Pedigree of an Unusual Blaine Amendment: Article I, Section 3 Interpreted and Implemented in Florida Education

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In 1875, Representative James G. Blaine introduced into the United States House of Representatives a proposed constitutional amendment that would have barred states from spending public funds on “sectarian” institutions—which were commonly understood as Catholic parochial schools—while preserving Protestant instruction in the public schools.¹ The amend-

¹. See Mitchell v. Helms, 530 U.S. 793, 828 (2000) (plurality opinion). “[I]t was an open secret that ‘sectarian’ was code for ‘Catholic.’” Id. (citing Steven K. Green, The Blaine Amendment Reconsidered, 36 AM. J. LEGAL HIST. 38, 41–43 (1992)); Zelman v. Simmons-Harris, 536 U.S. 639, 721 (2002) (Breyer, J., dissenting) (noting the purpose of federal and state Blaine amendment movements was “to make certain that government would not help pay for ‘sectarian’ (i.e., Catholic) schooling for children”); Douglas Laycock, The Underlying Unity of Separation and Neutrality, 46 EMORY L.J. 43, 50 (1997) (“Although there were legitimate arguments to be made on both sides, the nineteenth century opposition to funding religious schools drew heavily on anti-Catholicism.”); Ira C. Lupu, The Increasingly Anach-
ment passed though the House, 180 to 7, but fell 4 votes shy in the Senate. All the same, the amendment enjoyed enough popular nativist support that Congress required new states to adopt this language in their constitutions as a condition of joining the union. In addition, many existing states, including Florida, voluntarily adopted the language.

Florida first adopted its Blaine Amendment—the last phrase of the declaration of rights, section 6—later than most other states in 1885, and then readopted it with changes in the last sentence in article I, section 3 in 1968.

2. 4 CONG. REC. 5172, 5191 (1876).
3. 4 CONG. REC. 5558, 5595 (1876).
5. 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.”) See, e.g., N.Y. CONST. art. XI, § 3; DEL. CONST. art. X, § 3; KY. CONST. § 189; MO. CONST. art. IX, § 8; FLA. CONST. of 1885, Declaration of Rights, § 6.
6. FLA. CONST. of 1885, Declaration of Rights, § 6 (“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.”) (emphasis added).
7. FLA. CONST. art. I, § 3. Article I, section 3 provides:
No convention records illuminate the intent of the framers who adopted the 1885 amendment. Convention records from 1968 are not any more helpful. The amendment shares with other states similar text and a common relationship with bigotry. In fact, the same Florida convention that in 1885 enacted the declaration of rights, section 6, precluding aid to sectarian institutions, adopted the separate but equal racial doctrine.

Nevertheless, this article reveals that even in the area most closely linked to the declaration of rights, section 6—education—it has nearly always coexisted with the equal participation of religious persons in neutral, generally applicable public programs with a secular purpose. The exception pertains to a brief interlude from the 1910s to the world wars when anti-Catholic religious bigotry dominated Florida’s headlines. This article examines the key factors influencing the Supreme Court of Florida’s unique historical interpretation of the state Blaine Amendment, as well as the non-exclusionary implementation of it by the Florida Legislature and lesser legislative bodies. This history is especially important now that article I, section 3 has become the primary tool in lieu of the federal Establishment Clause for challenging Florida school choice.

When called upon to construe the Bill of Rights, the Supreme Court of Florida has instructed state courts to examine “the express language of the constitutional provision, its formative history, both preexisting and develop-

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.

Id. (emphasis added).

8. The rough chronology of the amendment’s adoption is available. See Fla. Const. Convention, J. of the Proceedings, at 118–91, 575–90 (1885). The committee presented a report on then-section 22. Id. at 118. The committee read and passed the provision without amendment. Id. at 183–91. The section was renumbered as section 6 without amendment. Id. at 575–77, 590; see also Proceedings of the Constitutional Convention, Wkly. Floridian, June 25, 1885 (Supp.) (committee reported Bill of Rights with section 22); Wkly. Floridian, July 2, 1885 (indicating “[t]he Preamble and Declaration of Rights was . . . spread upon the Journal’’); Wkly. Floridian, July 9, 1885 (indicating committee read and passed Preamble and Declaration of Rights, modifying only section 8 (concerning infamous crime)); Constitution Adopted by the Convention of 1885, Wkly. Floridian, Aug. 6, 1885 (renumbering occurred by August 6, 1885).


10. See Fla. Const. art. I, § 3; see, e.g., Ariz. Const. art. IX, § 10; Nev. Const. art. XI, § 2.

PEDIGREE OF AN UNUSUAL BLAINE AMENDMENT

When interpreting the state’s Bill of Rights, the Supreme Court of Florida directs courts to “focus primarily on factors that inhere in their own unique state experience.” It is precisely these differences that have led the Court to give an unusual interpretation to Florida’s Blaine Amendment and the legislature to implement it in a less exclusionary fashion. The key variables influencing this history are not exceptional. As elsewhere in the United States, the history of Florida’s Blaine Amendment is irrevocably linked to the progress of the common school movement and immigration, urbanization, and industrialization. What is distinctive is the speed and extent of the developments.

The common school movement, in Florida and elsewhere, taught a “common religion” that was essentially Protestant in character, requiring until the 1960s, daily reading from the King James Bible, prayer, and other Protestant religious observances in the public schools. Nationally, Blaine amendments diffused as a reaction to Roman Catholic opposition to the common religion and the request for equal public funding for parochial schools. In Florida, the Protestant reaction was muted and postponed by the slow pace of the Florida common school movement, Florida’s tradition of religious

13. Id.
15. See VITERITI, supra note 1, at 151–52.
pluralism,\textsuperscript{17} and delayed and less substantial foreign Catholic immigration, urbanization, and industrialization.

A. \textit{Florida Public Education Before the Civil War}

Florida had a nascent \textit{de jure}, but not a \textit{de facto} common school system prior to the Civil War.\textsuperscript{18} Consequently, private schools were crucial in Florida's pioneer days.\textsuperscript{19} Frequently, religious schools were the only available schools.\textsuperscript{20} What little public funding existed for education was shared with religious schools.\textsuperscript{21} Religious pluralism and tolerance was a tradition in Florida.\textsuperscript{22} In the 1850s, not even the Know-Nothings propagating an anti-Catholic message in Florida.\textsuperscript{23}

1. Religious Tolerance

Unlike a number of northeastern states, Florida never had an established church.\textsuperscript{24} Roman Catholics were obviously St. Augustine's first European settlers, but their numbers in mid-nineteenth century Florida were small.\textsuperscript{25} Alongside Catholics in St. Augustine, Jews arrived in the 1780s; Presbyterians arrived in 1824; Episcopalians appeared in St. Augustine in 1821; and Methodists came to Pensacola in 1821.\textsuperscript{26} "Baptists [arrived] in Nassau County in 1821 and in Bethlehem in 1825."\textsuperscript{27} Florida enjoyed religious diversity in the early 1800s, but Protestants were by far the largest religious group.\textsuperscript{28}

\textsuperscript{17} See Office of the Secretary of the Interior, The Eleventh Census of the United States: 1890, Statistics of Churches 260 (1894) [hereinafter Eleventh Census Churches].

\textsuperscript{18} See Cutler, supra note 16, at 223.

\textsuperscript{19} See id.

\textsuperscript{20} See id.

\textsuperscript{21} See id. at 222–23.

\textsuperscript{22} Michael J. McNally, Catholic Parish Life on Florida's West Coast, 1860–1968, at 21 (1996) [hereinafter McNally I].


\textsuperscript{24} See Chamberlin v. Dade County Bd. of Pub. Instruction, 143 So. 2d 21, 31 (Fla. 1962), rev'd, 377 U.S. 402 (1964). "[A] state church . . . existed in Massachusetts for more than forty years after the adoption of the Constitution." \textit{id.} (citation omitted).


\textsuperscript{26} \textit{id.}

\textsuperscript{27} \textit{id.}

In 1850, the largest Protestant denomination in Florida was the Methodists, who had eighty-seven churches with property valued at $55,260, accommodating 20,015 members. The Baptists were the next largest denomination with fifty-six churches and property valued at $25,640, accommodating 11,985 members. Presbyterians had sixteen churches with property valued at $31,500 and accommodating 5900 members. Episcopalians had ten churches with property valued at $37,800 and accommodating 3810 members. Roman Catholics had but five churches with property valued at $13,600 and accommodating 1850 members.

"Scholars report that by the mid-[nineteenth] century religious conflict over matters such as Bible reading ‘grew intense,’ as Catholics resisted and Protestants fought back to preserve their domination." But in frontier Florida, Protestant-Catholic relations were generally cordial. Before the Civil War, the only recorded anti-Catholic riot occurred in St. Augustine in 1848, in response to an anti-Catholic book published by a non-Floridian about the city’s Catholic population. “On the frontier everybody chipped in to help one another.” For example, in 1858, one observer recounted: "Catholics and Protestants alike generously contributed to . . . the construction of a Catholic church in Tampa.”

2. The Age of Private Religious Education

a. The Territorial Years

Florida’s tradition of religious tolerance positively influenced education, which was essentially private and sectarian until the 1840s, then sectarian, but evenly split between public and private schools until the Civil
War. The very first common school law in Florida was federal. In 1822, when Florida became a territory, Congress reserved every sixteenth section of land throughout the territory for the purpose of supporting primary schools. The federal limitation on the land grant was in the nature of a trust condition for the purpose of establishing a public school system.

On January 29, 1827, Congress authorized the Governor and Territorial Legislature to preserve and lease the lands and appropriate the funds for schools. The legislature implemented this in 1828 and appointed trustees of the school lands to preserve the lands, collect rent, and select up to twenty acres in every sixteenth-section for the erection of a school. When this led to the rental of but five sections of land for an annual rent of $101.50, the legislative council conferred power in 1832 on the people of the townships to elect commissioners of the sixteenth-sections, and then in 1834, removed the authority to county judges.

Fueled by these developments, on January 22, 1831, the short-lived Florida Education Society in Tallahassee was founded and thereafter, spun-off auxiliary societies. The Educational Society at St. Augustine recorded the first effort to establish a common school in 1831, albeit with the general apathy of the people with respect to education, racial prejudices, and the obstacles caused by a scattered small population, as discussed in the Society’s annals. Efforts in Tallahassee to found a common school also failed in the early 1830s, when promoters found they could not sell, instead of lease, the sixteenth-section lands. The education societies were abandoned altogether around the same time.

This left education in Florida entirely to private schools. As elsewhere in the United States, the first schools in frontier Florida were Protestant. The typical pattern was for a church or a family of means to commence an

40. CUTLER, supra note 16, at 223.
41. See id. at 221.
42. THOMAS EVERETTE COCHRAN, HISTORY OF PUBLIC-SCHOOL EDUCATION IN FLORIDA 1 (1921).
43. Id. at 5.
44. Id. (citation omitted).
45. Id. at 6 (citing Act of Nov. 21, 1828, 1828 Fla. Territory Laws 247, 247–248 (to provide for laying out the school lands in this Territory)).
46. Id. at 6–7 (citations omitted).
47. COCHRAN, supra note 42, at 1–2.
48. Id. at 2–3.
49. Id. at 4.
50. Id. at 4–5.
“academy” or “institute.” In 1827, Reverend Henry White founded Leon County’s and potentially Florida’s first school, Leon Academy. In 1834–1835, Episcopalian Reverend Alva Bennett opened Key West’s first school after a resolution of the town council. Likewise, in frontier Tampa in 1848–1854, Methodist minister Jasper K. Glover and Presbyterian minister Edmund Lee and his wife founded private schools utilizing books furnished by the churches. Classes produced numerous teachers “who instructed generations of Manatee and Hillsborough County young people,” attending both private and public schools. Through the 1830s, it is fair to say that private religious education was essentially the only choice in Florida.

Nevertheless, the Territorial Legislature continued its efforts to create an authentic common school system. The Act of 1835 directed the register of the land office to select portions of sixteenth-sections “for schools, seminaries, and other purposes,” the Acts of 1836 and 1837 directed the territorial treasurer to demand money due from the rent of sixteenth-sections and to prosecute trespassers; the Act of 1839, termed the first general school law, directed three elected trustees in each town to establish common schools where they did not exist from land revenue and to set aside two percent of the territorial tax and auction duties for the education of poor orphan children; the Acts of 1843 and 1844 removed authority from the trustees to sheriffs to look after the education of poor children; and the Acts of 1845 provided that judges should officiate as superintendents of common schools, elected trustees should report to them, and the Governor could select private lands in place of sixteenth-sections for schools.

52. Id. at 15, 33–34.
55. 1 JAMES W. COVINGTON, THE STORY OF SOUTHWESTERN FLORIDA 308 (1957); BROWN, supra note 51, at 11.
56. BROWN, supra note 51, at 11.
57. COCHRAN, supra note 42, at 1, 5–10.
58. Id. at 7 (citation omitted).
59. Id. (citing Act of Feb. 13, 1836, 1836 Fla. Territory Laws 42–43 (amendatory of the several Acts relating to the School Lands in the Territory of Florida)).
60. Id. at 8 (citing Act of Mar. 2, 1839, 1839 Fla. Territory Laws 15–16 (to raise a fund by taxation for the education of Poor Children)); see also CUTLER, supra note 16, at 220.
61. COCHRAN, supra note 42, at 8 (citing Act of Mar. 15, 1843, 1843 Fla. Territory Laws 34–36 (concerning School Lands); Act of Mar. 15, 1844, 1844 Fla. Territory Laws 61–65 (to Incorporate the Inhabitants of the different Townships of this Territory, for the institution and establishment of common schools)).
62. Id. at 9 (citing Ch. 21–(No. 21), § 1, 1845 Fla. Laws, 40, 40).
By all reports, many of these laws were ignored and public school funds criminally squandered or not collected, so that by 1842, the public school fund had a deficit. Governor R.K. Call reported to the Territorial Legislature in 1843 that “in many of the counties, at least, no attention whatever has been paid” to the Act of 1834, and that the territorial treasurer’s duties in Tallahassee prevented him from effectively enforcing the Acts of 1836 and 1837. Governor W.D. Moseley announced in 1846 that the laws were so poorly enforced that trespassers on school lands were common and that rents received were “humiliating, shamefully neglected or criminally squandered.” Moreover, the Territorial Legislature made no provision for taxation in support of common schools, erecting or maintaining common schools, school or teacher standards, or school terms. Public education was left to a few willing counties which offered a free education only to a handful of poor children. Monroe and Franklin Counties led the way with Monroe County providing for the education of thirty children in Key West from county taxes in 1843, notwithstanding the absence of any state authority for the tax.

b. Florida Becomes a State

Florida became a state in 1845. In An Act Supplemental to the Act for the Admission of Florida and Iowa into the Union, Congress restated its condition on the grant of sixteen-section lands. Article X, section 1 of Florida’s first constitution incorporated the condition:

The proceeds of all lands that have been, or may hereafter be, granted by the United States for the use of schools and a seminary or seminaries of learning, shall be and remain a perpetual fund, the interest of which, together with all moneys derived from any other source . . . shall be inviolably appropriated to

63. CUTLER, supra note 16, at 220.
64. COCHRAN, supra note 42, at 7-8 (citing FLA. H.R. JOUR. 19–20 (Terr. Sess. 1843); FLA. S. JOUR. 23 (Terr. Sess. 1843)).
65. Id. at 11–12 (quoting FLA. H.R. JOUR. 7 (Reg. Sess. 1846); Fla. S. Jour. 6 (Reg. Sess. 1846)).
66. Id. at 11.
67. Id. at 12.
68. BROWNE, supra note 54, at 21; accord COCHRAN, supra note 42, at 12.
69. COCHRAN, supra note 42, at 11.
70. An Act for the Admission of the States of Iowa and Florida into the Union, ch. 48, 5 Stat. 742, 742 (1845).
71. Ch. 75, 5 Stat. 788 (1845).
72. Ch. 75, 5 Stat. at 788.
the use of schools and seminaries of learning, respectively, and to no other pur-
pose.73

In 1846, the Florida Legislature authorized the rental of the sixteenth-
section lands,74 and their sale in 1848, as the system of renting was unprofit-
able.75 The Florida Legislature directed preservation of the proceeds in a
permanent common school fund.76 The State School Trust Fund (School
Fund) remains part of Florida law,77 although its importance for funding edu-
cation has vastly diminished. Nevertheless, in the 1840s, gains in public
education made possible by sixteenth-section lands were impressive enough
that according to federal census records, common schools began to educate
more students than private schools.78 In 1840, eighteen private schools
served 732 pupils, compared to fifty-one common schools serving 925 pu-
pils.79 In 1850, thirty-four private schools served 1251 pupils, compared to
sixty-nine common schools serving roughly 1878 pupils.80 Of course, the
public schools of the 1850s–1860s were nothing like today's schools; the line
between common schools and volunteer civic and religious groups was
blurry.

In the early years of the common school movement, the schools looked
more like "private-public institution[s]."81 Florida counties commonly des-
ignated private religious schools as public schools,82 as Pasco County did for
a number of Catholic schools.83 "Tax money was used for [their] upkeep,
with no qualms about the First Amendment."84 Alternatively, the first public
schools commonly met in church buildings.85 For example, Hillsborough
County did not erect its first school building in Tampa until 1878, but relied
instead upon the facilities of religious and civic organizations.86

73. FLA. CONST. of 1838, art. X, § 1. A condition of statehood was that the Territory of
Florida adopt a state constitution, which became effective in 1845. See U.S. CONST. art. IV, §
4.
74. Ch. 93—(No. 23), § 3, 1846 Fla. Laws 47, 48.
75. COCHRAN, supra note 42 at 16 (citation omitted).
76. Id. (citation omitted).
77. See FLA. STAT. § 1010.71(1)(a) (2004).
78. See COCHRAN, supra note 42, at 27 tbl.1.
79. Id.
80. Id.
81. COVINGTON, supra note 55, at 308.
82. See McNALLY I, supra note 22, at 148–49.
83. Id.
84. Id. at 149.
85. See BROWN, supra note 51, at 19, 34, 54, 57–58.
86. Id. at 57.
More private schools than public schools existed in 1860. There were ninety-seven public schools with ninety-eight public school teachers with an annual income of approximately $20,000, compared to 138 private schools with 185 teachers and an annual income of approximately $75,000. By comparison, Massachusetts, where the common school movement began, boasted 4134 public schools with 5308 public school teachers with an annual income of $1,545,454.

3. Florida Know-Nothingism

Commencing in the 1850s, the Know-Nothing, or American Party, came into national prominence as the successor to the failing Whig Party and reached its peak strength in Florida in 1856, then rapidly dissolved here due to its moderate orientation on state’s rights and slavery. Nationally, the Know-Nothing platform required reading of the King James Bible in common schools; favored constitutional amendments limiting or depriving suffrage and public office-holding by Catholics; banned foreign language instruction; limited immigration; and prevented immigrants from holding state jobs. The first Blaine-like constitutional amendment was passed by the Know-Nothing Party in the cradle of the common school movement in Massachusetts.

Know-Nothingism is linked to the wave of Catholic and Jewish immigration to the United States in the mid-nineteenth century. This influx gave voice to opponents of the common religion. In 1840, the Very Reverend

87. Herbert J. Doherty, Jr., Florida in 1856, 35 FLA. HIST. Q. 60, 63 (1956).
90. NINTH CENSUS POPULATION, supra note 88, at 453.
91. Thompson, supra note 33, at 42.
92. Id. at 59.
94. Prior to its amendment, the original Eighteenth Article of Amendment provided that “[a]ll moneys . . . which may be appropriated by the state for the support of common schools. . . shall never be appropriated to any religious sect for the maintenance exclusively of its own schools.” Mass. Const. amend. art. XVIII, historical notes.
96. Id. at 6.
John Power, Vicar-General of the Roman Catholic Diocese of New York, explained Catholic resistance as follows: “The Catholic Church tells her children that they must be taught religion by AUTHORITY -- The Sects say, read the bible [sic], judge for yourselves.”97 Beginning that year where Catholic immigrants concentrated, the Catholic Church launched an offensive to forbid devotional Bible reading in the common schools and obtain tax exemptions and public funding for parochial schools “to preserve youth from the deleterious effects of Protestantism or secularism.”98

The wave of Catholic immigrants dissenting from the common religion in the northeast came later, in less substantial numbers, and predominately from different countries to Florida.99 Foreign-born Floridians accounted for just 3% of the state’s population in 1850, and even by 1890, just 6% of the population.100 By comparison, foreigners in Massachusetts accounted for 16% of the population in 1850, and by 1890 equaled 30% of the population.101 In 1850, Florida’s urban centers included Key West with a population of 1825 persons; Pensacola with 1073 persons; St. Augustine with 1213 persons; Tampa with 631 persons; and Jacksonville with 532 persons.102 Catholic immigrants settled in Duval, Escambia, Monroe, and St. Johns County.103 In 1860, the Irish (25%), Germans (15%), and West Indians (28%) comprised Florida’s largest immigrant groups;104 however, the Irish and Germans, who American Party activists most vilified, constituted less than 1% of Florida’s total population.105

With so few Catholic immigrants in Florida, and a still nascent common school movement, Florida Know-Nothingism proved nationally distinct.106 Although Democrats branded them as religiously intolerant and abolition-
ists, the Florida American Party platform disapproved the national platform with respect to religious intolerance, states’ rights, and slavery. The Party did not emphasize anti-Catholicism, although there were certainly party leaders who were unabashedly anti-Catholic and opposed to “foreignism,” and others including Governor R.K. Call, critical of any “‘higher allegiance’ to the Pope.” Yet the 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.

4. The Common School System Matures

In 1849, the legislature approved the first general law for the State of Florida, authorizing the establishment of common schools for white children with the register of the land office as the state superintendent, probate judges as county superintendents, and local elected boards of trustees who were to be elected by the taxpayers of the various school districts each year. The legislature augmented the school fund by adding to the sale of sixteenth-sections the “net proceeds of five percent of other public lands, and of all escheated property, and of all wreckage, and flotsam found on the coast.”

In January 1851, the legislature approved the first “tax on both real and personal property for the support of the common schools” not to exceed four

107. Id. at 45.
108. Id. at 46. The Florida platform stated with respect to religious intolerance as follows: That the American Party of Florida unqualifiedly condemns and will endeavor to counteract all efforts by any sect or party to bring about a union of Church and State, and utterly disclaim any intention to prescribe a religious test as a qualification for office, and that in advocating the principles of the American Party, we wish it distinctly understood that we maintain the right of every citizen to the full, free and unrestricted exercise of his own religious opinions and worship.

Id. (citation omitted); accord Overdyke, supra note 23, at 227.
109. Doherty, supra note 87, at 67; Overdyke, supra note 23, at 227–28; Thompson, supra note 33, at 49.
110. Spessard Stone, The Know-Nothings of Hillsborough County, 19 Sunland Trib. 3, 3 (1993); Thompson, supra note 33, at 43.
111. Overdyke, supra note 23, at 227. Governor R.K. Call said “that while some of his best friends were Catholics, he was willing to declare ‘resistance to the aggressive policy and corrupting tendencies of the Roman Catholic Church.’ He was alarmed over ‘higher allegiance’ to the Pope.” Id. At the Florida American State Convention, “R.K. Call presided and delivered a typical nativistic speech.” Id. at 76.
112. See id. at 227; accord Thompson, supra note 33, at 46.
114. Cutler, supra note 16, at 221; accord Cochran, supra note 42, at 18;
dollars annually for each school-aged child; added to the school fund proceeds from the sale of slaves; and required the state superintendent to notify the comptroller of counties where the money arising from the interest of the school fund was insufficient to allow two dollars to be given annually for the education of school-aged children, so the comptroller could make up the difference.

Also, in 1851, the Florida Legislature authorized two seminaries of learning, both committed to the common religion and led by Protestant clergy. East Florida Seminary (1853-1905) and West Florida Seminary (1857-1901), the forebears of, respectively, the University of Florida and Florida State University, initially concerned themselves primarily with basic elementary education. Constructed with public funds, they subsisted in the 1850s primarily upon income from the school fund, and an annuity from their city of origin (respectively, Ocala and Tallahassee), together with tuition and donations. The annuity has been hailed by common school

115. Cochran, supra note 42, at 19 (citing Ch. 343-(No. 32), 1850 Fla. Laws 104); see Cutler, supra note 16, at 221; Brown, supra note 51, at 18-19.
116. Cochran, supra note 42, at 19 (citing Ch. 341-(No. 30), 1850 Fla. Laws 103).
117. Id. (citing Ch. 340-(No. 29), 1850 Fla. Laws 102).
119. West Florida Seminary initially had a strong Presbyterian influence as two of its original presidents were former Presbyterian ministers: Rev. Duncan McNeill Turner (1857-1860) (former Pastor of the Presbyterian Church of Tallahassee) and Rev. Levi H. Parsons (1864). William G. Dodd, History of West Florida Seminary 9, 24 (1952). East Florida Seminary was at first the idea of the Florida Conference of the Methodist Church. See Charles L. Crow, East Florida Seminary-Ocala (1852) (citation omitted). Later, East Florida Seminary had as principal Edward W. Meany, an Episcopal priest, and rector of Holy Trinity Episcopal Church in Gainesville. Samuel Proctor & Wright Langley, Gator History: A Pictorial History of the University of Florida 19 (1986).
120. Brown, supra note 51, at 10; Cochran, supra note 42, at 154-55. Harry Gardner Cutler refers to West Florida Seminary as the first bona fide common school in the state, but other evidence set forth above belies this. Cutler, supra note 16, at 221.
121. See Proctor & Langley, supra note 119, at 21. East Florida Seminary “received $28,300 in state appropriations for buildings and another $20,000 ‘for general purposes.’” Id.; State Seminary West of the Suwannee, Catalogue 7 (1897-98) [hereinafter State Seminary West, Catalogue] (“The City of Tallahassee gave to the State, as an inducement, the property known as the Florida Institute, embracing about ten acres of land and a new two-story brick building, with the furniture and other appliances, valued at $10,000.”).
122. See generally Proctor & Langley, supra note 119, at 21 (“Annual income from the Agricultural Land Fund [for East Florida Seminary] was $9,000 in 1890, but only $7,700 in 1903.”).
123. Dodd, supra note 119, at 3; accord Cutler, supra note 16, at 221.
advocates as "'among the earliest attempts in the South to support schools by taxation.'" 124

In its last education enactment before the Civil War, the legislature in 1853, named the register of public lands to be the state superintendent of schools and gave additional responsibilities to county commissioners and probate judges, including fixing the length of the school year and requiring probate judges to employ and discharge teachers. 125 Reviewing Florida's public educational accomplishments in 1854, State Superintendent David S. Walker said, "[w]ith the exception of the counties of Monroe and Franklin . . . I have heard of none that have contributed anything from the county treasury for the augmentation of the school money received from the State." 126

Apathy was widespread. 127 Reports suggest that parents who could afford tuition resented the idea that they should pay taxes to send other people's children to school. 128 Some counties like Hillsborough County reacted to the general laws by differentiating school districts, but without creating "a true or free public school system." 129 Tuition was subsidized, but not usually free; the school year was but six weeks to three months long; 130 and school buildings were the exception, so classes continued to meet in church and civic buildings or other borrowed properties. 131

Up to the Civil War, private schools and public-private partnerships were obviously far more critical to education in Florida up to the Civil War than in the northeast. Due partly to these reasons and because the executive, legislature, and probate court were in agreement that funding students attending private religious schools and common schools teaching a common religion was constitutional, records indicate that public subsidization of parochial education was commonplace. 132 According to census records (which were likely understated because of the blurring of public and private schools) pri-

124. Rhodes, supra note 53, at 22 (quoting GEORGE GARY BUSH, HISTORY OF EDUCATION IN FLORIDA 16 (Bureau of Education Circular of Information No. 7, 1888) (1889)). Apart from the "one which ran for a short while in St. Augustine in 1832," the school was the "first real public school in the state operated on a substantial basis." Id.
125. COCHRAN, supra note 42, at 19–21.
126. Id. at 23; accord CUTLER, supra note 16, at 221.
127. COCHRAN, supra note 42, at 26.
128. BROWN, supra note 51, at 33; see also WILLIAM F. BLACKMAN, HISTORY OF ORANGE COUNTY FLORIDA 48 (1973) (deeming public schools to be pauper schools).
129. BROWN, supra note 51, at 18.
130. Id.
131. Id. at 19; see W.L. STRAUB, HISTORY OF PINELLAS COUNTY, FLORIDA 64 (1929).
132. See BROWN, supra note 51, at 18; COCHRAN, supra note 42, at 25 ("[D]uring the early fifties the money received from public funds was used in many of the counties to subsidize favorite private schools.").
vate schools received five percent of their budgets from public sources in 1860, and more than double this amount in 1870.\textsuperscript{133}

B. Florida's Reconstruction

During the Civil War, a majority of Florida schools closed and the state spent most of the principal of the common school fund on munitions.\textsuperscript{134} Yet the state emerged with a constitution and laws the most committed yet to public education.\textsuperscript{135} By the 1870s, the state began more carefully distinguishing public from private schools while still funding private religious education, alongside the separate but equal racial doctrine even after enactment of the declaration of rights, section 6.\textsuperscript{136} The delayed start of public education, along with delayed and less substantial immigration from different countries, postponed any nativist reaction until the Twentieth Century.\textsuperscript{137}

1. Florida Enacts a Constitutional Common School System

Some deem the Constitution of 1868 the real beginning of common education in Florida, some forty years after the national commencement of the movement.\textsuperscript{138} The Constitution of 1868 made provision for certain tax revenue and impliedly prohibited use for other schools by stating that the interest of the School Fund "shall be exclusively applied to the support and maintenance of common schools."\textsuperscript{139} No such constitutional limitation applied to school funds generated by counties or municipalities.\textsuperscript{140} The Constitution of 1868 also set penalties in terms of lost educational dollars for counties failing to raise tax revenue for education and enacted an appointed State

\begin{itemize}
\item \textsuperscript{133} \textit{Ninth Census Population}, supra note 88, at 455–56; accord \textit{Cochran}, supra note 42, at 27 tbl.I.
\item \textsuperscript{134} \textit{Brown}, supra note 51, at 40; \textit{Cochran}, supra note 42, at 28.
\item \textsuperscript{135} \textit{See} \textit{Cochran}, supra note 42, at 34.
\item \textsuperscript{136} \textit{See} \textit{Brown}, supra note 51, at 66; \textit{Cochran}, supra note 42, at 52.
\item \textsuperscript{137} \textit{See infra} Part II.E.
\item \textsuperscript{138} \textit{Brown}, supra note 51, at 66; \textit{Cochran}, supra note 42, at 36–37 (the Constitution of 1868 incorporated "the first common-school law which succeeded in creating a real system of public education"); \textit{Cutler}, supra note 16, at 221; \textit{Dodd}, supra note 119, at 31 (citing Ch. 1686–(No.2), 1869 Fla. Laws 7);
\item \textsuperscript{139} The period [prior to 1868] is one in which can be seen only the beginnings of the ideas of public school education for all the people. It remained for the constitution of 1868, and the school law of 1869 to create a public school system even in the mere legal sense of the term.
\item \textsuperscript{139} \textit{Rhodes}, supra note 53, at 29.
\item \textsuperscript{139} \textit{Fla. Const.} of 1868, art. VIII, § 4.
\item \textsuperscript{140} \textit{See} id.
\end{itemize}
Board of Education comprised of the Superintendent of Public Instruction appointed by the Governor and confirmed by the Senate, Secretary of State, and Attorney General.\textsuperscript{141}

The School Law of 1869 implemented the Constitution of 1868 by mandating a "uniform system of public instruction," open without charge "to all the youth residing in the State between the ages of six and twenty-one" without respect to race; establishing a board of education in each county appointed by the State Board of Education; creating a county school superintendent appointed by the Governor and local school trustees appointed by the county boards of education; requiring the state superintendent to establish teacher licensing requirements; setting a minimum three-month school year; imposing a state tax on property; and authorizing a county tax on property.\textsuperscript{142}

The law authorized county boards to establish not only elementary, but also heretofore unknown secondary schools.\textsuperscript{143} It reserved authority over post-secondary education for the State Board of Education, but entitled county boards of education to send pupils in the ratio that they sent representatives to the legislature.\textsuperscript{144}

Florida did not fully implement the School Law of 1869 for over a decade because of the State’s poor fiscal situation, resentment toward carpetbaggers and Reconstruction, racial prejudice, the still scattered and sparse population, and the opposition affluent residents voiced about paying taxes to send other peoples’ children to school.\textsuperscript{145} Some school board members refused appointments and the school boards dragged their feet.\textsuperscript{146} Nevertheless, by 1870, Florida’s public schools once again had the edge in numbers over Florida’s private schools, were near parity in spending, and would never again look back; 226 public schools with 265 public school teachers and an annual income of $76,389, compared to 151 private schools with 217 private school teachers and an annual income of $78,180.\textsuperscript{147} Inflaming racial prejudice, many of the new schools begun by Republicans were for blacks.\textsuperscript{148}

\textsuperscript{141} See COCHRAN, supra note 42, at 34–36 (citing FLA. CONST. of 1868, art. VIII, §§ 8–9); ERNEST L. ROBINSON, HISTORY OF HILLSBOROUGH COUNTY FLORIDA 128 (1928).
\textsuperscript{142} COCHRAN, supra note 42, at 36–45 (citations omitted); see also BROWN, supra note 51, at 50–51 (the 1869 school law did not require racial segregation).
\textsuperscript{143} COCHRAN, supra note 42, at 44.
\textsuperscript{144} Id.
\textsuperscript{145} Id. at 49, 54, 72; BROWN, supra note 51, at 51; Rhodes, supra note 53, at 45.
\textsuperscript{146} BROWN, supra note 51, at 51.
\textsuperscript{147} NINTH CENSUS POPULATION, supra note 88, at 452, 454–55 (private school figures combined).
\textsuperscript{148} See BROWN, supra note 51, at 50–51.
Roughly seventy-seven percent of the state educational budget for the year 1868 was spent on educating African-Americans.149

The number of children attending Florida common schools skyrocketed between 1870 and 1880 and the number of public schools increased five-fold to 1135 with 1151 public teachers and an annual income of $129,907.150 In 1860, Florida private schools taught more children than Florida public schools; there were 2032 public school children and 4486 private school children.151 By 1870, schools designated "public" taught considerably more children; there were 10,132 public school children and 4538 private school children.152 The number of public school children increased more than four-fold between 1870 and 1880 to 43,304 public school children.153 As in earlier periods, however, the line between public and private schools remained blurred in the 1870s.154

2. Public and Private Schools Still Blurred

Some so-called common schools were really private religious schools.155 For example, in October 1878, St. Johns County agreed to treat a Catholic parochial school as part of the public school system.156 The county entered the following notation: "PUBLIC SCHOOL NO. 12—Sisters of St. Joseph, St. George Street; 180 pupils, Teachers—Sister Gertrude Capo, Sister Agnes Hernandez, Sister Mary Fitz-Simmons."157 The school building was owned by the Sisters of St. Joseph and was the only grade school in St.

149. See id. at 50; see also id. at 28-31. To make up for the exhaustion of the seminary fund for munitions, another twenty-four percent of the state educational budget was spent on direct legislative appropriations to the seminaries equal to what they might otherwise have received from the fund. Id. at 50.

150. Compare OFFICE THE OF THE SECRETARY OF THE INTERIOR, THE TENTH CENSUS OF THE UNITED STATES: 1880, POPULATION OF THE UNITED STATES 916-17 (1882), [hereinafter TENTH CENSUS POPULATION] with NINTH CENSUS POPULATION, supra note 88, at 452. Some of these public schools may not have been in operation. McNALLY I, supra note 22, at 50. "As of 1880 Hillsborough County had forty-nine schools, but not all were in operation . . . ." Id.

151. NINTH CENSUS POPULATION, supra note 88, at 453, 456.

152. Id. at 452, 454-55.

153. Compare TENTH CENSUS POPULATION, supra note 150, at 918, with NINTH CENSUS POPULATION, supra note 88, at 452.

154. COCHRAN, supra note 42, at 52.

155. Id.


157. Id. (citation omitted).
Augustine. The same thing happened in 1883 in St. Ambrose, and after the adoption of the state Blaine Amendment in 1892 in Mandarin (which became Loretto) in Duval County. Duval County actually erected the school building for the Sisters in Mandarin on property donated by a Catholic family. The Sisters of Saint Joseph were required to receive training and take an exam, utilize approved texts, restrict religious instruction to after-school hours, and submit to monthly inspections.

Altogether, in the 1870s at least fifteen percent of the budget of private schools came from public funding. With respect to bona fide common schools, public school buildings were scarce through the 1870s, and disagreement persisted over which three months were best for common education in frontier Florida. Taxpayers opposed the erection of school buildings as exceeding school board authority. Public schools continued to meet in church and civic buildings, usually rent-free. Manatee County erected its first school house in 1873, Key West constructed its first public school building in 1874, and Tampa erected its first public school in 1876. The State lacked a common course of study, common textbooks, or textbooks at all until 1883, and had a “small and poorly trained teaching force.” In frontier towns especially, parochial education was key. Accordingly, the Sisters of Saint Joseph opened some of the first grade schools: in Orlando in October 1889; in Ybor City for latins in 1891 and for blacks in 1903; and in Miami in March 1905.

158. Id.
159. Id. at 40–42.
160. Id. at 42.
161. Alberta, supra note 156, at 41, 56.
162. See NINTH CENSUS POPULATION, supra note 88, at 454.
163. BROWN, supra note 51, at 59–60; see also COCHRAN, supra note 42, at 49, 66. According to Democrat Samuel Pasco, the president of the Constitutional Convention of 1885, “[n]o public buildings, institutions for the unfortunate, colleges, normal schools or seminaries were built or aided by the State Treasury during the period of Republican rule in Florida (1867–1876).” Alberta, supra note 156, at 12 (citation omitted).
164. BROWN, supra note 51, at 57.
165. ROBINSON, supra note 141, at 132; COCHRAN, supra note 42, at 66.
166. COCHRAN, supra note 42, at 67.
167. BROWNE, supra note 54, at 22.
168. ROBINSON, supra note 141, at 129.
169. COCHRAN, supra note 42, at 49. In 1883, the legislature provided that county boards “that had not provided for uniform textbooks in their schools were required to . . . [in] May of that year.” Id. at 72 (citing Ch. 3446—(No. 34), § 1, 1883 Fla. Laws 65, 65).
170. See Alberta, supra note 156, at 19–21.
171. Id.
In the 1880s, Florida’s fiscal situation improved, permitting faster growth in public education in the next decade so that the number of pupils more than doubled between 1880 and 1890 to 91,188 public school children and 6304 private school children.\textsuperscript{172} The assessed value of state educational property also more than doubled between 1870 and 1884.\textsuperscript{173} State educational expenditures invested in the School Fund doubled,\textsuperscript{174} but Democrats who regained control of Florida in 1877, redirected public funds from black schools,\textsuperscript{175} while increasing appropriations to the seminaries in the 1880s, which began adding secondary-level courses.\textsuperscript{176} Public sentiment began to favor common schools as reflected most notably by the increasing number of counties approving and increasing local levies for their support: from “eleven counties with an average school tax of but one and one-half mills . . . in 1870 [to] thirty-nine counties with an average school tax of a little over three mills” in 1884.\textsuperscript{177} Yet grade schools and high schools were still largely unknown except at the seminaries and a few select cities.\textsuperscript{178} Tampa’s first high school was founded in the late 1870s\textsuperscript{179} and its first grade school in 1878.\textsuperscript{180}

3. First Immigrant Influx

In the 1870s, Florida also experienced its first immigrant influx.\textsuperscript{181} Cubans immigrated to Key West due to “[t]he Ten Years War (1868–1878) against Spanish colonialism”\textsuperscript{182} and the United States imposed tariffs and expanded the modest Key West cigar industry that began in the 1830s.\textsuperscript{183} “By the early 1890s, an estimated 50,000 to 100,000 persons traveled annually between Cuba and the United States.”\textsuperscript{184} Immigrants imported the first

\begin{itemize}
\item \textsuperscript{172} Compare Tenth Census Population, supra note 150, at 918, with Office of the Secretary of the Interior, The Eleventh Census of the United States: 1890, Education 59 (1893).
\item \textsuperscript{173} Cochran, supra note 42, at 58.
\item \textsuperscript{174} Id. at 56 tbl.3.
\item \textsuperscript{175} Brown, supra note 51, at 55–56.
\item \textsuperscript{176} Cochran, supra note 42, at 50, 154–55; Dodd, supra note 119, at 36–37, 67, 68–69, 76–77, 89, 98.
\item \textsuperscript{177} Cochran, supra note 42, at 57.
\item \textsuperscript{178} Brown, supra note 51, at 61.
\item \textsuperscript{179} Id.
\item \textsuperscript{180} Id. at 60.
\item \textsuperscript{181} McNally I, supra note 22, at 63.
\item \textsuperscript{182} Id.
\item \textsuperscript{183} Robert P. Ingalls & Louis A. Pérez, Jr., Tampa Cigar Workers: A Pictorial History 2 (2003).
\item \textsuperscript{184} Id. at 3.
\end{itemize}
labor militancy into the State, a source of nativist discontent elsewhere in the United States. By the mid-1880s, in or about the time the declaration of rights, section 6 was enacted, strikes were commonplace in Key West with the largest of such strikes occurring in 1885, 1889, and 1894. Cigar manufacturers, primarily Spanish, began looking for a new site for their factories. "In 1885, Vicente Martínez Ybor settled on a forty-acre tract of land east of Tampa" which became known as Ybor City, and other manufacturers soon followed.

Florida's immigrant population increased to around six percent by the 1890s, with particular concentrations in Florida's few relatively urban and industrialized areas and a few almost strictly Catholic immigrant settlements in San Antonio, Dade City, and St. Joseph. The overall effect on the religious diversity of the State was modest. The largest denominations in Florida held constant through at least 1890, with Methodists reporting 70,458 members, and Baptists reporting 39,575 members. Significantly, Catholics, against whom nativists were most prejudiced, took over as the third largest denomination in 1890 with 16,867 communicants. Presbyterians reported 4574 members and Episcopalians reported 4225 members. New denominations included Disciples of Christ with 1306 members, Congregationalists with 1184 members, and Lutherans with 369 members. The stage was set for a Blaine-like backlash.

Just as immigration to Florida gained momentum and Florida's common school system was congealing, Representative James G. Blaine, a former Speaker of the House and a favored successor to President Grant, seized upon Grant's recommendation and introduced the federal Blaine Amendment

185. See id. at 2-3.
186. Id. at 3; McNALLY II, supra note 103, at 31; McNALLY I, supra note 22, at 72; BROWNE, supra note 54, at 126.
187. INGALLS & PÉREZ, supra note 183, at 3.
188. Id.
189. See McNALLY I, supra note 22, at 33. San Antonio was designed to be exclusively a German Catholic colony and from 1882 to 1888 only Catholics only could buy property. Id.
190. See ELEVENTH CENSUS CHURCHES, supra note 17.
191. Id. at 502.
192. Id. at 159, 172.
193. Id. at 231.
194. Id. at 632.
195. ELEVENTH CENSUS CHURCHES, supra note 17, at 707.
196. Id. at 344.
197. Id. at 332.
198. Id. at 437.
on December 14, 1875. Discussions of federalism and Congress' proper legislative power controlled the legislative debate. The House overwhelmingly approved it with an amendment stating it should not be "construed to prohibit the reading of the Bible in any school or institution." The Senate barely disapproved it. Nevertheless, support for the Amendment was strong enough that it began diffusing rapidly among the states with the number enacting them increasing from fourteen in 1876 to twenty-nine in 1890. Florida was on the trailing-end of the movement.

C. Home Rule and the 1885 State Blaine Amendment

The Florida Constitutional Convention of 1885 replaced the Republican Reconstruction-era constitution with an indigenous one that became law on January 1, 1887. The article on education in the Constitution of 1885 elaborated upon its predecessor by, among other things: 1) providing for a definite state tax for education and for the distribution of this tax, together with the interest of the School Fund in proportion to the number of school-aged youth in each county; 2) requiring counties to support the common schools and setting a minimum and maximum rate for an annual county school tax; 3) adding the Governor and Treasurer to the State Board of Education; and 4) requiring the quadrennial election of the Superintendent of Public Instruction.

199. Heytens, supra note 1, at 131–32. In December 1875, President Grant recommended a constitutional amendment to deny all direct or indirect public support to sectarian institutions. Id. The Blaine Amendment read:

No State shall make any law respecting an establishment of religion or prohibiting the free exercise thereof; and no money raised by taxation in any State for the support of public schools, or derived from any public fund 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.

Id. at 132 (quoting 4 CONG. REC. 204, 205 (1876)). See also LLOYD P. JORGENSON, THE STATE AND THE NON-PUBLIC SCHOOL, 1825–1925, at 138–39 (1987).

200. See Green, supra note 1, at 57–68.

201. Id. at 60 (citation omitted).


203. Green, supra note 1, at 43.

204. COCHRAN, supra note 42, at 79.

205. Id. at 80 (citing FLA. CONST. of 1885, art. XII, §§ 6, 7).

206. Id. (citing FLA. CONST. of 1885, art. XII, § 8).

207. Id. at 79 (citing FLA. CONST. of 1885, art. XII, § 3).

208. Id. (citing FLA. CONST. of 1885, art. XII, § 2).
The Constitution was also more religiously and racially discriminatory than its predecessor. The article on education implemented the separate but equal doctrine by requiring separate schools for blacks and whites and, in the very next subsection, included a provision distinct from the state Blain Amendment, providing "that no public-school money should go for sectarian schools." This was in addition to the provision in the 1868 Constitution, preserved in the 1885 Constitution, providing that the School Fund could "be exclusively applied to the support and maintenance of public free schools." The 1885 Constitution also included for the first time the declaration of rights, section 6: "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."

On the face of these provisions, if not for the requirement in both the 1885 Constitution and 1868 Constitution that the School Fund be expended exclusively on common schools, we might expect that public funding of private religious schools ceased altogether in Florida; but it did not. Undeniably, petitioners in other states were largely successful in litigation at striking so-called "aid" reaching Catholic institutions. For example, in one of the earliest cases, the Supreme Court of Mississippi refused a pro rata share of the school fund to parents of students attending a Catholic parochial school and struck an act entitling them to a proportionate share of the funds.

Perhaps most egregiously, state courts did not require public payment for services rendered. For example, the Supreme Court of Illinois upheld under the state Blaine Amendment the refusal of Cook County to make payment for the tuition, maintenance, and care of infants committed until age eighteen by Cook County courts to the Industrial School for Girls at Chicago.

209. See COCHRAN, supra note 42, at 83.
210. Id.; FLA. CONST. of 1885, art. XII, § 12 ("White and colored children shall not be taught in the same school, but impartial provision shall be made for both."); FLA. CONST. of 1885, art. XII, § 13. This section provides:
No law shall be enacted authorizing the diversion or the lending of any County or District School Funds, or the appropriation of any part of the permanent or available school Fund to any other than school purposes; Nor shall the same, or any part thereof, be appropriated to or used for the support of any sectarian school.

Id.
211. FLA. CONST. of 1885, art. XII, § 4.
212. FLA. CONST. of 1885, Declaration of Rights, § 6.
213. See FLA. CONST. of 1885, art. XII, § 13; FLA. CONST. of 1868, art. VIII, § 4.
which the court held was a front for the Catholic Archdiocese. Likewise, the Supreme Court of Nevada excused the state from paying to feed orphans assigned to the Nevada Orphan Asylum, also run by the Sisters of Charity. In the most straightforward equation of "sectarianism" with Catholicism, the courts disagreed that the schools were teaching merely the common religion because, according to them, Catholicism was "sectarianism." Until the present, Florida case law reveals no litigation along similar lines, notwithstanding that public funding for parochial education persisted through at least the mid-1910s. Duval County erected the school building and authorized the Sisters of Saint Joseph to commence a supposed common school in Mandarin in 1892, seven years after enactment of the 1885 constitution. Similarly, records indicate that in 1892, Pasco County erected a larger building for Saint Anthony's, known to teach, among other things, catechism and Bible history. The Sisters of Saint Joseph "surrendered" their common schools around 1914, but Pasco County built a second school for another Catholic parish, Sacred Heart, as late as 1916.

216. Id. at 184, 198. The court referenced then-article 8, section 3 of the Illinois Constitution as follows:

Neither the [G]eneral [A]ssembly, nor any county, city, town, township, school-district, or other public corporation, shall ever make any appropriation, or pay from any public fund whatever, anything in aid of any church or sectarian purpose, or to help support or sustain any school, academy, seminary, college, university, or other literary or scientific institution, controlled by any church or sectarian denomination whatever; nor shall any grant or donation of land, money, or other personal property, ever be made by the state, or any such public corporation, to any church, or for any sectarian purpose.

Id. at 184 (quoting ILL. CONST. art. X, § 3).

217. Nevada ex rel. Nev. Orphan Asylum v. Hallock, 16 Nev. 373, 381, 388 (1882). The court referenced then-article XI, section 2 of the Nevada Constitution which states that the legislature must "provide for a uniform system of common schools, by which a school should be established and maintained in each school district . . . and that any school district which should allow instruction of a sectarian character therein might be deprived of its portion of the interest of the public school fund during the time of such instruction." Id. at 379. (citing NEV. CONST. art. XI, § 2). The court also referenced then article II, section 9 of the Nevada Constitution, providing that "[n]o sectarian instruction shall be imparted or tolerated in any school or University that may be established under this [c]onstitution." Id. (quoting NEV. CONST. art. XI, § 9).

219. See Alberta, supra note 156, at 42.
220. See id.
221. Cf. id. (noting Catholic educational efforts).
222. See id. at 41–42. Records indicate that the land the Catholic family donated for the common school in Mandarin was surrendered to the state. Id. at 42.
223. McNALLY I, supra note 22, at 149.
Florida did not join the national Blaine prohibition against funding Catholic schools, but did require instruction in the common religion.224 The same convention that adopted the declaration of rights, section 6 also approved payment to the City of Ocala "for the reimbursement of certain monies expended to secure the location there of the East Florida Seminary in 1852, which seminary was summarily removed in 1865 and neither land [n]or money returned to the town."225 Both schools adhered to the common religion,226 as evidenced by daily devotional exercises including: Bible reading; singing hymns, choruses, and anthems; praying; short lectures; and required church attendance as late as 1904.227 The schools authorized opt-outs for Catholics and Jews, something courts in other states occasionally refused.228

The trend was obvious. Although themselves religious, Florida common schools were becoming more jealous about sharing resources with parochial schools and less reliant upon private religious charity.229 As an example, the total value of public school property, which was first recorded in 1877–78 as $116,934 for 992 schools, reached $250,000 for 1724 schools in 1884–85, then more than doubled by 1889–90 to $573,862 for 2333 schools, and continued to climb.230 Common graded schools, of which there were almost none prior to 1889, also began to appear.231 As required by the school law of that year, ten high schools were founded by 1892–93, public teachers vastly improved, and the school term lengthened from ninety-two days in 1884–85 to 100 days by 1889–90.232 State appropriations for the seminaries

225. THE WKLY. FLORIDIAN, July 30, 1885.
226. According to the West Seminary Course Catalogue of 1897–98, "[w]hile the school is strictly nonsectarian in every feature, no institution is more careful in the moral and religious training of her students than the Seminary." STATE SEMINARY WEST, CATALOGUE, supra note 121, at 45.
227. Id.; EAST FLORIDA SEMINARY, STATE NORMAL SCHOOL AND MILITARY INSTITUTE, CATALOGUE 24 (1885–86); EAST FLORIDA SEMINARY, STATE NORMAL SCHOOL AND MILITARY INSTITUTE, CATALOGUE 42 (1882–83); EAST FLORIDA SEMINARY AND MILITARY INSTITUTION, CATALOGUE 24 (1903–04).
228. See McCormick v. Burt, 95 Ill. 263, 264–66 (1880) (affirming judgment against Catholic plaintiff who was suspended for not observing Bible reading rule); Spiller v. Inhabitants of Woburn, 94 Mass. (12 Allen) 127, 130 (1866) (upholding student’s exclusion from school for refusing to bow her head during public school prayer); North v. Bd. of Trs. of Univ. of Ill., 27 N.E. 54, 56 (Ill. 1891) (holding that expulsion of plaintiff for failure to attend mandatory chapel exercises did not violate the Illinois Constitution).
229. Compare COCHRAN, supra note 42, at 68 tbl.6, with id. at 93 tbl.10.
230. Id. at 68 tbl.6, 93 tbl.10.
231. Id. at 94–98, 108 tbl.12.
232. Id. at 94–98, 108 tbl.12, 124 tbl.15.
also increased dramatically in the 1890s, and both adopted collegiate programs.

D. Public Education Consolidates in the Early 1900s

In the early 1900s, the last components of a modern common school system emerged with the adoption of a standard curriculum in 1911; the extension of the common education backward to kindergarten beginning in 1905 and forward to a formal university system pursuant to the Buckman Act in the same year; the passage of compulsory education legislation in 1919 that, although initially struck, eventually took permanent hold; the consolidation of school districts enabling bus transportation in the 1920s; and the growth of the Florida Education Association. The continued teaching of the common religion into the early 1960s was all that remained anachronistic in the public school system by today’s standards.

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233. "State appropriations during the 1890s [to East Florida Seminary] averaged $2,500 a year." PROCTOR & LANGLEY, supra note 119, at 21. In 1887, the same year that the 1885 Constitution became effective, the legislature made the first appropriation to the East Florida Seminary library in the amount of $500. Id.

234. Id. at 19; STATE SEMINARY WEST, CATALOGUE, supra note 121, at 9 ("[I]n the past few years . . . [the Legislature] propose to limit the scope of instruction in the Seminary mainly to high school and collegiate courses . . . .")

235. Ch. 6178-(No. 59), § 1, 1911 Fla. Laws 109, 109.

236. The first public kindergarten was established in Tallahassee in 1905, paid for by the county. Rhodes, supra note 53, at 61.

237. See Ch. 5384-(No. 13), § 1, 1905 Fla. Laws 37, 41-42. "By the Buckman Act [in 1905], the legislature abolished The Florida Agricultural College at Lake City . . . The White Normal School at DeFuniak Springs, The East Florida Seminary at Gainesville, The South Florida College at Bartow, and The Florida Agricultural Institute in Osceola County." City of Gainesville v. Bd. of Control, 81 So. 2d 514, 516 (Fla. 1955). West Florida Seminary, renamed Florida State College in 1901, became Florida Female College in 1905; and East Florida Seminary became the University of the State of Florida in 1905 and University of Florida in 1909. See Id. at 517; COCHRAN, supra note 42, at 162-63; CUTLER, supra note 16, at 231; DODD, supra note 119, at 107.

238. Ch. 7808-(No. 26), § 1, 1919 Fla. Laws 59, 59. After increasing school attendance by, for example, twenty-five percent in Leon County, the compulsory school attendance law was declared unconstitutional in 1920. Rhodes, supra note 53, at 56-57.

239. Rhodes, supra note 53, at 55-56, 73-74. Although Leon County considered consolidation and bus transportation as early as 1902, it did not become a reality until 1921-22. Id.


241. See generally Chamberlin v. Dade County Bd. of Pub. Instruction, 143 So. 2d 21, 35 (Fla. 1962), rev'd, 377 U.S. 402 (1964) ("The principles governing the recitation of the Lord's Prayer, the singing of religious hymns and the holding of baccalaureate programs . . . are so conducted as not to infringe the constitutional safeguards enjoyed by appellants.")
E. Nativism Flourishes as Florida Enters the Twentieth Century

Just as the common school movement was consolidating and becoming basically self-reliant, an upturn in urbanization, industrialization, immigration, and unemployment occurred, exposing the precursors elsewhere in America to virulent nativism.\textsuperscript{242} The result was predictable: religious and racial prejudice flourished as never before in Florida.\textsuperscript{243} Neutral public funding for sectarian schools lapsed precisely as racial and religious bigotry flared.\textsuperscript{244}

1. Delayed Urbanization Advances

Florida urbanized and industrialized late by comparison to other states. Florida's population was 20% urban in 1890 and 1900; 29% urban in 1910; 37% urban in 1920; and 52% urban in 1930.\textsuperscript{245} The state's largest urban centers in 1910 included Jacksonville, with a population of 28,249; Pensacola with 17,747; Key West with 17,144; and Tampa with 15,839.\textsuperscript{246} "By 1914 Tampa was the seventh most popular destination for immigrants coming to the United States,"\textsuperscript{247} which caused Tampa rapidly to take over as the second largest city by 1920\textsuperscript{248} and caused Miami to emerge as a new urban center.\textsuperscript{249} The Tampa area quickly became the focus of nativist sentiment, yet by comparison to large cities elsewhere in America, Tampa was small.\textsuperscript{250} In 1920, at a time when the population of New York was 5.6 million, the population of Florida's four largest cities was 91,558 in Jacksonville; 51,608 in Tampa; 31,035 in Pensacola; and 29,571 in Miami.\textsuperscript{251}

\textsuperscript{242} Glenn, supra note 1, at 259–60.
\textsuperscript{243} Thompson, supra note 33, at 50–52; Gannon, supra note 25, at 86–87.
\textsuperscript{244} Anti-Catholicism in American Culture 34–36 (Robert P. Lockwood ed., 2000).
\textsuperscript{246} McNally I, supra note 22, at 56.
\textsuperscript{247} Id. at 168.
\textsuperscript{248} Fourteenth Census Population Vol. I, supra note 245, at 82.
\textsuperscript{249} Gannon, supra note 25, at 85.
\textsuperscript{250} McNally I, supra note 22, at 68.
\textsuperscript{251} Fourteenth Census Population Vol. I, supra note 245, at 82.
2. Delayed Industrialization Makes Gains

Anti-Catholic nativism had its roots in industrial and urban centers in America. Industrialization in Florida, as measured by power used in manufacturing, experienced dramatic gains at the turn of the century from 7147 horsepower in 1880 to 16,058 in 1890, 40,745 in 1900, and 139,456 in 1919. Wage earners increased too. For example, in Jacksonville they increased from 1988 in 1909 to 7168 in 1919; in Tampa from 6786 in 1909 to 13,079 in 1919; and in Pensacola from 940 in 1909 to 4586 in 1919. Florida’s principal industries in 1919 were lumber and timber products ($42,598,000 with 21,058 employees); tobacco, cigars, and cigarettes ($37,926,000 with 12,393 employees); shipbuilding and steel ($24,234,000 with 7838 employees); turpentine and rosin ($21,509,000 with 11,748 employees); and fertilizers ($10,686,000 with 1390 employees).

3. Immigration Redoubles

Industrialization, urbanization, immigration, and nativism were linked in Florida nowhere more closely than to the cigar industry in Tampa. In 1890, fifty percent of Tampa’s population was comprised of immigrants, including Cubans, Spaniards who primarily managed the cigar industry, and Italians. Ybor City, then West Tampa, mushroomed into almost exclusively Latino enclaves. Due to cigar-related immigration by 1919, Tampa had by far the largest number of immigrants (10,666), followed by Jacksonville (3894), Key West (3235), Miami (2563) and Pensacola (1445). Three thousand four hundred and fifty-nine Cubans, 2,817 Italians (Sicilians), and 2,726 Spaniards settled in Tampa; 1704 Cubans, and 1040 West Indians set-

252. See McNally I, supra note 22, at 73.
256. Id. at 244.
257. Id. at 243. "Florida ranked second in turpentine and rosin [production] and fourth in tobacco, cigars, and cigarettes" production in 1900. Twelfth Census Abstract, supra note 100, at clxxxix.
258. See McNally I, supra note 22, at 68–69.
259. Id.
tled in Key West. By 1920, the largest foreign-born ethnic groups in Florida included relatively few at the heart of the nativist controversy in the north. There were 6613 Cubans, 4745 Italians, 4451 English, 4121 Canadians, 4091 Spaniards, 3534 Germans, and 2087 West Indians. By 1920, the Irish and Germans comprised less than one-half percent of the total population and resided predominately in Jacksonville and Miami. About 100 German families also resided in San Antonio, St. Joseph, and Dade City. Nativists later picked on these settlements, as well as the Latino cigar workers located in the Tampa area.

"[C]igar workers comprised the highest paid and most concentrated work force in Florida." Accordingly, whites "looked upon the Latins with both envy and prejudice, with attraction and repugnance; they saw West Tampa as a wild [w]est town and Ybor City as a notorious place of crime, vice, and Dionysian frenzy." Worst, they considered "the denizens of the Latin enclave as un-American, conspiratorial, and nefarious." Jim Crow signs arose forbidding not just blacks, but also Latinos from entering. Ironically, Ybor's inhabitants, although viewed as pervasively Catholic, demonstrated little interest in the Catholic Church.

4. Structural Unemployment Develops

The problem of structural unemployment and adjustment eventually accompanied industrialization and urbanization in Florida, increasing the friction between native Floridians and the supposedly Catholic immigrants they believed were taking their jobs, corrupting their culture, and burdening gov-

262. Id.
263. Id. These cities included a relatively large number of Canadians, and Jacksonville included a relatively large number of English and Russians (600 and 469 respectively). Id.
264. McNally I, supra note 22, at 73–75.
266. Id.
267. McNally I, supra note 22, at 166; accord Fourteenth Census Population Vol. III, supra note 245, at 197 (indicating that 363 Germans resided in Hillsborough County and 205 in Pinellas County, compared to 608 in Duval County and 334 in Dade County).
269. Id.
270. Id.
271. Id.
272. Id.
Labor militancy erupted in Tampa’s cigar industry in the late 1800s, as it had in Key West. Cigar manufacturers, which came under the control of American conglomerates, began mechanizing traditional hand-rolling methods, leading to the so-called weight strike of 1899, in which workers protested the supply of only a fixed quantity of tobacco to produce a specified number of cigars.

La Resistencia, with links to cigar workers’ organizations in Cuba, was formed in 1899 and called the first general strike in 1901. Vigilantes assaulted strike leaders, but general strikes in Tampa were not deterred in 1910, 1920 and 1931 under the leadership of the Cigar Maker’s International Union, which had decided anarchist and socialist tendencies of concern to Floridians. When cigar demand plummeted during the Great Depression, in order to cut costs, manufacturers automated and, during World War II, turned predominately to women to produce cigars. Structural unemployment became severe, deepening prejudices toward immigrants.

5. Nativism Flourishes in Florida

Nativism came into its own in Florida in the early 1900s, once the national precursors consolidated. In 1901, an arsonist burned St. Mary, Star of the Sea Church to the ground in Key West; and in 1915, an arsonist

274. Id. at 3.
275. Id. at 8.
276. Id.
277. Id. at 9. The first general strike failed after four months following various vigilante actions. INGALLS & PÉREZ, supra note 183, at 10.
278. Id. at 9–10. During the first general strike lasting four months, vigilantes with impunity, kidnapped and exported thirteen of the union’s most prominent leaders. Id. Local authorities arrested union supporters unless they returned to work, evicted them, and froze union funds in local banks. Id.; accord McNALLY I, supra note 22, at 71–73.
279. INGALLS & PÉREZ, supra note 183, at 10–11; McNALLY I, supra note 22, at 72–73. The Cigar Makers’ International Union took over from La Resistencia. INGALLS & PÉREZ, supra note 183, at 10, 99. Both unions had decidedly anarchist, socialist, and communist tendencies, in part due to the role of lectures or lectura in the cigar plants who stimulated radical thought. Id. at 11–12, 82–85, 92–93, 178–83, 212–13. The plants banned lectura in 1931, after thousands of cigar workers joined a union affiliated with the communist party. Id. at 11, 178–83.
280. INGALLS & PÉREZ, supra note 183, at 12.
281. Id. at 12, 191, 206, 210.
282. Id. at 191–93. The final blow to the industry came in the 1960s, when the United States imposed an embargo against the importation of Cuban products including tobacco. Id. at 12, 214–15.
283. McNALLY I, supra note 22, at 73.
burned a classroom in the parish school.\textsuperscript{284} Anti-Catholic literature circulated widely in Florida after 1910, causing the Bishop of St. Augustine, Michael J. Curley, to write, "[w]e Catholics . . . are victims of organized vilification and the government itself through the mails takes a hand by the distribution of lewd and lascivious anti-Catholic filth."\textsuperscript{285} Nativism impacted local and statewide elections.\textsuperscript{286} In St. Augustine in 1910, a secret society, the Patriotic Sons of America, helped defeat Catholic Congressional candidate Lewis W. Zim.\textsuperscript{287} Protestants also opposed Catholic candidates in Jacksonville and St. Augustine due to their faith.\textsuperscript{288}

In 1913, nativism even influenced the Florida Legislature to pass "legislation titled 'An Act Prohibiting White Persons from Teaching Negroes in Negro Schools,'"\textsuperscript{289} targeting the Sisters of St. Joseph, the only whites known to teach black children at the time (in schools at St. Augustine, Fernandina, Jacksonville, and Ybor City).\textsuperscript{290} For three years the law was not enforced; then at Easter, on April 24, 1916, the state prosecutor charged Sister Mary Thomasine with a violation.\textsuperscript{291} In May, the county court discharged her from custody by holding that "the petitioner was upon the date named in the affidavit a teacher of a private school in no manner supported or maintained by the public funds," and that the Act did not apply to private schools.\textsuperscript{292}

In 1914, the Florida Legislature nearly passed the so-called Garb Bill,\textsuperscript{293} which would have precluded public school teachers, widely understood as the same Sisters of St. Joseph, from wearing religious garb.\textsuperscript{294} This bill also revealed a link between religious prejudice and Blaine-styled limitations on public funding.\textsuperscript{295} Garb Bill supporters decried "'public funds used for sec-

\begin{itemize}
  \item \textsuperscript{284} Id.
  \item \textsuperscript{285} Id. at 74.
  \item \textsuperscript{286} See id.
  \item \textsuperscript{287} Id.
  \item \textsuperscript{288} McNALLY I, supra note 22, at 74.
  \item \textsuperscript{289} Id. at 75; Chapter 6490—(No. 70) of the Florida Laws states:
    \begin{quote}
      Section 1. From and after the passage of this Act it shall be unlawful in this State, for white teachers to teach negroes in negro schools, and for negro teachers to teach in white schools.
    \end{quote}
    Section 2. Any person, or persons, violating the provisions of this Act, shall be punished by a fine not to exceed five hundred ($500.00) dollars or by imprisonment in the County jail not exceeding six (6) months.
  \item \textsuperscript{290} McNALLY I, supra note 22, at 75; Alberta, supra note 156, at 44.
  \item \textsuperscript{291} Alberta, supra note 156, at 45.
  \item \textsuperscript{292} Id. at 47.
  \item \textsuperscript{293} Robert B. Rackleff, \textit{Anti-Catholicism and the Florida Legislature, 1911–1919}, 50 FLA. HIST. Q. 352, 353 (1972).
  \item \textsuperscript{294} McNALLY I, supra note 22, at 75.
  \item \textsuperscript{295} Id.
\end{itemize}
tarian purposes."\textsuperscript{296} The Bill proved the immediate precursor to the Sisters’ of St. Joseph’s surrender of their so-called common schools\textsuperscript{297} and the discharge of Sister Thomasine in 1916.\textsuperscript{298}

In the same year, Governor Catts, formerly a Baptist pastor, fomented nativist prejudice to win statewide office.\textsuperscript{299} Secret societies, including the Patriotic Sons of America, Guardians of Liberty, the True Americans, the Masons, and the Knights of Pythias supported Catts’ self-proclaimed “crusade against ‘the continuance of the Roman domination’ of America.”\textsuperscript{300} He coupled religious and class prejudice by adding to his anti-Catholic message,\textsuperscript{301} an anti-German war and anti-Black message. Typical stump rhetoric included the claim that German Catholics in San Antonio were planning an armed-Negro insurrection for Kaiser Wilhelm II, after which the Pope would move the Vatican there.\textsuperscript{302} There could hardly have been a more thoroughly prejudicial speech.

In Fort Lauderdale and Fort Myers, at the height of Catts’ hysteria, public teachers lost their jobs in 1915–16 due to their Catholic faith.\textsuperscript{303} Parochial schools, previously attended in roughly equal numbers by Catholics and Protestants, became religiously segregated.\textsuperscript{304} Additionally, in 1917, the Florida Legislature finally passed in the Convent Inspection Bill, which was killed in committee two years earlier.\textsuperscript{305} Although Governor Catts appointed a team to perform the task annually, there is no evidence that the Act was enforced; however, the legislature did not repeal it until 1935.\textsuperscript{306}

Elsewhere in the United States, nativism was also influential and led to no-aid separationist court victories.\textsuperscript{307} For example, in 1918, the Supreme Court of Iowa struck down public payments for maintenance of a public

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\textsuperscript{296} Alberta, \textit{supra} note 156, at 43 (no citation provided in original).
\textsuperscript{297} \textit{Id.} at 41–42. Perhaps influenced by the Latino population, the \textit{Tampa Tribune} opposed the \textit{Garb Bill} as discriminatory and a violation of the First Amendment. \textit{MCNALLY I, supra} note 22, at 75.
\textsuperscript{298} \textit{Id.} note 22, at 75.
\textsuperscript{299} \textit{Id.} at 75–76.
\textsuperscript{300} \textit{Id.} at 76.
\textsuperscript{301} \textit{GANNON, supra} note 25, at 74.
\textsuperscript{302} \textit{See} \textit{MCNALLY I, supra} note 22, at 78–79.
\textsuperscript{303} \textit{Id.} at 74. Also, neutral state and local funding benefiting sectarian schools was threatened. \textit{See id.} at 75.
\textsuperscript{304} \textit{Id.} at 153–54. Protestant children who made up roughly fifty percent of Catholic classes in 1905–06 in Tampa and about forty percent in 1910 in Tampa and St. Augustine, made up just twenty-five percent in Tampa and twenty percent in St. Augustine in 1919. \textit{Id.} at 154.
\textsuperscript{305} \textit{MCNALLY I, supra} note 22, at 75.
\textsuperscript{306} \textit{Id.} at 75.
\textsuperscript{307} \textit{See} Knowlton v. Baumhover, 166 N.W. 202, 214 (Iowa 1918).
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school operating on the second floor of a parochial school on the grounds that it, too, was essentially parochial. In 1922, a New York court struck down indirect aid to pupils in the form of the provision of textbooks and other supplies to parochial students.

F. The Post-World War II Years

After World War II, public funding of Florida educational programs neutrally benefiting religious and non-religious educational institutions resumed. The reason was first as of necessity, in the form of loans and scholarships for teachers and nurses. Subsequently, the funding expanded to other fields and K-12 education. The first three Florida cases ever to interpret the declaration of rights, section 6 also followed in rapid succession after the wars. Accordingly, until the 1967 Constitutional Revision Commission, both the Florida Legislature and the judiciary behaved as if the dec-

308. *Id.* The Supreme Court of Iowa also struck it down under the state Establishment Clause, a clause precluding “taxation for ecclesiastical support,” as well as a statute forbidding “the use or appropriation of gift or loan of public funds to any institution or school under ecclesiastical or sectarian management or control.” *Id.* at 207. *Accord Jenkins v. Inhabitants of Andover,* 103 Mass. 94, 100, 103 (1869) (holding educational enactment unconstitutional to the extent it permits the town of Andover to support a supposed public school that was run by a private board affiliated with Christ Church).


*No Aid to Denominational Schools.* Neither the state, nor any subdivision thereof, shall use its property or credit or any public money, or authorize or permit either to be used, directly or indirectly, in aid or maintenance, other than for examination or inspection, of any school or institution of learning wholly or in part under the control or direction of any religious denomination, or in which any denominational tenet or doctrine is taught.

*Id.* (quoting N.Y. CONST. of 1894 art. IX, §4).

310. *See generally* ch. 29726, §§ 1–3, 1955 Fla. Laws 231, 231–34. Chapter 29726 was enacted to provide for scholarships and loans to prospective teachers. *Id.* Chapter 28919 was enacted to provide for scholarships and loans to prospective nurses. *Id.* Chapter 28919, §§ 1–2, 1955 Fla. Laws 572, 572–73.


312. *See Act effective June 22, 1961, ch. 61-496, pmbl., 1961 Fla. Laws 1091, 1091–92.* The purpose of this act was to provide financial assistance to Florida high school graduates seeking to attend college. *Id.* This program served as a predecessor to the Corporate Income Tax Credit Scholarship Program, which permits students in grades K–12 to attend private religious or non-religious schools of their parents’ choice. *See FLA. STAT. § 220.187 (2004); FLA. STAT. § 1002.20(6) (2004).*

313. *See Southside Estates Baptist Church v. Bd. of Trs., 115 So. 2d 697, 698 (Fla. 1959); Koerner v. Borck, 100 So. 2d 398, 402 (Fla. 1958); Fenske v. Coddington, 57 So. 2d 452, 456 (Fla. 1952).*
laration of rights, section 6 was consistent with religiously neutral programs of general eligibility with a secular purpose.\textsuperscript{314}

1. Neutral Public Funding of Religious Schools Reemerges

Teaching and nursing shortages in the aftermath of the world wars were the first to prompt a neutral public education scholarship program.\textsuperscript{315} The legislature responded in 1955 by enacting scholarship loans for residents to attend any institution of higher learning in Florida approved for teacher education, religious or non-religious.\textsuperscript{316} Awardees pledged to teach in a Florida public school or junior college for at least as long as the resident received the scholarship.\textsuperscript{317} The teacher scholarship loan recipient could “register in any college, school, department, or division of the institution he may desire, and may pursue a course of studies leading toward any type of degree he may desire,” as long as, upon graduation, the recipient would be fully eligible for teacher certification.\textsuperscript{318} At the time, Florida residents could attend, for teacher education, a variety of religious institutions including, for example, Stetson University, St. Leo College, Bethune-Cookman College, Edward Waters College, Florida Presbyterian College, and Barry College.\textsuperscript{319} Similar loan and scholarship programs survive today.\textsuperscript{320}

\textsuperscript{314} 1967 Minutes, \textit{supra} note 9.


\textsuperscript{316} Ch. 29726, § 2, 1955 Fla. Laws 231, 232–33 (codified at FLA. STAT. § 239.41 (1961)). The law required scholarship loans to be awarded on the basis of competitive examinations and allocated funds to the counties proportionate to their K–12 enrollment. \textit{Id. See also} FLA. STAT. § 239.42 (1961) (explicitly referencing disbursement of scholarship funds at private institutions).

\textsuperscript{317} Ch. 29726, § 2, 1955 Fla. Laws 231, 232–33.

\textsuperscript{318} FLA. STAT. § 239.41 (1961); \textit{accord} FLA. ADMIN. CODE ANN. r. 130.5-10, 130.7-20 (1962). Florida’s State Board of Education approved programs for teacher education. \textit{Id. at r.} 130.5-10.


\textsuperscript{320} See FLA. STAT. §§ 1009.54, 1009.57–59 (2004) (addressing scholarship, loan forgiveness, and tuition reimbursement programs for teachers); Minority Teacher Education
Also in 1955, due to a nursing shortage, the State of Florida established a professional scholarship for Florida residents pledging to practice nursing in Florida. Eventually, one-half of the residents had to pledge their intent to practice nursing in a public hospital in Florida. Scholarships were available to attend several types of educational institutions: 1) "professional diploma schools of nursing or approved junior college schools of nursing in Florida;" 2) "basic collegiate schools of nursing in Florida;" 3) "practical schools of nursing in Florida;" and 4) baccalaureate-granting institutions in Florida and other states. Eligible institutions had to meet "the entrance requirements of a school of nursing approved by the Florida state board of nurse registration and nursing education." A similar program has existed ever since, now benefiting sectarian schools and has expanded to include occupational therapists. Religious hospitals have always benefited from the program.

The 1960s marked a significant expansion in public funding for private religious and non-religious schools. In 1961, the Florida Legislature approved the first school choice program, neutrally benefiting religious and non-religious higher educational institutions in the form of a corporate income tax educational scholarship program to assist Florida high school graduates "unable to attend college because of financial inability." The legislation rendered educational benefits payable from approved plans not to

Scholars Program, § 1009.60; Florida Fund for Minority Teachers, Inc., § 1009.605; Teacher/Quest Scholarship Program, § 1009.61; Grants for Teachers for Special Training in Exceptional Student Education, § 1009.62.

322. FLA. STAT. § 239.47(1)-(4) (1961).
323. § 239.47(1).
324. § 239.47(2).
325. § 239.47(3).
326. § 239.47(4).
327. § 239.49. Rollins College may have participated in the program. E-mail from Wenxian Zhang, Dep’t of Archives & Special Collections, Rollins College (Aug. 20, 2004). Rollins College offered a combined nursing and liberal arts program with Orange General Hospital School of Nursing in Orlando from 1941–59. Id.
328. See Nursing Student Loan Forgiveness Program, FLA. STAT. § 1009.66 (2004); Nursing Scholarship Program, § 1009.67. Bethune-Cookman College and Pensacola Christian College have nursing baccalaureate programs. Florida Center for Nursing, Nursing Education Programs in Florida, http://www.fclcenterformursing.org/links/individual_cat.cfm?cat_id=14 (last visited Oct. 30, 2005). See also Critical Occupational Therapist or Physical Therapist Shortage Student Loan Forgiveness Program, § 1009.632; Critical Occupational Therapist or Physical Therapist Shortage Scholarship Loan Program, § 1009.633; Critical Occupational Therapist or Physical Therapist Shortage Tuition Reimbursement Program, § 1009.634.
be deemed as a distribution of income to a member of a corporation.\textsuperscript{331} This was a forebear of the modern Corporate Income Tax Credit (CITC) Scholarship Program, enabling students to attend a private religious or non-religious kindergarten through twelfth grade school of the parents’ choice.\textsuperscript{332}

In 1963, the legislature expanded scholarship and loan assistance to higher education.\textsuperscript{333} The state appropriated a half-million dollars for a special trust fund to award scholarship loans for tuition, registration fees, books, and housing to eligible residents attending any “institution of higher learning in Florida, either private or public, which is a member of the Southern Association of Colleges and Secondary Schools, or whose credits are acceptable for transfer to state universities in Florida.”\textsuperscript{334} Eligibility depended upon need and ability as demonstrated by “standardized examinations and a certification of acceptability by the university or college of the applicant’s choice.”\textsuperscript{335} The state also established Seminole Indian Scholarships for Indians to attend any accredited community college, college, or university in Florida.\textsuperscript{336} These and similar aid programs still exist, with two incorporating an explicit requirement that the post-secondary educational institution have a secular purpose, namely, education itself.\textsuperscript{337}

In 1965, the legislature approved the precursor to today’s Florida Bright Futures Scholarship Program, the Florida Regents Scholarship.\textsuperscript{338} The legislature directed the Florida Board of Regents to award a scholarship to eligible residents to attend any “accredited public or private college, university or

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\item \textsuperscript{331} Act effective June 22, 1961, ch. 61-496, § 1(4), 1961 Fla. Laws 1091, 1092 (codified at FLA. STAT. § 617.50 (1967)).
\item \textsuperscript{332} See FLA. STAT. § 220.187 (2004); FLA. STAT. § 1002.20(6) (2004).
\item \textsuperscript{333} Act effective June 17, 1963, ch. 63-452, § 4, 1963 Fla. Laws 1176, 1178 (codified at FLA. STAT. § 239.67(4) (1967)).
\item \textsuperscript{334} Id.
\item \textsuperscript{335} § 239.67(5).
\item \textsuperscript{336} § 239.66.
\item \textsuperscript{337} Neutral post-secondary educational loan assistance programs include: the Florida Public Student Assistance Grant Program, FLA. STAT. § 1009.50 (2004), Florida Private Student Assistance Grant Program, § 1009.51, Florida Postsecondary Student Assistance Grant Program, § 1009.52. Florida post-secondary educational loan assistance programs requiring the institution to have a secular purpose include: the William L. Boyd, IV Florida Resident Access Grants, § 1009.89(3) (discussing private schools), and Access to Better Learning and Education Grant Program, § 1009.891(3) (discussing private schools). See also Mary McLeod Bethune Scholarship Program, § 1009.73, Jose Marti Scholarship Challenge Grant Program, § 1009.72 (discussing scholarship for Hispanic students attending, inter alia, private religious post-secondary institutions).
\item \textsuperscript{338} Act effective June 24, 1965, ch. 65-495, § 1(2), 1965 Fla. Laws 1683, 1684 (codified at FLA. STAT. § 239.451 (1967)).
\end{itemize}
junior college in Florida." Eligibility among seniors depended upon a "rank in the top five percent in the state as judged by the state-wide twelfth grade examination and high school academic record and recommendation of their high school principals." Renewal depended upon maintaining at least "a 'B' average on at least thirty credit hours of work per academic year." The program has expanded since and assumed new names including the Florida Academic Scholars' Fund, Florida Graduate Scholars' Fund, Florida Undergraduate Scholars' Fund, and Florida Bright Futures Scholarship Program.

2. Equal Treatment and Neutrality Principles Reemerge

Following World War II, the Supreme Court of Florida, in addition to the Florida Legislature, interpreted the declaration of rights, section 6 in a manner consistent with neutral and equal treatment of religious persons. The first three Florida cases ever to interpret the declaration of rights, section 6 followed in rapid succession after the World Wars and held constitutional devises of land and access to public buildings neutrally benefiting religious and non-religious persons. Two federal cases decided before the incorporation of the Establishment Clause against the states in 1947 also favored neutrality and equal treatment of persons on the basis of race and faith.

The United States Supreme Court upheld, against the Establishment Clause, the use of federal funds for construction of buildings on the grounds of two hospitals in the District of Columbia; allegedly directed by members of a Catholic monastic order or sisterhood with title to the property vested in

340. § 239.451(1).
341. § 239.451(2).
342. FLA. STAT. § 240.402 (1980).
344. FLA. STAT. § 240.402 (1986).
345. FLA. STAT. § 240.40202 (1997).
346. See, e.g., Southside Estates Baptist Church v. Bd. of Trs., 115 So. 2d 697, 700–01 (Fla. 1959) (condemning a preference of one sect or denomination over any other); Koerner v. Borck, 100 So. 2d 398, 401–02 (Fla. 1958) (upholding church's right or ingress and egress over county-owned land for baptismal purposes); Fenske v. Coddington, 57 So. 2d 452, 456 (Fla. 1952) (upholding the existence of "a Chapel for religious worship which is located in a portion . . . of a public school.").
347. See supra note 346.
the Sisters of Charity. Additionally, the Court upheld, against the Fourteenth Amendment, inter alia, a state law authorizing purchase of secular school books for the use of school children attending public and private religious and non-religious schools. The Court found no intent to benefit religious schools and that the actual beneficiaries were not the schools, but the children.

In 1947, *Everson v. Board of Education* upheld a law providing reimbursement to parents for the cost of transporting children on public busses to religious and non-religious schools. The Court incorporated the Establishment Clause against the states, yet found the Clause not violated by a program "neutral in its relations with groups of religious believers and non-believers." According to the Court, "[s]tate power is no more to be used so as to handicap religions than it is to favor them." Consequently, the Court stated in dicta that on the one hand, New Jersey could not directly contribute tax-raised funds to a sectarian school, but on the other hand, the state could not exclude persons because of their faith, or lack there of, from receiving the benefits of public welfare legislation.

Shortly after *Everson*, in 1952, the Supreme Court of Florida decided the first case interpreting the declaration of rights, section 6, *Fenske v. Coddington*. In *Fenske*, the court reviewed the desire of trustees of a sectarian "negro school" to transfer its related real estate and tangible personal property to the Board of Public Instruction of Orange County, allegedly to better serve the trust's purpose of providing a quality, albeit segregated, education to blacks. The court held the conveyance reserving Stewart Memorial Chapel to the grantors, who were at the heart of the real property, a right of ingress and egress to the premises did not violate the First Amendment or the declaration of rights, section 6. According to the *Fenske* court,

> [t]he very fact that sufficient money from the original trust is retained by the trustees under the supervision of the Chancellor to maintain this chapel until the further orders of the Chancellor, and that no public (state) monies

351. *Id.* at 374–75.
352. 330 U.S. at 17–18.
353. *Id.* at 18.
354. *Id.*
355. *Id.* at 16–17.
356. 57 So. 2d 452 (Fla. 1952).
357. *Id.* at 453.
358. *Id.* at 454, 456.
are to be spent in aid of any sectarian institution is sufficient evidence that neither the federal or the state Constitutions are being violated.359

In 1958, the Supreme Court of Florida likewise approved a devise of a parcel of land with a lake for use as a county park, reserving to a nearby church a perpetual right of ingress and egress over county-owned land to reach the lake for purposes of conducting baptisms and other religious and recreational events.360 Although the easement resulted in an important benefit to the church, and the court conceded that a public disbursement to improve the park was possible, in Koerner v. Borck,361 the court held that, "any improvement to the county-owned land will be made for the benefit of the people of the county and not for the church."362 Referencing Everson, "[t]he Florida Supreme Court recognized that prohibiting baptisms in public waters would violate the United States Constitution because state power cannot be used to handicap religions any more than it can to favor them."363

In 1959, the Supreme Court of Florida elaborated its nascent declaration of rights, section 6 equal treatment and neutrality framework when it held constitutional the temporary use by "several churches" of various public school buildings on Sunday,364 pursuant to state law and county board regulations,365 "pending . . . construction of church buildings."366 Appellants complained that the use was "an indirect contribution of financial assistance to a church in violation of Section 6 of the Declaration of Rights of the Florida Constitution, F.S.A."367 They further argued "that regardless of how small the amount of money might be, nevertheless, if anything of value can be traced from the public agency to the religious group, the Constitution has been thereby violated."368 The Supreme Court of Florida disagreed without remanding the case to clarify whether public funds had been contributed and

359. Id. at 456.
361. Id. at 398.
362. Id. at 402.
365. See FLA. STAT. § 235.02 (1959) ("Subject to law, the trustees of any district may provide for or permit the use of school buildings and grounds within the district, out of school hours during the school term, or during vacation, for any legal assembly . . . .").
366. Southside Estates Baptist Church, 115 So. 2d at 698.
367. Id.
368. Id. at 699.
considered de minimis any indirect benefit to the churches and cost to the public fisc.\textsuperscript{369}

In \textit{Southside Estates Baptist Church v. Board of Trustees}, the court approved the consistency of the declaration of rights, section 6 with the neutrality principle when it noted the lack of any evidence "that one sect or denomination is being given a preference over any other. As a matter of fact, the amended complaint reveals that some four or five religious groups had been accorded the same treatment. None has been denied . . . ."\textsuperscript{370} Citing \textit{Fenske} and \textit{Koerner}, the Supreme Court of Florida said: "We ourselves have heretofore taken the position that an incidental benefit to a religious group resulting from an appropriate use of public property is not violative of Section 6, of the Declaration of Rights of the Florida Constitution."\textsuperscript{371} Subject to judicial review for abuse of discretion, the court applied a rule of reason for a "basically religious" people,\textsuperscript{372} rather than appellant's position preventing use or occupancy of public property for Easter Sunrise Service and other "absurd application[s]."\textsuperscript{373}

It would be decades before the United States Supreme Court would reach a holding similar to \textit{Southside Estates Baptist Church}.\textsuperscript{374} On the other hand, with respect to striking the common religion, the United States Supreme Court acted first.\textsuperscript{375} In 1964, the United States Supreme Court reversed in part the Supreme Court of Florida's holding in \textit{Chamberlin} that a statute requiring daily readings from the Bible, the recitation of the Lord's Prayer, singing of religious hymns, and holding of baccalaureate programs did not violate the Establishment Clause or the declaration of rights, section 6.\textsuperscript{376} On remand, the Supreme Court of Florida preserved the constitutionality of "religious and sectarian baccalaureate programs . . . the conducting of a religious census among the [school] children to ascertain their own religious

\textsuperscript{369} \textit{Id.} at 699–701.
\textsuperscript{370} \textit{Id.} at 700.
\textsuperscript{371} \textit{Southside Estates Baptist Church}, 115 So. 2d at 700 (citations omitted).
\textsuperscript{372} \textit{Id.} at 701.
\textsuperscript{373} \textit{Id.} at 700.
\textsuperscript{376} \textit{Chamberlin v. Dade County Bd. of Pub. Instruction (Chamberlin I)}, 143 So. 2d 21, 23, 35 (Fla. 1962), rev'd, 377 U.S. 402 (1964) (referencing \textit{FLA. STAT.} § 231.09 (1961)). \textit{See also} \textit{Brown v. Orange County Bd. of Pub. Instruction}, 128 So. 2d 181, 183, 185 (Fla. 2d Dist. Ct. App. 1960) (reinstating a complaint for declaratory and injunctive relief against a school district policy permitting the Gideons to annually distribute the King James Bible at public schools on the grounds that it violated the Florida Blaine Amendment, the First Amendment, and parents' right to inculcate their children in religion).
affiliations . . . [and] the conducting of religious tests as a qualification for the employment of teachers."377

G. The 1967 Constitutional Revision Session

On the eve of the 1967 Constitutional Revision Session, the Florida Legislature had approved numerous public funding programs neutrally benefiting religious and non-religious schools.378 The Supreme Court of Florida and the United States Supreme Court also had generally endorsed the principles of neutrality and equal treatment of persons on the basis of faith.379 The Committee of the Whole House approved a single amendment by a vote of seventy-one to twenty-four380 to replace the declaration of right, section 6's "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,"381 with article I, section 3's "[n]o 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."382 The minutes do not reflect the reason, but the change ensured, to the extent there was any question, that local governmental bodies are subject to it.383

The Commission rejected numerous other amendments to the declaration of rights, section 6, but few conclusions can be drawn from this.384 For example, the Commission rejected an amendment permitting "the provision of health and welfare or other non-curricula services . . . for the benefit of all school children" and "the distribution of Federal funds in accordance with the terms of the Federal law."385 The former proposed nothing new or controversial as private school students have long benefited from basic health and welfare services (for example, immunization) and there is no evidence the Commission sought to end this.386 The Commission may very well have rejected the second amendment because it was unnecessary; federal law pri-


378. See 1967 Minutes, supra note 9, at 17.


380. 1967 Minutes, supra note 9, at 17.

381. FLA. CONST. of 1885, Declaration of Rights, § 6.

382. FLA. CONST. art. I, § 3; see 1967 Minutes, supra note 9, at 17.

383. 1967 Minutes, supra note 9, at 17.

384. Id. at 15.

385. Id. at 13.

386. See id.
arily governs federal expenditures. The Commission also rejected the following amendment, but presumably without meaning to endorse its object: "The liberty of conscience hereby secured shall not be so construed as to justify licentiousness or practices subversive of, or inconsistent with, public morals, peace or safety."

Other rejected amendments include the addition to the 1885 language of the words "for religious, denominational or sectarian purposes," which would have precluded aid for a religious purpose. The declaration of rights, section 6 already prohibited this. 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: "There shall be no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." At this early date, there was no obvious difference between state and federal jurisprudence and no reason to believe either would eventually prove more separationist than the other, although in fact, federal jurisprudence would shortly emerge as the more exclusionary. Last, the Commission rejected a proposal that recurred in subsequent constitutional conventions to strike the phrases "or indirectly" and "directly or indirectly." It also refused an amendment advancing equal treatment of churches, sects, religious denominations, and sectarian institutions, as prevailing jurisprudence already required this.

H. The 1968 Florida Blaine Amendment Interpreted

The declaration of rights, section 6 became article I, section 3 with minor modification in the 1968 Florida Constitution. The same year, the legislature did not view it as unconstitutional to enact a K-12 voucher program for disabled students unable to obtain exceptional student services from public schools whose parents petitioned to permit them to attend private

387. See 63C AM. JUR. 2D Public Funds § 54 (1997).
388. 1967 Minutes, supra note 9, at 13.
389. Id.
390. See id.
391. FLA. CONST. of 1885, Declaration of Rights, § 6.
392. 1967 Minutes, supra note 9, at 14.
394. 1967 Minutes, supra note 9, at 15, 17.
395. Id. at 13.
396. See FLA. CONST. of 1885, Declaration of Rights, § 6.
397. FLA. CONST. art. I, § 3.
schools, including religious ones. The Supreme Court of Florida eventually reviewed whether the state could cap the amount it would pay for the sectarian education under this program consistent with article IX, section 1, without otherwise commenting on the constitutionality of the program. This was the precursor to the McKay Scholarship Program, which is functionally equivalent to the Opportunity Scholarship Program.

Also in 1968, the United States Supreme Court decided that the loan of textbooks to students attending parochial schools did not violate the Establishment Clause, as “[t]he law merely makes available to all children the benefits of a general program . . . .” The Court held that the “financial benefit [was primarily] to parents and students, not schools.” The Court was not concerned that this would create incentives for some students to attend religious schools. According to the Court, “[p]erhaps free books make it more likely that some children choose to attend a sectarian school, but that was true of the state-paid bus fares in Everson and does not alone demonstrate an unconstitutional degree of support for a religious institution.”

The Supreme Court of Florida also continued expanding its neutrality jurisprudence. In 1970, the Supreme Court of Florida held a statute exempting properties used as licensed homes for the elderly, including religious homes, was consistent with the First Amendment and the Blaine Amendment. “The atmosphere of the home [wa]s religious,” as demonstrated by, among other things, daily chapel services, except Sunday, “under the supervision of an ordained minister,” Bible instruction and study, and transport to the churches of the residents’ choice on Sunday. Out of 158 residents, seventy-six were members of the Presbyterian Church. “Unquestionably, a Christian atmosphere [wa]s maintained.” The Synod of Florida of the Presbyterian Church elected the officers and directors of the home.

401. § 1002.38.
403. Id. at 244.
404. See id. at 244-45.
405. Id. at 244.
407. Id. at 261-63.
408. Id. at 258.
409. Id. at 263.
410. Id. at 258.
411. Johnson, 239 So. 2d at 258.
In upholding the constitutionality of a tax exemption benefiting the home, the court in *Johnson v. Presbyterian Homes of the Synod of Florida, Inc.* disregarded its sectarian character or, indeed, the fact that it was controlled by a church, and instead focused on the statute's secular purpose of encouraging the establishment of homes for the elderly.\(^{412}\) Referencing federal precedent, the court also discussed the neutrality of the exemption:

The exemption goes, not only to homes for the aged owned by religious bodies, but to any bona fide homes for the aged duly licensed, owned and operated in compliance with the terms of the statute by Florida corporations not for profit . . . . There is nothing to prevent organizations which do not believe in a Supreme Being from also complying with the statute.\(^{413}\)

The *Johnson* court went one step further and held that excluding the religious home from the tax exemption could itself violate the law: "To exempt all homes complying with the statute, except church-related homes, would indeed be discriminatory and inconsistent with the obvious intent and secular aims of the Legislature."\(^{414}\)

A year later, in 1971, federal and state law diverged for the first time with the Supreme Court of Florida still on the neutrality track, while the United States Supreme Court turned toward no-aid separationism.\(^{415}\) The Supreme Court of Florida upheld the Educational Facilities Law, which authorized Florida counties to create county authorities to assist institutions of higher education, including sectarian institutions, with obtaining financing to develop and expand educational facilities.\(^{416}\) The plaintiff challenged bond financing for the purpose of constructing a dormitory-cafeteria and purchasing necessary equipment and other facilities at the Florida Institute of Technology.\(^{417}\) The court ruled against the appellant on the following grounds:

> A state cannot pass a law to aid one religion or all religions, but state action to promote the general welfare of society, apart from any religious considerations, is valid, even though religious interests may be indirectly benefited. If the primary purpose of the state action is to promote religion, that action is in violation of the

\(^{412}\) *Id.* at 261. "It is apparent that Fla. Stat. (1967), § 192.06(14), F.S.A., was enacted to promote the general welfare through encouraging the establishment of homes for the aged and not to favor religion . . . ." *Id.*

\(^{413}\) *Id.* at 261–62.

\(^{414}\) *Id.* at 262.

\(^{415}\) *See* Nohrr *v.* Brevard County Educ. Facilities Auth., 247 So. 2d 304, 307 (Fla. 1971).

\(^{416}\) *Id.* at 306–07.

\(^{417}\) *Id.* at 306.
First Amendment, but if a statute furthers both secular and religious ends, an examination of the means used is necessary to determine whether the state could reasonably have attained the secular end by means which do not further the promotion of religion.\textsuperscript{418}

In contrast, in 1971, the United States Supreme Court held that laws authorizing reimbursement for parochial teacher salaries, textbooks, and instructional materials used in the teaching of secular subjects were unconstitutional on the grounds that they would cause excessive entanglement with the Catholic Church.\textsuperscript{419} Thus, this ruling began the United States Supreme Court's roughly two-decade swing toward federal no-aid separationism,\textsuperscript{420} which allowed neutral aid to religious organizations in only isolated instances consistent with the Court's previous rulings pertaining to textbook loan programs and bus transportation.\textsuperscript{421} Except in Florida, the trend else-

\textsuperscript{418} Id. at 307 (quoting Johnson, 239 So. 2d at 261).
\textsuperscript{421} See Meek v. Pittenger, 421 U.S. 349, 373 (1975) (upholding statute authorizing textbooks for private schools); Wolman v. Walter, 433 U.S. 229, 255 (1977) (upholding use of public school personnel to provide guidance, remedial and therapeutic speech and hearing
services on a neutral site; upholding provision of diagnostic services on neutral site; upholding reimbursing cost of standardized testing and scoring of private school students); Springfield Sch. Dist. v. Dept. of Educ., 397 A.2d 1154, 1171 (Pa. 1979) (upholding state law requiring school districts to provide bus transportation for all children, including children enrolled in religious schools); Comm. for Pub. Educ. & Religious Liberty v. Regan, 444 U.S. 646, 648, 662 (1980) (upholding religious school reimbursement for actual costs of state-mandated tests and reporting).

422. Compare Sheldon Jackson Coll. v. State, 599 P.2d 127, 132 (Alaska 1979) (stricking a program providing tuition grants exclusively to students attending private schools based in part on then-current federal Establishment Clause jurisprudence), and Spears v. Honda, 449 P.2d 130, 139 (Haw. 1968) (striking a program that would provide students transportation to private schools), and People ex rel. Klinger v. Howlett, 305 N.E.2d 129, 132–36 (Ill. 1973) (striking grants to cover the costs of tuition, textbooks and auxiliary services for students attending private schools, but did not disturb a statute providing transportation for schoolchildren), and State ex. rel. Rogers v. Swanson, 219 N.W.2d 726, 735 (Neb. 1974) (striking a scholarship program offering grants for students attending private colleges), and Dickman v. Sch. Dist. No. 62C, 366 P.2d 533, 534, 537 (Or. 1961) (striking a textbook loan program), and Hartness v. Patterson, 179 S.E.2d 907, 909 (S.C. 1971) (struck a tuition grant program benefiting only private schools), and Weiss v. Bruno, 509 P.2d 973, 976, 991 (Wash. 1973), overruled by State ex rel. Gallwey v. Grimm, 48 P.3d 274, 284 (Wash. 2002) (struck financial assistance for needy and disadvantaged students to attend public and private schools and tuition support for higher education), with Ala. Educ. Ass’n v. James, 373 So. 2d 1076, 1081 (Ala. 1979) (upholding a college scholarship program neutrally benefiting religious schools because the purpose of the act was to benefit the public), and Ams. United v. Rogers, 538 S.W.2d 711, 718–19 (Mo. 1976) (upholding college scholarship because act was to benefit the public), and Cal. Educ. Facilities Auth. v. Priest, 526 P.2d 513, 522 (Cal. 1974) (upholding use of revenue bonds to finance facilities at religious schools), and Bd. of Educ. v. Allen, 228 N.E.2d 791, 793–94 (N.Y. 1967) (upholding a textbook loan program), and Durham v. McLeod, 192 S.E.2d 202, 204 (S.C. 1972) (upholding a student loan program benefiting public and private schools).


424. Id. at 422.
fare of society, apart from any religious considerations, has been held valid by the courts, even though religious interests may be indirectly benefited.  

In 1977, the Attorney General issued a second opinion interpreting article I, section 3, stating that the maintenance of religious facilities in county jails and of rent-free office space for a chaplain, as well as the payment of public funds to compensate a chaplain serving the religious needs of prisoners, does not violate article I, section 3, provided that the facilities and clergy are made available to all inmates regardless of religious belief and that no one religion is given preference over another. The opinion found that county commissioners may fund repairs, construction or other capital improvements to provide religious facilities at a jail and the sheriff may fund the operation and equipping of the facilities. The Attorney General noted authority for the view that refusing religious accommodations in these circumstances could be deemed inhibition of religion. In dicta, the opinion also approved a statute permitting “instruction of the prisoners in their basic moral and religious duties.”

I. The 1977 Constitutional Revision Commission

The 1968 Florida Constitution incorporated a continuous revision clause requiring consideration of revisions to the constitution within the first ten years after approval and every twenty years afterwards. The 1977 Constitutional Revision Commission (CRC) considered article I, section 3, including draft amendments to strike it and weaken it, but rejected the changes on the ostensible grounds that its purpose was merely to fix glitches in the Declaration of Rights, not change them substantively. Its decision can hardly be viewed as a mandate for an exclusionary article I, section 3. Debate even at this late date incorporated allusions to anxiety over whether the Pope or

425. Id.
427. Id. at 120–21.
428. See id. at 118–19.
429. Id. at 119 (quoting FLA. STAT. § 944.11 (1977)).
430. FLA. CONST. art. XI, § 2.
431. Constitution Revision Comm’n Transcript, Full Comm’n 99 (Dec. 6, 1977) [hereinafter 1977 Constitution Revision Transcript]. A proposal to strike the Blaine amendment was rejected. See id. Another amendment considered regarded a committee philosophy of restraint. See id. at 100–04. The effort to delete “directly or indirectly” was rejected. Id. at 122. In truth, the 1977 CRC approved draft substantive changes to the Declaration of Rights including with respect to privacy, pretrial release, grand jury counsel, and non-discrimination based upon sex. Steven J. Uhlfelder & Robert A. McNeely, The 1978 Constitution Revision Commission: Florida’s Blueprint for Change, 18 NOVA L. REV. 1489, 1492–94 (1994).
other Catholic Church officials sought to "takeover in this state." Ultimately, the debate was unavailing in 1978; the electorate disapproved all the 1977 CRC's proposed revisions—whether or not they concerned the Declaration of Rights.

Without distinguishing or even discussing prevailing case law, the key proponents of striking article I, section 3 gave as their reason that it allegedly precluded aid as simple as vaccinating pupils at religious schools, busing to parochial school or for field trips, offering curriculum guidance, utilizing public sports facilities and participating in sports contests, renting private religious facilities, and testing for eyeglasses, and indirect aid as sophisticated as tax credits and vouchers for tuition at parochial schools. Opponents disagreed that the 1968 Blaine Amendment forbade the less sophisticated forms of aid, ironically, for the reason that the Opportunity Scholarship Program is constitutional; in other words, they were offered as part of a generally eligible program to all Floridians regardless of religious preference.

Neither side betrayed a thoughtful grasp of prevailing case law or practice. Proponents of striking the amendment overstated what precedent indicated it forbade, and opponents voiced support for the neutrality principle upon which the constitutionality of school choice programs depend as much as less sophisticated welfare programs. An alternative amendment proposed striking "directly or indirectly" from the 1968 Blaine Amendment as unnecessary, but opponents defeated this proposal twenty to fifteen on the ground that if the language was superfluous there was no need to eliminate it. The CRC's final decision not to modify the 1968 Florida Blaine Amendment became a non-event when voters disapproved all of the 1977

432. 1977 Constitution Revision Transcript, supra note 431, at 109, 111.
433. Id. at 101, 120; Kelley H. Armitage, Constitution Revision Commissions Avoid Logrolling, Don't They?, Fla. B.J., Nov. 1998, at 62, 64 n.36 (citation omitted).
434. 1977 Constitution Revision Transcript, supra note 431, at 101, 120.
435. Id. at 108, 121.
436. Id. at 102.
437. Id. at 107–08.
438. Id. at 110.
439. 1977 Constitution Revision Transcript, supra note 431, at 121.
440. Id. at 106–07, 112, 114.
441. Id. at 101, 103.
442. For example, Southside held that a church's use of public facilities is permitted. Southside Estates Baptist Church v. Bd. of Trs., 115 So. 2d 697, 700–01 (Fla. 1959).
443. 1977 Constitution Revision Transcript, supra note 431, at 102, 105.
444. Id. at 114–15, 122.
CRC's proposals because, according to pundits, "the casino gambling initiative also on the ballot poisoned the voters to all the initiatives.\footnote{445}

\section*{J. The 1997 Constitutional Revision Commission}

Pursuant to the 1968 Florida Constitution continuous revision clause,\footnote{446} the 1997 CRC met without intervening developments in article I, section 3 precedent.\footnote{447} The United States Supreme Court, on the other hand, was in the midst of one of the most radical realignments in the Court's history dating back to its pre-1971 neutrality jurisprudence. The shift is evident in cases upholding public aid to a blind person attending a sectarian institution for the purpose of becoming a minister;\footnote{448} a government-provided sign language interpreter for deaf children in religious schools;\footnote{449} and remedial educational services on the campus of private schools.\footnote{450} It was likewise evident in cases holding that religious persons should be treated equally in public forums, just as the Supreme Court of Florida held decades earlier that churches should have equal access to public facilities.\footnote{451}

The 1997 CRC session opened with the caution that a too ambitious agenda could lead to the same defeat experienced by the 1977 CRC.\footnote{452} In 1998, voters nevertheless approved diverse revisions affecting the judiciary, environment and conservation, education, cabinet, privacy, elections, and gun sales.\footnote{453} The legislature encouraged this result by establishing a task force on the judiciary, funding, and assisting with bill drafting and other ser-

\begin{footnotes}
\footnote{445} Armitage, \textit{supra} note 433, at 64 n.36 (citation omitted).
\footnote{446} FLA. CONST. art. XI, § 2.
\footnote{448} Witters v. Wash. Dep't of Servs., 474 U.S. 481, 483, 489 (1986).
\footnote{449} Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1, 13 (1993).
\footnote{451} Compare Southside Estates Baptist Church v. Bd. of Trs., 115 So. 2d 697, 700–01 (Fla. 1959) (holding a Florida public school may use its building for religious club meeting during non-school hours), \textit{with} Widmar v. Vincent, 454 U.S. 263, 265, 276–77 (1981) (holding a state university's policy of excluding religious student groups from campus facilities was unconstitutional), \textit{and} Bd. of Educ. of Westside County Sch. v. Mergens, 496 U.S. 226, 253 (1990) (plurality opinion) (holding that a public secondary school that receives federal funding could not prohibit a student religious club from meeting after school hours on school premises).
\footnote{453} \textit{Id.} at 276 n.5, 282 n.22 (citations omitted).
\end{footnotes}
vices as early as 1994. The 1997 CRC did not consider proposals to modify the 1968 Blaine Amendment made by the public in public hearings required by the Constitution. Under the rules of procedure for the Rules and Administration Committee of the 1997 CRC, public proposals for revisions had to be read and were rejected unless moved for consideration by the full committee by at least ten votes.

A commissioner on the Rules and Administration Committee motioned to file with the Secretary for consideration by the 1997 CRC one public proposal to revise the 1968 Blaine Amendment "to ensure that the provision is not interpreted to prevent students in parochial schools from receiving neutral benefits." This motion did not receive the mandatory ten votes for consideration by the CRC. Additional public proposals to modify the 1968 Blaine Amendment were never moved in the Committee; these included a proposal to remove the language "directly or indirectly in aid of any church, sect, or religious denomination or in aid of any sectarian institution" so that the amendment would have stated: "to directly promote any church, sect, or religious denomination or directly aid any sectarian religious institution or program. The state or any political subdivision or agency thereof shall not deny equal access to a public benefit on account of religion." Another public proposal was to modify the 1968 Blaine Amendment to read as follows: "There shall be no law respecting the establishment of one religion in preference to any other . . . ." In the end, the Committee prevented any public proposal to modify the 1968 Blaine Amendment from receiving consideration by the full CRC and Florida voters.

K. Last Blaine Amendment Litigation

In the aftermath of the 1997 CRC, two Florida appellate courts have examined religiously-neutral programs of general eligibility with a secular purpose, including the first to strike such a program. Meanwhile, the United States Supreme Court completed its realignment with neutrality principles
and forced opponents of school choice to dismiss their federal causes of action and rely with limited success upon state Blaine amendments. First, in 2000, in *Rice v. State*, the Fifth District held constitutional a criminal statute enhancing penalties for controlled substance crimes near a place of worship. Echoing *Southside Estates*' holding that the expenditure of public revenue on religious institutions is permissible if not for a religious purpose, the Fifth District held, "the expenditure of public money to enforce the statute is too remote to aid any sectarian purpose." In 2002, in *Zelman v. Simmons-Harris*, the United States Supreme Court upheld school vouchers permitting parents to send their children to public or private religious or non-religious schools. The Court held,

where a government aid program is neutral with respect to religion, and provides assistance directly to a broad class of citizens

463. See *Zelman v. Simmons-Harris*, 536 U.S. 639, 652 (2002). For the results of Blaine litigation elsewhere thus far, see *Jackson v. Benson*, 578 N.W.2d 602, 607, 632 (Wis. 1998) (upholding a school choice program similar to the Opportunity Scholarship Program); *Kotterman v. Killian*, 972 P.2d 606, 625 (Ariz. 1999) (upholding a tax credit-based school choice program); *Toney v. Bower*, 744 N.E.2d 351, 363 (Ill. App. Ct. 2001) (upholding a tax credit-based statute for a taxpayer's expenses for elementary and secondary school education); *Embry v. O'Bannon*, 798 N.E.2d 157, 167 (Ind. 2003) (upholding a program that allocated state funds to provide secular educational services to parochial school students enrolled in public school); *State ex rel. Gallway v. Grimm*, 48 P.3d 274, 288 (Wash. 2002) (upholding a program that provided funding for certain students to attend colleges or universities, including those schools affiliated with or operated by a religious group); see also *Doolittle v. Meridian Joint Sch. Dist.*, 919 P.2d 334, 343 (Idaho 1996) (upholding reimbursement under IDEA for education at a parochial school); *Minn. Fed'n of Teachers v. Mammenga*, 485 N.W.2d 305, 310 (Minn. Ct. App. 1992) (upholding statute providing for state payments to colleges and universities, including those religiously-affiliated but found not to be "pervasively sectarian," covering costs incurred by high school students enrolled in college courses for secondary school credit); *Ams. United for Separation of Church & State Fund, Inc. v. State*, 648 P.2d 1072, 1088 (Colo. 1982) (upholding a program permitting students to use scholarships at any approved public, private or religiously-affiliated college or university); *Lenstrom v. Thone*, 311 N.W.2d 884, 889 (Neb. 1981) (upholding college scholarship program); *Neb. ex rel. Creighton Univ. v. Smith*, 353 N.W.2d 267, 272-73 (Neb. 1984) (upholding research grant to religious school). *But see Chittenden Town Sch. Dist. v. Dep't of Educ.*, 738 A.2d 539, 563-64 (Vt. 1999) (striking down tuition reimbursement to parochial school program); *Bagley v. Raymond Sch. Dep't*, 728 A.2d 127, 147 (Me. 1999) (holding an education tuition program statute that excluded religious schools to be constitutional); *Op. of the Justices*, 616 A.2d 478, 480 (N.H. 1992) (finding that it would be unconstitutional for school districts to pay partial tuition for parents who sent students to private schools of their choice).

464. 754 So. 2d 881 (Fla. 5th Dist. Ct. App. 2000).
465. *id.* at 882-83.
466. *id.*
468. *id.* at 662-63.
who, in turn, direct government aid to religious schools wholly as a result of their own genuine and independent private choice, the program is not readily subject to challenge under the Establishment Clause.  

The Court fully embraced principles evident in Florida law, just as Florida law took an about-face.

In 2004, in *Bush v. Holmes*, the First District held the Opportunity Scholarship Program unconstitutional under article I, section 3 in an en banc 8-5-1 decision. The Opportunity Scholarship Program entitles parents with children in schools underperforming for two-out-of-four years to scholarships to enroll their children in private nonreligious or religious schools which agree: 1) to “[a]ccept scholarship students on an entirely random and religious-neutral basis,” and 2) “not to compel any student attending . . . on an opportunity scholarship to profess a specific ideological belief, to pray, or to worship.”

Although insisting its decision “does not reach” other programs, the First District adopted a three-part test for infringements of article I, section 3 that could do none other.

The constitutional prohibition in the no-aid provision involves three elements: 1) the prohibited state action must involve the use of state tax revenues; 2) the prohibited use of state revenues is broadly defined, in that state revenues cannot be used ‘directly or indirectly in aid of’ the prohibited beneficiaries; and 3) the prohibited beneficiaries of the use of state revenues are ‘any church, sect or religious denomination’ or ‘any sectarian institution.’

The court hinted that, in its view, “sectarian” might really mean “pervasively sectarian,” and, remarkably, expressed skepticism that the history or text of Blaine Amendments nationally was associated with religious bigotry or animus.
III. THE CONTEMPORARY MEANING OF THE 1968 FLORIDA BLAINE AMENDMENT

Florida is one of the few states with a Blaine Amendment where all branches of government and lesser governmental bodies have interpreted the constitution to permit religiously-neutral public educational programs of general eligibility with a secular purpose. Beginning with direct funding for parochial education and use of sectarian facilities for public education in the 1840s, continuing after the adoption of the declaration of rights, section 6 until the 1910s, then resuming after the world wars, state and local governments have insisted upon treating persons equally without regard to religious beliefs.

A. The Three-Prong Test for Complying with Article I, Section 3

During the half-century of jurisprudence and lawmaking leading to 2004, the following three-part test was applied to assess compliance with article I, section 3: (1) religion-neutral programs; (2) having a non-sectarian bona fide public purpose; and (3) of general eligibility and equally available to both sectarian and nonsectarian institutions, do not violate the Florida Constitution. For programs complying with this test, public revenue passing to sectarian institutions is not "in aid of" them within the meaning of article I, section 3 because it does not have the purpose of, or intent to, benefit them. The purpose of the Opportunity Scholarship Program, for

Whether the Blaine-era amendments are based on religious bigotry is a disputed and controversial issue among historians and legal scholars. There is no evidence of religious bigotry relating to Florida's no-aid provision. Even if the no-aid provisions were "born of bigotry," such a history does not render the final sentence of article I, section 3 superfluous. Significantly, nothing in the proceedings of the CRC or the Florida Legislature indicates any bigoted purpose in retaining the no-aid provision in the 1968 general Revision of the Florida Constitution.

Id. (quoting Mitchell v. Helms, 530 U.S. 793, 824 (2000)). "[N]othing in the history or text of the Florida no-aid provision suggests animus towards religion." Id. at 364.

478. See supra Part II.C.
479. See supra Part II.A.2.b.
480. See supra Part II.F.2.
481. See supra Part II.B–E.
482. See supra Part II.F.2.
484. FLA. CONST. art. 1, § 3.
485. See Johnson, 239 So. 2d at 261.
example, is to improve the overall quality of Florida’s public schools; it is not a mere pretext to benefit religious schools.

For public programs complying with the three-part test, the primary beneficiaries are those receiving the service, not the religious institutions. For example, the Supreme Court of Florida in Koerner held county taxpayers were the beneficiaries of any improvements to the park, not the church reserving an easement over it for baptisms. In Johnson, the tax exemption for eldercare primarily benefited the elderly and community, not the nonprofit Presbyterian facility. Likewise, in City of Boca Raton v. Gidman, a case not interpreting article I, section 3, the Supreme Court of Florida held that the beneficiaries of city funds subsidizing a child day care center run by a nonprofit organization were the city’s disadvantaged children, not the nonprofit corporation. The city charter provided, similar to article I, section 3, that “[n]o city funds shall be expended in any manner whatsoever to accrue either directly or indirectly to the benefit of any religious, charitable, benevolent, civic, or service organization.” The United States Supreme Court held likewise that children and parents, not private schools, were the beneficiaries of reimbursement for school bus fares in Everson, loan of textbooks in Board of Education v. Allen, and tuition and tutorial aid in Zelman v. Simmons-Harris.

This is not to deny that, as the Supreme Court of Florida stated in Johnson, a benefit “merely incidental to the achievement of a public purpose” passes to the private service provider. Otherwise, crucial social services


487. Plaintiffs may prove a pretextual religious purpose. See Johnson, 239 So. 2d at 261 (“[I]f a statute furthers both secular and religious ends, an examination of the means used is necessary to determine whether the state could reasonably have attained the secular end by means which do not further the promotion of religion.”); cf. Silver Rose Entm’t, Inc. v. Clay County, 646 So. 2d 246, 252 (Fla. 1st Dist. Ct. App. 1994) (indicating the court may critically examine any putative purpose of a law).

488. See Johnson, 239 So. 2d at 261.


490. Johnson, 239 So. 2d at 261.

491. 440 So. 2d 1277 (Fla. 1983).

492. Id. at 1282.

493. Id. at 1278.


496. 536 U.S. 639, 645 (2002).

might never be delivered. Nor is it to disagree that the private provider may attract persons who otherwise would not attend. It is merely to point out that neither has so far been material to Florida courts in analogous cases. Likely, more elderly Floridians can afford pervasively religious nursing homes due to the property tax exemption held constitutional in Johnson.\textsuperscript{498} Possibly, more persons attend places of worship because of enhanced controlled substance penalties held constitutional in Rice v. State.\textsuperscript{499} The university in Nohrr could presumably build more facilities attracting more students as a result of tax-advantaged bond financing.\textsuperscript{500} Church members in Southside Estates may not have been able to worship at all without equal access to public school facilities.\textsuperscript{501}

Modern educational funding programs sever the link between religious organizations and any alleged government benefit derived from the program and satisfy the three-prong test more cleanly than any of the aforementioned cases. A public benefit passed directly to the devoutly religious retirement home in Johnson,\textsuperscript{502} religious university in Nohrr,\textsuperscript{503} and churches in Southside Estates,\textsuperscript{504} and Koerner.\textsuperscript{505} In contrast, parents and students must decide where to spend their Opportunity Scholarship,\textsuperscript{506} McKay Scholarship,\textsuperscript{507} Bright Future Scholarship,\textsuperscript{508} Florida Resident Access Grant,\textsuperscript{509} and Florida Teacher Scholarship.\textsuperscript{510} As long as a school is qualified, Florida is entirely neutral about the school parents and students choose, public or private, religious or non-religious.\textsuperscript{511} The effect of the parents' discretion is to add an intervening step rendering the benefit received by the religious organization even more incidental than was the case in prior precedent. It would be no

\textsuperscript{498} See id. at 263.
\textsuperscript{499} See 754 So. 2d 881, 885 (Fla. 5th Dist. Ct. App. 2000).
\textsuperscript{500} See Nohrr v. Brevard County Educ. Facilities Auth., 247 So. 2d 304, 306 (Fla. 1971).
\textsuperscript{501} See Southside Estates Baptist Church v. Bd. of Trs., 115 So. 2d 697, 700–01 (Fla. 1959).
\textsuperscript{502} See Johnson, 239 So. 2d at 264.
\textsuperscript{503} Nohrr, 247 So. 2d at 307.
\textsuperscript{504} Southside Estates Baptist Church, 115 So. 2d at 700–01.
\textsuperscript{505} Koerner v. Burck, 100 So. 2d 398, 402 (Fla. 1958).
\textsuperscript{506} FLA. STAT. § 1002.20(6)(b)(1) (2004).
\textsuperscript{507} § 1002.20 (6)(b)(2).
\textsuperscript{511} See § 1002.20(6)(a)-(b).
different if the religious school received the money from a parent who received a tax deduction or tax credit or if a parent who was a public employee spent part of her paycheck on private school tuition or if a welfare recipient did likewise.\textsuperscript{512} The effect of the parents', public employees', or welfare recipients' discretion is analogous to that of a superseding, independent variable as in tort law.

Prevailing precedent and law also does not turn on the extent of an organization's or publicly financed activity's religiosity. \textit{Johnson} dealt with a devoutly religious retirement home engaged in religious instruction,\textsuperscript{513} \textit{Koerner} and \textit{Southside Estates} with a church,\textsuperscript{514} and \textit{Nohrr} with a religious university.\textsuperscript{515} The retirement home and churches were engaged in inherently religious activity including religious instruction and worship.\textsuperscript{516} Florida precedent does not single-out these factors because article I, section 3 of the Florida Constitution does not.\textsuperscript{517} The plain text of article I, section 3 supports no difference at all between public funding for: 1) religious organizations, but not devoutly religious ones; 2) secular activities or social services performed by sectarian persons, but not religious activities or services; or 3) post-secondary education provided by devoutly religious institutions, but not kindergarten through twelfth grade education.\textsuperscript{518} Article I, section 3 mentions "any church, sect, or religious denomination or . . . sectarian institution."\textsuperscript{519} The common theme is that all are religious without distinction as to degree.\textsuperscript{520}

B. \textit{The Fee-for-Services Exception to Article I, Section 3}

Public programs may also comply with article I, section 3, because they do not confer "aid" at all, but are purely fee-for-service transactions or value-
for-value agreements. Fee-for-service transactions are quid pro quo arrangements that happen to involve the government as the monopoly provider, whereas classic aid programs do not result in the recipient conferring a direct and proximate benefit on government;\(^{521}\) for example, public textbook loan programs or public educators offering guidance counseling in private schools.\(^{522}\) In these circumstances, the aid is akin to unrequited donations.\(^{523}\) In contrast, the United States Supreme Court has upheld reimbursing a sectarian school for performing administration and grading of testing required by the state.\(^{524}\) This is similar to a fee-for-service transaction, where the government receives something of equal value in exchange for payment.\(^{525}\)

The most common fee-for-service transactions involve mail, transportation (e.g., toll roads; bus, ferry, and train fares; and curb cuts), utilities, airport landing rights, pavilion and camping site rentals, building permits, paid parking spaces, and extra police security or crossing guards.\(^{526}\) Like mandatory and universal government-funded services such as police and fire protection, these optional paid-for services probably attract persons to religious and non-religious organizations alike who would not otherwise attend; however, excluding religious organizations from participating in these neutral and generally eligible programs would, in the words of Johnson, “indeed be discriminatory.”\(^{527}\) Public services offered for a fee are religiously neutral, generally available, and have a secular purpose.\(^{528}\)

Fee-for-service transactions also occur when the state pays vendors’ market rates to provide mandatory public services such as fee-for-polling stations, fees-for-probation services, fees-for-healthcare, and fees-for-education.\(^{529}\) Modern scholarship and loan assistance require that, in exchange for the scholarship or loan, the state receive an educated teacher,
nurse, or child. Religious and nonreligious private schools provide this service that taxpayers would otherwise finance through public schools likely at a greater cost, because taxpayers finance entirely public facilities. School districts could actually lose net public revenue without the Opportunity Scholarship and McKay Scholarship Program because public schools benefit from state and federal revenue for students participating in both programs as if they were enrolled in the school districts, but would receive no such revenue stream if parents chose to finance their child’s private education entirely on their own.

1. Unless Neutral, the Blaine Amendment Is Not Self-Executing

The Supreme Court of Florida and Florida Legislature have given a meaning to article I, section 3 in keeping with its plain text by treating “in aid of” as “for the purpose of.” Courts in other states have done likewise. In contrast, the opponents of school choice treat “in aid of” within the meaning of article I, section 3 as “any benefit to,” but without advocating an end to literally all public revenue benefiting religious institutions, only revenue for certain religious activities and for “pervasively sectarian” organizations. The Supreme Court of Florida in Southside Estates Baptist Church and the Fifth District in Rice squarely rejected the notion that any public revenue benefiting a pervasively religious institution is unconstitutional. If, contrary to historic precedent, a religiously-neutral program of general eligibility with a secular purpose is unconstitutional, the finer distinctions

530. Cf. FLA. CONST. art. IX, § 1; Bush v. Holmes (Bush II), 767 So. 2d 668, 675 (Fla. 1st Dist. Ct. App. 2000).
531. See Initial Brief, supra note 486, at 22–23.
532. See id.
533. FLA. CONST. art. I, § 3.
534. See e.g., Jackson v. Benson, 578 N.W.2d 602, 612 (Wis. 1998) (holding school choice statute had primary secular purpose of “provid[e] low-income parents with an opportunity to have their children educated outside of the embattled [public] [s]chool system”); Ala. Educ. Ass’n v. James, 373 So. 2d 1076, 1081 (Ala. 1979) (noting that the purpose of a scholarship program was to benefit the public, not individual colleges); Ams. United for Separation of Church & State Fund, Inc. v. State, 648 P.2d 1072, 1084–85 (Colo. 1982) (upholding a program that permitted students to use scholarships at religious colleges because it was intended to achieve a secular purpose in educating the student).
535. See Brief of Professor Steven G. Gey as Amicus Curiae Supporting Appellees at 11–16, Bush v. Holmes, Fla. S. Ct., Case Nos. SC04-2323, SC04-2324, SC04-2325 (Fla. Mar. 7, 2005) [hereinafter Amicus Brief].
536. Southside Estates Baptist Church v. Bd. of Trs., 115 So. 2d 697, 700 (Fla. 1959); Rice v. State, 754 So. 2d 881, 883 (Fla. 5th Dist. Ct. App. 2000).
appellees draw, without basis in precedent or the language of the amendment, beg the question whether article I, section 3 is self-executing. 537

The basic guide, or test, in determining whether a constitutional provision should be construed to be self-executing, or not self-executing, is whether or not the provision lays down a sufficient rule by means of which the right or purpose which it gives or is intended to accomplish may be determined, enjoyed, or protected without the aid of legislative enactment. 538

The meaning of key terms that appellees in *Holmes* debate include "revenue of the state . . . taken from the public treasury," "directly or indirectly," "in aid of," "aid," and "sectarian." 539 As set forth above, for example, Appellees contend that "sectarian" means "pervasively sectarian." 540 However, the Supreme Court of Florida has not treated these terms as ambiguous and the Florida Legislature has attributed to them their plain meaning by not expending public revenue for the purpose of benefiting religious organizations, only for a secular purpose as part of a religiously-neutral program of general eligibility. 541

If not self-executing, article I, section 4 has impliedly been legislatively implemented repeatedly in a non-exclusionary fashion through scholarship and loan programs benefiting students at all levels. 542 Once, the Legislature even enacted a voucher program for exceptional students contemporaneous with the re-adoption of the state Blaine Amendment. 543 The state's increased religious diversity and new education policy objectives, such as increasing educational competition and improving accountability, support the further expansion of religiously-neutral public programs of general eligibility. 544 For example, it is widely recognized that the state could not meet the educational challenge posed by a universal pre-kindergarten program without including religious providers. 545

539. Amicus Brief, supra note 535, at 3–4.
540. Id. at 16–17.
541. See Johnson v. Presbyterian Homes of the Synod of Fla., Inc., 239 So. 2d 256, 261 (Fla. 1970).
544. See FLA. STAT. § 1002.205 (2004); FLA. STAT. § 1008.31 (2004).
2. Adequacy, Uniformity, and the State School Trust Fund

Even if the Blaine Amendment does not preclude publicly funded religiously-neutral programs in which religious and nonreligious schools participate, some argue that article IX, section 1, the adequacy and uniformity requirement, together with article IX, section 6, the School Fund, prohibit it. This argument is erroneous. First, in 2004–05, the School Fund accounted for much less than one percent of all public school funding. Although there is no question that from its enactment in 1828, revenue from the School Fund was limited, pursuant to the federal sixteenth-section trust condition, to then-Protestant public instruction; however, county funds were not so limited and, as set forth above, financed private religious education until the 1910s. In modern terminology, this county educational funding represents “required local effort” within the meaning of the Florida Education Finance Program (FEFP) and is derived from the school district board millage levy. Most of the FEFP comes from general revenue. As not all of the various income streams comprising the FEFP are poured into one pot and intermingled, the Department of Education funds the Opportunity Scholarship Program strictly from general revenue or categorical funds other than School Fund revenue.

The theory that article IX, section 1, together with article IX, section 6, somehow permits funding only public education, challenges long-standing practice and the bedrock constitutional principle that the legislature is free to

546. See Fla. Const. art. IX, §§ 1, 6.
548. See id.
enact any statute, unless the constitution clearly prohibits it.552 “The Florida Constitution is a limitation upon, rather than a grant of, power.”553 Article IX, section 1 unambiguously requires the State to make an adequate provision for a “uniform, efficient, safe, secure and high quality system of free public schools” and to establish, maintain, and operate institutions of higher learning.554 However, it does not expressly or impliedly preclude the legislature from also funding private education from sources other than the School Fund, any more than it precludes the legislature from funding highways, or a host of other annual appropriations that in some remote sense reduce the revenue available for public education.555 The legislature’s contemporary construction of article IX, section 1 in enacting the Opportunity Scholarship Program and its purpose to improve public education is also entitled to deference,556 whereas the principle of expressio unius est exclusio alterius (the mention of one thing implies the exclusion of the other) has no application where the constitution does not clearly prohibit the legislature from acting.557

C. No-Aid Separationism and Unequal Treatment Implicate Other State and Federal Constitutional Protections

A construction of article I, section 3 radically different from the past, requiring no-aid separationism and unequal treatment of religious persons, would necessarily implicate other state and federal constitutional principles. It would pit article I, section 3 against the state and federal Free Exercise Clause and federal Establishment Clause. Additionally, it would implicate the state and federal Equal Protection Clause. Furthermore, an exclusionary interpretation of article I, section 3 raises troubling separation of powers and preemption questions related to federal aid distributed by the State.

1. Free Exercise of Religion

The Florida Free Exercise Clause is just two sentences removed from the Blaine Amendment and provides, “[t]here shall be no law respecting the

552. See State v. Miller, 313 So. 2d 656, 658 (Fla. 1975).
553. Bush v. Holmes (Bush II), 767 So. 2d 668, 673 (Fla. 1st Dist. Ct. App. 2000), rev. denied, 790 So. 2d 1104 (Fla. 2001) (citing Bd. of Pub. Instruction v. Wright, 76 So. 2d 863, 864 (Fla. 1955); Taylor v. Dorsey, 19 So. 2d 876, 881 (Fla. 1944)).
554. FLA. CONST. art. IX, §1(a).
555. Id.
556. See Bush II, 767 So. 2d at 673 (citing Taylor, 19 So. 2d at 882); Gallant v. Stephens, 358 So. 2d 536, 540 (Fla. 1978); Greater Loretta Improvement Ass’n v. Boone, 234 So. 2d 665, 670 (Fla. 1970).
557. Bush II, 767 So. 2d at 674 (citing Taylor, 19 So. 2d at 881).
establishment of religion or prohibiting or penalizing the free exercise thereof." It is black letter law that the courts must interpret constitutional provisions in pari materia, so that each phrase and clause is given "independent legal import" with like effect. "Every . . . section of the Declaration of Rights stands on equal footing with every other section." Additionally, state courts are forbidden from according lesser rights than the federal constitution requires. 

a. Florida Free Exercise Clause

The Supreme Court of Florida has only occasionally interpreted the state Free Exercise Clause. In 1943, the Court treated as a free exercise violation a license tax of $50.00 imposed upon Jehovah's Witnesses for distributing religious pamphlets. The relevant ordinance applied to all pamphleteers, but selective, arbitrary, and capricious enforcement of similar statutes against Jehovah's Witnesses was commonplace. Similarly, although not explicitly interpreting the Free Exercise Clause, the Court in Johnson said, "[t]o exempt all homes complying with the [property tax exemption] statute, except church-related homes, would indeed be discriminatory." In effect, the Supreme Court of Florida has treated public discrimination against a religious group as an unconstitutional penalty.

Webster's defines a "penalty" as the "disadvantage, loss, or hardship due to some action" and a "handicap." An interpretation of the third sentence of article I, section 3 requiring the state to exclude religious persons from religiously-neutral programs of general eligibility with a secular purpose, would inevitably penalize them contrary to the Free Exercise Clause.

558. FLA. CONST. art. I, § 3.
559. Traylor v. State, 596 So. 2d 957, 962 (Fla. 1992); see Burnsed v. Seaboard Coastline R.R. Co., 290 So. 2d 13, 16 (Fla. 1974).
560. Boynton v. State, 64 So. 2d 536, 552–53 (Fla. 1953).
561. Traylor, 596 So. 2d at 961.
562. State ex rel. Singleton v. Woodruff, 13 So. 2d 704, 705–06 (Fla. 1943).
563. See Hord v. City of Fort Myers, 13 So. 2d 809, 810 (Fla. 1943) (striking permit ordinance to distribute literature on freedom of religion and freedom of speech grounds); see also State ex rel. Hough v. Woodruff, 2 So. 2d 577, 577–78 (Fla. 1941); State ex rel. Wilson v. Russell, 1 So. 2d 569, 569–70 (Fla. 1941).
565. Southside Estates Baptist Church v. Bd. of Trs., 115 So. 2d 697, 698–99 (Fla. 1959) (citing FLA. CONST. of 1885, Declaration of Rights, § 6).
566. WEBSTER'S NEW COLLEGIATE DICTIONARY 846 (1976); WEBSTER'S NEW WORLD DICTIONARY OF AMERICAN ENGLISH 998 (3d ed. 1994).
567. See FLA. CONST. art. 1, § 3.
One lodestar of legal historical research is that in 1885, "sect" or "sectarian" within the meaning of state Blaine amendments meant Catholic. As the United States Supreme Court has recognized, the purpose of Blaine amendments nationally was to ensure that the public paid for only Protestant religious observances. Taxpayers in Florida supported teaching the common religion in the public schools even later than in other states.

The framers of the declaration of rights, section 6 likely intended to penalize Catholics or, in effect, to exclude them from the protection of the state free exercise clause, just as they did with blacks. Most deny this was any longer the case after 1968. Yet, rather than adopt the view that all persons are now protected by the state free exercise clause, no-aid separationists would exempt an even broader class of persons from its protections to include all devout religious persons or even all religious persons. The separationists contend this exemption is required or one part of article I, section 3 would now be unconstitutional under another part. To the contrary, if the state free exercise clause now protects all persons, all that is required is for the Supreme Court of Florida to continue to apply its post-World War II three-prong analytical framework, finding constitutional a 1) religiously-neutral program; 2) of general eligibility; 3) with a secular purpose.

b. Federal Free Exercise Clause

"At a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons." As early as Everson, the Court held that New Jersey "cannot exclude indi-
individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, because of their faith, or lack of it, from receiving the benefits of public welfare legislation." 576 In *Lukumi*, the Court held that "[a] law burdening religious practice that is not neutral . . . must undergo the most rigorous of scrutiny," 577 and that "the minimum requirement of neutrality is that a law not discriminate on its face." 578 *Smith* recognized that strict scrutiny applies in the absence of a "valid and neutral law of general applicability," as when a purported general law: facially excludes a class of persons due to their religion; includes individualized exemptions from a general requirement, but not benefiting a particular religious group; has as its purpose infringing upon practices due to their religious motivations; or incorporates hybrid constitutional violations such as free exercise-free speech violations. 579

*Lukumi* and *Smith* govern the permissibility of excluding religious persons from programs of general eligibility to the extent the purpose is to burden their religious exercise. 580 On the one hand, no-aid separationists deny excluding religious persons from school choice programs of general eligibility burdens or has the purpose of burdening their religious exercise. 581 On the other hand, they characterize parochial instruction as a quintessential form of religious expression different from "secular social services" such as

578. *Id.* at 533.
579. Employment Div., Dep’t of Human Res. of Or. *v.* Smith, 494 U.S. 872, 879 (1990) (quoting *United States v. Lee*, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring)). The exclusionary rule relieves the individual from observing general laws that do not promote or restrict beliefs. *Id.* at 879. The Court bars the application of a hybrid rule involving the Free Exercise Clause and other constitutional protections. *Id.* at 881. The Court had held that the state may not refuse to allow exemptions in religious cases where there is an exemption system in place. *Id.* at 884; accord *Lukumi*, 508 U.S. at 533 (citing *Smith*, 494 U.S. at 878–79). Free Exercise jurisprudence demonstrates that an individual's beliefs do not excuse him from compliance with otherwise valid law. See *Lukumi*, 508 U.S. at 534–37. Activities exempted by other laws, for example, zoning ordinances, are exempted from these prohibitions. *Id.* at 536. *Lukumi* does not require a manifestation of animus, consistent with other forms of unconstitutional discrimination, such as disparate treatment discrimination. See *id*; *Locke v. Davey*, 540 U.S. 712, 732 (2004) (Scalia, J., dissenting) (citing, *inter alia*, *Brown v. Bd. of Educ.*, 347 U.S. 483, 493–95 (1954); *United States v. Va.*, 518 U.S. 515, 549–51 (1996); *Adkins v. Children’s Hosp. of D.C.*, 261 U.S. 525, 552–53 (1923), overruled by *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 400 (1937)). However, the enactment and enforcement of the Florida Blaine Amendment was certainly accompanied by religious and racial bigotry. See *Bush v. Holmes (Bush I)*, 886 So. 2d 340, 351 n.9 (Fla. 1st Dist. Ct. App. 2004).
580. See *Lukumi*, 508 U.S. at 546; see also *Smith*, 494 U.S. at 879.
581. See Answer Brief, supra note 573, at 47.
the provision of healthcare by religious hospitals. They cannot have it both ways. According to the Sixth Circuit, a ban on religious providers and instruction in the army's on-base day care program violated the _Lukumi_ standard by burdening the children's and parents' religious exercise, insofar as the parents believed it critical for their children to be raised in a religious environment.

Compliance with article I, section 3 is not likely to be deemed a permissible compelling interest adequate to satisfy strict scrutiny. The United States Supreme Court has expressed serious reservations about the constitutionality of a state Blaine amendment interpreted to require the very exclusion federal courts have deemed a violation of the Free Exercise Clause and Equal Protection Clause. In _Mitchell v. Helms_, the plurality concluded that "the exclusion of pervasively sectarian schools from otherwise permissible aid programs" is premised upon a "doctrine, born of bigotry, [that] should be buried now."" "[H]ostility to aid to pervasively sectarian schools has a shameful pedigree that we do not hesitate to disavow." Joining this plurality, the dissent in _Zelman_ recognized that Blaine amendments were intended to disadvantage Catholics and other religious groups.

In 2004, the United States Supreme Court held in _Locke v. Davey_ that with respect to state scholarships available to students pursuing post-secondary studies, except devotional theology, it would not find unconstitutional a state statute that "codifies the State's constitutional prohibition on providing funds to students to pursue degrees that are 'devotional in nature or designed to induce religious faith.'" This decision did not backpedal from the Court's expressed reservations about discriminatory enforcement of a state Blaine amendment, but instead emphasized that the Court was not considering the constitutionality of a Blaine amendment. The Court underscored the otherwise substantial inclusiveness of the scholarship program, for example, enabling students to spend scholarships at pervasively sectarian schools to major in anything besides ministry.

582. _Id._ at 41–42.
586. _Id._ at 829.
587. _Id._ at 828.
590. _Id._ at 723–24 n.7.
591. _Id._ at 723–25. The court stated:
The expressed reason that the Court in *Locke* found no evidence of animus in the Promise Scholarship Program is the very reason opponents of Florida school choice programs would strike them. The Supreme Court found no religious animus in Washington's implementation of the Promise Scholarship Program precisely because of the ability of Washington Promise Scholars to "use their scholarship[s] to pursue a secular degree" at a pervasively religious institution and take devotional theology classes. This rationale suggests that the United States Supreme Court would not affirm the unconstitutionality of a Florida scholarship program on the very ground of its inclusiveness and religious neutrality. Article I, section 3 was interpreted to require the striking of religiously neutral educational programs of general eligibility with a secular purpose as they would violate the federal Free Exercise Clause.

2. Establishment Clause

To the extent state courts adopted an interpretation of article I, section 3 that public revenue may be expended at some sectarian institutions, but not pervasively sectarian ones, the decision would prove at least as problematic as if it barred expending public revenue at all sectarian institutions. First, "the First Amendment forbids an official purpose to disapprove of a particular religion or of religion in general." Yet, this would be the effect of a rule prohibiting devoutly religious persons from participating in general public programs, but permitting other religious persons to join. "[T]o withstand the strictures of the Establishment Clause there must be a secular legis-

Far from evincing the hostility toward religion which was manifest in *Lukumi*, we believe that the entirety of the Promise Scholarship Program goes a long way toward including religion in its benefits. The program permits students to attend pervasively religious schools, so long as they are accredited. . . . And under the Promise Scholarship Program's current guidelines, students are still eligible to take devotional theology courses. . . . [S]ome students may have additional religious requirements as part of their majors.

*Id.* at 724–25 (citations omitted).

592. *Id.; see Answer Brief, supra* note 573, at 26, 28.


594. *Id.* at 721 n.4.

595. *See id.* at 725.

596. *See id.*


599. *See Lukumi*, 508 U.S. at 532; *Rusk*, 379 F.3d at 423.
lative purpose and a primary effect that neither advances nor inhibits religion." 600

Second, the states and courts may not “troll[] through a person’s or institution’s religious beliefs” to decide whether they are too religious to receive public benefits. 601 To enforce a state orthodoxy test of devoutness as a condition of eligibility for public benefits, the state would have to judge religious doctrine and observe religious expression. 602 This would put the state at greater risk of excessively “entangling itself with religion” than observing strict neutrality. 603 The church autonomy doctrine, premised primarily upon the Establishment Clause and, secondarily, upon the Free Exercise Clause, precludes this unwarranted inquiry. 604

The Mitchell plurality explicitly rejected the pervasively sectarian test on these grounds and due to its “shameful pedigree.” 605 According to the Court, “the religious nature of a recipient should not matter to the constitutional analysis, so long as the recipient adequately furthers the government’s secular purpose.” 606 Justices O’Connor and Breyer joined the plurality in finding a federal program distributing money to state and local government agencies to purchase educational material and equipment on behalf of public and private schools constitutional and in overruling two cases expounding the pervasively sectarian test in education. 607 Concluding that the test is defunct, the Fourth Circuit held it unconstitutional to deny a religious college’s request for generally available state grant funds. 608 According to the Court, “[t]he First Amendment requires government neutrality, not hostility, to religious belief.” 609


602. See id.


606. Id. at 827; accord Columbia Union Coll. v. Oliver, 254 F.3d 496, 501–02 (4th Cir. 2001) (quoting Mitchell, 530 U.S. at 827).

607. Oliver, 254 F.3d at 503 (citing Mitchell, 530 U.S. at 844–45, 850 (O’Connor, J., concurring)).

608. Id. at 507–08.

609. Id. at 510 (citing Everson v. Bd. of Educ., 330 U.S. 1, 18 (1947) (Jackson, J., dissenting)).
3. Federal and State Equal Protection

State and federal courts have generally deemed a constitutional provision requiring the exclusion of protected persons from programs of general eligibility an equal protection clause violation.\(^6^{10}\) Contrasting the rational basis standard of review applicable to economic regulatory legislation, the United States Supreme Court held "a classification . . . drawn upon inherently suspect distinctions such as race, religion or alienage" is subject to strict scrutiny.\(^6^{11}\) The same is true under state law.\(^6^{12}\) Consequently, an exclusionary interpretation of the Florida Blaine Amendment should violate equal protection in two ways: 1) the Blaine Amendment was apparently "enacted with the constitutionally suspect purpose of discriminating" against a particular religious group, then reenacted, according to some, with an even broader discriminatory purpose; and 2) the Blaine Amendment " facially classifies] on the basis of religion."

Section 6 of the declaration of rights was enacted to discriminate against Catholics, a "discrete and insular" minority in the 1880s,\(^6^{14}\) then reenacted as the last sentence of article I, section 3, allegedly not for the purpose of discriminating against Catholics, but either "pervasively religious"

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\(^6^{12}\) The Florida Equal Protection Clause is contained in article I, section 2 of the Florida Constitution and states "No person shall be deprived of any right because of race, religion, national origin, or physical disability." FLA. CONST. art. I, § 2. The Florida and federal Equal Protection Clauses are coterminous. *See In re Constitutionality of House Joint Resolution 25E, 863 So. 2d 1176, 1178–79 (2003); see also Fla. High Sch. Activities Ass’n v. Thomas ex rel. Thomas, 434 So. 2d 306, 308 (Fla. 1983) (noting that strict scrutiny applies "to those actions by the state which abridge some fundamental right or affect adversely upon some suspect class of persons"); Henry v. State, 825 So. 2d 431, 433 (Fla. 1st Dist. Ct. App. 2002) (holding that "[d]eliberately basing the decision to prosecute upon race, religion, or other ‘unjustifiable’ classification . . . is prohibited"); State v. A.R.S., 684 So. 2d 1383, 1386–87 (Fla. 1st Dist. Ct. App. 1996) (holding a prosecutor’s motive for prosecuting a case may not be based on an unjustifiable standard).

\(^6^{13}\) Heytens, *supra* note 1, at 145–46.

\(^6^{14}\) *Id.* The original rationale for heightened scrutiny in equal protection cases was to prevent "prejudice against discrete and insular minorities." *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).
persons or all religious persons. Appellees in *Holmes* argue that the reenactment cured the original invidious defect. Reenactment can cure an original invidious purpose in some circumstances, but not here where the alleged new purpose of article I, section 3 has an effect more prejudicial than the original. The impact of the revised interpretation is actually to broaden the class of religious persons ineligible to participate in public programs. By all indications, these devoutly religious persons are as discrete and insular today as Catholics were in the 1800s.


616. See id. at 26.

617. Compare *Johnson* v. Governor of Fla., 405 F.3d 1214, 1223, 1234 (11th Cir. 2005) (affirming summary judgment against article VI, § 4 of the Florida Constitution concerning felon disenfranchisement, because, although enacted for a racially discriminatory purpose, it was reenacted for a legitimate purpose applicable to a narrower class), with *Hunter* v. Underwood, 471 U.S. 222, 233 (1985) (striking Alabama constitutional provision that disenfranchised any person convicted of an offense involving moral turpitude, notwithstanding that the provision could conceivably now serve legitimate nondiscriminatory state interests).

618. *Cf. Johnson*, 405 F.3d at 1223–24 (recognizing that the disenfranchisement provision at issue was enacted with discriminatory intent before it was amended).

619. Case law is unsettled whether discrimination between religious and nonreligious persons, as opposed to among religious persons or sects, is prohibited under the Equal Protection Clause. See *Heytens*, *supra* note 1, at 142–43. “[T]he modern Supreme Court has never analyzed a claim of discrimination against a religious group or against religion in general under the Equal Protection Clause.” *Id.* at 142. Religious persons in general, as opposed to devout religious persons, are not a discrete and insular minority, but the United States Supreme Court has protected other non-insular groups such as Caucasians and males. *Id.* at 143–45 (citing *Adarand Constr.*, Inc. v. Pena, 515 U.S. 200 (1995); *City of Richmond* v. J.A. Croson Co., 488 U.S. 469 (1989); *Craig* v. *Boren*, 429 U.S. 190 (1976)). Some conclude that religious persons are presumptively protected. Colleen Carlton Smith, *Note, Zelman's Evolving Legacy: Selective Funding of Secular Private Schools in State School Choice Programs*, 89 VA. L. REV. 1953, 1991 (2003).

[D]ifferentiation among religious sects would trigger the strictest scrutiny, yet [the Court] has never addressed this question with regard to laws that make a more general distinction between the secular and the religious. The weight of the evidence, however, supports the view that the Equal Protection Clause requires at least some form of heightened review and probably mandates strict scrutiny. *Id.* at 1991 (footnote omitted). Eugene Volokh, *Equal Treatment Is Not Establishment*, 13 NOTRE DAME J.L. ETHICS & PUB. POL’Y 341, 370 (1999) (“[T]he court has often said that religious discrimination violates the Equal Protection Clause; though it has generally said this about discrimination among religious sects, this principle should at least presumptively apply to discrimination between religious and nonreligious people and institutions.”). Case law is also unsettled as to whether religious organizations, as opposed to individuals, may constitute a suspect class. See *Louis K. Liggett Co. v. Lee*, 288 U.S. 517, 536 (1933) (“Corporations are as much entitled to the equal protection of the laws . . . as are natural persons.”); *Christian Sci. Reading Room v. City & County of S.F.*, 784 F.2d 1010, 1012 (9th Cir. 1986), (“It seems clear that an individual religion meets the requirements for treatment as a suspect class . . . [w]hether all religions together constitute a suspect class for purposes of the Equal Protection Clause is a far more complex question that the courts have not previously addressed.”); Civil
Some United States Supreme Court precedent suggests that the exclusion of religious persons from generally eligible programs is properly subject to free exercise analysis, rather than equal protection analysis, but *Lukumi* applied strict scrutiny when "[i]n determining if the object of a law is a neutral one under the Free Exercise Clause," it looked for "guidance in our equal protection cases." *Locke* held on its distinguishable facts, not involving a Blaine amendment and not challenging a broadly inclusive scholarship program, that rational basis scrutiny applied to Davey's equal protection claim. The Court relied upon an equal protection case dealing with fundamental rights analysis, rather than suspect classification analysis at the heart of Blaine amendment litigation.

A federal court has not yet ruled squarely on an equal protection challenge to Blaine-inspired exclusion; however, in *Peter v. Wedl*, the Eighth Circuit held that a Minnesota rule excluding private religious schools from participating in the Individuals with Disabilities Education Act program "explicitly discriminated against children who attended private religious schools," and violated the Free Exercise Clause, Free Speech Clause, and Equal Protection Clause. Likewise, in *Columbia Union College v.*

Liberties for Urban Believers v. City of Chi., 157 F. Supp. 2d 903, 910, 911 n.5 (N.D. Ill. 2001), ("While individuals of a particular religious faith may constitute a suspect class . . . there is no proof churches as an entity qualify as a suspect class here."). In the context of school choice programs, directors of schools are natural persons who could be members of a suspect class, along with parents prohibited from spending scholarships at religious schools. See *Peter v. Wedl*, 155 F.3d 992, 1001-02 (8th Cir. 1998) (remanding on whether the state could condition a parent's right to participate in a generally available program upon their forbearance to exercise their right to send a child to the school of their choice); Hartmann v. Stone, 68 F.3d 973, 979 n.4 (6th Cir. 1995) (parents who wished to enroll their children in religious day care had standing to sue the Army for prohibiting it).


621. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah (Lukumi)*, 508 U.S. 520, 540 (1993); *see also* Police Dep't of Chi. v. Mosley, 408 U.S. 92, 96 (1972) (rejecting exclusion of a picketer protesting racial discrimination within 150 feet of a school, but not picketers protesting labor policies, the Court held, "[n]ecessarily, then, under the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views").


625. 155 F.3d 992, 996 (8th Cir. 1998).
Clarke, the Fourth Circuit held that excluding a religious college from a state grant program presumptively violated these clauses.

4. Separation of Powers and a Political Question

It is perhaps fitting that as in times past, the future interpretation of a "doctrine, born of bigotry" must be decided in the field of education. On the other hand, it is unfortunate that a political conflict over a single educational program now colors the public's view of a previously consensual analytical framework for interpreting article I, section 3 of the Florida Constitution with implications reaching far beyond school choice. The ugly truth is that many of those seeking to enforce article I, section 3 against educational reform programs care more about defeating the policy initiative than the proper balance between church and state in Florida. Their agenda raises political and policy questions, which the courts are not competent to rule upon and which are reserved by the separation of powers doctrine to the legislature.

626. 159 F.3d 151 (4th Cir. 1998).
627. Id. at 155 n.1, 155–57 (referencing plaintiff’s constitutional claims as “one constitutional inquiry”). Plaintiffs in Hartmann also made an equal protection and “Parental Liberty” claim. Hartmann v. Stone, 68 F.3d 973, 978 (6th Cir. 1995); see also Vineyard Christian Fellowship v. City of Evanston, 250 F: Supp. 2d 961, 978 (N.D. Ill. 2003) (holding a zoning regulation that classified on the basis of religion was a violation of the Equal Protection Clause and subject to strict scrutiny). The district court in Vineyard Christian Fellowship distinguished Civil Liberties for Urban Believers v. City of Chicago, 157 F. Supp. 2d 903, 906 (N.D. Ill. 2001), on the grounds that the zoning ordinance in that case treated religious institutions like similarly-situated counterparts. Id at 977; cf. Cornerstone Bible Church v. City of Hastings, 948 F.2d 464, 472 n.13 (8th Cir. 1991) (“Absent evidence of purposeful discrimination based on religious status, the rational basis standard should apply. The disparate impact of the ordinance on the Church is insufficient to support an inference of discriminatory purpose.”); Cornerstone Bible Church v. City of Hastings, 740 F. Supp. 654, 669 (D. Minn. 1990) (“If the zoning ordinance did establish a classification based solely on religion,” the “zoning ordinance is subject to strict scrutiny because it establishes a classification which is drawn upon the inherently suspect distinction of religion.”).
IV. CONCLUSION

Florida has reached an important crossroad leading either in the direction of neutrality and equal treatment, consistent with Florida and federal jurisprudence, or in the direction of no-aid separationism and unequal treatment, consistent with discredited federal Establishment Clause jurisprudence and traditional national Blaine amendment jurisprudence. It is the choice between a state agnostic toward religious confession or concern about it; between a national doctrine borne of religious and racial bigotry or this state’s Blaine amendment jurisprudence, rooted in American equality and pluralism; between encouraging charity and education, regardless of impetus or only if secular; between widening or narrowing the cultural rift separating nonbelievers and devout believers; between federal or state law; and between providing market-sensitive equal educational opportunities to have-nots, or perpetuating systemic educational inequity.

Each factor that state courts are required to examine in order to construe the Bill of Rights points in the same direction: 1) preexisting and developing state education law includes numerous examples of religion-neutral programs of general eligibility with a secular purpose; 2) the express language of article I, section 3 of the Florida Constitution forbids only programs “in aid of” or for the purpose of benefiting sectarian institutions; 3) the formative history of the declaration of rights, section 6 reveals that it was likely intended to bar public funding of Catholic schools, but was implemented in this manner only during a short interlude of anti-Catholic nativism; 4) but for this bigoted period, the state’s history generally reflects religious pluralism and tolerance; 5) evolving conditions within the state support greater involvement of private schools on a religion-neutral basis to meet Florida’s most pressing educational challenges; and 6) external influences that have shaped state law including state and federal constitutional prohibitions preclude discriminating against persons on the basis of their faith.631

Until now, Florida’s experiment with the Blaine amendment has been unusual, generally vindicating: 1) religiously neutral programs; 2) of general eligibility; and 3) with a secular purpose.632 The constitutionality of a host of educational and social welfare initiatives with deep historical roots turns on the continued application of this three-prong test. We should be proud of and expand upon Florida’s non exclusionary Blaine history, rather than depart from it and risk literally transforming Florida, as religious schools are disqualified from assisting with Florida’s most pressing educational chal-
lenges and indeed, faith-based organizations are precluded from meeting the basic needs of our most vulnerable citizens. Excluding persons from public programs solely on the basis of their faith is not the vision of most Floridians vindicated in the legislature. If it becomes the vision of Florida’s courts, it will erode public confidence and surely inspire a new and unnecessary constitutional reform movement.