IN THE
SUPREME COURT OF FLORIDA

Case Nos. SC04-2323/2324/2325

JOHN ELLIS "JEB" BUSH, *et al.*,
CHARLES J. CRIST, JR., and
BRENDA McSHANE, *et al.*,

Appellants,

v.

RUTH D. HOLMES, *et al.*,

Appellees.

BRIEF AMICUS CURIAE OF THE BAPTIST JOINT COMMITTEE, THE UNION FOR REFORM JUDAISM, AMERICANS FOR RELIGIOUS LIBERTY, THE NATIONAL COUNCIL OF JEWISH WOMEN, AND THE JEWISH LABOR COMMITTEE IN SUPPORT OF APPELLEES

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INTEREST OF AMICI

The Baptist Joint Committee ("BJC") is a religious liberty organization, serving fourteen cooperating Baptist conventions and conferences in the United States, with supporting congregations throughout the nation, including in Florida. BJC deals exclusively with religious liberty and church-state separation issues and believes that vigorous enforcement of both the Establishment and Free Exercise Clauses is essential to religious liberty for all Americans. BJC also supports religious liberty protections in state constitutions, such as Article I, § 3 of the Florida Constitution, which provide an additional safeguard against government sponsorship of and interference in religion.

The Union for Reform Judaism is the central body of the Reform Movement in North America including 900 congregations encompassing 1.5 million Reform Jews. The Reform Jewish Movement comes to this case out of two overlapping concerns: strengthening public schools and defending the separation of church and state. We maintain that using taxpayer money to fund private, religious schools through student vouches not only divests much-needed resources from our public schools system but undermines the concept that government and religion should each be free to flourish in their separate spheres.

Americans for Religious Liberty ("ARL") is a national nonprofit public interest educational organization, with members in Florida, dedicated to defending religious liberty, freedom of conscience, and the constitutional principle of separation of church and state. ARL has participated as an amicus in a number of other cases in this court that have implicated these concerns.

The National Council of Jewish Women ("NCJW"), Inc., is a volunteer organization, inspired by Jewish values, that works through a program of research, education, advocacy and community service to improve the quality of life for women, children and families and strives to ensure individual rights and freedoms for all. Founded in 1893, NCJW has 90,000 members and supporters nationwide, including members living in Florida. Given NCJW's *Resolution* which states our support for "Quality public education for all, utilizing public funds for public schools only," and NCJW's *Principle* which states, "Religious liberty and the separation of religion and state are constitutional principles which must be protected and preserved in order to maintain our democratic society," we join this brief.

The Jewish Labor Committee ("JLC") serves as a bridge linking the organized Jewish community and organized labor. Founded 70 years ago the JLC was the only national Jewish organization to be involved in the rescue of Jewish

leaders and labor leaders during the Holocaust. JLC has a long history of involvement in education issues including vouchers, Holocaust education, civil rights, and human rights. JLC has chapters throughout the United States, including Miami, Florida.

SUMMARY OF ARGUMENT AND INTRODUCTION

The State, intervenors and their supporting amici impugn the legitimacy of the no-funding principle contained in Article I, § 3 of the Florida Constitution, arguing that it is little more than a mask for religious bigotry. See Attorney General's Brf. at 14; Intervenors' Brf. at 5; Florida Catholic Conf. Brf. at 14-19; Becket Fund Brf., *passim*. On the contrary, the no-funding principle, as represented in the Blaine Amendment, arose independently of Catholic parochial schooling or anti-religious animus and is based on important constitutional values. As discussed below, the principle rests on long-standing notions of religious liberty, rights of conscience and avoidance of religious strife.

ARGUMENT

I. The No-Funding Principle Arose Independently of Anti-Religious Animus.

A. Origins of the No-Funding Principle

The legal rule against public funding of religious instruction and worship is based on notions of religious liberty and rights of conscience that arose in the struggle for independence and in the founding of the national and state governments. As early as the 1770s, Thomas Jefferson and James Madison were equating government financial support for religion with infringements on religious

liberty and rights of conscience. In 1779 Jefferson wrote that:

> to compel a man to furnish contributions of money for the propagation of opinions which be disbelieves and abhors, is sinful and tyrannical; that even forcing him to support this or that teacher of his own religious persuasion, is depriving him of the comfortable liberty of giving his contributions to the particular pastor whose morals he would make his pattern.[1]

Madison echoed Jefferson's belief that funding of religious worship and instruction violated notions of liberty:

> Who does not see . . . that the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever.[2]

Jefferson and Madison did not make these arguments in a vacuum but raised them in opposition to an effort by the Virginia Assembly to impose an assessment for the support of houses of worship and teachers of religion, *including teachers in private religious schools*.[3] Madison applied this principle later as President when

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[1] "A Bill for Establishing Religious Freedom, 12 June 1779," The Founders' Constitution 5:77 (Philip B. Kurland and Ralph Lerner, eds., 1987).

[2] "Memorial and Remonstrance Against Religious Assessments, 20 June 1785," id. at 82.

[3] See Douglas Laycock, *'Nonpreferential' Aid to Religion: A False Claim About Original Intent*, 27 Wm & Mary L. Rev. 875, 897 and n. 108 (1986); Thomas Buckley, Church and State in Revolutionary Virginia, 1776-1787 133 (1977) ("The assessment had been carefully drafted to permit those who preferred to support education rather than religion to do so.").

he vetoed a bill that would have authorized an Episcopal Church in the District of Columbia to receive poor funds for the education and care of destitute children.[4]

Although Jefferson and Madison's spacious views on church-state separation were not shared by all of their contemporaries, greater consensus existed over the issue of public funding of religion.[5] Funding of religious activities and enterprises was generally viewed as the anthesis of disestablishment. In providing that "there shall be no establishment of any one religious church," the North Carolina Constitution of 1776 declared that no person could be "obliged to pay . . . [for] the building of any house of worship, or for the maintenance of any minister or ministry."[6] Baptist leader Isaac Backus urged disestablishment in Massachusetts on similar grounds, denying the authority of a "civil Legislature to

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[4] See *Veto Message to Congress, Feb. 21, 1811*, in Founders' Constitution 5:99.

[5] See Thomas J. Curry, The First Freedoms: Church and State in America to the Passage of the First Amendment 217 (1986).

[6] N.C. Const. Art. 34, in The Federal and State Constitutions 5:2793 (Francis Newton Thorpe, ed., 1909). Contrary to the interpretation of *Locke v. Davey*, 124 S. Ct. 1307 (2004) advanced by amici Florida Catholic Conference, early state prohibitions on funding were broader than merely prohibiting public support for *clergy*. In addition to the North Carolina Constitution, several early state constitutions prohibited compelled support for houses of worship and religious ministries, in addition to clergy. See Del. Const. Art. I, § 1 (1792); N.J. Const. Art XVIII (1776); Pa. Const. Art. II (1790); Vt. Const. Ch. I, Art. 3 (1793).

impose religious taxes" for the support of any ministry.[7] Accordingly, by the time of the framing of the First Amendment, "[t]he belief that government assistance to religion, especially in the form of taxes, violated religious liberty had a long history."[8]

Thus the principles of religious liberty, liberty of conscience, and separation of church and state – with their no-funding corollary – arose independently of and prior to the rise of the common school movement or the development of the Catholic parochial school system. This version of the no-funding principle therefore provides an *independent* and *sufficient* basis for nineteenth century opposition to funding of religious schools, apart from specific concerns about funding of Catholic and other sectarian schools.

B. The Rise of the Nonsectarian School

The no-funding principle also developed in conjunction with the rise of the common school. At the time of the nation's founding, public education was practically nonexistent with most schooling taking place through private tutors or

[7] See The Founders' Constitution 5:65 ("[W]e are persuaded that an entire freedom from being taxed by civil rulers to religious worship, is not a mere favor, from any man or men in the world, but a right and property granted us by God.").

[8] Curry, The First Freedoms at 217.

in a handful of church-run schools.[9] Following the Revolution, early educational reformers such as Benjamin Franklin, Thomas Jefferson, Benjamin Rush, and Noah Webster began agitating for universal public schooling with a curriculum based on secular subjects rather than relying on religious texts.[10]

The first attempt at a comprehensive nonsectarian educational program came with the founding of the Free School Society of New York City in 1805.[11] From its inception the Society distinguished its charity schools from the denominational schools by stressing the nonsectarian character of its curriculum which, it asserted, made its schools appropriate for children of all classes and

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[9] See Essays on Education in the Early Republic xvi-xvii (Frederick Rudolph, ed., 1965); Readings in Public Education in the United States 75-140 (Ellwood P. Cubberely, ed., 1934).

[10] See Jefferson, "A Bill for the More General Diffusion of Knowledge," in Jefferson: Magnificent Populist 248-49 (Martin A. Larson, ed.,1984); Webster, "On Education of Youth in America," (1790), in Rudolph, Essays on Education at 65-66. However, Rush and Webster supported the reading of select passages of the Bible for inculcating virtue and moral character. Webster, "On Education of Youth." at 50-51, 64-67.

[11] See generally, William Oland Bourne, History of the Public School Society of the City of New York (1870) (hereinafter "Public School Society"). See also John Webb Pratt, Religion, Politics, and Diversity: The Church-State Theme in New York History 158-203 (1967); Diane Ravitch, The Great School Wars: New York City, 1805-1973 3-76 (1974).

religious faiths.[12]

For the first seventeen years of existence, the Free School Society competed with denominational schools for state public school funds, although it increasingly received the lion's share of tuition and building funds.[13] In 1822, Bethel Baptist Church secured a state grant for construction of a school building.[14] The Society opposed the grant on grounds that it undermined nonsectarian education for children of all faiths and that funding of sectarian schools violated notions of separation of church and state. For the first time the Society articulated arguments that would serve as the basis for the no-funding principle: that the grant "impose[d] a direct tax on our citizens for the support of religion" in violation of rights of conscience; that funding of religious schools would cause competition and rivalry among faiths; that the school fund was "purely of a civil character;" and

> the proposition that such a fund should never go into the hands of an

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[12] Bourne, Public School Society, at 9, 38, 641. In addition to instructing in the "common rudiments of learning" the Society described its curriculum as teaching only "the fundamental principles of the Christian religion, free from all sectarian bias, and also those general and special articles of the moral code, upon which the good order and welfare of society are based."

[13] Pratt, Religion, Politics and Diversity, at 165-166.

[14] Id., at 166-67; Bourne, at 49-50.

> ecclesiastical body or religious society, is presumed to be incontrovertible upon any political principle approved or established in this country. . . . that church and state shall not be united.[15]

After considering the Society's memorials, a legislative committee in 1824 recommended to discontinue funding denominational schools, opining "whether it is not a violation of a fundamental principle . . . to allow the funds of the State, raised by a tax on the citizens, designed for civil purposes, to be subject to the control of any religious corporation."[16] The following year, the New York City Common Council voted to end the funding of denominational schools.[17]

What is significant about this episode is that opposition to funding of sectarian schools arose in the context of a request made by a *Protestant* school. As the Society asserted in one of its resolutions, the funding of Bethel Baptist Church's school "promot[ed] . . . private and *sectarian* interests."[18] Also, significantly, the Society and the legislative committee viewed this bar as a

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[15] Bourne, at 52-55, 88; Pratt, at 167.

[16] Bourne, Public School Society, at 70-72. The Society also claimed that it was "totally incompatible with our republican institutions, and a dangerous precedent in our free Government, to permit any part of such funds to be disbursed by the clergy or church trustees for the support or extension of sectarian education." Id. at 88.

[17] Id. at 72-75; Pratt, at 167.

[18] Bourne, at 51.

"fundamental" constitutional mandate.[19] While it is possible that some officials were concerned about the potential, future establishment of Catholic parochial schools when they were crafting their arguments, nothing in the memorials and reports indicates such an awareness or apprehension. The first significant wave of Irish Catholic immigration was still a decade off, and it was not until the Second Provincial Council in1833 that the American Catholic Church recommended the creation of a parochial school system.[20] According to popular understanding of the time, *a sectarian school was any religious school in which particular doctrines were taught*.[21] The Protestant denominational schools were *sectarian*. The developing consensus that public funds should not pay for religious education arose within this context.

That anti-Catholicism played no part in the rise of the no-funding principle

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[19] Id. at 70-72. The New York City Mayor and Common Council also supported the Society's position, arguing in its own memorial that funding of "religious or ecclesiastical bodies is [] a violation of an elementary principle in the politics of the State and country." Id. at 64-67.

[20] Ray Allen Billington, The Protestant Crusade, 1800-1860 35-37 (1938); Peter Guilday, The National Pastorals of the American Hierarchy, 1792-1919 60-61, 74 (1923).

[21] See "Memorial and Petition of the Mayor, Alderman, and Commonalty of the city of New York," referring to the Protestant charity schools as "sectarian." Bourne, at 66.

is supported by an episode six years later. In 1830, the Roman Catholic Orphan Asylum and the Methodist Charity School petitioned for a share of the school fund to support their respective programs. The Free School Society, while raising the same church-state objections as before, also made what can best be described as an early argument about the *pervasively sectarian character* of the schools, noting that "one of the objects aimed at in all such schools is to inculcate the particular doctrines and opinions of the sect having the management of them."[22] In its characterization of sectarian schools, the Society did not distinguish between Catholic and Methodist programs. The Council's law committee concurred with the Society in its report, writing that "to raise a fund by taxation, for the support of a particular sect, or every sect of Christians, [] would unhesitatingly be declared an infringement of the Constitution, and a violation of our chartered rights."[23] Despite the committee's recommendation, the Common Council approved payment to the Catholic Orphan Society on the apparent theory that the funds primarily supported the *care* of the orphans, not their education. The Council,

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[22] Id. at 126. See also id. at 128 (arguing that the "system of education" in such schools is "so combined with religious instruction.").

[23] Id. at 139-140. "Your committee cannot, however, perceive any marked difference in principle, whether a fund be raised for the support of a particular church, or whether it be raised for the support of a school in which the doctrines of that church are taught as a part of the system of education."

though, denied the request of the Methodist Charity School, reaffirming its 1825 decision that public funds could not pay for sectarian education.[24] The episode again indicates that all parties viewed the notion of sectarian education and the accompanying bar on its funding in *generic* terms, applying to all religious schools.[25] In this instance, because the Catholic Orphan Society was providing primarily a charitable service rather than sectarian education, it was eligible for public support. If anti-Catholicism had fueled the debate, then the outcome would have been reversed, or at least resulted in the denial of funds for both institutions. As a result of these episodes, the no-funding principle was firmly established in New York by the time the first controversy over Catholic school funding arose in the1840s.[26]

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[24] Id. at 145, 148.

[25] In urging the Council to adhere to its 1825 decision, the Law Committee argued that "Methodist, Episcopalian, Baptist, and *every other sectarian school*, [would] come in for a share of this fund. . . . It would be . . . no[] less fatal in its consequences to the liberties and happiness of our country, to place the interest of the school fund at the disposal of sectarians. It is to tax the people for the support of religion, contrary to the Constitution, and in violation of their conscientious scruples." Id. at 140 (emphasis added).

[26] In 1842, in response to a Catholic petition for a share of the public school fund for its parochial schools, the Legislature enacted a law that prohibited the granting of public funds to any school where "religious sectarian doctrine or tenet shall be taught, inculcated, or practiced." Bourne, at 496-525; Pratt, at 182-190; Ravitch, at 58-76.

Therefore, the arguments of amici Becket Fund and Florida Catholic conference are misplaced. The word "sectarian" has long been viewed and applied in generic terms. The fact that the term was later applied to Catholic schools in the 1870s or used in state constitutions does not on its own indicate religious bigotry; indisputably, nineteenth century Catholic schools were sectarian, in that they "inculcat[ed] the particular doctrines and tenets of the [Church]."[27] Moreover, contrary to suggestions that the term is *per se* evidence of animus, members of the U.S. Supreme Court have consistently used the term "sectarian" in the funding context when describing religious schools.[28] In *Bowen v. Kendrick,* for example, Chief Justice Rehnquist used the term throughout his opinion while affirming the validity of the pervasively sectarian concept.[29] If the Court's use of "sectarian" was an appropriate descriptor, at least until 2000, then no dispersions can be cast on Florida's similar use of the term in 1885 or 1968.

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[27] See Bourne, at 126. See also Mark D. Stern, *Blaine Amendments, Anti-Catholicism, and Catholic Dogma*, 2 First Amend. L. Rev. 153 (2003).

[28] See *Agostini v. Felton*, 521 U.S. 203, 218, 226-229 (1997) (Opinion by O'Connor); *Zobrest v. Catalina Foothills School Dist.*, 509 U.S. 1, 4 (1993) (Opinion by Rehnquist); *Bowen v. Kendrick*, 487 U.S. 589, 610-611 (1988) (Opinion by Rehnquist); *Mueller v. Allen*, 463 U.S. 388 (1983) (Opinion by Rehnquist).

[29] 487 U.S. at 610-611.

II. There is No Evidence that Anti-Catholicism Played a Significant Role in the Development of Many Early State Constitutions.

Critics have argued that the no-funding provisions of many early state constitutions came about primarily through the influence of antebellum nativist groups, in particular, the Know-Nothing party.[30] But nativism cannot be held responsible for all state enactments or explain the basis for similar provisions in other parts of the country, like Florida, where there was no significant religious dissension or nativist activity.[31] For example, Michigan adopted a no-funding provision in its 1835 constitution[32] even though the state lacked a significant number of Catholic parochial schools and the enactment came before the wave of Catholic immigration.[33] The Michigan Constitution served as the model for

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[30] See John R. Mulkern, The Know-Nothing Party in Massachusetts 76, 94-103 (1990); Lloyd Jorgenson, The State and the Non-Public School 85-93 (1987).

[31] Professor Ray Billington indicates in his seminal study of antebellum nativism that the Know-Nothings were relatively ineffective in enacting anti-Catholic legislation, even in those states where they briefly held clear majorities. Billington, Protestant Crusade, at 412-417. Billington also notes that nativism was most effective in the northeastern states and that Know-Nothings "showed little strength in the middle west." Id. at 391, 396.

[32] "No money shall be draw from the treasury for the benefit of religious societies, or theological or religious seminaries." Mich Const. of 1835, Art. I, sec. 5, in Thorpe, 4:1931.

[33] Thomas M. Cooley, Michigan: A History of Governments 306-329 (8th ed., 1897). Apparently, Catholic and Presbyterian clergy were instrumental in the movement to establish universal nonsectarian schooling at both the collegiate and

similar constitutional provisions in Wisconsin (1848), Indiana (1851), Minnesota (1857), and Oregon (1857), all states without significant conflicts over parochial school funding at the time. In Wisconsin, for example, the common school movement with its emphasis on universal, nonsectarian education predated the Catholic Church's establishment of a parochial school system.[34] According to one study, there is "no evidence that the [Wisconsin] lawmakers and constitution makers were anti-religious in making the [no-funding] requirements, or that they harbored a prejudice against any sect."[35] A similar conclusion can be reached for the no-funding provision of the 1851 Indiana Constitution[36] and the 1857 Oregon

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common school levels. Id. at 309-311.

[34] See Alice E. Smith, The History of Wisconsin 1:588-589 (1985); Richard N. Current, The History of Wisconsin, 2:162-169 (1976). See also, Joseph A. Ranney, *'Absolute Common Ground': The Four Eras of Assimilation in Wisconsin Education Law,* 1998 Wis. L. Rev. 791, 793-93, 796-97 (1998) (placing the development of the parochial school systems after the enactment of the 1848 Constitution). Even Professor Lloyd Jorgenson, a critic of the common school movement, documented no anti-Catholic animus in his study of the creation of the Wisconsin public education system. See Jorgenson, The Founding of Public Education in Wisconsin 68-93 (1956).

[35] Smith, The History of Wisconsin, I:593.

[36] See Barclay Thomas Johnson, *Credit Crisis to Education Emergency: The Constitutionality of Model Student Voucher Programs Under the Indiana Constitution,* 35 Ind. L. Rev. 173, 200-203 (2001) (Indicating that in 1850, less than six percent of Indiana inhabitants were immigrants and fewer still were Catholics. The no-funding provision was not "a remnant of nineteenth century religious bigotry promulgated by nativist political leaders who were alarmed by

Constitution, which in turn influenced the drafters of the 1889 Washington Constitution (which was at issue in *Locke v. Davey*, 124 S. Ct. 1307 (2004)).[37]

Thus there is little evidence that anti-Catholicism or disdain for Catholic schooling played a significant role in the development of the no-funding principle or in the enactment of many state no-funding provisions. On the contrary, nineteenth century state constitution drafters were primarily concerned with the survival of the nascent public schools and in securing their financial security. In addition, they were committed to the principle of church-state separation. But most important, no inference of bigotry can be drawn from the mere inclusion of no-funding language in a particular state's constitution.

III. The Blaine Amendment Arose from a Variety of Motivations, of which Anti-Catholicism was only One Factor.

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the growth of immigrant populations and who had a particular disdain for Catholics."). Id. at 203.

[37] See The Oregon Constitution and Proceedings and Debates of the Constitutional Convention of 1857 (Charles Henry Clay, ed.,1926). The records of both the Oregon and Washington conventions are bereft of any statements hostile to Catholicism or parochial school funding. See id. at 305 (Mr. Williams: "Nor did he believe that congress had any right to take the public money, contributed by the people, of all creeds and faith [sic], to pay for religious teachings. It was a violent stretch of power, and an unauthorized one. A man in this country had a right to be a Methodist, Baptist, Roman Catholic, or what else he chose, but no government had the moral right to tax all of these creeds and classes to inculcate directly or indirectly the tenets of any one of them.").

The Blaine Amendment of 1876 has been maligned as an unfortunate episode in Catholic bigotry. See *Mitchell v. Helms*, 530 U.S. 793, 828-29 (2000). Although it is indisputable that anti-Catholic animus motivated many supporters of the amendment and colored the debates surrounding its near enactment, this is an incomplete account.[38] Contrary to the assertions of Intervenors and their amici, many scholars recognize the complexity of the Blaine Amendment as transcending the singular issue of anti-religious animus.[39]

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[38] It is worth noting that neither the State nor its amici have been able to point to any evidence that anti-Catholic animus motivated the adoption of Article I § 3 in 1885 or its reenactment in 1968. The mere fact that some relationship may exist between the Blaine Amendment and Article I § 3 does not justify concluding that Florida's no-funding provision is the product of impermissible bias. On the contrary, courts should be cautious about assigning motives to legislative action. See *United States v. O'Brien*, 391 U.S. 367, 383-84 (1968).

[39] See Stephen Macedo, Diversity and Distrust 45-87 (2002); Ira C. Lupu and Robert W. Tuttle, *Zelman's Future: Vouchers, Sectarian Providers, and the Next Round of Constitutional Battles*, 78 Notre Dame L. Rev. 101 (2003); Laura S. Underkuffler, *The 'Blaine' Debate: Must States Fund Religious Schools?* 2 First Amend. L. Rev. 179 (2003); Mark D. Stern, *Blaine Amendments, Anti-Catholicism, and Catholic Dogma*, 2 First Amend. L. Rev. 153 (2003);Steven K. Green, *Blaming Blaine: Understanding the Blaine Amendment and the 'No-Funding Principle,'* 2 First Amend. L. Rev. 107 (2003); Noah Feldman, *Non-Sectarianism Reconsidered*, 18 J.L. & Pol. 65 (2002). See also Mark Tushnet, *Vouchers After Zelman*, 2000 Sup. Ct. Rev. 1, 16, n.52 ("One might note that the Blaine Amendment might have been motivated, not by hostility to the religious dimensions of Catholicism, but by concern about political aspects of Catholic doctrine in the 1870s, which proponents of the amendment believed had strongly antidemocratic implications.").

The Blaine Amendment was the culmination of eight years of heightened attention to and conflict over the "School Question." Arising in the years following the Civil War, the School Question involved more than a concern about parochial school funding; that issue was part of a larger controversy over the responsibility and role of the federal government in public education, over whether that education should be truly universal for all social and economic classes and races (including the children of recently freed slaves), over ensuring the financial security of the still nascent public education system, and over whether that education should be secular, nonsectarian (i.e., watered-down Protestantism), or more religious.[40] The battle lines were not drawn solely between Catholics and nativists but involved other groups and concerns: liberal Protestants, free-thinkers, and Jews who opposed the nonsectarian character of the nation's schools; conservative Protestants who sought to preserve or *increase* the Protestant character of many public schools; education and civil rights reformers who sought a larger government role in funding and regulating public education; Democratic and Republican partisans who had little interest in education issues but viewed Catholics as a voting block to cultivate or demonize; and state-rights

[40] See generally, Steven K. Green, *The Blaine Amendment Reconsidered*, 36 Am. J. Legal Hist. 38 (1992); Ward M. McAfee, Religion, Race and Reconstruction 105-124 (1998).

advocates who saw no government role in education, particularly at the federal and state levels.[41] Thus, according to Princeton professor Stephen Macedo:

> [I]t would be wrong to attribute the civic anxieties of this period to racism alone, or to a simple desire to use public institutions to promote Protestantism for its own sake. It was not unreasonable for Americans to worry about the fragility of their experiment in self-government. There were also civic, secular reasons for fearing that an education in orthodox Catholicism could be hostile to republican attitudes and aspirations. Racism and anti-Catholic prejudice were not the all-consuming motives of the era.[42]

Former House Speaker James G. Blaine proposed the "Blaine Amendment" on December 14, 1875, as a means to settle the School Question. As introduced by Blaine, the amendment sought to achieve two things: (1) make the provisions of the First Amendment apply directly to state actions; and (2) to prohibit the allocation of public school funds or other public monies or land to religious institutions.[43] Blaine drew heavily from President Ulysses Grant's broader proposal that would have obligated states "to establish and forever maintain free

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[41] See Macedo, Diversity and Distrust at 76-79; Green, *Blaming Blaine* at 113-114.

[42] Macedo, Diversity and Distrust at 63.

[43] "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, not 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." 4 Cong. Rec., 44th Cong., 1st Sess. 205 (1875).

public schools adequate to the education of all the children in the rudimentary branches . . . irrespective of sex, color, birthplace, or religions."[44] Even though this provision did not make it into the final language of Blaine's proposal, the issue of a *federally mandated universal* education fueled the debate.[45]

To be sure, many observers viewed the amendment as crass political maneuvering designed to appeal to anti-Catholic voters.[46] Others, however, viewed the amendment as an opportunity to resolve the larger School Question while avoiding religious strife.[47] The Independent, the nation's leading religious

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[44] See "Seventh Annual Message, Dec. 7, 1875," reprinted in Ulysses S. Grant 92 (Philip P. Moran, ed., 1968).

[45] McAfee, Race, Religion, and Reconstruction at 4-5, 15-21, 105-124. See also Lyman Atwater, "Civil Government and Religion," *Presbyterian Quarterly and Princeton Review* 195 (April 1876) (arguing that universal secular education was "wholly beyond the proper function of the national government, and an unwarranted invasion of the proper liberties and franchises of the States.").

[46] See The Nation, Mar. 16, 1876 at 173. ("Mr. Blaine did, indeed, bring forward at the opening of Congress a Constitutional amendment directed against the Catholics, but the anti-Catholic excitement was, as every one knows now, a mere flurry; and all that Mr. Blaine means to do or can do with his amendment is, not to pass it but to use it in the campaign to catch anti-Catholic votes.").

[47] Both the Republican New York Times and the Democratic New York Tribune supported Blaine's proposal as a way of diffusing religious conflict. See New York Times, Dec. 8, 1875, at 6, and Dec. 15, 1875, at 6; New York Tribune, Dec. 8, 1875, at 6, and Dec. 15, 1875, at 4 ("Thinking men of all parties see much more to deplore than to rejoice over, in the virulent outbreak of discussions concerning the churches and the schools, and welcome any means of removing the dangerous question from politics as speedily as possible.").

journal, insisted that the funding issue "manifestly does not cover the whole question in controversy."[48] Rather, the controversy "bring[s] to the surface the whole subject of church and state, civil government and religion, in their relations to each other."[49] Therefore, a combination of issues – whether public schooling should be secular or religious and truly universal for all faiths, races and nationalities, whether the national government should mandate schooling at the state or local levels, and how best to diffuse religious strife – fueled the debate surrounding the Blaine Amendment as much as the issues of parochial school funding or anti-Catholicism.[50] For many people these issues were interrelated. The fact that they were intertwined, however, does not mean that support for the

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[48] See Samuel T. Spear, Religion and the State, or The Bible and the Public Schools 21 (1876).

[49] Id. at 24. According to The Independent, the School Question involved more than the issue of parochial school funding but also included issues of federal control over public education and whether public schools would retain their Protestant nonsectarian character, would become more Protestant in their practices, or would become "purely secular." Id. at 17-18, 21-22, 44-66.

[50] According to Professor Douglas Laycock, the problem with the modern critics of the Blaine Amendment is that they "never acknoweldge[] the possibility that when the [U.S.] Supreme Court or public opinion endorses separation [of church and state] today, they might mean something entirely different from anticlerical efforts to suppress Catholics or even all religion." See Douglas Laycock, *The Many Meanings of Separation*, 70 Univ. Chi. L. Rev. 1667, 1686 (Fall 2003).

amendment was one-dimensional or limited solely to efforts to disadvantage Catholics by denying them a share of the public school fund.[51]

CONCLUSION

Consequently, it is inaccurate to characterize the Blaine Amendment solely as an episode in anti-Catholic bigotry. While anti-Catholicism motivated some amendment supporters, that factor should be distinguished from sincere beliefs that funding of parochial schools would threaten the nation's commitment to public schooling and undermine church-state separation. The Blaine Amendment and the no-funding principle must thus be viewed within this larger controversy over the character and future of American public schooling.

Respectfully submitted,

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[51] Macedo, Diversity and Distrust at 76-79.

CERTIFICATE OF COMPLIANCE

I certify that this brief was typed in Times New Roman 14-point font in compliance with Rule 9.210(a)(2), Florida Rules of Appellate Procedure.

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CERTIFICATE OF SERVICE

On March —, 2005, I served the attached Brief Amicus Curiae on the counsel for the parties listed below by depositing a true copy in the U.S. Postal Service, postage paid.

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