, *State ex rel. Gallwey v. Grimm*, 48 P.3d 274, 284 (Wash. 2002).

182. *Id.* at 977, 990. While the court applied only Article IX, § 4, the petitioners sought review of the challenged program under both Article I, § 11 and Article IX, § 4. *Id.* at 977-78.

183. *Id.* at 977.

184. 529 P.2d 1051 (1974).

185. *Id.* at 1053-54.

186. *Malyon*, 935 P.2d 1272.

187. *Witters v. St. Commn. for the Blind*, 689 P.2d 53, 54-55 (Wash. 1984).

188. *Id.* at 55.

189. *Id.*

190. *Id.*

Court, which overruled the state supreme court by holding that it was permissible under the First Amendment for Witters to have access to the financial aid program.[191] Witters's case returned to Washington State for a fresh determination of his application for funding.[192]

The good news did not last long for Mr. Witters. His application to the state vocational aid program was again rejected by the state, and Witters again appealed to the courts.[193] In 1989 the case once more came before the Washington Supreme Court, which reviewed the state's decision to deny Witters aid under the state, rather than federal, constitution—specifically Article I, § 11.[194] The court found that the educational purpose that Witters sought to effectuate through use of the aid, an education based on "a religious course of study at a religious school, with a religious career as his goal," was exactly the sort of use of public funds prohibited by "the clear language"[195] of Article I, § 11.

Looking at *Dearle* and *Calvary Bible* for guidance as to the meaning of Article I, § 11's prohibition on "religious instruction,"[196] the court found that the educational program that Witters sought to pursue was one that would "necessarily provide indoctrination in the specific beliefs of Christianity."[197] As such, any public aid to allow him to pursue such an education would implicate the state in the application of public funds for religious instruction, the very thing prohibited by Article I, § 11.[198] In order to emphasize this point, the court made clear that Article I, § 11 does not simply prohibit appropriation of government funds for private religious instruction, but it also prohibits "the *application* of public funds to religious instruction."[199] Having disposed of Witters's case on Article I, § 11 grounds, the court did not find it necessary to explore the impact of Article IX, § 4.[200]

While the Washington Supreme Court's second decision in *Witters* was based on a reading of Article I, § 11 alone, the court returned to viewing Articles I, § 11 and IX, § 4 as tandem constitutional provisions in the 2002 case of *Gallwey v. Grimm*.[201] That case dealt with the constitutionality of Washington's Educational Opportunity Grant ("EOG") program.[202] The grant program was designed to provide tuition assistance to college students who were attending either public or private institutions.[203] There were several criteria that students had to meet in order to qualify for the grants, one of which was that the student had to "adhere to

191. *Witters v. Wash. Dept. of Servs. for the Blind*, 474 U.S. 481 (1986).
192. *Witters v. St. Commn. for the Blind*, 771 P.2d 1119, 1120 (Wash. 1989) [hereinafter *Witters II*].
193. *Id.* at 1120.
194. *Id.* at 1121.
195. *Id.*
196. *Id.*
197. *Witters II*, 771 P.2d at 1122.
198. *Id.*
199. *Id.* (emphasis in original).
200. *Id.*
201. 48 P.3d 274.
202. *Id.* at 276.
203. *Id.*

the EOG Program's religious exclusion."[204] Under this exclusion, both the student and the university's financial aid office had to agree that the university program could not mandate that a student "be enrolled in any program that includes religious worship, exercise, or instruction."[205] In addition, the student was prohibited from "pursuing any degree in religious, seminarian, or theological academic studies while receiving the EOG."[206] The university's financial aid office further had to certify that the student would not be "enrolled for any classes that include any religious worship, exercise, or instruction."[207] Private institutions participating in the program could not directly apply the funds to a participating student's account; the funds had to first be provided to the student, who could then disburse the funds to his or her educational institution.[208]

The program was challenged on the grounds that it violated both the First Amendment's guarantee against the establishment of religion and Articles I, § 11, VIII, § 5 (a prohibition on the state loaning credit to any individual or organization), and IX, § 4 of the Washington Constitution.[209] The *Grimm* court, following *Weiss* and *Graham*, struck down the EOG program as a violation of Article IX, § 4.[210] The case was appealed to the state supreme court, which reversed the trial court and ruled that the EOG program was permissible under both the state and federal constitutions.[211] In its decision, the supreme court focused most intently on Article IX, § 4, holding that the provision does not apply to institutions of higher education, and overruling those portions of *Weiss* and *Graham* that had held otherwise.[212]

The court did not end its examination of the constitutionality of the EOG with its exploration of Article IX, § 4.[213] The court went on to examine the impact of Article I, § 11, finding that the EOG program did not run afoul of Article I, § 11's requirements.[214] The court provided a detailed overview of the article, particularly as interpreted in previous case law.[215] The court found that Article I, § 11 was dedicated to preventing religious establishment and state-funded "religious instruction."[216] Looking at the requirements of the EOG program, the court found that the program supported neither an establishment of religion nor religious instruction.[217] In a strongly worded section, the court rejected any effort to "conflate" Article I, § 11 with Article IX, § 4, holding that the two sections

204. *Id.* at 277.
205. *Id.* at 285 (citing former Wash. Rev. Code § 28B.101.040 (1993)).
206. *Gallwey*, 48 P.3d at 278 (quoting Clerk's Paper at 1082).
207. *Id.* at 278.
208. *Id.*
209. *Id.*
210. *Id.* at 278-79.
211. *Gallwey*, 48 P.3d at 288.
212. *Id.* at 280-84.
213. *Id.* at 287.
214. *Id.*
215. *See id.* at 284-87.
216. *Gallwey*, 48 P.3d at 285.
217. *Id.* at 288.

should be applied differently, with Article IX, § 4 being applied with more "rigorous scrutiny" when evaluating programs that impacted public schools, and Article I, § 11 being applied in a more "even-handed" fashion in regards to "all challenges" arising under its provisions.[218]

While there is no doubt that the court's decision in *Gallwey* draws a clear distinction between Article I, § 11 and Article IX, § 4,[219] that distinction in no way undermines the fact that the two provisions are connected both in purpose and in motivation. The court rightly drew a distinction between the two provisions that had been obscured in earlier case law involving public funding for tuition assistance to students attending private religious educational institutions.[220] Article I, § 11, which prohibits any use of public funds or property to support religious instruction or activity, by its very wording is broader than Article IX, § 4, which applies to ensuring that public schools are free from "sectarian control or influence."[221] As the court in *Gallwey* points out, this difference in wording affects the mechanics of how the provisions should be applied when dealing with questions of government aid to higher education.[222] But this distinction does not mean that the two provisions are not, in origin and meaning, linked. As the histories of the Blaine Amendment and the Washington Constitution show, both Article I, § 11 and Article IX, § 4, along with Article XXVI, had a common core purpose, which was to prevent the use of public funds to assist in the propagation of sectarian ideology, either in the public schools or through state-assisted private religious educational efforts.[223] Both constitutional articles further this purpose in different ways, but are united in this central concern. The court itself underscores the linkage between the two provisions in its description of the hermeneutical mechanics of applying both provisions, stating clearly that its "even-handed" approach to Article I, § 11 will not result in any breaches of the wall between church and state as far as the public schools are concerned because Article IX, § 4 remains to protect such separation.[224] The two articles, in effect, work together, with Article IX, § 4 providing backup for any lapses in non-sectarianism that might be engendered by a neutral application of Article I, § 11. The two articles working together effectuate the exact sort of preclusion of government aid for religious education or instruction that motivated the various versions of the Blaine Amendment in the nineteenth-century.

V. CONCLUSION

This article has sought to demonstrate that there are strong reasons to regard Article I, § 11 of the Washington Constitution as being both textually and

218. *Id.* at 286-87.
219. *Id.*
220. *Id.*
221. *Compare* Wash. Const. art. I, § 11 *with* Wash. Const. art. IX, § 4.
222. *Gallwey*, 48 P.3d at 287.
223. *See supra* nn. 138-39, 152 and accompanying text.
224. *Gallwey*, 48 P.3d at 287.

ideologically linked to the three versions of the failed Blaine Amendment. Ideologically, the text of Article I, § 11 closely parallels the concerns that were part and parcel of the common school movement of the nineteenth-century, the movement that propelled the Blaine Amendment to national prominence. The language of Article I, § 11 closely parallels language that was included in the various versions of the Blaine Amendment. Although unlike Articles IX, § 4 and XXVI, Article I, § 11 was not mandated for inclusion in the state constitution by the Enabling Act of 1889, its inclusion was strongly supported by the Washington State Constitutional Convention, a convention dominated by Republicans loyal, both personally and ideologically, to the sponsor of the Blaine Amendment, James Blaine. In addition, the Washington Supreme Court has consistently viewed Article I, § 11 as a linked provision, at least as far as public funding for education is concerned, with Article IX, § 4, a provision of the Washington Constitution which very clearly has its origins in the Blaine Amendment and the Enabling Act of 1889. This linkage is apparent in the early cases applying the two articles. Even in the recent case of *Gallwey v. Grimm*, the court's attempt to create some interpretational differentiation between the two provisions has only strengthened the interdependence of the two provisions, at least as far as guaranteeing the separation of church and state in regards to public education is concerned. Despite the U.S. Supreme Court's dismissive footnote in *Locke v. Davey*, there are very good reasons indeed to consider Article I, § 11 as a Blaine amendment provision contained within Washington's state constitution.