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Blaine's Shadow: Politics, Discrimination, and School Choice

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Abstract

The First Amendment to the Constitution of the United States provides powerful protections to those who espouse and practice religious beliefs, and those protections have been extended to states under the Fourteenth Amendment. Despite common interpretations of the phrase "separation of church and state," the government's primary responsibility in dealing with different religions is to maintain neutrality. The history of Blaine clauses at both the federal and state levels involves a variety of factors—immigration, discrimination, nativism, politics, and ambition—that have led to the modern debate over private school choice programs involving faith-based schools. Though the history of Blaine clauses is nuanced, this history makes clear that such clauses are rooted in attempts to mitigate the influence of and prohibit taxpayer funding to those who practice certain faiths. This paper includes a brief discussion of the First Amendment's religious protections, an overview of the history of Blaine clauses both at the federal level and in Colorado specifically, a discussion of Colorado's Blaine provision as it has been applied by the courts, and an examination of a possible path forward.

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Introduction

One of the largest impediments to private educational choice programs in Colorado is Article IX, §7 of the Colorado Constitution. Often referred to as Colorado's "Blaine Amendment," this constitutional clause—along with other, lesser-known constitutional provisions—has played and will continue to play a large role in important debates on educational choice in the Centennial State. More than three dozen other states have similar clauses in their constitutions. Despite the importance of these constitutional provisions, few have a full understanding of the legal, historical, and policy-related issues involved in their interpretation and application. To further productive conversations on this important issue, this paper provides an overview of Blaine clauses, their history, and their current impacts on private school choice.

The First Amendment and "Separation of Church and State"

The first step toward understanding Blaine clauses and the constitutional issues they raise is to understand the religious protections offered by the First Amendment to the Constitution of the United States.

The First Amendment contains two religious protection clauses, both of which are found in the same sentence. The amendment reads:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof…

The first clause of this sentence is known as the Establishment Clause. This clause contains two restrictions on the federal government in its interaction with religion. First, it prohibits the creation of a national church by the federal government. Second,

it requires official neutrality toward different religions on the part of the federal government.

The latter clause, called the Free Exercise Clause, protects the right of American citizens to hold religious beliefs and engage in religious rituals connected to those beliefs. Notably, beliefs "need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection."[1]

The United States Supreme Court has repeatedly emphasized the importance of neutrality when making laws that burden religious activities. For instance, in *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah* (1993), the court held unconstitutional a city ordinance restricting the practice of animal sacrifice by a particular religion. Justice Anthony Kennedy delivered the opinion of the court, writing:

> Under the Free Exercise Clause, a law that burdens religious practice need not be justified by a compelling governmental interest if it is neutral and of general applicability. *Employment Div., Dept. of Human Resources of Oregon v. Smith, 494 U.S. 872*. However, where such a law is not neutral or not of general application, it must undergo the most rigorous of scrutiny: it must be justified by a compelling governmental interest, and must be narrowly tailored to advance that interest. Neutrality and general applicability are interrelated, and failure to satisfy one requirement is a likely indication that the other has not been satisfied.[2]

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Though it precedes the Free Exercise Clause in syntax, the Establishment Clause was intended as a way to reinforce government neutrality with respect to religion. According to constitutional scholar Rob Natelson, the clause:

> …was designed to buttress free exercise by requiring the federal government, to the extent its legislation touched religion, to treat all faiths in a non-discriminatory manner. This requirement obviously went beyond a mere ban on a national church. Rather the Establishment Clause was an extension of the trust duty of impartiality that already pervaded the Constitution.[3]

The term "separation of church and state" is often used to describe these key provisions of the U.S. Constitution. That term connotes the idea that government must exist wholly separate from religion in all circumstances. Yet the key tenet of the First Amendment's religious protections is not absolute separation *between* government and religion. Rather, the amendment requires government neutrality *toward* different religions. Thus, any law designed implicitly or explicitly to discriminate against or place a burden upon those who espouse certain beliefs while exempting others is inherently in violation of the First Amendment.

Although the First Amendment by its terms applies only to the federal government, the U.S. Supreme Court has extended its protections to the states under the Fourteenth Amendment.[4] This extended application is particularly important in the context of Blaine clauses in state constitutions. As the following sections illustrate, the history of Blaine clauses makes clear that such provisions were designed to mitigate the influence of and prohibit taxpayer funding to those who practice certain faiths—most notably Catholics.

The Casualties of Ambition: The Birth of Blaine Clauses

Thirty-eight states have Blaine clauses in their state constitutions.[5] These provisions vary in their level of restrictiveness and specific language, but all are designed to accomplish the same task: prohibiting state and local governments from providing aid to "sectarian" institutions and purposes. Yet, as is often the case with all things involving politics, there is more to these constitutional provisions than their language may convey. They must be considered in the context of their historical origins in order to understand their constitutional implications for present-day students.

Blaine clauses trace their nominal roots to a failed attempt to amend the U.S. Constitution by then-Congressman James G. Blaine of Maine. On December 14, 1875, Congressman Blaine introduced a constitutional amendment into the United States House of Representatives. The text of that amendment read:

> 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.[6]

The amendment passed in the House on an overwhelming 180-7 vote. However, it narrowly failed to reach the required two-thirds majority in the Senate, failing with 28 votes in favor and 16 opposed.[7]

The introduction of Blaine's amendment is considered by many to be the genesis of the conversation about sectarian influences in school. It was not. Rather, it represented the political marriage of longstanding concerns about sectarianism in the emerging "common school" system, the interweaving of these concerns with a rising tide of anti-Catholic and anti-immigrant sentiment, and the political ambition of James G. Blaine and the early Republican Party.

The Evolution of Sectarianism

The education system of the early 18th century looked very different than today's public school system. Education in pre-revolution America was decentralized and widely varied. Following the Revolutionary War, however, many American leaders believed that the survival of the new republic would depend on its ability to educate its children in the ways of citizenship. Importantly, this vision of education was not limited to academic skills. Rather, it sought to inculcate the kind of moral and religious tenets believed to foster the characteristics needed for republican self-governance.[8]

By the early 19th century, early "common schools" had begun to emerge, distinguishing themselves from the town-run and denominational religious schools of the previous century by focusing on liberal subjects like mathematics, history, and geography and deemphasizing doctrinal divides between Christian denominations.[9] Early common schools were "nonsectarian" only insofar as they attempted to mitigate inter-denominational conflict within dominant Protestant Christianity. They were not irreligious.

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Viewed as inseparable from moral and civic education, Protestantism was pervasive in these early schools. Students engaged to various extents in religious rituals, reciting prayers, reading from the King James Bible, singing hymns, and reciting the Lord's Prayer.[10] Despite the fact that these early schools ostensibly sought to be inclusive of all Christian sects, an argument could be made that the earliest iterations of nonsectarian education suppressed denominational beliefs in favor of an early form of nondenominational Protestantism.

The drive toward common schools continued in the 1830s. Horace Mann, a former congressman then serving as secretary of the Massachusetts Board of Education, became a prominent proponent of the common school.

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Under Mann's leadership, the system of government-run and taxpayer-financed common schools that would grow into the modern public education system took shape in Massachusetts. Mann advocated strongly for a new version of "nonsectarian" schools that would teach universal religious principles rather than focus on dogmatic differences in theology. As was the case with earlier common schools, the institutions spawned by this effort were not irreligious. In fact, despite efforts to define schools as "religious but not sectarian," they were not even convincingly non-Protestant. Rather, their curricula "evidenced a 'pan-Protestant compromise, a vague and inclusive Protestantism' designed to tranquilize conflict among Protestant denominations."[11]

Mann himself acknowledged the presence and importance of Christianity in the public schools of the mid-1800s. Responding to those who criticized his vision of universal religious principles as anti-Christian, he stated that while common schools were barred from "inculcating the peculiar and distinctive doctrines of any one religious denomination," the system:

> "…earnestly inculcates all Christian morals; it founds its morals on the basis of religion; it welcomes the religion of the Bible; and, in receiving the Bible, it allows it to do what it is allowed to do in no other system—to speak for itself. But here it stops, not because it claims to have compassed all truth, but because it disclaims to act as an umpire between hostile religious opinions."[12]

Despite Mann's appeal to universal Christian values, a variety of groups saw his vision of nonsectarian education as an attempt to suppress the views of certain Christian sects. Evangelicals suspected Mann, a Unitarian, of surreptitiously foisting Unitarianism and godlessness on schoolchildren. Simultaneously, Unitarians, Catholics, and other groups attacked Mann for promoting what they saw as a particular brand of Protestantism.[13] Whatever level of religious bias was truly present in Mann's utopian vision of nonsectarian system of public schools, many groups viewed his system as a means of forcing inculcation in a particular vein of religious philosophy.

Mann's version of nonsectarian education was designed to suppress conflicts within Protestantism, not to marginalize Catholics and those of other faiths. However, the dominance of nondenominational Protestantism in emerging public school systems was complicated by the United States' changing demographics. The mid-1800s saw a dramatic increase in immigration to United States from Ireland, Germany, and Italy. These immigrants rapidly swelled the Catholic population of the country, which had been relatively

small.[14] According to historian Doris Kearns Goodwin, "This largely Catholic influx descended on a country that was mostly native-born Protestant, anti-Catholic in sympathy."[15] As the number of Catholic immigrants swelled, strong anti-immigrant, anti-Catholic nativist sentiment found its way onto the American political stage.

Immigrant families faced stark educational choices. Anti-Catholic sentiment spurred by rising immigration soon found its way into schools. In many cases, the schools' "virulently anti-Catholic curriculum frightened immigrants away, dooming vast numbers to illiteracy, poverty, and vice."[16] Immigrant children who found themselves in the common schools were compelled to engage in religious activities that were contrary to their beliefs, including Protestant prayer and hymn singing.[17] Also problematic for Catholics were daily readings from the King James Bible, which the Catholic Church did not recognize as legitimate, and textbooks hostile to the Catholic faith.[18]

Catholics were not alone in their concerns about Protestant dominance in the common schools during the 19th century. Jews also found the practice of Bible reading in schools concerning,[19] and the Protestant views underlying the common schools' religious nature "plainly excluded … other non-mainstream believers (Mormons, Jehovah's Witnesses, and the like), and non-believers."[20] However, it was Catholics who mounted the most serious challenges to the prejudice.

Bolstered by their increasing numbers, Catholic leaders began using their newfound political power to challenge the Protestant practices in common schools. In one notable challenge to the practice of Bible reading in schools, a Catholic student in Maine sued after being expelled for refusing to participate in such readings. The Maine Supreme Judicial Court rejected her claim, affirming the right of the school to exercise such disciplinary actions.[21]

Faced with limited choices, Catholics began creating their own parochial schools where their children could be educated in a way they found acceptable. Such schools appeared in cities like New York, Philadelphia, Cincinnati, Boston, and Baltimore.[22] These separate systems resulted in increasing pressure on state legislatures to grant public funds to Catholic schools in addition to the predominantly Protestant common schools.[23] In turn, immigrant Catholic lobbying efforts "provoked a display of majoritarian politics of unprecedented brutality - all under the inverted banner of religious freedom."[24]

One of the earliest battles over educational choice, fought on the basis of providing public funds to parochial schools, was waged in New York under Governor William H. Seward. Looking to expand the base of support for the Whig Party, Seward argued that Catholic immigrants should be welcomed "with all the sympathy which their misfortunes at home, their condition as strangers here, and their devotion to liberty should excite."[25] In the early 1840s, Seward sought to accomplish this goal by backing a controversial proposal designed to allow Catholic parochial schools in New York to access public funds. The backlash by nativist Protestants was vicious. Seward was eventually forced to retreat to a watered-down compromise under which the management of New York common schools was passed from a private Protestant organization to an early system of school districts. However, Protestant practices continued in the public schools and parochial schools were still locked out of public funding under the new arrangement.[26]

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Though the situation in New York eventually calmed, the confrontation forever eroded Seward's support among nativist groups. Indeed, the opposition of these groups to his bid for the Republican presidential nomination of 1860 was a major factor in his loss of the nomination to Abraham Lincoln.[27]

Similar battles raged elsewhere over the nature of public schooling. In Philadelphia, more than 50 Protestant leaders formed the American Protestant Association. The mission of this organization was "to alert the public, through lectures, publications, and revivals, to the dangers of popery and 'romanism.'"[28] The tensions in Philadelphia reached a head in 1844, when Catholics challenged the practice of reading the Bible in public schools. This action sparked the Nativist Riots of 1844, in which 20 people were killed and at least 100 were injured. Catholic homes were looted or destroyed, and two churches and a convent were burned to the ground.[29]

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As the nation began to splinter on the issue of slavery and hurtled toward civil war, a new divide had taken shape. Growing anti-Catholic sentiment gave rise to a number of formal nativist groups, the most prominent of which was the Know-Nothing Party of the 1850s. Virulently opposed to Catholic immigration and focused on mitigating what many of its members saw as an attempted takeover of the Protestant United States by outside forces, this organization exerted strong influence in northern statehouses. The Know-Nothing Party used its political power to advocate for causes designed to hobble Catholics in their efforts to support parochial schools with public funds. In Horace Mann's Massachusetts, Know-Nothings took control of both houses of the state legislature and the governorship in 1854. They subsequently adopted a constitutional amendment prohibiting the appropriation of public funds to any religious sect for the maintenance of its own schools and a statutory requirement that students read the King James Bible.[30]

Some historians point out that similar "no-funding" provisions were adopted in states where no significant conflict over parochial school funding existed. Instead, these provisions were designed to thwart competition among different types of schools for public resources, standardize instruction, and address early concerns about religious factionalism in education.[31]

It is likely true that some early no-funding provisions were not designed with anti-Catholic animus as the primary intent. However, as later iterations of these provisions illustrate, that fact alone does not necessarily mitigate the danger they posed to religious freedom. Contemporaneous dictionary definitions of "sectarian" make clear that at the time, the word strongly implied associations with heresy, prejudice, religious bigotry, and divergence from prevailing beliefs.[32] A sect was, in essence, any religious group that undesirably deviated from dominant beliefs. Thus, once placed into a state constitution, no-funding provisions could serve as permanent devices for denying public funds to any religious minority that happened to offend the majority, whether then or in the future—and that is precisely how later refinements of these no-funding provisions were used.

No-funding provisions were rapidly weaponized against Catholics as "Protestant nativists seized on the no-funding principle as a tool to maintain Protestant hegemony in the culture and the schools and used charges of papal designs to fuel anti-Catholic bigotry."[33] The word "sectarian" began to take on a new meaning: Catholic.

The rising ideology of the Know-Nothings found its way onto the national stage as it

intermingled with the nascent Republican Party. Though many prominent Republican leaders opposed anti-immigrant and anti-Catholic sentiment, Republicans and Know-Nothings were linked by their shared opposition to slavery.[34] The counterintuitive coexistence of opposition to the oppression of blacks and support for the oppression of Catholic immigrants among Know-Nothings was captured by Abraham Lincoln in an 1855 letter to Joshua Speed, in which he wrote [original spelling and capitalization retained]:

> I am not a Know-Nothing. That is certain. How could I be? How can any one who abhors the oppression of negroes, be in favor of degrading classes of white people? Our progress in degeneracy appears to me to be pretty rapid. As a nation, we begin by declaring that "all men are created equal." We now practically read it "all men are created equal, except negroes." When the Know-Nothings get control, it will read "all men are created equal, except negroes, and foreigners, and catholics." When it comes to this I should prefer emigrating to some country where they make no pretence of loving liberty-to Russia, for instance, where despotism can be taken pure, and without the base alloy of hypocracy.

Despite the hypocrisy noted by Lincoln, the Republican Party's opposition to slavery led Know-Nothings members to join the Republican Party "in droves."[35] The formal Know-Nothing Party faded as the Civil War approached and the slavery argument rose to a fever pitch, but the influence of its members on policy discussions—and elections—lived on.

James G. Blaine's Ambition

Battles over the funding of parochial schools were largely dormant during the dark years of the Civil War and its aftermath. By the early 1870s, however, the "School Question" once again had risen to national prominence. U.S. senators from Alabama and Nevada proposed constitutional amendments to prohibit government entities from appropriating funds to religious "sects."[36] A large number of states took action to prevent Catholic schools and charities from receiving public money; by the mid-1870s, more than a dozen states had adopted constitutional or other measures against the funding of sectarian institutions.[37] In 1872, the Ohio Supreme Court upheld a decision by the Cincinnati school board to prohibit the reading of all religious texts and instruction in public schools, rankling Protestants. Similar bans followed in New York, Chicago, Michigan, and other states.[38]

Though the term "sectarian" had, to some, begun to take on a more irreligious quality, the use of the word as a euphemism for anti-Catholic sentiment remained. The reconstructed South had already flexed its political muscle by retaking the U.S. House of Representatives in 1874 and capturing Republican seats in the U.S. Senate, and there was concern that they could also seize the presidency in 1876 if the Republican Party did not act.[39] Sensing an opportunity to use the School Question to bolster his faltering administration and both his and the Republican Party's chances at retaining the presidency in 1876, President Ulysses S. Grant delivered the following remarks in Des Moines, Iowa, on September 20, 1875:

> Now, the centennial year of our national existence, I believe, is a good time to begin the work of strengthening the foundations of

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the structure commenced by our patriotic forefathers one hundred years ago at Lexington. Let us all labor to add all needful guarantees for the security of free thought, free speech, a free press, pure morals, unfettered religious sentiments, and of equal rights and privileges to all men irrespective of nationality, color, or religion. Encourage free schools, and resolve that not one dollar, appropriated for their support, shall be appropriated to the support of any sectarian schools. Resolve that neither the State nor Nation, nor both combined shall support institutions of learning other than those sufficient to afford to every child growing up in the land the opportunity of a good common school education, unmixed with sectarian, pagan, or atheistical dogmas. Leave the matter of religion to the family altar, the Church, and the private school, supported entirely by private contributions. Keep the Church and State forever separate.[40]

Though the speech was favorably received, few failed to recognize Grant's intentions. As historian Steven Green writes, "The speech clearly aligned the Republican Party and the Protestant cause."[41] By positioning the Republican Party as a champion of public education and opening the door to anti-Catholic voters through the invocation of the word "sectarian," Grant had laid the groundwork for the Republican Party—and himself—in the coming elections.

One observer who recognized the opportunity provided by Grant's speech was U.S. Representative James G. Blaine. Blaine was a deeply ambitious politician who had lost his position as Speaker of the United States House of Representatives in the Democratic tide of 1874. He badly wanted the 1876 Republican presidential nomination and recognized that he was well positioned to take it thanks to the scandals and accusations that marred President Grant's administration.[42] Hoping to ride the wave generated by Grant's speech, Blaine publicly released a letter

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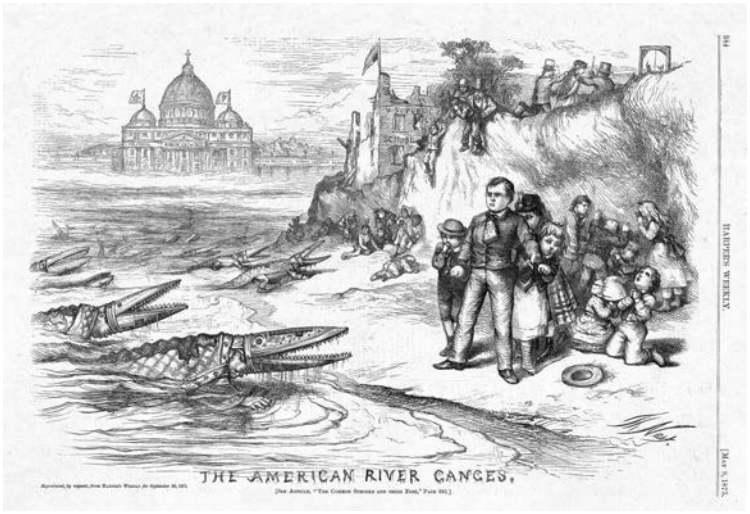

This 1875 cartoon depicts Catholics as crocodiles preparing to devour American school children. Note that the students' protector wears a Bible over his heart, that the fortress-like public school in the background has been battered, and that the school's American flag is being flown upside down in a display of distress.

ostensibly written to his friend that laid out his case for the settlement of the School Question through a constitutional amendment that would result in a "complete victory for nonsectarian schools."[43]

Coupled with the president's speech, Blaine's proposal drew significant attention. Blaine's proposal was widely opposed by Catholics, who rightly believed the move was a cynical attempt to realize a politician's ambition through the cultivation of anti-Catholic nativist voters. Protestant leaders continued to support a funding ban on parochial schools, though they continued to oppose any restriction on what they termed "nonsectarian" religious activity in public schools[44]—perhaps one of the clearest indications that even as late as the 1870s, the word "nonsectarian" was not understood to mean irreligious. Rather, it continued to denote the same kind of Protestantism that had dominated the public school system for decades.

Grant reiterated and clarified his call for an amendment to the U.S. Constitution in his annual message to Congress on December 7, 1875. One week later, as public interest and anticipation peaked, Blaine introduced his amendment. Reactions from Protestant news outlets were positive, as many viewed the amendment as a way to deal a final blow to Catholic influence in public education.[45] This was very likely the response Blaine desired, as the amendment was designed to solidify support for Blaine among nativist factions in the Republican Party. Unfortunately for Blaine, any political boost he experienced was short lived. As one prominent newspaper wrote, "Mr. Blaine did, indeed, bring forward at the opening of Congress a Constitutional amendment directed against the Catholics, but the anti-Catholic excitement was, as everyone knows now, a mere flurry; and all that Mr. Blaine means to do or can do with his amendment is not to pass it but to use it in the campaign to catch anti-Catholic votes."[46]

Though he undoubtedly basked in the exposure and positive press he received for his amendment, Blaine showed little interest in its substance or implications—particularly after it became clear that the move would not secure him the Republican presidential nomination. He did not participate in debates surrounding the amendment in either chamber of Congress. When Rutherford B. Hayes, who had himself relied on anti-Catholic sentiment and conspiracy theories to retain the governor's seat in Ohio, took the Republican nomination, Blaine lost all desire to discuss the amendment or the ideas it espoused. He never again substantively discussed the issue; indeed, he does not even mention the event in his autobiography.[47] As one historian writes, "After the amendment failed to secure [Blaine] the nomination, it also lost all importance even as a historical event."[48]

Compelling evidence exists that Blaine himself was not anti-Catholic.[49] But he was ambitious, and that ambition led him and other Republican leaders to court anti-Catholic and anti-immigrant forces as a means of achieving political power. Thus, the political ambition of James G. Blaine—and, by extension, the Republican Party—helped unleash prejudicial constitutional language with which today's students must still contend.

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Colorado's Blaine Clause

Though Article IX, §7 of the Colorado Constitution is often called a Blaine "amendment," this term is technically inaccurate. This particular section of the Colorado Constitution was included in the original draft of the document created by the state's constitutional convention in 1875-1876—a convention that occurred nearly simultaneously with Blaine's and Republican Party's courtship with anti-Catholic forces. Indeed, the delegates to the convention almost certainly had heard or read about Grant's speeches and Blaine's amendment and felt the same surge of public opinion that drove those two men toward advocating for "nonsectarian schools." And, having endured a long, arduous path to statehood that lasted nearly two decades[50] and saw Colorado's status as a state rejected at different times by President Andrew Johnson and Congress,[51] these delegates were likely keenly aware of the risks of interfering with political efforts or strategy ahead of the 1876 election.

Despite accusations by Catholic leaders that the convention was engaging in openly anti-Catholic behavior, language mirroring Blaine's amendment was adopted.

Evidence exists that there was more to Colorado's adoption of constitutional language mirroring Blaine's amendment than political expediency, however. The territory's Catholic population, which at the time was comprised heavily of Mexican-Americans, was "wildly underrepresented" at the convention. This underrepresentation skewed proceedings toward the philosophy and agenda of white Protestants.[52] The convention itself "was held in the Denver lodge of a secret society that refused to admit Catholics."[53] Delegates discussed and debated public support of sectarian schools numerous times during the convention.[54] These debates and the reactions they incited exposed the underlying current of anti-Catholic sentiment pervading the convention. In early 1876, as the convention was in full swing, the *Rocky Mountain News* wrote harshly about the "antagonism of a certain church towards our American public school system." The article went on to say that such antagonism, if continued, would "lay our vigorous young republic, bound with the iron fetters of superstition at the feet of a foreign despot, the declared foe of intellectual liberty and human progress."[55] A Boulder newspaper wondered, "Is it not enough that Rome dominates Mexico and all of South America?"[56]

Despite accusations by Catholic leaders that the convention was engaging in openly anti-Catholic behavior, language mirroring Blaine's amendment was adopted. The final language of the section, which went into effect along with the rest of the state constitution when President Ulysses S. Grant granted Colorado admission to the union on August 1, 1876, reads:

> **Section 7. Aid to private schools, churches, sectarian purpose, forbidden.** Neither the general assembly, nor any county, city, town, township, school district or other public corporation, shall ever make any appropriation, or pay from any public fund or moneys whatever, anything in aid of any church or sectarian society, or for any sectarian purpose, or to help support or sustain any school, academy, seminary, college, university or other literary or scientific institution, controlled by any church or sectarian denomination whatsoever; nor shall any grant or donation of land, money or other personal property, ever be made by the state, or any such public corporation to any church, or for any sectarian purpose.

Article IX, §7 is not the only portion of the Colorado Constitution touching on the issue of "sectarianism." A number of other potentially relevant provisions are also included. These provisions are:

Article II, §4: The free exercise and enjoyment of religious profession and worship, without discrimination, shall forever hereafter be guaranteed; and no person shall be denied any civil or political right, privilege or capacity, on account of his opinions concerning religion; but the liberty of conscience hereby secured shall not be construed to dispense with oaths or affirmations, excuse acts of licentiousness or justify practices inconsistent with the good order, peace or safety of the state. No person shall be required to attend or support any ministry or place of worship, religious sect or denomination against his consent. Nor shall any preference be given by law to any religious denomination or mode of worship. [This type of provision is known as a compelled support clause]

Article V, §34: No appropriation shall be made for charitable, industrial, educational or benevolent purposes to any person, corporation or community not under the absolute control of the state, nor to any denominational or sectarian institution or association.

Article IX, §8: No religious test or qualification shall ever be required of any person as a condition of admission into any public educational institution of the state, either as a teacher or student; and no teacher or student of any such institution shall ever be required to attend or participate in any religious service whatsoever. No sectarian tenets or doctrines shall ever be taught in the public school, nor shall any distinction or classification of pupils be made on account of race or color, nor shall any pupil be assigned or transported to any public educational institution for the purpose of achieving racial balance.

It should also be noted that Colorado has seen challenges to statutory, rather than constitutional, requirements related to sectarian institutions. In 2008, the United States Court of Appeals, 10th Circuit ruled statutory language restricting the provision of state-funded scholarships to "pervasively sectarian" institutions of higher learning unconstitutional because it "expressly discriminates among religions without constitutional justification, and its criteria for doing so involve unconstitutionally intrusive scrutiny of religious belief and practice."[57]

Though much of this language has been euphemized as "separation of church and state," the origins of both the federal Blaine amendment and Colorado's related clauses make clear that they were inextricably interwoven with the anti-Catholic sentiment prevalent during that time in American history. And given the criticality of neutrality toward religion on the part of government under the First Amendment, it is clear that this intermingling of the concepts is deeply problematic from a constitutional perspective.

Though much of this language has been euphemized as "separation of church and state," the origins of both the federal Blaine amendment and Colorado's related clauses make clear that they were inextricably interwoven with the anti-Catholic sentiment prevalent during that time in American history.

The Effects of Colorado's Blaine Clause on Educational Choice

In April 2003, Colorado enacted the Colorado Opportunity Contract program, the state's first and only statewide private educational choice program. The adoption of this voucher program followed a landmark U.S. Supreme Court ruling in 2002 (*Zelman v. Simmons-Harris*) holding that private educational choice programs, including programs involving faith-based schools, were permissible under the Establishment Clause of the United States Constitution because they are neutral with respect to religion and "provide aid directly to a broad class of individuals, who, in turn, direct the aid to religious schools or institutions of their own choosing."[58] Nevertheless, Colorado's program was challenged by the Colorado Parent Teacher Association under the state's Blaine clause and compelled support clause. The case against the program was argued by lawyers from national and state teachers unions, as well as a number of other groups.[59]

In 2011, Douglas County School District attempted to address the Colorado Supreme Court's concerns about statewide voucher programs by enacting a local voucher program.

Plaintiffs also challenged the program under a litany of other constitutional provisions. One of these challenges dealt with the program's funding mechanism. Plaintiffs argued that the program violated article IX, §15 of the Colorado Constitution by interfering with school districts' ability to allocate locally raised funds as they saw fit. This constitutional provision, which grants locally elected school boards control of instruction in their districts, is often referred to as the state's Local Control Clause. In 2004, the Colorado Supreme Court issued a decision striking down the Opportunity Contract program under the local control clause.[60] Because it found the program unconstitutional under the local control clause, the court did not address the Blaine or compelled support arguments.

In 2011, Douglas County School District attempted to address the Colorado Supreme Court's concerns about statewide voucher programs by enacting a local voucher program. The program, called the Choice Scholarship Program (CSP), was intended as a pilot program for up to 500 Douglas County students. To allow funding to flow to students and their chosen private schools, the district created a system under which students were technically enrolled in a public charter school. The school did not physically exist; it served only as a mechanism that would allow the program to operate under Colorado's current school finance system. Twenty-three private schools were approved for participation in the program, 16 of which were considered religious.[61] The program was challenged under multiple provisions of the Colorado Constitution by a number of plaintiffs, including the American Civil Liberties Union and Americans United for Separation of Church and State.

A Denver District Court judge issued a permanent injunction against the Douglas County program in 2011, but this decision was overturned by the Colorado Court of Appeals in 2013. Plaintiffs petitioned the Colorado Supreme Court to review the appellate decision, and the high court agreed to do so in early 2014.[62] The questions before the court involved three separate constitutional provisions:

- Whether the [CSP] violates article IX, section 7, of the Colorado Constitution by diverting state educational funds intended for Douglas County public school students to private elementary and secondary schools controlled by churches and religious organizations.

- Whether the [CSP] violates the compelled-support and compelled-attendance clauses of article II, section 4, of the Colorado Constitution by directing taxpayer funds to churches and religious organizations, and by compelling students enrolled in a public charter school to attend religious services.
- Whether the [CSP] violates article IX, section 8, of the Colorado Constitution by requiring students who are enrolled in a public charter school, and counted by Douglas County as public school students, to be taught religious tenets, submit to religious admission tests, and attend religious services.[63]

The court issued a broad decision in June 2015 that the CSP violated the state's Blaine clause, Article IX, §7. Because the court found the program to be in violation of Article IX, §7, it did not consider whether it violated the other constitutional provisions raised by plaintiffs. Thus, these provisions remain untested in the context of educational choice programs and could be raised in challenge against a future educational choice program.

The Colorado Supreme Court's ruling that even indirect aid to faith-based schools violated the state constitution was a contentious one, even among the justices. It broke with U.S. Supreme Court reasoning laid out in the *Zelman* case as well as with state supreme court rulings related to private educational choice programs in numerous other states. Justice Allison Eid issued a strong dissent, arguing:

> Today, the plurality interprets Article IX, Section 7 as prohibiting the expenditure of any state funds that might incidentally or indirectly benefit a religious school. This breathtakingly broad interpretation would invalidate not only the Choice Scholarship Program ("CSP"), but numerous other state programs that provide funds to students and their parents who in turn decide to use the funds to attend religious schools in Colorado. The plurality's interpretation barring indirect funding is so broad that it would invalidate the use of public funds to build roads, bridges, and sidewalks adjacent to such schools, as the schools, in the words of the plurality, "rely on" state-paid infrastructure to operate their institutions.[64]

Justice Eid was not alone in questioning the applicability of Article IX, §7 to the CSP. Though the Douglas County decision has been portrayed as being a 4-3 majority decision, this framing ignores a legally important nuance: While a majority of justices did concur in the judgment to strike down the Choice Scholarship Program, only three justices agreed that the CSP violated the Colorado Constitution's Blaine clause. Chief Justice Rice, Justice Hobbs, and Justice Hood held that the CSP violated the state constitution, while Justice Marquez joined in striking down the program on the basis that it violated the statutory School Finance Act of 1994. Justice Eid, Justice Boatright, and Justice Coats argued that the CSP did not violate the state constitution.[65]

The fact that a majority of the Colorado Supreme Court justices did not hold that the CSP violated Colorado's Blaine clause is critically important because it means legal precedent has not yet been set on this constitutional issue. The question could once again be brought before the court should another private educational choice program be enacted.

Douglas County formally petitioned the U.S. Supreme Court to review the Douglas County voucher case in October 2015, arguing that the state's Blaine

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clause violates the First Amendment and Fourteenth Amendment of the United States Constitution. As of the date of this publication, the court has yet to indicate whether it will hear the case. It is widely suspected that the court will first hear *Trinity Lutheran v. Pauley*, another Blaine-related case out of Missouri dealing with the provision of tire scraps to a private preschool affiliated with a church for the purpose of playground resurfacing under a state tire scrap grant program.[66]

A Way Forward

Because of previous Colorado Supreme Court rulings on state constitutional provisions related to local control and sectarian institutions, state-funded private educational choice programs can be legally problematic. However, not all educational choice programs involve state funding. Scholarship tax credit programs, for instance, rely only upon changing state tax structures to incentivize private philanthropic giving toward private school scholarships for certain groups of students. These programs seek to provide a tax credit, rather than a tax deduction, to individuals and/or corporations that donate to nonprofit K-12 scholarship-granting organizations.

However, not all educational choice programs involve state funding. Scholarship tax credit programs, for instance, rely only upon changing state tax structures to incentivize private philanthropic giving toward private school scholarships for certain groups of students.

The first scholarship tax credit program was adopted in Arizona in 1997. Since then, seventeen states have adopted such a program.[67] The largest program in the nation serves nearly 100,000 students in Florida.[68] Scholarship tax credits have often been challenged by the teachers unions and other organizations on the same grounds as state-funded educational choice programs, but have thus far proven to be legally immune from such arguments. No scholarship tax credit program to date has been struck down following the conclusion of the legal appeals process.

Most cases against scholarship tax credits have been dismissed because plaintiffs failed to prove legal standing, or their right to bring a suit in the first place due to a demonstrable injury. For instance, a battle over a scholarship tax credit program in Arizona ended in 2011 when the U.S. Supreme Court held that the program's challengers, who sued as taxpayers, lacked the required standing to sue because they challenged a tax credit rather than a government expenditure.[69] Similar logic was applied in 2014 New Hampshire Supreme Court ruling and a 2016 Florida appellate court decision.[70] The Florida Supreme Court declined to hear an appeal of the latter ruling, which means the appellate ruling stands.[71] Standing is also a major issue in Georgia scholarship tax credit case recently accepted by the Georgia Supreme Court.[72]

In 2015, the Alabama Supreme Court issued a ruling on the constitutional merits of the state's scholarship tax credit program, which was included under the Alabama Accountability Act. The court upheld the AAA, finding that tax credits do not constitute state appropriations and applying the standard jurisprudence that choice programs are neutral with respect to religion because they provide aid to private citizens who then decide where to use that aid.[73]

Given the constitutional complications arising from state-funded private educational choice programs and the demonstrated ability of scholarship tax credit programs built upon private philanthropy to withstand legal challenges, those wishing to advance educational choice in Colorado should strongly consider a scholarship tax credit program.

Conclusion

Much of the future conversation about Blaine clauses will depend on any ruling issued on the subject by the U.S. Supreme Court. A broad ruling against Blaine clauses could fundamentally alter the educational choice landscape in future years. For now, however, these constitutional provisions remain embedded in state constitutions across the United States despite their ignominious history. Those engaged in conversations about private educational choice programs should internalize the legal significance and historical origins of Blaine clauses in order to facilitate more effective discussions about the legality of educational choice in Colorado.

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