NOTE

SCHOOL CHOICE AND STATE CONSTITUTIONS

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The principle that government may not enact laws that suppress religious belief or practice is so well understood that few violations are recorded in our opinions.1

Justice Anthony M. Kennedy, 1993

My friend says there is no danger [of government aid to Catholic schools.] Well, Mr. President, in my judgment there is danger. That cloud is looming above the horizon; it is larger than it was a few years ago . . . .2

Senator Oliver Morton, 1876

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STATE constitutional provisions dating back to the nineteenth century occupy an increasingly prominent place in the twenty-first century debate over private school voucher programs. In the public debate and in the courts, voucher opponents invoke state constitutional provisions, popularly known as Blaine Amendments, to support their contention that government may not operate a program that sends public money to religious schools. This Note argues that many (if not all) of these state constitutional provisions themselves violate the Equal Protection Clause of the Federal Constitution. More generally, it suggests that explicit ex-

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3 The basic concept behind voucher proposals is fairly straightforward: Give parents a check for a portion or all of the money that it would cost to educate their children in public school, and allow them to use it at a school of their choosing. See Mark E. Chopko, Vouchers Can Be Constitutional, 31 Conn. L. Rev. 945, 947 (1999) (defining a voucher as "a certificate [of value] issued to parents, which ... can only be used for the education of their child or children at a primary or secondary school in accordance with state law"). For a basic description of a recently enacted plan, see Rick Bragg, Florida to Allow Student Vouchers, N.Y. Times, Apr. 28, 1999, at A1.

Eligibility to participate in a voucher program can be restricted in several ways. Students may not be eligible unless their assigned public school performs below a certain level on statewide exams. See id. Eligibility may be linked to family income. See Wis. Stat. Ann. § 119.23(2)(a)(1) (West 1999) (restricting participation in Milwaukee voucher program to families whose income is no greater than "1.75 times the poverty level" set by the federal government). Finally, some programs explicitly exclude religious schools. See Me. Rev. Stat. Ann. tit. 20-A § 2951(2) (West 1998) (allowing only "nonsectarian" schools to participate in tuition reimbursement program).

4 As used in this Note, the phrase "Blaine Amendments" refers to a group of state constitutional provisions the texts and histories of which are similar to a failed proposal to amend the Federal Constitution that was introduced in the House of Representatives by James G. Blaine of Maine. See Joseph P. Viteritti, Blaine's Wake: School Choice, the First Amendment, and State Constitutional Law, 21 Harv. J.L. & Pub. Pol'y 657, 670-75 (1998) [hereinafter Viteritti, Blaine's Wake] (discussing the history of "Blaine Amendments" nationwide); see also infra Section II.A (same).

5 See Viteritti, Blaine's Wake, supra note 4, at 659 ("Opponents of choice are planning their legal strategies around the existence of so-called 'Blaine Amendment' provisions incorporated into many state constitutions ... ").

6 U.S. Const. amend. XIV, § 1 ("No state shall ... deny to any person within its jurisdiction the equal protection of the laws.").

7 Professor Joseph Viteritti has argued that the Blaine Amendments violate the Free Exercise Clause, see Viteritti, Blaine's Wake, supra note 4, at 660-61, and has implied that they may violate other constitutional provisions as well, see Joseph P. Viteritti, Choosing Equality: Religious Freedom and Educational Opportunity Under Constitutional Federalism, 15 Yale L. & Pol'y Rev. 113, 191 (1996) [hereinafter...
clusion of religious schools from a private school voucher program would violate the Equal Protection Clause as well.

Vouchers are probably the most highly profiled educational reform being considered today. Their merits have been debated nationwide, and the issue promises to be important in the upcoming presidential election. In June of 1999, Florida enacted the nation’s first statewide voucher program. While the precise scope of that program remains unclear, it has the potential to affect “tens of thousands or [even] hundreds of thousands” of Florida students. Vouchers have also been enacted in at least seven localities during the last three years.

Viteritti, Choosing Equality, but no one to date has argued that they violate the Equal Protection Clause.


Bragg, supra note 3 (quoting Jeanne Allen, president of the Center for Education Reform) (internal quotation marks omitted). The plan calls for all public schools to be rated on an “A” to “F” scale based on statewide standardized tests that will rank the schools' students in math, reading, and writing. See id.; Across the USA, USA Today, June 25, 1999, at 10A. Seventy-eight Florida schools scored an “F” on these standardized tests when the first report cards were issued in June of 1999, and more than 70% of Florida's public schools earned a grade of “C” or lower. See Across the USA, supra. Students attending public schools that receive a grade of “F” twice within four years will be eligible to participate in the voucher program. See id.

See People For the American Way Foundation, Litigation Docket (visited Aug. 18, 1999) (Arizona, Florida, Maine, Ohio, Pennsylvania, and Wisconsin); People For the American Way Foundation, Voucher Battle Heats Up Across the U.S. (visited Aug. 18, 1999) [hereinafter Voucher Battle] (Maine, New Jersey, Ohio, Pennsylvania, Texas, Vermont, and Wisconsin). The programs in New Jersey and Texas have been subsequently rescinded. See Voucher Battle, supra. In addition, the Ohio voucher program was enjoined on August 25, 1999, due to U.S. District Judge Solomon Oliver, Jr.'s belief that “there is no substantial possibility’ that the voucher program would pass muster under the U.S.
Voucher proposals are mired in controversy. The American public is deeply divided on the issue,13 and the debate has spawned unique political alliances.14 The academic community is split over whether vouchers should play a role in solving the serious problems currently plaguing many public schools.15 Not surprisingly, the limited social science research examining the efficacy of private school voucher programs has reached mixed conclusions.16

13 See Adrienne D. Coles, Poll Finds Americans Split Over Public Funding of Private Education, Educ. Wk., Sept. 9, 1998, at 6 (citing a poll showing that Americans are closely divided over whether “students and parents [should be able] to choose a private school to attend at public expense”). Curiously, the poll showed self-identified Republicans and Democrats deeply divided over vouchers, despite the firm positions taken by the national parties supporting and opposing vouchers, respectively. See id.


15 Compare John E. Chubb & Terry M. Moe, Politics, Markets, and America’s Schools (1990) (arguing that vouchers will spur competition among private schools for students, resulting in improved achievement, increased parental autonomy, and greater responsiveness to student needs), and Jonathan B. Cleveland, School Choice: American Elementary and Secondary Education Enter the “Adapt or Die” Environment of a Competitive Marketplace, 29 J. Marshall L. Rev. 75, 114–28 (1995) (arguing that competition created by vouchers will spur improved teaching and greater parental involvement), with James S. Liebman, Voice, Not Choice, 101 Yale L.J. 259, 277–93 (1991) (reviewing Chubb & Moe, supra) (arguing that vouchers will remove the best students from urban public schools, which will in turn leave those urban schools with less money to educate the remaining, less educable children).

16 A research team from Indiana University studied the performance of students enrolled in a voucher program in Cleveland, Ohio. See Cohen, supra note 9, at 36–37. The study concluded that voucher participants attending established private schools slightly outperformed their public school counterparts, while students attending schools established for the purpose of accepting voucher participants performed worse than comparable public school students. See id. at 37. Another study of private voucher recipients in New York City found slight improvements in reading and math. See Jeff Archer, N.Y.C. Voucher Students Post Modest Gains, Educ. Wk., Nov. 4, 1998, at 3. Finally, two studies of the effects of a Milwaukee voucher program reached conflicting results. See Lynn Olson, New Studies on Private Choice
Vouchers are as controversial legally as they are politically. Voucher programs have been challenged in Ohio, Wisconsin, Maine, and Vermont. The day after the Florida program was signed into law, the ACLU, the NAACP, and People For the American Way filed a lawsuit claiming that it was unconstitutional.

Vouchers epitomize the modern debate over the proper relationship between God and government. Since over 85% of private primary and secondary schools are religiously affiliated, it is difficult to implement a viable voucher program that does not include religiously affiliated schools. Yet the inclusion of religious schools in a voucher program invites a powerful (and predictable) response: The program violates the principle of separation of church and state.

The Federal Establishment Clause, the most obvious doctrinal home for this argument, has been the focus of much of the scholarship.
any debate. While no consensus has been reached, this Note assumes for the purposes of argument that at least some voucher plans that include religious schools would be found valid under the Establishment Clause. This assumption is based on language in recent United States Supreme Court opinions, is consistent with recent cases from Arizona, Ohio, Wisconsin, and Vermont, and is not inconsistent with two recent cases from Maine.

Establishment Clause applicable to the states. See Everson v. Board of Educ., 330 U.S. 1, 8 (1947).


Language in the Supreme Court's recent school aid cases suggests that a majority of the current Court would vote to uphold a carefully drawn voucher program. See Agostini v. Felton, 521 U.S. 203 (1997); Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1 (1993); Witters v. Washington Dep't of Servs. for the Blind, 474 U.S. 481, reh'g denied, 475 U.S. 1091 (1986); Mueller v. Allen, 463 U.S. 388 (1983). For example, in Agostini the Court declared: "[W]e have departed from the rule... that all government aid that directly assists the educational function of religious schools is invalid." Agostini, 521 U.S. at 225. The Court also explicitly rejected the argument that "the constitutionality of an aid program depends on the number of sectarian school students who happen to receive the otherwise neutral aid." Id. at 229; see also Mueller, 463 U.S. at 491 ("We would be loath to adopt a rule grounding the constitutionality of a facially neutral law on annual reports reciting the various classes of private citizens who claimed benefits under the law.").

In light of these cases, it appears that a carefully drafted voucher program could pass constitutional muster so long as any aid flowing to religious schools did so only because of the children's parents' "genuinely independent and private choices." Witters, 474 U.S. at 487. Professor Viteritti agrees with this assessment of the Court's recent Establishment Clause decisions. See Viteritti, Blaine's Wake, supra note 4, at 660 ("A review of the First Amendment decisions handed down by the Rehnquist Court suggests ... [that] under certain conditions, it is constitutionally permissible to provide public support for parents to send their children to parochial schools ... ").


See Simmons-Harris v. Goff, 711 N.E.2d 203, 211 (Ohio 1999) (noting that Cleveland school voucher program does not violate the Establishment Clause).


See Bagley v. Raymond Sch. Dep't, 728 A.2d 127, 147 (Me.) ("While it may be possible for the Legislature to craft a program that would allow parents greater flexibility in choosing private schools for their children, the current program could not
The Establishment Clause does not, however, present the only legal hurdle for voucher proposals. Approximately thirty state constitutions contain provisions commonly known as Blaine Amendments. While their language varies, a reasonably typical formulation forbids "draw[ing money] from the treasury for the benefit of religious societies, or religious or theological seminaries." The term "seminaries" is generally understood to include all religiously affiliated schools. Thus, most Blaine Amendments would allow the use of state funds "for the benefit of" secular private schools but forbid their use "for the benefit of" religiously affiliated private schools.

32 This number is approximate because there is some dispute over which state constitutional provisions should be considered Blaine Amendments. Compare Donald L. Kinzer, An Episode in Anti-Catholicism: The American Protective Association 11–12 (1964) (listing twenty-four Blaine Amendments), with Kemerer, Constitutional Dimension, supra note 25, at 154–55 (thirty-three), Douglas Laycock, Religious Liberty as Liberty, 7 J. Contemp. Legal Issues 313, 342 (1996) (at least thirty-two), Viteritti, Blaine’s Wake, supra note 4, at 673 (at least twenty-nine), and Ann Marlow Grabel, Comment, Minnesota Public Money and Religious Schools: Clearing the Federal and State Constitutional Hurdles, 17 Hamline L. Rev. 203, 223 (1993) (stating that Blaine Amendments were enacted "into twenty-nine state constitutions between 1877 and 1917").

33 Wis. Const. art. I, § 18.

34 Some state constitutional provisions that are arguably Blaine Amendments forbid the use of public funds for any private school or subject such disbursement to heightened voting requirements. See Ala. Const. art. IV, § 73 (requiring a two-thirds vote of both houses of the legislature); Cal. Const. art. 9, § 8; Colo. Const. art. 5, § 34; Conn. Const. art. VIII, § 4; Mass. Const. art. XVIII; Mich. Const. art. VIII, § 2; Neb. Const. art. VII, § 11 (allowing state to contract with private schools to provide nonsectarian services to disabled children); N.M. Const. art. 4, § 31; Pa. Const. art. III, § 30 (requiring a two-thirds vote of the state legislature); S.C. Const. art. XI, § 4; Va.
Advocates and scholars have begun to recognize the importance of Blaine Amendments to the modern voucher controversy. Discussion of the amendments has started to appear in the political arena. Voucher opponents contend that the Blaine Amendments impose a "far stricter" version of church/state separation than does the Federal Establishment Clause and further argue that the amendments prohibit any voucher program from including religiously affiliated private schools. One state high court has already rejected this claim by upholding a voucher program that included religious schools despite the state’s Blaine Amendment. Voucher opponents nevertheless remain hopeful that the state constitutional argument will succeed in many states. Several scholars have attempted to determine which state courts may be inclined to invoke the Blaine Amendments to block voucher programs by examining state constitutional language and case law.

This Note examines a different question: whether the Blaine Amendments themselves violate the Federal Constitution. It also

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Const. art. 8, § 10 (listing several exceptions to the general prohibition against public aid); Wyo. Const. art. 3, § 36, art. 7, §§ 4, 7.

36 See Choice Bandwagon, Wall St. J., Jan. 29, 1999, at A14 (applauding the apparent demise of state Blaine Amendments as obstacles to school choice); Martin Dyckman, History of Religion Has a Place in Schools, St. Petersburg Times, July 18, 1999, at 3D (arguing that any "taint" that may have attached to Florida’s Blaine Amendment was "washed clean" when the state constitution was reenacted in 1968); George F. Will, A Choice for Children, Wash. Post, Nov. 29, 1998, at C7 (broadly arguing in favor of school choice and specifically attacking the "Blaine laws" as "repellent residues of 19th-century nativism").


38 See Viteritti, Blaine’s Wake, supra note 4, at 659.

39 See Jackson v. Benson, 578 N.W.2d 602 (Wis.) (upholding a Milwaukee voucher program that included religious schools against attacks based on the federal and state constitutions), cert. denied, 119 S. Ct. 466 (1998).

40 See Viteritti, Blaine’s Wake, supra note 4, at 659 ("Opponents of choice are planning their legal strategies around the existence of so-called ‘Blaine Amendment’ provisions . . .").


42 The Supremacy Clause dictates that the Federal Constitution trumps contrary state constitutional law. See U.S. Const. art. VI, cl. 2 ("This Constitution . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby,
explores a question of even broader importance to the ongoing public debate: whether, assuming the Establishment Clause does not prohibit the use of vouchers to fund private religious education, it would ever be constitutional to exclude religious schools from a private school voucher program. Part I will examine the interpretations of various Blaine Amendments by state courts. It will show that, despite recent high-profile examples to the contrary, numerous state courts would likely invoke their states’ versions of the Blaine Amendment to block voucher programs that included religiously affiliated schools. Part II will offer a short history of the Blaine Amendments. It will demonstrate that the intent behind their passage was not the preservation of the church/state separation or the general advancement of public education, but rather, to prevent aid to Roman Catholic institutions. Part III will build on this history and develop the federal constitutional case against the Blaine Amendments. It will show that the Blaine Amendments classify on the basis of religion, demonstrate that such classifications warrant strict scrutiny, and argue that most of the Blaine Amendments cannot survive strict scrutiny. Part IV will shift to a broader focus and argue that any overt exclusion of religious schools from a voucher program would raise serious Equal Protection Clause concerns because the exclusion would be based explicitly on the suspect classification of religion. Part V will conclude this Note and offer some brief thoughts regarding its implications for the current debate over vouchers.

I. WILL THE BLAINE AMENDMENTS BE USED TO BLOCK SCHOOL CHOICE?

The Blaine Amendments matter only if construed to permit certain types of church/state interaction that are proscribed by the Federal Establishment Clause. This Note’s contention—that the Blaine Amendments violate the Federal Constitution—is thus ir-

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any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."). At least one lawsuit has been filed challenging the Blaine Amendments’ validity under the Federal Constitution. See Will, supra note 36 (discussing a lawsuit by the Becket Fund for Religious Liberty challenging Massachusetts's Blaine Amendment); Becket Fund for Religious Liberty, Press Release: Parents File Federal Civil Rights Challenge to Massachusetts Barriers to School Choice (visited Aug. 18, 1999) <http://www.becketfund.org/press/030398.html> (same).
relevant to the voucher debate unless some state courts can be expected to construe their Blaine Amendments more broadly than the Federal Establishment Clause. This Part demonstrates that such a result is likely in many states, despite recent contrary examples from Wisconsin and Ohio.\footnote{See Simmons-Harris v. Goff, 711 N.E.2d 203, 212 (Ohio 1999) (holding that Cleveland voucher program does not violate Ohio's Blaine Amendment); Jackson v. Benson, 578 N.W.2d 602, 623 (Wis.), cert denied, 525 U.S. 997 (1998) (upholding Milwaukee voucher program under the Wisconsin constitution). The Wisconsin Supreme Court had previously indicated that its Blaine Amendment would be interpreted in light of the United States Supreme Court's Establishment Clause jurisprudence. See King v. Village of Waunakee, 517 N.W.2d 671, 672 (Wis. 1994) (sustaining the validity of a Christmas display containing Christian elements). In Maine's recent voucher case, the state constitution, which does not contain a Blaine Amendment, was not at issue. See Bagley v. Raymond Sch. Dep't, 728 A.2d 127, 132 (Me.), cert. denied, 120 S. Ct. 364 (1999).}

In a 1997 article, Professor Frank Kemerer shows that many state courts take a narrow view of the amount of church/state interaction permissible under state constitutional law. Professor Kemerer examines the "state Establishment Clause" provisions in all fifty state constitutions and classifies seventeen states as having a "restrictive" view regarding state aid to religious schools.\footnote{See Kemerer, State Constitutions, supra note 41, at 39-40 tbl.1. The states are Alaska, California, Delaware, Florida, Hawaii, Idaho, Kansas, Kentucky, Massachusetts, Michigan, Missouri, North Dakota, Oklahoma, South Dakota, Virginia, Washington, and Wyoming. See id.} Each of these state constitutions contains a Blaine Amendment.\footnote{Professor Kemerer classifies only thirteen of the seventeen restrictive states as containing restrictive constitutional language. He excludes Alaska, Idaho, South Dakota, and Washington from the list. See id. Professor Kemerer acknowledges, however, that his classifications "should be viewed as approximations" because "of the complexity of this task and the subjectivity inherent in making these determinations." Id. at 4.}

Kemerer describes fourteen states as "permissive," either because their state constitution lacks a provision concerning church/state
relations or because of a "supportive legal climate." Eight of these "permissive" states nevertheless have Blaine Amendments. Finally, nineteen states, ten of which have Blaine Amendments, are classified as "uncertain." Professor Kemerer's work thus suggests that at least seventeen states, those classified as "restrictive," would be inclined to view a voucher program involving religious schools with a skeptical eye.

A 1985 note reached conclusions similar to Professor Kemerer's. It found that courts in twelve states had indicated that their state constitutional standards were stricter than those of the Federal Establishment Clause. Courts in almost twenty states had further indicated that they did not consider themselves bound by the United States Supreme Court's Establishment Clause jurisprudence when interpreting their own state religion clauses.

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4 Kemerer, State Constitutions, supra note 41, at 23. The states are Alabama, Arizona, Maine, Maryland, Mississippi, Nebraska, New Hampshire, New York, Pennsylvania, Rhode Island, South Carolina, Utah, Vermont, and West Virginia. See id. at 39–40 tbl.1.

5 Professor Kemerer lists Alabama, Maine, Maryland, Nebraska, Pennsylvania, Rhode Island, and Vermont as having permissive constitutional language. See id. Nevertheless, two of these states' constitutions—Nebraska's and Pennsylvania's—also contain Blaine Amendments. See Neb. Const. art. VII, § 11; Pa. Const. art. III, § 29. Additionally, the Arizona, New Hampshire, New York, South Carolina, Utah, and West Virginia constitutions contain Blaine Amendments. See supra note 32 (collecting provisions).

6 See Kemerer, State Constitutions, supra note 41, at 39–40 tbl.1. The states are Arkansas, Colorado, Connecticut, Georgia, Illinois, Indiana, Iowa, Louisiana, Minnesota, Montana, Nevada, New Jersey, New Mexico, North Carolina, Ohio, Oregon, Tennessee, Texas, and Wisconsin. See id. Of course, since both the Milwaukee, Wisconsin and Cleveland, Ohio voucher programs have been upheld against state constitutional attack, see Simmons-Harris v. Goff, 711 N.E.2d 203, 207 (Ohio 1999); Jackson v. Benson, 578 N.W.2d 602, 632 (Wis.), cert. denied, 525 U.S. 997 (1998), neither of those states is uncertain any longer.

7 These states are Colorado, Georgia, Illinois, Indiana, Minnesota, Montana, New Mexico, Oregon, Texas, and Wisconsin. See supra note 32 (listing Blaine Amendments).

8 Kemerer, State Constitutions, supra note 41, at 37.

9 See Note, supra note 41.

10 See id. at 640–41. The twelve states are Alaska, California, Delaware, Hawai‘i, Idaho, Michigan, Minnesota, Missouri, Nebraska, South Dakota, Virginia, and Washington. See id. at 641 n.86.

11 See id. at 634 & n.49; see also id. at 636 & nn.53–55 (noting that several states have departed from the holding of the United States Supreme Court in Mueller v. Allen, 463 U.S. 388 (1983), by striking down laws providing for public transportation of
A brief overview of the case law also supports Professor Kemerer’s conclusion. The notion that the Blaine Amendments are “far stricter” than the Establishment Clause originated in Witters v. Washington Department of Services for the Blind.\(^{54}\) The Witters litigation thus provides a prototypical example of how the Blaine Amendments could be used to block a voucher program that included private religious schools.

_Witters_ involved a state program that provided financial assistance to disabled students wishing to pursue higher education. Larry Witters, a blind man, requested financial assistance to enable him to enroll in a seminary. When his request was denied, he filed suit in state court alleging abridgement of his equal protection and free exercise rights.\(^{55}\) The state hearing examiner and the Washington Superior Court upheld the state’s decision based on state constitutional grounds.\(^{56}\) When the case first reached the Washington Supreme Court, however, the court’s opinion upholding the state’s decision rested solely on the Federal Establishment Clause.\(^{57}\)

The United States Supreme Court unanimously reversed. The Court held that the “extension of aid under Washington’s vocational rehabilitation program to finance petitioner’s training at a Christian college... would [not] advance religion in a manner inconsistent with the Establishment Clause of the First Amendment.”\(^{58}\) The Court nevertheless remanded the case, stating that “the state court is of course free to consider the applicability of the ‘far stricter’ dictates of the Washington State Constitution.”\(^{59}\)

On remand, the Washington Supreme Court again upheld the state’s decision, this time on state constitutional grounds. The court rested its holding on the language of the state’s Blaine Amendment, which, the court concluded, “prohibits not only the

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\(^{54}\) 474 U.S. 481, 489, rel’g denied, 475 U.S. 1091 (1986).

\(^{55}\) See id. at 483–84.

\(^{56}\) See id. at 484. The Washington constitution provides that “[n]o public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment.” Wash. Const. art. I, § 11.


\(^{58}\) Witters, 474 U.S. at 489.

\(^{59}\) Id.
appropriation of public money for religious instruction, but also the application of public funds to religious instruction." Because the court considered the language of the state constitution substantially more "sweeping and comprehensive" than the language of the Federal Establishment Clause, the court concluded that "apply[ing] federal establishment clause analysis ... would be inappropriate." The court also rejected Witters's contention that the denial of funding violated the Federal Equal Protection Clause. While the precise content of Witters's equal protection challenge was unclear, the court summarily rejected it, ruling that the state had a "compelling interest in maintaining the strict separation of church and state set forth in" the state constitution. Witters sought a writ of certiorari, but the United States Supreme Court denied his petition.

Witters thus demonstrates that at least one state supreme court construes its Blaine Amendment more strictly than the Federal Establishment Clause. It also suggests that at least some state courts will—not surprisingly—be hostile to the claim that a provision of their state constitution violates the Federal Constitution. Finally, the swiftness with which the court dismissed Witters's equal protection claim indicates that the Washington Supreme Court considered it largely self-evident that compliance with a state constitutional provision constituted an interest of sufficient magnitude to survive any level of equal protection scrutiny.

Other case law also suggests that some state supreme courts would be skeptical of a voucher program that included religious schools. The highest courts of three states—New Hampshire, Washington, and Massachusetts—have held that various forms of school choice violated their state constitutions. In 1992, the Supreme Court of New Hampshire issued an advisory opinion stating that a proposal to reimburse private primary and secondary schools at a rate of 75% of the per-pupil cost of public education would

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61 Id. (quoting Witters, 689 P.2d at 57). The court also rejected Witters's Free Exercise argument because the denial of funds did not "compel or pressure him to violate his religious beliefs." Id. at 1123 (quoting Witters, 689 P.2d at 53).
62 Id. at 1123.
64 See id.
violate the state constitution because “[n]o safeguards exist to prevent the application of public funds to sectarian uses.” Similarly, in 1973 the Washington Supreme Court struck down a program that would have provided aid to “elementary and secondary pupils attending public and private schools... who demonstrate a financial inability to meet the total costs of supplies, books, tuition, incidental and other fees.” Finally, in 1970 the Supreme Judicial Court of Massachusetts held that a proposal to give $100 to the parents of every child attending private schools would violate the state constitution because it would constitute impermissible direct aid to religious schools.

Other state high courts have also indicated that their state constitutions prohibit more church/state interaction than does the Federal Establishment Clause. Despite Everson v. Board of Education, in which the United States Supreme Court held that it does not offend the Federal Constitution to subsidize the transportation costs of children attending private religious schools, courts in Alaska, Delaware, Hawaii, Idaho, Oklahoma, and Oregon have nevertheless held that the practice violates their state constitutions. Courts in other states have invoked state constitutional provisions to invalidate programs where the state purchased textbooks for use at private religious schools. In 1979, the Supreme

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65 Opinion of the Justices (Choice in Education), 616 A.2d 478, 480 (N.H. 1992); see also Opinion of the Justices, 258 A.2d 343, 346 (N.H. 1969) (reaching the same conclusion about a proposed $50 residential property tax exemption for any household with one or more children in private school).


67 See Opinion of the Justices to the House of Representatives, 259 N.E.2d 564, 565-66 (Mass. 1970). The Massachusetts constitutional provision at issue states that “no grant, appropriation or use of public money or property... shall be made or authorized by the commonwealth or any political division thereof for the purpose of founding, maintaining or aiding... any school... or educational... undertaking which is not publicly owned.” Mass. Const. art. 46, § 2.


69 See id. at 16-18.


Court of Alaska held a plan that partially reimbursed students attending private colleges for the difference in cost between the private university and a comparable public university violated its state constitution.\textsuperscript{72} The Attorney General of New Mexico expressed the same opinion regarding a comparable plan.\textsuperscript{73} While these examples are not exhaustive, they are sufficient to demonstrate that the Blaine Amendments could pose a serious obstacle to any voucher proposal that included religious schools. Accordingly, the validity of the Blaine Amendments under the Federal Constitution may well determine the ultimate fate of many voucher programs.

II. THE HISTORY OF THE BLAINE AMENDMENTS

A. Proposal and Enactment

The Blaine Amendments take their name from an unsuccessful proposal to amend the Federal Constitution that was introduced in Congress by then-Representative James G. Blaine of Maine.\textsuperscript{74} Most of the state provisions were enacted after the defeat of the federal proposal.\textsuperscript{75} This Section provides a brief overview of the proposal and enactment of the Blaine Amendments, beginning with a chronology of events surrounding the federal proposal and concluding with an overview of the state enactments.

The first major public statements on the Blaine Amendments were delivered by President Ulysses S. Grant. On September 30, 1875, in a speech to the Society of the Army of Tennessee, Grant exhorted his listeners to “[e]ncourage free schools, and resolve that not one dollar, appropriated for their support, shall be appropriated to the support of any sectarian schools.”\textsuperscript{76} On December 7 of that year, Grant submitted his final State of the Union address to Congress, calling for “a constitutional amendment . . . prohibiting the granting of any school funds, or school taxes, or any part

\textsuperscript{75} See discussion supra note 32. Several state Blaine Amendments were nevertheless enacted prior to the federal proposal. See, e.g., Wis. Const. art. I, § 18 (1848).
\textsuperscript{76} Green, supra note 74, at 47 (quoting Grant) (internal quotation marks omitted).
thereof... for the benefit or in aid, directly or indirectly, of any religious sect or denomination.’”

Representative Blaine responded to President Grant’s call-to-arms by introducing a proposed amendment to Congress. Blaine was an extraordinarily influential Republican member of Congress who had served as Speaker of the House until the Democrats recaptured the chamber in 1874. Blaine had openly set his eye on attaining the presidency in 1876 and was considered a “viable candidate” from a party tainted by scandal. On December 14, 1875, Blaine submitted the proposal that would ultimately bear his name. It 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.

The House debate was short. The entire debate occurred on August 4, 1876, with the discussion focusing almost entirely on whether the proposal would or should enlarge the legislative power of Congress. There was no discussion of the proposal’s substan-

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77 4 Cong. Rec. 174–75 (1875) (annual message of the President of the United States).
78 See Representative William E. Barrett, Memorial Address Upon the Late James G. Blaine, Delivered Before the House of Representatives 12–13 (Feb. 23, 1893) (noting that Representative Blaine “dominated [the] House, though in a minority”). Some of Representative Blaine’s fellow congressmen chafed at his influence. See id. at 13 (quoting Kentucky Representative Brown’s angry statement in one 1876 debate: “I want to know whether this is the American Congress, or a school in which we are merely pupils of the school-master from Maine!”).
79 See Green, supra note 74, at 49.
80 Id.
82 Id. (reprinted text of the proposed constitutional amendment).
83 See 4 Cong. Rec. 5189–92 (1876). The discussion addresses almost exclusively the concern that the amendment would appear to “vest, enlarge, or diminish legislative power in the Congress.” Id. at 5190. After adopting a proposal clarifying that the amendment would in no way expand legislative power, the House voted on the amendment in this altered form. See id. at 5191–92.
Blaine’s amendment passed the House with the required two-thirds supermajority, with 180 members voting in favor, 7 voting against, and 98 abstaining.

The Senate debate was far more extensive. The Senate began its consideration on August 7, 1876. Debate initially focused on the fact that the original proposal applied only to taxes raised for public school purposes. The amendment was then referred to the Judiciary Committee, which made two significant changes. First, it broadened the scope of the amendment to include all public monies and lands. Second, the committee added a new sentence to Section 1: “This article shall not be construed to prohibit the reading of the Bible in any school…”

The full Senate’s debate on this amended proposal ranged over a wide variety of topics. One recurrent topic was federalism. Senators discussed, among other things, how best to enforce the provision without granting the federal government “the power to interfere with the public schools of the States.” Several senators expressed concern that the proposal could “prohibit religious instruction in prisons,” hospitals, or reformatories. There was an extended colloquy concerning the meaning of an 1864 papal encyclical on the subject of religious education. Ultimately, the proposal fell short of the required two-thirds supermajority vote, with 28 members in favor, 16 opposed, and 27 absent. It was almost a perfect party-line vote: All but one of the voting Republicans sup-

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\[a\] See id. at 5189–92.
\[b\] See id. at 5191–92. Professor William O’Brien has attributed the lopsided House vote to the desire of “Democrats in the House… to deny the Republicans [a] campaign issue by voting for a proposal which they actually disapproved”). F. William O’Brien, The States and “No Establishment”: Proposed Amendments to the Constitution Since 1798, 4 Washburn L.J. 183, 192 (1965).
\[c\] See 4 Cong. Rec. 5245 (1876).
\[d\] See id.
\[e\] See id. at 5246, 5453.
\[f\] See id.
\[g\] Id.

While the House debate consumed only three pages of the Congressional Record, see supra note 84 and accompanying text, the Senate debate consumed eighteen. See 4 Cong. Rec. 5561–62, 5580–95 (1876).
\[h\] 4 Cong. Rec. 5561 (1876).
\[i\] Id. at 5581–82.
\[j\] See id. at 5583, 5587–91.
\[k\] See id. at 5595.
ported the amendment, and all of the voting Democrats opposed it.\textsuperscript{96}

The defeat of the Blaine Amendment in Congress did not, however, end the matter. During the late nineteenth and early twentieth century, approximately thirty states wrote or amended their constitutions to include language substantially similar to that of the defeated federal Blaine Amendment.\textsuperscript{97} In fact, Congress required that several prospective states include such provisions in their constitutions as a condition for admission to the Union.\textsuperscript{98}

\textbf{B. What Motivated the Blaine Amendments?}

This Section examines the historical background of the Blaine Amendments and demonstrates that they were motivated by a wave of anti-Catholic hysteria that swept the United States after the Civil War. One of the best illustrations of anti-Catholic motivation arose during the Senate debate. During an exchange with Senator Francis Kernan, a Democrat from New York, Senator Oliver Morton, a Republican from Indiana, stated:

\begin{quote}
My friend says there is no danger. Well, Mr. President, in my judgment there is danger. That cloud is looming above the horizon; it is larger than it was a few years ago . . . .

I ask my friend if there have not been large amounts of money given for the support of denominational institutions in his own State, given out of the public treasury or raised by public taxation?\textsuperscript{99}
\end{quote}

\textsuperscript{96} See Green, supra note 74, at 67. One of the most amusing facts of the federal Blaine Amendment's history is that James Blaine himself did not bother to vote for it. Blaine had been appointed to the Senate one month prior to the vote, but he was not present when the Senate voted on the amendment destined to be associated with his name. See id. at 67-68. Some commentators have opined that Senator Blaine's presence during the Senate's vote might have secured the amendment's passage. See id. at 68.

\textsuperscript{97} See Kinzer, supra note 32, at 11–12; Laycock, supra note 32, at 342. While a few of these provisions were enacted prior to the defeat of the Blaine Amendment in Congress, the majority of them were enacted after its defeat. See Grabiel, supra note 32, at 223 (stating that the Blaine Amendments were inserted "into twenty-nine state constitutions between 1877 and 1917").

\textsuperscript{98} See Viteritti, Choosing Equality, supra note 7, at 146–47 (discussing state constitutional amendments in Montana, New Mexico, North Dakota, South Dakota, and Washington).

\textsuperscript{99} 4 Cong. Rec. 5585 (1876).
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The "denominational institutions" to which Senator Morton was referring were Roman Catholic schools.\textsuperscript{100}

The period from the end of the Civil War until the end of the First World War witnessed explosive growth in the number of Catholic Americans, both in absolute numbers and as a percentage of the American population. When the United States gained its independence in 1789, only 35,000 of its citizens—less than 1%—were Roman Catholics.\textsuperscript{101} By 1840, their numbers had risen to 563,000,\textsuperscript{102} or approximately 3.3% of the American population.\textsuperscript{103} The rate of increase quickened during the next two decades, and shortly after the end of the Civil War, in 1866, just over one in ten Americans were Catholic.\textsuperscript{104} The Catholic population nearly doubled between 1864 and 1884,\textsuperscript{105} a time when the overall population grew 59%.\textsuperscript{106} By 1891, 8,277,000 American Catholics\textsuperscript{107} made up 12.9% of the nation's population.\textsuperscript{108} Through a combination of immigration\textsuperscript{109} and domestic birth rate, the number of Catholic Americans grew by over two million each decade from 1891 until 1921,\textsuperscript{110} by which time they constituted 16.5% of the nation's population.\textsuperscript{111}

\textsuperscript{100} See id. at 5585-86 (continuing exchange between Senators Morton and Kernan); see also Green, supra note 74, at 43 (noting that Catholic schools received over $700,000 from the State of New York in 1871).


\textsuperscript{103} The overall population grew to 17,120,000 by 1840. See U.S. Dep't of Commerce, Historical Statistics of the United States 14 Series A 6-8 (1975) [hereinafter Historical Statistics].

\textsuperscript{104} The Catholic population in 1866 was approximately 4,000,000. See Hennesey, supra note 102, at 159. While Hennesey estimates that the total American population at that time was 30,000,000, census figures place the number at 36,538,000. See Historical Statistics, supra note 103, at 14 Series A 6-8.

\textsuperscript{105} See Kinzer, supra note 32, at 13.

\textsuperscript{106} The national population grew from 34,863,000 to 55,379,000 during this period. See Historical Statistics, supra note 103, at 14 Series A 6-8.

\textsuperscript{107} See id. at 392 Series H 800-805. The first year for which the United States government has official records listing the number of American Catholics is 1891. See id.

\textsuperscript{108} The total national population in 1891 was 64,361,000. See id. at 14 Series A 6-8.

\textsuperscript{109} See Hennesey, supra note 102, at 173 (noting that the United States absorbed over 1,000,000 Catholic immigrants each decade during this time period).

\textsuperscript{110} See Historical Statistics, supra note 103, at 390 Series H 800-805.

\textsuperscript{111} The national population in 1921 was 108,538,000. See id. at 14 Series A 6-8.
These Catholic immigrants were not easily integrated into the Protestant-dominated civil society that had characterized the United States prior to the Civil War. Catholic immigrants were mostly poor and predominantly settled in urban areas. Catholics often perceived Protestant-controlled public schools as hostile to their faith and values. Professor Joseph Viteritti notes that these perceptions were largely based in reality: "The common-school curriculum promoted a religious orthodoxy of its own that was centered on the teachings of mainstream Protestantism and was intolerant of those who were non-believers." Catholics particularly objected to the then-prevalent use of the King James Bible in public schools because the text was not approved for Catholic worship.

Catholics formed political alliances with other religious minorities in response to the hostility of the public schools. Their aims were generally two-fold: removing Protestant bias from public institutions and gaining public funding for Catholic institutions. Catholic activists achieved notable success on both fronts during the late nineteenth century. In 1872, three years before Representative Blaine introduced his famous amendment, the highest court in Ohio sustained the Cincinnati Board of Education’s decision to remove the King James Bible from the public schools. In addition to their success in Cincinnati, Catholics also succeeded in removing the King James Bible from the curricula in New York, and Chicago; these successes spurred further efforts in other northern

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112 See Hennesey, supra note 102, at 184.
113 See Viteritti, Blaine’s Wake, supra note 4, at 666–67. One example, admittedly anecdotal, suggests that such claims were not without merit: During the 1830s the two “public” schools in Chicago were located on the grounds of Presbyterian and Baptist churches. See Hennesey, supra note 102, at 185 (noting that “[t]he alliance of common school and Protestantism . . . prospered” during the nineteenth century); see also Green, supra note 74, at 41 (commenting on the “obvious evangelical Protestant overtones [of] public education”).
114 Viteritti, Blaine’s Wake, supra note 4, at 666.
115 See Kinzer, supra note 32, at 5–7; Viteritti, Blaine’s Wake, supra note 4, at 666–68.
116 See Hennessey, supra note 102, at 185.
117 See Kinzer, supra note 32, at 5.
118 See Board of Educ. v. Minor, 23 Ohio St. 211, 211–12, 253 (1872), discussed in Kinzer, supra note 32, at 5–6.
states. Catholics succeeded in obtaining funding for their schools in New York, Wisconsin, and several other states.

Both sets of efforts were met with fierce resistance from nativist Protestant groups. Overtly anti-Catholic periodicals proliferated, and anti-Catholic sermons thundered from Protestant pulpits. Anti-Catholic activists pushed for compulsory schooling laws that would require all children to attend public schools. Interdenominational Protestant "societies," including the Order of the American Union, the Alpha Association, and the American Protective Association, were formed to preserve Protestant religion in public schools and to prevent aid from being directed to Catholic schools. These groups allied with Protestant churches for two purposes: "to preserve Bible study in public-school curricula and to deny government support to sectarian institutions." The Republican Party, which had experienced devastating defeat during the 1874 congressional elections, resolved to make full use of "the school question" during the presidential election of 1876.

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119 See Green, supra note 74, at 47; Viteritti, Blaine's Wake, supra note 4, at 670.
121 See Viteritti, Blaine’s Wake, supra note 4, at 669. Professor Viteritti writes that this pro-Catholic activity provoked a display of majoritarian politics of unprecedented brutality—all under the inverted banner of religious freedom. When Bishop Hughes of New York entered the fray in 1842 to demand public support for Catholic schools, his residence was destroyed by an angry mob, and militia were summoned to protect St. Patrick's Cathedral. When Catholics in Michigan proposed a similar school bill in 1853, opponents portrayed their plan as a nationwide plot hatched by the Jesuits to destroy public education. Parochial school advocates in Minnesota were accused of subverting basic American principles. When the Know-Nothing Party gained control of the Massachusetts legislature in 1854, it drafted one of the first state laws to prohibit aid to sectarian schools, and simultaneously instituted a Nunnery Investigating Committee.
123 See Billington, supra note 122, at 41–47.
124 See Kinzer, supra note 32, at 12. These laws were eventually held unconstitutional. See Pierce v. Society of Sisters, 268 U.S. 510, 534–35 (1925).
125 See Green, supra note 74, at 41–42; Higham, supra note 120, at 28–30.
127 O'Brien, supra note 126, at 142 (quoting letter from Rutherford Hayes to Blaine).
The Blaine Amendments arose out of this historical context, and the conclusion that they were driven by the Protestant/Catholic divide is unmistakable, despite the fact that none of the amendments refer specifically to Roman Catholics or Catholic schools. This appears to be the scholarly consensus. It is also supported by the statistics regarding private school religious affiliation at the time, the Senate debate over the Federal Blaine Amendment, and the breakdown of social and political groups that supported and opposed the measure.

Virtually all private schools were affiliated with the Catholic church when the Blaine Amendments were proposed and enacted. This trend was slow to change: As late as 1959, over 90% of private primary and secondary schools were Catholic-affiliated, and as late as 1970, 97.4% of students attending Catholic schools were Catholic. The conclusion is inescapable: When politicians spoke of private or sectarian schools during the debate over Blaine Amendments, they meant Catholic schools. This supposition is supported by an examination of the Senate debate of the proposed federal Blaine Amendment. The debate was replete with allusions to the Catholic controversy. The word “Catholic,” for example, was used fifty-nine times during the one-day Senate debate. The Pope was mentioned twenty-three times, and there was an extended colloquy about an 1864 papal encyclical

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123 See, e.g., Green, supra note 74, at 41-42; Marie Carolyn Klinkhamer, The Blaine Amendment of 1875: Private Motives for Political Action, 42 Cath. Hist. Rev. 15, 18-19, 27 (1956); Laycock, supra note 32, at 342; O'Brien, supra note 126, at 139-43; Viterritti, Blaine’s Wake, supra note 4, at 659.

124 See O'Brien, supra note 126, at 149 (“The fact was that by 1870 the Protestants, except on their missions, had almost universally abandoned parochial schools, whereas the Catholics were multiplying theirs in considerable number.”).

125 See Hennessey, supra note 102, at 296.


127 While disparate impact on a particular group is generally not sufficient to demonstrate intentional discrimination under the Constitution, results this stark nevertheless provide common sense support for the proposition that the Blaine Amendments were passed with a constitutionally invalid purpose. See Washington v. Davis, 426 U.S. 229, 242 (1976) (stating that disproportionate impact on a suspect class, while “not the sole touchstone” for proving invidious purpose, is not irrelevant).

128 See generally the discussion supra in Part II.

129 See 4 Cong. Rec. 5562, 5582-85, 5587-94 (1876).

130 See id. at 5583, 5587-91.
on the subject of religious education. While most supporters took pains to deny that the proposal was motivated by anything but religious neutrality, others were not so careful. Perhaps the most revealing comment was made by Senator George F. Edmunds of Vermont, who, when speaking in reference to the papal encyclical, stated:

[T]hese dogmas and commands put forth in 1864 are at this moment the earnest, effective, active dogmas of the most powerful religious sect that the world has ever known, or probably ever will know—a church that is universal, ubiquitous, aggressive, restless, and untiring. I do not speak of it as impugning the right of any man to believe all this; it is just as much his right to believe it as it is mine to believe in the duty of preserving public schools from that sort of domination . . .

The “sort of domination” feared by Senator Edmunds is unmistakably domination by the Roman Catholic church. Opponents of the Blaine Amendment repeatedly justified their position by suggesting that the proposal was motivated by anti-Catholic animus. While it is beyond the scope of this Note to examine the transcripts from every State that enacted a Blaine Amendment, this examination of the federal legislative history suggests that anti-Catholicism may have played a role in state enactments as well.

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136 See id. at 5583, 5587–88, 5591.
137 See, e.g., id. at 5585 (statement of Sen. Morton) (“Every sect is left free. The Catholics may have as many schools as they see proper and teach their religion, and so may Protestants—no abridgment of their freedom.”).
138 Id. at 5588.
139 See id. at 5583 (statement of Sen. William Pinckney Whyte); id. at 5589 (statement of Sen. John W. Stevenson). This claim was perhaps most eloquently made by Missouri Senator Lewis V. Bogy:

I think I know the motive and the animus which have prompted all this thing. I do not believe it is because of a great devotion to the principles of religious liberty. That great idea which is now moving the modern world is used merely as a cloak for the most unworthy partisan motives. The African race has played its part in this country; the negro is for party purposes in a manner dead; and these gentlemen, knowing that this thing is played out, and that “the bloody shirt” can no longer call out the mad bull, another animal has to be brought forth by these matadores to engage the attention of the people in this great arena in which we are soon all to be combatants. The Pope, the old Pope of Rome, is to be the great bull that we are all to attack.

Id. at 5589 (statement of Sen. Bogy).
A final piece of evidence supporting the scholarly consensus is the pattern of both support for and opposition to the Blaine Amendments. Support for, and particularly opposition to, the Blaine Amendments fell largely along Protestant/Catholic lines. The positions of the Republican and Democratic parties were thought to be dictated by the parties’ desires to appeal to nativist Protestant and immigrant Catholic voters, respectively. The newspaper The Nation, for example, which was friendly toward Blaine’s politics, acknowledged that the proposed amendment was “directed against the Catholics” for the purpose of allowing Blaine to “use it in [his presidential] campaign to catch anti-Catholic votes.” This reality was not lost on Rutherford B. Hayes, the man who would be elected President in 1876 on the Republican ticket. Speaking in reference to the school controversy in 1875, he stated: “We must not let the Catholic question drop out of sight.”

The Blaine Amendments are an artifact of the religious tensions that plagued the United States during the latter third of the nineteenth century. During that time, a growing Catholic minority became increasingly vocal in challenging widely accepted practices supporting Protestantism in American culture. This Catholic minority also became increasingly successful in attaining support for alternative institutions. These demands provoked a backlash by the nation’s Protestant majority. Out of this atmosphere the Blaine Amendments emerged—purporting to settle the issue of whether state aid may flow to Catholic institutions. It is, however, appropriate to inquire whether the historical animus that motivated the passage of the Blaine Amendments is relevant to determining whether the policy judgments reflected in the Amendments should continue to bind us today.

III. ARE THE BLAINE AMENDMENTS UNCONSTITUTIONAL?

This Part argues that many of the Blaine Amendments violate the Equal Protection Clause of the Federal Constitution. Section III.A demonstrates that distinctions drawn on the basis of religion

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140 See Green, supra note 74, at 51–53.
141 See id. at 51–54.
142 Two Favorite Sons, Nation, Mar. 16, 1876, at 173.
143 O’Brien, supra note 126, at 142 (quoting Hayes).
are suspect. Section III.B shows how most (if not all) of the Blaine Amendments make distinctions based on religion because their original purpose was directed at Catholic schools. Section III.C demonstrates that the Blaine Amendments, subject to strict scrutiny, fail that test because they are not narrowly tailored to any compelling state interest.

A. Is Religion a Suspect Class?

The Equal Protection Clause is concerned with the way government treats some people vis-à-vis others. Any state action that treats some people differently than others must, at the very least, bear a rational relationship to a legitimate state interest. State action that differentiates based upon a suspect criterion, such as race or national origin, is subject to the higher standard of strict scrutiny and must be narrowly tailored to address a compelling state interest to avoid invalidation.

State action can discriminate along suspect lines in two ways: either through overt discrimination or through a facially neutral policy that was enacted with a discriminatory purpose. Perhaps the best known example of the former type of overtly discriminatory laws were those requiring public schools to be segregated by race. An example of the latter type of facially neutral but nevertheless discriminatory state action would be a state constitutional provision disenfranchising any person convicted of an offense involving "moral turpitude" that was enacted with the purpose of stripping African-Americans of the franchise and that had historically operated with that effect.

The threshold issue under equal protection analysis is thus whether the Blaine Amendments were motivated by a suspect dis-
criminatory purpose. If they were, then they are subject to strict scrutiny. If not, then they are presumably subject only to rational basis review. The Supreme Court has repeatedly stated, albeit in dicta, that distinctions based on religion, like those based on race, are suspect under the Equal Protection Clause. Two lower courts have recently reached the same conclusion. This suggests that state actions distinguishing between specific religious groups—such as Catholics and non-Catholics—or between believers and nonbelievers are subject to strict scrutiny.

Only two factors cast doubt on this conclusion, but neither fatally undermines it. First, the modern Supreme Court has never analyzed a claim of discrimination against a religious group or against religion in general under the Equal Protection Clause. The plaintiffs in two recent cases in the United States Supreme Court involving religious liberty have raised equal protection claims during some phase of the litigation, but the Court resolved both such cases on free speech grounds. This fact need not, how-

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Another recent religious liberty case, which involved a challenge to a city ordinance banning animal sacrifice, was decided on Free Exercise grounds. See Church of
School Choice and State Constitutions

ever, raise doubts concerning the status of religion under equal protection. Most state actions that differentiate based on religion do so with regard to religiously motivated conduct. Until Employment Division v. Smith was decided in 1990, the Free Exercise Clause was (in theory) considerably more protective in such situations than the Equal Protection Clause, because the Equal Protection Clause requires a showing of discriminatory purpose to trigger strict scrutiny while the Free Exercise Clause (in theory) requires only an adverse impact on a religious practice. Similarly, no showing of intent is necessary when governmental action facially discriminates against certain categories of speech.

The second potential argument against applying strict scrutiny to discrimination against religious people in general or Catholics in particular is that such distinctions do not raise the concerns against which strict scrutiny is intended to guard. The rationale for heightened scrutiny first articulated in United States v. Carolene Products focused on the existence of "prejudice against discrete and insular minorities." It could be argued that distinctions tending to disadvantage religious persons in general or Catholics in particular need not be examined under heightened scrutiny because neither group is discrete or insular.

This argument seems particularly strong when applied to religiosity in general. At least 80% of Americans claim to believe in

the Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 531–46 (1993). It does not appear from the lower court opinion that the plaintiffs in Lukumi ever explicitly raised a claim based on the Equal Protection Clause. See Church of the Lukumi Babalu Aye v. City of Hialeah, 723 F. Supp. 1467, 1479 (S.D. Fla. 1989) (disagreeing with the plaintiff's contention that "the ordinances were passed [with the purpose of] discriminat[ing] against" plaintiffs, but never referring to any argument based on the Equal Protection Clause), aff'd, 936 F.3d 586 (11th Cir. 1991) (unpublished opinion), rev'd, 508 U.S. 520 (1992). Nevertheless, a majority of the Supreme Court was careful to avoid even the appearance that it was relying on the Equal Protection Clause. When Justice Anthony Kennedy attempted to inject a discussion of equal protection doctrine into his opinion for the Court, he was joined in that part only by Justice John Paul Stevens. See 508 U.S. at 540–41.

145 See id. at 892–93 (O'Connor, J., concurring).
148 See Rosenberger, 515 U.S. at 819–20; Lamb's Chapel, 508 U.S. at 394.
149 304 U.S. 144 (1938).
150 Id. at 153 n.4.
Religious people constitute an overwhelming majority, not an oppressed minority. It is, after all, difficult to think of any successful political leaders who are avowed atheists. This argument can likewise be applied to Roman Catholics, albeit with somewhat less force. It is unquestionably true that American Catholics have endured a long history of discriminatory treatment. It nevertheless seems overstated to refer to Catholics as a discrete and insular minority. Catholics presently constitute 25% of the American population, and Catholic voters are considered an important constituency in national politics.

Whether religious people in general or Catholics in particular are discrete and insular is, however, ultimately irrelevant for determining the level of equal protection scrutiny. The Court has made clear that the issue in equal protection cases is not whether a suspect group is being discriminated against but rather whether the basis of the classification is suspect. This approach was most dramatically illustrated in City of Richmond v. J.A. Croson Co. and Adarand Constructors v. Pena, both of which held that discrimination against Caucasians is subject to strict scrutiny. The Adarand Court specifically noted that while “[m]ost [previous equal protection cases] involved classifications burdening groups that have suffered discrimination in our society,” the standard of review applied in equal protection cases “is not dependent on the race of those burdened or benefited by a particular classification.”

Similarly, a line of decisions going back at least as far as Craig v. Boren holds that discrimination against men is subject to the


See discussion supra Part II.


Adarand, 515 U.S. at 224; Croson, 488 U.S. at 493–94.

Adarand, 515 U.S. at 218.

Id. at 224 (quoting Croson, 488 U.S. at 494).

429 U.S. 190 (1976). A fair argument can be made that this line of cases actually stretches back to Frontiero v. Richardson, 411 U.S. 677 (1973), where the Court applied heightened scrutiny to strike down a military regulation that presumed the
same level of equal protection scrutiny as discrimination against women.\textsuperscript{17} While the demographics and power structure of the United States have certainly changed, few would argue that white men are a discrete and insular minority needing extraordinary protection from active discrimination in the political process. Nevertheless, once heightened scrutiny is applied to discrimination against one group, such as women, the Court has held that "consistency" requires application of the same level of scrutiny to all distinctions drawn on that basis.\textsuperscript{172}

The principle applied in these cases dictates that all distinctions based on religion are suspect for equal protection purposes. Suppose a state passed a law declaring that "[t]he children of Atheists, Jews, and Muslims shall be ineligible to attend public school." There can be little doubt that the Court would invoke strict scrutiny and strike down the provision. If this supposition is accurate, then fidelity to the "consistency" principle stated in \textit{Adarand} and applied in the sex discrimination cases dictates that strict scrutiny must be applied to all distinctions that disadvantage religious people in general or a certain religious group in particular. Accordingly, if the Blaine Amendments discriminate on the basis of religion, then they should be subject to strict scrutiny under the Equal Protection Clause.

\textbf{B. Do the Blaine Amendments Discriminate on the Basis of Religion?}

The Blaine Amendments discriminate on the basis of religion in two ways. First, they were enacted with the constitutionally sus-

\textsuperscript{17} See \textit{Adarand}, 515 U.S. at 229–30.
pect purpose of discriminating against Roman Catholics. Second, the majority of the Blaine Amendments facially classify on the basis of religion, since, by their very terms, they impose different rules on private schools based on whether they have a religious affiliation. This Section discusses the first of these arguments, while Part IV considers the second.

Arguing that the Blaine Amendments unconstitutionally discriminate against Catholics would be somewhat novel. Because the Amendments are facially neutral, and because any discriminatory purpose that motivated them occurred over one hundred years ago, such a claim might seem tenuous. While this precise question does not appear to have been litigated, a recent case from Arizona nevertheless demonstrates that some courts may well be receptive to the argument.

The history recounted in Part II suggests that the Blaine Amendments were originally enacted with the constitutionally suspect purpose of discriminating against Catholics. Washington v. Davis established that purposeful discrimination is necessary to trigger heightened scrutiny. Personnel Administrator v. Feeney clarified that a constitutionally impermissible purpose exists only when an action was taken "because of," not merely "in spite of," a particular outcome. While it could be argued that the Blaine Amendments were passed to ensure the solvency of the public school fund or out of a desire to encourage the development of

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173 See discussion supra Section II.B.
174 See, e.g., Wis. Const. art. I, § 18 (forbidding the allocation of public money "for the benefit of religious societies, or ... seminaries").
175 See Kotterman v. Killian, 972 P.2d 606, 624 (Ariz.) (en banc) ("[W]e would be hard pressed to divorce the [Blaine Amendment's] language from the insidious discriminatory intent that prompted it."), cert. denied, 120 S. Ct. 283 (1999). This case is further discussed infra in Part V.
177 See id. at 240 (noting the equal protection principle that "the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose").
179 Id. at 279 ("'Discriminatory purpose' ... implies that the decisionmaker ... selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group.") (citations omitted).
strong public schools, such a conclusion is contrary to the historical record.\textsuperscript{180}

Of course, more than a century has passed since the Blaine Amendments were enacted. The question thus becomes whether that fact is relevant to constitutional review. In other words, does passage of time operate to mitigate initial discriminatory purpose under the Equal Protection Clause?

The short answer is no. Passage of time, standing alone, is insufficient to purge the taint of an originally invidious purpose. In \textit{Hunter v. Underwood},\textsuperscript{181} the Supreme Court unanimously struck down a provision of the Alabaina Constitution that disenfranchised any person convicted of an offense involving moral turpitude.\textsuperscript{182} It was not seriously disputed that the provision had been enacted, in the words of the President of the 1901 convention that drafted it, to "establish white supremacy in [Alabama]."\textsuperscript{183} The Supreme Court brushed aside Alabama's argument that the provision's original intent was too historically remote to be dispositive because the provision conceivably could serve legitimate, nondiscriminatory state interests:

Without deciding whether [the provision] would be valid if enacted today without any impermissible motivation, we simply observe that its original enactment was motivated by a desire to discriminate against blacks on account of race and the section continues to this day to have that effect. As such, it violates equal protection . . . .\textsuperscript{184}

\textit{Hunter} thus teaches that the impermissible anti-Catholic motivations that created the Blaine Amendments will not be excused simply because so many decades have elapsed since the provisions were enacted.

What additional actions by a legislative body are necessary to ameliorate an original invidious purpose? Two cases, \textit{Rostker v. Goldberg}\textsuperscript{185} and \textit{United States v. Virginia}\textsuperscript{186} ("VMP") suggest an an-

\textsuperscript{180} See discussion supra Section II.B.
\textsuperscript{181} 471 U.S. 222 (1985).
\textsuperscript{182} See id. at 232–33.
\textsuperscript{183} Id. at 229.
\textsuperscript{184} Id. at 233.
\textsuperscript{185} 453 U.S. 57 (1981).
\textsuperscript{186} 518 U.S. 515 (1996).
Explicit legislative reauthorization purges the taint of prior discriminatory purpose; the newly authorized, facially neutral provision is therefore constitutional unless a fresh showing of discriminatory purpose is made.

In *Rostker*, the Supreme Court upheld the sex-specific provisions of the Military Selective Service Act ("MSSA") after examining the extensive legislative history arising out of a 1980 funding reauthorization debate. The Court rejected the suggestion that it should determine the purposes behind the MSSA solely by reviewing evidence contemporaneous to the Act's original enactment "in its modern form" in 1948. The Court noted that while "Congress did not change the MSSA in 1980," it did "thoroughly reconsider the question of exempting women from its provisions, and its basis for doing so." This detailed reconsideration was sufficient to convince the Court that Congress had not "unthinkingly" maintained the sex-specific policy based on "a traditional way of thinking about females."

This rationale is further supported by *VMI*, which held that the Constitution requires that women be admitted to the Virginia Military Institute ("VMI"). In that case, the Commonwealth of Virginia argued that any discriminatory purpose that may have originally motivated the decision to operate VMI as a single-sex school was no longer relevant since VMI's admissions policy had been explicitly reassessed following the Supreme Court's 1982 decision in *Mississippi University for Women v. Hogan*, which held that Mississippi could not operate an all-female nursing school. Specifically, the Commonwealth argued that VMI's single-sex status had been maintained to promote diversity within Virginia's system of higher education.

The Court ultimately rejected this argument, finding that nothing in the post-*Hogan* reconsideration had demonstrated that

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187 See *Rostker*, 453 U.S. at 72-83.
188 Id. at 74.
189 Id. at 75.
190 Id. at 72, 74 (quoting Califano v. Webster, 430 U.S. 313, 320 (1977) (quoting Califano v. Goldfarb, 430 U.S. 199, 223 (1977) (Stevens, J., concurring in the judgment))).
191 See *VMI*, 518 U.S. at 535-40, 554-56.
193 See id. at 723-33.
194 See *VMI*, 518 U.S. at 535.
VMI's single-sex status had actually been maintained in the interests of educational diversity. \(^{195}\) Importantly, the Court never held that subsequent reconsideration was incapable of dispelling an original invidious intent. In fact, the Court's willingness to consider the Commonwealth's argument in \(\text{VMI}\) suggests that, under appropriate circumstances, genuine reflection and reconsideration will be sufficient to achieve such a result.

\(\text{Hunter}, \text{Rostker}, \text{and VMI}\) thus demonstrate that sufficient legislative reconsideration may purge the taint of original invidious intent, but none of the cases defines the requisite degree of reconsideration. While \(\text{Hunter}\) strongly implies that actual substantive reenactment will be constitutionally sufficient, \(\text{Rostker}\) and \(\text{VMI}\) indicate that something short of that may suffice in some cases. It may be significant that in both \(\text{Rostker}\) and \(\text{Virginia}\) the sex-based classification itself was explicitly reconsidered and retained. In such cases, it seems unlikely that the legislative body unthinkingly continued an invidious policy is lessened. \(^{196}\) It remains unclear whether a general review that does not explicitly reconsider the specific policy in question could ever be constitutionally sufficient.

The most important question with respect to the continuing status of each state's Blaine Amendment appears to be whether the provision in general, or the state constitution as a whole, has been reenacted since the Blaine Amendment was originally adopted. While some states have explicitly reenacted or amended their Blaine Amendments, \(^{197}\) others have not. \(^{198}\) Where such reauthorization has not occurred, \(\text{Hunter}\) indicates that the Blaine Amendments should be subject to strict scrutiny. Where reauthorization has occurred, \(\text{Rostker}\) and \(\text{VMI}\) suggest that the taint

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\(^{195}\) See id. at 539.

\(^{196}\) See \(\text{Rostker}, 453\) U.S. at 72.

\(^{197}\) See, e.g., Legislative Drafting Research Fund of Columbia University, Constitutions of the United States: Wisconsin WI-4-WI-5 (1997) (noting that the state's Blaine Amendment had been amended to remove sex-specific terminology); Dyckman, supra note 36 (noting that Florida's Blaine Amendment has been reinstated).

\(^{198}\) See, e.g., Legislative Drafting Research Fund of Columbia University, Constitutions of the United States: Colorado i (1992) (stating that the Colorado constitution of 1876 is still in force); Legislative Drafting Fund of Columbia University, Constitutions of the United States: Kentucky i (1998) (stating that Kentucky's 1891 constitution remains operative).
may have been purged, particularly if the Blaine Amendments' original discriminatory purpose was overtly discussed and explicitly abandoned during subsequent reauthorization debates.¹⁹

C. Do the Blaine Amendments Survive Strict Scrutiny?

Most, if not all, of the Blaine Amendments should be subject to—and should fail to satisfy—strict scrutiny under the Equal Protection Clause. The Amendments cannot survive strict scrutiny because they are significantly overinclusive with regard to the only compelling state interest they may reasonably be seen to further: compliance with the Federal Constitution.

State action rarely survives strict scrutiny. To be upheld under a strict scrutiny standard, a state-mandated classification must be motivated by a compelling state interest and must be narrowly tailored to achieve that goal.²⁰ While strict scrutiny has often been derided as “strict in theory and fatal in fact,”²¹ the Supreme Court has recently indicated that some classifications should be able to pass the test.²²

The Supreme Court has deemed few state interests to be compelling.²³ Compliance with other provisions of the Federal Constitution, such as the Establishment Clause, is, however, one such compelling state interest.²⁴ The problem is that state Blaine

¹⁹ See Dyckman, supra note 36 (arguing that this has occurred in Florida).
²² See Adarand, 515 U.S. at 237 (“[W]e wish to dispel the notion that strict scrutiny is ‘strict in theory, but fatal in fact.’”)
²³ Some interests found compelling by the Court include remedying past racial discrimination caused or perpetuated by a specific organ of government, see City of Richmond v. Croson, 488 U.S. 469, 491–92 (1989) (plurality opinion) (“[A] state... has the authority to eradicate the effects of private discrimination within its own legislative jurisdiction.”), and protecting national security, see Korematsu v. United States, 323 U.S. 214, 217, 223–24 (1944). The Court has also found compelling various other interests of a fairly high order. See, e.g., Reno v. ACLU, 521 U.S. 844, 868–69 (1997) (protecting minors from “indecent” and “patently offensive” speech); R.A.V. v. St. Paul, 505 U.S. 377, 396 n.8 (1992) (“preventing voter intimidation and election fraud”).
Amendments are only relevant to the constitutionality of a voucher program if they are construed in a manner that makes them more restrictive than the Establishment Clause. When construed in that manner, the Blaine Amendments are, by definition, overinclusive because they go further than is necessary to comply with the Establishment Clause's self-executing dictates.

A second possible compelling interest is a state's interest in complying with its own constitutional requirement of strict separation between church and state. In *Widmar v. Vincent*, the Supreme Court explicitly reserved this question with respect to the Free Speech Clause, stating that it was "unnecessary for [the Court] to decide whether, under the Supremacy Clause, a state interest, derived from its own constitution, could ever outweigh free speech interests protected by the First Amendment." And in at least two cases, state supreme courts have summarily held that the state's obligation to comply with its own constitution is sufficient to overcome an equal protection challenge. It seems reasonably clear, however, that the United States Supreme Court would not allow a state to violate equal protection rights in the name of complying with a state constitutional provision. The Supremacy Clause dictates that federal constitutional guarantees trump conflicting state laws—not vice versa.

The Supreme Court has frequently ruled that practices dictated by a state constitution violate the Federal Constitution. In *Widmar*, for example, the Court held that compliance with the Missouri Constitution could not justify a university's refusal to allow

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Id. at 275–76.

See Dickman v. School Dist. No. 62C, 366 P.2d 533, 544 (Or. 1961) (en banc) (holding that the state's refusal to provide textbooks to a religious student did not violate the Equal Protection Clause because such a result is "commanded by the [state] constitution itself"); Witters v. State Comm'n for the Blind, 771 P.2d 1119, 1120, 1123 (Wash. 1989) (en banc) (holding that the state's refusal to allow a blind man to utilize a tuition assistance program to enroll in a seminary did not violate equal protection because of the state's "compelling interest in maintaining the strict separation of church and state" as was required by the state constitution).

See U.S. Const. art. VI, cl. 2 ("This Constitution ... shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.").
religions student groups access to public facilities. In Brown v. Board of Education, perhaps the most celebrated case in the last century, the Court invalidated provisions of the Delaware, Kansas, South Carolina, and Virginia constitutions on Equal Protection Clause grounds. And in Hunter v. Underwood, the Court struck down a provision of the Alabama constitution that restricted the voting rights of African-Americans. Indeed, the sole exception to the principle that federal constitutional standards may not be limited by local practice lies in the area of obscenity, where the Court has allowed "contemporary community standards" to dictate whether material is "obscene" and therefore not protected by the First Amendment. This approach has not spread to other areas of constitutional law.

Because no other compelling state interest seems available to defend the Blaine Amendments, many of them are unconstitutional. The Blaine Amendments were enacted with the constitutionally suspect purpose of discrimination against a particular religious group—Roman Catholics. Unless substantively reenacted, or explicitly reconsidered under circumstances demonstrating that they have been retained for noninvidious reasons, they are therefore subject to strict scrutiny under the Equal Protection Clause of the Federal Constitution. Since Blaine Amendments are not necessary to the accomplishment of any compelling state interest, any Amendment subjected to strict scrutiny will almost certainly fail the test. Accordingly, it appears that the Blaine Amendments of many states should not pose an independent barrier to the participation of religious schools in a voucher program.

209 See Widmar, 454 U.S. at 265, 276.
211 See id. at 486 n.1, 493–95.
213 See id. at 223.
215 See, e.g., Poodry v. Tonawanda Band of Seneca Indians, 85 F.3d 874, 900–01 (2d Cir. 1996) ("[T]here is simply no room in our constitutional order for the definition of basic rights on the basis of cultural affiliations . . . ."); Mark D. Rosen, Our Nonuniform Constitution: Geographical Variations of Constitutional Requirements in the Aid of Community, 77 Tex. L. Rev. 1129, 1135 (1999) (arguing that "courts and commentators systematically ignore, or are hostile to, geographical constitutional nonuniformity," which refers to "variations across geographical locations as to what activities are permitted, required, or proscribed under the Federal Constitution").
IV. MAY RELIGIOUS SCHOOLS EVER BE EXCLUDED FROM A VOUCHER PROGRAM?

The conclusion that many of the Blaine Amendments are unconstitutional will not necessarily ensure that religious schools will be allowed to participate in voucher programs. First, some Blaine Amendments may be immune from a challenge based upon their original discriminatory purpose if they have been reenacted and a fresh showing of discriminatory purpose cannot be made.\(^{216}\) Second, other, nondiscriminatory state constitutional provisions could be invoked to justify the exclusion of religious schools.\(^{217}\) Finally, political expediency could result in the passage of a voucher program that excludes religious schools.\(^{218}\)

This Part therefore examines the broader question of whether, absent Establishment Clause prohibition, it would ever be constitutional to exclude religious schools from a voucher program under the Equal Protection Clause.\(^{219}\) It concludes that this exclusion

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\(^{216}\) See supra Section III.B.

\(^{217}\) See Chittenden Town Sch. Dist. v. Vermont Dep’t of Educ., 738 A.2d 539, 562-63 (Vt.) (affirming the exclusion of religious schools from a voucher program because their inclusion would violate the non-Blaine Amendment provision of the state constitution), cert. denied, 120 S. Ct. 626 (1999); see also Jackson v. Benson, 578 N.W.2d 602, 623-30 (Wis.) (rejecting claims that a private voucher program would violate three non-Blaine Amendment provisions of the state constitution), cert. denied, 525 U.S. 997 (1998).

\(^{218}\) See Miller v. Benson, 878 F. Supp. 1209 (E.D. Wis.), vacated as moot, 68 F.3d 163 (7th Cir. 1995). The equal protection issue was presented but not decided in Miller v. Benson. The Milwaukee voucher program excluded religious schools when it was first enacted, and a group of parents challenged this exclusion on equal protection and free exercise grounds. See id. at 1212. The district court granted summary judgment to the defendants on the ground that inclusion of religious schools would violate the Establishment Clause. See id. at 1215-16. The Wisconsin legislature nevertheless amended the program to include religious schools while the case was on appeal to the Seventh Circuit. See Miller v. Benson, 68 F.3d 163, 164 (7th Cir. 1995). The Seventh Circuit concluded that the case had been mooted by this amendment and remanded to the district court with instructions to dismiss the case. See id. at 164-65.

\(^{219}\) It is possible that excluding religious schools would violate other constitutional provisions as well, such as the Free Exercise or Free Speech Clauses. See, e.g., Michael W. McConnell, Government, Families, and Power: A Defense of Educational Choice, 31 Conn. L. Rev. 847, 857-58 (1999) (suggesting that exclusion would violate the Free Exercise and Free Speech Clauses); Volokh, supra note 144, at 365-71 (1999) (same, but also making arguments based on the Establishment and Equal Protection Clauses). These arguments implicate additional complex areas of law that are beyond the scope of this Note.
would violate the Equal Protection Clause because the exclusion of religious schools would involve a constitutionally suspect line drawn on the basis of religion. As explained previously, distinctions drawn on the basis of religion are suspect for equal protection purposes. Excluding religious schools from a voucher program simply because they are religiously affiliated would explicitly create a distinction on the basis of religion and should therefore be subject to strict scrutiny.

The exclusion of religious schools from a voucher program would create a constitutionally unique situation. Government classifications that distinguish on the basis of suspect criteria are generally viewed as distinguishing between groups of people. By contrast, excluding religious schools, as opposed to religious children, from participation in a voucher program would create a distinction between institutions, rather than people, on the basis of religion.

This deviation from the equal protection norm could be constitutionally significant, but the lack of Supreme Court precedent on point makes it impossible to ascertain its true import. Regardless of the weight the Court might be inclined to give to it, the difference is constitutionally irrelevant. As described earlier in this Note, the Supreme Court's recent equal protection jurisprudence as emphasized that suspect classifications are constitutionally problematic due to the very existence of the classification rather than the particular group harmed by the classification. This approach implies that it is irrelevant whether a government policy

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220 See supra Section III.A.
221 An example of this would be the male-only admissions policy at issue in United States v. Virginia, 518 U.S. 515 (1996).
222 See Bagley v. Raymond Sch. Dep't, 728 A.2d 127, 136 (Me.) ("In essence, the parents [who wish to use Maine's Tuition Assistance Program to send their children to a Catholic school] claim that [the religiously affiliated school] is treated differently because it is a religious school, not that the parents are treated differently because they are Catholic."). cert. denied, 120 S. Ct. 364 (1999). The Maine court noted that "ordinarily, the Equal Protection claim here would be asserted... by the school itself," id. (citing Columbia Union College v. Clarke, 159 F.3d 151 (4th Cir. 1998)), but nevertheless allowed the parents of children wishing to attend the religiously affiliated institution to bring the equal protection claim themselves. See id.
223 See supra Section III.A.1.
classifies people or institutions; what is constitutionally important is the *basis* of the classification.

Under this approach, the only barrier to challenging the exclusion of religious schools from a voucher program would be to locate a plaintiff with standing. To establish standing in federal court, those wishing to challenge governmental action must establish (1) the existence of a constitutionally significant "injury in fact" that is "fairly traceable" to the conduct of the defendant and (2) that a favorable decree is "likely" to lead to adequate redress of that injury. Parents wishing to send their children to religious schools could easily satisfy this standard. Exclusion from enjoyment of a government benefit based on a constitutionally impermissible distinction is a constitutional injury in fact. The injury would be fairly traceable to the governmental unit that enacted the voucher program. Finally, a judicial decree would likely lead to redress because a court could either order that religious schools be allowed to participate or enjoin the operation of the voucher program so long as the unconstitutional distinction existed.

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225 Since the doctrine of standing is a jurisdictional doctrine imposed on the federal courts by Article III of the Federal Constitution, it does not independently apply to the jurisdiction of state courts. Requirements to establish standing in state courts are matters of state law. The issue of standing has not generally arisen in recent state court cases involving challenges to voucher and voucher-like programs. See Kotterman v. Killian, 972 P.2d 606 (Ariz.) (including no discussion of standing), cert. denied, 120 S. Ct. 283 (1999); Chittenden Town Sch. Dist. v. Vermont Dep't of Educ., 738 A.2d 539 (Vt.) (same), cert. denied, 120 S. Ct. 626 (1999); Bagley v. Raymond Sch. Dep't, 728 A.2d 127 (Me.) (same), cert. denied, 120 S. Ct. 364 (1999); Simmons-Harris v. Goff, 711 N.E.2d 203 (Ohio 1999) (same); Jackson v. Benson, 578 N.W.2d 602 (Wis. 1998) (same).


227 See Northeastern Fla. Chapter of the Assoc. Gen. Contractors of Am. v. City of Jacksonville, 508 U.S. 656, 666 (1993) ("When the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group...[t]he 'injury in fact'...is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit."); cf. Hartman v. Stone, 68 F.3d 973, 979 n.4 (6th Cir. 1995) (adopting the same analysis).

228 See Miller v. Benson, 878 F. Supp. 1209, 1212 (E.D. Wis.), vacated as moot, 68 F.3d 163, 164–65 (7th Cir. 1995) (holding that the plaintiff's requested relief—inclusion of religious schools in a private voucher program or permanent injunction of
It could, however, be argued that classifications cannot be suspect for equal protection purposes unless they distinguish between individuals rather than institutions. The strongest argument for this position is that equal protection rights are personal rights. A successful challenge to the exclusion of religious schools from a voucher program may therefore still require identification of a group of persons against whom the classification discriminates. There is, however, a group of "persons" that such a policy would facially discriminate against on the basis of religion: the corporate "persons" operating religious schools.

Corporations enjoy some, but not all, of the rights afforded to natural persons under the Constitution. The Supreme Court has declined to formulate categorical rules for determining when corporate and natural persons are equivalent for constitutional purposes, stating instead that the question of whether "a particular guarantee" is available to corporations "depends on the nature, history, and purpose of the particular constitutional provision." Corporations are considered "persons" protected by the Equal Protection Clause in some circumstances, such as for the purpose of challenging discriminatory state taxation. Corporations also possess the freedom to speak, enjoy protection against unreasonable searches and seizures, and are protected by the Due Proc-

the program as a whole—was sufficient to demonstrate that court action could lead to redress of the plaintiff's alleged injuries).

229 See U.S. Xonst. amend. IV, § 1 ("No state shall . . . deny to any person . . . the equal protection of the laws.") (emphasis added); see also Adarand Xonstrs. v. Pena, 515 U.S. 200, 227 (1995) ("[T]he Fifth and Fourteenth Amendments to the Xonstitution protect persons, not groups.").


231 See Metropolitan Wife Ins. Xo. v. ard, 470 U.S. 869, 881 n.9 (1985) ("It is well established that a corporation is a 'person' within the meaning of the Fourteenth Amendment.") (citing estern & S. Wife Ins. Xo. v. State Bd. of Equalization, 451 U.S. 648, 660 n.12 (1981)); Santa Xlara Xounty v. Southern Pac. R.R. Xo., 118 U.S. 394, 396–97 (1886) (stating in a case involving a challenge by a railroad to a state tax scheme that the Xourt "does not wish to hear argument on the question whether [the Equal Protection Xlause] applies to these corporations" because the Xourt was already "of the opinion that it does").


233 See Marshall v. Barlow's, 436 U.S. 307, 311 (1978) (holding that "[t]he arrant Xlause of the Fourth Amendment protects commercial buildings as well as private homes" and sustaining the corporation's challenge to the administrative agency's search of its headquarters).
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ess, Double Jeopardy, and Takings Clauses of the Federal Constitution. Corporations do not, however, possess a privilege against self-incrimination or enjoy a constitutional right of privacy, nor are they protected by the Privileges and Immunities Clause.

Allowing distinctions between corporations to be considered suspect under the Equal Protection Clause is also consistent with the modern understanding of the Clause’s purpose. The Adarand line of cases has emphatically rejected the notion that the level of equal protection scrutiny should be linked to the degree to which the adversely affected persons require or deserve special protection under the law. Thus, considerations regarding corporations’ political and economic power or their moral right to protection from discrimination, even if different from natural persons, are irrelevant in determining the level of equal protection scrutiny to which distinctions along suspect lines should be subject. What is relevant for equal protection purposes is the basis for the classification rather than the status of the plaintiff.

This conclusion is also in harmony with the case law. The Supreme Court’s most recent affirmative action decisions all rest on


See Doe v. United States, 487 U.S. 201, 206 (1988) (“There . . . is no question that the foreign banks cannot invoke the Fifth Amendment in declining to produce the documents; the privilege does not extend to such artificial entities.”).


See Adarand Constrs. v. Pena, 515 U.S. 200, 224 (1995) (noting that the standard of review applied in Equal Protection Clause cases is the same regardless of whether the particular group was “burdened or benefited by a particular classification”) (quoting City of Richmond v. J.A. Croson Co., 488 U.S. 469, 494 (1989) (plurality opinion)).
the assumption that distinctions between corporations may be suspect for equal protection purposes. While the Court's first two affirmative action cases, *DeFunis v. Odegaard*\(^{241}\) and *Regents of the University of California v. Bakke*,\(^{242}\) featured individual plaintiffs claiming they had personally been denied equal treatment,\(^{243}\) the last three, *Adarand Constructors v. Pena*,\(^{244}\) *Metro Broadcasting v. FCC*,\(^{245}\) and *City of Richmond v. J.A. Croson Co.*,\(^{246}\) all involved corporations, and only corporations, as plaintiffs.\(^{247}\)

The classifications at issue in those cases facially distinguished only among corporations.\(^{248}\) In none of the three latter cases did


\(^{243}\) Marco DeFunis claimed that his rejection by the University of Washington Law School was unconstitutional because of the school's affirmative action policy. See *DeFunis*, 416 U.S. at 314. The Supreme Court eventually dismissed the case as moot because, pursuant to an order entered by the district judge earlier in the case, DeFunis would graduate from the law school regardless of the Court's decision. See id. at 314–16, 319–20.

Allan Bakke applied to and was rejected twice by the University of California at Davis Medical School in both 1973 and 1974. See *Bakke*, 438 U.S. at 276–77 (opinion of Powell, J.). Bakke then filed suit, claiming that the medical school's affirmative action plan violated the Equal Protection Clause of the Federal Constitution, the equal protection provision of the California constitution, and federal law. See id. at 277–79 (opinion of Powell, J.). A 5-4 majority of the Court ordered Bakke admitted to the medical school in a decision that produced six opinions arguing in favor of three different results. See id. at 271–72 (Opinion of Powell, J.) (announcing the Court's decision and explaining the voting tallies).

\(^{244}\) 515 U.S. 200 (1995).

\(^{245}\) 497 U.S. 547 (1990). *Metro Broadcasting*’s holding that affirmative action programs by the federal government need not be subject to strict scrutiny was subsequently overruled in part by *Adarand*. See *Adarand*, 515 U.S. at 227. This fact is irrelevant to the present point, however, because even *Metro Broadcasting* held that distinctions harming only corporations could be subject to a standard higher than rational basis review under the Equal Protection Clause. See *Metro Broad.*, 497 U.S. at 566 (asking whether the policy at issue is “substantially related” to an “important governmental objective”).

\(^{246}\) 488 U.S. 469 (1989).

\(^{247}\) See *Adarand*, 515 U.S. at 205 (listing Adarand Constructors, Inc., “a Colorado-based highway construction company specializing in guardrail work,” as the sole plaintiff); *Metro Broad.*, 497 U.S. at 558 (stating that the sole plaintiff, Metro Broadcasting, Inc., wished to procure a broadcast license to “construct and operate a new UHF television station in the Orlando, Florida, metropolitan area”); *Croson*, 488 U.S. at 469 (noting that suit was brought by Croson, “a mechanical plumbing and heating contractor”).

\(^{248}\) See *Adarand*, 515 U.S. at 204 (ruling on a policy that gave financial incentives to “general contractors on Government projects”); *Metro Broad.*, 497 U.S. at 556–58
the Court specifically comment on the fact that the plaintiffs were corporations, much less suggest that this fact was relevant to the level of equal protection scrutiny. Finally, even if it could be argued that the Court in *Adarand*, *Metro Broadcasting*, and *Croson* was actually allowing the organizations to assert the rights of their employees and owners,249 this argument proves too much because precisely the same argument could be advanced to support the right of religious schools to raise the rights of their employees and students.

Nor is this conclusion undermined by the older cases treating corporations as persons for equal protection purposes. While it is true that the Court did not invoke heightened scrutiny in any of these cases,250 these cases nevertheless fit well within the conventional equal protection framework. Each of the older cases involved economic regulations, and such regulations are subject to rational basis scrutiny.251 Finally, it is worth noting that two recent lower court cases have indicated that classifications distinguishing solely between corporate persons may be considered suspect for

(considering FCC policy that gave preference to licensees whose majority owners were members of racial minorities); *Croson*, 488 U.S. at 477 (examining a policy requiring prime contractors doing business with the city to subcontract at least 30% of the job to businesses whose controlling owners were members of racial minorities).


equal protection purposes.22 Treating the natural/corporate person distinction as irrelevant to determining the appropriate level of equal protection scrutiny is thus consistent with both Supreme Court precedent and the rationales underlying those decisions.

Accordingly, it appears that absent Establishment Clause prohibition, explicit exclusion of religious schools from a voucher program would violate the Establishment Clause. Overt exclusion would be constitutionally suspect—regardless of whether the claim is raised by any party able to demonstrate standing or whether the claim is raised only by the operators of religious schools against whom the discrimination would directly apply. Such an exclusion could not survive strict scrutiny.

CONCLUSION

The Blaine Amendments should not pose a barrier to school choice. The examples of Wisconsin and Ohio demonstrate that some state courts will interpret their state constitutional Blaine Amendments to allow aid to private religious schools so long as the aid is not prohibited by the Federal Establishment Clause.23 Indeed, a contrary interpretation of a state’s Blaine Amendment could raise serious federal constitutional objections under the Equal Protection Clause.

The federal constitutional argument could be presented to a court in three ways. First, it could be raised defensively by voucher proponents in a federal or state action brought by voucher opponents seeking a declaration that a program including religious schools would violate either the Establishment Clause or a particular state’s Blaine Amendment. While it does not appear that this

22 See Columbia Union College v. Clark, 159 F.3d 151, 155–56 & n.1 (4th Cir. 1998) (allowing a religiously affiliated college to challenge its exclusion from a generally applicable grant program on equal protection grounds), cert. denied, 119 S. Ct. 2357 (1999); Bagley v. Raymond Sch. Dep’t, 728 A.2d 127, 136–37 (Me.) (noting that the equal protection claim at issue ultimately belonged to the religious school itself and indicating that “the defendants’ contention that rational basis scrutiny applies is incorrect”), cert. denied, 120 S. Ct. 364 (1999).

23 See Simmons-Harris v. Goff, 711 N.E.2d 203, 207 (Ohio 1999) (holding that a Cleveland voucher program does not violate Ohio’s Blaine Amendment); Jackson v. Benson, 578 N.W.2d 602, 623 (Wis.) (sustaining Milwaukee’s voucher program against an attack based in part on Wisconsin’s Blaine Amendment), cert. denied, 525 U.S. 997 (1998).
argument has been made explicitly in this context,\(^2\) a recent case from Arizona indicates that at least some state courts might be receptive to it. In Kotterman v. Killian,\(^3\) the Arizona Supreme Court upheld a program granting up to $500 in tax credits to parents who send their children to private schools, despite the petitioners' claims that the program violated the Federal Establishment Clause, Arizona's Blaine Amendment, and two other provisions of the state constitution.\(^4\) The court concluded that the tax credit did not constitute "an appropriation of public money" and thus did not violate the state constitution.\(^5\) More important, in responding to the dissent's originalist argument,\(^6\) the majority indicated that it was deeply troubled by the prospect of applying an originalist methodology to a provision that may have been motivated by anti-Catholic bigotry.\(^7\) While arguments about the unconstitutionality of the Blaine Amendments may not persuade state courts to strike them down, they may be sufficient to convince state courts to construe

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\(^2\) This argument was not made in either Wisconsin in Jackson or in Arizona in Killian. See Interview with Clint Bolick, Vice President and Litigation Director, Alliance for Justice, in Charlottesville, Va. (Feb. 17, 1999) (on file with the Virginia Law Review Association). According to Bolick, the supporters of the Wisconsin voucher and Arizona tax credit programs believed that it would be extremely difficult to convince a state court that a provision of its state constitution violated the Federal Constitution. See id. But see Jo Becker, Voucher Vote Twisted With a Century-Old Fight, St. Petersburg Times, July 6, 1999, at 4B (implying that defenders of the Florida voucher program intend to argue that the state's Blaine Amendment should either be given very little weight or declared unconstitutional).

\(^3\) 972 P.2d 606 (Ariz.) (en banc), cert. denied, 120 S. Ct. 283 (1999).

\(^4\) See id. at 609–10, 625.

\(^5\) Id. at 621. The Arizona constitution reads, in relevant part: "No tax shall be laid or appropriation of any public money made in aid of any church, or private or sectarian school, or any public service corporation." Ariz. Const. art. IX, § 10.

\(^6\) See Kotterman, 972 P.2d at 631–39 (Feldman, J., dissenting). The dissent recognized that the state's Blaine Amendment was an outgrowth of the federal proposal. Despite acknowledging that anti-Catholicism drove the enactment of the state provision, the dissent concluded that the framers of the state constitution had an "indisputable desire to exceed the federal requirements" regardless of religious bigotry. Id. at 639 (Feldman, J., dissenting). Justice Feldman concluded that adherence to this desire required invalidation of the tax credit scheme at issue in the case. See id. (Feldman, J., dissenting). The dissent did not consider the possibility that the invidious intent behind the state constitutional provision rendered it invalid under the Federal Constitution.

\(^7\) See id. at 624 ("[W]e would be hard pressed to divorce the amendment's language from the insidious discriminatory intent that prompted it.").
the Amendments as substantively equivalent to the Establishment Clause.

The Blaine Amendments could also be attacked offensively in two contexts. First, voucher proponents challenging the exclusion of religious schools from a voucher program in federal or state court could argue that such exclusion violates the Federal Equal Protection Clause. In addition, the federal constitutional argument could be made before the Supreme Court of the United States if a lower court were to find that a voucher program that included religious schools violated a state's Blaine Amendment. Wherever the federal constitutional argument is raised, it seems clear that any voucher program specifically excluding religious schools would violate the Equal Protection Clause. Such exclusion should be subject to, and would necessarily fail, strict scrutiny under the Equal Protection Clause because it would facially classify on the basis of religion.

This Note's argument, if correct, could have tremendous implications for the legal debate surrounding school vouchers. Voucher proponents and opponents have been gearing up for battles to be fought nationwide on the working assumption that the Supreme Court of the United States would not find that all voucher programs that include private religious schools violate the Establishment Clause. This Note suggests that the other primary barrier to voucher programs that include religious schools—the Blaine Amendments—are in fact unconstitutional. This Note has further argued that in the absence of Establishment Clause prohibition it violates the Federal Constitution to exclude religious schools from a private school voucher program. If the Supreme Court of the United States adopts this reasoning, the Court's much-anticipated opinion resolving whether private school voucher programs may include religious schools may determine whether such programs must include religious schools as well.

260 Maine's Blaine Amendment was not implicated in Bagley v. Raymond School Department, 728 A.2d 127, 132 (Me.), cert. denied, 120 S. Ct. 364 (1999), because the parties agreed that the relevant provisions of the Maine constitution were coextensive with the Federal Constitution.