

# FLORIDA’S BLAINE AMENDMENT: GOLDILOCKS AND THE SEPARATE BUT EQUAL DOCTRINE

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Anti-Catholic prejudice that gave rise to so-called Blaine Amendments in myriad state constitutions is widely known.<sup>2</sup> These amendments provide, in essence, that no public revenue may pass directly or indirectly in aid of a sectarian institution.<sup>3</sup> Lesser known is the

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2. CHARLES L. GLENN, JR., *THE MYTH OF THE COMMON SCHOOL* 253 (1988); PHILIP HAMBURGER, *SEPARATION OF CHURCH AND STATE* 335 (2002); WARD M. MCAFEE, *RELIGION, RACE AND RECONSTRUCTION: THE PUBLIC SCHOOL IN THE POLITICS OF THE 1870s*, at 196–97 (1998); Mark E. DeForrest, *An Overview and Evaluation of State Blaine Amendments: Origins, Scope and First Amendment Concerns*, 26 HARV. J.L. & PUB. POL’Y 551, 559 (2003); 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. OF AM. L. 413, 423 (2003); John C. Jeffries & James E. Ryan, *A Political History of the Establishment Clause*, 100 MICH. L. REV. 279, 305 (2001); Douglas Laycock, *The Underlying Unity of Separation and Neutrality*, 46 EMORY L.J. 43, 50–51 (1997); Ira Lupu, *The Increasingly Anachronistic Case Against School Vouchers*, 13 NOTRE DAME J.L. ETHICS & PUB. POL’Y 375, 386 (1999); Joseph P. Viteritti, *Blaine’s Wake: School Choice, the First Amendment, and State Constitutional Law*, 21 HARV. J.L. & PUB. POL’Y 657, 671–72 (1998); Toby J. Heytens, Note, *School Choice and State Constitutions*, 86 VA. L. REV. 117, 137–38 (2000).

3. *What are Blaine Amendments?* BLAINE AMENDMENTS, <http://www.blaineamendments.org/Intro/whatis.html> (last visited Dec. 31, 2011) (“Blaine Amendments are provisions in dozens of state constitutions that prohibit the use of state funds at

relationship explored in this article between the Blaine Amendment and racial prejudice. In Florida, the two were patently interrelated. Before ratification of the State's 1885 Constitution, freedmen could receive a quality education at integrated common schools or private religious schools. The "separate but equal" doctrine<sup>4</sup> foreclosed the first choice and the Blaine Amendment limited the second. Not coincidentally, the private religious schools teaching freedmen at the time were sponsored by carpetbaggers,<sup>5</sup> Protestant abolitionists, and Catholics. Thus, the separate but equal doctrine and the Blaine Amendment together became a juggernaut of racial and religious oppression impacting primarily the African-American community.

Today, Florida courts refer to the Blaine Amendment in far more benign terms as a "no-aid" provision.<sup>6</sup> But this article reveals that the Amendment's framers would not have recognized their clause as such. They were not in favor of strict separation as are most of the Blaine Amendment's supporters today. Rather, they generally favored a Protestant establishment of religion even in the public schools. The test Florida courts have adopted to interpret Article I, Section 3, permits in effect the just-about-right religious to participate in publicly-funded programs, but not the too-religious. Because this is reminiscent of the Goldilocks tale, the article refers to this test as the "Goldilocks test" for compliance with Article 1, Section 3.<sup>7</sup>

Employing the Goldilocks test to interpret Article I, Section 3 not only perpetuates a prejudicially motivated amendment, but also impinges upon state and federal precedent against preferring one religion over another and entangling the state in church law, policies, and regulations. Therefore, the fact that the Blaine Amendment was readopted in the 1968 Constitution and passed on by subsequent constitutional conventions cannot and should not save this interpretation of the clause. It should not

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'sectarian' schools. They're named for James G. Blaine, who proposed such an amendment to the U.S. Constitution while he was Speaker of the U.S. House of Representatives in 1875.").

4. *See Plessy v. Ferguson*, 163 U.S. 537 (1896) (upholding a Louisiana statute on the ground that "equal but separate accommodations for the white, and colored races" does not violate the Thirteenth or Fourteenth Amendments to the United States Constitution).

5. *Carpetbagger Definition*, MERRIAM-WEBSTER.COM, <http://www.merriam-webster.com/dictionary/carpetbagger> (last visited Dec. 31, 2011). A carpetbagger is "a Northerner in the South after the American Civil War, usually seeking private gain under the reconstruction governments." *Id.*

6. *E.g.*, *Bush v. Holmes*, 886 So. 2d 340, 343-44 (Fla. Dist. Ct. App. 2004), *aff'd on other grounds*, 919 So. 2d 392 (Fla. 2006).

7. *See infra* pp. 21-24.

save it, because the Amendment as reframed will cause even more public discrimination than as proposed with racial and religious animus. In addition, it would severely undercut state and local government's ability to provide social services to the poor and needy from healthcare and substance abuse treatment to transitional housing and eldercare.

#### ORIGINS OF THE BLAINE AMENDMENT

Among the potent political forces in early nineteenth century America was Know-Nothingism.<sup>8</sup> Nationally, the Know-Nothing Party, or American Party, was concerned about the immigration of "Papists"<sup>9</sup> from Southern Europe to America, where they tended to congregate in inner cities and to establish parochial schools.<sup>10</sup> America's public schools, or "common schools," were essentially Protestant. Prayer, King James Bible reading, and hymn singing were common.<sup>11</sup> Irish and German immigrants wanted their children to learn Roman Catholic values and religion from the Douay Version of the Bible, rather than the Protestant Bible. Because of the Protestant influence in the public schools, Catholics established a parallel school system and sought public funding, or at least exemption from taxation.<sup>12</sup>

Prior to the Civil War, the Know-Nothings led the fight against the immigration of the supposed unsavory and un-American Southern Europeans and the private school funding they sought. Begun as a secret society in New York in 1849, party members were instructed to answer, "I

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8. *Know-Nothingism Definition*, MERRIAM-WEBSTER.COM, <http://www.merriam-webster.com/dictionary/know-nothingism> (last visited Dec. 31, 2011). Know-Nothingism is "a mid-20th century political attitude characterized by anti-intellectualism, exaggerated patriotism, and fear of foreign subversive influences." *Id.*; see also *Know-Nothing Definition*, MERRIAM-WEBSTER.COM, <http://www.merriam-webster.com/dictionary/know-nothing> (last visited Dec. 31, 2011). A Know-Nothing is "a member of a 19th century secret American political organization hostile to the political influence of recent immigrants and Roman Catholics." *Id.*

9. See *Papist Definition*, MERRIAM-WEBSTER.COM, <http://www.merriam-webster.com/dictionary/papist> (last visited Dec. 31, 2011). Papist is a disparaging term used for a Roman Catholic. *Id.*

10. See JOHN R. MULKERN, *THE KNOW-NOTHING PARTY IN MASSACHUSETTS* 102 (1990) (describing legislators' concern with the influx of poverty-stricken Irish Catholic immigrants settling in Massachusetts).

11. See *Chamberlin v. Dade Cnty. Bd. of Pub. Instruction*, 143 So. 2d 21, 23 (Fla. 1962), *rev'd*, 377 U.S. 402 (1964) (noting plaintiffs averred, *inter alia*, that Bible reading, prayer recitation, and hymn singing were commonly observed in public schools).

12. See Steven K. Green, *The Blaine Amendment Reconsidered*, 36 AM. J. LEGAL HIST. 38, 41-43 (1992) (stating Catholics established their own parochial schools in response to obvious evangelical Protestant overtones in public education).

don't know," when asked about the organization.<sup>13</sup> As secrecy gave way to public awareness, the party's mantra became "America for Americans."<sup>14</sup> Attracting former Whigs and nativists, the Know-Nothings appeared on national ballots for the first time in 1856, with former President Millard Fillmore as the standard bearer.<sup>15</sup> In their national platform, they demanded a twenty-one-year period of naturalization and a ban on non-native born Americans from office-holding.<sup>16</sup> But the Know-Nothings did not long endure; they split over the Kansas-Nebraska Act, and the party collapsed around 1856 in the wake of two powerful movements: abolitionism and secessionism.<sup>17</sup>

The American Party's position on abolitionism was apparently in the eye of the beholder. Stephen Douglas equated Know-Nothingism with abolitionism, whereas Abraham Lincoln warned, "[w]hen the Know Nothings get control, it will read all men are created equal, except Negroes, and foreigners, and Catholics."<sup>18</sup> Southern defectors from the American Party generally emerged as Constitutional Unionists, while Northern supporters joined the rapidly rising Republican Party. After the Civil War, Know-Nothing influence emerged the strongest in the Republican Party.<sup>19</sup>

In 1875, President Ulysses S. Grant and former House Speaker James G. Blaine seized on part of the Know-Nothings' message to revitalize the Grand Old Party which lost control of the House of Representatives in 1874.<sup>20</sup> Blaine sought the Republican nomination,<sup>21</sup> but Grant also not so

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13. PAUL F. BOLLER, JR., *PRESIDENTIAL CAMPAIGNS FROM GEORGE WASHINGTON TO GEORGE W. BUSH* 93 (2004) (explaining how members of the American Party became known as "Know-Nothings").

14. *Id.*

15. FREDERICK MERK, *HISTORY OF THE WESTWARD MOVEMENT* 179 (1978) (noting Millard Fillmore was the candidate for the American Party during the presidential election of 1856).

16. AMERICAN PLATFORM OF PRINCIPLES, *THE TRUE AMERICAN'S ALMANAC AND POLITICIAN'S MANUAL FOR 1857* (Tisdale ed., 1857), available at <http://www.yale.edu/glc/archive/974.htm> (last visited Dec. 31, 2011) (listing the Know-Nothings' enumerated principles, which were adopted on February 21, 1856).

17. See Arthur W. Thompson, *Political Nativism in Florida, 1848-1860: A Phase of Anti-Secessionism*, 15 J.S. HIST. 39, 59 (1949) (describing the political climate leading to the rapid decline of the American Party in 1857).

18. Letter from Stephen Douglas to Howell Cobb (Oct. 6, 1855), in STEPHEN A. DOUGLAS, *THE LETTERS OF STEPHEN A. DOUGLAS* 342 (Robert W. Johannsen ed., 1961) ("Abolitionism, Know Nothingism, and all the other isms are akin to each other and are in alliance . . . against the national Democracy."); STEPHEN B. OATES, *THE APPROACHING FURY: VOICES OF THE STORM, 1820-1861*, at 165 (1997) (internal quotation marks omitted).

19. MCAFEE, *supra* note 2, 47.

20. Green, *supra* note 12, at 49 (discussing Republican political losses in the national election of 1874).

secretly desired an unprecedented third term.<sup>22</sup> Although Grant's administration was marred by corruption,<sup>23</sup> anti-Catholicism and the "school question" offered an avenue to rebuild the Republican Party.<sup>24</sup> Consequently, "[i]n 1875, Republicans chose to use religious prejudice as a political counterpoise to racial prejudice."<sup>25</sup> In a celebrated speech, President Grant inspired an amendment to the United States Constitution, hastily proposed by Blaine to upstage his rivals, that precluded "aid" to "religious sects," commonly understood to mean "Catholic" institutions.<sup>26</sup>

Protestants hailed the Amendment, but the Catholic Church bitterly contested it.<sup>27</sup> The Amendment passed overwhelmingly in the House of Representatives (180-7), but failed in the Senate by four votes on a party-line vote.<sup>28</sup> The primary objection raised in the Senate was that it would infringe on state autonomy in educational matters.<sup>29</sup> Notwithstanding this, Congress required new states entering the Union to include versions of the Blaine Amendment in their constitutions.<sup>30</sup> Many other states voluntarily

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21. MCAFEE, *supra* note 2, at 189.

22. *Id.* at 189-90.

23. Green, *supra* note 12.

24. *Id.* at 49, 61; *accord* MCAFEE, *supra* note 2, 189.

25. MCAFEE, *supra* note 2, at 172.

26. Green, *supra* note 12, at 52-53, 60. The original text of the Amendment that Blaine submitted to the House read as follows:

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

*Id.* at 53 n.96. During the Amendment's consideration in 1876, the Senate Judiciary Committee added the following sentence, which appeared in the final version: "This article shall not be construed to prohibit the reading of the Bible in any school or institution." *Id.* at 60; *accord* MCAFEE, *supra* note 2, at 194, 197. *See also* Zelman v. Simmons-Harris, 536 U.S. 639, 721 (2002) (Breyer, J., dissenting) (noting the purpose of federal and state Blaine amendment movements was "[t]o make certain that government would not help pay for 'sectarian' (i.e., Catholic) schooling for children"); Mitchell v. Helms, 530 U.S. 793, 828 (2000) (plurality opinion) (citing Green, *supra* note 12, at 41-43) ("[I]t was an open secret that 'sectarian' was code for 'Catholic.'"); Bush v. Holmes, 886 So. 2d 340, 343-44 (Fla. Dist. Ct. App. 2004), *aff'd on other grounds*, 919 So. 2d 392 (Fla. 2006).

27. Green, *supra* note 12, at 53-54 ("The *Catholic World* criticized those politicians who hope[d] to ride into power by awakening the spirit of fanaticism and religious bigotry . . . .") (internal quotation marks omitted); MCAFEE, *supra* note 2, at 194 (discussing a Tammany pamphlet that accused the president of raising the "black flag of Know-Nothingism").

28. 4 CONG. REC. 5172, 5191 (1876); 4 CONG. REC. 5558, 5595 (1876).

29. Green, *supra* note 12, at 66.

30. *See, e.g.*, ARIZ. CONST. art. IX, § 10; IDAHO CONST. art. IX, § 5; MONT. CONST. art. X, § 6; N.D. CONST. art. VIII, § 5; S.D. CONST. art. VIII, § 16; WASH. CONST. art. IX, § 4, art. 1, § 11;

adopted them until a super-majority of states emerged with Blaine-like amendments.<sup>31</sup> Florida enacted its Blaine Amendment in 1885, at the same time as it adopted the “separate but equal” and miscegenation amendments.<sup>32</sup> The timing was not coincidental.<sup>33</sup>

### PUBLIC SCHOOLS DURING RECONSTRUCTION

The contrast with the Carpetbagger Constitution of 1868 is stark. From 1868 to 1876, Republicans and Northerners sympathetic to the plight of blacks determined to educate them.<sup>34</sup> During Reconstruction, many, if not most, public school students were African-American.<sup>35</sup> The Florida

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Act of Feb. 22, 1889, 25 Stat. 676, ch. 180 (enabling act for North Dakota, Montana, South Dakota, and Washington); Act of July 3, 1890, 26 Stat. 215 § 8, ch. 656 (enabling act for Idaho); Act of June 20, 1910, 36 Stat. 557 § 26 (1910) (enabling act for Arizona and New Mexico); *see also* 20 CONG. REC. 2100–01 (1889) (statement of Sen. Blair) (arguing in favor of Enabling Act requirement that state constitutions guarantee “public schools [be] free from sectarian control,” in part because requirement would accomplish purposes of the failed federal Blaine Amendment); MCAFEE, *supra* note 2, at 220.

31. *See, e.g.*, DEL. CONST. art. X, § 3 (adopted 1897); N.Y. CONST. art. XI, § 3 (adopted 1894); KY. CONST. § 189 (adopted 1891); MO. CONST. art. IX, § 8 (adopted 1875); *see also Holmes*, 886 So. 2d at 349 n.8 (observing Blaine-era provisions are contained in roughly thirty-six state constitutions).

32. *See* FLA. CONST. DECL. OF RIGHTS § 6 (1885) (“No preference shall be given by law to any church, sect or mode of worship and no money 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.”); FLA. CONST. art. XII, § 12 (1885) (“White and colored children shall not be taught in the same school, but impartial provision shall be made for both.”); FLA. CONST. art. XVI, § 24 (1885) (“All marriages between a white person and a negro, or between a white person and a person of negro decent to the fourth generation, inclusive, are hereby forever prohibited.”). When first adopted in 1885, the Blaine Amendment was Section 6 of the Declaration of Rights of the Florida Constitution. FLA. CONST. DECL. OF RIGHTS § 6 (1885). In 1968, it became the last sentence of Article I, section 3 of the Florida Constitution (1968). FLA. CONST. art. I, § 3 (1968). The “separate but equal” doctrine was Article XII, section 12 of the Florida Constitution. FLA. CONST. art. XII, § 12 (1885). There was also a school fund limitation contained in Article XII, section 13 of the Florida Constitution, which stated:

No law shall be enacted authorizing the diversion of the lending of any County or District School Funds, or the appropriation of any part of the permanent or available school fund to any other than school purposes; [n]or shall the same, or any part thereof, be appropriated to or used for the support of any sectarian school.

FLA. CONST. art. XII, § 13 (1885).

33. *See* MCAFEE *supra* note 2, at 51 (“Reconstruction politics gravitated between rival antipathies—racial and religious.”).

34. Sheryl M. Howie, *State Politics and the Fate of African American Public Schooling in Florida, 1863–1900*, iv (2004) (unpublished M.A. thesis, University of Florida) (on file with George A. Smathers Library, University of Florida); *see also* MCAFEE, *supra* note 2, at 3.

35. *See* THE NINTH CENSUS OF THE U.S.: 1870, POPULATION OF THE U.S. 405 (1872) [hereinafter THE NINTH CENSUS]; W.M. N. Sheats, *History of the Origin and Growth of Public Schools in Florida*, in TWENTY-FIFTH AND TWENTY-SIXTH ANNUAL REPORTS OF THE DEP’T OF PUB. INSTRUCTION OF FLA., 12–13 (Dec. 31, 1894), *attached to* J. PROCEEDINGS OF THE SENATE

Constitution of 1868 extended education to “all the children residing within its borders, without distinction or preference,” and this was to be accomplished through a “uniform system of Common Schools, and a University” that would be free to all between the ages of four and twenty-one.<sup>36</sup> “The Republican party promoted the public school as the means to educate the recently freed blacks, elevating them to be worthy of the responsibilities of citizenship and suffrage,” as well as to Americanize the children of Catholic immigrants to keep America free of “feared papal domination.”<sup>37</sup>

Southern Whites resented universal education.<sup>38</sup> Later, State Superintendent of Public Instruction, W.M. E. Sheats, called the 1869 school law “an import” enacted by “freedmen less than four years out of slavery, with a sprinkling of carpet-baggers,” the “chief beneficiaries” of which were “the recent denizens the cotton patch.”<sup>39</sup>

The schools that freedmen attended after the Civil War were sponsored chiefly by religious abolitionist societies, such as the American Missionary Association (“AMA”) and National Freedmen’s Relief Organization, and by the Catholic Church.<sup>40</sup> In 1866, the Freedmen’s Bureau Superintendent of Education, H.H. Moore, observed that Florida’s whites “had shown no willingness to assist in negro education.”<sup>41</sup> In contrast, the AMA believed that “‘the only true ground to take – the only one sanctioned by the Constitution and by Christianity’ was that blacks were entitled to equal rights in both church and state.”<sup>42</sup> Radical

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OF THE STATE OF FLA. (1895). The 1870 Census reported that roughly thirty-five percent of public school students were African-American. THE NINTH CENSUS, *supra*. However, in his annual reports, State Superintendent of Public Instruction, W.M. N. Sheats, represented that the reports of the Department during this period were “so defective that they do not show it, but those of us on the scene of action at the time know that there was an average of three negro children or more to every white child in school throughout the State.” Sheats, *supra*.

36. FLA. CONST. of 1868, art. VIII, §§ 1–2.

37. MCAFEE, *supra* note 2, at 5–6.

38. H.G. CUTLER, 1 HISTORY OF FLORIDA: PAST AND PRESENT 221 (1923) (explaining that during “darker days of reconstruction” the conditions were not favorable to foster the idea of free public schools, supported by taxation, nor for the introduction of “the odious doctrine of co-education of the races”); *accord* MCAFEE, *supra* note 2, at 12 (“Throughout the South, the concept of public education had long been viewed as a New England idea, spawned by the very same people who had roused the Northern aggression against their region.”).

39. Sheats, *supra* note 35, at 12.

40. See Joe M. Richardson, *Christian Abolitionism: The American Missionary Association and the Florida Negro*, 40 J. NEGRO EDUC. 35 (1971); Howie, *supra* note 34, at 15.

41. Richardson, *supra* note 40, at 37.

42. Joe M. Richardson, “*The Nest of Vile Fanatics*”: William N. Sheats and the Orange Park School, 64 FLA. HIST. Q. 393, 394 (1986) (citation omitted).

Republican Superintendents of Public Instruction, C. Thurston Chase and Charles Beecher, invited the AMA into the State to fulfill this vision.<sup>43</sup>

Florida's first public schools were staffed by missionaries and frequently met in churches.<sup>44</sup> Public school buildings were uncommon. For example, Key West constructed its first public school building in 1874,<sup>45</sup> and Hillsborough County did not erect its first school building until 1878.<sup>46</sup> Florida counties admitted religious schools as public schools and maintained them with public funds;<sup>47</sup> for example, St. Johns County agreed to treat a Catholic parochial school owned and operated by the Sisters of St. Joseph as Public School No. 12.<sup>48</sup> The St. Ambrose and Mandarin neighborhoods in Duval County did likewise.<sup>49</sup> Public funding for private religious schools was not unusual as late as the 1890s,<sup>50</sup> and many of these

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43. See Howie, *supra* note 34, at 15–16, 29, 33 (explaining Chase and Beecher depended on the AMA to provide teachers and that AMA leaders “advocated a broad liberal education for blacks similar to that of northern schools”).

44. See CANTER BROWN, JR., *TEACHERS AND SCHOOLS ON THE TAMPA BAY FRONTIER* 19, 33–34, 54, 57–58 (1997) (providing examples of classes convening in churches); Sister Mary Alberta, *A Study of the Schools Conducted by the Sisters of St. Joseph of the Diocese of St. Augustine, Florida, 1866–1940*, at 40–42 (Aug. 1940) (unpublished M.A. thesis, University of Florida) (on file with George A. Smathers Library, University of Florida); Richardson, *supra* note 40, at 36–37, 42 (discussing AMA teachers, who were missionaries and, who in addition to general education, taught religion).

45. JEFFERSON B. BROWNE, *KEY WEST: THE OLD AND THE NEW* 22 (1973) (stating the school accommodated about 500 pupils).

46. BROWN, *supra* note 44, at 57.

47. See MICHAEL J. McNALLY, *CATHOLIC PARISH LIFE ON FLORIDA'S WEST COAST, 1860-1968*, at 148–49 (1996) (discussing the growth of Catholic schools in the late 1880's, which were maintained with public funds); Howie, *supra* note 34, at 29 (“In the late 1860s, the AMA began transferring management of its established schools to the state.”); Richardson, *supra* note 40, at 40–41 (noting the AMA turned over as many of its schools as it could to counties after the 1869 school law was enacted to encourage a system of public education).

48. Alberta, *supra* note 44, at 40.

49. *Id.* at 40–42.

50. See THE NINTH CENSUS, *supra* note 35, at 454–56, 462 (indicating taxation and public funds comprised about ten percent of the income of private schools, including parochial schools for the year ended June 1, 1860, and about four percent of the income of private schools for the year ended June 1, 1870); THOMAS EVERETTE COCHRAN, *HISTORY OF PUBLIC-SCHOOL EDUCATION IN FLORIDA* 25 (1921) (“[I]t seems that during the early . . . [1850s] the money received from public funds was used in many of the counties to subsidize favorite private schools.”); Gall, *supra* note 2, at 413, 416–17 (“Until [the] movement took hold, state governments regularly funded private, church-run schools.”); Howie, *supra* note 34, at 29 (referencing an AMA school that received federal and Duval County School Board funding in the late 1860s); accord MCAFEE, *supra* note 2, at 58 (referencing public funding of parochial education in New York). *But see* Bush v. Holmes, 886 So. 2d 340, 349 (Fla. Dist. Ct. App. 2004) (Brennan, J., concurring) (quoting Lemon v. Kurtzman, 403 U.S. 602, 647 (1971)) (“[A]fter 1840, no efforts of sectarian schools to obtain a share of public school funds succeeded.”).

schools taught African-Americans.<sup>51</sup>

Superintendent Beecher, the brother of Harriet Beecher Stowe, requested from the AMA teachers “full of the spirit of the cross.”<sup>52</sup> In fact, most AMA teachers were ordained ministers, as interested in the spiritual state of freedmen as their minds.<sup>53</sup> Eagerly, they reported on conversions to their faith.<sup>54</sup> Students were expected to memorize a verse from the Bible each day.<sup>55</sup> Reading instruction could be from the New Testament.<sup>56</sup> Teachers instructed whites and blacks using similar curriculum in day school, night school, and Sabbath school.<sup>57</sup> Consequently, white communities “refus[ed] to board teachers or rent buildings for [their] schools.”<sup>58</sup> They insulted, sneered at, and occasionally threatened and tried to harm the teachers,<sup>59</sup> and “looked upon Northern teachers as political emissaries who came South to foster social equality and hatred of whites.”<sup>60</sup>

#### RELIGIOUS AND RACIAL BIGOTRY

By 1877, Democrats had taken control of Florida government. Among their first acts was to hold a constitutional convention to replace the Carpetbagger Constitution of 1868.<sup>61</sup> The Blaine Amendment and separate but equal doctrine of 1885 had different language, but the same effect: both ensured that African-Americans would not receive equal public funding for a common education. Democrats reduced public funding for segregated black schools.<sup>62</sup> They also changed the mission of education from transforming the social position of African-Americans to one designed to benefit whites. “Public education for blacks became education for field labor[ers] . . . .”<sup>63</sup> Once more, private religious schools offering a private religious education commensurate with that taught whites could not receive public funding. Under the leadership of Sheats – not incidentally, the

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51. Alberta, *supra* note 44, at 19–21.

52. Howie, *supra* note 34, at 33 (citation omitted).

53. Richardson, *supra* note 40, at 42.

54. *Id.*

55. *Id.*

56. *Id.*

57. *See id.* at 38–40.

58. *Id.* at 37.

59. Richardson, *supra* note 40, at 37–38.

60. *Id.* at 38.

61. *See* Jerrell H. Shofner, *Reconstruction and Renewal, 1865-1877*, in *THE NEW HISTORY OF FLORIDA* 260–62 (Michael Gannon ed., 1996).

62. *See* Howie, *supra* note 34, at 12, 42 (discussing reduced funding to black schools and fewer educational opportunities in comparison to whites).

63. *Id.* at 42.

author of the separate but equal doctrine<sup>64</sup> – the Democrats took steps to prevent white teachers at even private schools unfunded by the state from instructing blacks and whites together.<sup>65</sup>

Sheats learned of just such an AMA school in Orange Park, Florida.<sup>66</sup> Incensed, he wrote to a friend, “I want the AMA to keep hands off in Florida.”<sup>67</sup> His strategy was to win enactment of a law in May 1895, making it illegal

for any individual, body of individuals, corporation or association to conduct within this state any school of any grade, public, private or parochial wherein white persons and negroes shall be instructed or boarded within the same building, or taught in the same class, or at the same time by the same teachers.<sup>68</sup>

In April 1896, the principal, five teachers, three white patrons, and a local Congregational minister who conducted a Bible class in the building were indicted.<sup>69</sup> Sheats’ popularity soared in Florida;<sup>70</sup> however, his law was struck down as unconstitutional in October 1896.<sup>71</sup>

The setback was temporary. Sheats lost the 1904 election, allegedly for being too soft on blacks, but he was reelected in 1912, and immediately began advocating for passage of a similar law.<sup>72</sup> In 1913, the Governor approved an “Act Prohibiting White Persons from Teaching Negroes in Negro Schools.”<sup>73</sup> Rather than fight the law this time, the AMA chose to close its Orange Park school, which in the interim had suffered a fire (possibly arson) and reduced attendance by whites.<sup>74</sup>

Catholic schools taught by the Sisters of St. Joseph and the Sisters of the Holy Names of Jesus, not tolerated even by the AMA, were the primary ones left for segregationists to target.<sup>75</sup> In April 1916, three Sisters of St.

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64. Richardson, *supra* note 42, at 396.

65. See Howie, *supra* note 34, at 58 (discussing Orange Park School and stating that state funds were not used to maintain the school).

66. Richardson, *supra* note 42, at 397.

67. *Id.*

68. *Id.* at 399.

69. *Id.* at 402.

70. See *id.* at 403.

71. *Id.* at 404.

72. Richardson, *supra* note 42, at 406 (discussing how Sheats approved an invitation of Booker T. Washington to speak in Gainesville to the chagrin of many whites).

73. MCNALLY, *supra* note 47, at 75.

74. Richardson, *supra* note 42, at 405–06.

75. MCNALLY, *supra* note 47, at 75; Richardson, *supra* note 40, at 43 (“[AMA] teachers gave the impression that their major religious enemies were the Roman Catholic Church and the Negro churches . . . . The AMA was extremely intolerant of Catholics. It seemed that they would

Joseph were charged with “unlawfully teaching Negroes” under the second Sheats law.<sup>76</sup> The charge itself says much about the interrelationship between racial and religious prejudice during this period; also probative is the contrast with an earlier period in Florida’s history when anti-Catholicism was hard to come by, even at the height of Know-Nothingism.

In the 1850s-60s, the American Party in Florida had distinguished itself by rejecting the anti-Catholic platform of the national party.<sup>77</sup> There was “[a]n undertone of prejudice . . . present” and occasional anti-Catholic editorials, but the issue was not as significant as elsewhere, “possibly because of the absence of a significant number of Catholics in the state” at the time and because of a labor shortage in Florida.<sup>78</sup> The more important issues for the American Party in Florida were states’ rights and slavery. During this period, immigration to Florida never did reach the levels elsewhere in the United States, and immigrants were not from the same places. It was not until the late 1870s, during the Ten Years War against Spanish colonialism, that substantial Cuban immigration to Key West and Tampa began.<sup>79</sup> Catholics also concentrated in Dade City, St. Joseph, and San Antonio.<sup>80</sup>

By 1890, fifty percent of Tampa’s population was comprised of immigrants, including Cubans, Spaniards, and Italians.<sup>81</sup> Ybor City, then West Tampa, mushroomed into almost exclusively Latino enclaves centered on the cigar industry.<sup>82</sup> Cigar workers were well paid and “had special fringe benefits.”<sup>83</sup> Because of this,

[whites] looked upon the Latins with both envy and prejudice, with attraction and repugnance; they saw West Tampa as a wild West town and Ybor City as a notorious place of crime, vice, and Dionysian frenzy. Part of this ill-will was based on differences in language, customs, and religion, while part was rooted in economic resentment.<sup>84</sup>

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prefer to leave freedmen uneducated to having them trained by Catholics.”).

76. MCNALLY, *supra* note 47, at 75.

77. Thompson, *supra* note 17, at 46.

78. *Id.* at 50, 54.

79. MCNALLY, *supra* note 47, at 63 (“The Ten Years War . . . against Spanish Colonialism resulted in thousands of Cubans immigrating to the U.S., especially to Key West.”).

80. *Id.* at 33 (chronicling the cities’ founders, settlers, and ethnically diverse, yet mostly Catholic, populations).

81. *Id.* at 68–69.

82. ROBERT P. INGALLS & LOUIS A. PÉREZ, JR., TAMPA CIGAR WORKERS: A PICTORIAL HISTORY 3–4, 31 (2003).

83. MCNALLY, *supra* note 47, at 71 (explaining cigar workers received frequent coffee breaks, complimentary cigars, and public reading during work).

84. *Id.*; *see also id.* at 69 (“Ybor City was the most densely populated Catholic area in

Worse yet, whites considered “the denizens of the Latin enclave as un-American, conspiratorial, and nefarious.”<sup>85</sup> Jim Crow signs forbade “[d]ogs, [n]iggers, or [l]atins” from entering.<sup>86</sup>

The conditions were ripe to add religious prejudice to racial prejudice. In education, it began with the 1885 Constitution.<sup>87</sup> The first Sheats bill passed in 1895.<sup>88</sup> The second Sheats bill passed in 1913, prohibiting whites from teaching blacks. Then, in 1914, the Florida Legislature seemed to single out the Sisters of St. Joseph again; the Legislature nearly passed the so-called “Garb Bill,” which would have precluded public school teachers from wearing religious garb while teaching.<sup>89</sup> Garb Bill supporters decried “public funds used for sectarian purposes,”<sup>90</sup> the most reviled of which was educating African-Americans. Next, the Legislature responded to salacious books and tracts popular at the time, which alleged convents to be hotbeds of sexual immorality between priests and nuns, as well as centers of papist conspiracy.<sup>91</sup> In 1917, the Florida Legislature enacted the Convent Inspection Bill, and Governor Catts appointed a team of convent inspectors to perform the task annually.<sup>92</sup>

Throughout the early 1900s in Florida, anti-Catholic and racially bigoted literature and secret societies were popular, such as the Patriotic Sons of America, Guardians of Liberty, True Americans, Masons, and Knights of Pythias.<sup>93</sup> These groups were the core supporters of gubernatorial candidate Sidney Catts’ successful campaign for office, during which he proclaimed a “crusade against the continuance of the Roman domination of America.”<sup>94</sup> A popular stump speech in rural Florida at the time claimed that monks living in San Antonio, Florida were planning an armed Negro insurrection for Kaiser Wilhelm II, after which the Pope planned to relocate the Vatican to San Antonio and take over the

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Florida.”).

85. *Id.*

86. *Id.*

87. *See* FLA. CONST. DECL. OF RIGHTS § 6 (1885); FLA. CONST. art. XII, § 12 (1885).

88. *See* Richardson, *supra* note 42, at 394.

89. Robert B. Rackleff, *Anti-Catholicism and the Florida Legislature, 1911-1919*, 50 FLA. HIST. Q. 352, 353 (1972).

90. Alberta, *supra* note 44, at 43 (internal quotation marks omitted).

91. Gall, *supra* note 2, at 416 (explaining the conspiracies that existed about the Catholic Church and the widespread acceptance of these conspiracies).

92. McNALLY, *supra* note 47, at 75.

93. *Id.* at 74, 76 (describing the organizational expression that led such Catholic hysteria); *see* Gall, *supra* note 2, at 416 (stating this literature portrayed the Catholic Church as anti-democratic, dangerous, and evil).

94. McNALLY, *supra* note 47, at 76 (internal quotation marks omitted).

state.<sup>95</sup> It is hard to imagine a more thoroughgoing racially and religiously prejudicial claim.

The secret societies also helped defeat Catholic candidates, such as Congressional candidate Lewis W. Zim in northeast Florida.<sup>96</sup> All of this, together with vandalism and possible arson,<sup>97</sup> led the Bishop of St. Augustine, Michael J. Curley, to write his priests in January 1915: “We Catholics . . . are victims of organized vilification and the government itself through the mails takes a hand by the distribution of lewd and lascivious anti-Catholic filth.”<sup>98</sup> At about the same time, enforcement of the Blaine Amendment became more rigorous. As elsewhere in the United States,<sup>99</sup> public support for religious education continued even after the Blaine Amendment was enacted,<sup>100</sup> but it ceased at the pre-secondary level around the same time that anti-Catholicism became fashionable in Florida due in part to the Catholic Church’s education of African-Americans.

#### BLAINE AMENDMENT PRECEDENT

By enacting the “separate but equal” doctrine and the Blaine Amendment, the framers of the 1885 Constitution achieved the same segregationist purpose: they prevented freedmen from receiving an equal education. The courts have long since repudiated the separate but equal doctrine.<sup>101</sup> A majority of the United States Supreme Court has also reposed the sorry patrimony of Blaine Amendments in general,<sup>102</sup> but Florida’s Blaine Amendment has experienced a renewal in the courts. In *Bush v. Holmes*, the court drew into question the historical prejudice at the

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95. *Id.* at 78–79; accord MCAFEE, *supra* note 2, at 41 (“News from Germany, where Bismarck was fighting to free public education from the influence of an antinational Roman Catholic Church, gave many . . . concerned Americans a sense that there was indeed an international Jesuit conspiracy against everything they hold dear.”).

96. MCNALLY, *supra* note 47, at 74 (mentioning certain literature, which encouraged members not to vote for Catholic candidates, including Lewis W. Zim).

97. See Gall, *supra* note 2, at 416.

98. MCNALLY, *supra* note 47, at 74.

99. See Green, *supra* note 12, at 43.

100. See Alberta, *supra* note 44, at 42. School districts in Duval and Pasco continued to erect and allow the Sisters of Saint Joseph to operate public schools until roughly 1916. *Id.*

101. See generally *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

102. See, e.g., *Mitchell v. Helms*, 530 U.S. 793, 829 (2000) (plurality opinion) (“[T]he exclusion of pervasively sectarian schools from otherwise permissible aid programs” is premised upon a “doctrine, born of bigotry, [that] should be buried now.”); *Id.* at 828 (“[H]ostility to aid to pervasively sectarian schools has a shameful pedigree that we do not hesitate to disavow.”); see also *Zelman v. Simmons-Harris*, 536 U.S. 639, 720–21 (2002) (Breyer, J., dissenting) (stating the Blaine amendments were intended to disadvantage Catholics and other religious groups).

root of the Amendment's nativity.<sup>103</sup> The court pointed out that there is no legislative record related to the enactment of Florida's Blaine Amendment in 1885, and, thus, no convention record expressing anti-Catholic animus.<sup>104</sup> But had there been no such record relating to the enactment of the separate but equal or miscegenation amendments, the association with racism would still be difficult to ignore.

Until *Holmes*, Florida avoided the Blaine Amendment litigation nationally that, beginning in the late 1800s, barred sectarian or Catholic institutions from receiving payment even for services rendered. For example, the Supreme Court of Illinois upheld under the state Blaine Amendment the refusal of Cook County to make payment for the tuition, maintenance, and care of infants under age eighteen committed by Cook County courts to the Industrial School for Girls at Chicago.<sup>105</sup> The appellant called it a "front" for the Catholic Archdiocese.<sup>106</sup> Similarly, the Supreme Court of Nevada excused the state from paying to feed orphans assigned to the Nevada Orphan Asylum run by the Sisters of Charity.<sup>107</sup> In contrast, until 2004, no Florida court applying the Blaine Amendment found a violation.

The first reported decision involving Florida's Blaine Amendment arose quite late by national standards, but was associated from the start with segregation. In 1952, the Florida Supreme Court upheld the conveyance by trustees of a sectarian "negro industrial school" of property including a chapel to the Board of Public Instruction of Orange County, allegedly to better serve the trust's purpose of providing segregated education to blacks, because the trust had sufficient funds to provide for the property's maintenance without public contribution.<sup>108</sup> Explicitly referencing the separate but equal provision, the court justified the conveyance of the school for "negro vocational education" in light of the

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103. *Bush v. Holmes*, 886 So.2d 340, 351 n.9 (Fla. Dist. Ct. App. 2004) ("Whether the Blaine-era amendments are based on religious bigotry is a disputed and controversial issue among historians and legal scholars.").

104. *Id.* at 348, 351-52 n.9 (calling into question whether Blaine-era amendments are based on religious bigotry); *Id.* at 377 (Polston, J., dissenting) (criticizing the majority for this).

105. *See Cook County v. Chi. Indus. Sch. for Girls*, 18 N.E. 183, 184 (Ill. 1888).

106. *See id.* at 185.

107. *See Nevada ex rel. Nev. Orphan Asylum v. Hallock*, 16 Nev. 373, 381, 388 (1882).

108. *Fenske v. Coddington*, 57 So. 2d 452, 456 (Fla. 1952); *see also Koerner v. Borck*, 100 So. 2d 398, 402 (Fla. 1958). Public disbursements to improve a park with a lake devised by a church subject to a perpetual right of egress to the lake for purposes of conducting baptisms was constitutional, because "any improvement to the county-owned land will be made for the benefit of the people of the county and not for the church." *Koerner*, 100 So. 2d at 402.

“rapid progress which has been made by the State of Florida by providing educational facilities in our Free Public School System for Negroes . . . .”<sup>109</sup>

Although grounded in racial discrimination, the first case interpreting Article I, Section 3 set an example of religious neutrality that later cases would endorse. In 1959, the Florida Supreme Court held “that an incidental benefit to a religious group resulting from an appropriate use of public property is not violative” of the Blaine Amendment.<sup>110</sup> Consequently, the court upheld temporary use by several churches of various public school buildings on Sunday.<sup>111</sup> Likewise, in 1970-71, the Florida Supreme Court ruled against plaintiffs who argued that a Presbyterian nursing home should not receive a tax exemption, and that the Educational Facilities Law was unconstitutional inasmuch as it permitted issuance of revenue bonds benefiting religious and secular schools.<sup>112</sup> In both instances, the court emphasized the neutrality of the programs under which they qualified.<sup>113</sup> It did not matter to the court that “[u]nquestionably, a Christian atmosphere is maintained” at the nursing home.<sup>114</sup> Even as late as 1981, the Florida Supreme Court interpreted a city charter provision similar to a Blaine Amendment as no obstacle to the city contracting with faith-based providers of childcare services and expending city funds pursuant to the contract.<sup>115</sup>

But neutrality doctrine came to a crossroad in 2004. Following in the footsteps of prior legislatures, which had approved scholarships for students to attend the colleges of their choice,<sup>116</sup> the Florida legislature enacted a scholarship or “voucher” program for K-12 students attending

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109. *Fenske*, 57 So. 2d at 455.

110. *Southside Estates Baptist Church v. Bd. of Tr., Sch. Tax Dist. No. I, In & For Duval Cnty.*, 115 So. 2d 697, 700 (Fla. 1959).

111. *Id.* at 700-01.

112. *Nohrr v. Brevard Cnty. Educ. Fac. Auth.*, 247 So. 2d 304, 307 (Fla. 1971); *Johnson v. Presbyterian Homes of the Synod of Fla.*, 239 So. 2d 256, 263 (Fla. 1970).

113. *Nohrr*, 247 So. 2d at 307; *Johnson*, 239 So. 2d at 261-62. In *Johnson*, the court discussed the neutrality of the tax exemption benefiting the home for the elderly: “The exemption goes, not only to homes for the aged owned by religious bodies, but to any bona fide homes for the aged duly licensed, owned and operated in compliance with the terms of the statute by Florida corporations not for profit . . . .” *Johnson*, 239 So. 2d at 261-62. In *Nohrr*, the court upheld tax exempt bond financing on these grounds: “A state cannot pass a law to aid one religion or all religions, but state action to promote the general welfare of society, apart from any religious considerations, is valid, even though religious interests may be indirectly benefited.” *Nohrr*, 247 So. 2d at 307.

114. *Johnson*, 239 So. 2d at 258.

115. *City of Boca Raton v. Gidman*, 440 So. 2d 1277, 1281 (Fla. 1983).

116. See 1965 Fla. Laws 1683-1684; 1963 Fla. Laws 1176-1179; 1961 Fla. Laws 1091-1099; 1955 Fla. Laws 572-576; 1955 Fla. Laws 231-235.

failing public schools in 1999.<sup>117</sup> In *Holmes*, the First District Court of Appeal held this Florida Opportunity Scholarship Program unconstitutional under the Blaine Amendment.<sup>118</sup> The court found that the drafters of the Amendment “clearly intended at least to prohibit the direct or indirect use of public monies to fund education at religious schools.”<sup>119</sup>

In *Zelman v. Simmons-Harris*,<sup>120</sup> the United States Supreme Court held a similar “indirect aid” program constitutional under the Federal Constitution for reasons echoing the Florida Supreme Court’s earlier decisions focused on neutrality.<sup>121</sup> The decision was the culmination of a gradual shift away from federal Establishment Clause precedent that had rendered the Blaine Amendments at best redundant.<sup>122</sup> After *Zelman*, state Blaine Amendments were once again relevant to whether religious institutions—and not just Catholic ones—could participate in neutral publicly funded programs.

In *Holmes*, the court concluded that the Blaine Amendment was a “no-aid provision” and “was intended to impose restrictions beyond what is restricted by the federal Establishment Clause.”<sup>123</sup> The court ruled that a violation of Article I, Section 3 of the Florida Constitution involves three elements:

- (1) the prohibited state action must involve the use of state tax revenues; (2) the prohibited use of state revenues is broadly defined in that state revenues cannot be used directly or indirectly in aid of the prohibited beneficiaries; and (3) the prohibited beneficiaries of the use of state revenues are any church, sect, or religious denomination or any sectarian institution.<sup>124</sup>

The decision in *Holmes* turned on the second test, because the others were

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117. FLA. STAT. § 229.0537 (1999).

118. *Bush v. Holmes*, 886 So. 2d 340, 366 (Fla. Dist. Ct. App. 2004), *aff’d on other grounds*, 919 So. 2d 392 (Fla. 2006).

119. *Id.* at 351.

120. 536 U.S. 639 (2002).

121. *See id.* at 652; *Agostini v. Felton*, 521 U.S. 203, 231 (1997).

122. *See, e.g., Agostini*, 521 U.S. at 231 (stating New York City’s Title 1 program neither favors, nor disfavors religion); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993) (finding that placing public employees in sectarian schools is not barred by the Establishment Clause); *Witters v. Wash. Dep’t of Serv. for the Blind*, 474 U.S. 481 (1986) (deciding the First Amendment does not bar the state from extending financial aid to students wishing to attend religious schools); *Mueller v. Allen*, 463 U.S. 388 (1983) (stating a tax deduction for expenses incurred by sending a student to a religious school is constitutional).

123. *Holmes*, 886 So. 2d at 351.

124. *Id.* at 352 (internal quotation marks omitted).

undisputed.<sup>125</sup> Concerning it, the court held that, although scholarships were made payable to parents and did not cover the full cost of the education that students received at religious schools, the religious schools, rather than the parents or students, were directly or indirectly “aided.”<sup>126</sup>

The broader significance of the holding in *Holmes* for other social service providers did not become evident until *Council for Secular Humanism, Inc. v. McNeil*, when the court of appeal was asked to opine whether a statute authorizing use of state funds to pay for secular or faith-based substance abuse transitional housing for inmates was constitutional.<sup>127</sup> The pertinent statute stated, “[w]hen selecting contract providers to administer substance abuse treatment programs, the department shall make every effort to consider qualified faith-based services groups on an equal basis with other private organizations.”<sup>128</sup> Interpreting *Holmes*, the trial court in *McNeil* concluded that the decision was limited to the school context. After all, the court of appeal had denied in *Holmes* that its ruling would “put at risk a great multitude of other programs and activities in which the state provides funds for health and social service programs that are operated by institutions affiliated with a church or religious group.”<sup>129</sup> Instead, the court of appeal emphasized that its holding “does not reach such programs” and “leaves for another day, if need be, a decision on the constitutionality of any other government program or activity which involves a religious or sectarian institution.”<sup>130</sup>

Nevertheless, the court of appeal reversed the trial court,<sup>131</sup> and “conclude[d] that the overriding purpose of [Article I, Section 3] is to prohibit the use of state funds to promote religious or sectarian activities” of any kind.<sup>132</sup> So *McNeil* made it clear that the Blaine Amendment applies not only to education, but also to public social service programs of all kinds.

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125. *Id.* at 352, 354 (stating scholarships involved state revenue and the schools were deemed “sectarian”); accord *Council for Secular Humanism, Inc. v. McNeil*, 44 So. 3d 112, 120 n.3 (Fla. Dist. Ct. App. 2010).

126. *Holmes*, 866 So. 2d at 352–53 (explaining the court’s rationale as to why OSP vouchers violated the statute when applied to secular institutions).

127. *McNeil*, 44 So. 3d at 112.

128. FLA. STAT. § 944.473(2)(c) (2001).

129. *Holmes*, 866 So. 2d at 362.

130. *Id.*

131. *McNeil*, 44 So. 3d at 117 (characterizing the trial court’s ruling as unduly restrictive).

132. *Id.* at 119.

## THE GOLDBLOCKS TEST

*McNeil* was significant for a second reason. The court in *Holmes* did not have to decide what are “sectarian activities” or “sectarian institutions.” It hinted, without deciding, that activities of “pervasively sectarian” institutions, as the term was adopted in Federal Establishment Clause jurisprudence, qualified.<sup>133</sup> In *McNeil*, the court went further. It found that the inquiry into which organizations are sectarian “necessarily will be case-by-case and will consider such matters as whether the government-funded program is used to promote the religion of the provider, is significantly sectarian in nature, involves religious indoctrination, requires participation in religious ritual, or encourages the preference of one religion over another.”<sup>134</sup> The court emphasized that not all activities of religious institutions are sectarian.<sup>135</sup> Instead, after *McNeil*, the validity of any indirect aid program under Article I, Section 3 turns on (1) how religious are the institution’s activities, and relatedly, (2) how religious is the institution that would offer the public services.<sup>136</sup> Pursuant to this test, the devoutly religious or “too religious” cannot participate neutrally in public programs as vendors of social services, but the nominally religious or “just-about-right religious” can if they deliver the services in a secular fashion.<sup>137</sup>

In the tale of *Goldilocks and the Three Bears*, a similar principle is at work, which has become known colloquially as the “Goldilocks Principle”; the idea is that something must fall within certain margins, as opposed to reaching extremes, to be valid.<sup>138</sup> After testing each of three alternatives (*i.e.*, bowls of porridge, seats, and beds), Goldilocks determined that one was always too much in one extreme (*i.e.*, too hot or too large), one was too much in the opposite extreme (*i.e.*, too cold or too small), and one was “just right.” So it is under Article I, Section 3 and the Goldilocks Principle that the too-religious may not participate in public aid programs, the non-religious are not subject at all to Article I, Section 3, but the just-about-

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133. *Holmes*, 886 So. 2d at 354 n.10.

134. *McNeil*, 44 So. 3d at 120.

135. *Id.* at 119 (“Florida’s no-aid provision does not create a *per se* bar to the state providing funds to religious or faith-based institutions to furnish necessary social services.”).

136. *See id.* at 120; *Holmes*, 886 So. 2d at 353–54 n.10.

137. *See McNeil*, 44 So. 3d at 119 (citing *Holmes*, 886 So.2d at 362) (“[N]othing in the Florida no-aid provision would create a constitutional bar to state aid to a non-profit institution that was not itself sectarian, even if the institution is affiliated with a religious order or religious organization.”).

138. *See, e.g.*, Hazel Muir, *Goldilocks Planet May Be Just Right for Life*, NEW SCIENTIST, Apr. 25, 2007, <http://www.newscientist.com/article/dn11710-goldilocks-planet-may-be-just-right-for-life.html>.

right-religious or nominally religious may receive public aid.

Blaine, the Republicans, and the Know-Nothings would not have endorsed the Goldilocks test as a method to interpret the Blaine Amendment.<sup>139</sup> The popular movement supportive of Blaine Amendments was equally offended at funding parochial education and opposition to funding Protestant religious education in the common schools.<sup>140</sup> Galvanizing popular opinion along these lines was a trend in the nation's urban centers in the 1870s, suspending daily religious exercises in response to Catholic complaints.<sup>141</sup> Consequently, as finally proposed, the Federal Blaine Amendment both prohibited the disbursement of public funds to parochial education and forbade the exclusion of the Bible from the nation's public schools.<sup>142</sup>

The foremost advocates of public education championed the so-called "common religion" as a crucial tool for assimilating "papish" immigrants and for inculcating Protestant values and teachings.<sup>143</sup> "Thus, Mann could speak of barring 'sectarian instruction' from public schools, but simultaneously institute a state curriculum that included having students say prayers, sing hymns, and read the King James Bible."<sup>144</sup> The common religion was allegedly non-sectarian, even if thoroughly Protestant.<sup>145</sup> Florida was little different from the other states with respect to the practice of the common religion, except that the practice lasted even longer in our public schools than elsewhere. In Florida, the common religion was practiced in harmony with the Blaine Amendment until the United States Supreme Court struck it in the 1960s under the Federal Establishment Clause.<sup>146</sup>

As this example suggests, the original Blaine Amendment was not in fact a "no-aid" provision or stricter Establishment Clause. The Federal

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139. MULKERN, *supra* note 10, at 102.

140. Green, *supra* note 12, at 41.

141. *Id.* at 47; accord MCAFEE, *supra* note 2, at 54–55 (concerning the "Cincinnati Bible War.").

142. Green, *supra* note 12, at 38.

143. Gall, *supra* note 2, at 419–20.

144. *Id.* at 420; see Green, *supra* note 12, at 45 ("The entire curriculum centered around general assumptions of God's existence, the sense of His universe, and the 'spirituality' of human nature. Schools were the primary promulgators of this Protestant way of life.").

145. MCAFEE, *supra* note 2, at 197.

146. See *Chamberlin v. Dade Cnty. Bd. of Pub. Instruction*, 143 So. 2d 21, 35 (Fla. 1962), *rev'd*, 377 U.S. 402 (1964) (rejecting challenge brought under the First and Fourteenth Amendments to the U.S. Constitution and Sections 5 and 6 of the Declaration of Rights of the Florida Constitution).

Establishment Clause uprooted Protestantism in Florida's schools, not the Blaine Amendment. The original Blaine Amendment might have been classed a "no-aid" provision for Catholic schools, but, equally, it was an "aid" provision for Protestant common schools. Consequently, the "plain language" reading of the Blaine Amendment suggested today, which substitutes for "sectarian" the word "religious" in lieu of "Catholic," undermines Blaine's purpose for the Amendment. Today, we use "sectarian" and "religious" interchangeably, but in the Reconstruction Era when the Blaine Amendment was adopted, the religion of the majority was, by definition, "non-sectarian."<sup>147</sup>

When the Blaine Amendment was proposed, "both proponents and opponents . . . agreed that nothing in the Constitution prohibited the states from establishing a religion or from interfering with the free exercise thereof."<sup>148</sup> Blaine himself observed that the federal government was the only entity barred from having a religious establishment.<sup>149</sup> The *Slaughter-House* cases a few years earlier had undermined the applicability of the Fourteenth Amendment to the states.<sup>150</sup> Thus, the states were free to perpetuate the common religion as law. The Federal Blaine Amendment's supporters insisted that the amendment assist with this by adding a sentence that stated, "[t]his article shall not be construed to prohibit the reading of the Bible in any school or institution."<sup>151</sup> Blaine's supporters opposed any anti-establishmentarian purpose for the Amendment, and, thus, would not have recognized it as a more rigorous version of the Establishment Clause.

### BLAINE'S REENACTMENT

One possibility suggested in *Holmes* is that the reenactment of the Blaine Amendment in the 1968 Florida Constitution cured it of any bigotry and rendered immaterial the Amendment's patrimony.<sup>152</sup> The 1967 Constitutional Revision Commission renumbered the Amendment and removed any doubt that it applied to local governmental bodies.<sup>153</sup> The

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147. Gall, *supra* note 2, at 419–20; *accord* Cook County v. Chi. Indus. Sch. For Girls, 18 N.E. 183, 187 (Ill. 1888) ("Protestant children are taught only those things which are common to all Christian people," whereas "only the children of Catholic parents are taught the principles of the Catholic Church," rendering the instruction they receive "sectarian.").

148. GEORGE GOLDBERG, CHURCH, STATE, AND THE CONSTITUTION 15 (1987); *accord* MCAFEE, *supra* note 2, at 61.

149. Green, *supra* note 12, at 50.

150. The Slaughter-House Cases, 83 U.S. 36, 80–81 (1873).

151. Green, *supra* note 12, at 60.

152. Bush v. Holmes, 886 So. 2d 340, 351 n.9 (Fla. Dist. Ct. App. 2004).

153. See Fla. Constitutional Convention, Minutes at 17 (1967) (adopted and passed by voice

court observed that, as in 1885, nothing in the 1967 proceedings revealed any bigoted purpose for retaining the Amendment.<sup>154</sup> Then again, in 1977, various committees rejected efforts to weaken the Amendment.<sup>155</sup> Consequently, the Blaine Amendment has endured through multiple constitutional conventions, but not as interpreted today. This draws into question any conclusion that there is a popular mandate for treating the Amendment as a “no-aid” provision or that the courts now are furthering the re-enactors’ or peoples’ intent, if not the founders’ intent.

Precedent interpreting the Blaine Amendment when reenacted favored neutrality. The court did not reframe the Blaine Amendment into a “no-aid” provision relating to education until 2004.<sup>156</sup> Shortly afterwards, the Taxation and Budget Reform Committee approved a ballot measure that would have repealed and replaced it, except that the Florida Supreme Court held the Committee exceeded its constitutional mandate.<sup>157</sup> It was not until 2010, when Florida’s First District Court of Appeal made plain that the Amendment, which “was designed to address the growing controversy over public funding of religious schools and the continuation of religious exercises in the public schools,”<sup>158</sup> applied to social services generally.<sup>159</sup> A year later, the Florida Legislature approved a ballot measure to repeal altogether Article I, Section 3, and replace it with language ostensibly authorizing funding of the transitional housing program drawn into question in *McNeil*.<sup>160</sup> It remains to be seen how the Florida electorate will respond to the ballot initiative.<sup>161</sup> Regardless, if the electorate speaks, it

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vote); Committee of Whole House: Minutes with Explanatory Documents, H.R. Constitutional Revisions Sessions (July 31 and Aug. 21, 1967). Section 6 became Article I, Section 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.” *Id.*

154. *Holmes*, 886 So. 2d at 351 n.9.

155. See Constitution Revision Comm’n Transcript, Full Comm’n at 99–122 (1977).

156. *Holmes*, 886 So. 2d at 344.

157. See *Ford v. Browning*, 992 So. 2d 132, 141 (Fla. 2008).

158. Green, *supra* note 12, at 69.

159. See *Council for Secular Humanism, Inc. v. McNeil*, 44 So. 3d 112, 119 (Fla. Dist. Ct. App. 2010) (ruling Florida’s no-aid provision does not create a *per se* bar to the state providing funds to religious or faith-based institutions furnishing necessary social services).

160. H.R.J. Res. 1471, 112th Cong. (as amended by S. Comm. on the Judiciary, Apr. 14, 2011).

161. In *Shapiro v. Browning*, No. 2011-CA-1892, 2011 WL 7040145 (2d Cir. Dec. 13, 2011), the circuit court temporarily removed the proposed amendment from the ballot on the grounds that the ballot summary was misleading; however, the court explained how to correct the defect and upheld a new statute allowing the Florida Attorney General to fix the defect. Pursuant to this statute, the Florida Attorney General revised the ballot language consistent with the court’s direction and the Florida Secretary of State placed the amendment on the ballot as Ballot Number

will be the first time the public endorses or rejects a Blaine Amendment prohibiting funding of not only parochial schools, but also devoutly religious social service providers of every stripe.

Should the Blaine Amendment survive, it will be one of the few times an amendment adopted with prejudicial purposes is not merely perpetuated, but expanded in its discriminatory reach. Imagine Florida courts doing likewise with respect to the separate but equal or miscegenation amendments: acknowledging the racially prejudicial patrimony of the amendments, but identifying a new reason to justify applying them even more broadly with the same discriminatory effect. Few indeed would be those willing to defend either the new justification as other than pretext or the more thoroughgoing discriminatory consequences as somehow beneficial for minorities. A couple of the arguments in favor of the Blaine Amendment have eerie similarities to racially patronizing ones in our past; *i.e.*, discriminating against religious institutions is actually better for them because it enables them to be more authentically religious or discriminating against religious institutions ensures that we will keep fundamentalists in their place rather than expanding their influence.

Other arguments in support of the reframed Blaine Amendment are equally unconvincing. A common one is that the Blaine Amendment is essential to prohibit establishments of religion. This cannot be so for the simple reason that Article I, Section 3 of the Florida Constitution contains an establishment clause independent of the Blaine Amendment. According to time-honored principles of constitutional construction, this Amendment must have a purpose.<sup>162</sup> The Federal Establishment Clause also obviously precludes establishments of religion in the states. A second argument in favor of the reframed Blaine Amendment is that by repealing Article I, Section 3, the State will have to fund extremist, racist, and even terrorist groups, but this is contrary to another clause in Article I, Section 3, which provides, “[r]eligious freedom shall not justify practices inconsistent with public morals, peace or safety.”<sup>163</sup> Likewise, the United States Supreme

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7. See S.J. Res. 1218, 2011 Leg., Reg. Sess. (Fla. 2011) available at <http://www.fl.senate.gov/Session/Bill/2011/1218> (last visited Dec. 31, 2011).

162. See *Bush v. Holmes*, 886 So. 2d 340, 358 (Fla. Dist. Ct. App. 2004).

It is a fundamental principle of constitutional interpretation that [e]very word of the Florida Constitution should be given its intended meaning and effect. In construing constitutions, that construction is favored which gives effect to every clause and every part of it. A construction which would leave without effect any part of the language used should be rejected if an interpretation can be found which gives it effect.

*Id.* (internal quotation marks omitted).

163. FLA. CONST. art. I, § 3; see also *State v. Bd. of Pub. Instruction for Hillsborough Cnty.*,

Court has made abundantly clear that free exercise and free speech are not absolute, but subject to penal laws and other regulation for public safety.<sup>164</sup> A third argument is that without the Blaine Amendment as reinterpreted, funding for public schools will be insufficient because of the funds that could be made available to parochial schools. The Florida Supreme Court prohibited this result when it affirmed the court of appeal in *Holmes* not on the basis of the Blaine Amendment, but Article IX, Section 1 of the Florida Constitution, which requires a “uniform, efficient, safe, secure, and high quality system of free public schools.”<sup>165</sup>

Another argument for enforcement of Article I, Section 3 is that devoutly religious institutions exercise their right under Title VII to hire persons of the same faith, whereas the nominally religious institutions do not or certainly do not to the same extent. The argument is ironic, because it is precisely this right that enables faith-based organizations to remain as such and that distinguishes their activities as religious in character; otherwise, as an example, Orthodox Jewish organizations might become Presbyterian, Baptist, or secular as directors, officers, and staff joined who were members of other faiths or no faith. The argument that religious institutions should not hire on the basis of religion is also not unique to the Blaine context, but has also surfaced frequently in relation to federal charitable choice initiatives. Whether or not a religious institution may exercise this right is ultimately a question under state and federal employment law, rather than the Blaine Amendment.

#### FEDERAL PRECEDENT

The reinterpreted Florida Blaine Amendment also has not yet been tested against federal constitutional guarantees. As mentioned above, a majority of the United States Supreme Court, as previously constituted, signaled disapproval of Blaine Amendments generally.<sup>166</sup> In addition, there are three broad lines of federal precedent suggesting that the Goldilocks test for applying the Blaine Amendment to religious institutions violates

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190 So. 815, 816 (Fla. 1939) (“Practices in the name of religion that are contrary to approved canons of morals or that are inimical to the public welfare, will not be permitted even though done in the name of religion.”).

164. See *Cantwell v. Connecticut*, 310 U.S. 296, 306–08 (1940) (identifying various United States Supreme Court cases in which free exercise and free speech were deemed lawfully regulated in the public interest).

165. See FLA. CONST. art. IX, § 1(a); see also *Holmes*, 919 So. 2d at 398 (“[W]e determine that the [program] is unconstitutional as a violation of article IX, section 1(a) . . .”).

166. See *Zelman v. Simmons-Harris*, 536 U.S. 639, 720–21 (2002) (Breyer, J., dissenting); *Mitchell v. Helms*, 530 U.S. 793, 828–29 (2000) (plurality).

the United States Constitution: (1) the test favors particular types of religious expression over others; (2) the test requires an intrusive inquiry into the religious beliefs of an organization; and (3) the test relies on a federal standard known as the “pervasively sectarian” test that is disfavored.<sup>167</sup>

First, inquiries are unconstitutional that call into question a person’s view about the centrality of her faith to practice,<sup>168</sup> or imply a preference for certain religious expression over other expression.<sup>169</sup> “The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another.”<sup>170</sup> Put otherwise, “no [s]tate can ‘pass laws which aid one religion’ or that ‘prefer one religion over another.’”<sup>171</sup> The Florida Supreme Court has explicitly recognized this principle.<sup>172</sup> But if the nominally and just-about-right religious may receive a public benefit or the ones who do not hire on the basis of religion, whereas the devoutly religious or too-religious cannot, the state violates this requirement.<sup>173</sup>

The Tenth Circuit held exactly that with respect to a scholarship program that enabled students to attend sectarian, but not pervasively sectarian universities:<sup>174</sup> “This is discrimination ‘on the basis of religious views or religious status’ . . . and is subject to heightened constitutional scrutiny.”<sup>175</sup> The court rested its holding on *Larson v. Valente*, where the

167. See Brandon S. Boulter, *Goldilocks and the Three-Judge Panel: Spencer v. World Vision, Inc. and the Religious Organization Exemption of Title VII*, 2011 B.Y.U.L. REV. 33 (2011) (analyzing Title VII’s religious institution exemption and the test of whether an institution is “religious”).

168. See Emp’t Div., Dep’t of Human Res. of Or. v. Smith, 494 U.S. 872, 887 (1990) (“It is not within the judicial ken to question the centrality of particular beliefs or practices to a faith . . . .”) (citation omitted).

169. See *id.* at 887 (“Judging the centrality of different religious practices is akin to the unacceptable ‘business of evaluating the relative merits of differing religious claims.’”) (citation omitted)

170. *Larson v. Valente*, 456 U.S. 228, 244 (1982).

171. *Id.* at 246 (quoting *Everson v. Bd. of Educ.*, 330 U.S. 1, 15 (1947)).

172. See *Brown v. Orange Cnty. Bd. of Pub. Instruction*, 128 So. 2d 181, 183 (1960).

Under even the most strict interpretation, the First Amendment of the United States Constitution forbids preferential treatment by government, Federal or State, of one sect or religion over others . . . . It is clear that state power is no more to be used so as to handicap religions than it is to be used to favor them.

*Id.* (citations omitted).

173. See *Univ. of Great Falls v. NLRB*, 278 F.3d 1335, 1346 (D.C. Cir. 2002); *Universidad Central de Bayamon v. NLRB*, 793 F.2d 383, 402 (1st Cir. 1985) (en banc); *Johnson v. Presbyterian Homes of the Synod of Fla.*, 239 So. 2d 256, 262 (Fla. 1970).

174. *Colo. Christian Univ. v. Weaver*, 534 F.3d 1245, 1258 (10th Cir. 2008).

175. *Id.* (citing *Emp’t Div., Dep’t of Human Res. of Or. v. Smith*, 494 U.S. 872, 877 (1990)).

United States Supreme Court invalidated a Minnesota statute imposing special registration requirements on any religious organization that did not “receive[] more than half of [its] total contributions from members or affiliated organizations.”<sup>176</sup> The statute discriminated against religions, like the Unification Church, and found that it was “not simply a facially neutral statute,” because it “ma[de] explicit and deliberate distinctions between different religious organizations.”<sup>177</sup> The Tenth Circuit considered Colorado’s law “even more problematic than the Minnesota law invalidated in *Larson*,” because the discrimination was based on the degree of religiosity of the institution, rather than secular considerations such as how much money was raised internally or how much was donated by outsiders.<sup>178</sup> Equal treatment of all religious faiths without discrimination or preference has been the cardinal conception of religious liberty in America and one from which we dare not depart without the gravest repercussions.<sup>179</sup>

Second, to determine whether an institution is too religious to receive public aid, searching discovery is essential into the doctrinal views and nature of a religious institution and its programs. About a similar inquiry, the United States Supreme Court held, “[i]t is not only the conclusions that may be reached . . . which may impinge on rights guaranteed by the Religion Clauses, but also the very process of inquiry leading to findings and conclusions.”<sup>180</sup> Under state and federal law, investigations which entangle the state in judgments about doctrine and orthodoxy or require interpretation of church law, policies or practices are not allowed.<sup>181</sup> Consequently, the D.C. Circuit has repeatedly rejected the NLRB’s implementation of a “substantial religious character” test quite similar to

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176. 456 U.S. at 231–32.

177. *Id.* at 247 n.23.

178. *Colo. Christian Univ.*, 534 F.3d at 1259; *accord* *Awad v. Ziriaux*, No. 10-6273, 2012 WL 50636, at \*10-11 (10th Cir. Jan. 10, 2012) (holding the *Larson* test valid and ruling that “if a law discriminates among religions, it can survive only if it is ‘closely fitted to the furtherance of any compelling interest asserted’” (citing *Larson*, 456 U.S. at 255)).

179. *Colo. Christian Univ.*, 534 F.3d at 1257.

180. *See* *NLRB v. Catholic Bishop of Chi.*, 440 U.S. 490, 502 (1979); *accord* *Mitchell v. Helms*, 530 U.S. 793, 828 (2000).

181. *See* *Catholic Bishop*, 440 U.S. at 502; *Lemon v. Kurtzman*, 403 U.S. 602, 627 (1971); *Carroll Coll., Inc. v. NLRB*, 558 F.3d 568, 571 (D.C. Cir. 2009); *Colo. Christian Univ.*, 534 F.3d at 1261; *Ams. United for Separation of Church & State v. Prison Fellowship Ministries, Inc.*, 509 F.3d 406, 414 n.2 (8th Cir. 2007) (joined by O’Connor, J.); *Univ. of Great Falls v. NLRB*, 278 F.3d 1335, 1341 (D.C. Cir. 2002); *Universidad Central de Bayamon v. NLRB*, 793 F.2d 383, 401 (1st Cir. 1985) (en banc); *Surinach v. Pesquera De Busquets*, 604 F.2d 73, 78 (1st Cir. 1979); *House of God which is the Church of the Living God, the Pillar & Ground of the Truth without Controversy, Inc. v. White*, 792 So. 2d 491, 493 (Fla. Dist. Ct. App. 2001).

Florida's Goldilocks test to decide whether a religious school is exempt from the National Labor Relations Act.<sup>182</sup>

Under the substantial religious character test, the NLRB considers "all aspects of a religious school's organization and function that [it deemed] relevant" such as how effective the organization was at inculcating its beliefs.<sup>183</sup> The NLRB evaluates the types of factors that the court in *McNeil* recommended, such as the influence of faith on curriculum and the board of trustees, and whether officers, professors, and students have to be members of the same faith.<sup>184</sup> The D.C. Circuit held the test just "'the sort of intrusive inquiry that *Catholic Bishop* sought to avoid,' with 'the NLRB trolling through the beliefs of [schools], making determinations about [their] religious mission, and that mission's centrality to the "primary purpose" of the [school].'"<sup>185</sup>

Federal courts have repeatedly warned that intrusive inquiry into the religiosity of an institution leads to excessive entanglement with religion, and by exempting solely "pervasively sectarian" schools from the NLRA, prefers one religion to another.<sup>186</sup> In *New York v. Cathedral Academy*, the United States Supreme Court considered a state statute that reimbursed private religious schools for the costs of examinations and other state-mandated teaching activities only if they lacked religious content.<sup>187</sup> The Court held the process of examining the schools' teaching practices for religious content unconstitutional, explaining that the inquiry itself would encroach on the First and Fourteenth Amendments.<sup>188</sup> As under Article I, Section 3 as interpreted by *McNeil*, "[i]n order to prove their claims for reimbursement, sectarian schools would be placed in the position of trying to disprove any religious content," and the Court "would be cast in the role of arbiter of the essentially religious dispute."<sup>189</sup> It concluded with words equally apt under the Florida Blaine Amendment: "[t]he prospect of church and state litigating in court about what does or does not have religious meaning touches the very core of the constitutional guarantee against religious establishment."<sup>190</sup>

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182. *Carroll Coll.*, 558 F.3d at 571.

183. *Id.* at 572.

184. *Univ. of Great Falls*, 278 F.3d at 1340.

185. *Carroll Coll.*, 558 F.3d at 572 (quoting *Univ. of Great Falls*, 278 F.3d at 1341–42).

186. *Catholic Bishop*, 440 U.S. at 499; *Agostini v. Felton*, 521 U.S. 203, 218 (1997); *Bayamon*, 793 F.2d at 402 (en banc); *Univ. of Great Falls*, 278 F.3d at 1342.

187. *New York v. Cathedral Acad.*, 434 U.S. 125 (1977).

188. *Id.* at 132.

189. *Id.* at 132–33.

190. *Id.* at 133.

Likewise, in *Rosenberger v. Rector and Visitors of the University of Virginia*, the United States Supreme Court rejected the idea that a public university must not extend a neutral subsidy to student publications containing religious “indoctrination” and “evangelis[m],” as opposed to “descriptive examination of religious doctrine,”<sup>191</sup> because “it would require the University . . . to scrutinize the content of student speech, lest the expression in question . . . contain too great a religious content.”<sup>192</sup> This threatened “the specter of governmental censorship,” which “would be far more inconsistent with the Establishment Clause’s dictates than would government provision of [assistance] on a religion-blind basis.”<sup>193</sup>

This same threat caused the Tenth Circuit to reject Colorado’s effort to police participation on a state scholarship program according to whether a college’s curriculum “tend[ed] to indoctrinate or proselytize.”<sup>194</sup> The court observed, “[w]hether an outsider will deem [educators’] efforts to be ‘indoctrination’ or mere ‘education’ depends as much on the observer’s point of view as on any objective evaluation of the educational activity.”<sup>195</sup>

Most recently, in *Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission*, the United States Supreme Court unanimously rejected the authority of the Equal Employment Opportunity Commission and courts to penalize a church for terminating an unwanted teacher who was a commissioned minister or to require her reinstatement under employment discrimination laws.<sup>196</sup> Concurring in the opinion, Justices Alito and Kagan explained that for civil courts to engage in “pretext analysis” to probe the “*real reason* for respondent’s firing, a civil court—and perhaps a jury—would be required to make a judgment about church doctrine.”<sup>197</sup> They concluded,

[T]he mere adjudication of such questions would pose grave problems for religious autonomy: It would require calling witnesses to testify about the importance and priority of the religious doctrine in question, with a civil factfinder sitting in ultimate judgment of what the accused church really believes, and how important that belief is to the church’s overall mission.<sup>198</sup>

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191. 515 U.S. 819, 867, 876–77 (1995) (Souter, J., dissenting) (internal quotation marks omitted).

192. *Id.* at 844.

193. *Id.* at 844–45.

194. *Colo. Christian Univ. v. Weaver*, 534 F.3d 1245, 1261–63 (10th Cir. 2008).

195. *Id.* at 1263.

196. 132 S.Ct. 694 (2012).

197. *Id.* at 715.

198. *Id.*

Yet, these are the very questions the Goldilocks test for applying the Florida Blaine Amendment poses.

The third reason the Goldilocks test may violate the United States Constitution is that the so-called “pervasively sectarian” test has fallen on hard times even as precedent interpreting the Florida Blaine Amendment has begun to favor it as the standard for what is a “sectarian institution.”<sup>199</sup> A plurality of the U.S. Supreme Court in *Mitchell v. Helms* asserted the irrelevance of the pervasively sectarian inquiry.<sup>200</sup> “While acknowledging that ‘there was a period when this factor mattered, particularly if the pervasively sectarian school was a primary or secondary school [referring explicitly to the Know Nothing period], that period is one that the Court should regret, and it is thankfully long past.’”<sup>201</sup> Moreover, the concurring opinion joined the plurality opinion in overruling two cases hinged on the pervasively sectarian test.<sup>202</sup> Interpreting *Mitchell*, the Fourth Circuit and Tenth Circuit agreed that the pervasively sectarian test should not be utilized to decide whether a private religious college was entitled to participate in a public aid to private colleges program or student scholarship program.<sup>203</sup>

Notwithstanding this, Blaine Amendment supporters insist the United States Supreme Court held in *Locke v. Davey*, that Washington did not violate the Free Exercise Clause by preventing students otherwise eligible to receive scholarships from receiving them to pursue pastoral studies.<sup>204</sup> The holding convinced the court in *Holmes* and *McNeil* that application of

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199. In *Bush v. Holmes*, 886 So. 2d 340 (Fla. Dist. Ct. App. 2004), the court stated in dicta, without deciding the question, “[i]t certainly might be logical to adopt the ‘pervasively sectarian’ standard developed in Federal Establishment Clause jurisprudence” as the standard for a violation of the Blaine Amendment. *Id.* at 353 n.10.

200. *Zelman v. Simmons-Harris*, 536 U.S. 639, 657 (2002); *Mitchell v. Helms*, 530 U.S. 793, 826 (2000). The plurality in *Mitchell* noted that the Supreme Court had not relied on the test to strike down an aid program since 1985 in *Aguilar v. Felton*, 473 U.S. 402 (1985) and *Sch. Dist. of Grand Rapids v. Ball*, 473 U.S. 373 (1985), and that the Court had since overruled *Aguilar* in full and *Ball* in part. *Mitchell*, at 826. Justice Kennedy also questioned the test in *Bowen v. Kendrick*, 487 U.S. 589, 589–90 (1988). *Id.* at 840–41. The Court has since upheld aid programs to students who attend pervasively sectarian schools. *See id.* at 827.

201. *Columbia Union Coll. v. Oliver*, 254 F.3d 496, 502 (4th Cir. 2001) (quoting *Mitchell*, 530 U.S. at 826).

202. *Mitchell*, 530 U.S. at 837, 850 (O’Connor, J., concurring) (citing *Wolman v. Walter*, 433 U.S. 229 (1977); *Meek v. Pittenger*, 421 U.S. 349 (1975)).

203. *Colo. Christian Univ. v. Weaver*, 534 F.3d 1245, 1258 (10th Cir. 2008); *Columbia Union Coll.*, 254 F.3d at 504, 507–08; *see also Barnes-Wallace v. Boy Scouts of Am.*, 275 F. Supp. 2d 1259, 1269 (S.D. Cal. 2003) (concluding the Supreme Court abrogated the pervasively sectarian test).

204. *Locke v. Davey*, 540 U.S. 712, 715 (2004).

Article I, Section 3 “fits within the ‘play in the joints’ between the Establishment Clause and the Free Exercise Clause,” so that “states are free to ‘draw[] a more stringent line than drawn by the United States Constitution . . . .”<sup>205</sup> The trouble with this interpretation is three-fold. First, the United States Supreme Court held that the state constitutional prohibition at issue in *Davey* was not a Blaine Amendment.<sup>206</sup> The Court went out of its way to point out, “the Blaine Amendment’s history is simply not before us.”<sup>207</sup> Second, the Court found that “[f]ar from evincing the hostility toward religion,” Washington’s Promise Scholarship Program was not discriminatory in violation of the First Amendment, because it enabled students to attend pervasively religious schools, major in everything except pastoral studies, and even take devotional classes while on scholarship.<sup>208</sup> Article I, Section 3 as interpreted today would have prohibited this. Last, the Court emphasized that from the earliest days of the republic, pursuant to the Establishment Clause and not a Blaine Amendment, states have excluded support and training for the clergy.<sup>209</sup> Consequently, the Court in *Davey* did not, in fact, hold that discriminating against or among religious persons on the basis of a Blaine Amendment is consistent with the United States Constitution. To the contrary, federal precedent remains firmly entrenched, precluding the favoring of one religious tradition over another and impeding the state from becoming entangled in church doctrine, policies, and practices.

#### PUBLIC POLICY

Independent of the constitutional arguments against discriminating as broadly against religious social service providers as the court in *McNeil* indicated is required under Article I, Section 3, we should consider the policy repercussions.<sup>210</sup> First, application of the Goldilocks test will mean that some of the most effective social service providers will serve fewer poor people, or no longer serve the needy at all. True religion, said John Wesley, is serving orphans, widows, and the poor.<sup>211</sup> Religious institutions

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205. *Bush v. Holmes*, 886 So. 2d 340, 360–61, 365 (Fla. Dist. Ct. App. 2004) (quoting *Davey*, 540 U.S. at 1313); *see also* *Council for Secular Humanism, Inc. v. McNeil*, 44 So. 3d 112, 121 (Fla. Dist. Ct. App. 2010) (alterations in original) (quoting *Davey*, 540 U.S. at 722).

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

207. *Id.*

208. *Id.* at 724–25.

209. *Id.* at 722–24.

210. *McNeil*, 44 So. 3d at 118.

211. 8 JOHN WESLEY, *A Farther Appeal to Men of Reason and Religion*, in THE WORKS OF THE REVEREND JOHN WESLEY, pt. 1, at 235 (J. & J. Harper 1827) (quoting *James* 1:27).

have long been critical public partners and sometimes the only ones willing to address serious social needs. Many testify that crime and other social maladies are at least partly reflective of a condition of the heart. Therefore, it is not surprising that faith-based social service providers, which minister to the mind, soul, and body in more than a nominal fashion, are sometimes more effective than their secular counterparts. Irrespective of results, without religious institutions such as Salvation Army, Catholic Charities, Lutheran Social Services, Baptists, and Seventh-day Adventists, state and local government will find it difficult to meet social demand for substance abuse treatment, healthcare, transitional housing, eldercare, homelessness, and a plethora of other social programs.

Second, religious institutions are commonly willing to provide services at reduced cost as compared to secular providers due to their religious motivations. If they are cut out of applying for public contracts and grants, the Florida Supreme Court acknowledged that the cost of providing social services is likely to rise.<sup>212</sup> Consequently, the natural consequences of applying the Goldilocks test will be the provision of less effective social services for fewer people at greater public expense.

### CONCLUSION

In Florida, the roots of the Blaine Amendment during the Reconstruction Era were more complex than in the North. As in the North, they were certainly anti-Catholic and reactionary in support of the Protestant establishment in the public schools. But the Blaine Amendment in Florida was equally segregationist inasmuch as it was designed to prevent African-Americans from receiving a private education equivalent to that of whites. By relegating blacks to inferior public schools and cutting off funding to private religious schools offering them a free or reduced-fee education, the 1885 Florida Constitution erected twin and related barriers to freedmen seeking economic emancipation.

At the root of the Blaine Amendment's endurance in the soil of the separate but equal doctrine is a mistaken understanding about its original purposes and overreliance upon the importance of its subsequent reenactment. As originally conceived, the Blaine Amendment was not a "no-aid" provision or "stricter Establishment Clause." It was enacted to preserve a Protestant establishment. Blaine himself would have considered it a great irony that the Protestant expression he would have protected in

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212. *City of Boca Raton v. Gidman*, 440 So. 2d 1277, 1281 (Fla. 1983).

schools as the essential “moral means for the renovation of mankind,” now may not receive even neutral public funding under his amendment.<sup>213</sup>

The Goldilocks test for enforcing Article I, Section 3 as a “no-aid” provision against all religious providers of social services will require the state, in effect, to favor the nominally or just-about-right religious as compared to the devoutly religious or too-religious. The state will then do the one thing it must not under the Establishment Clause: favor one religion over another. More than this, it will entangle itself in church doctrine, policy, and practices in a manner the clause was designed to prevent. Furthermore, state and local governments will thereby lose some of the most effective social service providers and drive up costs.

Hopefully, the time has come when the Blaine Amendment, by popular vote, will share the same fate as the separate but equal and miscegenation amendments.<sup>214</sup> But if not, the neutrality doctrine as an interpretation of Article I, Section 3 would be more consistent with other constitutional guarantees, as would a more natural and critical interpretation of who is primarily aided when religious institutions provide services to the poor at less than cost: ordinarily, the client enrolled in the religious institution’s social service program, rather than the religious institution itself.<sup>215</sup>

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213. Gall, *supra* note 2, at 417 (quoting CHARLES LESLIE GLENN, JR., *THE MYTH OF THE COMMON SCHOOL* 81–83 (Univ. of Mass. Press 1988)).

214. *See generally* *Loving v. Virginia*, 388 U.S. 1 (1967) (noting that miscegenation statutes violate the Equal Protection and Due Process clauses of the Fourteenth Amendment); *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (concluding the separate but equal doctrine violates the Fourteenth Amendment’s constitutional guarantee of equal protection under the law).

215. Repeatedly, in Florida Constitutional law, the purveyors of critical social services are treated as mere “incidental beneficiaries,” rather than the primary beneficiaries. *See, e.g.*, *Memorial Hospital- West Volusia, Inc. v. News Journal Corp.*, 927 So. 2d 961, 971 (Fla. 2006) (hospital); *Gidman*, 440 So. 2d at 1282 (childcare center); *Florida v. Volusia County Indus. Dev. Auth.*, 400 So. 2d 1222, 1224 (Fla. 1981) (private nursing home); *Florida v. Leon County*, 400 So. 2d 949, 951 (Fla. 1981) (for-profit nursing home); *Wald v. Sarasota County Health Facilities Auth.*, 360 So. 2d 763, 769 (Fla. 1978) (private hospital).