

Winter 2007

Dusting off the Blaine Amendment: Two Challenges to Missouri's Anti-Establishment Tradition

Aaron E. Schwartz

Follow this and additional works at: <https://scholarship.law.missouri.edu/mlr>



Part of the [Law Commons](#)

Recommended Citation

Aaron E. Schwartz, *Dusting off the Blaine Amendment: Two Challenges to Missouri's Anti-Establishment Tradition*, 72 Mo. L. REV. (2007)

Available at: <https://scholarship.law.missouri.edu/mlr/vol72/iss1/16>

This Comment is brought to you for free and open access by the Law Journals at University of Missouri School of Law Scholarship Repository. It has been accepted for inclusion in Missouri Law Review by an authorized editor of University of Missouri School of Law Scholarship Repository. For more information, please contact bassettcw@missouri.edu.

COMMENT

Dusting off the Blaine Amendment: Two Challenges to Missouri's Anti-Establishment Tradition

*Aaron E. Schwartz**

I. INTRODUCTION

Using broad strokes to paint the rights and protections granted therein, the free exercise and the establishment clauses stand as dual monuments to the great-American experiment in separating the State and the sacred.¹ Their elegant and sparse language is contrasted by particular manifestations of similar interests in the State constitutions. The command that the state may not fund religiously affiliated educational institutions is the most common in the State Constitutions.² No fewer than thirty-eight states, including Missouri, adopted a so-called "Blaine Amendments" which prevent states from support-

* J.D., 2006, University of Missouri-Columbia School of Law; B.A., 2002, University of Wisconsin-Madison. The author thanks Kory Stubblefield and Courtney Stirrat for their invaluable assistance and encouragement. The author would also like to thank Professor Carl Esbeck for reviewing this comment in the spring of 2006. Any errors are, of course, my own.

1. Jefferson called it a "bold" and "novel experiment." THOMAS JEFFERSON, BILL FOR THE ESTABLISHMENT OF RELIGIOUS FREEDOM IN VIRGINIA (1779).

2. *See* *Locke v. Davey*, 540 U.S. 712, 722 (2004) ("Since the founding of our country, there have been popular uprisings against procuring taxpayer funds to support church leaders, which was one of the hallmarks of an 'established' religion."). *See* R. BUTTS, THE AMERICAN TRADITION IN RELIGIOUS AND EDUCATION 15-17, 19-20, 26-37 (1950); F. LAMBER, THE FOUNDING FATHERS AND THE PLACE OF RELIGIOUS IN AMERICA 188 (2003) ("In defending their religious liberty against overreaching clergy, Americans in all regions found that Radical Whig ideas best framed their argument that state-supported clergy undermined liberty of conscience and should be opposed."). *See also* Appendix, *Everson v. Bd. of Educ.*, 330 U.S. 1, 65-66 (1947) (stating "the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever").

ing sectarian or religious schools.³ Employing more detail than its federal counterpart, Missouri's constitution made explicit the separation of church and state in funding religious education.⁴ Missouri's Blaine Amendment reads:

Neither the general assembly, nor any county, city, town, township, school district or other municipal corporation, shall ever make an appropriation or pay from any public fund whatever, anything in aid of any religious creed, church or sectarian purpose, or to help to support or sustain any private or public school, academy, seminary, college, university, or other institution of learning controlled by any religious creed, church or sectarian denomination whatever; nor shall any grant or donation of personal property or real estate ever be made by the state, or any county, city, town, or

3. Rita-Anne O'Neil, Note, *The School Voucher Debate after Zelman: Can States be Compelled to Fund Sectarian Schools under the Federal Constitution?*, 44 B.C. L. REV. 1397, 1403 (2003).

A note on the etymology of the term "Blaine Amendment" is necessary. Maine Congressman James G. Blaine proposed an amendment to the United States Constitution that would have prohibited the appropriation of state or federal funds to "sectarian" schools. Steven K. Green, *The Blaine Amendment Reconsidered*, 36 AM. J. LEGAL HIST. 38, 38 (1992). Although it passed the House, the amendment was stopped in the Senate. *Id.*

Many incorrectly believe Congressman Blaine acted with anti-Catholic motives in attempting to limit the use of public funds for parochial schools. The historical evidence tends to show the opposite. Blaine sent two of his daughters to Catholic boarding school and claimed not to be anti-Catholic, instead wishing merely "to remove the school issue from the public forum." *Id.* at 54 & n.103. Stating further "[t]his adjustment, it seems to me, would be comprehensive and conclusive, and would be fair alike to Protestant and Catholic, to Jew and Gentile, leaving the religious faith and the conscious of every man free and unmolested." JAMES P. BOYD, LIFE AND PUBLIC SERVICES OF HON. JAMES G. BLAINE 353 (1893). See also DENIS BRIAN, PULITZER: A LIFE 93 (2001) ("In fact, Blaine was not anti-Catholic, his mother was Catholic and his sister the Mother Superior of a Convent. But his silence implied otherwise, and even convinced some that the Republican Party had an anti-Catholic bias.").

By using the term "Blaine Amendment" to refer generally to similar provisions in state constitutions, this comment makes no assertion of a connection between the Congressman's efforts on the national level and the prohibitions on funding religious schools in the Missouri and other state constitutions.

4. *Paster v. Tussey*, 512 S.W.2d 97, 101-02 (Mo. 1974) (stating that "it becomes readily apparent that the provisions of the Missouri Constitution declaring that there shall be a separation of church and state are not only more explicit but more restrictive than the Establishment Clause of the United States Constitution").

other municipal corporation, for any religious creed, church, or sectarian purpose whatever.⁵

Since their inception in the state constitutions, the Blaine amendments remained in semi-deep-freeze. The intricate question of the proper boundary between church and state in the public financing of religious education was left to the federal religion clauses. However, in a recent decision, the United States Supreme Court shifted the question of the permissibility of state funding for religious schools to the state constitutions.⁶ For many types of programs, the Blaine amendments, no longer overshadowed by their oblique federal counterparts, stand as the last significant barrier to the use of State resources for private, sectarian schools.

Since the federal hurdles have subsided, a significant coalition of State legislators has attempted to directly or indirectly fund sectarian educational institutions over the last several years.⁷ Their efforts raise two questions. First, is it wise to fund religious schools? This is a question properly reserved for policy makers and remains unanswered by this comment. Secondly, assuming the political will is insufficient to repeal Missouri's Blaine Amendment, is it constitutionally permissible to support religious schools through either a voucher program by declaring the Blaine Amendment violative of the federal free exercise clause or by avoiding the Blaine Amendment with the use of a tax benefit for parochial schools?

Neither of these two challenges to Missouri's Blaine Amendment, a tax scheme or a free exercise challenge is likely to succeed. A federal Free Exercise challenge to a voucher program based on the denial of a generally available benefit due to religious use is bound to fail.⁸ Additionally, a Free Exercise challenge based on the anti-Catholic motives of the drafters of the Missouri Blaine Amendment is unsupported and likely historically inaccurate. Little evidence links the 1875 Missouri Blaine Amendment with the anti-Catholic bigotry which is often associated with the failed National Blaine Amendment and Blaine Amendments in other states.⁹ Even less evidence of

5. MO. CONST. art. IX, § 8.

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

7. *See infra* notes 160-68.

8. *See Locke v. Davey*, 540 U.S. 712 (2004) (holding that states have compelling interests in withholding education funds from those who would use it for sectarian education).

9. *See also Mitchell v. Helms*, 530 U.S. 793, 828-29 (2000) (stating in the plurality decision "hostility to aid to pervasively sectarian schools has a shameful pedigree that we do not hesitate to disavow. . . . Opposition to aid to 'sectarian' schools acquired prominence in the 1870's with Congress's consideration (and near passage) of the Blaine Amendment, which would have amended the Constitution to bar any aid to sectarian institutions. Consideration of the amendment arose at a time of pervasive hostility to the Catholic Church and to Catholics in general, and it was an open secret that 'sectarian' was code for 'Catholic.'"); *cf. State ex rel. Pittman v. Adams*, 44 Mo.

religious bigotry is available for the Blaine Amendment readopted in the 1945 Missouri constitution. Furthermore, any number of tax schemes supporting religious schools are likely impermissible in Missouri because a tax credit is equivalent to a grant of public funds, tax benefits help “sustain or support” religious schools, and even indirect aid to parochial schools is impermissible.¹⁰

II. THE CONSTITUTIONAL LANDSCAPE

A. The Establishment Clause: Opening the Flood-Gates

Prior to the United States Supreme Court’s landmark decision of *Zelman v. Simmons-Harris*,¹¹ the Establishment Clause served as a stout federal bulwark against the use of state funds for religious purposes.¹² At one point in its evolving jurisprudence, the Supreme Court even went so far as to announce “no tax in any amount . . . can be levied to support any religious activities or institutions.”¹³ After *Zelman*, the Establishment Clause’s barrier was significantly lowered, at least for the use of public funds for religious purposes in the context of school voucher programs.¹⁴

570, 574, 577 (Mo. 1869) (equating the Methodist Episcopal church with the word “sectarian” a mere six years prior to the enactment of the Missouri Blaine Amendment) and *St. James Military Acad. v. Gaiser*, 28 S.W. 851 (Mo. 1894) (equating the word sectarian with the Episcopal church nineteen years after the enactment).

10. *Curchin v. Mo. Indus. Dev. Bd.*, 722 S.W.2d 930 (Mo. 1987).

11. 536 U.S. 639 (2002).

12. *Id.* at 688 (Souter, J., dissenting).

13. *Everson v. Bd. of Educ.*, 330 U.S. 1, 16 (1947).

14. Of course, this sea change in Establishment Clause jurisprudence did not occur overnight. *See Zelman*, 536 U.S. at 688-89 (Souter, J., dissenting).

In the period from 1947 to 1968, the basic principle of no aid to religion through school benefits was unquestioned. Thereafter for some 15 years, the Court termed its efforts as attempts to draw a line against aid that would be divertible to support the religious, as distinct from the secular, activity of an institutional beneficiary. Then, starting in 1983, concern with divertibility was gradually lost in favor of approving aid in amounts unlikely to afford substantial benefits to religious schools, when offered evenhandedly without regard to a recipient’s religious character, and when channeled to a religious institution only by the genuinely free choice of some private individual. Now, the three stages are succeeded by a fourth, in which the substantial character of government aid is held to have no constitutional significance, and the espoused criteria of neutrality in offering aid, and private choice in directing it, are shown to be nothing but examples of verbal formalism.

Id.

In *Zelman*, the Ohio legislature established a school voucher program to supplement its failing Cleveland School District.¹⁵ Tuition aid was distributed to economically disadvantaged students so they could attend better functioning public schools and secular and religious private schools.¹⁶ The overwhelming majority of students who took advantage of the tuition voucher used it to attend religious schools.¹⁷ After a group of Ohio taxpayers complained the program violated the federal Establishment Clause, the Sixth Circuit held the program impermissibly had the “primary effect” of advancing religion and therefore violated the Establishment Clause.¹⁸

In overturning the Sixth Circuit, Chief Justice Rehnquist wrote that the Ohio voucher program involved “a program of true choice,” therefore, did not violate the Establishment Clause.¹⁹ The Court noted that the Establishment Clause prohibits states from enacting several types of funding plans for parochial schools. First, states are prohibited from enacting plans with the “purpose” of advancing or inhibiting religion.²⁰ Secondly, there still must be a “genuine and independent” choice for individuals using funds between religious and secular institutions.²¹ In *Zelman*, students could take the same tuition assistance to a secular public or private school.²² Third, states are prohibited from enacting programs which create excessive entanglement between church and state.²³

Following *Zelman*, a variety of funding models do not violate the United States Constitution’s Establishment clause. A voucher program giving the

15. *Id.* at 643-44 (majority opinion).

16. *Id.* at 645.

17. *Id.* at 647.

18. *Zelman*, 234 F.3d 945, 948-61 (6th Cir. 2000). Under the pre-*Zelman* regime, a statute which incidentally aids religion will be held not to violate the Establishment Clause only if (1) the statute has a secular legislative purpose, (2) the principal or primary effect neither advances nor inhibits religion, and (3) the statute does not foster excessive entanglement with religion. *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971).

19. *Zelman*, 536 U.S. at 662-63.

20. *Id.* at 648-49 (relying on *Agostini v. Felton*, 521 U.S. 203, 222-23 (1997)).

21. *Id.* at 649. See also Jason S. Marks, *Spackle for The Wall? Public Funding for School Vouchers After Locke v. Davey*, 61 J. MO. B. 150, 150 (2005).

22. *Zelman*, 536 U.S. at 655. The court found irrelevant that the overwhelming majority (96%) of students used those funds at religious schools. *Id.* at 658-59 (citing *Mueller v. Allen*, 463 U.S. 388, 401 (2000) and *Mitchell v. Helms*, 530 U.S. 793, 812 n.6) (“[*Agostini*] held that the proportion of aid benefiting students at religious schools pursuant to a neutral program involving private choices was irrelevant to the constitutional inquiry.”).

23. *Id.* at 668. While the Supreme Court has excised the “excessive entanglement” prong as a separate prong of the test it still survives as a component of the primary effect prong. *Id.* at 668-69 (“[W]e folded the entanglement inquiry into the primary effect inquiry. This made sense because both inquiries rely on the same evidence.”).

parents of the student a true choice between a secular and sectarian education no longer violates the Establishment Clause.

As *Zelman* blessed the use of school voucher programs, the federal Establishment Clause no longer serves as an ironclad barrier between church and state in the arena of parochial school funding. "*Zelman* [was] the first case in which a majority of the Court has sanctioned direct public funding of schools whose *modus vivendi* is to inculcate religious values, beliefs and teachings in their students."²⁴ For all but the rare case of inartfully drawn or overreaching voucher programs, only state constitutions stand in the way of the use of public funds for private religious schools.

B. The Post-Zelman Establishment Clause: Down, but Not Out

While the fight over public funding of sectarian schools is likely to be waged on state constitutional grounds, several key aspects of the federal Establishment Clause still limit funding for religious schools.

1. True Choice for Statewide Sectarian School Funding?

Zelman dealt exclusively with a voucher program enacted in a small geographic location.²⁵ However, many of the programs proposed in Missouri, voucher or tax credit, concern state-wide initiatives. A specific finding of fact in *Zelman* noted students had a variety of choices in their education.²⁶ Under *Zelman* real choice between religious and secular is required.²⁷ In *Zelman*, real choice was available, because each individual recipient of a school voucher could choose between a wide variety of public and private sectarian and non-sectarian schools.²⁸

Like most states, Missouri is comprised largely of rural areas, and it is therefore highly unlikely a true choice can be provided to all residents of the State. Economies of scale will not provide individuals in isolated areas with a variety of schools. It is probable in many areas only one well functioning school will be available. Any statewide program would certainly create instances where the superior education alternative would be a sectarian school.

24. Jason S. Marks, *What Wall? School Vouchers and Church-State Separation after Zelman v. Simmons-Harris*, 58 J. Mo. B. 354, 354 (2002).

25. *Zelman*, 536 U.S. at 643-44.

26. *Id.* at 655.

27. A program will generally not violate the Establishment Clause if it is "neutral with respect to religion, and provides assistance directly to a broad class of citizens who, in turn, direct government aid to religious schools wholly as a result of their own genuine and independent private choice." *Id.* at 652.

28. "There also is no evidence that the program fails to provide genuine opportunities for Cleveland parents to select secular educational options for their school-age children." *Id.* at 655.

The state would thus be tacitly encouraging students to attend religious schools. This is problematic under *Zelman*.

Furthermore, *Zelman* did not tell us if the Establishment Clause mandates real choice as between religions. The Establishment Clause will not permit the favoring of one religion over another.²⁹ Imagine a rural area with a single family of a minority religion. The student has a choice of attending a failing public school or a largely successful religious school of the majority religion. Does the minority family have a true choice, as *Zelman* mandates? The minority student will either be sentenced to an inadequate public school or a private religious school of a religion with which he disagrees. This blatantly favors the majority religion and disfavors the minority. Accordingly, as voucher programs and tax schemes expand beyond select areas with high population densities questions as to the propriety of funding of religious schools under the Establishment Clause will continue to rise.

2. Excessive Entanglement: How Much is Too Much?

Few concepts are more deeply embedded in the fabric of our national life and shared history, than that the government exercise at the very least this kind of "benevolent neutrality toward churches and religious exercise generally so long as none was favored over others and none suffered interference."³⁰ Unlike the deduction for a donation to a church, the tax benefit for a donation or tuition reimbursement to a church-affiliated school will invariably seek to place restrictions on the schools: who they should hire and on what basis, who they should admit, safety and accessibility regulations, and regulations on curriculum and accreditation. Doing such increases conflict between church and state. Most tax benefit and voucher programs have the potential to place governmental restrictions on those schools: who they should hire, which students they should admit, safety regulations, and regulations on curriculum and accreditation. Doing such increases conflict between church and state.

Walz v. Tax Commissioner illuminates this matter.³¹ In that case, New York granted a property tax waiver for religious organizations.³² A taxpayer argued this was essentially a grant of public funds and thus violated the federal Establishment Clause.³³ Although the case dealt with the Establishment Clause, and not a state Blaine Amendment, the Court discussed exemptions from generally applicable tax regulations which benefited religious institu-

29. "The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Larson v. Valente*, 456 U.S. 228, 244 (1982).

30. *Walz v. Tax Comm'n of N.Y.*, 397 U.S. 664, 676-77 (1970).

31. 397 U.S. 664 (1970).

32. *Id.* at 666-67.

33. *Id.* at 667.

tions.³⁴ The Court determined that the controlling interest is limiting the state's involvement with the religious organizations.³⁵ The Court stated:

[e]ither course, taxation of churches or exemption, occasions some degree of involvement with religion. Elimination of exemption would tend to expand the involvement of government by giving rise to tax valuation of church property, tax liens, tax foreclosures, and the direct confrontations and conflicts that follow in the train of those legal processes. Granting tax exemptions to churches necessarily operates to afford an indirect economic benefit and also gives rise to some, but yet a lesser, involvement than taxing them. In analyzing either alternative the questions are whether the involvement is excessive, and whether it is a continuing one calling for official and continuing surveillance leading to an impermissible degree of entanglement.³⁶

The court sought to limit "sustained and detailed administrative relationships for the enforcement of statutory or administrative standards" between religious organizations and the state.³⁷ Exemptions tend to augment this interest. The property tax deviation was acceptable, because it limited, rather than generated, entanglement between the acts of the church and the state. The state no longer had a need for tax liens, assessments, and foreclosures on church property.

In this respect, the deduction made for donation to a church and the tax credit to the attached church school for tuition paid or tuition voucher are likely to be antithetical. The grant of state benefits would presumably come with strings attached: accreditation, anti-discrimination, textbook selection, and health and safety standards.³⁸ For instance, Missouri currently has the power to define portions of a sectarian school's curriculum.³⁹ That power can be expanded and is more likely to expand with an increase of state funds. Increased state regulation of religious schools would create a host of new relations between the sectarian institution and the state and would be the antithesis of the "benevolent neutrality" sought in *Walz*.⁴⁰ We can contrast the types of regulation likely with a voucher program with the benevolent neu-

34. *Id.* at 674-75.

35. *Id.*

36. *Id.*

37. *Id.* at 675.

38. It seems likely that any legislature that passes a bill supporting or sustaining a religiously affiliated educational institution will seek to exercise at least a minimal amount of control over these institutions.

39. See MO. REV. STAT § 170.011 (2000) (requiring each school in the state of Missouri to teach the Missouri and United States Constitutions, American History, and the racial equality movement).

40. *Walz*, 397 U.S. at 669.

trality of the usual deduction for donations to religious organizations creates virtually no state involvement with the sectarian institution's operations.⁴¹ Legislators rarely expend huge amounts of funds without some assurance they will be spent properly. Strings-attached vouchers and tax incentives, however, will increase conflict between religious institutions and the state.

C. Arthritic Joints: Free Exercise and Federal Disharmony

While the Establishment Clause may preclude some types of state funding for religious schools, the Free Exercise Clause may compel other types of support for religious institutions. The religion clauses, if read literally, create an irrational scheme.⁴² If each were extended to its logical conclusion, each would obliterate the other.⁴³ The Supreme Court has described this conflict:

[T]he Establishment Clause and the Free Exercise Clause are frequently in tension. Yet we have long said that "there is room for play in the joints" between them. In other words, there are some

41. See I.R.C. § 501(c)(3). The state, in practice, has only two contacts with the religious organization. First, it must determine whether the organization is a bona fide religious organization, and, second, whether the organization is engaging in prohibited legislative or political activity. See I.R.C. § 501(h).

42. "[The two religion clauses] are cast in absolute terms, and either of which, if expanded to a logical extreme, would tend to clash with the other." *Cutter v. Wilkinson*, 544 U.S. 709 (2005) (quoting *Walz v. Tax Comm'n of N.Y.*, 397 U.S. 664, 668-69 (1970)). While the clauses have "complementary values, they often exert conflicting pressures." *Id.* at 719.

43. Professor Carl Esbeck is incorrect when he argues that conflict between the two religion clauses is impossible because they are both negative restraints on the government. Carl H. Esbeck, "*Play in Joints between the Religion Clauses*" and *Other Supreme Court Catachreses*, 34 HOFSTRA L. REV. 1331, 1333 (2006). While his statement might ring true in a hypothetical country without taxation, expenditures, or State preference, it ignores the complex role the State and Federal governments play. The possibility of uneven taxation and spending generates the conflict between the two clauses, not the flat language of the clauses themselves.

Imagine a generally available direct state funding for private schools. While the establishment clause may compel a State to deny funding to a religious private school operated by a church (because to grant the funding would funnel state funds to religious instructors, a "hallmark of establishment," see *infra* note 3), the free exercise clause would tend to push the state to distribute the funding to the religious schools (because to deny to funding would be discrimination based on religion and an impede free exercise).

Professor Esbeck seems to arrive at his conclusion because of his apparent distrust in "nine unelected justices" to balance the interests enshrined by the two clauses. Maybe he would have more faith in the justices if we subjected them to partisan elections. Or maybe his qualm is not with excessive judicial power in balancing the competing federal religion clauses but at *Marbury v. Madison*.

state actions permitted by the Establishment Clause but not required by the Free Exercise Clause.⁴⁴

School voucher programs and tax benefits for religious schools exist in the space between the two interests. The denial of a generally available benefit for the explicit purpose of choosing not to fund religion implicates this play. The state has a non-establishment interest in not funding religion; the individual has free exercise interest in being free from discrimination based on his religious choices.

1. Free Exercise and the Intent of the Drafter

Determining if a state or local ordinance violates the Free Exercise Clause involves a variety of factors, including the statute's explicit reference to religious practice, its disparate effect on a particular religious practice, and whether it targets a religion.⁴⁵ The Supreme Court told us recently to examine the intent of the drafters to determine if a law violates the Free Exercise Clause: "[T]he First Amendment forbids an official purpose to disapprove of a particular religion or of religion in general."⁴⁶

In *Church of Lukumi Babalu Aye v. City of Hialeah*, the Supreme Court struck down a city ordinance prohibiting animal sacrifice.⁴⁷ The Court noted the Free Exercise protections were applicable to the ordinance because it criminalized religious conduct.⁴⁸ The laws in question were drafted in response to the opening of a new Santerian religious center and affected virtually no other group than the Santerians.⁴⁹ Furthermore, the laws in question were not sufficiently narrowly tailored.⁵⁰ The legitimate ends of the statute, reducing the health risks associated with slaughtering uninspected animals raised in unsanitary conditions, emotional injury to juveniles who would be exposed to the ritual slaughter of the animals, protecting the animals themselves from unnecessarily cruel treatment and slaughtering methods, and the restriction of sacrifice to areas zoned for animal slaughter,⁵¹ could have been met without the severe burden on the Santerians.⁵²

44. *Locke v. Davey*, 540 U.S. 712, 718-19 (2004). *See also* *Bush v. Holmes*, 886 So. 2d. 340, 364 (Fl. Dist. Ct. App. 2004) (citations omitted).

45. The Free Exercise Clause is applicable to the states via the Fourteenth Amendment. *See Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940).

46. *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993).

47. *Id.* at 531-32.

48. *Id.* at 532-33.

49. *Id.* at 535-36 ("Santeria alone was the exclusive legislative concern.").

50. *Id.* at 538.

51. *Id.* at 529-530.

52. *Id.* at 536

While a clear majority of the *City of Hialeah* Court agreed the ordinances in question impermissibly targeted Santerian religious practices,⁵³ the Court disagreed as to the importance of evidence of the subjective intent of the drafters of the law.⁵⁴ Justice Kennedy explicitly argued when determining if an ordinance is neutral, the courts should look to the intent of the drafters.⁵⁵ They would use sources including “historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by the members of the decisionmaking body.”⁵⁶ Two Justices, however, explicitly argued the contrary.

The argument for investigating subjective intent of the drafter controlled a majority of the Court. It concluded, “[l]egislators may not devise mechanisms, *overt or disguised, designed* to persecute or oppress a religion or its practices.”⁵⁷ Justice Scalia and Chief Justice Rehnquist disagreed, stating that the primary, and possibly only evidence that should be used to determine if a law violates the Free Exercise Clause is the text of the law itself;⁵⁸ not the subjective motives of the drafters.⁵⁹ Justices Souter, Blackmun, and O’Connor did not reach the question.⁶⁰ Those Justices did, however, insinuate

“It suffices to recite this feature of the law as support for our conclusion that Santeria alone was the exclusive legislative concern. The net result of the gerrymander is that few if any killings of animals are prohibited other than Santeria sacrifice, which is proscribed because it occurs during a ritual or ceremony and its primary purpose is to make an offering to the *orishas*, not food consumption. Indeed, careful drafting ensured that, although Santeria sacrifice is prohibited, killings that are no more necessary or humane in almost all other circumstances are unpunished.”

Id.

53. *Id.* at 534, 542.

54. *Id.* at 540.

55. *Id.*

56. *Id.*

57. *Id.* at 447 (emphasis added).

58. This dissent, however, leaves room for the possibility of looking to the intent of the drafters. It states “[p]erhaps there are contexts in which determination of legislative motive *must* be undertaken.” *Id.* at 558 (Scalia, J., dissenting). *See also, e.g.,* *United States v. Lovett*, 328 U.S. 303 (1946). “But I do not think that is true of analysis under the First Amendment. The First Amendment does not refer to the purposes for which legislators enact laws, but to the effects [The Free Exercise Clause] does not put us in the business of invalidating laws by reason of the evil motives of their authors.” *City of Hialeah*, 508 U.S. at 558 (Scalia, J., dissenting).

59. *Id.*

60. *Id.* at 561-62, 577. The concurring Justices argued the city of Hialeah did not make sufficient accommodation for the Santeria’s religious practice. *Id.* at 578 (Blackmun, J., concurring).

it is acceptable to use circumstantial evidence to look to the subjective intent of the drafters in a free exercise challenge.⁶¹

Once the Court determined the statute was not neutral, it applied strict scrutiny.⁶² The law must address “‘interests of the highest order’ and must be narrowly tailored in pursuit of those interests.”⁶³ The ordinance did not meet this standard because it was not narrowly tailored: the legislature did not further the purported governmental interest without needlessly prohibiting religious conduct. Nor did the City of Hialeah prove its interests were compelling.⁶⁴

A law neutral towards a particular religion or religion in general is one that does not target religion and generally is applicable to all persons. Such a law does not require a compelling governmental interest to justify it.⁶⁵ There is no violation of the Free Exercise Clause “if prohibiting the exercise of religion . . . is not the object of the [governmental burden] but merely the incidental effect of a generally applicable and otherwise valid provision.”⁶⁶ However, if the object or motive of the drafters of the law was to infringe a right to practice religion, the law is not neutral.⁶⁷ Even if a law is not neutral and generally applicable, it still would not violate the Free Exercise Clause if the law is justified by a compelling state interest and the means for satisfying that compelling state interest are narrowly tailored.⁶⁸

As held in *City of Hialeah*, determination that a statute is not neutral does not end with a cursory review of the language of the statute. Even if a statute is silent as to religion, it still may violate the Constitution if it targets a religion or in practice is only applied to a particular religion. The language of the statute is a mere starting point.⁶⁹ The intent of the drafters must be considered.⁷⁰ A law is not facially neutral if it refers to a religious practice with-

61. “The point here is the unremarkable one that our common notion of neutrality is broad enough to cover not merely what might be called formal neutrality, which as a free-exercise requirement would only bar laws with an object to discriminate against religion [F]ormal neutrality would permit enquiry also into the intentions of those who enacted the law.” *Id.* at 561-62 & n.3. (Souter, J., concurring). And, “I write separately to emphasize that the First Amendment’s protection of religion extends beyond those rare occasions on which the government explicitly targets religion.” *Id.* at 577 (Blackmun, J., concurring).

62. *Id.* at 546.

63. *Id.*

64. *Id.*

65. *See* *Employment Div., Dep’t of Human Res. of Ore. v. Smith*, 494 U.S. 872 (1990).

66. *Id.* at 878.

67. *Id.* at 878-79.

68. *City of Hialeah*, 508 U.S. at 531-32.

69. *Id.* at 534 (stating “[w]e reject the contention advanced by the city that our inquiry must end with the text of the laws at issue”) (citation omitted).

70. *Cf. U.S. v. O’Brien*, 391 U.S. 367, 383 (1968) (stating, while discussing free speech,

out reference to a secular means.⁷¹ Compliance with the Free Exercise Clause cannot be met with artful drafting of discriminatory statutes; instead the law looks to intent of the drafters.⁷²

However, if we look into the subjective intent of the drafters, we create a host of new questions concerning the appropriate method for doing so. By what standard should we judge the intent of legislators? Do we need to find positive proof the requisite number of legislators passed the law without discriminatory motive? Should we presume a legislator acted on nondiscriminatory motives? Assume there were one hundred senators and fifty votes were needed for passage. Further assume the bill passed with seventy votes: twenty-five had strong, well-known anti-Catholic feelings and another twenty five had well known anti-establishment grounds. We know nothing of the other twenty. To what may the court attribute the votes of the other twenty senators? Do we need determine which is the predominant of multiple motives in a single legislature, or should that legislator be counted as acting on discriminatory motives if the legislators had even a fraction of discriminatory intent? Politicians generally make multiple political calculations to produce one act or vote. Do we consider only "pivotal" legislators?⁷³ How do we count legislators who did not vote for the law for either a benevolent or discriminatory purpose, but rather was simply trying to appeal to his constituency? Furthermore, how could the court determine the subjective intent of a drafting body that has not existed for over 130 years? The court's jurisprudence to date has provided no satisfying answer these questions.

Placing criticism aside, the fact remains that these subjective motives apparently require analysis to determine if the provision violates the Free Exercise Clause. However, because of the innate difficulty in ascertaining the true motive of the drafters and the less than overwhelming precedential authority for looking to that intent, something more than mere suspicion of big-

[i]t is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive "The decisions of this court from the beginning lend no support whatever to the assumption that the judiciary may restrain the exercise of lawful power on the assumption that a wrongful purpose or motive has caused the power to be exerted.").

But see *Romer v. Evans*, 517 U.S. 620, 633 (1996) (stating, in an equal protection case, "If the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest."). Under *Romer*, it is acceptable to look to the intent to the drafters to determine if that intent was merely to harm the religious minority. *Id.* at 634-35. It is uncertain, but certainly possible, that an in-depth analysis of the intent of the drafters is appropriate when determining a violation of the Free Exercise Clause.

71. *City of Hialeah*, 508 U.S. at 533.

72. *Id.* at 534.

73. McNollgast, *Positive Canons: The Role of Legislative Bargains in Statutory Interpretation*, 80 GEO. L.J. 705, 707 (1992).

otry from a few non-policy makers may be required for a Free Exercise challenge.

2. Approaching State Funding of Sectarian Education

Current Supreme Court Free Exercise jurisprudence does not clearly provide an answer as to the constitutionality of the state Blaine Amendments. We can gain greater understanding the possible success of a free exercise challenge to the Blaine Amendments by examining other cases where state funding for sectarian schools was at issue. In *Locke v. Davey*,⁷⁴ the Court insinuated that the strict scrutiny standard of *City of Hialeah* is inapplicable to some forms of state funding when directed to private religious education.⁷⁵ The majority there held a publicly financed scholarship program explicitly denying scholarship funds for religious education did not violate the Free Exercise Clause of the First Amendment.⁷⁶ When the two religion clauses are in conflict, the Court embarks on a weighing exercise; pitting the state's non-establishment interest against the individual's free exercise interest.

In *Locke*, the Washington legislature initiated a scholarship for postsecondary education with both merit and need selection criteria.⁷⁷ Per statute, and in accordance with the Washington state constitution, which prohibited the use of public funds for religious instruction,⁷⁸ the scholarship could not be used toward "a degree in theology."⁷⁹ The Court noted Washington's non-establishment interest was extremely compelling – no state can be placed in a position where it must subsidize religious education.⁸⁰ This explicit denial of a generally available state benefit due to religious use was held to be non-violative of the Free Exercise Clause.⁸¹ Mere disparate impact between students who would use their tuition grants for devotional instruction and secular instruction is an insufficient reason to invalidate the program. The student of devotional theology in *Locke* was not barred from participating in the public education system; he was merely barred from pursuing a sectarian degree at

74. 540 U.S. 712 (2004).

75. *See id.*

76. *Id.* at 715.

77. *Id.* at 715-16.

78. The Washington Constitution states "[n]o public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment." WASH. CONST. art. I, § 11.

79. *Locke*, 540 U.S. at 716. "Devotional theology" was not defined by statute; however, the parties agreed it meant a degree "devotional in nature or designed to induce religious faith." *Id.*

80. *Id.* at 722-23 ("[W]e can think of few areas in which a State's antiestablishment interests come more into play. Since the founding of our country, there have been popular uprisings against procuring taxpayer funds to support church leaders, which was one of the hallmarks of an 'established' religion.") (citations omitted).

81. *Id.* at 725.

taxpayer expense.⁸² The Court balanced the state's strong nonestablishment interest and the plaintiff's relatively small interest in obtaining a degree in devotional theology at state expense.⁸³ Washington's denial of scholarships based on religious use sails between Scylla and Charybdis; it is a program permitted by the Establishment Clause and not required by the Free Exercise Clause.⁸⁴

However, *Locke* does not foreclose the possibility that other prohibitions on the state aid to religious schools be constitutionally permissible. Chief Justice Rehnquist, writing for the majority, used a single paragraph to distinguish *City of Hialeah* and other presumptively unconstitutional statutes from the scholarship program in *Locke* not subject to strict scrutiny.⁸⁵ The paragraph does not give a clear indication of when each standard ought to be applied, although it notes several instances.⁸⁶ Strict scrutiny should be used when, as in *City of Hialeah*, the state actively seeks to suppress a religious practice and there are criminal or civil sanctions for a violation.⁸⁷ Strict scru-

82. The Court actually noted the statute was relatively tolerant of religious conduct: students using the scholarship could attend pervasively religious schools and take devotional theology classes. *Id.* at 724.

83. *Id.* at 725 ("The State's interest in not funding the pursuit of devotional degrees is substantial and the exclusion of such funding places a relatively minor burden on Promise Scholars. If any room exists between the two Religion Clauses, it must be here.").

84. *Id.* at 718-19. ("In other words, there are some state actions permitted by the Establishment Clause but not required by the Free Exercise Clause.").

85. *Id.* at 720-21.

He contends that under the rule we enunciated in *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, the program is presumptively unconstitutional because it is not facially neutral with respect to religion. We reject his claim of presumptive unconstitutionality, however; to do otherwise would extend the *Lukumi* line of cases well beyond not only their facts but their reasoning. In *Lukumi*, the city of Hialeah made it a crime to engage in certain kinds of animal slaughter. We found that the law sought to suppress ritualistic animal sacrifices of the Santeria religion. In the present case, the State's disfavor of religion (if it can be called that) is of a far milder kind. It imposes neither criminal nor civil sanctions on any type of religious service or rite. It does not deny to ministers the right to participate in the political affairs of the community. And it does not require students to choose between their religious beliefs and receiving a government benefit. The State has merely chosen not to fund a distinct category of instruction.

Id. (citations omitted).

86. *Id.*

87. *Id.*

In *Lukumi*, the city of Hialeah made it a crime to engage in certain kinds of animal slaughter. We found that the law sought to suppress ritualistic animal sacrifices of the Santeria religion. In the present case, the State's disfavor of religion (if it can be called that) is of a far milder kind. It im-

tiny should also be applied when the right to participate in political life is stripped from religious officials.⁸⁸ Finally, the strict standard should be employed when merely holding a particular religious belief operates to deny a government benefit.⁸⁹ However, according to *Locke*, a statute is not presumptively unconstitutional even if it explicitly excludes religious education from generally available education funds because of the state's overriding interest in separation of church and state.⁹⁰

Locke does not provide an answer to the question as to the propriety of the Blaine Amendments.⁹¹ The Washington constitution had a Blaine Amendment;⁹² however, the constitutional provision at issue was the general section on religious liberty.⁹³ No investigation was made into the Blaine Amendment's legislative history and other extrinsic evidence of the intent of the drafters, and no illicit motive was alleged for the general section on religious liberty.⁹⁴ However, the reference to the "history" of the Blaine Amendment insinuates it would be proper to look to the discriminatory subjective intent when interpreting that provision.⁹⁵ For this reason, *Locke* did not foreclose the possibility of a challenge to Missouri's Blaine Amendment.

Free exercise challenges to a Blaine Amendment could have been conceivably mounted in two possible forms. The first line of attack against Missouri's non-establishment tradition argues the Blaine Amendment limits a state benefit based on religion, violating the Free Exercise Clause. For exam-

poses neither criminal nor civil sanctions on any type of religious service or rite.

Id. (emphasis added) (citation omitted).

88. *Id.* ("It does not deny to ministers the right to participate in the political affairs of the community.")

89. *Id.*

90. *Id.* at 720. *But see* Shannon Black, Note, *Locke v. Davey and the Death of Neutrality as a Concept Guiding Religion Clause Jurisprudence*, 19 ST. JOHN'S J. LEGAL COMMENT. 337, 364-65 (2005)

("The reference to religious practice in the statute, coupled with the different treatment afforded to those engaged in that religious practice, should be enough to trigger strict scrutiny under *Lukumi*, even absent ill motive by the state, and despite the state's interest in setting up a stricter separation of church and state than the Federal Establishment Clause provides.")

91. *Locke*, 540 U.S. at 723 n.7.

92. 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").

93. *Id.* art. I, § 11 ("No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment . . .").

94. *Locke*, 540 U.S. at 723 n.7.

95. *Id.* at 723 ("Neither Davey nor *amici* have established a credible connection between the Blaine Amendment and Art. I, § 11, the relevant constitutional provision. Accordingly, the Blaine Amendment's history is simply not before us.")

ple, secular schools are free to receive a benefit, while religious schools are not; this unfairly hampers their religious exercise. This line of attack is foreclosed by *Locke*. Explicit denial of a benefit because of religious use is insufficient when there is no ill motive by the drafters.

The second and still viable possible line of attack argues that the law targets a particular religion rather than religion in general. Even the Supreme Court, has acknowledged the anti-Catholic movement that culminated with the passage of Blaine Amendments in several states.⁹⁶ In *City of Hialeah*, several Supreme Court justices held a particular ordinance violates the Free Exercise Clause if the intent of the drafters was to burden a specific religion.⁹⁷ Some argue that because of the Blaine Amendments' history of manifest anti-Catholic in the 1870s, the amendments intentionally disfavor a particular religion and therefore violate the Free Exercise Clause.⁹⁸ While the face of the Blaine Amendment may apply to all religious schools, the intent, some argue was only to discriminate against Catholics.⁹⁹ If the subjective intent of the drafters of a facially neutral law was to harm a particular religion, that law may violate the Free Exercise Clause.¹⁰⁰

III. THE POLICY: THE PROPRIETY OF FUNDING RELIGIOUS SCHOOLS

Like many issues facing Missouri, the question of funding religious schools presents competing policy interests. Some argue state resources would be better spent revitalizing public schools, while others believe the money could be more efficiently spent by private schools, some with religious affiliation. No attempt is made to resolve the conflict here. The following is a brief outline of the major interests on each side.

The state has a strong interest in the nonestablishment of religion: the maintenance of the wall between church and state. As Justice Stevens has said, "Whenever we remove a brick from the wall that was designed to separate religion and government, we increase the risk of religious strife and weaken the foundation of our democracy."¹⁰¹ Each time we allow greater

96. As the Court said of the origins of the Blaine Amendments, "hostility to aid to pervasively sectarian schools has a shameful pedigree that we do not hesitate to disavow." *Mitchell v. Helms*, 530 U.S. 793, 828 (2000) (plurality).

97. *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546-47 (1993).

98. Robert William Gall, *The Past Should not Shackle the Present: The Revival of a Legacy of Religious Bigotry by Opponents of School Choice*, 59 N.Y.U. ANN. SURV. AM. L. 413, 415-24 (2003).

99. See *infra* note 197 and accompanying text.

100. See *supra* note 96 and accompanying text.

101. *Zelman v. Simmons-Harris*, 536 U.S. 639, 686 (2002) (Stevens, J., dissenting). While speaking about the Establishment Clause, the rationale transfers equally as well to the states' interest in non-establishment.

contact between the state and religious organization, we increase the possibility of the religious strife.

The separation of church and state issue can be examined more closely by breaking the subject into two discrete subissues. First, the machinery of the state ought not to be used to indoctrinate, as doing so harms both the state and the religion.¹⁰² The religion is harmed in that it will no longer be free to govern its own theology and inner workings,¹⁰³ while the state is harmed because its decision making may be clouded by majoritarian religious principles.¹⁰⁴ Second, forcing an individual to support an idea, especially a religious tenet the individual believes to be repugnant. It is tantamount to compelled religious expression.¹⁰⁵ While there is nothing more American than the right to proselytize, the right to proselytize at state expense is not a part of our tra-

102. See Paul A. Freund, *Public Aid to Parochial Schools*, 82 HARV. L. REV. 1680, 1686 (1969). Freund writes,

This risk of intrusion from one side or the other points up a . . . policy embodied in the religious guarantees – mutual abstention – keeping politics out of religion and religion out of politics. The choice of textbooks in any school is apt to be a thorny subject; witness the current agitation over the recognition of the Negro, his contributions and his interests, in the books assigned in public schools. For the identity and integrity of religion, separateness stands as an ultimate safeguard. And on the secular side, to link responsibility for parochial and public school texts is greatly to intensify sectarian influences in local politics at one of its most sensitive points.

Id.

103. See *Paster v. Tussey*, 512 S.W.2d 97, 105 (1974).

[T]here are those that appreciate the great contribution made by persons supporting private schools but, the taxation question aside, believe that religious freedom can be preserved better by not bringing government into the private school -- the latter thought being based on the "carrot and stick" idea that it is common knowledge that acceptance of "government funds" is with certainty immediately followed by "government controls."

Id. See also Thomas Jefferson, Reply to Virginia Baptists (Nov. 21, 1808), available at <http://etext.virginia.edu/jefferson/quotations/jeff1650.htm> ("Moreover, state support of an established religion tends to make the clergy unresponsive to their own people, and leads to corruption within religion itself. Erecting the 'wall of separation between church and state,' therefore, is absolutely essential in a free society.").

104. Steven H. Shiffrin, *Symposium: Law and Cultural Conflict: Liberalism and the Establishment Clause*, 78 CHI.-KENT. L. REV. 717, 719 (2003) (stating the Establishment Clause "protects the autonomy of the state to protect the public interest").

105. See Freund, *supra* note 102, at 1684.

Religion must not be coerced or dominated by the state, and individuals must not be coerced into or away from the exercise or support of religion . . . [T]axpaying families could not be required to support a concededly religious activity; nor could pupils, by the psychological coercion of the schoolroom, be compelled to participate in devotional exercises.

Id.

dition. Taking value from an unwilling taxpayer to support a religious cause which he finds disagreeable approaches compelled exercise. It is invidious to force an individual to support a religion with which he disapproves – much more so than to force him to support beef or mushroom advertisements, as was recently approved by the Supreme Court.¹⁰⁶

While we may allow gentle coercion of government towards religiosity in many areas of public life, these interests become all the more sinister when they are applied to impressionable children. The Missouri Supreme Court noted,

it is the unqualified policy of the State of Missouri that no public funds or properties, either directly or indirectly, be used to support or sustain any school affected by religious influences or teachings or by any sectarian or religious beliefs or conducted in such a manner as *to influence or predispose a school child towards the acceptance of any particular religion or religious beliefs.*¹⁰⁷

The court's primary concern is the indoctrination of the children of Missouri. For a variety of reasons, Missouri has a strong interest in maintaining a strict separation between church and government power, especially when the indoctrination of children is at play.¹⁰⁸

In contrast to the interest of non-establishment is the equally important interest in efficiently providing the best possible education for Missouri's students. Quality education is fundamental "to our democratic society. It is a check on government indoctrination and emblematic of a free people."¹⁰⁹ "It is required in the performance of our most basic public responsibilities. . . . It is the very foundation of good citizenship."¹¹⁰ The decline in public school

106. See *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550 (2005) (finding no free speech violation when the complainant is compelled to support government speech advertising beef). See also *U.S. v. United Foods*, 533 U.S. 405 (2001) (finding no free speech violation when the complainant is compelled to support a non-state actor's speech advertising mushrooms). Cf. THOMAS JEFFERSON, BILL FOR ESTABLISHING RELIGIOUS FREEDOM IN THE STATE OF VIRGINIA (1777) ("To compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhors, is sinful and tyrannical.").

107. *Berghorn v. Reorganized Sch. Dist.*, 260 S.W.2d 573, 582-83 (Mo. 1953) (emphasis added).

108. See, e.g., *id.*

109. See Robert S. Peck, *The Constitution and American Values, in THE BLESSINGS OF LIBERTY: BICENTENNIAL LECTURES AT THE NATIONAL ARCHIVES* 133 (1989).

Knowledge will forever govern ignorance; and a people who mean to be their own governours must arm themselves with the power that knowledge gives. . . . Learned institutions ought to be favorite objects with every free people. They throw that light over the public mind which is the best security against crafty and dangerous encroachments on the public liberty.

Id. (citing James Madison).

110. *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

quality makes the question even more pressing, and compels the states to find innovative means for providing quality education.¹¹¹

Where a centralized, government controlled system fails, a market based system often will succeed.¹¹² Public schools will continue to command state funds, irrespective of performance, so long as there is not other practical educational alternative. Harnessing the self interest and intelligence of each family in obtaining the best education possible for their children may be a better means of providing education. The state has a strong interest in the widest latitude of education alternatives available.

Additionally implicated in the voucher-public school debate is the interest in having a variety of different types of schools to avoid state indoctrination.¹¹³ Democracies are strengthened by a variety of ideas in the market places and independent schools further the seeding of a multitude of views in the marketplace.

Furthermore, parents ought not to have only the legal right to send their children to a variety of different schools, but the practical ability to do so as well. Implicated in the school choice debate is the liberty interest enshrined in *Pierce v. Society of Sisters*.¹¹⁴ Parents have an interest in seeing their children educated in the manner they see best fit. A general tax for public schools places those who prefer religious education at an economic disadvantage. They are compelled to support public schools and the parochial school they send to which they send their children. These costs serve as a practical impediment to actually choosing the place and manner of their children's education. For many families, supporting two schools, one public school through taxation, and one private school through tuition, is not economically feasible,

111. Recently, a failing St. Louis area high school sent college bound seniors and the entire freshman class away from the school at a cost of \$65,000. Editorial, *Leadership at Last*, ST. LOUIS POST-DISPATCH, Jan. 13, 2006, at C12. An increasing number of parents choose to avoid the failing public schools altogether by home schooling. See Zinie Chen Sampson, *More Black Families are Finding that Home Schooling Makes the Grade*, ST. LOUIS POST-DISPATCH, Dec. 18, 2005, at E4.

112. See generally JAMES TOOLEY, RECLAIMING EDUCATION (2000); Milton Friedman, *The Role of Government in Education*, in ECONOMICS AND THE PUBLIC INTEREST (Robert A. Solo ed., 1955).

113. See JOHN STUART MILL, ON LIBERTY 163-64 (Currin V. Shields ed., Prentice-Hall 1997) (1859).

A general State education is a mere contrivance for moulding people to be exactly like one another: and as the mould in which it casts them is that which pleases the predominant power in the government, whether this be a monarch, a priesthood, an aristocracy, or the majority of the existing generation, in proportion as it is efficient and successful, it establishes a despotism over the mind, leading by natural tendency to one over the body.

Id.

114. This liberty interest was established by *Meyer v. Nebraska*, 262 U.S. 390 (1923), and *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925).

and thus the liberty interest described by *Pierce* is, although legally unimpeded, practically unobtainable.

These are difficult questions properly reserved for policy makers. The question for the legal community is to determine the degree of latitude that may properly be granted to the policy makers.

IV. OTHER STATES' RESPONSE TO VOUCHERS AND TAX CREDITS

Despite the constitutional impediments to the use of state funds for private religious schools, many states have long been tempted to do so.¹¹⁵ Those plans have experienced varying success in overcoming state constitutional barriers. The language of the states' Blaine Amendments is not uniform.¹¹⁶ Furthermore, attempts to co-opt the machinery of the state to fund religious schools have varied, ranging from direct state payments to parochial schools to indirect tax benefit schemes.¹¹⁷ For this reason, each attempt to avoid the prohibition will be tailored to the state's constitutional language and the form of the funding.

A. Vermont: A Weak Provision Holds

The Chittenden School Board operated a rural school district but did not operate its own high school.¹¹⁸ Rather, the board paid for the tuition of its students at surrounding public high schools and approved private sectarian and non-sectarian schools.¹¹⁹ Religion was pervasive in at least one of the approved schools.¹²⁰ In response to the new policy of allowing tuition reimbursement at the religious school, the Commissioner of Education discontinued state aid to the Chittenden Town School District.¹²¹

115. See Marks, *supra* note 24, 354 (stating the idea behind vouchers was first proposed by economist Milton Freidman). However, one might argue that the idea of voucher systems have a longer pedigree than that. See MILL, *supra* note 113.

If the government would make up its mind to *require* for every child a good education, it might save itself the trouble of *providing* one. It might leave to parents to obtain the education where and how they pleased, and content itself with helping to pay the school fees of the poorer classes of children, and defraying the entire school expenses of those who have no one else to pay for them.

Id.

116. See *infra* notes 118-157 and accompanying text.

117. *Id.*

118. Chittenden Town Sch. Dist. v. Dep't of Educ., 738 A.2d 539, 542 (Vt. 1999).

119. *Id.*

120. *Id.* at 542-43.

121. *Id.* at 543.

Vermont's constitution contained a prohibition of using State funds for sectarian education. It stated "no person ought to, or of right can be compelled to . . . erect or support any place of worship, or maintain any minister, contrary to the dictates of conscience."¹²² This constitutional provision did not explicitly mention either the support of sectarian schools or teachers.

It was assumed the word support "includes financial support through the payment of taxes."¹²³ The Vermont Supreme Court cited several other courts who also arrived at this conclusion.¹²⁴ The plaintiff contended a school was not a "place of worship" and the intent of the constitutional provision was merely to prohibit state establishment of religion.¹²⁵ The court held the Chittenden policy of paying tuition at sectarian schools violated the state constitution because "there [were no] restrictions that prevent[ed] the use of public money to fund religious education."¹²⁶ Because state funds were used for religious worship and education, the court held the program to be violative of the state constitution.¹²⁷ Thus, Vermont required a discrete separation of secular and nonsecular studies, and separate accounting of both.

B. Wisconsin: A Weak Provision Succumbs

The Wisconsin legislature enacted the Milwaukee Parental Choice Program which provided tuition assistance to students in kindergarten through the twelfth grade whose family's income was less than 1.75 times the federal poverty level.¹²⁸ The program only allowed a small percentage of the eligible students to participate.¹²⁹ The tuition assistance could only be used at a private school complying with federal antidiscrimination provisions¹³⁰ and certain Wisconsin health and safety provisions.¹³¹ While the tuition assistance could be used at sectarian schools, any student, with the consent of their guardian, could opt out of participating in the school's religious activities.¹³²

The Wisconsin constitution had two separate clauses applicable to the use of tax funds spent to support private religiously affiliated schools. It stated "nor shall any person be *compelled* to attend, erect or support any place

122. VT. CONST. ch I, art 3.

123. *Chittenden*, 738 A.2d at 550.

124. *Id.* at 550 n.10 (citing *Reichwald v. Catholic Bishop of Chicago*, 101 N.E. 266, 267 (Ill. 1913); *Almond v. Day*, 89 S.E.2d 851, 858 (Va. 1955)).

125. *Chittenden*, 738 A.2d at 550.

126. *Id.* at 562.

127. *Id.* at 563-64.

128. *Jackson v. Benson*, 578 N.W.2d 602, 608 (Wis. 1998).

129. *Id.* at 608-09. At the time of the litigation, 3,400 children had been admitted to private schools under the program. *Id.* at 609 n.3.

130. *Id.* at 608; 42 U.S.C. § 2000d (2000) ("No person in the United States shall, on the ground of race, color, or national origin, be excluded.").

131. *Jackson*, 578 N.W.2d at 608.

132. *Id.* at 609.

of worship, or to maintain any ministry, without consent . . . nor shall any money be drawn from the treasury *for the benefit* of religious societies, or religious or theological seminaries.”¹³³ Thus, Wisconsin’s constitution contained both a “compelled support clause” and language prohibiting state funds to be used for the benefit of religious organizations, known as the “benefits clause.”¹³⁴

Overturing a Wisconsin court of appeals decision, which held the program violated the state constitution, the Supreme Court of Wisconsin held the Milwaukee scholarship program did not violate the state constitution.¹³⁵ The court drew upon federal establishment jurisprudence to interpret its own benefits clause.¹³⁶ The court held the central test in satisfying the benefits clause was “not whether some benefit accrues to a religious institution as a consequence of the legislative program but whether its principal or primary effect advances religion.”¹³⁷ Citing the areligious motives in the legislation and the interest in parental choice in education, the court found the program was neutral towards sectarian and nonsectarian schools; accordingly, the scholarship program did not run afoul of the benefits clause.¹³⁸

Next, the court turned its attention to the compelled support clause.¹³⁹ Because no participants in the voucher program were compelled to attend a sectarian school, the compelled support clause was not at issue.¹⁴⁰ Public and nonsectarian private schools were available. The court held that because the last persons in the chain of possession of tax dollars, the parents of the children attending the religious schools, were not compelled to support the place of religion, the constitution was not violated.¹⁴¹

This decision starkly contrasts with the Vermont decision of *Chittenden Town School District*.¹⁴² Both decisions interpret similar compelled support language, yet they arrived at polar conclusions. Where the Vermont court held the provision meant no taxpayer should be compelled to fund a religious school, the Wisconsin court held it meant no individual recipient of state aid, but not taxpayer, should be compelled to support a place of worship.

133. WIS. CONST. art I, § 18 (emphasis added).

134. *Id.*

135. *Jackson*, 578 N.W.2d at 607. Two Justices, including Chief Justice Shirley Abrahamson, dissented. *Id.* at 632-33 (Bablitch, J., dissenting).

136. *Id.* at 620-21 (majority opinion).

137. *Id.* at 621 (quoting *Tilton v. Richardson*, 403 U.S. 672, 679 (1971)).

138. *Id.*

139. *Id.* at 622.

140. *Id.* at 623.

141. *Id.* at 619.

142. *Chittenden Town Sch. Dist. v. Dep’t of Educ.*, 738 A.2d 539 (Vt. 1999).

C. Arizona: A Strong Blaine Amendment Legislatively Excised

Unlike Vermont, Arizona initiated a tax credit to fund religiously affiliated schools.¹⁴³ This program allowed a dollar-for-dollar tax credit up to \$500 for donations to a "School Tuition Organization."¹⁴⁴ The donation could not be made to directly pay for the tuition of a dependent of the taxpayer.¹⁴⁵ Also, the credit could not be used at a school that discriminated on the basis of race, color, sex, handicap, familial status, or national origin. However, there was no explicit prohibition on discrimination on the basis of religion.¹⁴⁶ The credit could be carried forward for up to five years if it exceeded other taxes due,¹⁴⁷ but could not generate a refund.¹⁴⁸ The Arizona Supreme Court held this tax credit did not violate its constitution.¹⁴⁹

Arizona's constitutional prohibition states "[n]o public money or property shall be appropriated for or applied to any religious worship, exercise, or instruction, or to the support of any religious establishment."¹⁵⁰ It also states "[n]o tax shall be laid or appropriation of public money made in aid of any church, or private or sectarian school, or any public service corporation."¹⁵¹ Missouri's Blaine Amendment, in contrast, prohibits state funds to merely "support or sustain" religious schools.¹⁵²

The Arizona Supreme Court, using a textual approach, found the tax credit scheme to be in compliance with Arizona's Blaine Amendment.¹⁵³ Because money given directly to religious schools from individuals was not controlled by the state, it was not public money or property, and thus did not invoke the prohibition on public money or property being used for religious schools.¹⁵⁴ Furthermore, the language of the constitution prevented only appropriations of state property or levying of a tax to fund sectarian schools. No

143. *Kotterman v. Killian*, 972 P.2d 606, 609 (Ariz. 1999).

144. ARIZ. REV. STAT. ANN. § 43-1089 (1997).

145. *Id.* A question arises if a taxpayer could set up a school tuition organization to directly pay for the tuition of a non-dependent.

146. *Id.*

147. *Id.*

148. *Id.*

149. *Kotterman v. Killian*, 972 P.2d 606, 625 (Ariz. 1999).

150. ARIZ. CONST. art. II, § 12.

151. *Id.* art. IX, § 10.

152. MO. CONST. art. IX, § 8.

153. *Kotterman*, 972 P.2d at 621.

154. *Id.* at 617-18. The court rejected the petitioner's argument that because the state had the power to cause the tax revenue to enter the state treasury it had quasi-ownership over it. *Id.* at 618. The court also rejected an argument that a tax credit directs funds to private schools thus in operation it is identical to appropriation. *Id.* at 620.

such special tax was levied here.¹⁵⁵ The court rejected the petitioner's request to expand the prohibition on state support for religious schools beyond its narrow textual limits.¹⁵⁶ The court briefly discussed the failed United States Blaine Amendment; however, it only used it as dicta, illustrating the difficulty of looking to the intent of the framers of the Arizona constitution.¹⁵⁷ The program at issue there did not, therefore, violate the Arizona Blaine Amendment.

States with prohibitions against using state funds for religious schools are in conflict on how to interpret these provisions. Some courts stretch to ensure funding for religious schools, while others stretch to ensure a vigorous separation of church and state. Strong public policy on each side of the argument, confusing and misleading legislative history, and tortured textual analysis of the amendments themselves make these questions difficult and unpredictable for state supreme courts.

V. THE SHIFTING POLITICAL IMPETUS IN MISSOURI

A rising tide of political will seeks the repeal of Missouri's Blaine Amendment or its emasculation through other means. Parochial schools in St. Louis and across Missouri face funding shortages and several have recently closed.¹⁵⁸ The Missouri Republican Party has adopted, as their official stance, the repeal of Missouri's Blaine Amendment.¹⁵⁹ Even if the Republican goal to

155. *Id.* at 621 ("We cannot say that the legislature has somehow imposed a tax by declining to collect potential revenue from its citizens. Nor does this credit amount to the laying of a tax by causing an increase in the tax liability of those not taking advantage of it.").

156. *Id.*

157. *Id.* at 624.

158. David Hunn, *Catholic Schools Embrace New Faces*, ST. LOUIS POST-DISPATCH, Feb. 4, 2006, at A1. At least ten parish schools in Missouri have closed in the last year. *Id.* See also David Hunn, *As Tuition Climbs, Parents Feel the Pinch*, ST. LOUIS POST-DISPATCH, Mar. 12, 2006, at A1 (discussing the rise in tuition at a St. Louis area Catholic elementary school and citing a \$4,000 increase in tuition for twelfth grade students at independent private schools over the last 10 years) and David Hunn, *To Survive, Catholic Schools Try New Tactics*, ST. LOUIS POST-DISPATCH, Jan. 15, 2006, at A1.

159. 2004 Missouri Republican Party Platform, available at <http://www.mogop.org/docs/2004PartyPlatform.pdf> (last visited June 23, 2007).

Whereas we recognize the right of all parents to determine their children's education; Whereas we support state and federal efforts to adopt a fair system that grants parents the ability to escape failing schools and attend schools of their choice; Whereas our public schools are overburdened by government regulations; . . . Whereas the Missouri Constitution through the Blaine Amendment prohibits direct dispersal of federal funds; Be it resolved that the Missouri Republican Party supports the repeal of the Blaine Amendment.

repeal the Blaine Amendment fails, many still seek to initiate school-choice measures, in violation of the spirit, if not the letter, of the Blaine Amendment.¹⁶⁰

In recent years, several attempts have been made to repeal Missouri's constitutional prohibition on the use of public funds for sectarian schools. In 2000, former state Senator Anita Yeckel attempted to replace Missouri's Blaine Amendment with language identical to the First Amendment.¹⁶¹ Yeckel made a similar attempt in 2004.¹⁶² The 2004 proposed amendment stated, "[t]hat no preference shall be given to nor any discrimination made against any church, sect or creed of religion, or any form of religious faith or worship."¹⁶³ However, because both bills failed, it is unlikely that the political will exists to repeal the Blaine Amendment via constitutional amendment.

In 2006, at least three bills were introduced that created the possibility of Blaine Amendment issues. Senator Yvonne Wilson's Senate Bill 708 and Senator John Loundon's Senate Bill 876 sought to establish a tuition grant for relatives of certain Iraq war veterans.¹⁶⁴ The grant could have been used at a private religious school.¹⁶⁵ Both of these bills would have allowed the tuition grants to be used at a qualifying institution as defined by section 173.205.¹⁶⁶ This bill made no exception for private schools with a religious affiliation.¹⁶⁷ The only limitations were that the textbooks used at religious institutions must be selected without pressure from a sectarian or religious source, and admission to the school could not be based on race, religion, sex, or national origin.¹⁶⁸ Most startling of all is Senate Bill 590,¹⁶⁹ which gained unanimous senate support. It allowed wards of the state, soldiers returning from overseas

Id.

160. *Id.*

[Education] is our moral imperative. Therefore, the Missouri Republican Party supports . . . [e]fforts at the state and federal levels to adopt a fair system that grants parents the ability to help their children the ability to escape failing schools and attend schools of their choice by using vouchers, tax credits, or direct payments. No child should be trapped in a failing school.

Id.

161. *See* S.J. Res. 42, 90th Gen. Assem., 2nd Reg. Sess. (Mo. 2000). The bill did not pass through the Democratic-controlled Senate Civil and Criminal Jurisprudence Committee.

162. S.J. Res. 25, 92nd Gen. Assem., 2nd Reg. Sess. (Mo. 2004).

163. S.J. Res. 26, 92nd Gen. Assem., 2nd Reg. Sess. (Mo. 2004).

164. S.B. 708, 93d Gen. Assem., 2nd Reg. Sess. (Mo. 2006); S.B. 876, 93d Gen. Assem., 2nd Reg. Sess. (Mo. 2006).

165. Mo. S.B. 708; Mo. S.B. 876.

166. Mo. S.B. 708; Mo. S.B. 876.

167. MO. REV. STAT. § 173.205 (2000).

168. *Id.* § 2(d)-(e).

169. S.B. 590, 93d Gen. Assem., 2nd Reg. Sess. (Mo. 2006).

combat, and foster children to receive tuition grants that can be used religiously affiliated colleges.¹⁷⁰

Additionally, tax schemes have been a popular proposed route in Missouri for circumventing the constitutional prohibition on the use of state funds for religious schools. In 2000 Senator Yeckel attempted to create a tax credit for 90% of tuition spent at most private schools to be limited to \$500.¹⁷¹ Religious educational institutions were to be included as the beneficiaries of this credit,¹⁷² which died in committee.¹⁷³ In 2003 an introduced bill would have created a \$2,500 tax credit for educational expenses associated with tuition for grades one through twelve.¹⁷⁴ That bill also died.¹⁷⁵ In 2007, a bill would have created a 65% tax credit for donations made to special vehicles created to fund private secular and sectarian schools.¹⁷⁶

The political climate in Missouri is volatile. A significant portion of policy makers seek to do away with the Blaine Amendment or bypass it by creating either a voucher program or a tax benefit which facilitates sectarian education. The Missouri legislature is likely to further wrestle with these issues in the 2007 session.¹⁷⁷

VI. TWO CHALLENGES TO MISSOURI'S BLAINE AMENDMENT

Assuming the political will to use state funding for religious schools exists, and is insufficient to amend the Missouri constitution what sorts of programs would be permissible? Probable attempts to circumvent Missouri's Blaine Amendment may be accomplished in two distinct ways. First, the legislature could create a voucher program and argue Missouri's Blaine Amendment is void because it violates the federal Free Exercise Clause. Second, the legislature may create a tax incentive for those who directly or indirectly fund private religious schools. Both have the same effect: the funneling of state resources into religious educational institutions in violation of the spirit, if not letter of Missouri's Blaine Amendment.

170. Chris Blank, *Higher Education Board Stands to Get More Power, Rebellious State Schools Could Lose Some of Their State Funding Under a Bill Approved by the Missouri Senate*, JEFFERSON CITY NEWS TRIB., Feb. 17, 2006.

171. S.B. 592, 90th Gen. Assem., 2nd Reg. Sess. (Mo. 2000).

172. *Id.*

173. *Id.*

174. H.B. 398, 92nd Gen. Assem., 1st Reg. Sess. (Mo. 2003).

175. *Id.*

176. H.B. 498, 94th Gen. Assem., 1st Reg. Sess. (Mo. 2007). The bill is rumored dead.

177. See Matthew Frank & Virginia Young, *Top Issues Facing Jeff City*, ST. LOUIS POST-DISPATCH, Jan. 2, 2007, at B3.

A. The Free Exercise Challenge: The Myth of the Anti-Catholic Missouri Blaine Amendment

The first way to circumvent the Blaine Amendment is to argue it violates the federal Free Exercise Clause because of its anti-Catholic history. The free exercise argument could come about in two ways: the state could create a voucher program where funds could be used at religious schools. Alternatively, the legislature could initiate a voucher program that explicitly disallows funds to be used at religious institutions, saying they are only doing so to comply with the Missouri Constitution. Then, students who wished to attend the sectarian institutions could bring suit using the same theory. Relying on *City of Hialeah* and other Supreme Court precedent alluding to inquiry into the actual intent of the drafters, the opponents of the Blaine Amendment would argue that drafters of the Blaine Amendment enacted it because of anti-Catholic motives. This, they would argue, violates the Free Exercise Clause because the law intentionally “targets” a religious minority.

1. The Standard Test and *Locke*

The fact that a law is facially neutral is not automatic proof of constitutionality.¹⁷⁸ Even if the law targets religion, it can still be considered constitutional if it “advance[s] interest of the highest order and [is] narrowly tailored in pursuit of those interests.”¹⁷⁹ However, the ordinances at issue in *City of Hialeah* were too broadly tailored, both under inclusive and over inclusive, and thus violated of the Free Exercise Clause.¹⁸⁰

First, to determine if a particular law is targeting religion, one must begin by examining the explicit language of the law.¹⁸¹ Does the explicitly reference a religious practice or use? In *Locke v. Davey*, the Supreme Court ruled out the question of attacking a facially neutral law denying an educational benefit based on religion.¹⁸² Much like *Locke*, the Blaine Amendment does not involve criminal or civil sanctions, nor does it limit the right of religious persons to participate in government.¹⁸³ Unlike *City of Hialeah*, *Locke* dealt with a statute and provision of the constitution for which no religious bigotry was alleged. Therefore, *Locke* did not delve into the motives of the drafters of the Blaine Amendments.¹⁸⁴

178. *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993).

179. *Id.* at 546.

180. *Id.* at 546-47.

181. *Id.* at 533.

182. *Locke v. Davey*, 540 U.S. 712, 719-20 (2004).

183. *Id.* at 720.

184. *Id.* at 723 n.7.

Another piece of evidence used to determine the intent of the drafters is the effect of the statute.¹⁸⁵ This portion of *City of Hialeah* is uncontroversial, but of little help for the question presented here.¹⁸⁶ Simple findings of adverse effect will not necessarily implicate an improper motive.¹⁸⁷ This is especially true when the statute was also in response to a legitimate governmental concern.¹⁸⁸ The court will take into consideration the effect of the ordinance on acts other than religious exercise.¹⁸⁹ If it reaches little more than religious conduct of a purportedly targeted group, it is likely to be presumptively unconstitutional. In *City of Hialeah*, the ordinance affected virtually no other individual or group besides the targeted religion.¹⁹⁰ The legitimate goal of the ordinances, that is, limiting unnecessary, unsanitary, or inhumane slaughter, reached only Santerian sacrifice, where other killings that were no more necessary, sanitary, or humane were allowed.¹⁹¹ Such an analysis is likely to be of little benefit after *Locke*.

2. Historical Analysis of Missouri's 1875 Blaine Amendment

The most important question in a Free Exercise challenge to a Blaine Amendment is whether or not the law is targeting religion because of illicit motivation. "Facial neutrality is not determinative."¹⁹² Even if a law is facially neutral, it still may be presumptively unconstitutional if it is "covert suppression of particular religious beliefs."¹⁹³ Does Missouri's Blaine Amendment restrict a religious practice through the denial of state funds for

185. *City of Hialeah*, 508 U.S. at 535.

186. One piece of evidence which has tended to negate a successful free exercise challenge to the Missouri Blaine Amendment is its neutral application. While the Blaine Amendment of many other states disallowed the reading of the Catholic Bible in public school while allowing the reading of the Protestant Bible, Missouri's Blaine Amendment did not. Missouri Attorney General Edward Coke Crow, who served from 1897-1905, issued an opinion concerning the Blaine Amendment, interpreting it as prohibiting the reading of the Bible in publicly funded schools, as it was a form of sectarian instruction. See JOURNAL OF THE MISSOURI CONSTITUTIONAL CONVENTION 1922-23, at 13-14 (day 162). Bible reading was also prohibited, however, this was due to a resolution of the Board of Education in 1869. *Id.* at 80. Thus, in actual operation, the Missouri Blaine Amendment worked to keep all religious influence out of the public schools, not just the Catholic influence.

187. *City of Hialeah*, 508 U.S. at 535 ("To be sure, adverse impact will not always lead to a finding of impermissible targeting. For example, a social harm may have been a legitimate concern of government for reasons quite apart from discrimination.").

188. *Id.*

189. *Id.*

190. *Id.* at 535-36.

191. *Id.* at 538-39.

192. *Id.* at 534.

193. *Id.* (citations omitted).

private schools, because of religious, anti-Catholic, motivation? Even if a statute does not expressly target or only affect a particular religion if its enactment was motivated by a desire to harm the religion, it will be “presumptively invalid unless it is justified by a compelling interest and is narrowly tailored to advance that interest.”¹⁹⁴ A law may violate the Free Exercise Clause if it was drafted with the subjective intention of harming a particular religious minority.

While the language of both constitutions is identical, a question remains if we should look to the intent of the 1875 or 1945 Blaine Amendment drafters. Using the “historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by the members of the decision-making body,” we can begin to determine the intent of the drafters.¹⁹⁵ One must look to the particular legislative body that passed the amendment to examine its actual motives. Merely noting Blaine Amendments across the country and the failed federal Blaine Amendment were drafted with anti-Catholic motives is insufficient to show an illicit targeting of religious practices.¹⁹⁶ Imputing the bigotry of a state legislator in New York to the Missouri Constitutional Convention is a fiction that only confuses the issue. Little evidence links anti-Catholic bigotry to the 1875 Blaine Amendment, and no evidence links it with the 1945 Blaine Amendment.¹⁹⁷

194. *Id.* at 533.

195. *Id.* at 540.

196. See Robert William Gall, *The Past Should Not Shackle the Present: The Revival of a Legacy of Religious Bigotry by Opponents of School Choice*, 59 N.Y.U. ANN. SURV. AM. L. 413, 434 (2003) (stating the state interest enshrined in the Blaine Amendments is not compelling; it is not an extension of the Establishment Clause but rather “historical discrimination against a religious minority”); Brandi Richardson, Comment: *Eradicating Blaine’s Legacy of Hate: Removing the Barrier to State Funding of Religious Education*, 52 CATH. U. L. REV. 1041, 1071-72 (2003). Richardson argues that in the wake of *Romer v. Evans*, Blaine Amendments are unconstitutional because they were drafted with anti-Catholic animus. *Id.* at 1073 (discussing *Romer v. Evans*, 517 U.S. 620, 635-36 (1996)). The radical anti-Catholic political environment the Blaine Amendments spring from suggests they are presumptively unconstitutional. In *Romer*, the Supreme Court analyzed a Colorado Constitutional amendment which repealed several city and county ordinances which criminalized discrimination based on sexual conduct and orientation. *Romer*, 517 U.S. at 623. Relying heavily on the legislative history and process of the constitutional amendment, the court stuck down Colorado’s amendment as violating the Equal Protection Clause. *Id.*

197. Prior to any discussion of the history of anti-Catholic motivation behind the Blaine Amendment, it is important to remember the very real persecution and discrimination the Catholic community has withstood. Nevertheless, the focus of this section is limited to the subjective motivations of a discreet number of individuals and not a general history of persecution.

It would be difficult to deny the anti-Catholic history surrounding the enactment of 1870s Blaine Amendments in other states and the failed National Blaine Amendment,¹⁹⁸ however, anti-Catholic bigotry was far less prevalent in Missouri than in other parts of the country.¹⁹⁹ While a neutral observer might imagine two reasons for prohibiting the use of state funds for religious school—either for entirely legitimate non-establishment reasons or an illegitimate purpose of keeping power from the growing Catholic community—the general historical consensus, accepted by a plurality of the Supreme Court and many academics is that Blaine Amendments were originally passed with the later, illegitimate motive in mind.²⁰⁰ The Blaine Amendments, however, were understood differently by individual lawmakers. Some were influenced by the acceptable motive of separation of church and state,²⁰¹ while others used the amendment as a thinly veiled attack on a religious minority.²⁰²

198. Much has been written on the anti-Catholic motives of the proposed amendment to the United States Constitution. See Joseph P. Viteritti, *Choosing Equality: Religious Freedom and Educational Opportunity Under Constitutional Federalism*, 15 YALE L. & POL'Y REV. 113, 146 (1996); but see *id.* (stating

The Nation, which was sympathetic to the Blaine Amendment, admitted: “Mr. Blaine did, indeed bring forward . . . a [United States] Constitutional amendment directed against the Catholics, but the anti-Catholic excitement was, as every one knows now, a mere flurry; and all that Mr. Blaine means to do or can do with his amendment is, not to pass it but to use it in the campaign to catch anti-Catholic votes.”).

199. See *infra* notes 206-242.

200. See *Mitchell v. Helms*, 530 U.S. 793, 828-29 (2000) (stating in Justice Thomas’s plurality decision

hostility to aid to pervasively sectarian schools has a shameful pedigree that we do not hesitate to disavow . . . Opposition to aid to “sectarian” schools acquired prominence in the 1870’s with Congress’s consideration (and near passage) of the Blaine Amendment, which would have amended the Constitution to bar any aid to sectarian institutions. Consideration of the amendment arose at a time of pervasive hostility to the Catholic Church and to Catholics in general, and it was an open secret that “sectarian” was code for “Catholic.”

(citations omitted)). See also Joseph P. Viteritti, *Blaine’s Wake: School Choice, the First Amendment, and State Constitutional Law*, 21 HARV. J.L. & PUB. POL’Y 657, 667 (1998).

201. See Green, *supra* note 3, at 47-48.

Encourage free schools, and resolve that not one dollar, appropriated for their support, shall be appropriated to the support of any sectarian schools. Resolve that neither the State nor the Nation, nor both combined shall support institutions of learning other than those sufficient to afford to every child growing up in the land the opportunity of a good common school education, unmixed with sectarian, pagan, nor atheistically dogmas. Leave the matter of religion to the family altar, the Church, and the private school, supported entirely by private contributions. Keep the Church and State forever separate.

The standard academic dogma holds that all state Blaine Amendments were the product of anti-Catholic bigotry,²⁰³ nevertheless, Missouri's adoption of its Blaine Amendment was not fueled by anti-Catholic politics. Since its first constitution in 1820, Missouri has established an expanding constitutional tradition of separation of church and state, independent of its oscillating appreciation and hostility for its Catholic minority.²⁰⁴ Missouri's first constitution held "no man can be compelled to erect, support or attend any place of worship, or to maintain any minister of the gospel, or teacher of religion."²⁰⁵ No explicit mention was made of the application of this provision to schools; however, it was widely believed sectarian schools could not receive state funding.²⁰⁶ The 1865 constitution strengthened the barrier between church and state, holding "no preference can ever be given, by law, to any church, sect or mode of worship."²⁰⁷ As Missouri aged, it increasingly strengthened the barrier between church and state, the 1875 Blaine Amendment is just one point of this trend.

In Missouri, anti-Catholic sentiment has periodically waned and waxed.²⁰⁸ However, in the 1870s it was not as intense in Missouri as it was in other areas of the country.²⁰⁹

Id. (quoting President Grant's contemporary speech made on September 30, 1875). Regardless of true intention or objective meaning, the speech was criticized as anti-Catholic shortly after its publication. *See id.* at 48.

202. *See id.*

203. Irina D. Manta, *Missed Opportunities: How the Courts Struck Down the Florida School Voucher Program*, 51 ST. LOUIS U. L.J. 185, 189 (2006) ("Scholars are in significant agreement that anti-Catholicism fueled the states' respective Blaine Amendments."). This is nothing but "squint and shoot from the hip" history. Without citation to historical authority, Professor Manta claims that all state Blaine Amendments were passed with the anti-Catholic politics associated with national Blaine Amendment. *See id.*

204. *See Marks, supra* note 21, at 152.

205. MO. CONST. art. XIII, § 4 (1820).

206. *See* George Melvin DeWoody, *Development of the Educational Provisions of the Missouri Constitution of 1945*, at 83 (1948) (unpublished Ph.D. dissertation, University of Missouri) (on file with Ellis Library, University of Missouri) (stating "No mention was made of religion in the [educational portions of the] Constitution of 1820 but it was generally believed to assure religious freedom.").

207. MO. CONST. art. I, § 11 (1865). *But cf.* DeWoody, *supra* note 206, at 84 ("[The constitution of 1865] forbade the state and any of its subdivision to grant any financial aid to church or sectarian school."). If it did so, it did not do so explicitly. *See* MO. CONST. art. 1 § 10 (1865).

208. H. Margaret Stauf, *The Anti-Catholic Movement in Missouri: Post Civil War Period* (1936) (unpublished masters thesis, St. Louis University) (on file with St. Louis University Pius Library) (discussing several periods of strong anti-Catholic sentiment in Missouri). The first period occurred between 1833 and 1835 when the anti-Catholic sentiment was largely a product of angst towards German and Irish immigration. *Id.* at 20-21. The bigotry eased between 1835 and 1850. *Id.* at 29. Missouri witnessed Know-Nothing, anti-Catholic riots in 1855. *Id.* All leading newspa-

Pockets of [anti-Catholic] prejudice were everywhere, but the most intense feelings were found on the East Coast, where the number of immigrants was staggering. In Philadelphia, Catholic churches were burned. However, at least in the Midwest, individual Protestants dealing with individual Catholics on a one-to-one basis were usually friendly to each other. . . . Records of parishes in the Diocese of Kansas City-St. Joseph often described how a church was built with the help of non-Catholic townspeople.²¹⁰

Furthermore, at least in St. Louis, anti-Catholic sentiment may have been far weaker than it was elsewhere in the country, as many of its inhabitants were Catholic.²¹¹ Whether as a means of appeasing new Catholic voters or out of a genuine Midwest civic virtue, anti-Catholic sentiment in Missouri during the decades following the Civil War was not as intense as it was elsewhere.

St. Louis, however, was not immune from the second half of the 19th century's anti-Catholic hysteria. A local newspaper of the day stated

pers had condemned the Know-Nothing party by 1856 and the party "rapidly disintegrated." During the Civil War, the Catholic Church remained neutral and refused to denounce the confederacy. *Id.* at 36. This created a third period of strong anti-Catholic sentiment in the years immediately following the Civil War. *Id.* at 82. Missouri's 1865 constitution was widely seen as a means of punishing the Catholic Church for their stance during the war. *Id.* at 50. It made it difficult for churches to hold property, increased their tax burden, and vote. *Id.* at 50-52. Catholic parochial schools were harmed in two ways by the 1865 constitution: their tax exemption was removed, and it was difficult to gift or devise property to parochial schools. *Id.* at 59.

209. See *infra* note 225 and accompanying text.

210. 1 DOROTHY BRANDT MARRA, *THIS FAR BY FAITH: A POPULAR HISTORY OF THE CATHOLIC PEOPLE OF WEST AND NORTHWEST MISSOURI* 66-67 (1992).

211. The St. Louis Archdiocese writes about the time preceding the Missouri Blaine Amendment:

But while the diocese was becoming smaller in terms of territory, the immediate St. Louis area was experiencing unparalleled growth. Just prior to Kenrick's arrival, the city's population had doubled, growing from about 8,000 to just over 16,000 between 1835 and 1840. The population would grow to almost 80,000 by 1850.

Although many of the original inhabitants had been French, St. Louis soon became a destination for Germans. Many German Catholics came to St. Louis because it offered freedom, good land and the presence of other Catholics. In fact, many Catholic immigrants found their way to St. Louis after being treated badly in other parts of the country. They faced hostility from Americans because they were German just as they had faced hostility from Germans because they were Catholic. That was less of an issue in St. Louis, and as the city grew, *about half of the new settlers were Catholics.*

Archdiocese of St. Louis, *Three Centuries of Catholicism*, available at <http://www.archstl.org/history/chap3.html> (emphasis added).

[t]he signs of the times all indicate an intention on the part of the managers of the Republican party to institute a general war against the Catholic Church. . . . Some new crusading cry thus becomes a necessity of existence, and it seems to be decided that the cry of “No popery” is likely to prove most available.²¹²

In the decades preceding the Civil War, the undercurrent of anti-Catholic hysteria even manifested itself in violence and destruction of property.²¹³ These episodes seemed to have waned by the 1870s. Even less evidence links the 1875 constitutional convention with anti-Catholic sentiment.

The information that is available leads to the conclusion that both the Education Committee and the constitutional convention as a whole were not motivated by anti-Catholic sentiment when they restricted funding for parochial schools. Of the entire 1875 Missouri Constitutional Convention, several members were Catholic and at least one put down an anti-Catholic riot.²¹⁴

One of the ten delegate committees at the convention was charged with determining which parts of the previous constitution pertaining to education required alteration.²¹⁵ Of the nine members of the committee, eight were De-

212. Green, *supra* note 3, at 44 (citing N.Y. TRIBUNE, July 8, 1875, at 4; THE INDEX, Aug. 5, 1875, at 365).

213. Archdiocese of St. Louis, *supra* note 211.

The tension between the Know-Nothings and Catholics in St. Louis eventually boiled over in election riots. In the summer of 1854, several Irish Americans were denied the right to vote by Know-Nothings who were serving as election judges. An argument ensued, and soon a scuffle broke out. In the melee one of the would-be Irish voters stabbed a boy. Soon, mobs were attacking Irish houses and stores, and they threatened to destroy churches. St. Louis mayor, John Howe, called for volunteer soldiers to assist police. On the evening of August 7, 1854, a mob began to move against St. Francis Xavier Church. As word spread that the mob was preparing the [sic] attack the church at Saint Louis University, another rumor began to spread that a large force of armed men was waiting to defend the church against the mob.

Id.

214. Lowndes Henry Davis converted to Catholicism in 1897. Buel Leopard, *Biographical Sketches of the Delegates*, in 1 JOURNAL OF THE MISSOURI CONSTITUTIONAL CONVENTION, 1875, at 72, 81 (1920). Thomas Tasker Gantt helped put down the anti-Catholic St. Louis “Know-Nothing” riot of 1854. *Id.* at 85. Spaunhorst was a Catholic. *Id.* at 107-08. Pulitzer may have had a Catholic mother. See *infra* note 247. Complete biographical data is not available on all delegates at the constitutional convention.

215. State Historical Society of Missouri, *Journal of the Constitutional Convention of 1875 of the State of Missouri*, in 1 JOURNAL OF THE MISSOURI CONSTITUTIONAL CONVENTION, 1875, at 113, 134-35 (1920) [hereinafter State Historical Society of Missouri I]. The committee seemed to be controlled disproportionately by representatives from urban areas. The committee was chaired by Switzler of Boone County, Pulitzer of St. Louis, Shields of St. Louis, Carleton of Pemiscot County, McAfee of Lincoln County, Allen of Clay County, and Letcher of Saline

mocrats and one was Republican.²¹⁶ At least one may have had a Catholic mother.²¹⁷ The committee on education adopted a resolution barring money from the School Fund to “the different religious denominations, creeds, sects, or churches of this State to be used by such religious denominations, creeds, sects or churches for educational purposes.”²¹⁸ Several other similar resolutions were accepted by the committee.²¹⁹ The committee’s recommendation barring public funds to be used at sectarian schools was accepted by the convention without dissent.²²⁰

In addition, the education committee and the convention as a whole were overwhelmingly controlled by Democrats. The Democrats were generally supportive of Catholics and vice versa.²²¹ Republicans, on the other hand, generally showed more signs of anti-Catholic bigotry.²²² While it was a factious party,²²³ the Democratic Party in Missouri was not decisively anti-Catholic. At the Missouri Democratic Convention of 1874, the fear of Catholic control of the public schools was not an issue.²²⁴

We can gain a greater understanding of the workings of the Committee on Education, the body that accepted the 1875 Missouri Blaine Amendment,

County. *Id.* at 149. Later Chairman Switzler also appointed Todd of St. Louis and McCabe of Marion. *Id.* at 268. Switzler was a Democrat and a union supporter and a member of the Presbyterian church. Leopard, *supra* note 214, at 72, 108-09. Pulitzer was a Democrat from Hungary and owner of the St. Louis Post Dispatch. *Id.* at 99-100. Pulitzer came from a Jewish and possibly Catholic family. *See infra* note 247. Shields was a Presbyterian and a Republican. Leopard, *supra* note 214, at 106-07. Carleton was a Democrat. *Id.* at 78. McAfee was a Democrat. *Id.* at 93. Allen was a Democrat and attended a Baptist college. *Id.* at 74. Letcher was a Democrat and a Methodist. *Id.* at 91-92. McCabe was a Democrat and a Presbyterian. *Id.* at 92-93. Todd was also a Democrat. *Id.* at 110-11.

216. *See supra* note 222.

217. *Id.*

218. State Historical Society of Missouri I, *supra* note 215, at 113, 171.

219. Davis proposed the prohibition of state aid to “any sectarian school, or any school not supported by taxation.” *Id.* at 186-87. This provision was accepted by the committee. State Historical Society of Missouri, *Journal of the Constitutional Convention of 1875 of the State of Missouri*, in 2 JOURNAL OF THE MISSOURI CONSTITUTIONAL CONVENTION, 1875, at 515, 526 (1920) [hereinafter State Historical Society of Missouri II]. Todd of St. Louis proposed state educational funds be used only for the “free public schools and the State University.” State Historical Society of Missouri I, *supra* note 215, at 113, 186. This was rejected. State Historical Society of Missouri II, *supra*, at 515, 526.

220. State Historical Society of Missouri II, *supra* note 219, at 596-97.

221. *See generally* Green, *supra* note 3.

222. *See id.* at 44.

223. Mae Florence Donohue, *The Democratic Party in Missouri 1873-80*, at 26 (1930) (unpublished masters thesis) (on file with the University of Missouri-Ellis Library).

224. *Id.* at 68-69. The party was more concerned with debt management, taxation, elected official’s salaries, and railroad regulation.

by looking to its constituent members. The chair of the Education Committee of the 1875 constitution, W.F. Switzler, was by no means bigoted towards Catholics. Historical evidence shows just the opposite. While a Presbyterian himself, he had a healthy respect and appreciation for the Catholic faith. Switzler kept a diary on one of his early trips to New Orleans where he first encountered the Catholic Church.²²⁵ As a youth, Switzler spoke kindly Catholic theology stating, “[b]oth Catholic & Protestant agree in the tenet that all men are equal in the sight of God, but the formen [sic] alone gives practical exemplification of his creed.”²²⁶ He noted the Catholics, and not the Protestants, gave comfort to slaves and outcasts of society.²²⁷ Switzler further compared the Catholic and Protestant social justice of the day, “while the congregation of the Protestant Church consist of a few ladies, arranged in well cushioned pews, the whole floor of the extensive cathedral should be crowned with worshipers of all colours and classes.”²²⁸ Switzler wrote “[t]he arms of the [Catholic] church are never closed against the meanest outcasts of society. I am no Catholic but cannot suffer a prejudice of any kind to refrain me from giving every body of Christian Ministers their just due.”²²⁹ The leader of the Education Committee, the committee which presented the Blaine Amendment to the convention as a whole, appears not to have been motivated by anti-Catholic bigotry.

Furthermore, Joseph Pulitzer, a member of the Committee on Education, also likely voted for the Blaine Amendment for non-bigoted reasons. Pulitzer spent his early post-Civil War years in St. Louis among its relatively large

225. See William F. Switzler, *A Trip to the South* (January 17, 1836) (unpublished manuscript, on file with the Western Historical Manuscript Collection-Columbia).

226. *Id.* at 16. Switzler also commented,

In a Catholic Church the Prince & and [sic] the Peasant, the Slave and his master, kneel before the same alter, in temporary oblivion of all worldly distinction. They come there but in one character: that of sinners: and no rank is felt or acknowledged, but that connected with the offices of religion. Here the vanity of the rich man receives no increase; the proud are not flattered & the humble are not abashed. In Protestant Churches a different rule prevails. People of colour are either excluded altogether, or pushed in some corner separated by barriers from the main body of the church. No white Protestant [sic] would kneel at the same alter with a black one.

Id.

227. *Id.* at 17. Switzler stated that “[i]n Catholic Churches, from the hand of the Priest, the Slaves receive all the comforts of his faith. He is visited in sickness and consoled in affliction and his dying lips receive the consecrated wafer, & in the very agony of death, the last voice that intersects his ear is that of his Priest, uttering sublime words.” *Id.*

228. *Id.*

229. *Id.* at 18.

German-Catholic community.²³⁰ He supported equal rights for religious and ethnic minorities.²³¹ At the 1875 Constitutional Convention he stated “I am not here, sir, as a trader or trafficker; we are not selling and bargaining. Principles, convictions and motives are neither sold nor bargained for.”²³² “Pulitzer found strong opposition to his belief that the state had a moral responsibility to prevent crime by giving the poor a good *public* education. Yet he said, ‘I heartily despise demagogical appeals against the rich, or any particular class, but this question is so grave that it must be treated without gloves.’”²³³

Pulitzer’s own religious convictions are somewhat of an enigma. He was married in an Episcopal Church.²³⁴ His mother, with whom he had a close relationship and was said to “adore,” was either Jewish or Catholic, although Pulitzer may have believed her to be Catholic.²³⁵ He published statements clarifying his views on the importance of religion in public life. He wrote, “[w]e assume that the nationality and the religious beliefs of persons who fall into the newspaper can be of no particular interest to the public.”²³⁶ Accordingly, Pulitzer was not an anti-Catholic bigot, and it is highly likely he voted to adopt the Blaine Amendment with beneficent, anti-establishment interests in mind.

After the education committee adopted the provision, it was accepted overwhelmingly by all members of the entire convention — even those who were Catholics and those who had previously supported Catholics.²³⁷ While the committee adopted both a minority and majority proposal concerning the subjects to be taught in the free public schools,²³⁸ both proposals accepted the bar on the use of state funds for sectarian religious schools.²³⁹ The minority report did not take issue with the prohibition of the use of state funds for religious education,²⁴⁰ nor was a separate minority report issued on the sectarian school funding question.²⁴¹ The convention adopted the Blaine Amend-

230. DENIS BRIAN, PULITZER: A LIFE 8-15 (2001).

231. *Id.* at 85 (“From the start, Pulitzer had supported justice and equal rights for all with no exceptions – but especially for the Irish, Germans, Scandinavians, and Jews.”).

232. *Id.* at 25.

233. *Id.* (emphasis added).

234. *Id.* at 29. This may have been, however, to appease his wife’s parents who were married in the same church. *Id.*

235. *Id.* at 5, 29-30.

236. *Id.* at 85.

237. See *supra* note 227 and accompanying text.

238. See DeWoody, *supra* note 206, at 43.

239. *Id.* at 38. The presenter of the Minority Report, Todd, had earlier made a proposal limiting state funds to “free public schools.” *Id.*

240. State Historical Society of Missouri II, *supra* note 219, at 526-27.

241. *Id.*

ment.²⁴² It was adopted at the convention and passed by a vote of 48 to 8.²⁴³ None who dissented cited anti-Catholic motivations.²⁴⁴

One can safely conclude that at least in Missouri, contrary to the belief of many politicians and activists,²⁴⁵ the 1875 Blaine Amendment was not a product of anti-Catholic bigotry. Due to its demographic uniqueness, personal statements and history of members of the Education Committee and the Convention, neutral application, and lack of dissent even from Catholic members of the convention, Missouri's Blaine Amendment more than likely was drafted with permissible non-establishment motivation. Thus, challenging Missouri's Blaine Amendment based on the anti-Catholic motives of the 1875 drafters using the federal Free Exercise Clause is a losing proposition.

3. Blaine Revisited: Historical Analysis of the 1945 Blaine Amendment

Even if one assumes Missouri's 1875 Blaine Amendment was the bona fide product of anti-Catholic bigotry, the intent of the drafters of the 1945 Constitution may control the analysis.²⁴⁶ Any taint of anti-Catholic sentiment that may have been present in the 1875 Blaine Amendment was purged by the 1945 constitution.²⁴⁷ By 1945, any anti-Catholic hysteria existing in the state

242. *Id.* at 814-15.

243. *Id.* Pulitzer voted for the provision. *Id.* The only member of the Education Committee who voted against it was Todd, who had other qualms with the provisions. *Id.*

244. *Id.*

245. See Peter Kinder, *Tracing the Vestiges of Anti-Catholic Bigotry*, ST. LOUIS POST-DISPATCH, May 31, 1997, at 34. He stated:

Consistent with positions I have stoutly defended through two election campaigns, I took the floor in the longest speech I've made in five Senate sessions. In impassioned remarks, this Protestant pointed to what was, before dropping down the memory hole, an acknowledged fact. The amendment to Missouri's Constitution is, I argued, "a vestige of anti-Catholic bigotry from a century ago that has no place in our public life today."

Id. See also Mae Duggan, Editorial, *Tuition Vouchers are Justice for Kids in Failing Schools*, ST. LOUIS POST-DISPATCH, Dec. 31, 2006, at B2 ("Sadly, the public school system in the 1800s was born in bigotry and preserved in prejudice.").

246. See generally J. Scott Slater, Comment, *Florida's "Blaine Amendment" and Its Effect on Educational Opportunities*, 33 STETSON L. REV. 581 (2004).

247. Assume Missouri's 1875 Blaine Amendment was purposely drafted to harm Catholics, and assume further this malicious intent invalidated that provision of the Missouri constitution. What is necessary for Missourians to reinstate an identical constitutional provision for benevolent, non-establishment purposes? To do this, Missouri would have to pass the provision through the constitutional process again, with-

had largely dissipated,²⁴⁸ and the amendment was passed for entirely benevolent reasons, without a shred of historical evidence of illicit anti-Catholic motive.²⁴⁹ In fact, the convention saw little discussion of the Blaine Amendment, and none of it involved anti-Catholic rhetoric nor did key individuals make anti-Catholic contemporary statements.²⁵⁰

Missouri's current constitution was adopted in 1945 in a bipartisan constitutional convention.²⁵¹ A substantial majority of Missourians adopted the new constitution on February 27, 1945.²⁵² Little attention was paid to religion in the public schools or public funds used at sectarian schools. One proposal, number 270, would have permitted the reading of any version of the Bible at any public school.²⁵³ The Catholic Bible would have been acceptable.²⁵⁴ In addition number 347, introduced by Kirk,²⁵⁵ would have repealed the Blaine Amendment. However, it would have replaced it with a new section that would have also prohibited the use of state funds for religious schools.²⁵⁶ In

out the purpose of harming any particular religious group. This happened during the Missouri Constitutional Convention of 1945.

248. The Democratic Party had by 1945 run a Roman Catholic for president of the United States. Alfred E. Smith ran in 1928.

249. *Cf. Manta, supra* note 203, at 193.

[T]he burden is on school voucher opponents to show that the legislature transformed the intent behind the no-aid provision from the discriminatory one of the Blaine era to a neutral one. In a hypothetical case of reenactment without any sort of legislative history and where no significant changes to a provision occur, one would presumably just assume that the intent behind the provision remains the same.

Id. Just why Manta insists that the burden is one of presumptive unconstitutionality is unclear. While case law is lacking, this proposition seems incorrect. Under *City of Hialeah*, laws are presumptively constitutional and only become unconstitutional with evidence of malicious intent. *See Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531-33 (1993). There was no intent in 1945 to do harm to a minority group and while the language of the 1945 and the 1875 constitutions are identical, they do not have similar legislative histories. *See infra* note 246.

250. *See* JOURNAL OF THE MISSOURI CONSTITUTIONAL CONVENTION 1943, Sept. 12, 1943, at 20. (No amendments made to Missouri's Blaine Amendment).

251. DeWoody, *supra* note 206, at 87-88. No single party could control more than half of the members of any committee. The convention consisted of forty-one Democrats, forty-one Republicans and one Anti-New Deal Democrat. *Id.*

252. *Id.* at 89.

253. JOURNAL OF THE CONSTITUTIONAL CONVENTION OF MISSOURI, 1943-45, at 12 (day 33) [hereinafter JOURNAL].

254. *Id.*

255. *Id.* at 9 (day 42).

256. *Id.* at 2 (day 99). The only discussion was of the similarity between the provision explicitly barring the use of state funds for education and the general provisions of the Bill of Rights. *Id.*; *see also* DeWoody, *supra* note 206, at 145.

the end, the Blaine Amendment was readopted by the convention without significant debate.²⁵⁷

This evidence is in accord with the social climate in Missouri at the time. The period immediately preceding the 1945 constitutional convention marked a period of greater understanding between the Protestant majority and Catholic minority in Missouri. Many Catholic priests during this period engaged in a widespread “street preaching” effort.²⁵⁸ Most of these efforts centered on the Ozark regions where few Catholics lived.²⁵⁹ Besides spreading the Catholic faith, these missions served to dispel myths many southern Missourians had about the Catholic Church and encouraged greater understanding between the religions.²⁶⁰ Catholics were no longer seen as a distrusted minority but as a powerful ally against a common godless communist foe.²⁶¹ By 1945, anti-Catholic tendencies in Missouri had eased. Meanwhile, the Blaine Amendment was readopted in Missouri’s new constitution without alteration, dissent, or significant discussion.²⁶²

Furthermore, many Lutherans in Missouri were actively engaged in seeking to provide public bus service to private, religiously affiliated

257. JOURNAL, *supra* note 253, at 16 (day 130).

258. 1 MARRA, *supra* note 210, at 134.

259. *Id.* at 135 (The southern part of the state was referred to as “no priest land”).

260. *Id.* at 135-36 (“Father Ready credited a few conversions to his street preaching efforts, but the main impact of the program was the good will toward the Church it created.”).

261. See PHILIP JENKINS, THE NEW ANTI-CATHOLICISM: THE LAST ACCEPTABLE PREJUDICE 36 (2003). “Religious tensions calmed during the war years and memories of interfaith cooperation in the services left an important legacy of ‘foxhole fellowship.’ Catholics also gained respect for their staunch anti-communism.” *Id.* Furthermore, in the 1940s “Hollywood depictions of the Catholic church and its clergy were uniformly favorable, to the point of adoring.” *Id.* See also H.W. CROCKER III, TRIUMPH: THE POWER AND THE GLORY OF THE CATHOLIC CHURCH: A 2000-YEAR HISTORY 406 (2001) (“In [the] cold war it was the Catholic Church that became England’s and America’s most vocal ally in defense of freedom and against communism.”); Harfst v. Hoegen, 163 S.W.2d 609, 614 (Mo. 1942).

We know of the great educational institutions conducted by the Jesuits and other Catholic Orders and of their high standards of excellence, St. Louis University being a leader among them. We recognize as well the great need of spiritual training not only in our own country, but throughout this troubled world. The right of freedom of worship, which at this time is being denied to the peoples of two foreign governments in particular, must be restored before the world is again secure.

Id.

262. See MARTIN L. FAUST, CONSTITUTION MAKING IN MISSOURI: THE CONVENTION OF 1943-1944, at 140-46 (1971). (Stating there was no change in the “strong language” of Missouri’s Blaine Amendment and the only discussion was concerning the alteration of the Blaine Amendment to allow reading of the Bible in Public Schools).

schools.²⁶³ Lutherans and Catholics found “themselves on the same side of the educational fence.”²⁶⁴ While many Protestants remained opposed to the use of public funds for religiously affiliated schools, the opposition was decreasingly about fear of Catholic domination, and more about separation of church and state. The Missouri Synod, a church not limited to the geographic limits of Missouri, had its own parochial schools.²⁶⁵ In 1944 it adopted an official policy of promoting the initiation and extension of state and federal aid for those schools.²⁶⁶ Additionally, many of the Lutherans who did not want to see state funds being used for religious schools took this position out of legitimate non-establishment concerns and not out of anti-Catholic bigotry.²⁶⁷ By 1943 a drafter of the constitution determined to harm religious minorities with a new Blaine Amendment would have been forced to harm both Lutherans and Catholics. There is no evidence of widespread anti-Lutheran animus in Missouri in the 1940s. This demonstrates a significant shift away from the anti-Catholic hysteria that poked previous generations. Thus, anti-Catholicism was not a driving force behind the readoption of Missouri’s Blaine Amendment in 1945.

While even factions of the United States Supreme Court speak of the violently bigoted and anti-Catholic origins of the Blaine Amendments,²⁶⁸ little, if any, historical evidence links that bigotry to the adoption of Missouri’s Blaine Amendment in 1875 and its readoption in 1945. Even if the 1875 Blaine Amendment was unequivocally anti-Catholic, which seems unlikely, this motive may be irrelevant, as the amendment was readopted in

263. MYRON A. MARTY, LUTHERANS AND ROMAN CATHOLICISM; THE CHANGING CONFLICT 1917-1963, at 86 (1968).

264. MYRON A. MARTY, MISSOURI SYNOD LUTHERANS AND ROMAN CATHOLICISM: OPPOSITION AND REAPPRAISAL 1917-1967, at 104 (1967) (on file with Saint Louis University Pius Library).

265. *Id.* at 89.

266. *Id.* at 92.

The social service program should in equity be available to all children of school age irrespective of their school association. . . . The State can grant to children in churches schools this program, since rendering this service does not promote the religious tenets of Church The Church can accept this program as it is offered and may even be within its rights in demanding it.

PROCEEDINGS OF THE THIRTY-NINTH CONVENTION OF THE LUTHERAN CHURCH-MISSOURI SYNOD 132 (1944).

267. MARTY, *supra* note 264, at 110-11.

“[F]or many Lutherans sincerely believed that a fundamental principle was at stake. Lutheran observers wavered between the conviction that, on the one hand, the American system of Church-State relations could not allow for church related schools to receive public funds, and the fear on the other, that such aid would be enacted and the system destroyed.”

Id.

268. *Mitchell v. Helms*, 530 U.S. 793, 828-29 (2000).

1945 for non-bigoted purposes. By 1945 anti-Catholic tension had eased and more religious sects had their own parochial schools and supported state funding of these schools.

Thus, whether we examine the intent of the drafters of the 1875 or the 1945 Missouri Constitution, the Missouri Blaine Amendment is not subject to a free exercise challenge based on the subjective intent of the drafters. *Locke* tells us vouchers that exclude religious education are not facially unconstitutional merely because they deny an otherwise available state benefit because of religious affiliation. Furthermore, in Missouri we cannot rely on the presumptive unconstitutionality of *City of Hialeah* because there is no identifiable illicit motive in the drafters. For both the 1875 and the 1945 constitutions, the evidence of anti-Catholic motivation is thin at best. For this reason, a free exercise challenge to Missouri's Blaine Amendment based on the illicit intent of the drafters is bound to fail.

B. The Tax Scheme Challenge

In lieu of enacting a voucher program, the legislature could attempt to avoid a Blaine Amendment challenge and still create greater practical access religious schools by creating a tax credit or deduction scheme. The proponents of this avenue argue the state would not be supporting religious schools but merely creating a tax benefit that facilitates individuals' support of religious schools. Therefore, such a program would not violate the Blaine Amendment.

Several variations of the same scheme are possible. First, a dollar-for-dollar tax credit scheme would allow an individual to reduce their tax liability by the same amount spent on financing private education. Thus, if a person had an anticipated tax liability of \$1,500, and spent \$1,000 on private education for their children, then that taxpayer would have a final tax liability of \$500.²⁶⁹ For the parent, it is as if they did not pay tuition, and to the state it is as if they paid for the education directly.

Second, the state could enact a less than dollar-for-dollar credit, or a percentage credit. In this scheme, a taxpayer would receive a credit of some percent of the amount used to pay tuition at a religious institution.²⁷⁰ For instance, if it were a 90% credit, a taxpayer with an anticipated tax liability of \$1,000 that spent \$100 on religious education would receive a tax credit of \$90. The taxpayer would \$90 less tax liability and the school would have a net gain of \$100.

269. Most of these programs have been drafted with caps limiting the impact on the state's fisc. In those programs, it is as if the government only pays for the first amount, up to the cap, and the individual pays the remainder.

270. Alternatively, the credit could be received after donating to a special vehicle, which funnels the money to qualifying schools. See H.B. 498, 94th Gen. Assem., 1st Reg. Sess. (Mo. 2007).

Finally, the legislature could create a deduction for amounts spent on education at sectarian schools. Deductions represent an appropriation of public funds in aid of sectarian education. “Both tax exemptions and tax deductibility are a form of subsidy that is administered through the tax system. A tax exemption has much the same effect as a cash grant to the organization of the amount of tax it would have to pay on its income.”²⁷¹

None of these three tax schemes are permissible under current Missouri law. Such plans require either constitutional amendments or a significant departure from Missouri Supreme Court precedent.²⁷²

1. The Textual Approach: “Appropriation” and “Support or Sustain”

A textual examination of Missouri Blaine Amendment compels the conclusion that most tax benefits for religious schools are unconstitutional. When examining a law in light of Missouri’s Constitution, the courts presume the law does not violate the constitution. The State Constitution, unlike the federal constitution, “is not a grant of power, but as to legislative power, it is only a limitation; and, therefore, except for the [restrictions imposed by the state constitution,] the power of the state legislature is unlimited and practically absolute.”²⁷³ Furthermore, “a court must undertake to ascribe to the words of a constitutional provision the meaning that the people understood them to have when the provision was adopted. The meaning conveyed to the voters is presumptively the ordinary and usual meaning given the words of the provision.”²⁷⁴

Missouri’s constitution states, in pertinent part, “[n]either the general assembly, nor any county, city, town, township, school district or other municipal corporation, shall ever make an appropriation or pay from any public fund

271. *Regan v. Taxation with Representation*, 461 U.S. 540, 544 (1983). *But cf.* Donna D. Adler, *The Internal Revenue Code, the Constitution, and the Courts: The Use of Tax Expenditure Analysis in Judicial Decision Making*, 28 WAKE FOREST L. REV. 855, 857 (1993) (arguing

[T]he Court has fully accepted the equivalence of direct spending programs and tax expenditures in the area of Free Speech rights, but it has not fully applied this concept in the context of Establishment Clause analysis. . . . Different constitutional standards have been applied to direct spending programs and to tax expenditures that have the same economic effect. For example, the refusal to treat tax expenditures and direct spending programs in a consistent manner allows benefits to flow to religious institutions through the Internal Revenue Code when the same benefits would be struck down if distributed in a direct spending program.).

272. Each of these three models assumes that the school provided education at a cost arrived at by normal market forces. The school spent a certain amount on education and recuperated that loss by the tuition charged.

273. *Kansas City v. Fishman*, 241 S.W.2d 377, 379 (Mo. 1951).

274. *Farmer v. Kinder*, 89 S.W.3d 447, 452 (Mo. 2002) (en banc) (citations omitted).

whatever, anything in aid . . . or to help to support or sustain any” sectarian schools.²⁷⁵ One might argue, as was done in Arizona, the legislature would be permitted to create a tax credit for individuals who transfer money to educational assistance organizations, which then in turn fund tuition at religious schools, without running afoul of the state constitution.²⁷⁶ In the Arizona case, *Kotterman v. Killian*, it was argued that a tax benefit is not public money and thus could not be appropriated.²⁷⁷ Accordingly, the state cannot “appropriate” or “pay” a tax credit, and thereby violate the Blaine Amendment, because the state never possessed the credit. The credit is merely a tax benefit awarded to an individual to promote a private, voluntary transaction.

However, this argument, at least when applied to Missouri’s constitution, is faulty. The Blaine Amendment states “[n]either the general assembly, nor any county, city, town, township, school district or other municipal corporation, shall ever make an *appropriation or pay from any public fund whatever, anything in aid . . .*”²⁷⁸ Here, the words “public fund” do not speak to the word “appropriation,”²⁷⁹ but rather only speak to the word “pay.”²⁸⁰ Unlike the word “appropriation,” the word “pay” connotes the payor has possession over the value paid. The appropriator, on the other hand, only must designate the destination of the appropriation.²⁸¹ The word “appropriation” is modified by the phrase “anything of aid,” and not “public fund.” To violate the Blaine Amendment the state need only steer the destination of the aid to the religious institution – a tax credit for a donation to a religious school or a charitable corporation which funds religious school tuition does just that.²⁸²

275. MO. CONST. art. IX, § 8. Missouri’s Blaine Amendment is significantly stronger than that of Arizona. Arizona’s constitution states, “No tax shall be laid or appropriation of public money made in aid of any church, or private or sectarian school, or any public service corporation.” ARIZ. CONST. art. IX, § 10.

276. It was argued there “that reducing a taxpayer’s liability is [not] the equivalent of spending a certain sum of money. An appropriation earmarks funds from ‘the general revenue of the state’ for an identified purpose or destination.” *Kotterman v. Killian*, 972 P.2d. 606, 620 (Ariz. 1999).

277. *Id.*

278. MO. CONST art. IX, § 8 (emphasis added).

279. Appropriation means “[t]he act of appropriating or setting apart; prescribing the use destination of a thing; designating the use or application of a fund.” BLACK’S LAW DICTIONARY 130 (3d ed. 1933). Furthermore, appropriation can also mean “[t]he act by which the legislative department of government designates a particular fund, or sets apart a specified portion of the *public revenue*.” *Id.* (emphasis added). Thus possession by the government is not required for funds to be “appropriated.” *Id.*

280. Pay means “[t]o discharge debt; to deliver to a creditor the value of a debt; either in money or in goods, for his acceptance The term is sometimes limited to discharging an indebtedness by the use of money.” *Id.* at 1339.

281. *See supra* notes 290-91.

282. In this situation, the parochial school and not the taxpayer is the ultimate beneficiary of the tax credit or deduction. Assume Missouri initiated a dollar for dollar tax credit for money spent for donations to organizations to be used for sectarian

The tax relief flows to the religious school when the State enables the individual to provide tuition. The state designates several schools as possible recipients of support or aid. Thus, these tax schemes violate Missouri's Blaine Amendment because a tax benefit "appropriates," despite the fact that it is not a payment from a public fund.²⁸³ Accordingly, since the schemes appropriate a tax benefit, clearly something of value, to parochial schools, the Blaine Amendment is violated.

Alternatively, tax benefits in the form of exemption or credits for tuition reimbursement or flat donations can be analyzed under the "support or sustain" clause. This clause is even broader than the "appropriation" clause. It includes any state action that helps sustain any sectarian school. One could safely conclude that any type of tax benefit operates to "support or sustain" a private school. The private school need not gain anything from the transaction or be a beneficiary to run afoul of this provision. Rather, the school must only continue to exchange education for tuition with state assistance to be sustained. The school does not need to gain or benefit, only continue to exist at status quo through favorable tax treatment.

2. Missouri Precedent: Credits as Grants and Absolute Separation

In Missouri, a tax credit is a grant of public resources.²⁸⁴ A tax credit is essentially a waiver of an account payable to the state; it is an indirect method of government funding.²⁸⁵ In *Curchin v. Missouri Industrial Development Board*, the Supreme Court of Missouri held "[t]here is no difference between

education. If the taxpayer donates \$5,000 he would in return receive a \$5,000 credit. For the taxpayer it is a neutral transaction – he has gained the same amount he has lost. The school however, has gained. It received \$5,000 and provided education.

Alternatively, if the tax benefit is earned, unlike in Arizona, for tuition spent, then the sectarian school is one of two ultimate beneficiaries of the tax credit or deduction. Assume a dollar for dollar tax credit for a tuition reimbursement for religious schools. If the taxpayer pays \$5,000 to the school he gets a credit of \$5,000 then the taxpayer has a positive transaction. He lost the \$5,000 he transferred to the school and received a corresponding \$5,000 benefit along with \$5,000 worth of education. His net worth is unaffected by the transaction and he received tuition gratis. For the sectarian school, this is also a positive transaction. It received \$5,000 and provided education for one additional student. The state has appropriated aid to private schools; the private school religious or secular is an indirect beneficiary of the state's tax policy. The appropriation of the tax benefit acts to support or sustain the sectarian school even if the primary beneficiary is the student or taxpayer.

283. Arizona, on the other hand, has much more explicit language. It forbids "appropriation of public money." ARIZ. CONST. art. IX, § 10. Missouri's constitution forbids all appropriation, from public money or elsewhere. MO. CONST. art. IX, § 8.

284. See Marks, *supra* note 21, at 157 (stating, "the use of a tax credit-funded voucher system seems to violate numerous provisions of the state constitution").

285. The argument would be even stronger if the credit produced a tax refund.

the state granting a tax credit and foregoing the collection of the tax and the state making an outright payment . . . from revenues already collected.”²⁸⁶ Thus, a tax credit is a direct appropriation of state funds.

In *Curchin*, the Missouri Industrial Development Board was authorized to issue bonds.²⁸⁷ Per statute, any holder of those bonds, upon event of default of the principal or interest, was entitled to a tax credit.²⁸⁸ A taxpayer brought suit to declare the bonds, or at least the tax credit element of those bonds, violated the Missouri Constitution.²⁸⁹ The constitution stated “[t]he general assembly shall have no power to grant public money or property, or lend or authorize the lending of public credit, to any private person, association or corporation”²⁹⁰ Essentially, this provision “prohibits the General Assembly from using public money, property, or credit to assist any private person, association, or corporation.”²⁹¹ Stating the answer was “obvious,” the court, found that tax credits are “grant[s] of public money.”²⁹²

Additionally, other precedent extends the rationale to deductions and percentage tax credits.²⁹³ In *Paster v. Tussey*, the Supreme Court of Missouri was charged with determining if the use of state funds to loan textbooks to parochial school students violated the state constitution.²⁹⁴ The court reaffirmed Missouri’s compelling interest in maintaining an absolute separation of church and state where education is implicated. It stated:

[t]he constitutional policy of our State has decreed the *absolute separation* of church and state, not only in governmental matters, but in educational ones as well. Public money, coming from tax-

286. 722 S.W.2d 930, 933 (Mo. 1987) (This case was affirmed in dicta in *Smith v. Coffey*, 37 S.W.3d 797, 800 (Mo. 2001)).

287. *Id.* at 931.

288. *Id.*

289. *Id.* at 932.

290. MO. CONST. art. III, § 38(a).

291. JERALD D. BREKKE, UNDERSTANDING THE MISSOURI CONSTITUTION 55 (3d ed. 1993).

292. *Curchin*, 722 S.W.2d at 933. While such a position did command a majority of the court, it was not unanimous. Of the six judges hearing the case, one dissented arguing that a tax credit is no different than a deduction, which is not a grant of public money. The only difference, says the dissenting judge, is the potential tax savings of the tax credit numerically greater than the tax savings of the deduction, which is a \$500 credit will be more valuable to the taxpayer than the \$500 credit and therefore insignificant to constitutional interpretation. *Id.* at 937 (Rendlen, J., dissenting).

293. It is unclear if percentage tax credits were included as a grant of state aid in *Curchin*. Nonetheless, they certainly fall into the “indirect benefit” category or “help [to] sustain” a sectarian school as discussed above. *See supra* section IV.B.1.

294. 512 S.W.2d 97, 97 (Mo. 1974).

payers of every denomination, may not be used for the help of any religious sect in education or otherwise.²⁹⁵

Where education is concerned, the rule is absolute separation.²⁹⁶

“To succeed, or even exist, [parochial] school[s] must have pupils (or parents thereof) who are adherents of the same sectarian purpose. Individuals, acting individually or collectively, can have and promote a sectarian purpose, and by attending a private school designed for such a purpose do, in fact, promote the sectarian objective for which [the Blaine Amendment] prohibits the expenditure of any public funds.”²⁹⁷

In practice, if the benefit ultimately flows towards the sectarian school, it creates a precarious constitutional position.²⁹⁸ The court held that even though the parochial schools were not directly benefited, because the state provided the books to the students and the students independently channeled the benefit of the books to the school, the law violated Missouri’s Blaine Amendment.²⁹⁹

The state funding of books in *Paster* is analogous to a tax credit and deductions, as both credits and deductions create a benefit that is indirectly routed to a parochial school. These tax benefits thus violate the Missouri Constitution. The parochial school does not take the deduction or tax credit in any of the plans proposed. Rather, the individual takes the deduction and the state facilitates the support of the parochial school. Many scholars

posit that provisions of the tax code that “really” carry out social and economic policy goals should be considered the equivalent of direct spending decisions . . . granting a taxpayer an exemption from a tax that would otherwise accrue (i.e., from the “normative

295. *Id.* at 101 (citations omitted) (emphasis added).

296. The court also stated

That it is the unqualified policy of the State of Missouri that no public funds or properties, either directly or indirectly, be used to support or sustain any school affected by religious influences or teachings or by any sectarian or religious beliefs or conducted in such a manner as to influence or predispose a school child towards the acceptance of any particular religion or religious beliefs

Id. (citations omitted).

297. *Id.* at 104-05.

298. *Id.* at 104 (“[W]hen approval is given for the diversion of public tax revenues to any phase of the educational process not related to the public school system a very tenuous constitutional position is created—referred to in the cases noted, generally, as ‘verging’ on unconstitutionality.”).

299. *Id.* at 103-04.

tax”) is the same – in purpose and in effect – as collecting that tax and giving the taxpayer a direct subsidy.³⁰⁰

Subsidizing private school tuition is one of the primary evils the Blaine Amendment attempts to disallow. Missouri’s strong interest in absolute separation of church and state in educational settings as stated in *Paster* requires a strict tracing of the benefit of any government action. The benefit of the tax deduction or credit flows to the parochial school. Thus, both credits and deductions for donations or tuition rebates to private religious schools are likely to violate Missouri’s strict separation of church and state.

Therefore, tax schemes of any sort are likely to be unsuccessful in circumventing the interests enshrined in Missouri’s Blaine Amendment. This has been confirmed, at least to the extent of dollar-for-dollar credits, by the Missouri Supreme Court, and would be likely to hold true for percentage credits and deductions, which tend to shift support to religious education.³⁰¹

VII. CONCLUSION

Although *Zelman* significantly lowered the wall between church and state, the States still must be careful in drafting programs which facilitate parochial schooling so that they do not excessively entangle the workings of church and state and provide true choice to all beneficiaries of the program. Doing so, however, is not an insurmountable barrier. The states are free to navigate the gauntlet between the two religion clauses either creating parochial school funding or removing religiously affiliated programs from general school choice measures.³⁰²

Ultimately, barring constitutional amendment, Missouri’s interest in withholding state assistance from religious institutions is well secured by our under-appreciated Blaine Amendment. Free Exercise challenges are likely to fail, due to apparent the anti-establishment motives of the 1875 and 1945 Missouri Constitutional Conventions. Various tax schemes are also prohibited due to precedent holding tax credits to be grants of public funds, and construing the Blaine Amendment as creating a strict separation between church and state.

AARON E. SCHWARTZ

300. Erika King, *Tax Expenditures and the Establishment Clause*, 49 SYRACUSE L. REV. 971, 994 (1999).

301. Tax benefits may also generate Establishment Clause issues as they will generally tend to increase state involvement in the educational policy of religious schools and may not provide true choice to all beneficiaries of the benefit. *See supra* notes 29-48 and accompanying text.

302. *See Locke v. Davey*, 540 U.S. 712, 718-19 (2004).