BLAINE IN THE JOINTS: THE HISTORY OF BLAINE AMENDMENTS AND MODERN SUPREME COURT RELIGIOUS LIBERTY DOCTRINE IN EDUCATION

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INTRODUCTION

Near the end of its October 2021 term, the Supreme Court handed down its decision in *Carson v. Makin,*[1] a case challenging Maine's insistence that state funding only go to "non-sectarian" education.[2] *Carson,* the culmination of a series of educational choice cases, implicated the infamous "play in the joints"[3] between the Free Exercise and Establishment Clauses of the First Amendment.[4] The clauses, which litigants often invoke in battles over school funding, have created a confusing doctrinal web, leaving the Court to resolve complicated

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1. 142 S. Ct. 1987, 1997 (2022).

2. Rachel Reed, *Supreme Court Preview: Carson v. Makin*, HARVARD LAW TODAY (Nov. 29, 2021), https://today.law.harvard.edu/supreme-court-preview-carson-v-makin/.

3. "Play in the joints" refers to the idea that "there are some state actions permitted by the Establishment Clause but not required by the Free Exercise Clause." *Locke v. Davey,* 540 U.S. 712, 719 (2004). The "play in the joints" idea is often invoked to support the idea that within that framework, states have some freedom to decide how much or how little to support religiously affiliated activity. *See also* US CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . . . .

4. Erin Morrow Hawley, *Symposium: Putting Some Limits on the "Play in the Joints"*, SCOTUS BLOG (June 26, 2017), https://www.scotusblog.com/2017/06/symposium-putting-limits-play-joints.

cases. The educational funding space has been a battleground for this confusion in the last two decades, leading up to the litigation around *Carson*.[5]

The Religion Clauses pose unique challenges for the modern Supreme Court in elementary and secondary education. Originalism, the current Court's preferred interpretative method,[6] does not provide straightforward answers because the Constitution's framers knew nothing of the modern education system and mandatory school attendance policies. Common public schooling did not broadly take hold until the Reconstruction Amendments fundamentally changed the nation's Constitutional structure.[7] Until the 1960s, school prayer and nondenominational Protestant practices were present in schools.[8] The Court's *Engel v. Vitale* decision revolutionized public education by mandating secular neutrality, leading to a long battle over what role the Religion Clauses play in the public classroom.[9] Two cases in the October 2021 term, *Carson v. Makin* and *Kennedy v. Bremerton School District,* presented the Court with questions on religion in education concerning how much "play in the joints" should be left to the discretion of local school administrators.

State constitutional provisions that broadly prohibit state funding to religious institutions factor into these cases.[10] They provide ground for challenges[11] and have sparked debate among academics and Supreme Court justices.[12] These provisions largely stem from a state

5. *See* Locke v. Davey, 540 U.S. 712 (2004); Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012 (2017), Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246 (2020); Carson v. Makin (2021) (series of cases centering around government funding for religious schools or education).

6. *See, e.g.,* New York State Rife & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2126 (2022) (instructing courts to analyze the Second Amendment's original scope and historical regulations); Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2428 (dictating that the First Amendment's Establishment Clause be interpreted by reference to history and tradition). Both cases are from the October 2021 term and indicate majority support for the broader shift toward originalism.

7. *See* EMILY ZACKIN, LOOKING FOR RIGHTS IN ALL THE WRONG PLACES 71 (2013) (charting when common school provisions were added to state constitutions); US CONST. amend. XIII (outlawing involuntary servitude); US CONST. amend. XIV (applying Equal Protection and Due Process against state governments); US CONST. amend. XV (proscribing the denial of voting rights on account of race).

8. *See* Engel v. Vitale, 370 U.S. 421, 424 (1962) (holding for the first time that school prayer, even voluntary and non-denominational, violates the Establishment Clause).

9. *See id.* at 436 (holding prayer in schools unconstitutional).

10. *See, e.g.,* Espinoza v. Montana Dep't. of Revenue, 140 S. Ct. 2246, 2259 (2020) (referencing the Blaine Amendment proposed at the federal level in the 1870s).

11. *See* Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2017 (2017). (arising from Missouri's Blaine Amendment).

12. *See* Transcript of Oral Argument at 21, Trinity Lutheran Church of Columbia, Inc. v.

trend in the 1870s following a push at the national level to amend the Constitution to forbid funding for sectarian schools.[13] When the national amendment failed, states enacted their own amendments in its place, and thirty-eight state constitutions contain the "no-aid" provisions today.[14] These no-aid provisions are referred to as "Blaine amendments" after their failed national counterpart.[15] Although some argue that these provisions reflect a long and admirable history of separation of church and state advanced by the founders,[16] others maintain that these provisions reflect hate and anti-Catholic bigotry that peaked in the 1870s with the national proposal.[17]

In June of 2020, the Supreme Court weighed in on the debate in *Espinoza v. Montana,*[18] a case centered around an educational choice program enacted by the Montana state legislature in 2015.[19] In a 5-4 opinion authored by Chief Justice Roberts, the Court held that "[a] State need not subsidize private education. But once a State decides to do so, it cannot disqualify some private schools solely because they are religious."[20] The landmark opinion included a discussion of the country's history and tradition of subsidizing religious schools, and the Chief Justice briefly raised the issue of the "Blaine amendment."[21] The case arrived at the Supreme Court after Montana's Supreme Court put the provision on the national stage by using Montana's Blaine Amendment to strike down the state's entire educational choice program.[22] In reversing the Montana Supreme Court's reliance on its

Comer,137 S. Ct. 2246 (2017) (No. 15-577). (Justice Alito following up on Justice Sotomayor's line of questioning and engaging with the advocate on Blaine amendment history).

13. EMILY ZACKIN, LOOKING FOR RIGHTS IN ALL THE WRONG PLACES 204 (2013).

14. Steven Green, *Symposium: RIP State "Blaine Amendments"–Espinoza and the "No-Aid" Principle*, SCOTUS BLOG (June 30, 2020), https://www.scotusblog.com/2020/06/symposium-rip-state-blaine-amendments-espinoza-and-the-no-aid-principle/ Other sources have identified 37, others 39, so the exact number may be contested.

15. *See supra* note 10.

16. Transcript of Oral Argument at 17, Trinity Lutheran Church of Columbia, Inc. v. Comer,137 S. Ct. 2246 (2017) (No. 15-577) (Justice Sotomayor describing the importance of separation of church and state to the founders and characterizing these amendments as part of the history of states' compliance with the Establishment Clause).

17. *See* Espinoza v. Montana Dep't of Revenue, 140 S. Ct. 2246, 2259 (2020) (discussing the troubling history of bigotry tied to the amendments).

18. 140 S. Ct. 2246 (2020).

19. For an summary of the case's issues, see John Kramer, *Landmark Victory for Parents in U.S. Supreme Court School Choice Case*, INSTITUTE FOR JUSTICE (June 30, 2020), https://ij.org/press-release/landmark-victory-for-parents-in-u-s-supreme-court-school-choice-case/.

20. *Espinoza*, 140 S. Ct. at 2261.

21. *Id.* at 2259.

22. *Id.* at 2253.

constitutional provision, the Supreme Court characterized the Blaine amendments as "born of bigotry."[23] The amendments were widely understood as resistance to Catholic schools and Catholic immigrants in particular, which Justice Alito's concurrence emphatically narrated.[24] The extent to which a provision's history should factor into modern constitutionality remains a hotly contested debate, but the predominantly originalist Supreme Court has left no doubt that it considers at least some historical underpinnings.[25]

This Note explores the history of Blaine amendments, the motivation behind them, and the Supreme Court's discussion of the amendments in its recent cases. Part I discusses the amendments' historical and cultural background and the introduction of the federal amendment in Congress. Part II provides a survey of modern Supreme Court cases and an overview of how recent justices have characterized the amendments. Part III examines the concerns raised by the 1876 Congress and the modern Court in discussing the amendments. Finally, Part IV concludes by discussing the Court's decision in *Carson* and the Blaine amendments, their history, and their place in the First Amendment's "play in the joints" doctrine.

I. INTRODUCING THE AMENDMENT

This Part explores the origins of the Blaine Amendment, the history and culture behind it, and its introduction, debate, and failure at the national level. This Part begins by describing the impetus behind the original Blaine Amendment at the national level as an aspect of President Grant's political platform. Next, it focuses on the historical background and culture at the time, which was rife with anti-Catholic sentiment and driven by a broad desire to "Americanize" the new waves of immigrants. Finally, it surveys broad themes that surfaced in the congressional debate before the national amendment's demise.

A. The Origins

In a speech addressed to Congress in December of 1875, President

23. *Id.* at 2259.

24. *Id.* at 2268 (Alito, J., concurring).

25. *See* Espinoza v. Montana Dep't of Revenue, 140 S. Ct. 2246, 2258 (2020) ("no comparable 'historical and substantial' tradition supports Montana's decision to disqualify religious schools from government aid."); Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2428 (2022) ("In place of *Lemon* and the endorsement test, this Court has instructed that the Establishment Clause must be interpreted by 'reference to historical practices and understandings.'") (internal citations omitted).

Ulysses S. Grant declared "the education of the masses" to be "the first necessity for the preservation of our institutions."[26] Following the Civil War, Grant sought to shift the country's priorities and emphasized education's importance for the future of the United States.[27] Critically, this education needed to be free and public.[28] Grant urged states to pass constitutional amendments creating schools for the education of all children "irrespective of sex, color, birthplace, or religions."[29] Grant's proposal initially sounds noble, progressive, and much needed. Over three quarters of a century later, in *Brown,* the Supreme Court would recognize that "education is perhaps the most important function of state and local governments."[30] The period after the Civil War saw immense growth in public education through the common school movement.[31] States amended their constitutions to provide for public education, often for the first time.[32]

But Grant did not stop with these lofty goals. He continued by imploring states to include language in these provisions that prohibited "the teaching in said schools of religious, atheistic, or pagan tenets" and banned "the granting of any school funds or school taxes . . . for the benefit or in aid, directly or indirectly, of any religious sect or denomination."[33] Grant's conclusion reiterated these priorities, echoing the point that "[n]o sectarian tenets shall ever be taught in any school supported in whole or in part by the State, nation, or by the proceeds of any tax levied upon any community."[34] Grant's speech "created a buzz around the subject of religious and public education" and sparked a national conversation leading up to the 1876 election.[35] Ironically, his speech was followed by the House Chaplain offering a prayer for the President, the House, and the Senate, asking that the Lord would "further us with Thy continual help, that in all our works, begun, continued, and ended in Thee, we may glorify Thy holy name."[36] As Grant petitioned Congress to prohibit sectarian religion in public

26. Ulysses S. Grant, Seventh Annual Message (Dec. 7, 1875).
27. *Id.*
28. *Id.*
29. *Id.*
30. Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954).
31. ZACKIN, *supra* note 13, at 75.
32. *Id.* at 69.
33. Ulysses S. Grant, Seventh Annual Message (Dec. 7, 1875).
34. *Id.*
35. Mark Edward DeForrest, *An Overview and Evaluation of State Blaine Amendments: Origins, Scope, and First Amendment Concerns*, 26 HARV. J. L. & PUB. POL'Y 551, 558 (2003).
36. 4 CONG. REC. 181 (1875).

schools, Congress itself actively engaged in Protestant prayer, suggesting that perhaps it was only disfavored religions that concerned President Grant and Congress.

James Blaine, a former Republican House Speaker with his own 1876 presidential ambitions, jumped at the political opportunity.[37] He introduced a constitutional amendment seeking to codify Grant's suggestion to bar state funding for religious schools. The 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 therefore, 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.[38]

The amendment's novel contributions included applying the Establishment Clause to the states.[39] It also clarified the Establishment Clause's limits, or at least Senator Blaine's vision of those limits. The Establishment Clause of the First Amendment simply reads, "Congress shall make no law respecting an establishment of religion."[40] Blaine's amendment expanded this prohibition and drew clear lines governing state action. Versions of the amendment had been introduced twice before, but they had not gone anywhere.[41] This time, the amendment successfully passed in the House and narrowly failed the two-thirds bar in the Senate.[42]

B. The Impetus

Understanding the debates over the Blaine Amendment requires broader historical context surrounding the emerging public-school systems. America underwent two overlapping transformations in the nineteenth century. First, immigration waves brought newfound

37. *Id.* at 556.

38. *Id.* (citing H.R.J. Res. 1, 44th Cong., 1st Sess., 4 CONG. REC. 205 (1875)).

39. The Establishment Clause was not formally incorporated against the states until the 1940s in *Everson v. Board of Education,* another case dealing with a state funding scheme benefitting religious schools. 330 U.S. 1, 15–16 (1947). Although the Court determined that the Establishment Clause did apply to the states, it upheld the program challenged in that case, which provided bus transportation to students attending both public and parochial schools. *Id.* at 17.

40. U.S. CONST. amend. I.

41. DeForrest, *supra* note 35, at 558–59.

42. Brief for The Becket Fund for Religious Liberty in Support of Petitioners as Amicus Curiae at 10–11, Espinoza v, Montana Dep't of Revenue, 140 S. Ct. 2246 (2020) (No. 181195).

diversity to the United States. Irish and German immigrants came to the United States in large numbers, increasing Catholicism's prevalence in the majority Protestant country.[43] Second, state-supported schools increased in number as states began to add constitutional provisions requiring public education.[44] Congress supported this endeavor by encouraging both new states and states rejoining the Union after the Civil War to include educational provisions in their new constitutions.[45]

Early public school education, in sharp contrast to the modern secular curriculum, included Protestant religious practices as part of its effort to raise good young citizens.[46] The school day often included readings from the King James Bible and "student recitation from the Book of Common Prayer."[47] This was driven by a desire to "Americanize" the growing immigrant population.[48] Reformers working to advocate for the new common schooling system equated Catholicism with a "lack of civic virtue."[49] Public school officials feared devotion to the Pope over devotion to the country, and some common school advocates saw the schools as a mill to ensure that children would come out "in the grist Americans and Protestants."[50] Rather than view religion in schools as a violation of the Establishment Clause—as the Court would hold in *Engel v. Vitale* in 1962[51]—common school movement proponents viewed Protestant devotional exercises in the classroom as a "*defense* of democratic values."[52]

Catholic leaders resisted the system's bias toward explicitly Protestant practices.[53] Rather than continue to send their children to Protestant public schools, Catholic parents opted for parochial schools, a parallel system set up by Catholic leadership.[54] Catholic leaders lobbied for state funding as they created the alternative school system.[55] They argued that because their tax dollars went to Protestant

43. Steven K. Green, *The Blaine Amendment Reconsidered,* 36 THE AMERICAN JOURNAL OF LEGAL HISTORY 38, 42 (1992).
44. ZACKIN, *supra* note 13, at 63.
45. *Id.* at 75.
46. *See id.* at 73 (describing how advocates of public education focused on the "character of the citizenry" and saw public schools as "necessary to maintain a republican government").
47. *Id.* at 203.
48. *Id.* at 74.
49. ZACKIN, *supra* note 13, at 74.
50. *Id.* at 203.
51. 370 U.S. 421, 430 (1962).
52. Deforrest, *supra* note 35, at 560 (emphasis added).
53. ZACKIN, *supra* note 13, at 203–04.
54. *Id.*
55. *Id.* at 204.

public schools, it was "only fair" that governments extend funding to Catholic schools too.[56] As Catholics gained political power, they began to lobby more extensively for funding and were met with strong and sometimes violent resistance.[57] One Catholic group in Michigan was accused of being part of a Jesuit conspiracy to "destroy public education."[58] By the 1870s, however, Catholic leaders began to see some success. In 1871, the state of New York allocated $700,000 for the parochial school system.[59] In another line of legal attacks, Catholics successfully lobbied school districts to remove the King James Bible readings from public-school curricula.[60] Success in the courtrooms and in the legislatures only exacerbated the public's fear of Catholic influence,[61] opening the political door for Grant and Blaine.

C. Congress Weighs In

The Senate first saw a "no-aid provision" proposal in 1871.[62] Senator Warner, who raised the issue, cited a petition "numerously signed" by Indiana citizens.[63] The petitioners objected to their tax money supporting sectarian or religious activity that they opposed. The petition also advocated for a constitutional amendment banning the United States or any state from using money to support a religion or sect.[64] It was referred to the Judiciary Committee, but Congress took no further action.[65]

Senator Stewart tried to introduce another version of the amendment through joint resolution.[66] That proposed amendment read: "There shall be maintained in each State and Territory a system of free common schools; but neither the United States nor any State, Territory, county, or municipal corporation shall aid in the support of any school wherein the peculiar tenets of any religious denomination are taught."[67] Interestingly, this amendment did not contain the

56. DeForrest, *supra* note 35, at 560.
57. *See id.* at 561 (describing how a mob burned down the home of a Catholic priest in New York after he requested funding).
58. *Id.*
59. *Id.* at 561–62.
60. *See id.* (noting that cities in Ohio and New York and the city of Chicago removed the Protestant Bible readings in an attempt to "de-Protestantize" schools).
61. DeForrest, *supra* note 35, at 561–62.
62. CONG. GLOBE, 41st Cong., 3rd Sess. 592 (1871).
63. *Id.*
64. *Id.*
65. *Id.*
66. CONG. GLOBE, 41st Cong., 1st Sess. 730 (1871).
67. *Id.*

problematic "sect" terminology later described as code for Catholic and other minority denominations.[68] Senator Blair objected without explanation,[69] and the proposal failed to advance through Committee.[70] Although neither early attempt was successful, they illustrate that the Senate had considered the issue and indicate that certain senators did not read the First Amendment's Establishment Clause as clearly prohibiting either the United States or local governments from funding religious schools.

James Blaine first introduced his amendment in the House, and it was initially referred to the Committee on the Judiciary in December 1875.[71] The proposal received full debate in the Senate in 1876 after it passed by nearly unanimous vote in the House.[72] The Senate debates present an in-depth consideration of the proposal from many angles, covering issues from federalism to Blaine's underlying political motivation, and hitting on the First Amendment somewhere in between.

The House delivered the following amendment to the Senate:

> 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 or denomination; nor shall any money so raised or lands so devoted be divided between religious sects or denominations.[73]

The Senate had another, more detailed version:

> No State shall make any law respecting an establishment of religion, or prohibiting the free exercise thereof; and no religious test shall ever be required as a qualification to any office or public trust under any State. No public property, and no public revenue of, nor any loan of credit by or under the authority of, the United States, or any State, Territory, District, or municipal corporation, shall be appropriated to, or made or used for, the support of any school, educational, or other institution, under the control of any religious or anti-religious sect, organization, or denomination, or wherein the particular creed or tenets of any religious or anti-religious sect, organization, or

68. Mitchell v. Helms, 530 U.S. 793, 828 (2000).
69. CONG. GLOB, 41st Cong., 1st Sess. 730 (1871).
70. Greene, *supra* note 43, at 44.
71. H.R.J. Res. 1**,** 44th Cong., 1st Sess., 4 CONG. REC. 205 (1875).
72. 4 CONG. REC. 5558 (1876).
73. *Id.* at 5580.

> denomination shall be taught; and no such particular creed or tenets shall be read or taught in any school or institutions supported in whole or in part by such revenue or loan of credit; and no such appropriation or loan of credit shall be made to any religious or anti-religious sect, organization, or denomination, or to promote its interests or tenets. This article shall not be construed to prohibit the reading of the Bible in any school or institution; and it shall not have the effect to impair rights of property already vested.
>
> Sec. 2. Congress shall have power, by appropriate legislation, to provide for the prevention and punishment of violations of this article.[74]

Both amendments faced scrutiny from supporting and opposing senators. The debates included four considerations that still factor into modern First Amendment debates: (1) federalism, (2) the potential for religious strife and the need for religious freedom, (3) practical implications of the legal change, and (4) the motivation or need for an amendment at all. Also relevant to the modern discussion of Blaine amendments, the debates were infused with references to Catholicism.

The first concern in the debates was the proposed amendment's implications for federalism. Some senators voiced strong hostility to the federal government interfering with religion in any instance, claiming that religion had long been the prerogative of the state and local governments.[75] Senator Kernan, who read the proposals to the Senate, announced he stood in principle against them because "[t]he framers of the Constitution believed . . . that it was wiser and better that the people of the several States should reserve to themselves and exercise all those powers of government which related to home rights."[76] He argued that nothing good would come from allowing some states to dictate other states' internal and local dealings, advocating that Congress should only deal with common interests that individual states could not address.[77] In Kernan's view, education was best left to the states.

Senator Eaton joined Kernan, announcing that he too opposed the amendment because it "interferes with the rights of the States."[78] Eaton believed that each state could legislate individually on the issue if it so

74. *Id.*
75. *Id.*
76. *Id.*
77. *Id.*
78. 4 CONG. REC. 5558, 5592 (1876).

chose and implored his fellow senators to take care of their own states.[79] He insisted that the states had always maintained control over religion and did not relinquish this sovereignty at the Constitutional Convention.[80] Senator Stevenson likewise argued that the amendment would constitute federal overreach, citing Thomas Jefferson and arguing that "Kentucky does not want New England and other States to dictate to her what her schools shall be."[81] Stevenson argued that Jefferson would have been aghast at the lack of respect for state sovereignty.[82] He closed with a warning that proponents would "destroy the whole foundation-stone upon which this Government was reared and upon which only it can be preserved."[83]

These arguments would have been more persuasive had the Senate been debating legislation rather than a constitutional amendment. Senator Morton accurately responded to this concern by emphasizing that the amendment could not possibly rob the states of a sovereign right because the amendment process required that states vote in favor.[84] He argued, convincingly, that the three-quarters of states' ratification requirement for constitutional amendments meant that Congress could not take power from the states by merely passing an amendment within the walls of the Capitol.[85]

Despite standing firm on his federalism claims, Kernan was moved by the implications for religious freedom and strife throughout the country, a concern that also played a large role in the debates.[86] Kernan voiced a willingness to support the amendment if it would deal with "the greatest evil that ever comes among a community, strife and bitterness in reference to religious creed."[87] Senator Morton echoed concerns about state funding for religious schools and for religious freedom, warning that separation of church and state was "an essential principle of American liberty and one upon which the perpetuity of our Government depends."[88] In his mind, banning state support for schools

79. *Id.*

80. *See id.* (Eaton noting that his forbearers in representing the state of Connecticut did not relinquish that sovereignty).

81. *Id.* at 5589.

82. *Id.*

83. 4 CONG. REC. 5558, 5589 (1876). (Stevenson also noted that Jefferson was a friend of religious freedom but would not have supported the amendment).

84. *Id.* at 5594.

85. *Id.*

86. *Id.* at 5581.

87. *Id.*

88. 4 CONG. REC. 5558, 5585 (1876).

helped to guard the "perfect freedom of religious worship."[89] Allowing funding for religious schools, even at the state's own discretion, would show favoritism and support for a particular religion "at public expense," which would violate the Establishment Clause and threaten freedom of religion for all Americans.[90] Another senator declared that there would be "no liberty, according to modern ideas, without entire separation of church and state."[91]

Senator Bogy argued that rather than discriminate against Catholics, the amendment would grant Catholics the very thing they wanted: non-sectarian schools.[92] He emphasized that Catholics had been opposed to the public school system because they viewed it as teaching Protestant religion to the students.[93] Using that framing of Catholic opposition to public schools and a papal encyclical[94] to buttress his argument, he made the case that "the principles in this proposition are in exact accordance with the view of Catholics in the United States."[95] Bogy correctly argued that Catholics were opposed to the religious indoctrination happening in public schools,[96] and most would have, in theory, likely supported a secular education.

It is worth pointing out, however, that the amendment did not propose a strictly secular education. It explicitly allowed for the reading of the Bible in schools. Bogy, in acknowledging the Catholic desire for a non-religious education, admitted: "What is strictly and logically speaking, sectarian teaching, I am not able to tell. What is religious teaching, it is very hard to say."[97] He pondered the difficulty of line-drawing, recognizing that Congress itself had a chaplain pray for its members.[98] The problem, he explained, was that "you have got to go back to the days of pure paganism or teach the Christian religion which is necessarily divided into many sects."[99] Other senators, like Edmunds, had fewer concerns, claiming that "everybody can be taught religion

89. *Id.*
90. 4 CONG. REC. 5558, 5585 (1876).
91. *Id.* at 5589.
92. *Id.* at 5590.
93. *Id.*
94. A papal encyclical is a letter from the Pope to bishops in the Catholic Church providing guidance on an issue. *Social Encyclicals and Papal Letters Address the Issues of the Day,* CAL. CATHOLIC CONF. https://cacatholic.org/article/social-encyclicals-and-papal-letters-address-issues-day.
95. 4 CONG. REC. 5558, 5590 (1876).
96. ZACKIN, *supra* note 13, at 203–04.
97. 4 CONG. REC. 5558, 5590 (1876).
98. *Id.*
99. *Id.*

without being taught the particular tenets or creed of some denomination."[100] Line-drawing problems about religion continued to plague the Court long after Senator Bogy lamented the issue in Congress.[101]

Beyond the theoretical debates, some senators were concerned about the practical implications of the amendment across the religiously infused institutions and practices that the states already supported. One of these, developing schools for Native Americans, related directly to government funding for religious education.[102] Others dealt with education indirectly. Senators raised concerns that the amendment would bar orphanages from teaching children morality because they received state funding, which senators viewed as a negative consequence.[103]

Hospitals and prisons presented similar concerns.[104] The free exercise rights of prisoners required some states to provide ministers for incarcerated individuals, despite prisons being entirely state-funded.[105] In other states, funding went to private hospitals, Catholic and Protestant alike, which offered prayer services to patients.[106] The role of these institutions in treating the poor caused senators to worry that the amendment's consequences would threaten the future of these charitable efforts.[107] Even if the ban on religious funding was desirable for schools, charitable institutions, like orphanages, were places where states actively supported religion and saw benefits in continuing to do so, as well as serious practical and free exercise concerns with prohibiting it.

In the final portion of the debates, some senators raised the political nature of the amendment and questioned whether it was even

100. *Id.* at 5588.

101. *See, e.g.,* Lynch v. Donnelly, 465 U.S. 668, 679 (1984) (Justice Burger's plurality opinion noted that the Court has "repeatedly emphasized… unwillingness to be confined to any single test or criterion in this sensitive area." A fractured Court upheld a Christmas display in that case.); Marsh v. Chambers, 463 U.S. 783, 785 (1983) (upholding legislative prayer because of its long history); Sch. Dist. of Abington v. Schempp, 374 U.S. 203, 204–05 (1963) (holding that the Lord's prayer and Bible readings were unconstitutional); Van Orden v. Perry, 545 U.S. 677, 681 (2005) (plurality upholding Ten Commandments display at Texas State Capitol); McCreary County v. ACLU, 545 U.S. 844, 881 (2005) (finding a courthouse display of the Ten Commandments unconstitutional).

102. 4 CONG. REC. 5558, 5581 (1876).

103. *Id.*

104. *Id.*

105. *Id.* at 5582.

106. *Id.*

107. *Id.*

necessary.[108] Senator Eaton suggested the timing of the amendment's introduction made it appear to be an "election dodge."[109] The motivations behind the amendment raised the issue of partisan trickery in light of the impending election, calling into question whether the amendment was a move for votes rather than a measure taken to protect religious liberty. Returning to federalism arguments, one senator claimed that the provision would be redundant because states themselves could simply legislate or amend their constitutions to address the issue.[110]

Proponents of the amendment responded to this challenge in two ways. First, they recognized that states could amend their constitutions, but argued that the ease of state constitutional procedure meant that states could undo solutions as easily as they could implement them.[111] Therefore, the national amendment was necessary to keep states in line permanently and prevent them from undoing their progress on the issue.[112] Second, they cited the fact that the Democratic House of Representatives had passed the amendment with 166 out of 171 votes.[113] That, they noted, was proof that the amendment was not merely supported by Republicans.[114]

Lastly, although the debates undoubtedly reflected hostility to Catholicism, a sentiment that was present in the broader American culture at the time,[115] there were also senators who defended Catholics and considered their interests.[116] One senator accused others of "attempting to go to the Pope of Rome to scare the people of the free thirty-seven States of this confederacy that they cannot manage their schools."[117] But others introduced a papal encyclical from the 1860s that spoke out against attempts to tear people away from the Catholic Church as proof that the Pope held hostile views toward religious liberty.[118] This overgeneralization seems blatantly discriminatory,

108. 4 CONG. REC. 5558, 5592 (1876).
109. *Id.*
110. *Id.*
111. *Id.*
112. *See id.* (Senator Morton arguing that in some states a simple majority could "unmake" the adjustments).
113. *Id.* at 5593.
114. 4 CONG. REC. 5558, 5593 (1876).
115. *See* id. at 5589–90 (noting that in New Hampshire at the time Catholics could not hold office).
116. *Id.* at 5590.
117. *Id.* at 5589.
118. *Id.* at 5587–88.

especially when paired with Senator Edmunds' description of Catholicism as "the most powerful religious sect that the world has ever known . . .universal, ubiquitous, aggressive, restless, and untiring."[119] Other senators countered, recognizing that the Pope was merely voicing the similar sentiments shared by any other religious leader.[120]

A Maryland Senator gave a full-throated defense of Catholics in his state, arguing that "Roman Catholics of Maryland, represented by the patriotic Carroll of Carrollton, pledged their lives, their fortunes, and their sacred honors in the revolutionary struggle" for religious liberty.[121] Even proponents of the amendment actively denied bigotry, claiming, "No man ought to deny . . . that the Catholics of the old colony of Maryland were the first men in the New World to unfurl the great banner of liberty and religious freedom."[122] The amendment's most vocal advocate, Senator Morton, declared that "if anybody has attacked the Catholic religion to-night I have not heard it."[123] The political atmosphere in the country may have been openly hostile to Catholicism, but the Senate debates largely focused on other constitutional questions that still surface today.

Ultimately, the Senate voted 28-16 in favor of sending the amendment to the states, falling two senators short of meeting the two-thirds threshold.[124] No one can say for sure what the states would have done with the amendment, but the significant majorities the amendment garnered in both the House and Senate speak volumes about congressional understandings of its constitutionality, at least in the 1870s. When the national legislature failed to act, states took matters into their own hands, passing amendments to their own constitutions.

119. *Id.* at 5588.

120. 4 CONG. REC. 5558, 5589 (1876). (noting that the Pope was speaking to Catholics in a religious way, much the same as any other minister would).

121. *Id.* at 5583.

122. 4 CONG. REC. 5558, 5590 (1876).

123. *Id.* at 5593.

124. *Id.* at 5595; *See* U.S. CONST. art. V ("The Congress, whenever two thirds of both houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the legislatures of two thirds of the several states, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this Constitution, when ratified by the legislatures of three fourths of the several states, or by conventions in three fourths thereof, as the one or the other mode of ratification may be proposed by the Congress…").

II. MODERN SUPREME COURT CASES

Over the last two decades, the Supreme Court has been confronted with challenges to education and school funding, largely centered around the Establishment Clause and state Blaine amendments. This Part analyzes the Court's approach to no-aid provisions through its cases, which illustrate the modern Court's trend to rule largely in favor of religious liberty, although *Locke*[125] continues to serve as a limit on how far a state must go in providing funds to religious schools. This represents a shift, but one that appears to be predictive of how jurisprudence is trending. Each case also touches on Blaine amendments and how those state provisions factor into the Court's analysis of history and law in the area.

A. Mitchell v. Helms *(2000)*[126]

In *Mitchell v. Helms,* the Supreme Court addressed an Establishment Clause challenge to a federal program providing aid to private schools.[127] The Court acknowledged the difficulty of this area, stating, "In the over 50 years since *Everson*, we have consistently struggled to apply these simple words in the context of governmental aid to religious schools."[128] Under Chapter 2 of the Education Consolidation and Improvement Act of 1981, the federal government provided state and local governments and agencies with funding for equipment to local schools.[129] Louisiana taxpayers in Jefferson Parish challenged the local government's allocation of funds because religiously affiliated schools received state aid.[130] A plurality denied that the program's allocation of resources violated the Establishment Clause because the aid did not rise to the level of government indoctrination of students into any particular religion.[131]

More significantly, the plurality acknowledged the history of bars on school aid.[132] Justice Thomas' plurality opinion noted that "hostility to aid pervasively sectarian schools has a shameful pedigree that we do

125. *See infra* note 136–39 and accompanying text.
126. Mitchell v. Helms, 530 U.S. 793 (2000).
127. *Id.* at 801.
128. *Id.* at 807 (internal citations omitted); *See also supra* note 39 (explaining *Everson*'s incorporation of the Establishment Clause against the states).
129. *Id*.
130. *Id.* Thirty-four of the schools were Catholic; seven others were religiously affiliated. *Id.* at 803.
131. *See* Mitchell v. Helms, 530 U.S. 793, 809 (2000) (describing the test for whether educational aid from the government violates the Establishment Clause).
132. *Id.* at 828–29.

not hesitate to disavow."[133] As evidence of a history of discrimination, the plurality pointed to the "near passage" of the national Blaine amendment.[134] Describing the history surrounding the proposal as one of "pervasive hostility to the Catholic Church and Catholics in general," the plurality argued that its sinister motivations demand that the doctrine of exclusion "should be buried now."[135] Although the Court was not dealing with a state amendment in the case, the justices engaged with the history in their Establishment Clause analysis to support their argument that the neutral program did not violate the First Amendment.

B. Locke v. Davey *(2004)*[136]

Locke v. Davey represents the narrowly acceptable permissible use of no-aid provisions.[137] The Washington Constitution's no-aid provision at issue read, "No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment."[138] The state of Washington established a scholarship program to provide for postsecondary education assistance, with the caveat that "students may not use the scholarship at an institution where they are pursuing a degree in devotional theology."[139]

Joshua Davey, a scholarship recipient, tried to pursue a double major in pastoral ministries and business management and administration at an approved, private Christian college.[140] Davey planned to use the admittedly "devotional" degree to become a pastor, and when he refused to certify that he would not use the scholarship for that purpose, the state rescinded his scholarship.[141] Washington cited the statutory bar codifying its constitutional principle against aiding religion, which explicitly excluded the scholarships from being

133. *Id.* at 828.
134. *Id.*
135. *Id.* at 828-29.
136. Locke v. Davey, 540 U.S. 712 (2004).
137. *See* Transcript of Oral Argument at 36, Carson v. Makin, 142 S. Ct. 1987 (2022) (No. 10-1088) (Counsel for Petitioner was asked by Chief Justice Roberts to distinguish his case from *Locke* before making the case that it should be cabined to its facts and indicating the need to get around *Locke* to be successful.).
138. WASH. CONST., art. I, § 11.
139. Locke v. Davey, 540 U.S. 712, 715 (2004).
140. *Id.* at 717.
141. *Id.*

applied toward theology degrees.[142] Davey sued the state for violating the Free Exercise Clause of the Federal Constitution.[143]

Although the state's Blaine amendment equivalent was not directly at issue in the case, the justices clearly had the history in mind, raising it within the first few minutes of oral argument.[144] Washington's advocate quickly distinguished the Washington provision from the Blaine amendments,[145] noting that "[t]here's certainly no evidence in Washington that there was any discussion, any evidence of anti-Catholic motive."[146] The immediacy of the questioning on the "sectarian" support ban suggests just how prevalent Blaine amendments are in the justices' minds in these cases. The justices clarified with Washington's counsel multiple times that Davey would have been able to attend Northwest College and enroll in theology classes, so long as he did not declare a theology major with the intention of entering the ministry.[147] Washington's scheme contained a critical distinction in state funding for private institutions. Rather than banning sectarian school funding outright—as the Blaine amendment provision did for elementary and secondary education—the legitimacy of regulation on postsecondary education funding turned on religious *use*.

A 7-2 Court upheld Washington's exclusion of state funds for devotional scholarship degrees, characterizing the state's action as permissible and noting, "If any room exists between the two Religion Clauses, it must be here."[148] The Court emphasized the "play in the joints" between the two clauses, where state interests must be weighed and considered.[149] Although the Court acknowledged that a state could, without question, choose to permit scholarship recipients to pursue degrees in devotional theology, nothing in the Federal Constitution required it.[150]

In coming to this conclusion, the Court looked to the founding history and the long-held resistance to publicly funding church

142. *Id.* at 716.
143. *Id.* at 718.
144. *See* Transcript of Oral Argument Transcript at 5, Locke v. Davey, 540 U.S. 712 (2004) (No. 02-1315) (Justice O'Connor inquiring about Blaine amendments and how many states have them).
145. *See id.* (noting that Washington does have a constitutional provision saying that "no public funds shall be spent at schools under sectarian influence").
146. *Id.* at 6.
147. *Id.* at 22–23.
148. Locke v. Davey, 540 U.S. 712, 725 (2004).
149. *Id.* at 718.
150. *Id.* at 719.

leaders.[151] Because Davey conceded that he planned to use the funds to become a pastor, the Court could draw a direct analogy to founding-era resistance to government funding for the ministry and clergy.[152] Rather than funding general school education, as the later no-aid provisions did, these early state constitutional provisions focused explicitly on clerical training, targeting a narrowly problematic issue that is grounded in a "historic and substantial state interest," not "animus towards religion."[153]

In an impassioned dissent joined by Justice Thomas, Justice Scalia argued that this kind of direct exclusion should be prohibited under the Free Exercise Clause.[154] Although he conceded that the Framers were hostile "to funding the clergy *specifically*," he focused on the concept that once a state created a public benefit, as Washington had done with the scholarship program, it could not then exclude people like Davey based on religion.[155] Scalia dismissed the state's interest as "pure philosophical preference."[156] He took issue with the majority's conclusion that the record showed no evidence of animus in the program's adoption, writing, "We do sometimes look to legislative intent to smoke out more subtle instances of discrimination, but we do so as a *supplement* to the core guarantee of facially equal treatment, not as a replacement for it."[157] Concluding with a warning that he perceived modern culture to be especially hostile to religion and claiming that the majority's reasoning opened the door to a slippery secular slope, Scalia called for the Court to address religious discrimination with the same kind of vigor it applied to other protected groups,[158] a call that the modern Court seems to be answering.

C. Trinity Lutheran Church of Columbia v. Comer *(2017)*[159]

Unlike the previously discussed challenges, *Trinity Lutheran* squarely presented the Court with a straightforward application of a state Blaine amendment. Missouri's Department of Natural Resources created a program offering grants to public and private schools,

151. *Id.* at 722.
152. *See id.* at 723 (citing founding era state constitutional provisions preventing citizens from being compelled or taxed to support the ministry).
153. *Id.* at 725.
154. Locke v. Davey, 540 U.S. 712, 727 (2004) (Scalia, J., dissenting).
155. *Id.* at 727–28 (Scalia, J., dissenting) (emphasis in original).
156. *Id.* at 730 (Scalia, J., dissenting).
157. *Id.* at 732 (Scalia, J., dissenting) (emphasis in original).
158. *Id.* at 733 (Scalia, J., dissenting).
159. Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012 (2017).

including nonprofit daycare centers, to assist in purchasing recycled tires to resurface playgrounds.[160] The Department denied funding to the Trinity Lutheran Church Child Learning Center, despite the Center ranking fifth of forty-four applicants.[161] In explanation, the Department cited its policy of "denying grants to any applicant owned or controlled by a church, sect, or other religious entity."[162] The relevant article of the Missouri Constitution provided that "no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect or denomination of religion, or in aid of any priest, preacher, minister, or teacher thereof."[163] The preschool sued, alleging that the Department's policy violated the Free Exercise Clause of the First Amendment.[164]

The Court struck down the Department's policy in a 7-2 opinion authored by the Chief Justice. Roberts's majority distinguished the case from *Locke*, reasoning that "there is no question that Trinity Lutheran was denied a grant simply because of what it is—a church."[165] Unlike *Locke,* in which the student sought to use state funds for the religious purpose of pursuing a ministerial degree, all the preschool wanted was to make its playground safer for children, a goal no different than the other institutions to which the state was providing grants.[166] Critically for the majority, Missouri required Trinity Lutheran to "renounce its religious character in order to participate in an otherwise generally available public benefit program, for which it [was] fully qualified."[167] The majority viewed this as a refusal to extend a neutrally applicable, secular benefit.

D. Espinoza v. Montana Department of Revenue *(2020)*[168]

Espinoza brought another state Blaine amendment directly before the Court. The Montana legislature enacted a program in 2015 that offered a tax break to contributors to charitable organizations that provided scholarships to children.[169] The state allowed the scholarships

160. *Id.* at 2017.
161. *Id.* at 2018.
162. *Id.* at 2017.
163. *Id.,* citing MO. CONST. art. I, §7.
164. *Id.* at 2018.
165. Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2023 (2017).
166. *Id.*
167. *Id.* at 2024.
168. Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246 (2020).
169. *Espinoza v. Montana Department of Revenue: Montana Moms Seek to Restore School Choice Program that was Struck Down for Including Religious Options*, INSTITUTE FOR JUSTICE,

to be used at any private school—sectarian or not—until the Montana Department of Revenue determined that funding the religious schools violated the Montana Constitution.[170] Parents who wanted to send their children to religious schools challenged this decision in court. Instead of permitting the inclusion of religious schools, the Montana Supreme Court resolved the Free Exercise claim by finding the entire program invalid.[171] It found that including religious options violated the "'no-aid' provision of the State Constitution, which prohibits any aid to a school controlled by a 'church, sect, or denomination.'"[172] Because the Montana Court chose to strike down the entire program, the Supreme Court had to decide whether the application of Montana's no-aid provision to the program violated the Free Exercise Clause of the Federal Constitution.[173]

The relevant provision in the Montana Constitution stated:

> **Aid prohibited to sectarian schools**. . . . The legislature, counties, cities, towns, school districts, and public corporations shall not make any direct or indirect appropriation or payment from any public fund or monies, or any grant of lands or other property for any sectarian purpose or to aid any church, school, academy, seminary, college, university, or other literary or scientific institution, controlled in whole or in part by any church, sect, or denomination.[174]

Roberts, this time writing for a 5-4 majority, held that Montana's application of the Blaine amendment to prevent any aid from going to religious schools based solely on religious *status* was a violation of the First Amendment's Free Exercise Clause.[175] The Court noted that it had "repeatedly held that the Establishment Clause is not offended when religious observers and organizations benefit from neutral government programs."[176] The Establishment Clause was even less problematic in this case because the program turned on the individual choice of parents.[177] Analyzing the Montana Constitution, the majority observed that "[t]he provision plainly excludes schools from government aid

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https://ij.org/case/montana-school-choice/.

170. *Id.*

171. *Id.*

172. Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2251 (2020) (quoting MONT. CONST., art. X, § 6(1)).

173. *Id.*

174. *Id.* at 2252, citing MONT. CONST., art. X, § 6(1) (emphasis in original).

175. *Id.* at 2256.

176. *Id.* at 2254 (citing Locke v. Davey, 540 U.S. 712, 719 (2004)).

177. *Id.*

solely because of religious status," noting that the case did not turn at all on religious use.[178]

Contrasting the case with the program in *Locke,* which allowed scholarship use at "'pervasively religious schools' that incorporated religious instruction throughout their class,"[179] the majority focused on the idea that Montana's provision "bars all aid to a religious school 'simply because of what it is,' putting the school to a choice between being religious or receiving government benefits."[180]

Separately, the majority's opinion also distinguished *Locke* on historical grounds. Many states at the time of the founding discussed or enacted bars on government-supported clergy.[181] The Court viewed the history for general schools differently, citing the fact that at the time of the founding and the early nineteenth-century, governments did support private schools, including *denominational* schools.[182] The Court additionally noted that scholars have found that state constitutions actually encouraged the school support, particularly for poor children.[183]

Unlike the prohibitions on state funding for clergy, the majority explained that the no-aid provisions, like the one used by the Montana Supreme Court, "belonged to a more checkered tradition" of Blaine amendments.[184] Although Roberts acknowledged that the history was "complex" because Montana had re-adopted the provision in the 1970s, he refused to find the same kind of historic tradition of refusal to fund clergy.[185] Ultimately, the Court found a Free Exercise Clause violation, holding that "[a] State need not subsidize private education. But once a State decides to do so, it cannot disqualify some private schools solely because they are religious."[186] To do so would be "odious" to the Federal Constitution.[187]

178. Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2255–56 (2020).

179. *Id.* at 2257 (quoting Locke v. Davey, 540 U.S. 712, 724–25 (2004)).

180. *Id.* at 2257 (quoting Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2023 (2017)).

181. *Id.* at 2258.

182. *Id.*

183. *See* Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2258(2020).. (discussing L. Jorgenson, *The State and the Non-Public School* and M. McConnell, et al, *Religion and the Constitution*). The opinion also noted that governments funded denominational schools through the Freedmen's Bureau in the South for emancipated freedmen. *Id.*

184. *Id.*at 2259.

185. Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2259 (2020).

186. *Id.* at 2261.

187. *Id.* at 2263.

Justice Alito concurred and engaged in a lengthy historical analysis, concluding that Blaine amendments either stemmed from nativist views in the late nineteenth-century or from people who capitalized on those views for votes.[188] Citing a wave of immigration and growing "Nativist fears," his concurrence painted a picture of an America that viewed "Catholic priests as crocodiles slithering hungrily toward American children."[189] Alito described newspaper articles that characterized "popery" as the enemy of "*general* education" and sectarian education as "Terrors."[190] Alito pointed to the fact that Blaine himself tried to use the amendment to reach anti-Catholic voters, and he cited the historical congressional debates over the national amendment, which he characterized as "rife with anti-Catholic sentiment."[191] The blistering accounts of Blaine amendment history in *Espinoza* arguably left them unenforceable at the state level, at least in the school context.

III. BLENDING THE PAST AND PRESENT

The nation continues to grapple with the balance between what the Establishment Clause forbids and what the Free Exercise Clause mandates, particularly for states. For Justice Alito, under the Court's precedent in *Ramos*, evaluating the history of the provision matters for the legitimacy of the law.[192] That history is more complicated than just anti-Catholic bigotry, although such prejudice was certainly present and impactful.

One of the overlapping areas of debate involves the ever-present federalism discussion. The senators who opposed the national Blaine Amendment emphasized the states' importance in controlling the area of religion. For them, it was a matter of local governance—not something the national government had a role in regulating. Interestingly, state Blaine amendments present a twist on these federalism arguments. These amendments are not power grabs by the national government. Instead, they are democratically passed, state-by-state additions to independent constitutions.[193] Recasting the

188. *Id.* at 2270 (Alito, J., concurring).

189. *Id.* at 2269 (Alito, J., concurring) (describing a famous *Harper's Weekly* cartoon featured at 2270).

190. *Id.* (emphasis in original) (internal citations omitted).

191. Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2271 (2020).

192. *Id.* at 2268 (Alito, J., concurring).

193. This argument, of course, excludes the states that had to adopt the mini-Blaine amendments as part of admission to the Union. *See supra* note 45 and accompanying text.

amendments as individual state decisions may have flipped many of the opponents of the national amendment. The federalism objection falls away when states act without federal instruction.

Notably, federalism continues to play an important role in modern case law. The "play in the joints" concept describes government actions that do not necessarily violate the Establishment Clause but are not required under the Free Exercise Clause. The current Court, however, seems interested in deploying federalism as a one-way ratchet in favor of religious schools. The Establishment Clause offers states more leeway to indirectly fund religious schools under cases like *Zelman v. Simon-Harris*.[194] In those cases, the Court has respected states' interpretations of the Establishment Clause allowing funding for private education.

Federalism and state choice arguments have not been met with the same level of appreciation in the Free Exercise realm. There, states argue that they are free to exclude religious schools from funding if state policymakers believe it is in the state's best interests to do so. *Espinoza* refuted that kind of federalism argument by holding a state's behavior in that context to be "odious to the Constitution."[195] It is unclear whether Blaine amendment opponents were concerned about this. In fact, opponents pointed to state actions and amendments as proof that the proposed federal amendment was unnecessary.[196] They also voiced opposition "to putting anything in this Constitution that becomes a bar upon the people of the State as to what they may deem wise to all these institutions."[197] In debating the national Blaine Amendment, Congress may have incorrectly believed that the Free Exercise Clause allowed states to refuse to fund religion. It was at a minimum incorrect in thinking that the universal Protestantism was acceptable in public schools. The 1876 Congress's nuanced views of federalism in this context, however, certainly deserve the modern Court's attention.

Second, the 1876 Senate debates questioned the goal of religious freedom and what that meant for the separation of church and state, an

194. 536 U.S. 639 (2002) (holding that school choice programs did not violate the Establishment Clause by providing financial support directly to parents to spend on their children's education at religious schools so long as the choice was made by the parents).

195. Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2263 (2020); *see also supra* note 186 and accompanying text.

196. 4 Cong. Rec. 5558 (1876) at 5583.

197. *Id.*

issue the modern Court has grappled with repeatedly in the educational choice cases. Although *Engel* settled the debate over whether Bible reading in schools was acceptable,[198] whether the Constitution requires Jefferson's vision of complete separation of church and state remains a live issue in litigation over school funding. Senators in 1876 seemed to agree that the federal government had no place in funding religion in schools and that free exercise was supported by separating the two. Even the minority religions that advocated for funding almost universally viewed it as a compensatory measure for the Protestant teaching in public schools.[199] This directly contradicts the modern Court, which has, even in an era of secular public schools, held that prohibiting educational choice programs from indirect funding violates the Free Exercise Clause.[200] Senators in 1876 emphasized that the absence of funding for religion supported Free Exercise for all, a fundamentally different proposition.

Third, permissible religious practices in other institutions like prisons and hospitals still present issues for the Court.[201] Although the Court deals with separate Free Exercise cases in many other areas, some justices have consistently feared that educational choice and school funding decisions will have consequences that bleed into other institutions in society. In the *Locke* oral argument, Justice Breyer challenged Davey's counsel on the "breathtaking" implications for "not just educational programs, but nursing programs, hospital programs, contracting programs throughout the governments."[202] Recent cases like *Fulton* have dealt with government contracts in foster care,[203] and an entire federal statutory scheme under the Religious Land Use and Institutionalized Persons Act facilitates petitions concerning the Free Exercise rights of incarcerated persons, most recently in *Ramirez v. Collier.*[204] Each time the Court deals with First Amendment educational choice cases and Blaine amendments, the justices, like the 1876 Senate, must consider broader implications and could look to the relevant congressional debates discussed for guidance.

198. *See supra* notes 8, 9 and accompanying text.

199. DeForrest, *supra* Note 35, at 560.

200. *Espinoza,* 140 S. Ct. at 2263.

201. For a recent example of this conflict, see Fulton v. City of Philadelphia*,* 141 S. Ct. 1868 (involving a Free Exercise claim concerning foster care services)

202. Transcript of Oral Argument Transcript at 51–52, Locke v. Davey, 540 U.S. 712 (2004) (No. 02-1315).

203. *Fulton*, 141 S. Ct. at 1874.

204. *See* 142 S. Ct. 1264, 1283–84 (2022) (holding that a person who is incarcerated had the right to have a minister lay hands on him during his execution).

Of course, all of this is tempered by the accusations of bias and political ambition tarnishing the amendment, which were present in the debates. The modern Court has chosen to focus solely on those issues, leaving out a wealth of other interpretative options presented in the 1876 congressional understandings.

IV. STAINED BY BLAINE? THE *CARSON* DECISION AND IMPLICATIONS FOR THE FUTURE

In *Carson,* the Court decided that Maine's educational choice program violated the Establishment and Free Exercise Clauses.[205] Maine required public school attendance and guaranteed a free public education to all its children, but it did not have public schools in rural areas.[206] The state provided funding for students in those areas to attend other public schools or any approved private school, provided that the private school was "nonsectarian."[207] Petitioners in the case alleged that this violated the Free Exercise and Establishment Clauses, as well as the Equal Protection Clause.[208] Maine argued that its law required the state to provide the equivalent of a public education, and it claimed that the *distinguishing* component of a public education was secularity.[209] Notably, Maine placed no geographic limits on schools, explicitly excepted single-sex private schools from its anti-discrimination laws to allow for their participation in the program, and did not require Maine's own curriculum to be taught.[210] From Maine's perspective, the solitary component of a public education was complete separation from religion, an interpretation that not only seems contrary to logic, but also clearly contradicts longstanding American historical ideas about public education prior to *Engel v. Vitale*.

Themes from the 1876 debates surfaced during oral argument, as did the Supreme Court's recent precedents. Chief Justice Roberts challenged Maine's counsel at argument with a hypothetical about two schools with varying levels of religious devotion, ultimately drawing a concession from counsel that some schools with religious components may be acceptable, but others may not.[211] That distinction troubled the

205. Carson v. Makin, 142 S. Ct. 1987, 2002 (2022).
206. *Id.* at 1993.
207. *Id.* at 1993–94.
208. *Id.*
209. *Id.* at 1999.
210. *Id.* at 1994.
211. Transcript of Oral Argument at 57–58, Carson v. Makin, 142 S. Ct. 1987 (2022) (No. 10-1088)

Chief Justice, who said the distinction sounded like discrimination between religions based on belief.[212] He explained that the Court has found that to be "the most basic violation of the First Amendment religion clauses—for the government to draw distinctions between religions based on their doctrine."[213] This line of reasoning would be more consistent with historical arguments made by Catholics in favor of funding—that to fund one religion necessitates funding all of them to avoid running afoul of the First Amendment. The final opinion reflected some of the Chief Justice's concerns. It noted that intense efforts by the state to determine the use of religion in the curriculum would "raise serious concerns about state entanglement with religion and denominational favoritism."[214]

The *Carson* opinion also swept more broadly, putting an end to any idea of the status-use distinction left open after *Espinoza,*[215] relying heavily on the line of precedents slowly chipping away at restrictions on state funding of religious schools.[216] Chief Justice Roberts, for a 6-3 Court, wrote that "[t]he 'unremarkable' principles applied in *Trinity Lutheran* and *Espinoza* suffice to resolve this case."[217] Those principles mean that a state does not have to fund private education, but once it decides to do so, it cannot deny funding to an institution "solely because of [its] religious character."[218] The Court found that disqualifying religious schools from receiving funding available to nonreligious schools discriminates on the basis of religion and therefore must be analyzed using strict scrutiny.[219] Noting that government action rarely survives strict scrutiny, the Court proceeded to strike down Maine's program as unconstitutional under the Free Exercise Clause.[220] A government has no compelling interest in a broad interpretation of the Establishment Clause that would enforce the strict separation of church and state "in the face of the infringement of free exercise."[221] This is particularly true when the state is not directly funding religious institutions but is instead allowing parents and families to make independent decisions about the kind of education

212. *Id.* at 58.
213. *Id.* at 58.
214. Carson v. Makin, 142 S. Ct. 1987, 2001 (2022).
215. *Id.*
216. *Id.* at 1997.
217. *Id.*
218. *Id*. (citing Espinoza v, Montana Dep't of Revenue, 140 S. Ct. 2246, 2261 (2020)).
219. Carson v. Makin, 142 S. Ct. 1987, 1997 (2022).
220. *Id.*
221. *Id.* at 1998 (citing *Espinoza,* 140 S. Ct. at 2257).

that would best suit their children.[222]

The Court also emphasized that before 1981, Maine students had been allowed to use the funding for religious schools without incident, highlighting that Maine only changed its practice based on an erroneous former understanding of the Establishment Clause.[223] This seemed particularly aimed at the dissent, which argued first that the "play in the joints" provided flexibility for states to decide the appropriate level of separation between church and state and second, that the two clauses were essential for preventing "disunion."[224] Justice Breyer's arguments about religious dissent make sense in the 1876 world, which clearly favored one religion and openly discriminated against others, but the *Carson* decision simply requires a school of *any* religion to be eligible for student voucher use, which seems to avoid his main concern.

This broader holding—that state governments cannot distinguish between private schools for funding—essentially eliminates the play in the joints between the Establishment and Free Exercises Clauses for educational choice programs that provide money to parents to choose between private schools. The Court's holding heavily relied on the history of bigotry but simultaneously ignored other arguments, like federalism, that featured significantly in the debates over the federal Blaine Amendment. The majority of this Court has decided the stain from the Blaine Amendment motivation outweighs all the other constitutional arguments.

The *Carson* opinion is a major step forward for Free Exercise claims in the school funding context, but it opens the door to other questions about how the Court will approach text, history, and tradition tests in other Establishment Clause cases. *Kennedy v. Bremerton School District*—the other major school religion case handed down within days of *Carson v. Makin*—ended the *Lemon* test[225] and suggested that the

222. *Id.* at 1997 (citing Zelman v. Simmons-Harris, 536 U.S. 639, 652–53 (2002)).

223. *Id.* at 1994.

224. *Id.* at 2005 (Breyer, J., dissenting).

225. The *Lemon* test, initially outlined by the Court in 1973, provided a three-pronged, ahistorical balancing approach to Establishment Clause claims. *Lemon v. Kurtzman,* 403 U.S. 602, 612–13 (1971). The test considered whether the state action had a "primarily secular purpose," whether "its principal or primary effect" advanced or inhibited religion, and whether the state action would foster "excessive entanglement" of government and religion. *Id.* The Court applied the *Lemon* test erratically in the years following the case, leading Justice Scalia to famously refer to it as "some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried." Lamb's Chapel v. Moriches Union Free Sch. Dist., 508 U.S. 384, 398 (1993) (Scalia, J., concurring). For more on the Court's decision to

correct analysis for the Establishment Clause starts with "reference to historical practices and understandings."[226] The line of cases culminating in *Carson* suggests that school funding history may be treated differently. After all, the Court invalidated thirty-seven provisions of state constitutions, many over a century old, breaking with longstanding history and tradition. The United States has a long history of discrimination against minority religions in a way that seems wildly out of step with the modern Supreme Court's religious discrimination cases.[227]

CONCLUSION

Future cases will likely require the Court to elaborate on its Establishment Clause jurisprudence, and it will have to confront the problematic, complex history of religion in elementary and secondary education. The Court hesitated to rely on historical practice as evidence of constitutionality in this particular space, instead focusing on the clear evidence of historical malpractice and discrimination. In follow-on cases to *Carson* and *Kennedy*, the justices will inevitably have to decide whether the stain of the Blaine amendments makes historical analysis in this area unique or whether they are willing to consider similar factors in other contexts.[228] Regardless, the Court will surely continue to grapple with the same concerns that have persisted in these debates since the attempt to amend the Constitution failed in 1876.

overrule *Lemon, see supra* note 25 (noting that *Kennedy* overruled *Lemon*).

226. Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2428 (citing Town of Greece v. Galloway, 572 U.S. 565, 576 (2014)).

227. *See, e.g.*, Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520 (1993) (holding a city ordinance preventing animal sacrifice unconstitutional); Holt v. Hobbs, 574 U.S. 352 (2015) (finding for an incarcerated devout Muslim who wanted to grow a beard in accordance with his religious beliefs).

228. The Court considered the racially motivated origins of Oregon and Louisiana's nonunanimous jury rules to be constitutionally relevant. *See generally* Ramos v. Louisiana, 140 S. Ct. 1390 (2020) (The plurality noted that the provisions were racially motivated, and Justice Sotomayor's concurrence stressed that "the racially biased origins of the Louisiana and Oregon laws uniquely matter here."). After *Kennedy,* courts will likely have to decide whether the same religious bigotry and enforced religious orthodoxy in public schools that justified striking down the Blaine amendments also makes school prayer, which shares the same legacy, unconstitutional.