

1-1-2004

Reconstructing the Blaine Amendments

Frederick Mark Gedicks
BYU Law, gedicksf@law.byu.edu

Follow this and additional works at: https://digitalcommons.law.byu.edu/faculty_scholarship



Part of the [Religion Law Commons](#)

Recommended Citation

Frederick Mark Gedicks, *Reconstructing the Blaine Amendments*, 2 FIRST AMEND. L. REV. 85 (2004).

This Article is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

RECONSTRUCTING THE BLAINE AMENDMENTS

FREDERICK MARK GEDICKS*

In the wake of *Zelman v. Simmons-Harris*,¹ school choice proponents have turned their attention to state law obstacles, and in particular to the Blaine Amendments. Named after James G. Blaine, a xenophobic member of Congress who served in the House and Senate from 1863 to 1881, the Blaine Amendments are modeled after a federal constitutional amendment that Blaine introduced in the House in 1876. This proposed amendment would have applied the Religion Clauses to the states and prohibited them from allocating state funds and other resources to “sectarian” organizations, particularly religious elementary and secondary schools.² Although Congress never passed the federal Blaine Amendment, most of the states enacted similar provisions as part of their constitutions; thirty-seven of these are still on the books.

*Professor of Law, Brigham Young University Law School; gedicksf@lawgate.byu.edu. I am grateful to the University of North Carolina School of Law and The Pew Charitable Trusts for the opportunity to discuss this issue. I received insightful comments and criticisms from my co-panelists, and from Chip Lupu and Bill Marshall. I also benefited from participation in a meeting of the Advisory Council to The Roundtable on Religion and Social Welfare Policy held on June 19–20, 2003, at which related topics were discussed, which was also funded by The Pew Charitable Trusts. Finally, I thank Kristen Kemerer and Kim Pearson for excellent research assistance.

1. 536 U.S. 639 (2002) (upholding school voucher program against Establishment Clause challenge).

2. 4 CONG. REC. 205 (1875):

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

Thus, even though *Zelman* appears to have removed all federal Establishment Clause impediments to properly structured tuition voucher and other school choice programs, the constitutional effect of the Blaine Amendments remains to be determined.

The validity of the Blaine Amendments under current constitutional doctrine appears doubtful. Blaine's federal amendment and the state amendments it inspired were largely motivated by anti-immigrant and, in particular, anti-Catholic sentiment. In addition, the amendments by their terms impose special burdens on religious schools in the distribution of state funds and other financial aid to education. Both characteristics generally trigger heightened judicial scrutiny.³

That would seem to resolve questions about the constitutionality of the Blaine Amendments. Indeed, noting the discriminatory origin of the amendments, some conservative commentators have accused political liberals of civil rights hypocrisy for persisting in their defense.⁴ These accusations ignore that the contemporary social meaning of the Blaine Amendments, as opposed to their meaning in the late nineteenth century, is much less anti-Catholic than it is separationist. Although they were originally motivated by anti-Catholic hostility, the Blaine Amendments were also early manifestations of an ideology of church-state separation which continues to inform contemporary Establishment Clause doctrine, and which remains well within the political and intellectual mainstream.⁵

As a consequence, even if the Blaine Amendments would not survive constitutional challenge in their present form, continuing separationist sentiment in many states is likely to stimulate exploration of alternative constitutional means of restricting the allocation of state education funds to religious

3. See *infra* Part I. One version of the amendment may be defensible as a constitutionally legitimate government funding restriction. See *infra* note 18.

4. See, e.g., *The Next Voucher Battleground*, WALL ST. J., Aug. 7, 2002, at A14 (accusing Blaine Amendment defenders of "invoking a century-old relic of religious bigotry" that recalls the "poll taxes and grandfather clauses" employed in the post-Reconstruction South to deny African Americans the right to vote).

5. See *infra* Part II.

schools. Current doctrine would support, for example, a rule which permits states to condition a religious school's receipt of state funds on the school's adherence to policies expressed in secular terms, such as compliance with state anti-discrimination laws, from which religious organizations are often exempted. Such conditions would raise questions about the meaning and scope of the "neutrality" that now appears to be the dominant doctrinal concept in Religion Clause jurisprudence. I will suggest that neutrality should function as a shield that protects religious schools from religious discrimination in the government's distribution of aid and benefits, but not as a sword that grants to religious schools an entitlement to obtain government aid and benefits on more favorable terms than secular schools. Neutrality, in other words, prevents the government from conditioning the receipt of social welfare benefits on religious affiliation (or lack thereof), but does not generally prevent the government from imposing nonreligious conditions on such receipt, so long as they are secularly defined and generally applicable.⁶ I will close with a brief discussion of issues raised by three likely conditions that states would attach to a religious school's receipt of government education aid or benefits: compliance with state anti-discrimination laws, adherence to state education requirements, and avoidance or adoption of certain kinds of speech.⁷

I.

The Blaine Amendments are constitutionally suspect under current doctrine.⁸ Laws that single out a particular religion for disadvantageous treatment are invalid under the Establishment Clause, even when the law employs religiously neutral terms.⁹

6. *See infra* Part III.

7. *See infra* Part IV.

8. For a careful examination of equal protection, free exercise, and illicit motivation arguments that contend that the Blaine Amendments are unconstitutional, see Ira C. Lupu & Robert W. Tuttle, *Zelman's Future: Vouchers, Sectarian Providers, and the Next Round of Constitutional Battles*, 78 NOTRE DAME L. REV. 917 (2003).

9. *See, e.g.,* *Larson v. Valente*, 456 U.S. 228, 246, 247 (1982) (finding

Moreover, the Court has held that such laws are presumptively invalid under the Free Exercise and Equal Protection Clauses.¹⁰ Accordingly, if “sectarian” in the amendments is read as code for “Roman Catholic,” as history suggests it was so understood in the nineteenth century,¹¹ then Blaine Amendments that use this term are engaging in denominational discrimination in violation of both

statute whose effect was to subject only certain minority religions to fund-raising registration and reporting requirements to be suspect denominational preference under the Establishment Clause, which must be “closely fitted” to furthering a “compelling governmental interest”); *see also* *McDaniel v. Paty*, 435 U.S. 618, 639 (1978) (Brennan, J., concurring in the judgment) (stating that the Establishment Clause prohibits government from using religion “as a basis of classification for the imposition of duties, penalties, privileges or benefits”).

10. With respect to the Free Exercise Clause, *see Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 547 (1993) (“[Legislation] may not devise mechanisms, overt or disguised, designed to persecute or oppress a religion or its practices.”). With respect to the Equal Protection Clause, *see Niemotko v. Maryland*, 340 U.S. 268, 272 (1951) (holding that denial of Jehovah’s Witnesses’ application to use a city park because of government distaste for Witnesses’ beliefs violated the “[R]ight to equal protection of the laws, in the exercise of those freedoms of speech and religion protected by the First and Fourteenth Amendments”). *See also* *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938) (suggesting that a “presumption of constitutionality” should not attach to “statutes directed at particular religion”); *American Sugar Refining Co. v. Louisiana*, 179 U.S. 89, 92 (1900) (suggesting that tax exemptions drawn on the basis of “color, race, nativity, religious opinions, political affiliations or other considerations having no possible connection with the duties of citizens as taxpayers” are “purely arbitrary, oppressive or capricious” and deny “the equal protection of the laws to the less favored classes”).

11. *See, e.g.,* Richard A. Baer, Jr., *The Supreme Court’s Discriminatory Use of the Term “Sectarian”*, 6 J.L. POL. 449 (1990); *see also* Jay S. Bybee & David W. Newton, *Of Orphans and Vouchers: Nevada’s “Little Blaine Amendment” and the Future of Religious Participation in Public Programs*, 2 NEV. L.J. 551, 551 (2002) (observing that President Grant’s references to “demagogue,” “priestcraft,” and “religious sect” in his last annual message to Congress were clearly directed at the growing Roman Catholic influence on public education).

Four Justices of the Supreme Court recently drew attention to the anti-Catholic connotations of “sectarian.” *See Mitchell v. Helms*, 530 U.S. 793, 828–29 (2000) (plurality opinion of Thomas, J., joined by Rehnquist, C.J., & Scalia & Kennedy, JJ).

Religion Clauses and the Equal Protection Clause.¹²

The analysis of Blaine Amendments that ban aid to “religious” rather than “sectarian” schools is somewhat different.¹³ The Supreme Court has typically grouped “religion” with race and other traits which government is prohibited from using as a basis of classification under the Equal Protection Clause,¹⁴ though the Court has never actually held that a nondenominational classification defined in terms of a generic or general “religion” violates the Equal Protection Clause.¹⁵ The Free Exercise cases are similar, having suggested without holding that discrimination on the basis of

12. *E.g.*, FLA. CONST. art. I, § 3 (“No revenue of the state or any political subdivision or agency thereof shall ever be taken from the public treasury directly or indirectly in aid of any church, sect, or religious denomination or in aid of any sectarian institution.”); NEV. CONST. art.1, § 10 (“No public funds of any kind or character whatever, State, County or Municipal, shall be used for sectarian purposes.”).

Of course, it is not a foregone conclusion that a majority of the Court will read “sectarian” historically. *See infra* text accompanying notes 27–28.

13. *E.g.*, MASS. CONST. AMEND. art. XVIII (“No grant, appropriation or use of public money or property or loan of credit shall be made or authorized by the Commonwealth or any political subdivision thereof for the purpose of founding, maintaining or aiding any infirmary, hospital, institution, primary or secondary school, or charitable or religious undertaking which is not publicly owned and under the exclusive control, order and supervision of public officers or public agents authorized by the Commonwealth or federal authority or both”); UTAH CONST. art. X, § 9 (1986) (“Neither the state of Utah nor . . . its political subdivisions may make any appropriation for the direct support of any school or educational institution controlled by any religious organization.”); WASH. CONST. 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.”).

14. *See, e.g.*, *United States v. Armstrong*, 517 U.S. 456, 464 (1996); *Miller v. Johnson*, 515 U.S. 900, 911 (1995); *Burlington N. R.R. Co. v. Ford*, 504 U.S. 648, 651 (1992); *Wade v. United States*, 504 U.S. 181, 186 (1992); *McCleskey v. Kemp*, 481 U.S. 279, 291 n.8 (1987); *Friedman v. Rogers*, 440 U.S. 1, 17 (1979); *New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) (unanimous decision); *Oyler v. Boles*, 368 U.S. 448, 456 (1962); *see also* Toby J. Heytens, Note, *School Choice and State Constitutions*, 86 VA. L. REV. 117 (2000) (arguing that the Blaine Amendments are suspect under the Equal Protection Clause because they classify on the basis of “religion in general”).

15. Heytens, *supra* note 14, at 142.

“religion in general” violates the Free Exercise Clause.¹⁶ Even before *Zelman*, however, the Supreme Court had repeatedly held that denominationally neutral prohibitions on tangible aid to religious organizations and individuals violate the Establishment Clause.¹⁷ Accordingly, it seems that those Blaine Amendments prohibiting aid to “religious” organizations, as opposed to “sectarian” ones, are nevertheless equally violative of the Equal Protection, Establishment, and Free Exercise Clauses.¹⁸

16. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993) (“[T]he First Amendment forbids an official purpose to disapprove of a particular religion or of religion in general... [A]t a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs...”); *id.* at 547 (noting a law created in “animosity to religion” violates the Free Exercise Clause.).

17. See *Agostini v. Felton*, 521 U.S. 203 (1997); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993); *Witters v. Wash. Dept. of Servs. for the Blind*, 474 U.S. 481 (1986).

18. Restrictions on “religious” schools might also violate the Equal Protection Clause as covert discrimination against Roman Catholics, since denominationally neutral Blaine Amendment prohibitions on aid to religious schools disproportionately impact the extensive Roman Catholic parochial school system, and were originally motivated by religious hostility towards Roman Catholics. *Cf. Personnel Adm’r. v. Feeney*, 442 U.S. 256 (1979); *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977); *Washington v. Davis*, 426 U.S. 229 (1976).

Some questions about the constitutionality of the Blaine Amendments may be answered by the Supreme Court this term when it returns an opinion in *Davey v. Locke*, 299 F.3d 748 (9th Cir. 2002) (2–1 decision) (invalidating state law which prohibited otherwise qualified student from using state scholarship to study theology at denominational college), *cert. granted*, 123 S. Ct. 2075 (2003). In particular, the Court is likely to address the argument that some state restrictions on aid to “religious” organizations can be defended as constitutionally legitimate funding restrictions. Under this analysis, the fact that a state chooses to fund the exercise of some constitutionally protected choices with respect to a subject matter—*e.g.*, the choice of a secular course of study—does not require that the state fund other such choices—*e.g.*, the choice of a religious course of study. See *infra* notes 52–57 and accompanying text. As the *Davey* dissenter argued, the fact that a state declines to fund religious education is not impermissible religious discrimination, but merely a determination not to subsidize or support activities falling outside the parameters of the state’s educational program. See *Davey*, 299 F.3d at 764–66

II.

It is clear to contemporary scholars that the Blaine Amendments originated in religious bigotry, but this is not how they were understood by the Protestant majority in the late nineteenth century. The governing Protestant influence of that era—an influence that seems obviously religious today—was not understood as “sectarian,” which in the nineteenth century generally denoted a schismatic or heterodox departure from the Christian tradition.¹⁹ “Protestantism” has never been under the control of any single denomination, so reading the King James Bible, reciting Protestant prayers, and performing other Protestant devotional acts in the public schools were not understood as even denominational practices, let alone “sectarian” ones.²⁰ During the nineteenth century, a generalized Protestant morality was thought to be necessary to underwrite the moral consensus necessary for liberal democracy to function, and one of the principal purposes of the so-called “common schools” that proliferated during this era was precisely to instruct children in good democratic citizenship by teaching this morality.²¹ Protestantism in public education,

(McKeown, J., dissenting).

19. Nineteenth century usage attached to “sectarian” a sense of division and dissent from the orthodox Christian tradition. See OXFORD ENGLISH DICTIONARY (J. A. Simpson et al. eds., 2d ed. 1989) (quoting, *inter alia*, THOMAS CARLYLE, *HEROES* iii (1841) (“Dante does not come before us as a large catholic mind; rather as a narrow, and even sectarian mind.”); E. MIAL, *NONCONFORMITY* I 1A (1841) (referring to a “natural and invariable tendency [of Christianity] . . . to fall into distinct bodies and become sectarian, both in spirit and in aim”); 7 *ENCYCLOPEDIA BRITANNICA* 338 (1877) (“There are some doctrines in every system that are merely sectarian, adopted by one particular branch of the church, but not recognized by others as correct expressions of Christian faith and life.”)).

20. See John C. Jeffries, Jr. & James E. Ryan, *A Political History of the Establishment Clause*, 100 MICH. L. REV. 279, 298–99 (2001).

21. Joseph P. Viteritti, *Choosing Equality: Religious Freedom and Educational Opportunity Under Constitutional Federalism*, 15 YALE L. & POL’Y. REV. 113, 179–80 (1996); Kurt T. Lash, *The Second Adoption of the Establishment Clause: The Rise of the Nonestablishment Principle*, 27 ARIZ. ST. L.J. 1085, 1120–24 (1995). Mark DeWolfe Howe famously labeled these nineteenth century church-state interactions the “defacto Protestant

therefore, was not thought to reflect a sectarian or even a denominational point of view, but was understood as the effect of a properly organized constitutional republic. Though no nineteenth century Protestant would have used “neutral” or “objective” to describe his or her worldview, those terms nevertheless capture the way in which Protestants of the time understood their beliefs.

Nineteenth century Roman Catholics, by contrast, were members of a church that remains distinct from the great variety of Protestant denominations. Protestants of that era viewed Roman Catholicism as a serious threat to the social and cultural foundations of the United States.²² The dramatic rise in Roman Catholic immigration during the late nineteenth century, together with the questionable commitment of the nineteenth century popes to liberal democracy and religious pluralism generally, fueled Protestant fears that the cultural truths they took for granted would be subverted in many states and cities by ascendant Roman Catholic majorities.²³

establishment” of religion. MARK DE WOLFE HOWE, *THE GARDEN AND THE WILDERNESS* 11–15, 31, 98 (1965).

22. See, e.g., STEPHEN MACEDO, *DIVERSITY AND DISTRUST: CIVIC EDUCATION IN A MULTICULTURAL DEMOCRACY* 61 (2000) (noting the conflict between nineteenth century American “principles of individual freedom and democratic equality” and “the church’s authoritarian institutional structure, its long-standing association with feudal or monarchical governments, its insistence on close ties between church and state, its endorsement of censorship, and its rejection of individual rights to freedom of conscience and worship”); Jeffries & Ryan, *supra* note 20, at 303 (noting the contrast between the “overwhelmingly immigrant, urban, and poor” Roman Catholics of the late nineteenth century, and “Protestant, rural America”).

23. See Jeffries & Ryan, *supra* note 20, at 299–300, 303; see also Bybee & Newton, *supra* note 11, at 555 (noting that the “Vatican Decree of Papal Infallibility of 1870 added to the anti-Catholic sentiment during this time”). The church’s ambiguous attitude towards liberal democracy persisted well into the twentieth century. See, e.g., Thomas C. Berg, *AntiCatholicism and Modern Church/State Relations*, 33 *LOY. CHI. L.J.* 121, at 133–34 (2001) (observing that during the 1950s the Vatican continued to teach that religious freedom was “at most a prudential accommodation to the fact of diversity in religious beliefs,” with the moral ideal being “a Catholic confessional state with support for the Church and at least some restrictions on the educational and evangelistic activities of other faiths”). The comparably weak commitment of nineteenth century Mormons to religious pluralism and secular government in

From the distance of more than a century, it is easy to see the error of the nineteenth century Protestant self-understanding. The Protestant influence on public education and on government generally was no more neutral or objective in the nineteenth century than the secular influence on such education is in the twenty-first. To put the situation in the most familiar contemporary terms, the Blaine Amendments are the residue of a late nineteenth century culture war, one whose structure is strikingly similar to the cultural conflicts of today. Instead of a Protestant hegemony, we now have a secular one. Instead of a "sectarian" Catholic challenge to Protestantism, we have an interdenominational challenge to secularism, brought by theologically conservative believers across the theological spectrum.²⁴ Like nineteenth century Protestants, contemporary secularists mistakenly understand their secular worldview as not "a view" at all, but as the correct description of the world.²⁵ And like nineteenth century Roman Catholics, contemporary conservative religions are enjoying vibrant growth and are not anxious to reassure their secular opponents that their public intentions are benign.

What would be the relevance of all this for contemporary

Utah may have similarly triggered Protestant suspicion and persecution. See Jeffries & Ryan, *supra* note 20, at 303 (observing that a prominent evangelical preacher and author listed "immigration," "Catholicism," and "Mormonism" as the three most serious "perils" facing the nineteenth century American republic); Mary K. Campbell, *Mr. Peay's Horses: The Federal Response to Mormon Polygamy, 1854-1887*, 13 YALE J.L. & FEMINISM 29, 40-42, 52-56, 62-69 (2001) (showing how the nineteenth century anti-polygamy movement understood itself to have been founded on the practice's un-American and antidemocratic character).

24. See JAMES DAVISON HUNTER, *CULTURE WARS: THE STRUGGLE TO DEFINE AMERICA* 42-47 (1991) (arguing that contemporary cultural conflicts are rooted less in denominational differences than in opposing "orthodox" and "progressive" systems of moral understanding that transcend denominational affiliations).

25. I have criticized elsewhere secularism's claims to neutrality and objectivity. See Frederick Mark Gedicks, *Public Life and Hostility to Religion*, 78 VA. L. REV. 671 (1992); see also Larry Alexander, *Liberalism, Religion, and the Unity of Epistemology*, 30 SAN DIEGO L. REV. 763, 769 (1993) (arguing that liberalism is "just a sectarian view on the same level as the religious and other views it purports to be neutral about and tolerate").

constitutional doctrine? That one can demonstrate that the Blaine Amendments originated in anti-Catholic prejudice is hardly conclusive of their contemporary social meaning. Constitutional history is replete with laws whose constitutionally problematic origins have been held irrelevant in contemporary adjudication. That Sunday Closing Laws, for example, were first enacted to encourage attendance at Christian worship and to put the force of law behind Sabbath observance did not prevent the Supreme Court from upholding such laws on the basis of the much different, contemporary purpose of encouraging family unity.²⁶ Anti-polygamy laws have gone through a similar metamorphosis; originally enacted to impose Victorian morality and republican values upon nineteenth century Mormons, they are now justified as bulwarks against male dominance and protections against spouse and child abuse.²⁷

Finally, however the Blaine Amendments might have been understood in the late nineteenth century, it is doubtful that they are understood today as anti-Catholic. Perhaps the best evidence of this is the considerable historical spadework required to bring the anti-Catholic origins of the amendments to the surface of contemporary American consciousness. The amendments are more likely perceived today as simple manifestations of separationism, an ideology of church state relations which contends that religion presents unique threats to the liberal democratic order, and thus is properly the subject of special restraints in defense of that order, particularly in regard to the distribution of government funds and benefits.²⁸

26. See *McGowan v. Maryland*, 366 U.S. 420 (1961); Lash, *supra* note 21, at 1105–10.

27. See Campbell, *supra* note 24, at 30 (“Various scholars have argued that [polygamy] is sexist, antithetical to romantic love, and that it violates the central tenets of an egalitarian society.”); see, e.g., Michael Janofsky, *Young Brides Stir New Outcry on Utah Polygamy*, N.Y. TIMES, Feb. 28, 2003, at A1 (reporting Utah law enforcement authorities believe criminalization of “child bigamy” is necessary because many polygamist societies pressure young girls into underage marriage and sexual activity).

28. The best exposition of the legal foundations of separationism is Ira C. Lupu and Robert Tuttle, *The Distinctive Place of Religious Entities in Our Constitutional Order*, 47 VILL. L. REV. 37, 50–65 (2002). Judicial statements of

There is historical evidence that at least some supporters of the federal Blaine Amendment were motivated by separationist ideology. Professor Hamburger, for example, has detailed how “theologically liberal, anti-Christian secularists” reacted to the progressive and evangelical politics of the era by adopting the “absolute” separation of church and state as a unifying principle.²⁹ According to Hamburger, these secularists “viewed all Christians with the same fear and horror Protestants reserved for Catholics,” and thus “applied separation to all religious groups,” thereby expanding the “popular Protestant version of separation into a Liberal or secular version that limited all religions with equal vigor.”³⁰ Although these self-described “Liberals” maintained that the separation principle was already evident in the history and structure of the Constitution and the Bill of Rights, they joined with anti-Catholic nativists in support of a constitutional amendment that would expressly place the principle in the Constitution.³¹ In so doing, the Liberals transformed the “separation of church and state” from a vague synonym of religious liberty, into the now-familiar separationist principle that seeks affirmatively to limit the influence of religious institutions on government and American public life generally.³²

separationism include *Lemon v. Kurtzman*, 403 U.S. 602 (1971); *Board of Education v. Allen*, 392 U.S. 236, 250 (1968) (BLACK J., dissenting); and *Everson v. Board of Education*, 330 U.S. 1 (1947). *

29. See PHILIP HAMBURGER, SEPARATION OF CHURCH AND STATE 287–96 (2002).

30. *Id.* at 302–03.

31. See *id.* at 296–302. Not surprisingly, the secularists were disappointed by the tepid amendment proposals (including the federal Blaine Amendment) of the more numerous anti-Catholic nativists. See *id.* at 297–98.

32. See Joint Statement by Church-State Scholars on School Vouchers and the Constitution in SCHOOL VOUCHERS: SETTLED QUESTIONS, CONTINUING DISPUTES 8–9 (The Pew Forum on Religion and Public Life ed., Nov. 2002) (“[E]ven those state provisions originally affected by anti-Catholicism also rest on legitimate rationales for separating church and state that have the support of people who are not anti-Catholic or anti-religious.”), available at <http://pewforum.org/issues/files/VoucherPackage.pdf> (last visited Jan. 14, 2003). Compare HAMBURGER, *supra* note 29, chs. 12–14 with Berg, *supra* note 23, at 163 (“The stricter separationism of [the 1960s and 1970s] reflected a general distrust of any majority position on matters of religion, not

III.

Just as the nineteenth century Catholic antipathy to religious pluralism exaggerated Protestant suspicion of Catholic political goals, the more recent efforts of religious conservatives to “re-Christianize” the public schools and the social welfare bureaucracy feeds the fear of secularists that the ultimate aim is conservative Christian dominance of government.³³ The original understanding of the Blaine Amendments as anti-Catholic measures is not helpful in resolving this cultural conflict. If all of the Blaine Amendments were struck down tomorrow, separationist sentiment in many states—indeed, perhaps in most of them—could easily end in state imposition of secularly defined conditions on the participation of private schools in voucher and school choice programs, thereby leaving such programs to confront much the same constitutional and policy questions in relation to religious schools as they do now, without the anti-Catholic baggage now loaded onto the Blaine Amendments. As Professors Lupu and Tuttle have pointed out, states can comply with both anti-discrimination laws and their Blaine Amendments by treating religious and secular private schools alike.³⁴ Perhaps a better way of thinking about this issue, then, is not to focus directly on either the original or the contemporary meaning of the Blaine Amendments, but rather on the “neutrality” that the Religion Clauses now impose on government, and by extension on the amendments themselves.

That in the last twenty years neutrality has eclipsed

simply a distrust of Catholicism (which sometimes was, but sometimes was not, a majority faith.”)).

Professor Smith has recently argued that separationism is better understood as a constitutional tradition, than as the coherent development of a doctrinal principle or the result of interest-group politics. See Steven D. Smith, *Separation as a Tradition*, 18 J.L. & POL. 215 (2002).

33. “Re-Christianization” is a term employed by Gilles Kepel to describe the relatively recent re-emergence of Roman Catholic and Protestant activity in government and public life in the United States and western Europe. See GILLES KEPEL, *THE REVENGE OF GOD: THE RESURGENCE OF ISLAM, CHRISTIANITY, AND JUDAISM IN THE MODERN WORLD* 47–97, 196–98, 202–03 (Alan Braley trans., Pennsylvania State University Press 1994).

34. See Lupu & Tuttle, *supra* note 8, at 966–67.

separation as the doctrinal rule for measuring the constitutionality of distributions of government funds and other tangible benefits is a significant victory for religious conservatives.³⁵ For decades, the Court's general adherence to separationism constituted a formidable doctrinal obstacle to full participation by religious organizations in the contemporary American welfare state.³⁶ Separation doctrine denied government funds and benefits to religious groups and individuals who were otherwise fully qualified to receive them, solely and simply because of their religious character.³⁷ *Zelman* is only the latest in a line of decisions holding that the religious neutrality imposed on government by the Establishment Clause generally prohibits the exclusion of otherwise qualified religious groups and individuals from participating in government benefits and programs.³⁸

How much protection does Religion Clause neutrality extend to religion?³⁹ A distinction between "defensive" or negative

35. For an account of this development, see Frederick Mark Gedicks, *Neutrality in Establishment Clause Interpretation: It's Past and Future*, in CHURCH-STATE RELATIONS IN CRISIS: DEBATING NEUTRALITY 191 (Stephen V. Monsma ed., 2002).

36. See Frederick Mark Gedicks, *A Two-Track Theory of the Establishment Clause*, 43 B.C. L. REV. 1071, 1087-90 (2002).

37. See, e.g., *Aguilar v. Felton*, 473 U.S. 402 (1986); *Sch. Dist. Of Grand Rapids v. Ball*, 473 U.S. 373 (1985); *Wolman v. Walter*, 433 U.S. 229 (1977); *Meek v. Pittenger*, 421 U.S. 349 (1975); *Comm. For Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973); *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

38. See, e.g., *Mitchell v. Helms*, 530 U.S. 793 (2000); *Agostini v. Felton*, 521 U.S. 203 (1997); *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993); *Bowen v. Kendrick*, 487 U.S. 589 (1988); *Witters v. Wash. Dep't of Servs. for the Blind*, 474 U.S. 481 (1986); *Mueller v. Allen*, 463 U.S. 388 (1983); *Widmar v. Vincent*, 454 U.S. 263 (1981); *Bd. of Educ. v. Allen*, 392 U.S. 236 (1968); *Everson v. Bd. of Educ.* 330 U.S. 1 (1947).

39. Although I assume in what follows that neutrality informs the doctrine of both the Establishment Clause and the Free Exercise Clause, I have not attempted to elaborate the precise doctrinal dimensions of neutrality under each Clause. Cf. MICHAEL MCCONNELL, ET.AL., RELIGION AND THE CONSTITUTION 438 (2002) (noting the resemblance of the conflict between neutrality and separation under the Establishment Clause to arguments over mandatory accommodations under the Free Exercise Clause).

rights, on the one hand, and “offensive” or positive rights, on the other, offers one way to think about this question.⁴⁰ A negative right is a right to be free from the effects of government action, to prevent the government from acting as a restraint on the liberty of the right-holder. A positive right represents precisely the opposite: a right to a claim on the government, to compel the government to act affirmatively for the benefit of the right-holder. It is well established, for example, that the Press Clause is a “shield” rather than a “sword”—that is, a negative right rather than a positive one. The Press Clause protects the right of the press not to be restricted by government in its news gathering activities any more than the general public; on the other hand, the Clause does not give the press a positive right of access to information beyond that afforded to the general public.⁴¹

In similar fashion, neutrality can be understood as protecting only a negative right—the right of religious organizations and individuals to be free from special restraints on their participation in the social welfare state. Neutrality need not entail the positive right of such organizations or individuals to receive social welfare funds and benefits on some privileged basis peculiar to them as religious. To say that neutrality protects religious organizations and individuals from exclusion or other discrimination on the basis of their religion, however, is not to say that such groups and individuals are protected from the effects of

40. The classic development of this distinction is ISAIAH BERLIN, *Two Concepts of Liberty*, in *FOUR ESSAYS ON LIBERTY* 118 (1969).

41. See, e.g., *Cohen v. Cowles Media Co.*, 501 U.S. 663, 665 (1991) (holding Press Clause does not exempt reporters who violate promise to maintain confidentiality of a source from common law action by source for breach of promise); *Zurcher v. Stanford Daily*, 436 U.S. 547, 565 (1978) (holding Press Clause does not provide special protection against validly issued search warrant for negatives, films, and pictures in possession of newspaper of participants in allegedly illegal demonstration); *Branzburg v. Hayes*, 408 U.S. 665 (1972) (holding Press Clause does not exempt reporter who filmed illegal drug transactions for news report from the general obligation to testify to his knowledge of such transactions when called upon to do so by grand jury). See generally C. Edwin Baker, *Press Rights and Government Power to Structure the Press*, 34 U. MIAMI L. REV. 819, 839–45 (1980).

generally applicable secular laws.⁴² In this respect, *Zelman* is merely the doctrinal reciprocal of *Smith*, at least as to individuals: if neutrality prevents the *exclusion* of otherwise qualified individuals from a public welfare program, solely because they are religious, then presumably it also should prevent the *exemption* of such individuals from an otherwise applicable secular condition to participation in the program, solely because they are religious.⁴³

IV.

In principle, while religious individuals and organizations cannot be disqualified from receiving state aid on the basis of their religious beliefs or orientation, it is at least presumptively legitimate to disqualify them from such receipt if they do not conform to generally applicable, religiously neutral state policies—that is, policies framed in secular terms that apply to most organizations and most individuals, secular and religious.⁴⁴ At least three such conditions are likely candidates for imposition on any school's participation in state educational voucher and other school choice programs: compliance with state anti-discrimination laws; adherence to state curriculum, licensing, and certification requirements; and avoidance or adoption of certain kinds of speech.

A.

Many states or localities would likely require that private schools at which vouchers are redeemed comply with state anti-discrimination laws, both in their admission of students and in their employment of administrators, teachers, and other employees. Indeed, avoidance of racial discrimination in both admissions and

42. See *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531–32 (1993); *Employment Div. v. Smith*, 494 U.S. 872, 890 (1990).

43. FREDERICK MARK GEDICKS, *THE RHETORIC OF CHURCH AND STATE* 110–11 (1995).

44. See, e.g., Steven K. Green, *Religious Discrimination, Public Funding, and Constitutional Values*, 30 HASTINGS CONST. L.Q. 1, 18 (2002) (arguing that *Employment Division v. Smith* precludes “constitutional entitlement to a religious accommodation from a generally neutral law like Title VII”).

employment may well be a constitutionally required condition under the Equal Protection Clause,⁴⁵ given the Supreme Court's elastic application of the state action doctrine when racial discrimination is involved,⁴⁶ and the compelling weight that it places on the government goal of eliminating racial discrimination in education.⁴⁷ There would also be popular and judicial support in some states and localities for requiring that private school recipients of state educational and localities vouchers comply with anti-discrimination laws relating to gender and sexual orientation, even if such conditions were not required by the federal Constitution.⁴⁸

Compliance with anti-discrimination laws presents a variety of challenges for private religious schools that wish to participate in voucher and other school choice programs conditioned on such

45. See James G. Dwyer, *School Vouchers: Inviting the Public into the Religious Square*, 42 WM. & MARY L. REV. 963, 994-96 (2001).

46. See, e.g., *Hunter v. Erickson*, 393 U.S. 38 (1969) (holding city's amendment of its charter so as to prevent enforcement of existing fair housing law without popular referendum was state action under section 1 of the Fourteenth Amendment); *Reitman v. Mulkey*, 387 U.S. 369 (1967) (holding popular referendum providing for state constitutional protection of the right to private discrimination in the sale of property to be state action); *Burton v. Wilmington Parking Auth.*, 365 U.S. 715 (1961) (finding state action in racial discrimination by restaurant operating pursuant to a lease of city-owned building space); *Shelley v. Kraemer*, 334 U.S. 1 (1948) (according state action to judicial enforcement of racially restrictive covenant); see also ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW* 405-06 (2001) (observing that "[f]rom the late 1940s through the 1960s, the Court expansively defined what constitutes state action as part of trying to combat racial discrimination," but also noting the "reduced need to rely on the Constitution to reach private racial discrimination" since passage of the Civil Rights Act of 1964).

47. See, e.g., *Bob Jones Univ. v. United States*, 461 U.S. 574, 604 (1983); *Norwood v. Harrison*, 413 U.S. 455, 465 (1973); *Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954).

48. See Dwyer, *supra* note 45, at 995, 997 (arguing that the same logic that requires voucher recipients to avoid racial discrimination would also require them to avoid gender discrimination, and suggesting that if courts interpret the Equal Protection Clause to prohibit public schools from "discriminating against gay students or teaching that homosexuals are morally inferior human beings," they might also be willing to extend these requirements to private schools as a condition of the latter's accepting vouchers or other state educational funds).

compliance. The religious beliefs of the church, synagogue, mosque, or other religious group that sponsors the school may mandate certain kinds of discrimination, particularly in hiring the administrative and teaching staff of the school. Although racist beliefs about the capacity of African Americans for serving in the ministry have declined among American religions during the last half-century, such beliefs have not disappeared. Additionally, many religions remain committed to theologies that reserve religious leadership to men, or that condemn same-sex orientation or activity as a moral disqualification for such leadership. Finally, even when such discriminatory beliefs do not formally apply to the general religious membership, they may reinforce or otherwise contribute to a culture that countenances informal racial, gender, and sexual orientation discrimination even in circumstances, such as student admissions, to which discriminatory theological beliefs do not formally apply.

Aside from theologically mandated discrimination on the basis of race, gender, or sexual orientation, discrimination on the basis of religion creates unique problems for both religious institutions and for constitutional doctrine. Most ideologically oriented organizations can discriminate with respect to both leadership and membership in favor of those who share their beliefs. Pro-environment activist groups, for example, may prefer environmentalists as leaders and members, the Republican Party may prefer political conservatives, and so on. Because discrimination on the basis of religious affiliation is usually banned by anti-discrimination laws, however, such laws, when applied to religious schools, prohibit them from favoring co-religionists in admissions or employment decisions.⁴⁹

The inability of a religious school to restrict the majority of its administrators, teachers, or students to those who adhere to the school's core beliefs and practices will eventually end in dilution or loss of the school's denominational or religious identity, just as a secular group's loss of control over its leadership or membership would ultimately result in loss of its ideological distinctiveness.⁵⁰

49. See Gedicks, *supra* note 36, at 1105–06.

50. Frederick Mark Gedicks, *Toward a Constitutional Jurisprudence of*

Allowing religious schools to discriminate religiously gives to them the same control over leadership and membership that secular organizations possess.⁵¹

Nevertheless, it is difficult to argue that religious groups or individuals committed to discriminatory theologies are constitutionally entitled to participate in voucher and other school choice programs conditioned on compliance with anti-discrimination laws. The Supreme Court has been most solicitous of group identity conditioned on compliance with anti-discrimination laws when anti-discrimination laws apply directly against groups.⁵² At the same time, it has held that government is generally under no obligation to fund the exercise of all constitutionally protected choices, even if it chooses to fund the exercise of some.⁵³ It is one thing, in other words, to leave a group free to discriminate with its own money; it is quite another to leave it free to discriminate with the government's.⁵⁴ It is likely, then, that states may choose to condition participation in voucher and other school choice programs on compliance with anti-discrimination laws.

Religious Group Rights, 1989 WIS. L. REV. 99, 106–15.

51. Ira C. Lupu, *Why the Congress Was Wrong and the Court Was Right—Reflections on City of Boerne v. Flores*, 39 WM. & MARY L. REV. 793, 809 (1998); Lupu & Tuttle, *supra* note 8, at 83–84.

52. *See, e.g.*, *Boy Scouts of America v. Dale*, 530 U.S. 640, 648–59 (2000); *see also* *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327, 329–30 (1987) (upholding exemption from federal employment discrimination laws that enables religious groups to favor of co-religionists in their secular nonprofit activities); *Watson v. Jones*, 80 U.S. (13 Wall.) 679 (1871) (declining to intervene in church schism over theological status and treatment of past slave holders).

53. *E.g.*, *Rust v. Sullivan*, 500 U.S. 173, 193 (1991) (upholding federal regulations that prohibited institutional recipients of Title X funds from discussing abortion as a method of family planning, and further required that abortion services be provided by such recipients in a physically separate location); *Maher v. Roe*, 432 U.S. 464, 474 (1977) (upholding state medicaid program that paid for medical expenses of childbirth, but not those associated with elective abortion).

54. *See* Green, *supra* note 44, at 45; *cf. Maher*, 432 U.S. at 475 (“There is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy.”).

B.

As to the second likely condition, states will almost certainly require that schools participating in voucher and other school choice programs comply with state curriculum, teacher certification, and other accreditation standards.⁵⁵ Government has a clear interest in overseeing the use of its funds to ensure that the funds are actually being used consistently with the purposes for which they are granted.⁵⁶ States fund education and mandate school attendance to ensure that children residing within their borders acquire the skills necessary to function in society as informed citizens and productive adults.⁵⁷ On that basis, many states may not wish to have vouchers redeemed at private schools that refuse to teach, say, sex education or Darwinian evolution, that employ nonaccredited teachers, or that otherwise do not comply with minimum standards for education. Such conditions, like required compliance with anti-discrimination laws, would probably be upheld.

C.

This leaves the last likely condition, avoidance or advocacy of certain ideas. Suppose that a state sought to deny participation in a voucher or school choice program to schools that endorse or encourage stereotypical gender roles, or that teach the sinfulness or evil of those with differing practices or beliefs?⁵⁸ A state might also

55. See Lupu & Tuttle, *supra* note 8, at 978; e.g., *Zelman v. Simmons-Harris*, 536 U.S. 639, 644 (2002) (observing that the voucher program there at issue required that participating private schools comply with “statewide educational standards”).

56. See, e.g., *Rust*, 500 U.S. at 194 (“[W]hen the Government appropriates public funds to establish a program it is entitled to define the limits of that program”); Dwyer, *supra* note 45, at 985–86 (“[T]he state must condition participation in any program of state aid on compliance with such regulations as are necessary to ensure that recipients in fact further the secular aim that is the purpose for the aid program.”).

57. See, e.g., *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 681 (1986); *Ambach v. Norwick*, 441 U.S. 68, 76–77 (1979).

58. E.g., *Zelman*, 536 U.S. at 644 (observing that the voucher program

disqualify from participation private schools that reject widely accepted historical or political truths, such as the political or moral justifiability of the Civil War, the fact of the Holocaust, or the superiority of liberal democracy and capitalism over other political and economic systems. Such conditions would be controversial, because they constitute viewpoint-based regulation of “pure speech” protected by the Speech Clause of the First Amendment. Nevertheless, a state’s undeniable interest in ensuring that students who direct state funds to private schools receive a minimally adequate education would seem to encompass the power to make judgments about the factual, historical, or moral correctness of what such schools actually teach,⁵⁹ as well as about whether such schools’ ideological viewpoints promote or impede the development of the citizenship values necessary to a well-functioning liberal democracy.⁶⁰

there at issue required participating private schools to agree not to “advocate or foster unlawful behavior or teach hatred of any person or group on the basis of race, ethnicity, national origin, or religion” (quoting Ohio Rev. Code Ann. § 3313.976(A)(6)); Dwyer, *supra* note 45 at 996–97 (arguing that it would be “constitutionally problematic” for states to subsidize the teaching of such ideas).

59. See Dwyer, *supra* note 45, at 997 (arguing that the state need not tolerate in private schools practices which it has determined, “with a reasonable degree of certainty,” are harmful to children); cf. National Endowment for the Arts v. Finley, 524 U.S. 569, 584–85 (1998) (approving the National Endowment for the Art’s use of a content-based standard of “artistic excellence” in determining how to allocate arts funding”).

60. See *Fraser*, 478 U.S. at 681 (The “‘habits and manners of civility’ essential to a democratic society must, of course, include tolerance of divergent political and religious views, even when the views expressed may be unpopular.” (quoting CHARLES AUSTIN BEARD ET AL., *NEW BASIC HISTORY OF THE UNITED STATES* 228 (Doubleday 1968)); MARK G. YUDOF, *WHEN GOVERNMENT SPEAKS* 54 (1983) (arguing that children should be socialized to recognize the desirability of democratic values, including “tolerance, civility, liberty, equality, respect for individual dignity, participation in political decisions, freedom of expression, freedom to own and dispose of property, and respect for minority interests”); Viteritti, *supra* note 21, at 161 (arguing that *Brown v. Board of Education* “perceptively explained the central role that education plays in a free society—as a source of civic virtue, as a means of acculturation, as a vehicle for social mobility, and, ultimately, as a guarantor of full equality”); see also *Fraser*, 478 U.S. at 683 (“[T]he ‘fundamental values necessary to the maintenance of a democratic political system’ disfavor the use

These kinds of conditions would represent the use of voucher and other school choice programs indirectly to pressure private individuals and groups into altering expression that is protected from direct governmental interference by the Speech Clause of the First Amendment, if not by the Religion Clauses themselves. As with anti-discrimination norms, such requirements would be problematic if applied directly.⁶¹ As conditions to participation in a government program, however, such requirements are probably constitutionally permissible, so long as they are framed in secular terms and apply to all private schools, rather than being directed solely at religious ones. The Court has made clear that government is empowered to withhold tax exempt status from groups whose ethos does not enhance the public interest that tax exemptions are supposed to promote.⁶² It is a small step from there to hold that states are empowered to withhold participation in voucher and other school choice programs from private schools whose animating beliefs and practices undermine some or all of the values for which the state funds education, even if such schools formally comply with curriculum, licensing, and certification requirements.⁶³

of terms of debate highly offensive or highly threatening to others.”) (quoting *Ambach v. Norwick*, 441 U.S. 68, 77 (1979)).

61. See *Finley*, 524 U.S. at 587–88 (“[T]he government may allocate competitive funding according to criteria that would be impermissible were direct regulation of speech or a criminal penalty at stake.”); cf. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 270–71 (1988) (“The question whether the First Amendment requires a school to tolerate particular student speech . . . is different from the question whether the First Amendment requires a school affirmatively to promote particular student speech.”).

62. *Bob Jones Univ. v. United States*, 461 U.S. 574, 586–92 (1983).

63. See *Lupu & Tuttle*, *supra* note 8, at 974–76, 981–82. *Rust v. Sullivan* emphasized, however, that the regulations there at issue did not act as “a general law singling out a disfavored group on the basis of speech content,” but were simply “a case of the Government refusing to fund activities, including speech, which are specifically excluded from the scope of the project funded.” 500 U.S. 173, 194–95. By contrast, some of the secularized post-Blaine conditions that I have discussed appear to single out certain viewpoints for disqualification, and thus might be vulnerable to this aspect of *Rust*.

* * *

So long as separation remains an independent Religion Clause value, political pressure will continue in many states to find constitutionally permissible ways of restricting the access of religious organizations and individuals to state education funds. That the Blaine Amendments are probably unconstitutional as currently enacted is, therefore, not the end of the constitutional story, but its beginning.