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BLAINE AMENDMENTS, ANTI-CATHOLICISM, AND CATHOLIC DOGMA

MARC D. STERN*

INTRODUCTION

Even before the Supreme Court announced its decision in Zelman v. Simmons-Harris, an assault had begun on state constitutional provisions that restrict state power to provide financial aid to religious institutions. The effort is not merely to have those broadly worded constitutional provisions read more narrowly than their language might indicate. Nor is it merely to have them read in tandem with the new, more relaxed, federal Establishment Clause standards. Nor is it merely a campaign to have a specific program, such as school vouchers, upheld.

Rather, the campaign against state constitutional provisions, popularly known as Blaine Amendments, has a far broader purpose. The broad purpose for the attack on the Blaine Amendments is to invert the traditional church-state debate over aid to religious institutions. In this country, that debate always had been whether a particular form of aid was permissible or forbidden. Under the new approach, the question is whether aid is forbidden as an establishment of religion or mandatory to avoid discrimination against religion.

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2. For present purposes, I lump all the nineteenth century anti-aid clauses together. As other participants in this symposium have demonstrated, that is a too simplistic grouping.
Under the original understanding, legislatures enjoyed residual discretion as to funding interstitial programs of parochial school aid. Some states took advantage of this discretion to provide aid to parochial schools, such as textbooks or school transportation; others refused to do so, citing their own starker vision of the separation of church and state.

In *Norwood v. Harrison*, the Supreme Court gave its blessing to this state of affairs. Rejecting any attempted analogy between the power of a state to lend texts to parochial school students and those attending segregation academies, the Court said explicitly that a state could fund non-sectarian private schools but refuse to fund sectarian ones:

> The Religion Clauses of the First Amendment strictly confine state aid to sectarian education. Even assuming, therefore, that the Equal Protection Clause might require state aid to be granted to private nonsectarian schools in some circumstances—health care or textbooks, for example, a State could rationally conclude as a matter of legislative policy that constitutional neutrality as to sectarian schools might best be achieved by withholding all state assistance.

As we will see, that dicta later ripened into a full-fledged holding, one that was followed by many courts. If, however, broad-gauged challenges to Blaine Amendments are successful, the debate will no longer be whether aid is permissible or forbidden, but whether aid is mandatory or forbidden. *Norwood* will be repudiated.

Since the Supreme Court has steadily reduced the scope of the prohibitions under the federal Establishment Clause, the success of challenges to Blaine Amendments would mean that legislative discretion to deny aid to religious institutions would be reduced to the vanishing point, at least if any private secular

5. *Id.* at 462.
institution received aid, and, on some readings of Zelman, even if just public schools did.

_Leutkemeyer v. Kaufmann_⁷, a summary affirmance, noted that given the separation principle, religious and secular schools were not similarly situated. Some courts went even further and held that compliance with the Establishment Clause was a compelling governmental interest. The history of _Witters v. Washington_⁸ is to the same effect—after the Supreme Court held it would not violate the Establishment Clause to fund Witters' theological training, the Washington Supreme Court refused to authorize the expenditure under the federal Free Exercise Clause, pointing to the state constitution's restrictions on aid to religion.

Anyone familiar with the field knows how common it is for statutes providing aid to private institutions to exclude religious ones.⁹ To take but one example, federal aid to education programs allow for direct federal administration of aid programs in states with strict no-aid policies, as do some charitable choice statutes.¹⁰

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¹⁰. See e.g., _Assets for Independence Act_, 42 U.S.C. § 604(a) (2002) (permitting states receiving federal grants for family assistance and other social services to use them "in any manner reasonably calculated to accomplish the purpose of this [section]"). _See generally_ Marc D. Stern, _Charitable Choice: The Law as It Is and May Be_, in _CAN CHARITABLE CHOICE WORK: COVERING RELIGION'S IMPACT ON URBAN AFFAIRS AND SOCIAL_
College aid statutes, under compulsion of Supreme Court cases such as *Tilton v. Richardson,* 11 *Hunt v. McNair,* 12 and *Roemer v. Board. of Public Works,* 13 insist on the very restriction now under attack.

What is startling, even ironic, about this drive to overturn Blaine Amendments is that it is advanced by conservative groups even though it flies in the face of ideas fundamental to modern American conservatism. First, it aggrandizes the federal courts (and courts generally) in the face of expression of the popular will embodied for a century or more in state constitutions. Those expressions are the product of the conservatives’ golden years of the 1860s and 1870s, and not—God forbid—the lawless, riotous, and egalitarian 1960s.

Second, the attacks seek to impose uniform federal constitutional norms on the states at a time when the Supreme Court’s emphasis on federalism in other areas is directed at enhancing state autonomy from federal mandates. 14


11. 403 U.S. 672 (1971) (holding that provision of federal funds to religiously affiliated schools for secular purposes under Higher Education Facilities Act had neither purpose nor effect of promoting religion and therefore did not violate the First Amendment).

12. 413 U.S. 734 (1973) (holding that South Carolina statute allowing aid for secular purposes to religious schools for facilities used for secular purposes did not violate Establishment Clause).


14. See e.g., *Smith v. Robbins,* 528 U.S. 259, 274 (2000) ("[T]he Constitution 'has never been thought [to] establish this Court as a rule-making organ for the promulgation of state rules of criminal procedure.' " (quoting *Spencer v. Texas,* 385 U.S. 554, 564 (1967))); *Cruzan v. Dir., Mo. Dep’t of Health,* 497 U.S. 261, 292 (1990) (O’Connor, J., concurring) (noting that although the decision validates one state’s practice for protecting an incompetent individual’s interest in refusing medical treatment, it does not prescribe safeguards for other states); cf. *Zelman v. Simmons-Harris,* 536 U.S. 639, 679 (2002) (Thomas, J., concurring) ("States may pass laws that include or touch on religious matters so long as these laws do not impede free exercise rights or any other individual liberty interest."); *New State Ice Co. v. Liebmann,* 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous state may . . . serve as a laboratory; and try novel social and economic experiments without
Third, not so long ago conservatives attacked the Supreme Court for failing to acknowledge that, when adopted, the Establishment Clause had a federalism component of preserving various and differing state settlements of the church-state issue, each of which was constitutionally legitimate. The historical fact is that in preserving state settlements of the church-state question, the first Congress acknowledged the validity of some states adopting strict no-aid policies (Virginia) while others permitted more aid to preferred religious institutions (Massachusetts).

By contrast, contemporary anti-Blaine crusaders insist that the federal Constitution is a one-way street, imposing a regime of equal treatment and a narrow divide between church and state separation on all states. That does not sound like promoting states as laboratories for social experimentation.

Fourth, the campaign is essentially one for equal treatment in the face of a constitutional directive that religious and secular beneficiaries are not equal—elsewise why have a (non-) Establishment and not an Equal Protection Clause for religion? An insistence on equality is not a hallmark of modern conservatism. In no other area of constitutional law have conservatives been on the cutting edge of a movement for equality (e.g., the civil rights movements of blacks, gays, illegitimate children, women, and aliens).

There are, of course, ideological flips of convenience on both sides. American liberals have been vigorously egalitarian and proponents of a strong federal role in overriding contrary state policies, yet are now resisting the anti-Blaine Amendment litigation in the name of states’ rights.

Such inversions of position are not uncommon in American politics; hypocrisy is not the exclusive province of one side. Lawyers will make any argument that advances their client’s interest. If yesterday federalism was an argument that pro-aid risk to the rest of the country.”).


16. For a survey of various state approaches to establishment issues, see Thomas J. Curry, The First Freedoms: Church and State in America to the Passage of the First Amendment (1986).
supporters could invoke, today it is an argument their opponents can muster more successfully. No one ought to be surprised that each side makes the argument that best serves its substantive goal.

I. THE SUBSTANCE OF THE CHALLENGE TO BLAINE AMENDMENTS

Contemporary challenges to state Blaine Amendments rest on two pillars: (1) that these amendments were based on raw anti-Catholic bigotry and hence are a violation of the Establishment or Equal Protection Clauses, and (2) that regardless of the motivation for their adoption, the Blaine Amendments discriminate against religious activity and speech in violation of the Free Speech and/or Free Exercise Clauses. So far, most of the attention is focused on the former claim, although the latter finds literal support in an important recent Free Exercise Clause decision, Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah.17

The first thing to note about these arguments is that in one guise or another all are perfectly tenable as secular equal protection or free speech claims. The free speech claim itself is essentially an equal protection argument in First Amendment garb. That religious groups feel compelled to make secular arguments is an implicit concession of the weakness of religion in American society.

A generation ago, litigation about aid to religious institutions centered directly on the meaning of the Establishment Clause. The debates were about the value or danger of subsidized religion. Today, the arguments are cast in inherently secular terms such as freedom of speech, the marketplace of ideas, the importance of competition, and non-discrimination.

Both legal and policy arguments are often opportunistic, making use of whatever works and has appeal. But opportunistic arguments have a cost. When proponents of aid to parochial schools change the terms of the church-state debate from debates

about special rules for financial aid to religion, because religion is so powerful a force, and instead invoke secular arguments about equality—arguments most often made by relatively weak groups in society—they are changing the terms of the entire debate over religious liberty. Equality arguments rest on the belief that religious values or beliefs are not different (unequal) than secular ideological worldviews in any salient way. That is a concession of crucial importance, and of doubtful validity.

The popular maxim, "Be careful what you ask for, you may get it," is as valid for constitutional law as for any other human endeavor. The shift in emphasis from special rules regarding aid to religion to an equality based approach parallels in time—and with the exception of Justice Stevens who just dislikes organized religion, in the identity of Justices—the shift from a special protective rule to an equality-based approach to free exercise, embodied in Employment Division v. Smith.\(^\text{18}\)

Decisions such as Smith would have been inconceivable without a concomitant shift in Establishment Clause thinking from a regime of special rules to one of neutral rules of general applicability. If religion wants equal treatment in access to government funds or government fora on the theory that anything but equal treatment with secular competitors is illicit and unconstitutional, and that it ought to be allowed an equal opportunity to compete with secular ideas and institutions in the marketplace of ideas or government funding,\(^\text{19}\) then it is hard to see why it should not be held equally to religiously neutral laws that apply to every other person and institution in society. Equal means equal, not more equal.

It is not an accident that the two district courts\(^\text{20}\) that struck

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19. See Good News Club v. Milford Cent. Sch., 533 U.S. 98, 107–112 (2001) (holding that denying a religious club use of school facilities was unconstitutional viewpoint discrimination and that permitting a religious group to use the facility did not violate the Establishment Clause); Capitol Square Review & Advisory Bd. v. Pinnette, 515 U.S. 753, 760–63 (1995) (holding that permitting the Ku Klux Klan to place a cross in a public square did not violate the Establishment Clause).

20. Madison v. Riter, 240 F. Supp. 2d 566 (W.D. Va. 2003), rev’d, No. 03-
down the religious liberty enhancing Religious Land Use and Institutionalized Persons Act (RLUIPA)\textsuperscript{21} did so on the theory that the Act provides an unjustifiable advantage to inmates seeking to engage in religious activity (i.e. possession of religious books with inflammatory ideas) compared to peers seeking to engage in analogous secular activity (possession of secular books with inflammatory ideas). That distinction, these courts agreed, unconstitutionally privileges religion in violation of the new equality-based reading of the religion clauses. Federalism-based arguments against RLUIPA have so far proven unpersuasive,\textsuperscript{22} but the equality-based argument has bite and will not be rebuffed easily.\textsuperscript{23}

The voucher program upheld in \textit{Zelman} contained a poison pill provision for Jewish schools, one rooted in equality. Schools were eligible to participate in a Cleveland voucher program only if they did not discriminate in admission on the basis of religion. All, or almost all, Jewish schools (and many evangelical Christian schools) have such exclusionary policies rooted in an effort to create a community of believers. Catholic schools and many other parochial schools under different Christian auspices are prepared maintain schools as part of a social service ministry or to preach the gospel to anyone who will listen.

At least one appeals court has hinted strongly that the traditional special treatment for churches and other houses of worship in the zoning law of many states may be an establishment


\textsuperscript{22} Mayweathers v. Newland, 314 F.3d 1062, 1069 (9th Cir. 2002), \textit{cert. denied}, 124 S. Ct. 66 (2003) (holding that RLUIPA is an allowable accommodation of religious practice that satisfies that \textit{Lemon} test for neutral statutes and does not violate the Establishment Clause).

\textsuperscript{23} \textit{See Cutter}, 349 F.3d at 262, 268-69 (applauding the wisdom of the \textit{Madison} and \textit{Al-Ghashiyah} opinions and holding RLUIPA violative of the Establishment Clause).}
of religion.\textsuperscript{24} The argument is that departures from a neutral rule of zoning cannot be justified by the Free Exercise Clause because neutral laws of general applicability do not implicate that clause.\textsuperscript{25} The special, favored treatment given religious institutions gives them a leg up over their secular competitors and often cannot be justified under an equality-focused reading of the religion clauses.

For advocates of religious liberty, the question is whether the tradeoff between equal eligibility for government funding and equal compliance with the law despite religious objection is a wise and profitable one. In part, the answer depends on the extent a particular observer adheres to a faith that has countercultural practices that arguably violate some neutral law. Such practices include discrimination in employment or admissions, or teachings that are likely to be countercultural (i.e. a strongly anti-homosexual point of view that manifests itself in employment or admission discrimination, thereby running counter to contemporary rules of equality.)

The wisdom of the tradeoff also depends on whether the current trend toward secularization continues or whether in the near future American society will become more traditionally religious. Prophecy is not my strong suit, so I cannot answer the latter question definitively. Since, however, the Talmud remarks that in post-biblical times fools are among the limited class of beneficiaries of prophecy, I hazard the prediction that it is unlikely that the trend will be substantially reversed.

Congress talks not about rolling back the secularization of the public schools, as represented by cases such as \textit{Epperson},\textsuperscript{26}

\begin{itemize}
\item \textsuperscript{24} Congregation Kol Ami v. Abington Township, 309 F.3d 120, 139–40 n.5 (3d Cir. 2002) (noting that the “contention that religious institutions get preference in the land use context...would pose a significant problem” in light of the principle that “a local government must evenhandedly apply its laws and cannot single out religion for either discriminatory or preferential treatment.”).
\item \textsuperscript{25} Of course, it is fair to argue that zoning laws are not generally applicable given the wide number of zones and the availability of variances and special uses.
\item \textsuperscript{26} Epperson v. Arkansas, 393 U.S. 97 (1968) (holding that state “anti-evolution” statute, prohibiting the teaching of evolution in any state-supported school or university, is not religiously neutral and violates the
Engel,\textsuperscript{27} and Schempp,\textsuperscript{28} but about allowing all students to pray voluntarily and publicly if they so choose.\textsuperscript{29} These are not limited to the Christian or Judeo-Christian prayers of a generation ago, but to all prayers. Supporters of school prayer have reluctantly bowed to the prevailing secular and egalitarian ethos acknowledging that all faiths will have the opportunity to pray; a concession inconceivable a generation or two ago.

One can only hope that those bringing equality-based challenges to the Blaine Amendments know what they are doing, and that they are not acting more out of market-based ideological concern for increasing competition for government schools—and shrinking government—than the long-term health of religious schools. That many of the challenges are brought by groups more committed to the worship of the marketplace than the worship of God, and who pay homage to Milton Friedman, not Moses, should give pause.

\section*{II. Davey v. Locke}

The Ninth Circuit in \textit{Davey v. Locke},\textsuperscript{30} resting primarily on equal protection challenges in free exercise and speech garb, has, in effect, stricken Washington's Blaine Amendment from the state constitution on the ground that it violates the federal Constitution. Stripped to its essentials, the argument is that the government may not fund private secular activity (education) and refuse to fund analogous private religious speech (education). To do so is to engage in impermissible viewpoint discrimination not justified by any compelling interest and violates \textit{Lukumi's} rule against discrimination against religion. It is an argument with substantial Establishment Clause).

27. Engel v. Vitale, 370 U.S. 421 (1962) (holding that the Establishment Clause is violated when a state composes an official prayer to be recited at the beginning of the school day, even if students may be excused from recitation).
surface appeal but it should nonetheless be rejected. I leave to others the full details of the argument and counterargument.

This argument plunges directly into several of the more incoherent doctrines of contemporary constitutional law: what is a public forum, what is viewpoint discrimination and when do restrictions on government subsidies constitute illicit viewpoint discrimination? The confusion in all three areas is notorious, but I want to focus briefly on the problem of selective funding.

The cases are in wholesale disarray. It is constitutional to refuse to fund an organization that uses private funds to discuss abortion, but not to refuse to fund a legal services corporation that engages in constitutional challenges to federal statutes. It is constitutional to refuse to fund certain, but not all, kinds of art. It is unacceptable to bar public-funded broadcasters from taking editorial positions if they do so with private funds. (Accepting public funds, however, does not deny such broadcasters the right to engage in viewpoint discrimination of their own.) And it is unconstitutional to bar student religious publications from access to student activity funds where secular magazines are funded, although the Court was at pains to insist that it was not deciding whether the same rule applied to funds raised from taxpayers.

Perhaps there is rhyme or reason to this morass, but I am not smart enough to see it. Instinctively, one understands that in a society where the government subsidizes so much, the refusal to subsidize a particular viewpoint puts a governmental thumb (or

37. Id. at 840–41. The Court later, however, remanded for further consideration a Ninth Circuit case raising just that question. Gentala v. City of Tuscon, 244 F.3d 1065, 1082 (9th Cir.), vacated, 534 U.S. 946 (2001).
even a whole hand) on the scale against the unsubsidized speaker and distorts the free marketplace of ideas. As yet however, there is no persuasive answer to Justice Rehnquist’s challenge in Regan v. Taxation With Representation\textsuperscript{38} pointing in exactly the opposite direction. If the government is not free to withhold subsidies from speech with which it disagrees, must the government fund fascists, racists, or promiscuity if it funds the National Endowment for Democracy, a campaign to secure equal treatment for democracy, minorities or adolescent chastity? Since no one seriously contends that this is the case, it remains to be explained how the Rosenberger and Regan cases are to be reconciled.

The problem of funding is a product of applying an eighteenth century constitution (by a Court with originalist leanings to boot) to a twenty-first century government. The Founders thought of a limited scope for federal government, but we do not have such a government. Applying the Constitution as if we did does not work at all. In my blacker moments, I think that the gap between the Constitution as conceived and written, and the contemporary government it controls, may be unbridgeable.

At least with regard to the subsidization of religion, the fundamental error of those who challenge Blaine Amendments on equality grounds is of a different sort: they treat the Constitution as if it were a philosophical treatise on government, as logical and orderly as a modern academic treatise on constitutional law, not as a practical guide to the operation of government in a large republic. I think that academic efforts to find a grand theory of the Constitution fundamentally misconstrue the nature of the Constitution. It is not a theoretical statement, but a practical political document.

The Constitution was the product of intensely practical politicians, albeit ones who had spent a fair amount of time thinking about the science of government. It should be read as dealing with political and social problems discretely, not globally. Viewpoint discrimination may be a relevant rubric when dealing with regulation of private speech. It may not be the appropriate rubric for passing on government subsidies. Perhaps this is not a logical

\textsuperscript{38} 461 U.S. 540, 551 (1983).
distinction; it does not have to be logical if it was what the Founders wrought.

The document that emerged from the Founders' deliberations was designed to implement a form of republican government, not to be an earthly embodiment of a Platonic republic. It was to deal with the realities of the world as experience showed them to be and as far as the then contemporary political situation permitted. The system they produced was the product not of a uniform school of political thought rigorously, logically, slavishly, and systematically applied. The Constitution was what the Founders believed to be the best working out of what experience and political theory taught within the confines of the politically possible.

The Senate and the House together embody no single known theory of democracy and representation. The exact line between the executive and legislative power is likewise not the product of a sleek and unassailable theory as much as practical experience. The toleration of slavery was not a statement about human liberty as much as it was a concession to practical politics, or so we like to reassure ourselves. To superimpose a unitary modern theory on what the Founders did would be unfaithful to what they did and why they did it.

What may make sense ideally may be, and often is, wholly impracticable. Political compromises are rarely logical; they reflect no systematic theory of government. What is true of the Constitution generally is true of the religion clauses in particular. It might make theoretical sense to treat religion as any other ideological position. Human history, as many of the Founders viewed it, teaches that it was not wise to do so.

The Founders (and those who wrote state Blaine Amendments) had a view of the appropriate role religion was to play in government, and what dangers lurked if the appropriate distance between the two was not maintained. Exactly what role that was may not reflect solely a refined conception of theology or political science, but practical political compromises as well as a realistic conception of society. If the Founders thought and had expressed clearly the view, for example, that clergypersons should not preach election sermons, then such sermons would be
unconstitutional even if that ban was wholly irreconcilable with the Free Speech Clause.

To read the First Amendment as if it imposed a hardcore equal treatment rationale on Congress, and, when incorporated against the states, against them as well, is to assume what is not true: that the Founders were fundamentally egalitarian when it came to religion. Without rehearsing the voluminous literature on the subject, it is sufficient for present purposes to observe that there is at least a cogent case for the proposition that they were not, and that Justice Black, not Justice Thomas, is truer to the Founders' intent when he found a no-aid rule in the Constitution. Of course, any rule against established churches is in part egalitarian (religious favoritism is barred and all religions are equally barred from direct government support), but the rule does not exhaust itself in equal treatment. Equal funding of all religious bodies would satisfy a neutrality reading of the Constitution, but not a no-aid one.

When it comes to the present legal meaning of the Establishment Clause itself, of course, Justice Thomas is more important than Justice Black. But whether the rule of neutrality Justice Thomas espouses for the federal Constitution should be imposed on states which have clearly enunciated different rules is a different question. Justice Thomas himself has indicated a willingness to allow states greater leeway under the Establishment Clause than the federal government. I take it Justice Thomas is a true believer in state autonomy, not just the right of the states to agree with him as against his colleagues or the Congress.

III. ANTI-CATHOLIC BIAS AND BLAINE AMENDMENTS

The second argument against the Blaine Amendments is that they were motivated by implacable and unreasonable hatred of the Catholic Church and that Blaine Amendments as a class are constitutionally tainted under the rule of cases such as Larson v. Valente in the context of religion and Hunter v. Underwood in

the context of race. Here is Justice Thomas' enunciation of the argument, albeit in the limited role of abolishing the category of "pervasively sectarian" institutions:

[H]ostility to aid to pervasively sectarian schools has a shameful pedigree that we do not hesitate to disavow. Although the dissent professes concern for "the implied exclusion of the less favored" the exclusion of pervasively sectarian schools from government-aid programs is just that, particularly given the history of such exclusion. Opposition to aid to "sectarian" schools acquired prominence in the 1870's with Congress' consideration (and near passage) of the Blaine Amendment, which would have amended the Constitution to bar any aid to sectarian institutions. Consideration of the amendment arose at a time of pervasive hostility to the Catholic Church and to Catholics in general, and it was an open secret that "sectarian" was code for "Catholic."  

The Arizona Supreme Court has accepted this simplistic reading of history in Kotterm v. Killian and read its Blaine Amendment to be little more than the federal Establishment Clause. Laws motivated by sheer bigotry are unconstitutional. It would be fruitless to deny that the Blaine Amendments taken as group were aimed at rebuffing Catholic efforts to obtain funding for their schools. Finally, it cannot be denied that some of the rhetoric used in urging adoption of the Blaine Amendments in the nineteenth century was tainted by raw anti-Catholicism.

44. I am, however, puzzled by the Justices' insistence that the term "pervasively sectarian" has invidious connotations. I should think that parochial schools would be proud of the fact that their religious tradition pervades everything they do. I certainly hope that the parochial schools to which I send my children at least aspire to that goal.
45. See, e.g., Ward M. McAfee, The Historical Context of the Failed
For present purposes, it will do to assume that all state constitutional amendments are uniformly tainted in this way and that all should be treated alike for purposes of the unconstitutional motivation argument. This is, of course, almost certainly wrong. Likewise, for example, some restrictive state amendments precede the anti-Catholic agitation of the nineteenth century.

In many states, nineteenth century constitutions have been rewritten and readopted several times. On these latter occasions, the virulent anti-Catholicism of the past was noticeably absent and the debates were in terms of the appropriate height of the wall separating church and state. And of course, not in every nineteenth century case can anti-Catholicism be assumed (some of the amendments predate widespread anti-Catholicism). It would require an evidentiary showing in each case.

Where the argument breaks down is in assuming that rebuffing the efforts of a church to obtain a particular benefit is unconstitutional bigotry or hostility toward that particular religion or all religion. When a church enters the political fray, it cannot be expected to be free of criticism. Just as one may argue against a policy as being motivated by a corporate desire to enrich a corporate treasury at public expense, one permissibly can argue that a proposal endorsed by religious groups is designed to enhance the church’s treasury or authority without being labeled unconstitutionally hostile to religion.

If one church is particularly visible in a fight for some controversial policy, it should be neither surprising nor unconstitutional if opponents of the policy criticize it by name. If those opponents seek to embody their opposition in a constitutional amendment, that amendment will thwart both the policy and the church. It needs to be determined if the former or the latter is the target.

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47. New York’s anti-aid provision, N.Y. Const. art. XI, § 3, for example, dates to 1894, but was reenacted in the face of efforts to repeal it as recently as 1967. It was also amended to dilute the scope of the prohibition in 1938.
No one should be forbidden at pains of unconstitutionality from arguing that some proposal endorsed by a religious group impinges on the freedom of others to live a different moral life. Nor should one be prohibited from seeking legislation to enhance its view of public policy merely because a “target” of the amendment is the contrary position espoused by a religious group. To ban such arguments and legislation or to suggest that if such arguments prove persuasive the result would be the unconstitutional product of anti-religious hostility. The argument distorts the political scales. It ignores the plain and undeniable fact that religious groups have, in pursuit of their own interests, often been insensitive to the rights of others.

Would there be a constitutional problem, assuming American constitutional law governed, if each of the non-Islamic Nigerian states adopted a constitutional amendment barring the stoning of women convicted of adultery? There would be no doubt that such an amendment, wholly secular in form, would be aimed at Islamic Sharia law. If American constitutional standards applied, should that ban be unconstitutional as anti-Islamic?

Closer to home, the Utah Constitution explicitly prohibits any church from dominating the state. Everyone knows why this amendment was adopted and against which church it was aimed. Yet it was enacted because Congress did not want to admit a theocracy to the Union and so it insisted on this clause as a condition of admittance. Is it now unconstitutional, especially since it is not unconstitutional for a secular political party to dominate the Utah government?

The Blaine Amendments were, at least in large part, a reasoned response to positions held by the Catholic Church. Since Vatican II, the Catholic Church has accepted the notion of religious liberty. Despite sharp clashes over abortion, the Catholic Church

48. UTAH CONST. art. I, § 4 (“There shall be no union of Church and State, nor shall any church dominate the State ....”).

is today nowhere an opponent of liberal democracy. Viewed from this perspective, if someone today were to attack the Catholic Church in the same terms as did the pro-Blaine forces in the nineteenth century, their position would properly be dismissed as anachronistic bigotry. But in the nineteenth century, the harsh critiques of the advocates of Blaine were not anachronisms. On the contrary, these criticisms reflected fair criticism of church teachings and church actions. What is anachronistic is to judge nineteenth century critics of the Catholic Church as it existed then against the contemporary Catholic Church.

Official pre-Vatican II Church doctrine, as spelled out in authoritative, binding pronouncements by popes who were contemporaneously pronounced infallible, surely disparaged the separation of church and state and insisted on a special role for the Catholic Church and no other in setting official policy.

Pope Gregory XVI in his encyclical “Mirari Vos” denounced “the absurd and erroneous proposition . . . that liberty of conscience must be maintained for everyone.” He warned:

Nor can we predict happier times for religion and government from the plans of those who desire vehemently to separate Church from the state and to break the mutual concord between temporal authority and the priesthood. It is certain that that concord which always was favorable and beneficial for the sacred and civil order is feared by the shameless lovers of liberty.

His successor, Pope Pius IX, returned to this theme repeatedly, most famously in his encyclical “Quanta Cura” accompanied by the so-called Syllabus of Errors. In that encyclical, Pope Pius, after quoting Pope Gregory’s “Mirari Vos” (which Pope

35–39. Dulles argues that the Vatican II declaration was not as inconsistent with Quanta Cura and the Syllabus as commonly thought, but his arguments are not, to this non-Catholic, terribly persuasive.

50. See infra p. 176 and note 56.

Pius quotes, calling freedom of conscience "insanity") stated:

But, although we have not omitted often to proscribe and reprobate the chief errors of this kind, yet the cause of the Catholic Church, and the salvation of souls entrusted to us by God, and the welfare of human society itself, altogether demand that we again stir up your pastoral solicitude to exterminate other evil opinions, which spring forth from the said errors as from a fountain. Which false and perverse opinions are on that ground the more to be detested, because they chiefly tend to this, that that salutary influence be impeded and (even) removed, which the Catholic Church, according to the institution and command of her Divine Author, should freely exercise even to the end of the world—not only over private individuals, but over nations, peoples, and their sovereign princes; and (tend also) to take away that mutual fellowship and concord of counsels between Church and State which has ever proved itself propitious and salutary, both for religious and civil interests.

For you well know, venerable brethren, that at this time men are found not a few who, applying to civil society the impious and absurd principle of "naturalism," as they call it, dare to teach that "the best constitution of public society and (also) civil progress altogether require that human society be conducted and governed without regard being had to religion any more than if it did not exist; or, at least, without any distinction being made between the true religion and false ones." And, against the doctrine of Scripture, of the Church, and of the Holy Fathers, they do not hesitate to assert that "that is the best condition of civil society, in which no duty is recognized, as attached to
the civil power, of restraining by enacted penalties, offenders against the Catholic religion, except so far as public peace may require.” From which totally false idea of social government they do not fear to foster that erroneous opinion, most fatal in its effects on the Catholic Church and the salvation of souls, called by Our Predecessor, Gregory XVI, an “insanity,” viz, that “liberty of conscience and worship is each man’s personal right, which ought to be legally proclaimed and asserted in every rightly constituted society; and that a right resides in the citizens to an absolute liberty, which should be restrained by no authority whether ecclesiastical or civil, whereby they may be able openly and publicly to manifest and declare any of their ideas whatever, either by word of mouth, by the press, or in any other way.” But, while they rashly affirm this, they do not think and consider that they are preaching “liberty of perdition;” and that “if human arguments are always allowed free room for discussion, there will never be wanting men who will dare to resist truth, and to trust in the flowing speech of human wisdom; whereas we know, from the very teaching of our Lord Jesus Christ, how carefully Christian faith and wisdom should avoid this most injurious babbling.\(^2\)

In the accompanying *Syllabus of Errors*, Pius IX writes that among the modernist errors condemned by the Church (number 55) is the idea that “[t]he Church ought to be separated from the State.” As applied to education, “modernist” errors, according to the *Syllabus*, included the following (numbers 45 and 47):

The entire government of public schools in which the youth of a Christian state is educated, except (to a certain extent) in the case of episcopal seminaries, may and ought to appertain to the civil power, and belong to it so far that no other authority whatsoever shall be recognized as having any right to interfere in the discipline of the schools, the arrangement of the studies, the conferring of degrees, in the choice or approval of the teachers.

....

The best theory of civil society requires that popular schools open to children of every class of the people, and, generally, all public institutes intended for instruction in letters and philosophical sciences and for carrying on the education of youth, should be freed from all ecclesiastical authority, control and interference, and should be fully subjected to the civil and political power at the pleasure of the rulers, and according to the standard of the prevalent opinions of the age.\(^53\)

In these encyclicals the popes also asserted the authority of the Church to engage in censorship, prohibiting books with erroneous opinions favoring false religions, by which it was reasonable to understand the popes as including all Protestant denominations. Indeed, it is reasonable to read both Popes Gregory and Pius as being critical of the idea of political liberty generally. This is not the only possible reading of the encyclicals (and those of Leo XII who followed them), but it is a permissible one and one that surely would have suggested itself to non-Catholic nineteenth century Americans.

In the encyclical, "Maximae Quidem," addressed to the Church in Bavaria in 1864, Pope Pius is explicitly critical of

proposals to strip the public schools of their Catholic character, proposals he attributes to enemies of the Church interested in spreading "license" of knowledge, which is the Protestant idea that individuals could reach their own conclusion about religious ideas.

These papal pronouncements were made over the course of an almost century-long papal opposition to the liberalization of Europe. In almost every case, papal authority was ranged on the side of authoritarian regimes and against republican modernizers. American sentiment was largely on the other side in almost every one of these cases.

I have not yet been able to determine how many of these pronouncements were known in America. The Syllabus of Errors surely was—it found its way into the New York Times shortly after it was released. Some years later, again shortly after the Blaine Amendment controversy, a Protestant pastor published a series of lectures (some crossing the line into bigotry) entitled Romanism and the Republic. He had this to say on the Catholic Church:

In the Encyclical and the Syllabus of 1864, the Pope denounces some of the dearest rights of man, because they are opposed to Romish absolutism. To you who are not familiar with these terms, I may say, that the word Encyclical is applied to a letter or communication written to the general public, the world at large, the church as a whole; while the Syllabus is a similar document, containing those propositions, or heads of discourse, which sum up the leading ideas which the Pope wishes to communicate. Do not forget that these declarations of the Pope, by his own definition, and the definition of Romish councils, by the consent of Romish prelates, and undisputed and submitted to by the Roman Catholic church, have all the force of infallible authority and dogma. To dispute them, or refuse obedience to them, is to make a Roman Catholic a heretic, to put him under the ban of excommunication, and outside the pale of
salvation. There is not dogma of faith or morals, no doctrine of the Holy Scriptures, that is more binding upon the conscience and obedience of the Roman Catholic, than are these papal deliverances. There is no escape from yielding to them absolutely, except to break with the Roman Catholic church as a whole. With fearful epithets, the Pope denounces those who insist that governments should not inflict penalties upon such as violate the Catholic religion.\(^{54}\)

Informed Americans would also have known that the Catholic Church had opposed on religious grounds, almost all of the democratic and political liberalizing moments of mid-nineteenth century Europe. American Catholics were aware of these positions, recognized that they would cause them substantial grief, and did their best to explain them away, emphasizing that they were intended to apply only to Europe, not the United States.\(^{55}\)

These doctrinal statements and political positions were well known to Protestants. Pope Pius’ *Syllabus of Errors*, for example, was known to readers of American newspapers. As one prominent Catholic Bishop noted, the *Syllabus* set off a “howl of indignation” in the press.\(^{56}\) During the same period was the First Vatican Council at which the Church debated and ultimately adopted the doctrine of papal infallibility. This doctrine both heightened the

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56. HAMBURGER, supra note 55. See Dulles, supra note 49.
impact of the various encyclicals in the minds of Protestants (many of whom probably exaggerated the scope of that doctrine) and gave rise to a generalized fear of an anti-democratic, autocratic Catholic Church which was seeking political power everywhere.57

Taken together, these positions gave rise to legitimate fears about the intentions of the Catholic Church and whether it intended to mobilize its believers into putting the Church's officially stated doctrine into place in the United States. Whether or not in retrospect those fears were realistic, whether they would have carried the day if not for the addition of raw bigotry aimed at Catholics or the (mostly Irish) Catholic immigrants, or a desire to preserve the existing de facto Protestant hegemony, are all questions that require more research.

The record, though, strongly suggests that Protestants were not tilting at windmills but at a real ideological threat. The idea of church-state separation was no doubt more congenial to nineteenth century Protestant than Catholic theology, but it is nonetheless a secular doctrine which citizens should be free to pursue when they determine that the idea of separation of church and state needs to be buttressed against an anticipated onslaught.

Blaine Amendments may be good or bad policy, and they may or may not have outlived their usefulness, but they are not anti-religious bigotry simpliciter.

It may be that American Catholics truly had no intention of carrying out the doctrinal commands of the Vatican. It may be that the popes themselves had little interest or concern with America, being focused solely on the situation in Europe. It does not follow that critics of the Church could not plausibly see a genuine threat to their religious liberty in the American church's effort to obtain state financing for its schools. On this reading, the Blaine Amendments were legitimate attempts to protect a conception of religious liberty different than that endorsed by the Catholic Church, but their efforts are no more motivated by bigotry than are the efforts of proponents of banning Sharia law in Nigeria today.

57. See LANSING, supra note 54. This book, a collection of lectures delivered in 1888, which are a mixture of crude diatribe and reasoned analysis, provides one roughly contemporary Protestant account.
IV. COMPELLING STATE INTEREST

Even if one assumes that banning aid to religious schools beyond the confines of the federal Constitution constitutes viewpoint discrimination (or a denial of free exercise), it does not follow that it is unconstitutional. Viewpoint discrimination is unconstitutional only if not justified by a compelling state interest.

In *Widmar v. Vincent*,58 the Court assumed that the interest in not establishing religion could be a compelling interest justifying viewpoint restriction on speech.59 However, it found that a state constitutional restriction that went beyond the requirements of the federal Constitution could not be a compelling interest because the truly important interest was taken care of by the federal non-establishment provision.60 In *Good News Club v. Milford School District*,61 Justice Thomas for a majority was prepared to go farther and suggest that non-establishment cannot be a compelling interest justifying a viewpoint restriction on speech.62

I certainly do not understand the latter suggestion, and have great difficulty with the former. Compelling interests are not constitutional provisions at war with each other, but a government policy of such overriding importance that it can, as a matter of necessity, override a constitutional guarantee. When a court engages in compelling interest analysis it is not deciding which of two clauses in the same constitution takes priority in a particular circumstance. Whether diversity is a compelling interest in the affirmative action context does not depend on whether the federal Constitution (or a state constitution) requires affirmative action.

The same ought to be true of the state interest in non-establishment, particularly in aid cases where there is no question about state action. (This is not the case with religious speech cases that by definition do not involve state action.) Why a state cannot decide as a matter of highest importance that the state will leave the

59. Id. at 271.
60. Id. at 276.
62. Id. at 112–13.
financing of religious activity to private citizens escapes me. The present Court might not like that policy, but why it should be categorically barred from serving as a compelling interest is a mystery.

There is more force to Justice Powell's point in *Widmar* that those interests were protected by the federal Establishment Clause, but here too it is difficult to see why a state should be held to the limits of federal policy in defining its compelling interests. To return to a racial analogy, the federal Constitution does not require integration, it only bars segregation. That does not mean a state cannot have a compelling interest in integration sufficient to justify a use of racial classifications that are otherwise unconstitutional.