



Exposing the Myth of Anti-Catholic Bias

The Fabrication of History to Repeal the Florida Constitution's No-Aid Provision

*A Report by the ACLU Program on Freedom of Religion and Belief
and the ACLU of Florida*

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Introduction	p.2
I. The Text and History of the Provision as Well as the Religious and Political Dynamics at the Time of Its Adoption Disprove Claims of Anti-Catholic Bias.	
A. The Text of the No-Aid Provision Does Not Discriminate Against Catholics.	p.4
B. The Legislative History of the No-Aid Provision and State Constitution Does Not Reveal Any Intent to Target Catholics.	p.6
C. The Religious and Political Climate in Florida at the Time of the Adoption of the No-Aid Provision Show a Broad Tolerance of Catholicism.	p.8
II. There Is No Evidence That The Florida No-Aid Provision Was Inspired By Or Modeled After The Defeated Federal Blaine Amendment.	
A. There Is No Evidence That the Florida No-Aid Provision Was Based on the Blaine Amendment.	p.11
B. Proponents of Vouchers and the Repeal of No-Aid Provisions Have Distorted the History of the So-Called "Blaine Amendment."	p.15
C. Florida's No-Aid Provision Has Been Re-adopted Several Times, Severing Any Possible Link to Anti-Catholic Bias.	p.18
Conclusion	p.19

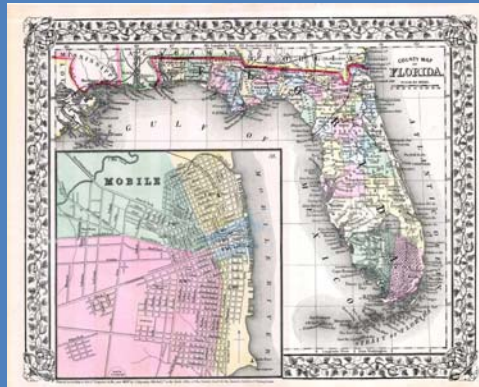
Introduction

Article I, section 3 of the Florida Constitution has long protected the religious-freedom rights of all Floridians by barring taxpayer-funded aid to religious institutions. Article I, section 3 states:

There shall be no law respecting the establishment of religion or prohibiting or penalizing the free exercise thereof. Religious freedom shall not justify practices inconsistent with public morals, peace or safety. No revenue of the state or any political subdivision or agency thereof shall ever be taken from the public treasury directly or indirectly in aid of any church, sect, or religious denomination or in aid of any sectarian institution.

The last sentence of this clause, often referred to as the “no-aid provision” has been in effect without material change for more than 125 years.¹ First adopted as part of the 1885 constitution, the no-aid provision has been re-ratified three times since in connection with the constitution revision commissions held in 1968, 1977, and 1997.²

Despite its *bona fide* historical roots, however, the no-aid provision has come under attack in recent years. Most recently, the Florida legislature approved language for a proposed constitutional amendment that would repeal the no-aid provision and replace it with language that would allow –



Florida's no-aid provision was adopted in 1885 and has been re-ratified three times since then – in 1968, 1977, and 1997 – without any material changes or charges of anti-Catholic bias.

¹ The current constitution was adopted in 1968, with revisions occurring in 1977 and 1997 and at other times via ballot initiatives proposed by the Legislature, the people of Florida, and the Taxation and Budget Reform Commission. The current version of Article I, Section 3 is slightly revised from the 1885 no-aid provision, which stated: “No preference shall be given by law to any church, sect or mode of worship, and no money shall ever be taken from the public treasury directly or indirectly in aid of any church, sect or religious denomination, or in aid of any sectarian institution.” FLA. CONST. of 1885, Declaration of Rights, § 6, available at <http://www.law.fsu.edu/crc/conhist/1885con.html> (last visited June 30, 2011). Because the language in the 1885 and 1968 provisions is nearly identical – the only salient difference being the 1968 revision that extended the prohibition on government funding to municipalities – “Article I, Section 3” and “no-aid provision” will be used generically to describe both, except where specified in the text.

² While constitutional revisions in the 19th century occurred almost entirely through constitutional conventions, revisions in the 20th century occurred primarily through constitution revision commissions. Revision commissions resemble constitutional conventions, with two major differences: First delegates to revision commissions are appointed, rather than elected; second revision commissions propose specific amendments, which can each be voted up or down, rather than proposing a new constitution that must be accepted or rejected in its entirety by the voters. The first revision commission produced the 1968 constitution. Though the no-aid provision underwent only minor changes, the 1968 constitution, on the whole, represented a major departure – in both substance and process – from the constitution of 1885. It also established mandatory constitution revision commissions to be held automatically every twenty years. FLA. CONST. of 1968, art. XI, § 2 (establishing that a review commission would meet ten years after the 1968 constitution, and thereafter every twenty years, which is the pattern that has been followed).. In accordance with this mandate, revision commissions have been convened in 1977 and, most recently, in 1997.

and even promote – taxpayer funding of religious institutions.³ The proposed repeal and amended language will be submitted to Florida voters in the November 2012 general election.

Supporters of the repeal have raised a red herring, claiming that Florida’s no-aid provision arose out of anti-Catholic bigotry and continues to promote such prejudice today. This contention is, simply put, false.

While supporters have couched the proposed repeal in “religious freedom” terms,⁴ for many proponents, the real goal is to promote a wide variety of government-funded religious entities and activities, including taxpayer-financed educational vouchers that would require Floridians to subsidize private religious schools. Indeed, Sen. Thad Altman, who sponsored the repeal legislation in the Senate, told the *Tampa Tribune*, “Education choice, higher education scholarships . . . are just a few of the examples of the services the religious organizations can provide.”⁵ These ends, however, would wholly undermine the no-aid provision’s longstanding religious liberty protections.⁶

Aware that, across the country, voters have consistently rejected plans to use taxpayer funds to subsidize private religious education,⁷ supporters of the repeal have instead raised a red herring, claiming that Florida’s no-aid provision arose out of anti-Catholic bigotry and continues to promote such prejudice today. This contention is, simply put, false. As Part I of this report illustrates, the text and legislative history of the Florida Constitution, judicial interpretations of the no-aid provision, and Florida’s broader history all belie this claim. None of these reflects any anti-Catholic bias associated with Florida’s no-aid provision.

Lacking any historical or textual evidence of anti-Catholic bigotry connected to the no-aid provision, voucher and repeal proponents contend that the clause was nevertheless borne out of anti-Catholic bias that sought to “effectively shut down Catholic schools.”⁸ Specifically, they contend that the provision was inspired by and associated with the so-called “Blaine Amendment,” a failed effort by

³ The amended section would provide: “There shall be no law respecting the establishment of religion or prohibiting or penalizing the free exercise thereof. Religious freedom shall not justify practices inconsistent with public morals, peace, or safety. Except to the extent required by the First Amendment to the United States Constitution, neither the government nor any agent of the government may deny to any other individual or entity the benefits of any program, funding, or other support on the basis of religious identity or belief.” H.J. Res. 1471, Sess. 2011 (Fla.).

⁴ Supporters have called the legislation proposing this amendment (CS/HJR 1471) the “Religious Freedom Act.”

⁵ Catherine Whittenburg, *Religious Freedom Act is Gaining Ground*, TAMPA TRIBUNE (Fla.), Apr. 14, 2010, at 4. Thomas Wenski, Archbishop of the Catholic Archdiocese of Miami, also highlighted the hope of many repeal proponents that “schools educating children from failing schools with vouchers . . . [would] be allowed to serve.” Thomas Wenski, Op-Ed, *Citizens Should Support Religious Freedom Act*, SUN-SENTINEL (Fla.), June 21, 2011, at 12A.

⁶ In 2006, the Florida Supreme Court voided Florida’s Opportunity Scholarship Program, which provided vouchers to the parents of children attending failing public schools. *Bush v. Holmes*, 919 So 2d 392 (Fla. 2006), *aff’d* 886 So. 2d 340 (Fla. Dist. Ct. App. 2004). The vouchers could be used at any accredited Florida private school, including religious schools. While the Florida First District Court of Appeal held that the voucher program violated the no-aid provision, the Florida Supreme Court relied on Article IX, Section 1 (the “uniformity in education” clause). The Supreme Court did not rule on whether the voucher program also violated Article I, Section 3. For a thorough discussion of the Opportunity Scholarship Program, see Jamie Dycus, *Lost Opportunity: Bush v. Holmes and the Application of State Constitutional Uniformity Clauses to School Voucher Schemes*, 35 J.L. & EDUC. 415, 419-21 (2006).

⁷ In the last 41 years, voters across the country have rejected private school vouchers every time they have been proposed, including proposed voucher programs in California, Colorado, the District of Columbia, Maryland, Michigan, Nebraska, Oregon, Utah, and Washington.

⁸ See, e.g., Wenski, *supra* note 5.

one congressional representative more than 135 years ago to amend the U.S. Constitution to prohibit taxpayer support for religious practices in the public or private schools.⁹ As Part II of this report explains, however, there is simply no evidence showing that the Florida no-aid provision was inspired by or modeled after the federal Blaine Amendment. Moreover, these claims grossly mischaracterize the alleged anti-Catholic roots of the Blaine Amendment.

I. The Text and History of the Provision, As Well As the Religious and Political Dynamics at the Time of Its Adoption, Disprove Claims of Anti-Catholic Bias.

Voucher and repeal proponents repeatedly argue that Florida's no-aid provision is steeped in anti-Catholic bigotry. But other than pointing out that the provision was adopted ten years after the failed federal Blaine Amendment (an argument addressed in Part II below), they offer no evidence of this serious charge. Nor could they. The provision has been part of the Florida Constitution for 125 years. Nothing in its text suggests any intent to discriminate against Catholics. The legislative history from the 19th and 20th centuries also yields no evidence that the no-aid provision was enacted or reenacted with the purpose of discriminating against any religious faith. Indeed, as shown below, Florida politics were free of anti-Catholicism, both in 1885 when the no-funding provision was passed, and in 1968 when it was re-ratified. It would thus strain credulity to maintain that the constitutional drafters held invidious prejudices against Catholics not shared by most of their fellow citizens, or that the measure could have gained support and been approved in 1885, 1968, 1977, and 1997 without eliciting a vocal response from the Catholic community.

A. The Text of the No-Aid Provision Does Not Discriminate Against Catholics.

Based on the text of the no-aid provision, it clearly applies equally to all religious denominations, creeds, and belief systems. Nothing in the text could reasonably be construed to single out Catholics for disadvantageous treatment. The same is true of the original version in the 1885 constitution, which had substantially similar wording.¹⁰ The law places all religious denominations on equal footing.

Citing unsupported dicta from the plurality opinion of one Supreme Court case,¹¹ some repeal opponents claim that the use of the term "sectarian" to describe the type of institution that is ineligible to receive taxpayer funding is code for "Catholic." But there is no historical evidence to support that contention. Quite the contrary – a group of leading legal historians has documented evidence otherwise, including an incident in the 1820's in which the New York legislature rejected

⁹ House Joint Resolution 1471, which authorized the ballot question proposing repeal, declared that "Florida's Blaine Amendment language was borne in an atmosphere of, and exists as a result of, anti-Catholic bigotry and animus" and that "the genesis of Florida's Blaine Amendment language reflects an attempt to stifle and disrupt the constitutional rights and development of the emerging Catholic minority community in America." H.J. Res. 1471, Sess. 2011 (Fla.). The resolution characterizes the proposed repeal as an "opportunity to remove the discriminatory Blaine Amendment language, a lasting stain upon the state's history . . ." *Id.* The measure was passed by the Florida House, 81 to 35, and the Florida Senate by a vote of 26 to 10.

¹⁰ See *supra* note 1.

¹¹ See *Mitchell v. Helms*, 530 U.S. 793, 828 (2000) (plurality opinion) ("[I]t was an open secret that 'sectarian' was code for 'Catholic.'") (citing Steven K. Green, *The Blaine Amendment Reconsidered*, 36 AM. J. LEGAL HIST. 38, 60 (1992)). The Court's citation to Green's article is odd because Green did not, in fact, reach the same conclusion as the Court.

Exposing the Myth of Anti-Catholic Bias

public funding for a religious school operated by the Baptist Church, after considering evidence of its “sectarian” character.¹² Similarly, six years after Florida approved its no-aid provision, the newly formed University of Chicago was dubbed “sectarian” in connection with criticism of its alliance with the Baptist church.¹³ And in an effort to downplay its relationship with the Episcopalian Church, Columbia University advertised itself as free from “sectarian control.”¹⁴ If “sectarian” was a code word for “Catholic,” these institutions of higher learning failed to notice.

Moreover, newspapers from the era provide ample additional evidence of the broad usage of the term “sect” to include a great diversity of non-Catholic groups:

- “If the doctrine advocated yesterday were upheld, every religious sect, from Presbyterianism down to Mormon, could subvert the very system of our Government.” (*Oakland Tribune*; Nov. 27, 1875; Oakland, CA.)
- “School Superintendent Campbell is greatly exercised over the opposition to [Protestant] Rev. Mr. Hamilton as a school Director . . . We hold that no clergyman ought to be elected to the Board of Education. [Campbell] straddles about in a ludicrous manner, first charging that we are opposed to the Catholics controlling the schools and then showing that we object to having Mr. Hamilton, as the representative of a religious sect or creede [sic] go into the Board of Education.” (*Oakland Tribune*; Feb. 25, 1875; Oakland, CA.)
- “[Since Governor Hayes] would not violate the [state] Constitution, or permit it to be violated, by giving undue preference to any religious sect, he must certainly have appointed at least one priest as a Chaplain to some one of the State institutions. If he appointed all Protestant Chaplains, he would *seem* to have given a preference to that *religious society*.” (*Ohio Democrat*; Sept. 9, 1875; New Philadelphia, OH.)
- “[The proposed amendment states that] no such appropriation shall be made to any religious sect or denomination . . . nor shall any public money, land, or property be divided between religious sects or denominations.” (*Galveston Daily News*; Aug. 16, 1876; Galveston, TX.)
- “[T]he religious sect known as Campbellites . . . will admit no name for themselves but ‘Christians,’ but the world persists in understanding all professed followers of Christ by that name, and few would understand a single sect by that term.” (*Galveston Daily News*; June 1, 1875; Galveston, TX.)
- “The *Globe-Democrat* has a letter from Kensett, Arkansas, detailing some atrocities committed by a [non-Catholic] religious sect called Cobb’s” (*Oakland Tribune*; Sept. 2, 1876; Oakland, CA.)
- “A camp meeting began . . . last Thursday, under the auspices of a new religious sect, known as the Free Gospelites. It has no connection with any other denomination in the county, and probably not in the state.” (*Bucks County Gazette*; Aug. 26, 1875; Bristol, PA.)

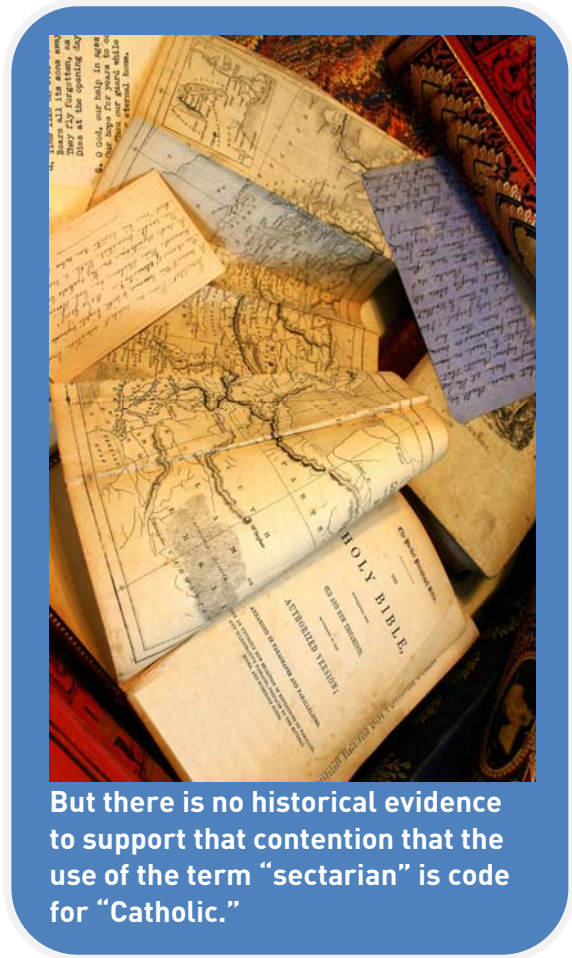
¹² Brief for Historians and Law Scholars as *Amici Curiae* Supporting Petitioners, *Locke v. Davey*, 540 U.S. 712 (2004), at 9 [hereinafter “Brief for Historians”].

¹³ JULIE A. REUBEN, *THE MAKING OF THE MODERN UNIVERSITY: INTELLECTUAL TRANSFORMATION AND THE MARGINALIZATION OF MORALITY*, 84 (1996) (“In 1891, when the Baptist Education Society led a fund-raising drive for the new University of Chicago, the *Educational Review* published an editorial blasting efforts to establish denominational schools: ‘The wickedness of this movement for sectarian universities is only exceeded by its folly.’”).

¹⁴ *Id.* at 86.

Exposing the Myth of Anti-Catholic Bias

- “Early education and impressions bear much upon our lives, and if in the schools we are to get our religious instructions, then each sect should have its own, for it would be taking advantage of some, if, in order to be a teacher you must be a Christian and a member of church, for it would be showing partiality to that denomination to which the teacher belonged to appoint him (or her) to instruct the youth of all sects” (*Bucks County Gazette*; Jan. 27, 1876; Bristol, PA.)
- “I suggest for your earnest consideration...that a constitutional amendment be submitted...to establish and forever maintain free public schools . . . forbidding the teaching in said schools of religious, aesthetic, or pagan tenets, and prohibit the granting of any school funds or school taxes . . . [for the benefit] of any religious sect or denomination” (*Defiance Democrat*; Dec. 16, 1875; Defiance, OH.)
- “In the government of Tamboff in Russia a particular religious sect, which has for some time existed in Siberia, is making many proselytes.” (*Defiance Democrat*; July 5, 1877; Defiance, OH.)
- “The camp-meeting of the ‘Church of God,’ a religious sect known as Winebrennarians . . . has been attended with great success” (*Defiance Democrat*; Sept. 27, 1877; Defiance, OH.)



But there is no historical evidence to support that contention that the use of the term “sectarian” is code for “Catholic.”

The oft-repeated blanket assertion that the term “sectarian” was a pretext to disguise anti-Catholic sentiment, then, is groundless. Rather, the terms “sectarian” and “sect” were widely understood to mean “religion” and “denomination,” and that is how they should be understood in the Florida Constitution.

B. The Legislative History of the No-Aid Provision and State Constitution Does Not Reveal Any Intent to Target Catholics.

Scholars on all sides of the political spectrum agree that nothing in the legislative record demonstrates an anti-Catholic slant by any of the framers who have revised the Florida Constitution since the Civil War.¹⁵ And the Florida First District Court of Appeal has explicitly considered and rejected the argument that Florida’s no-funding clause was rooted in religious intolerance, holding

¹⁵ See Jill Goldenziel, *Blaine’s Name in Vain?: State Constitutions, School Choice, and Charitable Choice*, 83 DENV. U. L. REV. 57, 82 (2005) (citing the “benign” history of Florida’s no-aid provision); J. Scott Slater, *Florida’s “Blaine Amendment” and its Effect on Educational Opportunities*, 33 STETSON L. REV. 581, 619 (2004) (noting the lack of any legislative debate surrounding the addition of the no-aid provision to the 1885 constitution).

that “nothing in the history or text of the Florida no-aid provision suggests animus towards religion.”¹⁶

Moreover, if the no-aid provision had been widely understood as an anti-Catholic measure when it was adopted in 1885, Catholic journalists, legislators, and Church officials presumably would have protested in response. But as some opponents of the no-aid provision have conceded, “the 1885 Constitutional Convention seems to have added this language without much debate or argument, and contemporary newspapers barely covered the addition of the new provision.”¹⁷

As one Florida court has observed, “nothing... indicates any bigoted purpose in retaining the no-aid provision,” either when the current version was enacted in 1968 or thereafter.

To that end, no Catholic Church official spoke against the “directly or indirectly” language, and during the debates at the 1885 Constitutional Convention, none of the delegates from the Catholic stronghold of St. Augustine stood up to protest or to propose any amendments.¹⁸ Further, *The Catholic Encyclopedia* – the first English-language encyclopedia written from a Catholic point of view – discussed the no-aid provision at length in its 1913 entry for “Florida” without once implying that the measure was born of bigotry. Indeed, *The Catholic Encyclopedia* concluded its survey of Florida law by observing that “the attitude of both bench and bar in the State has in these matters been ever

above suspicion of anti-Catholic bias or partiality.”¹⁹ Those who claim the no-aid provision was designed to impose special discriminatory burdens on Catholic education have been unable to explain why no prominent Catholic at the dawn of the 20th century was aware of this purported bias.

Indeed, not only was there no claim of anti-Catholic bias when Article I, Section 3 was added to the Florida Constitution in 1885, but the no-aid provision has been re-ratified each time it has come before Florida’s constitution revision commissions. The current version of Florida’s no-aid provision was enacted in 1968 by a revision commission composed of delegates from across the state. The delegates did not reflexively ratify the existing language; rather, they enacted several minor revisions. They also considered and rejected several amendments that would have loosened restrictions on public funding for religious institutions, indicating that there was a substantive review of the provision.²⁰

¹⁶ *Holmes*, 886 So. 2d at 364.

¹⁷ Slater, *supra* note 14, at 619.

¹⁸ JOURNAL OF THE PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF FLORIDA, WHICH CONVENEED AT THE CAPITOL, AT TALLAHASSEE, ON TUESDAY, JUNE 9, 1885 (Tallahassee, Fla., N. M. Bowen 1885).

¹⁹ James Veale, *Florida*, in *THE CATHOLIC ENCYCLOPEDIA* VOLUME VI, at 120 (Charles G. Herbermann et al. eds. 1909).

²⁰ Nathan A. Adams, *Pedigree of an Unusual Blaine Amendment: Article I, Section 3 Interpreted and Implemented in Florida Education*, 30 NOVA L. REV 1, 43 (2005) (“The Commission also rejected a substitute amendment condensing article 1, sections 3 through 5 and replacing the state Blaine amendment with language similar to the federal Establishment Clause . . . [T]he Commission [also] rejected a proposal that recurred in subsequent constitutional conventions to strike the phrases ‘or indirectly’ and ‘directly or indirectly.’”); see also *Holmes*, 886 So. 2d at 351 (“The proposed revised Constitution forwarded to the Florida Legislature by the Constitution Revision Commission (CRC) omitted what is now the final sentence of article I, section 3. This omission would have had the effect of equating the language of article I, section 3 with the language of the federal Establishment Clause. The legislature revised the CRC’s draft, however, to retain the no-aid prohibition in addition to the Establishment Clause language. By retaining the specific prohibition on using public funds to support sectarian institutions contained in the 1885 Constitution in addition to the Establishment Clause language, the legislature – and subsequently the electorate, which ratified the Constitution of 1968 – made clear that article I, section 3 necessarily imposes restrictions beyond the Establishment Clause.”) (citations omitted).

Exposing the Myth of Anti-Catholic Bias

Similarly, both the 1977²¹ and 1997²² revision commissions considered amendments to Article I, Section 3 that would have removed or substantially reinterpreted its “directly or indirectly” language to permit state funding for private religious schools. Both commissions declined even to submit the proposal to the voters, however. As the Florida First District Court of Appeal observed, “nothing in the proceedings of the [revision commission] or the Florida Legislature indicates any bigoted purpose in retaining the no-aid provision,” either in 1968 or thereafter.²³ Yet the repeal proponents have not offered any explanation as to how a law that they claim subordinates Catholics commanded so much support, and why no one previously identified its anti-Catholic bias or objected to it as recently as 1997, despite a boom in Florida’s Catholic population.²⁴

C. The Religious and Political Climate in Florida at the Time of the Adoption of the No-Aid Provision Show a Broad Tolerance of Catholicism.

Recent attacks on Florida’s no-aid provision by voucher and repeal advocates founders on the historical record, which, as noted above, fails to support the claim that the framers of Florida’s various constitutions harbored any animus towards Catholics. The anti-Catholic narrative also falls apart when one examines the history of Catholicism in Florida. While anti-Catholicism may have influenced politics in other states, it was almost unknown in Florida in 1885. And while a robust anti-Catholic movement did eventually develop in Florida, scholars generally agree that it did not emerge until the eve of World War I, and that by 1919, anti-Catholicism was a spent force in Florida politics.²⁵ Thus, anti-Catholicism could not have been an influential force in the framing of the Florida Constitution in 1885 or in 1968.

In particular, in 19th century Florida, where Catholics were few, anti-Catholicism was a political nonstarter. Organized Catholicism had a relatively weak presence in Florida,²⁶ and few Catholics there were of foreign descent (an important consideration, as political anti-Catholicism was always closely linked to xenophobia and nativism).²⁷ An instructive example of Florida’s tolerance for Catholics can be glimpsed in the history of the Know-Nothing Party in Florida. Although the national Know-Nothing Party was virulently anti-Catholic, this was not the case in

²¹ Talbot D’Alemberte, Chairman, Fla. Constitution Revision Comm’n, Meeting Proceedings for Dec. 6, 1977, at 95-123.

²² W. Dexter Douglass, Chairman, Fla. Constitution Revision Comm’n, Meeting Proceedings for Sept. 25, 1997, at 68, available at <http://www.law.fsu.edu/crc/minutes/crcminutes092597.html> (last visited June 23, 2011).

²³ *Holmes*, 886 So. 2d at 351 n.9.

²⁴ In 1971 in Florida, there were 917,459 Catholics adherents, defined as Catholics who regularly attend services or participate in the congregation. The number of Catholic adherents in Florida jumped 180% from 926,923 in 1980 to 2,596,148 in 2000. The Association of Religious Data Archives, U.S. Church Membership Data, available at <http://www.thearda.com/Archive/ChState.asp> (last visited June 26, 2011).

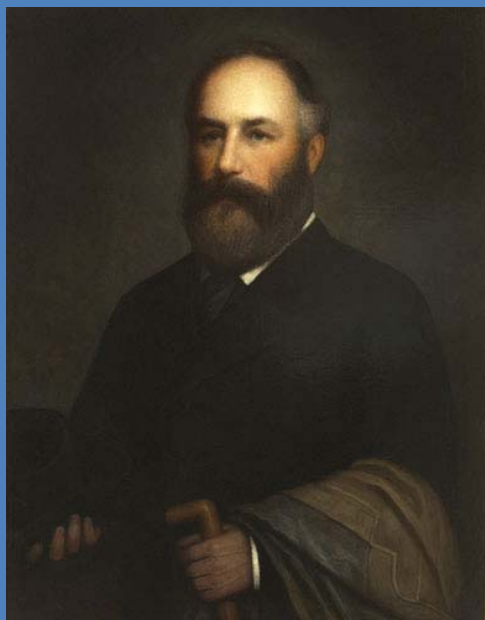
²⁵ See MICHAEL J. McNALLY, CATHOLICISM IN SOUTH FLORIDA: 1868-1968, at 42, 50 (1982) (arguing that “[m]ilitant” anti-Catholicism in Florida was limited to the period from 1910 to 1917); Adams, *supra* note 19, at 13-14 (explaining that Know-Nothingism in Florida was muted and “did not emphasize anti-Catholicism”); David P. Page, *Bishop Michael J. Curley and Anti-Catholic Nativism in Florida*, 45 FLA. HIST. Q. 101, 101 (1966) (dating the onset of anti-Catholicism in Florida to World War I); Stephen R. Prescott, *White Robes and Crosses: Father John Conoley, the Ku Klux Klan, and the University of Florida*, 71 FLA. HIST. Q. 18, 22 (1992) (“Anti-Catholicism had been largely a northern phenomenon prior to 1910.”); Arthur W. Thompson, *Political Nativism in Florida, 1848-1860: A Phase of Anti-Secessionism*, 15 J. OF S. HIST. 39, 49 (1949) (noting that the state Know-Nothing party in Florida “would have nothing to do with anti-Catholicism”); Dennis Michael McCarron, *Catholic Schools in Florida, 1866-1992*, at 82 (unpublished Ph.D. dissertation, Florida State University) (on file with author) (1993) (stating that anti-Catholicism did not emerge as a force in Florida politics until 1910).

²⁶ Thompson, *supra* note 24, at 50. Of the 1,227 Roman Catholic churches in America in 1850, Florida had only five. *Id.*

²⁷ Adams, *supra* note 19, at 13 (“Foreign-born Floridians accounted for just 3% of the state’s population in 1850, and even by 1890, just 6% of the population. By comparison, foreigners in Massachusetts accounted for 16% of the population in 1850, and by 1890 equaled 30% of the population.”).

Exposing the Myth of Anti-Catholic Bias

Florida. As Nathan Adams (the former Deputy General Counsel to Governor Jeb Bush), who supports government funding of religious schools, candidly acknowledged:



Edward A. Perry, Governor of Florida at the time the 1885 Constitution was passed.

Florida Know-Nothingism proved nationally distinct. Although Democrats branded them as religiously intolerant and abolitionists, the Florida American Party platform disapproved the national platform with respect to religious intolerance . . . [T]he state’s demurer from the national platform favoring anti-Catholicism is significant. Although other states discriminated against Catholics in public law prior to the Civil War, Florida did not.²⁸

The distinguished Florida historian Arthur W. Thompson concurs with this assessment, writing that even in the Know-Nothing Party, “there was no overt hostility to Florida Catholics. An undertone of prejudice was, of course, present. But the American [i.e., the Know-Nothing] party never made Catholicism an issue in Florida, possibly because of the absence of a significant number of Catholics in the state.”²⁹ Thus, at a time when tension between Catholics and Protestants was rapidly escalating in the North, the so-called “Catholic question” barely registered in Florida.

This lack of interest in persecuting Catholics in the South continued throughout the nineteenth century. As historian David Page wrote, “the South, Florida included, was relatively unaffected by the waves of anti-Catholicism that swept intermittently during the nineteenth century over much of the eastern and midwestern regions of the nation.”³⁰ Page calls attention to the lack of anti-Catholic sentiment in Florida “during the 1893-94 period” – eight years *after* the insertion of a no-funding provision in Florida’s constitution.³¹

Page illustrates this point with two telling historical details. First, he observes that Florida elected a Catholic – Stephen R. Mallory – to the U.S. Senate in 1897, and then renominated him without opposition in 1902.³² Mallory’s victories in both the general election and in a party primary open to the public suggests widespread tolerance of Catholicism by both the elite and popular classes in Florida. Second, Page underscores the “particularly amicable relationship” that developed between the Catholic hierarchy and the Florida government beginning in the late 1870s and continuing into the twentieth century, which broke down only with the explosion of Southern nativism during World War I.³³ It is doubtful that the Catholic Church could have coexisted so

²⁸ *Id.* at 13-14. While Adams does note that some individuals in the Know-Nothing Party in Florida may have harbored anti-Catholic feelings, he finds it significant that the Party itself (whose national representatives spoke of Catholics in extremely inflammatory terms) disavowed anti-Catholic public policies in Florida.

²⁹ Thompson, *supra* note 24, at 50.

³⁰ Page, *supra* note 24, at 101-102.

³¹ *Id.*

³² *Id.* at 104.

³³ *Id.* at 101 (“In the years between the Civil War and World War I . . . [a] particularly amicable relationship was formed between the bishops of this period and the officials of the State of Florida.”).

amicably with a government that was burdening it with discriminatory measures designed to “Protestantize” the children of its parishioners.

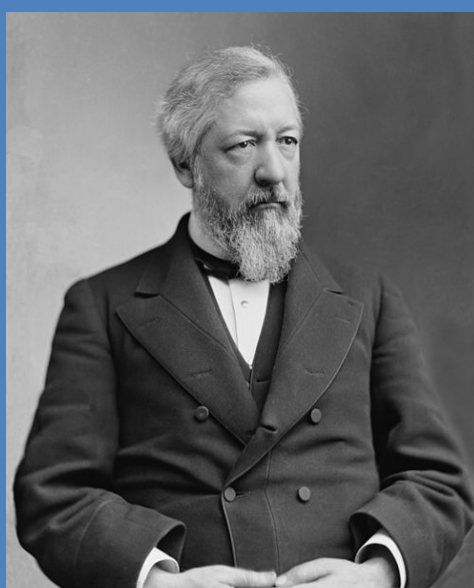
State judicial opinions interpreting and applying the no-aid provision have similarly evinced no anti-Catholic bias: In contrast to the religious establishment jurisprudence of some other states, no published opinion by any Florida court applies the religious freedom provision in a discriminatory fashion. None cuts off funding to Catholic institutions while declining to apply the same law to Protestant institutions.

II. There Is No Evidence That The Florida No-Aid Provision Was Inspired By Or Modeled After The Defeated Federal Blaine Amendment.

With no historical or textual evidence of any anti-Catholic bias associated with Florida’s no-aid provision, the claim of prejudice made by voucher and repeal proponents rests on the slimmest of reeds: the so-called “Blaine Amendment,” a failed effort by one congressional representative more than 135 years ago to amend the U.S. Constitution to prohibit taxpayer support for religious practices in the public or private schools

In 1875, James G. Blaine, a member of the U.S. House of Representatives from Maine – and a leading Republican candidate for President of the United States – proposed a new amendment to the U.S. Constitution:

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.³⁴



James Blaine was a Republican candidate for president, Speaker of the U.S. House of Representatives, U.S. Senator from Maine, and two-time Secretary of State.

This “Blaine Amendment” was approved by a wide margin in the U.S. House of Representatives before it was sent to the Senate. The Senate, however, substantially revised the original House version, and then narrowly failed to adopt it by the required two-thirds vote.³⁵

³⁴ 4 CONG. REC. 205 (1875).

³⁵ The Senate version stated:

No State shall make any law respecting an establishment of religion, or prohibiting the free exercise thereof; and no religious test shall ever be required as a qualification to any office or public trust under

Exposing the Myth of Anti-Catholic Bias

Repeal proponents argue that Florida's no-aid provision must be understood in light of the "anti-Catholic" politics that allegedly surrounded the proposed Blaine Amendment ten years earlier. For example, the Becket Fund, a leading advocate for the repeal of state constitutional provisions prohibiting taxpayer funding of religious schools, asserts that:

Blaine Amendments are provisions in dozens of state constitutions that prohibit the use of state funds at "sectarian" schools. They're named for James G. Blaine, who proposed such an amendment to the U.S. Constitution while he was Speaker of the U.S. House of Representatives in 1875. The amendment passed overwhelmingly (180-7) in the House, but failed (by 4 votes) in the Senate. Although the amendment failed narrowly, state-level versions were wildly successful. And in several states, adoption of Blaine Amendments was made an explicit condition for entering the Union.

....

It was not widely appreciated until recently that Blaine Amendments were passed as a direct result of the nativist, anti-Catholic bigotry that was a recurring theme in American politics during the 19th and early 20th centuries.³⁶

This view of the Florida no-aid provision suffers from several flaws. First, there is no evidence that the clause was inspired by or modeled after the Blaine Amendment. Rather, it is likely that the Florida no-aid provision was shaped with an eye toward a number of no-aid provisions adopted by other states well before the Blaine Amendment was ever proposed. Second, the alleged ties of the Blaine Amendment to anti-Catholic bias are greatly exaggerated and not supported by the evidence. Finally, Florida's no-aid provision has been reauthorized at least three times since its 1885 adoption, providing considerable distance from any possible anti-Catholic taint.

A. There Is No Evidence That the Florida No-Aid Provision Was Based on the Blaine Amendment.

The claim by voucher and repeal proponents that Florida's no-aid provision is a legacy of the federal Blaine Amendment is simply not true. There is no evidence of any link between the proposed Blaine Amendment of 1875 and the Florida Constitution and no-aid provision enacted ten years later

any State. No public property, and no public revenue of, nor any loan of credit by or under the authority of, the United States, or any State, Territory, District, or municipal corporation, shall be appropriated to, or made or used for the support of any school, educational or other institution under the control of any religious or anti-religious sect, organization, or denomination, or wherein the particular creed or tenets of any religious or anti-religious sect, organization, or denomination shall be taught. And no such particular creed or tenets shall be read or taught in any school or institution supported in whole or in part by such revenue or loan of credit; and no such appropriation or loan of credit shall be made to any religious or anti-religious sect, organization, or denomination, or to promote its interests or tenets. This article shall not be construed to prohibit the reading of the Bible in any school or institution; and it shall not have the effect to impair rights of property already vested.

4 CONG. REC. 5453 (1876). One Florida Senator, Charles W. Jones, voted against this revised amendment and the other, Simon B. Conover, did not vote. 4 CONG. REC. 5595 (1876). The Senate vote was 28 in favor and 16 against. *Id.*

³⁶ The Becket Fund for Religious Liberty, *What Are Blaine Amendments?* <http://www.blaineamendments.org/Intro/whatis.html> (last visited June 22, 2011). See also, e.g., *The Buzz: Florida Politics*, ST. PETERSBURG TIMES (Fla.), Feb. 26, 2010 (quoting repeal sponsor Rep. Steve Precourt as declaring that "Blaine Amendments are antiquated constitutional tenants rooted in bigotry that go far beyond the separation of church and state envisioned by our founding fathers").

Exposing the Myth of Anti-Catholic Bias

in 1885. Though it is true that the failed Blaine Amendment predated the 1885 Florida Constitution,³⁷ the language in the Florida provision is quite different from the language of the Blaine Amendment. Moreover, Florida was not the first state to include such language in its constitution. On the contrary, many states prohibited aid to religious schools long before the federal Blaine Amendment was proposed, and there is some evidence that Florida's provision was actually modeled after those measures.

In addition, the no-aid provision, ratified in 1885, was introduced at a time when many other states were passing similar measures. Twenty-two states drafted their own no-funding provisions in the fifty years following the defeat of the Blaine Amendment in 1876.³⁸ Deeming the post-Blaine no-aid provisions "baby Blaine" Amendments, some scholars have inferred that most or all of them were intentionally patterned after the Blaine Amendment.³⁹ But, as explained below, the evidence for this thesis is thin. As law professor Noah Feldman has observed, it strains credulity to believe "that each and every state that adopted a state Blaine did so in some sort of fit of either ideological or cynical anti-Catholicism."⁴⁰ More to the point, it is hard to believe that a single line of causation runs through the diverse assortment of no-aid provisions that were added to state constitutions under very different circumstances and in very different political climates throughout the second half of the 20th century.

1. *Many States Enacted Limitations on Taxpayer Subsidies for Religious Schools and Institutions Long Before the Defeated Blaine Amendment.*

The text and scope of Florida's no-aid provision is substantially different than the text of the originally proposed Blaine Amendment.⁴¹ Whereas the Blaine Amendment would have restricted only the use of funds "raised . . . for the support of public schools,"⁴² the Florida provision is written more broadly to forbid *any* taxpayer funds from subsidizing any religious institution. In addition, the Florida provision bars such aid, whether dispensed "directly or indirectly"—language not found in the Blaine Amendment. The Blaine Amendment also refers to "public lands" being "divided between religious sects,"⁴³ an anxiety that is conspicuously absent from Florida's no-aid provision. These discrepancies in language are difficult to explain if Florida modeled its no-aid provision after the Blaine Amendment, as repeal proponents claim.

The more likely explanation is that Florida's no-aid provision was modeled after a host of similar measures enacted by a number of states that barred aid to religious schools or other sectarian institutions *well before* Rep. Blaine proposed his federal amendment. James Madison, the primary architect of the First Amendment, famously opposed efforts by Virginia in 1785 to impose a

³⁷ See, e.g., Irina D. Manta, *Missed Opportunities: How the Courts Struck Down the Florida School Voucher Program*, 51 ST. LOUIS U. L.J. 185, 188-189 (2006) ("[Florida's] enactment, however, took place during the same time period in which other states were adopting Blaine Amendments."); Slater, *supra* note 14, at 619 (citing "closeness in time" as evidence that Article I, Section 3 was inspired by the federal Blaine Amendment).

³⁸ Steven K. Green, *The Insignificance of the Blaine Amendment*, 2008 B.Y.U. L. REV. 295, 297 (2008) [hereinafter *Insignificance*].

³⁹ See, e.g., PHILIP HAMBURGER, SEPARATION OF CHURCH AND STATE 335 (2002) ("Nativist Protestants also failed to obtain a federal constitutional amendment but, because of the strength of anti-Catholic feeling, managed to secure local versions of the Blaine amendment in a vast majority of the states.").

⁴⁰ Noah Feldman, *Non-Sectarianism Reconsidered*, 18 J.L. & POL. 65, 111 (2002).

⁴¹ Compare FLA. CONST. of 1885, Declaration of Rights, § 6, with the Blaine Amendment, 4 CONG. REC. 205 (1875).

⁴² 4 CONG. REC. 205 (1875).

⁴³ *Id.*

tax on its citizens to support “Teachers of the Christian Religion.”⁴⁴ Madison rejected this proposal because he thought that taxing the public to support private religious instruction was an unjustifiable and coercive interference with liberty of conscience. He wrote: “Who does not see . . . [t]hat 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?”⁴⁵ Thomas Jefferson, the other key intellectual influence on the framing of the Establishment Clause, insisted that no one “shall be compelled to . . . support any relig[i]ous [w]orship place or [m]inistry whatsoever,” even a “teacher of his own religious persuasion.”⁴⁶ Both Madison and Jefferson, then, called in the late eighteenth century for an approach to the public funding of religious institutions that is remarkably similar to the no-aid principle adopted by Florida in 1885. Thus, no one can seriously doubt that the principled refusal to fund private religious education with taxpayer dollars has a long and distinguished intellectual pedigree in America and nothing to do with anti-Catholic intolerance.

James Madison, the primary architect of the First Amendment, famously opposed efforts by Virginia in 1785 to impose a tax on its citizens to support “Teachers of the Christian Religion.”

Subsequently, the no-aid principle was enshrined in many state constitutions. In 1792, New Hampshire became the first state in the newly formed Union to prohibit the use of state and local school funds by religious institutions; Connecticut followed suit in 1818.⁴⁷ Michigan placed a no-funding provision in its constitution in 1835,⁴⁸ which served as the prototype for several other states in the region, including Wisconsin⁴⁹ in 1848, Ohio⁵⁰ and Indiana⁵¹ in 1851, Oregon⁵² in 1857, and Kansas⁵³ in 1858. In total,

⁴⁴ Douglas Laycock, “*Nonpreferential Aid to Religion: A False Claim About Original Intent*,” 27 WM. & MARY L. REV. 875, 897 & n.107 (1985). Laycock points out that, although the bill mentioned only Christian denominations, given that “[t]here were hardly any Jews in the United States at that time, and no other non-Christians to speak of,” this should not be taken as a sign that Madison would have accepted the bill if it had included synagogues, mosques, etc. *Id.* at 898.

⁴⁵ 2 THE WRITINGS OF JAMES MADISON 186 (Hunt ed. 1901), *quoted in Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 234 n.31 (1977).

⁴⁶ THOMAS JEFFERSON, A BILL FOR ESTABLISHING RELIGIOUS FREEDOM (June 12, 1779) *reprinted in* 5 FOUNDERS’ CONSTITUTION 77 (Philip B. Kurland & Ralph Lerner eds., 1987).

⁴⁷ Claudia Goldin & Lawrence F. Katz, *The “Virtues” of the Past: Education in the First Hundred Years of the New Republic* 29 (Nat’l Bureau of Econ. Research, Working Paper No. 9958, 2003).

⁴⁸ MICH. CONST. art. I, § 4 (“No money shall be appropriated or drawn from the treasury for the benefit of any religious sect or society, theological or religious seminary.”).

⁴⁹ WIS. CONST. art. I, § 18 (“nor shall any money be drawn from the treasury for the benefit of religious societies, or religious or theological seminaries”). The text of the Wisconsin no-aid provision, which was ratified nearly thirty years *before* the Blaine Amendment, is nearly identical to the language of the Blaine Amendment. Goldenziel, *supra* note 14, at 66. This has prompted some scholars to speculate that the Blaine Amendment borrowed heavily from the Wisconsin provision, further calling into question the claim that the Blaine Amendment was anti-Catholic, as the scholarly consensus establishes that Wisconsin’s provision was in no way intended to discriminate against Catholics. See Steven K. Green, “*Blaming Blaine: Understanding the Blaine Amendment and the “No-Funding” Principle*,” 2 FIRST AMEND. L. REV. 107, 127 (2003) [hereinafter *Blaming Blaine*].

⁵⁰ OHIO CONST. art. VI, § 2 (“The general assembly shall make such provisions, by taxation, or otherwise, as, with the income arising from the school trust fund, will secure a thorough and efficient system of common schools throughout the State; but, no religious or other sect, or sects, shall ever have any exclusive right to, or control of, any part of the school funds of this state.”).

⁵¹ IND. CONST. art. I, § 6 (“No money shall be drawn from the treasury, for the benefit of any religious or theological institution.”).

⁵² OR. CONST. art. I § 5 (“No money shall be drawn from the Treasury for the benefit of any religeous [sic], or theological institution, nor shall any money be appropriated for the payment of any religeous [sic] services in either house of the Legislative Assembly.”).

⁵³ KAN. CONST. art. VI, § 6 (c) (“No religious sect or sects shall control any part of the public educational funds.”).

Exposing the Myth of Anti-Catholic Bias

nineteen states had adopted constitutional measures restricting the provision of public funding to sectarian institutions by the time Blaine first proposed his amendment to Congress,⁵⁴ demonstrating that states needed no special encouragement from Washington to enact these kinds of laws.

Not only did these provisions emerge without any impetus from the Blaine Amendment (still decades away), but most were also free of even the faintest traces of anti-Catholic bias. Historians agree that anti-Catholic politics had no traction in New England between the Revolutionary War⁵⁵ and the 1830s.⁵⁶ Meanwhile, in Michigan, Wisconsin, Indiana, Oregon, and Ohio, parochial schools were almost nonexistent, and the few Catholics in these states enjoyed high levels of tolerance and social equality.⁵⁷

Why, then, were states during this period increasingly likely to prohibit public expenditures on religious institutions? Some have argued the states were likely motivated by a Madisonian concern about liberty of conscience and a pragmatic desire to ensure the financial success of their newly formed school systems.⁵⁸ What is clear, in any event, is that, by drafting a constitutional provision restricting the flow of state funds to private religious institutions, Florida's framers were drawing on a century's worth of well-articulated political ideas and historical precedents, nearly all of which were rooted in principle rather than prejudice.

2. *No-Aid Provisions Enacted After the Defeat of the Blaine Amendment Have Few Ties to the Federal Proposal.*

This long, pre-Blaine history of state no-aid provisions notwithstanding, repeal proponents nevertheless argue that the Florida measure must be inspired by the Blaine Amendment because the proposed Blaine Amendment predated the ratification of the Florida Constitution. But "opponents of the no-funding principle have generally failed to demonstrate a connection between the Blaine Amendment and the various state provisions from legislative histories, convention records, or other historical sources . . . [I]t is an argument based on innuendo and assumption, not historical fact."⁵⁹

⁵⁴ Jay S. Bybee & David W. Newton, *Of Orphans and Vouchers: Nevada's "Little Blaine Amendment" and the Future of Religious Participation in Public Programs*, 2 NEV. L.J. 551, 552 (2002).

⁵⁵ The standard work on New England anti-Catholicism in this period is FRANCIS D. COGLIANO, *NO KING, NO POPERY: ANTI-CATHOLICISM IN REVOLUTIONARY NEW ENGLAND* (1995). Cogliano concludes that after the American Revolution, anti-papal sentiment "would never again be at the center of New England culture." *Id.* at 155.

⁵⁶ See Feldman, *supra* note 40, at 79 (2002) (dating the onset of organized anti-Catholicism in America to the 1840s).

⁵⁷ Brief for Historians, *supra* note 11, at 15 ("The Michigan Constitution served as the model for 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."); see also Green, *Blaming Blaine*, *supra* note 49, at 127 ("Despite some growing tension between native Protestants and German Catholic and Lutheran immigrants during the late territorial period, 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.'"); 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 n.163 (2001) ("[W]hether article I, sections 4 and 6 [of the 1851 Indiana Constitution] were the product of the same anti-Catholic sentiment that gave rise to the Blaine Amendment, is a somewhat murky issue. The weight of the evidence suggests that the provisions were not the product of such sentiment.").

⁵⁸ See Green, *Blaming Blaine*, *supra* note 49, at 128. Justice Brennan, in his famous concurrence in *Lemon v. Kurtzman*, additionally attributed the increasing popularity of the no-aid principle in the 19th century to America's growing religious diversity, which suggested to policymakers the importance of avoiding competition between religious groups for taxpayer dollars. See *Lemon v. Kurtzman*, 403 U.S. 602, 645-46 (1971) (Brennan, J., concurring).

⁵⁹ Green, *Insignificance*, *supra* note 38, at 298. Green is the author of *The Blaine Amendment Reconsidered*, *supra* note 10, considered the seminal work of history on the Blaine Amendment by legal scholars of all ideological persuasions. Jill Goldenziel also writes that "activists seem to apply the Blaine name and taint indiscriminately to rhetorically reinforce their argument that all of these provisions have prejudicial origins." Goldenziel, *supra* note 14, at 66.

Indeed, recent scholarship examining state no-aid provisions passed after the proposal and/or defeat of the Blaine Amendment suggests that many of these measures share no historical or philosophical ties with the Blaine Amendment. For instance, one scholar has rejected the notion that Missouri's no-funding provision, passed in 1875, owes anything to the influence of the federal Blaine Amendment, despite having been introduced in the same year.⁶⁰ And following a survey of no-funding provisions in eight states, including Florida, Jill Goldenziel concluded that "many of the provisions which activists term 'Blaine Amendments' cannot justifiably be associated with James G. Blaine and Reconstruction-era anti-Catholic bigotry."⁶¹ In short, many states – understandably – wanted to avoid blurring the boundary between church and state for reasons that had nothing to do with covert anti-Catholicism and owed nothing to Blaine's failed federal legislation. As illustrated in Part I, there is simply no evidence that Florida was any different.

B. Proponents of Vouchers and the Repeal of No-Aid Provisions Have Distorted the History of the So-Called "Blaine Amendment."

Even if the federal Blaine Amendment did influence, however tangentially, Florida's adoption of the no-aid provision, voucher and repeal proponents have distorted the history of the Blaine Amendment. There is no question that many people who supported the original Blaine Amendment in 1875 were indeed antagonistic to Catholics, and it was used by some supporters to divide Protestants and Catholics. But there exists substantial evidence that Blaine himself was not anti-Catholic, and to pretend that anti-Catholicism was the major engine driving support for the Blaine Amendment or that all supporters of the Blaine Amendment were bigots is to gloss over innumerable historical complexities, simply to score political points for a contemporary agenda.

"I would not for a thousand presidencies speak a disrespectful word of my mother's (Catholic) religion, and no pressure will draw me into any avowal of hostility or unfriendliness to Catholics..."

-James Blaine

1. *James Blaine Was Not Anti-Catholic.*

While the issue was unquestionably politicized during the time of the presidential election of 1876, some have grossly distorted the controversy and have gone so far as to accuse Congressman Blaine himself of being an anti-Catholic "bigot."⁶² For example, the leading institution challenging state prohibitions on taxpayer-funded religious schools is the Becket Fund, an organization named after the 12th-century Catholic martyr, Thomas Becket. The Becket Fund has repeatedly vilified Blaine as being "anti-Catholic," including in its legal briefs filed in the U.S. Supreme Court.⁶³ Curiously, however, the

⁶⁰ Aaron E. Schwartz, *Dusting Off the Blaine Amendment: Two Challenges to Missouri's Anti-Establishment Tradition*, 73 MO. L. REV. 129, 166 (2008).

⁶¹ Goldenziel, *supra* note 14, at 66.

⁶² See, e.g., Kevin J. Hasson, President of the Becket Fund for Religious Liberty, Remarks in Panel at University of Pennsylvania Law School (Oct. 22, 1999), in *Do School Vouchers Violate the Establishment Clause? Are They Good Public Policy?*, 1 RUTGERS J. L. & RELIG. 6 (1999) (describing Blaine as "an opportunist bigot").

⁶³ See, e.g., Brief for the Becket Fund for Religious Liberty as *Amicus Curiae* Supporting Petitioners at 3, *Mitchell v. Helms*, 530 U.S. 793 (2000) (No. 98-1648); Press Release, The Becket Fund, Florida Voters to Decide Whether to Repeal KKK-Inspired Blaine Amendment (May 6, 2011), *available online* at <http://hosted-p0.vresp.com/795925/45595ab929/ARCHIVE> (last visited July 8, 2011) including a statement by Meir Katz, Legal Fellow at the Becket Fund, that the proposed amendment to the Florida Constitution is "an attempt to right a wrong inspired by an overzealous bigot named Senator James G. Blaine".

Exposing the Myth of Anti-Catholic Bias

Becket Fund has not offered any evidence to support its vituperative allegation.

In fact, though Blaine was a Presbyterian, his mother and her family were Roman Catholic, and Blaine was devoted to his mother and always had respect for her religious beliefs. He repeatedly rebuffed any suggestion otherwise, explaining on one occasion, "I would not for a thousand presidencies speak a disrespectful word of my mother's religion, and no pressure will draw me into any avowal of hostility or unfriendliness to Catholics" ⁶⁴ On another occasion, he further elaborated on the spurious accusation that he was anti-Catholic:

I am sure that I am the last man in the United States who would make a disrespectful allusion to another man's religion. The United States guarantees freedom of religious opinion. Before the law and under the Constitution, the Protestant, the Catholic and the Hebrew stand entitled to absolutely the same recognition and the same protection.

. . . .

[T]hough Protestant by conviction myself, and connected with a Protestant church, I should esteem myself of all men the most degraded if, under any pressure or under any temptation, I could, in any presence, make a disrespectful allusion to that ancient faith in which my mother lived and died. ⁶⁵

Indeed, in an act entirely inconsistent with the accusation that Blaine was anti-Catholic, he sided with Catholics and against his own church with regard to the religious conflict in Ireland. He favored the rights of the majority (Catholics) over the politically powerful minority (Protestants) on the British-controlled island. Blaine said:

I should be ashamed of the Presbyterian Church of America if it responded to an appeal which demands that five millions of Irish people shall be perpetually deprived of free government because of the remote and fanciful danger that a Dublin Parliament might interfere with the religious liberty of Presbyterians in Ulster. ⁶⁶

2. *The Blaine Amendment Was Not Primarily Driven By Anti-Catholic Animus.*

It is not only Blaine himself who has been vilified. Voucher and repeal advocates regularly claim that others' support of the Blaine Amendment was a "remnant of nineteenth-century religious bigotry promulgated by nativist political leaders who were alarmed by the growth of immigrant populations and who had a particular disdain for Catholics." ⁶⁷ Despite the popularity of this belief among pro-voucher and pro-repeal activists, however, this characterization greatly distorts the actual history of the Blaine Amendment, which was much more complicated:

⁶⁴ EDWARD STANWOOD, JAMES GILLESPIE BLAINE 13 (Houghton Mifflin Co. 1905). Blaine also said, "I shall always recall with pride that my ancestry and kindred were, and are, not inconspicuously connected with its history, and that on either side of the beautiful river, in Protestant and Catholic cemeteries, five generations of my own blood sleep in honored graves." JAMES P. BOYD, LIFE AND PUBLIC SERVICES OF HON. JAMES G. BLAINE: THE ILLUSTRIOUS AMERICAN ORATOR, DIPLOMAT AND STATESMAN 70 (Phila., Publishers' Union 1893).

⁶⁵ JAMES G. BLAINE, POLITICAL DISCUSSIONS: LEGISLATIVE, DIPLOMATIC, AND POPULAR 1856-1886, at 462 (Norwich, Conn., The Henry Bill Publishing Co. 1887).

⁶⁶ *Id.* at 480.

⁶⁷ Joseph P. Viteritti, *Blaine's Wake: School Choice, the First Amendment, and State Constitutional Law*, 21 HARV. J.L. & PUB. POL'Y 657, 659 (1998).

Exposing the Myth of Anti-Catholic Bias

Animus toward Catholics and immigrants generally was but one part – a significant part, to be sure – of a larger debate over the character and future of American public schooling and of American culture in general. In that sense, its presence in the Blaine Amendment should not be surprising. But it would be inaccurate to brand the Blaine Amendment as solely an exercise in Catholic bigotry.⁶⁸

Consistent with this larger debate, Blaine’s proposal was not the only measure introduced in Congress that would have limited government support for religious education. “Rather, the 1870s witnessed multiple proposals for a[n] education-related constitutional amendment – President Ulysses Grant’s proposal; James G. Blaine’s initial proposal; a Democratic alternative; secularist proposals and ultra-conservative religious proposals; the House-passed version; and the failed Senate version – all of which contained different language and received varying levels of support and opposition.”⁶⁹

Most versions of such legislation, like the original version offered by Blaine, were understood as prohibiting state funding for *all* religious instruction, whether in public or private schools. Blaine thus described his own proposal as a “simple restriction that the schools not be made the arena for sectarian controversy or theological disputation.”⁷⁰ Conservative evangelicals thus feared that such language might eventually be used to remove Protestant religious exercises from the public schools. These versions and “Blaine’s original proposal received much greater support among Democrats and Catholics”⁷¹

But Catholics opposed similar legislation approved by the Senate because the Senate had amended the text of Blaine’s proposal to provide that “[t]his article shall not be construed to prohibit the reading of the Bible in any school or institution”⁷² The “sentence had been inserted as a direct result of the lobbying efforts of the National Reform Association, a conservative evangelical group.”⁷³ Given this addendum, it is not surprising that Catholics objected so strenuously to the Senate version, as it would have provided cover for public schools to continue engaging in Protestant religious practices. Much of the of the rhetorical ammunition claiming that the Blaine Amendment was anti-Catholic is derived from the Senate debates over this version, during which several Democratic senators went on record calling the provision biased and anti-Catholic.⁷⁴ Francis Kernan, a Roman Catholic Senator from New York, explained, however, that while he opposed the Senate version of the Blaine Amendment, “Were this [the original Blaine Amendment] before the Senate I would support it.”⁷⁵

Prominent Catholics like Senator Kernan were willing to support a more balanced version of the Blaine Amendment because they viewed it as a fair compromise on the so-called “school question,” one of the most highly charged political issues in post-Civil War American life. As a

⁶⁸ Green, *Blaming Blaine*, *supra* note 49, at 151.

⁶⁹ Brief for Historians, *supra* note 11, at 19 (noting, in light of various proposed measures and amendments to Blaine’s original proposal, that “it is inaccurate to speak of *a* Blaine Amendment, particularly as a concept or model for the Enabling Act or state constitutional provisions”).

⁷⁰ Green, *Blaming Blaine*, *supra* note 49, at 141. This description indicates that Blaine may have understood his amendment as prohibiting *all* communication of religious doctrine in publicly funded schools, including Protestant religious doctrine.

⁷¹ Brief for Historians, *supra* note 11, at 13-14.

⁷² Green, *Blaine Reconsidered*, *supra* note 10 (quoting 4 CONG. REC. 5453).

⁷³ *Id.* at 61.

⁷⁴ See generally NOAH FELDMAN, DIVIDED BY GOD: AMERICA’S CHURCH-STATE PROBLEM – AND WHAT WE SHOULD DO ABOUT IT 82-83 (2005).

⁷⁵ Brief for Historians, *supra* note 11, at 25 n.70 n. (quoting 4 CONG. REC. 5580).

number of scholars have noted, the debate over public schooling was contentious precisely because it so clearly implicated the question of national unity, which continued to be the major preoccupation of American public life in the decades after the Civil War. The Republican Party tended to argue that the federal government should play a more active role in fostering republican values and civic virtues among its citizens, and advocated a robust system of public education as the best way to knit its heterogeneous citizenry together in a common national project.⁷⁶ As a number of Catholics believed that this idealized view of public education glossed over the fact that many public schools still taught a form of “nonsectarian” religious doctrine that was permeated with Protestantism,⁷⁷ they were willing to forgo state funding for parochial schools in exchange for the banishment of Protestant theology from the public schools. This also explains why Jews, secularists, and other groups that harbored no animus against Catholics nevertheless embraced the Blaine Amendment as an important first step towards the removal of narrow theological doctrines from public schools, an institution meant to be accessible and accommodating to children from all of America’s diverse religious groups and intellectual traditions.

C. Florida’s No-Aid Provision Has Been Re-adopted Several Times, Severing Any Possible Link to Anti-Catholic Bias.

Even if the no-aid provision were somehow inspired by or modeled after the federal Blaine Amendment and adopted in homage to the Blaine Amendment’s alleged anti-Catholic bias, the stigma of any anti-Catholic bias has long been dispelled. As explained above, the no-aid provision was studied and re-adopted in 1968, 1977, and 1997 under circumstances that all agree were free of religious intolerance. As one legal commentator has explained:

[W]hatever the origins of these laws, many have been reconsidered and re-ratified by legislative action and popular vote during far more contemporary times. Although bias against particular religious groups might have been part of the historical background for some of these laws, decisions to retain them in the twentieth century undoubtedly reflect far more complex understandings.⁷⁸

Those who claim that all no-aid provisions were originally inspired by the Blaine Amendment and were thus rooted in bigotry have reached the same conclusion, conceding that, “[e]ven if it could be proven that Florida’s Blaine Amendment was enacted with a discriminatory purpose, the Amendment was probably ‘washed clean’ when it was reviewed and changed in 1968.”⁷⁹ Thus,

⁷⁶ Cf. Green, *Insignificance*, *supra* note 38, at 299 [writing that education leaders in this period “sincerely sought to create an inclusive education system that would acculturate and assimilate children from diverse religious and national backgrounds into the unfolding American experience”].

⁷⁷ See, e.g., Douglas A. Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1, 61 (referring to the “de facto Protestant establishment in the public schools”).

⁷⁸ Laura S. Underkuffler, *The “Blaine” Debate: Must States Fund Religious Schools?*, 2 FIRST AMEND. L. REV. 179, 195-96 (2003); see also Laura S. Underkuffler, *Davey and the Limits of Equality*, 40 TULSA L. REV. 267, 272 (2004) (“Even if – as opponents claim – the original enactments of some of those laws were tainted with religious prejudice, the re-enactment or endorsement of those laws in more recent decades undoubtedly has been the product of far more diverse antiestablishment, political, religious, and educational concerns.”); Toby J. Heytens, *School Choice and State Constitutions*, 86 VA. L. REV. 117, 149-50 (2000) (“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 [citing to Florida], others have not. . . . Where reauthorization has occurred, Rostker and VMI suggest that the taint may have been purged” [citing *Rostker v. Goldberg*, 453 U.S. 57 (1981), and *United States v. Virginia*, 518 U.S. 515 (1996)]).

⁷⁹ Slater, *supra* note 14, at 619.

Exposing the Myth of Anti-Catholic Bias

Florida's modern no-aid provision does not represent an affront to Catholics and the claims that it should be repealed on this basis are meritless.

Conclusion

Accusations of anti-Catholicism clearly are meant to portray the proposed repeal of the no-aid provision as the only moral public policy choice and to lend credibility to the suggestion that “to oppose the failing-school vouchers . . . is to support prejudice.”⁸⁰ But no matter how often these manufactured claims of bias are repeated, voucher and repeal proponents cannot back them up with evidence. Anyone who has taken the time to read the text of Article I, Section 3 will understand that it is worded in a neutral way that is fair to all religions, and that it places no special burdens on the Catholic Church. There is also no evidence that any of the constitutional drafters harbored anti-Catholic feelings, or that there was a powerful anti-Catholic political lobby working behind the scenes to insert this language into the state constitution. Indeed, every prominent historian of Florida agrees that Florida was free of anti-Catholicism both in 1885 when the no-aid provision was first passed, and in 1968, when it was re-ratified. Finally, despite an effort by voucher advocates to portray Florida's no-aid provision as a successor to the failed federal “Blaine Amendment,” there is no warrant for this claim, which is, in any event, based on the dubious charge that the federal amendment's sponsor, James Blaine, and all supporters of his proposal, were raging anti-Catholics.



Florida's no-aid provision is worded neutrally and has been applied fairly to all religions.

We should call these charges of anti-Catholicism what they are: A myth perpetuated by those hoping to advance their policy agenda through distraction and misdirection. For 125 years, Florida's no-aid provision has served as a crucial bulwark against opportunistic politicians hoping to use the public treasury to advance private religious beliefs. It would be a grave mistake to jettison this constitutional safeguard against religious establishment to satisfy a vocal minority who insist on perpetuating unsubstantiated claims of prejudice against Catholics.

⁸⁰ Editorial, *Anti-Voucher, Not Bigotry*, PALM BEACH POST (Fla.), June 12, 2005, at 2E.