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# OF ORPHANS AND VOUCHERS: NEVADA'S "LITTLE BLAINE AMENDMENT" AND THE FUTURE OF RELIGIOUS PARTICIPATION IN PUBLIC PROGRAMS

Jay S. Bybee\* and David W. Newton\*\*

In December 1875, President Ulysses S. Grant delivered his last annual message to Congress. He warned of "the dangers threatening us" and the "importance that all [men] should be possessed of education and intelligence," lest "ignorant men . . . sink into acquiescence to the will of intelligence, whether directed by the demagogue or by priestcraft."<sup>1</sup> He recommended as "the primary step" a constitutional amendment "making it the duty of each of the several States to establish and forever maintain free public schools adequate to the education of all of the children" and "prohibiting the granting of any school funds, or school taxes . . . for the benefit of or in aid . . . of any religious sect or denomination."<sup>2</sup> There was no mistaking what President Grant referred to when he mentioned "demagogue," "priestcraft," and "religious sect" in connection with public education. Since the Civil War, the political influence of Catholics had become an important force in America, and in many states Catholics had sought public funding for their schools and charities.

Congress responded promptly. Within a week, Representative James Blaine, the powerful former Speaker of the House, introduced an amendment that would become known as "the Blaine Amendment," which provided that "no money raised by taxation in any State for the support of public schools . . .

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<sup>1</sup> 4 CONG. REC. 175 (1875).

<sup>2</sup> *Id.*

shall ever be under the control of any religious sect.”<sup>3</sup> In August 1876, the House of Representatives approved the bill with the necessary two-thirds vote.<sup>4</sup> The proposal, however, received a majority but not a two-thirds vote in the Senate and failed.<sup>5</sup>

Although Congress never sent the Blaine Amendment to the states for ratification, the states reacted to the national attention paid to the question of public financing of sectarian schools by adopting their own “Little Blaine Amendments.” Between 1840 and 1875, nineteen states adopted some form of constitutional restriction on sectarian institutions receiving state funds; by 1900, sixteen more states, plus the District of Columbia, had added such provisions.<sup>6</sup> Nevada was no exception. In 1877, the Nevada Legislature proposed amending the Nevada Constitution to provide that “No public funds of any kind or character whatever, State, County or Municipal, shall be used for sectarian purposes.”<sup>7</sup> The amendment, Article 11, Section 10, became final in 1880.

Like the Little Blaine Amendments states adopted across the United States, Nevada’s Little Blaine Amendment responded to controversy in Nevada over public funding of Catholic institutions. For years the legislature had funded the Nevada Orphan Asylum, the largest orphanage in the state, operated by the Sisters of Charity in Virginia City. In 1882, in *Nevada ex rel. Nevada Orphan Asylum v. Hallock*,<sup>8</sup> the Nevada Supreme Court held that the new amendment barred the legislature from making any future contributions to the orphanage. No Nevada court has had occasion to construe Section 10 since *Hallock*.

Attention has again focused on public funding of sectarian institutions, including schools and charitable activities. For example, in 1996 Congress enacted the “Charitable Choice Act,” which allows states participating in certain federally funded programs “to contract with religious organizations, or to allow religious organizations to accept certificates, vouchers, or other forms of disbursement [under these programs].”<sup>9</sup> And President Bush has announced his interest in encouraging faith-based solutions in partnership with the federal government.<sup>10</sup> Additionally, a number of states have begun experiments with

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<sup>3</sup> 4 CONG. REC. 205 (1875).

<sup>4</sup> Alfred W. Meyer, *The Blaine Amendment and the Bill of Rights*, 64 HARV. L. REV. 939, 942 (1951).

<sup>5</sup> *Id.* at 944.

<sup>6</sup> See *Lemon v. Kurtzman*, 403 U.S. 602, 647 (1971) (Brennan, J., concurring).

<sup>7</sup> NEV. CONST. art. XI, § 10.

<sup>8</sup> 16 Nev. 373 (1882).

<sup>9</sup> Charitable Choice Act of 1996, Pub. L. No. 104-193, tit. 1, § 104, 110 Stat. 2161 (1996) (codified at 42 U.S.C. § 604(b) (1996)).

<sup>10</sup> Marvin Olashy, *First, Aim for That Compassionate Agenda*, WASH. POST, Dec. 17, 2000, at B1; Dana Milbank & Hamil R. Harris, *Bush, Religious Leaders Meet President-Elect Begins Faith-Based Initiative, Reaches for Blacks*, WASH. POST, Dec. 21, 2000, at A6; Dana Milbank, *Bush's Faith-Based Group Initiative Will Meet Resistance*, WASH. POST, Jan. 27, 2001, at A10; Editorial, *“Faith-Based” Charities*, LAS VEGAS REV.-J., Jan. 29, 2001, at 6B; Dana Milbank, *Bush Unveils “Faith-Based” Initiative Effort Will Team Agencies, Nonprofits on Social Issues*, WASH. POST, Jan. 30, 2001, at A1; Laurie Goodstein, *Nudging Church-State Line, Bush Invites Religious Groups to Seek Federal Aid*, N.Y. TIMES, Jan. 30, 2001, at A18; Jeffrey Rosen, *Is Nothing Secular?*, N.Y. TIMES, Jan. 30, 2001, § 6, at 40; Laura Meckler, *Bush Promotes Plan to Widen Religious Role in Social Services*, LAS VEGAS REV.-

school vouchers, and those may find support in the Bush administration as well.<sup>11</sup> More importantly for Nevada, in 1999, the legislature authorized cities

J., Jan. 31, 2001, at 4A; Marc Lacey & Laurie Goodstein, *Bush Fleshes Out Details of Proposal to Expand Aid to Religious Organization*, N.Y. TIMES, Jan. 31, 2001, at A15; Dana Milbank, *New Director for Faith-Based Office: Bush Taps Jim Towey, a Veteran of the Hill and Mother Teresa's Ministry*, WASH. POST, Feb. 1, 2002, at A4; Caryle Murphy, *Religious Leaders Cautious on Bush Plan – Some Fear Dependency and Too Much Scrutiny*, WASH. POST, Feb. 1, 2001, at B1; J.R. Labbe, *Undermining Religion's Theme*, LAS VEGAS REV.-J., Feb. 11, 2001, at 1D; Kenneth L. Woodward, *Of God and Mammon*, NEWSWEEK, Feb. 12, 2001, at 24; Martha Minow, *Vouching for Equality: Religious Schools Can Rank Among the Choices*, WASH. POST, Feb. 24, 2002, at B5; Laurie Goodstein, *Bush's Charity Plan is Raising Concerns for Religious Right*, N.Y. TIMES, Mar. 3, 2001; Editorial, *Public Interests: Faith and Parking*, N.Y. TIMES, Mar. 6, 2001; Elizabeth Becker, *Aid on Track to Religious Charities, Official Says*, N.Y. TIMES, Mar. 14, 2001; Laurie Goodstein, *Support for Religious-Based Plan is Hedged*, N.Y. TIMES, Apr. 11, 2001; Laurie Goodstein, *Battle Lines Grow on Plan to Assist Religious Groups*, N.Y. TIMES, Apr. 12, 2001; Editorial, *Why Not Try Vouchers*, N.Y. TIMES, Apr. 27, 2001; Elizabeth Becker, *Bush's Plan to Aid Religious Groups is Faulted*, N.Y. TIMES, Apr. 27, 2001; Elizabeth Becker, *Senate Delays Legislation on Aid to Church Charities*, N.Y. TIMES, May 24, 2001; Mike Allen, *Bush Aims to Get Faith Initiative Back on Track: Stricter Rules to be Added for Use of Funds by Groups*, WASH. POST, June 25, 2001, at A1; Juliet Eilperin, *For N.Y. Minister, a Faith-Based "No" to U.S. Aid*, WASH. POST, June 26, 2001, at A2; Editorial, *The Reality of Faith-Based Programs*, WASH. POST, July 7, 2001, at A22; Richard Morin & Claudia Deane, *Conflict Resolution Starts on Faith-Based Plan*, WASH. POST, July 10, 2001, at A19; David S. Broder, *More Risk Than Reward?*, WASH. POST, July 11, 2001, at A19; Dana Milbank, *Bush Drops Rule on Hiring of Gays: Democrats – "Faith-Based" Initiative at Risk*, WASH. POST, July 11, 2001, at A1; Editorial, *The Faith-Based Problem*, WASH. POST, July 15, 2001, at B6; Dana Milbank, *House to Take Up Faith Initiative*, WASH. POST, July 18, 2001, at A4; Editorial, *Bad Bill in the House*, WASH. POST, July 19, 2001, at A26; Juliet Eilperin, *Faith Initiative Hits Snag in House: GOP Moderates' Bias Concerns Postpone Vote*, WASH. POST, July 19, 2001, at A1; Juliet Eilperin, *Faith-Based Initiative Wins House Approval*, WASH. POST, July 20, 2001, at A1; Jill Zuckman, *Bush Victory: House Oks Faith-Based Initiative*, LAS VEGAS REV.-J., July 20, 2001; Steve Tetreault, *Bush Allows Religious Groups to Bid for Federal Funds to Run Social Programs*, LAS VEGAS REV.-J., July 22, 2001; E.J. Dionne, Jr., *Faith-Based Defense*, WASH. POST, July 27, 2001, at A31; Hamil R. Harris, *Congregation Wins Credit Union Charter in Temple Hills, Bush Administration Lobbies for Support of Faith-Based Initiative*, WASH. POST, Aug. 1, 2001, at B3; Dana Milbank, *Senate Faith Initiative Backer to Drop Disputed Provisions*, WASH. POST, Aug. 2, 2001, at A2; E.J. Dionne, Jr., *Not Just Faith Is at Work Here*, WASH. POST, Aug. 7, 2001, at A15; Mike Allen, *"Faith-Based" Backup Plan: Agencies Look to Lower Barriers to Social Services Contracts*, WASH. POST, Aug. 17, 2001, at A2; Dana Milbank, *DiIulio Resigns from Top "Faith-Based" Post: Difficulties with Initiative in Congress Marked Seven Months at White House*, WASH. POST, Aug. 18, 2001, at A4; Dana Milbank, *Bush Urges Senators to Act on Faith Bill*, WASH. POST, Aug. 19, 2001, at A4; John A. Clahoun, *Faith and Funding Simplified*, WASH. POST, Aug. 29, 2001, at A21; David S. Broder, *Bush's Domestic Agenda Takes Back Seat: Education Reform, Faith-Based Initiatives Vie for Attention with Terrorist Fight*, WASH. POST, Oct. 15, 2001, at A4; Dana Milbank, *Charity Bill Compromise is Reached*, WASH. POST, Feb. 6, 2002, at A1; Dana Milbank, *Bush Endorses Compromise in Senate on Aid to Charities*, WASH. POST, Feb. 8, 2002, at A4.

<sup>11</sup> Florida enacted a voucher program in 1999. See *Florida Set to Provide Education Vouchers*, LAS VEGAS REV.-J., Apr. 28, 1999, at 13A. This program was challenged in the Florida courts, and is currently remanded to the trial court level. See *Bush v. Holmes*, 767 So. 2d 668 (Fla. Dist. Ct. App. 2000). Maine, Vermont, Cleveland, and Milwaukee also have voucher programs for public education. See Catherine L. Crisham, Note, *The Writing Is on the Wall of Separation: Why the Supreme Court Should and Will Uphold Full-Choice School Voucher Programs*, 89 GEO. L.J. 225, 233-34 (2000).

and counties to donate money or supplies to nonprofit organizations “created for religious, charitable or education purposes.”<sup>12</sup>

The U.S. Supreme Court has shown increased disposition to approve creative programs under which sectarian institutions or religiously motivated persons can participate on an equal basis in public programs.<sup>13</sup> This term, the Supreme Court has heard arguments in a challenge to the constitutionality of the Cleveland school voucher program.<sup>14</sup> As courts hear challenges to the constitutionality of these programs under the First Amendment to the U.S. Constitution, they have also had to confront – many for the first time – the legacy of post-reconstruction anti-Catholicism: Little Blaine Amendments.

In this article we consider the effect of Article 11, Section 10, of the Nevada Constitution on any “charitable choice,” school voucher, or similar program that might be proposed in Nevada. We begin in Part I with a review of the context for the federal Blaine Amendment and the resulting state efforts to adopt their own such amendments. In Part II, we provide background on the dispute over state funding of the Nevada Orphan Asylum, the adoption of Section 10, and the Nevada Supreme Court’s decision in *Hallock*. Although no Nevada courts have considered Section 10 since *Hallock*, the Nevada Attorney General has issued many opinions citing Section 10 and relying on *Hallock*. We review these decisions as well in Part II. In Part III, we discuss recent developments in the U.S. Supreme Court’s First Amendment jurisprudence, explaining why those developments will permit states to look to their own First Amendment-type restrictions, including Little Blaine Amendments. We conclude in Part IV with some thoughts on how Section 10 might be construed in future cases in Nevada.

## I. CATHOLIC SCHOOLS, POLITICAL INFLUENCE AND THE BLAINE AMENDMENT BEFORE CONGRESS AND THE STATES

### A. Catholics, Schools, and Public Funding

The Blaine Amendment struck deep at America’s religious tolerance and exposed a growing rift between Catholics and Protestants involving not only schools, but politics, language, and culture. At the time of the founding, the United States was overwhelmingly Protestant. Questions of religious tolerance were largely questions of tolerance among competing Protestant sects; colonial Americans “accepted some diversity in the beliefs of other Protestants, and barely tolerated Catholicism and Judaism.”<sup>15</sup> The framers had recognized the possibility that the Free Exercise Clause would apply to Muslims, Hindus, and

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<sup>12</sup> NEV. REV. STAT. 244.1505, 268.028 (1999).

<sup>13</sup> See, e.g., *Mitchell v. Helms*, 530 U.S. 793 (2000); *Agostini v. Felton*, 521 U.S. 203 (1997); *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995); *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993); *Bowen v. Kendrick*, 487 U.S. 589 (1988); *Witters v. Wash. Dep’t of Serv. for the Blind*, 474 U.S. 481 (1986).

<sup>14</sup> *Zelman v. Simmons-Harris*, Nos. 00-1751, 00-1777, 00-1779 (argued Feb. 20, 2002).

<sup>15</sup> Office of Legal Policy, *Report to the Attorney General: Religious Liberty Under the Free Exercise Clause* 23 (1986).

"pagans,"<sup>16</sup> but at the time none of these groups represented any serious threat to Protestant-homogenous Americans.

By the middle of the nineteenth century, however, things had changed. Catholic immigration and evangelization had swelled the numbers of American Catholics. At the time of the founding, less than one percent of Americans were Catholics; by the end of the Civil War, that figure was more than ten percent.<sup>17</sup> Catholics increased their representation in the U.S. population generally, and their influence was concentrated largely in northern cities, in some of which they constituted a majority.<sup>18</sup> As their numbers grew, Catholic political influence increased as well, and by 1876, it was generally assumed that the Catholic vote had "determined the results of elections since 1870."<sup>19</sup> The Vatican Decree of Papal Infallibility of 1870 added to the anti-Catholic sentiment during this time.<sup>20</sup>

Perhaps the greatest source of friction between the Protestant majority and the Catholic minority was the public school system. In the colonial era, education was the domain of the church. The states either supported the church-established schools or claimed no role in education. These roles reversed in the nineteenth century as Jacksonian populists insisted that states provide a free public education to all people. In 1852, Massachusetts adopted the first compulsory education law in the United States; other states followed after the Civil War.<sup>21</sup> The first public schools, although not devoted to the teachings of any particular denomination, embraced the notion of a "civic religion." The schools taught fundamental principles that emphasized the common ground between the various Protestant sects, rather than their differences.<sup>22</sup> The public schools routinely required pupils to pray, sing hymns, and read from the Bible, practices that the U.S. Supreme Court ended in the 1960s.<sup>23</sup> The public education movement reached its apex in the 1920s in state laws *requiring* a public education.<sup>24</sup>

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<sup>16</sup> 4 DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 194 (J. Elliot ed., 1836) (statement of James Iredell).

<sup>17</sup> Toby J. Heytens, Note, *School Choice and State Constitutions*, 86 VA. L. REV. 117, 135 (2000).

<sup>18</sup> Steven K. Green, *The Blaine Amendment Reconsidered*, 36 AM. J. LEGAL HIST. 38, 42-43 (1992).

<sup>19</sup> Marie Carolyn Klinkhamer, *The Blaine Amendment of 1875: Private Motives for Political Action*, 42 CATH. HIST. REV. 15, 32 (1957).

<sup>20</sup> See ANSON PHELPS STOKES & LEO PFEFFER, CHURCH AND STATE IN THE UNITED STATES 329 (1964).

<sup>21</sup> ORVILLE H. ZABEL, GOD AND CAESAR IN NEBRASKA: A STUDY OF THE LEGAL RELATIONSHIP OF CHURCH AND STATE, 1854-1954, at 86-87 (1955). See also *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 238-40 & n.7 (1963) (Brennan, J., concurring).

<sup>22</sup> See Green, *supra* note 18, at 45 n.46, 56 n.115.

<sup>23</sup> See, e.g., *Engel v. Vitale*, 370 U.S. 421 (1962) (state-prescribed prayers); *Abington Sch. Dist. v. Schempp*, 374 U.S. 203 (1963) (state-supported Bible readings).

<sup>24</sup> See *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925) (holding unconstitutional Oregon's compulsory public education law). See also Barbara Bennett Woodhouse, "Who Owns the Child?": Meyer and Pierce and the Child As Property, 33 WM. & MARY L. REV. 995, 1017-18 (1992) ("The guiding sentiment [for the compulsory public education movement] . . . seems to have been an odd commingling of patriotic fervor, blind faith in the cure-all powers of common schooling, anti-Catholic and anti-foreign prejudice, and the conviction that private and parochial schools were breeding grounds of Bolshevism.").

From the Catholics' perspective, public schools were Protestant schools. Catholics took offense at the form of the prayers offered in public schools, the nature of the hymns, and that students read from the King James Version rather than the preferred Catholic text, the Douay translation of the Bible.<sup>25</sup> Catholics responded to these developments by demanding public funding for their own schools, insisting that school boards stop religious exercises, and bringing suits to halt what they regarded as Protestant indoctrination.<sup>26</sup> Although Catholics had successfully obtained some public funding for their schools and had long obtained public funds for their charitable activities,<sup>27</sup> their attacks on the public schools brought an enormous backlash in the form of Protestant calls for prohibitions on public funding of religious education and charitable institutions.

### B. The Blaine Amendment

The Catholic question had been fomenting for a long time before President Grant called for a constitutional amendment. As early as 1871, members of Congress, including Nevada Senator William Stewart, had proposed amending the U.S. Constitution to prohibit federal, state, and local governments from funding sectarian schools.<sup>28</sup> Four years later, the President entered the debate. At a convention in Iowa, President Grant urged that Americans "[e]ncourage free schools, and resolve that not one dollar, appropriated for their support, shall be appropriated to the support of any sectarian schools . . . [E]very child growing up in the land [should be afforded] the opportunity of a good common school education, unmixed with sectarian, pagan, or atheistical dogmas."<sup>29</sup> Three months later, in December 1875, President Grant requested that Congress consider a formal amendment:

I suggest for your earnest consideration – and most earnestly recommend it – that a constitutional amendment be submitted to the Legislatures of the several States for ratification making it the duty of each of the several States to establish and forever maintain free public schools adequate to the education of all the children in the rudimentary branches within their respective limits, irrespective of sex, color, birthplace, or religions; forbidding the teaching in said schools of religious, atheistic, or pagan tenets; and prohibiting the granting of any school funds, or school taxes, or any part

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<sup>25</sup> Joseph P. Viteritti, *Blaine's Wake: School Choice, The First Amendment, and State Constitutional Law*, 21 HARV. J.L. & PUB. POL'Y 657, 666 (1998). See also WILLIAM G. ROSS, FORGING NEW FREEDOMS: NATIVISM, EDUCATION, AND THE CONSTITUTION, 1917-1927, at 20, 23 (1994).

<sup>26</sup> Green, *supra* note 18, at 41, 44-47; Viteritti, *supra* note 25, at 670. See also Jeffrey Rosen, *Is Nothing Secular?*, N.Y. TIMES, Jan. 30, 2000, § 6 at 40. See generally LLOYD P. JORGENSEN, THE STATE AND THE NON-PUBLIC SCHOOL, 1825-1925 (1987); DIANE RAVITCH, THE GREAT SCHOOL WARS: NEW YORK CITY, 1805-1973 (1974).

<sup>27</sup> Green, *supra* note 18, at 43.

<sup>28</sup> CONG. GLOBE, 41st Cong., 3d Sess. 592 (1871) (statement of Sen. Warner; presenting a petition from citizens in Indiana); CONG. GLOBE, 42d Cong., 1st Sess. 730 (1870) (proposal of Sen. Stewart). Stewart's proposed amendment read in part:

There shall be maintained in each State and Territory a system of free common schools; but neither the United States nor any State, Territory, county, or municipal corporation shall aid in the support of any school wherein the peculiar tenets of any religious denomination are taught.

*Id.* The Senate never acted on the proposal. See CONG. GLOBE, 42d Cong., 2d Sess. 206 (1871); CONG. GLOBE, 42d Cong., 2d Sess. 3892 (1872).

<sup>29</sup> Quoted in Green, *supra* note 18, at 47.

thereof, either by legislative, municipal, or other authority, for the benefit or in aid, directly or indirectly, of any religious sect or denomination . . . .<sup>30</sup>

A week later Representative James Blaine of Maine introduced in the House of Representatives what would have become the Sixteenth Amendment and became known as the "Blaine Amendment."<sup>31</sup> The proposed amendment came before the House in August 1876, where it occasioned relatively little debate.<sup>32</sup> The debate began in the Senate about the same time, but was far more extensive.<sup>33</sup> We will not recount all of the debate, which has been reviewed elsewhere, for its import (if any) on the question of whether the Fourteenth Amendment made the First Amendment applicable to the states.<sup>34</sup> For our purposes, we wish to review briefly the concerns senators expressed over the amendment's application (or not) to sectarian charitable causes as well as to sectarian schools.

The Blaine Amendment, as recommended by the House, was difficult to decipher. The amendment forbade tax money or public lands devoted to "the support of public schools" from being "divided between religious sects or denominations." Did that mean that money that had not been earmarked for use by public schools could be spent on sectarian education? Or did it mean that no public funds could be used in support of sectarian education, but public funds might be used in other sectarian activities? What, precisely, was the scope of the Blaine Amendment? According to Senator Frelinghuysen, the amendment proposed by the House "only applie[d] to a school fund . . . . There is not a word in the amendment that prohibits public money from being appro-

<sup>30</sup> 4 CONG. REC. 175 (1876). At the end of his state of the union report, President Grant repeated that "No sectarian tenets shall ever be taught in any school supported in whole or in part by the State, nation, or by the proceeds of any tax levied upon any community." *Id.* at 181.

<sup>31</sup> The amendment stated:

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 205.

Blaine had served as Speaker of the House from 1866 to 1874, when the Republicans lost control of the House of Representatives. Although Blaine introduced the proposed amendment as a member of the House, by the time either house considered it, Blaine had assumed a seat in the Senate. Blaine aspired to run for the presidency in 1876, and when he failed to secure the nomination, he lost interest in the amendment and did not even vote on the proposal. Green, *supra* note 18, at 53, 67-68.

<sup>32</sup> 4 CONG. REC. 5189-92 (1876) (The final vote was 180 to 7, with 98 not voting.).

<sup>33</sup> See 4 CONG. REC. 5245-46, 5357, 5453-61, 5561-62, 5580-95 (1876).

<sup>34</sup> See, e.g., *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 256-58 (1963) (Brennan, J., concurring); MICHAEL KENT CURTIS, *NO STATE SHALL ABRIDGE* 169-70 (1986); Jay S. Bybee, *Taking Liberties With the First Amendment: Congress, Section 5, and the Religious Freedom Restoration Act*, 48 VAND. L. REV. 1539, 1596-98 (1995); Daniel O. Conkle, *Toward A General Theory of the Establishment Clause*, 82 NW. U. L. REV. 1115, 1137-39 (1988); Green, *supra* note 18; William K. Lietzau, *Rediscovering the Establishment Clause: Federalism and the Rollback of Incorporation*, 39 DEPAUL L. REV. 1191, 1208-11 (1990); Alfred W. Meyer, *The Blaine Amendment and the Bill of Rights*, 64 HARV. L. REV. 939 (1951); F. William O'Brien, *The States and "No Establishment": Proposed Amendments to the Constitution Since 1798*, 4 WASHBURN L.J. 183, 186-94 (1965).



pritated to theological seminaries, to reformatories, to monasteries, to nunneries, to houses of the Good Shepherd, and many kindred purposes.”<sup>35</sup> But Senator Christiancy argued that the amendment did not prohibit “the States raising any amount of money . . . to the support of private schools for instruction in the religion of any sect.”<sup>36</sup>

In response to these concerns, the Senate Judiciary Committee proposed a much broader substitute, one that banned federal and state governments from using any “revenue . . . or loan of credit . . . for the support of any school, education or other institution under the control of any religious or anti-religious sect, organization, or denomination.”<sup>37</sup> Curiously, it specifically provided that the amendment “shall not be construed to prohibit the reading of the Bible in any school or institution.”<sup>38</sup> As we might have expected, the latter provision stirred debate over whether reading the Bible was a religious activity or a sectarian activity and whether it was consistent with the Establishment Clause.<sup>39</sup> Two things were clear from the subsequent Senate debates: the Blaine Amendment was part of a larger Catholic-Protestant debate,<sup>40</sup> and, as amended in the Senate, the Amendment would have applied to orphanages and other charities.<sup>41</sup> In the end, the Blaine Amendment failed – barely – in the Senate, twenty-eight to sixteen.<sup>42</sup>

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<sup>35</sup> 4 CONG. REC. 5245 (1876) (statement of Sen. Frelinghuysen).

<sup>36</sup> *Id.* (statement of Sen. Christiancy). *See also id.* at 5246 (statement of Sen. Morton).

<sup>37</sup> *Id.* at 5453. The proposal read:

No State shall make any law respecting an establishment of religion, or prohibiting the free exercise thereof; and no religious test shall ever be required as qualification to any office or public trust under any State. No public property and no public revenue of, nor any loan of credit by or under the authority of, the United States, or any State, Territory, District, or municipal corporation, shall be appropriated to or made or used for the support of any school, education or other institution under the control of any religious or anti-religious sect, organization, or denomination, or wherein the particular creed or tenets of any religious or anti-religious sect, organization, or denomination shall be taught. And no such particular creed or tenets shall be read or taught in any school or institution supported in whole or in part by such revenue or loan of credit; and no such appropriation or loan of credit shall be made to any religious or anti-religious sect, organization, or denomination, or to promote its interests or tenets. This article shall not be construed to prohibit the reading of the Bible in any school or institution; and it shall not have the effect to impair rights of property already vested.

Sec. 2. Congress shall have power, by appropriate legislation, to provide for the prevention and punishment of violations of this article.

<sup>38</sup> *Id.*

<sup>39</sup> *See, e.g., id.* at 5562 (statement of Sen. Frelinghuysen), 5588 (statement of Sen. Edmunds), 5590 (statement of Sen. Bogy), 5593 (statement of Sen. Eaton).

<sup>40</sup> *See, e.g., id.* at 5455 (statement of Sen. Randolph), 5562 (statement of Sen. Frelinghuysen), 5585 (statement of Sen. Morton), 5589-90 (statement of Sen. Stevenson), 5590-91 (statement of Sen. Bogy), 5593 (statements of Sens. Eaton and Morton).

<sup>41</sup> *See, e.g., id.* at 5561 (statement of Sen. Frelinghuysen), 5582 (statement of Sen. Kernan), 5585 (statement of Sen. Kernan), 5592 (statement of Sen. Eaton). Senator Eaton of Connecticut, for example, pointed out that in Hartford there were two asylums, one Catholic and one Protestant, with about five hundred children. “Hartford . . . by this amendment cannot give a thousand dollars a year to each of those two asylums although by doing it they should save \$20,000 a year. It is absurd.” *Id.* at 5592.

<sup>42</sup> *Id.* at 5595.

### C. "Little Blaine Amendments" and the States

What Congress failed to adopt for the nation, most of the states enacted for themselves. The movement to adopt "Little Blaine Amendments" actually predated President Grant's call for a constitutional amendment, although the controversy over the federal amendment surely reinforced state activity. According to one count, by 1876 fourteen states had adopted some kind of constitutional restriction on funding sectarian education.<sup>43</sup> During the 1870s, including the period following the debates over the Blaine Amendment, some nine additional states (including Nevada) adopted Little Blaine Amendments.<sup>44</sup> Additionally, Congress began requiring new states, as a condition of their entering the union, to include some kind of Little Blaine Amendment in their constitution.<sup>45</sup> Whether by their own hand or by congressional mandate, by 1890, at least twenty-nine states had some kind of constitutional prohibition on the use of public funds for sectarian education or other purposes.<sup>46</sup>

Some of the state provisions applied quite specifically to schools. California, for example, provided in its constitution of 1879:

No public money shall ever be appropriated for the support of any sectarian or denominational school, or any school not under the exclusive control of the officers of the public schools; nor shall any sectarian or denominational doctrine be taught, or instruction thereon be permitted, directly or indirectly, in any of the common schools of this State.<sup>47</sup>

Other provisions adopted during this period reflected a somewhat broader prohibition. The Illinois Constitution of 1870 prohibited the use of public funds for church controlled schools and "anything in aid of any church or sectarian purpose."<sup>48</sup> The Illinois provision applied to more than churches, but was not clear whether "sectarian purpose" included schools and charitable institu-

<sup>43</sup> Green, *supra* note 18, at 43.

<sup>44</sup> Viteritti, *supra* note 25, at 673 n.78. Professor Viteritti lists the states as Colorado, Illinois, Minnesota, Missouri, Nebraska, New Jersey, Pennsylvania, and Texas. Inexplicably, he omits Nevada.

<sup>45</sup> Illinois *ex rel.* McCollum v. Bd. of Educ., 333 U.S. 203, 220 n.9 (1948) (Frankfurter, J., concurring).

<sup>46</sup> See Green, *supra* note 18, at 43; Joseph P. Viteritti, *Choosing Equality: Religious Freedom and Educational Opportunity Under Constitutional Federalism*, 15 YALE L. & POL'Y REV. 113, 146 (1996); Viteritti, *supra* note 25, at 673-75. Congress also required states entering the union after 1890 to adopt some kind of provision guaranteeing public schools free from sectarian control. See *Kotterman v. Killian*, 972 P.2d 606, 636 (Ariz. 1999) (Feldman, J., dissenting); Robert F. Utter & Edward J. Larson, *Church and State on the Frontier: The History of the Establishment Clauses in the Washington State Constitution*, 15 HASTINGS CONST. L.Q. 451, 458-67 (1988).

There are some inconsistencies in the estimates of the number of states enacting Little Blaine Amendments. See Heytens, *supra* note 17, at 123 n.32. As we have already noted, *supra* note 44, Nevada is often omitted from such lists. We have not attempted to reconcile the numbers. The current state provisions are listed, and many are discussed, in Frank R. Kemerer, *State Constitutions and School Vouchers*, 120 EDUC. L. REP. 1 (1997).

<sup>47</sup> CAL. CONST. art. IX, § 8 (1879), reprinted in 1 FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS 432 (Francis Newton Thorpe, ed. 1909) [hereinafter FEDERAL AND STATE CONSTITUTIONS]. The current version is CAL. CONST. art. 16, § 5.

<sup>48</sup> ILL. CONST. art. VIII, § 3 (1870), reprinted in 2 FEDERAL AND STATE CONSTITUTIONS, *supra* note 47, at 1035.

tions. Furthermore, the phrase "sectarian purpose" begged the question raised during the Blaine Amendment debates whether educational instruction could be religious without being "sectarian." A provision of the Florida Declaration of Rights, adopted in 1885, simply prohibited aid to "any church, sect, or religious denomination or . . . any sectarian institution."<sup>49</sup> It seems more likely that Florida's provision would have prohibited aid to charitable institutions, so long as they were maintained by a sect or religious denomination. South Dakota was even more specific: "No money or property of the state shall be given or appropriated for the benefit of any sectarian or religious society or institution."<sup>50</sup> Although the states adopted various Little Blaine Amendments, it is at least clear that the states generally intended to forbid the use of public funds in sectarian schools; and in some cases, it appears that the amendments extended to other sectarian institutions as well.

## II. THE NEVADA CONSTITUTION, RELIGION, AND PUBLIC EDUCATION

### A. *The Nevada Constitution and Sectarian Instruction in Public Schools*

When Congress authorized the people of the Territory of Nevada to adopt a constitution and seek admission to the Union, it required as a condition that Nevada secure "perfect toleration of religious sentiment" and that "no inhabitant of said state shall ever be molested in person or property on account of his or her mode of religious worship."<sup>51</sup> Nevada adopted a provision, identical to California's provision, protecting "free exercise" and "liberty of conscience."<sup>52</sup> The Nevada Constitution does not expressly prevent religious establishment, although the Attorney General has so construed the free exercise provision.<sup>53</sup>

The Nevada Constitution placed special importance on education and devoted Article 11 to the issue. Consistent with the nationwide movement underway in the 1860s, the Nevada Constitution instructed the legislature to provide for a "uniform system of common schools" and "to secure a general attendance of the children in each school district upon said public schools."<sup>54</sup>

<sup>49</sup> FLA. DECL. OF RTS. § 6 (1885), reprinted in 2 FEDERAL AND STATE CONSTITUTIONS, *supra* note 47, at 733.

<sup>50</sup> S.D. CONST. art. VI, § 3 (1889), reprinted in 6 FEDERAL AND STATE CONSTITUTIONS, *supra* note 47, at 3370.

<sup>51</sup> *An Act to enable the People of Nevada to form a Constitution and State Government*, § 4, 13 Stat. 31 (1864). Congress placed similar restrictions in the enabling acts for the constitutions of Arizona, Idaho, New Mexico, North Dakota, South Dakota, Utah, Washington, and Wyoming. See STOKES & PFEFFER, *supra* note 20, at 158.

<sup>52</sup> NEV. CONST. art. I, § 4. The provision reads:

The free exercise and enjoyment of religious profession and worship without discrimination or preference shall forever be allowed in this State, and no person shall be rendered incompetent to be a witness on account of his opinions on matters of his religious belief, but the liberty of conscience hereby secured, shall not be so construed, as to excuse acts of licentiousness or justify practices inconsistent with the peace, or safety of this State.

See CALIF. CONST. art. I, § 4 (1849), reprinted in 1 FEDERAL AND STATE CONSTITUTIONS, *supra* note 47, at 391. California's provision follows closely a provision in the New York Constitution of 1777. N.Y. CONST. art. xxxviii (1777), reprinted in 5 FEDERAL AND STATE CONSTITUTIONS, *supra* note 47, at 2636-37.

<sup>53</sup> Op. Nev. Att'y Gen. 320 (Mar. 3, 1954).

<sup>54</sup> NEV. CONST. art. XI, § 2.

Although the original Nevada Constitution did not contain a formal Establishment Clause, Article 11, Section 2 stated that any school district allowing “instruction of a sectarian character” could be deprived of its portion of public school funding. As if for further emphasis, Section 9 repeated that “No sectarian instruction shall be imparted or tolerated in any school or University that may be established under this Constitution.”<sup>55</sup> Although these provisions applied only to public institutions, they raised, but left unanswered, an issue brought up during the congressional debates over the Blaine Amendment: Is “sectarian instruction” the same as “general religious instruction”?

Little guidance on this question is available from the constitutional debates. One delegate stated that “[t]his matter of religious and sectarian influence in the public schools, is, of all things, most calculated to arouse suspicious and jealousies in the public mind, and if the enemies of the Constitution can see anything in our action on that subject to carp at, they will be sure to make the greatest possible amount of capital out of it.”<sup>56</sup> Some members argued that the Section 2 provision did not represent a positive prohibition against imparting sectarian instruction, and therefore called for an addition to the section or perhaps an entirely new provision to do that.<sup>57</sup> The delegates settled on the idea of a new section, as this would allow coverage of all levels of state-financed education, including universities and colleges, which were not covered by Section 2. As Mr. Brosnan, the sponsor of the bill, stated, “let my amendment apply to all the schools.”<sup>58</sup> Brosnan’s amendment became Section 9.<sup>59</sup>

#### *B. The Nevada Constitution and the Nevada Orphan Asylum*

In the same year that Nevadans adopted their constitution, Father Manogue and the Sisters of Charity organized the Nevada Orphan Asylum.<sup>60</sup> They chose Virginia City as the site for the Asylum, probably because Storey County had the largest population of any county in Nevada at that time and because the high-risk nature of mining created a local need for an orphanage.<sup>61</sup> Despite the advent of such safety enhancements as square-set timbering and improvements in other machinery used in the Comstock mines, the danger of cave-ins, fire, falling timber within the mines, defective cables and other machinery continued to make life in the mines hazardous.<sup>62</sup> The Asylum took

<sup>55</sup> NEV. CONST. art. XI, §§ 2, 9. See also OFFICIAL REPORT OF THE DEBATES AND PROCEEDINGS IN THE CONSTITUTIONAL CONVENTION OF THE STATE OF NEVADA 565 (1866) [hereinafter OFFICIAL REPORT OF THE DEBATES]. This Article was originally titled Article 12, but in the final form of the Nevada Constitution became Article 11.

<sup>56</sup> OFFICIAL REPORT OF THE DEBATES, *supra* note 55, at 566.

<sup>57</sup> *Id.* at 660-61.

<sup>58</sup> *Id.* at 661.

<sup>59</sup> NEV. CONST. art. XI, § 9.

<sup>60</sup> HUBERT HOWE BANCROFT, HISTORY OF NEVADA 1540-1888, at 301 (1981).

<sup>61</sup> The census data from 1860 for Nevada are incomplete, as the territory was not organized until 1861. However, in 1870 the state had a population of 42,491, of which 11,359 lived in Storey County. The next largest county, Ormsby, had a population of 3,668. See U.S. Census 1900, 30.

<sup>62</sup> RUSSELL R. ELLIOTT, HISTORY OF NEVADA 144 (1973). As an example of this danger, in the year 1878 there were twenty-six fatal accidents on the Comstock: “four from caving, four from premature explosion of powder, six from falls unconnected with hoisting machin-

in not only children without parents, but also those of single parents who felt they could not adequately provide for the rearing of the child.<sup>63</sup> The first building consisted of a single room for the sisters and the twelve orphans that constituted the original population.

A number of immigrant groups formed the backbone of the laboring class on the Comstock, including the Welsh, who constituted the largest such group,<sup>64</sup> the Germans, French, Italians, Hispanic, and the Cornish.<sup>65</sup> Many of the Cornish and Welsh were still in the area as a result of the California gold rush. In 1870, the foreign-born residents of Virginia City outnumbered the native-born residents, and even as late as 1880, when the mines had begun to decline, there were almost four times as many foreign-born members of the labor force as native-born.<sup>66</sup> The major religious denominations of the area were the Catholics, the Methodists, and the Episcopalians, with smaller groups of Presbyterians and Baptists.<sup>67</sup> Many of these groups held religious services in the immigrants' native languages.<sup>68</sup>

By 1866, the Nevada Orphan Asylum had debts of over \$8,000, and legislators raised the question of public funding to aid the Asylum.<sup>69</sup> Senator Sumner introduced a bill in January 1866 to appropriate \$10,000 to the Asylum.<sup>70</sup> The *Virginia Daily Union* called the bill "most meritorious," adding that the benefits would be felt "more or less, throughout the State, and in equal proportion as they are felt in our own vicinity."<sup>71</sup> A petition from local businessmen in support of the bill stated that the original hope that the Asylum could be funded with local contributions had faded due to "the general depreciation of the business interests of this section of the State," and that this downturn necessitated some state support to allow the Asylum to continue operating.<sup>72</sup>

The Senate Committee on State Affairs visited the Asylum, filed a report on the general conditions found there, and recommended passage of the requested appropriation. The Committee concluded that it would be financially impossible for the state to construct and maintain its own home and, therefore, the state should fund the Asylum.<sup>73</sup> The report summarily dismissed concerns that an appropriation to the private institution would violate Article 11, Section 9 of the state constitution: "For numerous reasons, too obvious to require men-

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ery, one from being crushed by a cage in motion, three from defective machinery in shaft works, six from heat, and two from hoisting machinery."

<sup>63</sup> Anne M. Butler, *Mission in the Mountains: The Daughters of Charity in Virginia City, in COMSTOCK WOMEN: THE MAKING OF A MINING COMMUNITY* 156-57 (Ronald M. James & C. Elizabeth Raymond eds., 1998). These one-parent children were often called "half-orphans." See REPORT OF THE BOARD OF DIRECTORS OF THE STATE ORPHANS' HOME FOR THE ELEVENTH AND TWELFTH FISCAL YEARS (1877).

<sup>64</sup> ELLIOTT, *supra* note 62, at 148.

<sup>65</sup> Butler, *supra* note 63, at 159.

<sup>66</sup> ELLIOTT, *supra* note 62, at 141.

<sup>67</sup> *Id.* at 373. The Church of Jesus Christ of Latter-day Saints, or Mormon Church, was the first to organize in the area, but by about 1857 that group had withdrawn to Utah territory.

<sup>68</sup> *Id.* at 148.

<sup>69</sup> *A Law That Should Pass*, VA. DAILY UNION, Feb. 8, 1866, at 2.

<sup>70</sup> Nev. Senate Journal and Appendix, Second Session 30 (1866).

<sup>71</sup> *The Sisters of Charity*, VA. DAILY UNION, Jan. 20, 1866, at 2.

<sup>72</sup> *The Orphan Asylum Bill*, CARSON DAILY APPEAL, Feb. 3, 1866, at 2.

<sup>73</sup> Nev. Senate Journal and Appendix, *supra* note 70, at 112.

tion, this section is wholly inapplicable as against the appropriation asked in this case.”<sup>74</sup> When the bill came up for a final vote, Senator Lockwood attempted to insert a section incorporating the language of Section 9, that “no sectarian instruction shall be imparted or tolerated in any school or university that may be established or maintained under this Act.” This attempt failed, and the bill passed the Senate and went to the Assembly.<sup>75</sup>

The Assembly also weighed the costs of Nevada establishing its own orphanage versus the funding of the church-operated Asylum. The Committee of Ways and Means recommended rejecting the Asylum bill, along with another bill that would have funded an Episcopal Parish school, on the grounds that both bills would enable the institutions to “train up the children in the tenets or religious belief of the respective churches.”<sup>76</sup> The Committee also expressed concern that the funding would be used “in defraying the ordinary current expenses” of the Asylum, thereby increasing the likelihood that the Asylum would require an annual appropriation.<sup>77</sup> A minority report argued that the cost to the state of establishing its own orphanage would be “not less than four times the amount here asked,” and questioned whether the “injunction . . . [to] feed and clothe and expend wearisome labor and undergo painful solicitude in the care of little orphan children” belonged to any one sect.<sup>78</sup> Representative Hinckley entered a protest against the bill, “considering it the first step toward uniting Church and State” in Nevada.<sup>79</sup> Despite the Committee’s recommendation, the Assembly passed the bill and sent it to the Governor.<sup>80</sup>

Governor Henry Blasdel vetoed the bill based on Article 8, Section 9, of the state constitution.<sup>81</sup> This section mandated that the state could only donate money to “corporations formed for educational or charitable purposes” and, the Governor argued, the Asylum did not meet this requirement because it had not been incorporated.<sup>82</sup> The Governor remarked that the framers of the constitution wisely included this as a debt control measure, and that, because of its debts, the state was “not in a condition to make this donation, or any such, however laudable.”<sup>83</sup> The Senate attempted but failed to override the veto.<sup>84</sup> The actions of the Governor drew both criticism and praise from local newspapers. The *Virginia Daily Union* opined that “Governor Blasdel is a conscientious man and is possessed of constitutional veneration gratifying to behold, in fact . . . he would experience a happy dissolution could he quietly enfold himself within the pages of a ponderous Constitution and gently dissolve.”<sup>85</sup> The *Carson Daily Appeal* supported the Governor’s decision and criticized Senator

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<sup>74</sup> *Id.* at 113.

<sup>75</sup> *Id.* at 147.

<sup>76</sup> Nev. Assembly Journal and Appendix, Second Session 208 (1866).

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at 248-49.

<sup>79</sup> *Good God!*, VA. DAILY UNION, Feb. 28, 1866, at 2.

<sup>80</sup> *Two Important Bills Passed*, CARSON DAILY APPEAL, Feb. 27, 1866, at 2.

<sup>81</sup> *The Governor’s Veto of the Orphan Asylum Bill*, CARSON DAILY APPEAL, Mar. 2, 1866, at 2.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> Nev. Senate Journal and Appendix, *supra* note 70, at 253.

<sup>85</sup> *Truly Unfortunate*, VA. DAILY UNION, Mar. 1, 1866, at 2.

Sumner for having sponsored the Asylum bill for “his own advancement with the Irish (whom he seems to be anxious to encourage in their clanishness)” and for placing the Governor in the position of having to veto the legislation, thereby diminishing his chances at being renominated for the governorship.<sup>86</sup>

During the next legislature session, Senator Sumner introduced a similar bill to fund the Asylum. In the meantime, however, the Sisters of Charity had incorporated the Asylum, thereby curing the Governor’s previous objection to state funding.<sup>87</sup> The bill passed the Senate with little fanfare, but there was again a protest over the possible connection of church and state.<sup>88</sup> A Select Committee reported favorably on the bill, arguing that the state “has not, and is not likely in the near future, to provide a separate institution.”<sup>89</sup> The Assembly agreed with the Senate and voted to provide \$5000 to support the Asylum over a two-year period. The bill, however, required that “in receiving or rejecting applicants for admission into said Asylum, no distinction or preference shall be made or given on account of the nationality or religion of the applicant, or his or her parents.”<sup>90</sup>

In the 1869 legislative session, the battle over the Asylum heated up. Senator Grey introduced Senate Bill 12, requesting \$6000 in financial support for the Asylum, which the Senate approved.<sup>91</sup> There was only modest discussion of the sectarian purpose for this appropriation, and Senator Grey commented that he “was glad to find that bigotry had narrowed itself down to a very small compass.”<sup>92</sup> In the meantime, Assemblyman Potter introduced Assembly Bill 108, requesting funding for a State Orphan Home including \$8000 to build or purchase a suitable building in Carson City and \$7000 for the support of the orphans.<sup>93</sup> The Senate and Assembly approved both Senate Bill 12 and Assembly Bill 108, and the Governor signed both.<sup>94</sup>

The legislature had determined both to establish a state orphanage and to continue funding the Asylum. Any doubt as to the legislature’s intentions was dispelled by Section 13 of the act establishing the State Orphan Home, which provided:

On or before the first day of October, A.D. 1870, it shall be the duty of the Board of Directors of the State Orphan Home to notify the Trustees of the Nevada Orphan Asylum that they will receive all orphans in their charge, and will bear all the necessary expenses in their removal.<sup>95</sup>

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<sup>86</sup> *Governor Blasdel and the Orphan Asylum Bill*, CARSON DAILY APPEAL, Nov. 1, 1866, at 2.

<sup>87</sup> Butler, *supra* note 63, at 153.

<sup>88</sup> Nev. Senate Journal and Appendix, Third Session, 176 (1867).

<sup>89</sup> Nev. Assembly Journal and Appendix, Third Session, 222 (1867).

<sup>90</sup> 1867 Nev. Stat. 130-31.

<sup>91</sup> Nev. Senate Journal, Fourth Session, 21, 104 (1869); *Senate – Ninth Day*, TERRITORIAL ENTERPRISE, Jan. 13, 1869, at 2.

<sup>92</sup> *Thirty-Second Day – Senate*, TERRITORIAL ENTERPRISE, Feb. 5, 1869, at 2.

<sup>93</sup> *House – Forty-fourth Day*, TERRITORIAL ENTERPRISE, Feb. 18, 1869, at 2. The act required that the citizens of Ormsby County donate ten acres of land within Carson City. *The Orphans’ Home*, CARSON DAILY APPEAL, Oct. 7, 1869, at 3.

<sup>94</sup> Nev. Assembly Journal, Fourth Session, 164-65, 281 (1869); Nev. Senate Journal, *supra* note 91, at 284.

<sup>95</sup> 1869 Nev. Stat. 168.

Any orphans in the charge of, or supported by, the state were to be removed from the Asylum and placed in the State Orphans Home. It seems obvious that if the state established its own orphanage and removed orphans it was supporting from the Asylum that the legislature would no longer fund the Asylum, and it might be forced to close. Perhaps the point was too obvious for words, because there was no such discussion in the legislative debates.

The State Orphan Home apparently opened as scheduled in 1870. The legislature, nevertheless, continued funding the Asylum in the 1871 term.<sup>96</sup> In the 1873 term, the Assembly considered funding the Asylum, but the bill was withdrawn at the request of Sister Frederica, head of the Sisters of Charity at the Asylum, who believed that the Asylum lacked support for further funding: “[O]f late, a hostile feeling has risen against [the orphans]. If we are not entitled to the appropriation in justice, we do not look for it in charity.”<sup>97</sup> She also charged that the enemies of the Asylum had approached legislative candidates and informed them that their support in the election depended on the candidates’ opposition to further funding for the Asylum.<sup>98</sup> She felt the loss of funding was evidence of a larger anti-Catholic sentiment.<sup>99</sup>

The legislature eventually funded the State Orphan Home and directed that orphans housed in the Asylum at state expense could be transferred “at any time desired by the Trustees of the Nevada Orphan Asylum.”<sup>100</sup> This provision was a minor change from the 1869 act, which directed that all orphans receiving state support should be transferred from the Asylum to the Home. Although Nevada had established its own orphanage, it continued to fund the Asylum, despite increasing controversy over the Asylum.<sup>101</sup>

### C. *The Passage of Nevada’s Little Blaine Amendment*

#### 1. *Section 10 Before the Assembly and the People*

In February 1877, just six months after Congress considered the Blaine Amendment, Assemblyman W.H. Botsford, representing Storey County, proposed amending Article 11 of the Nevada Constitution.<sup>102</sup> The proposed Section 10 read: “No public funds, of any kind or character whatever, State, county, or municipal, shall be used for sectarian purposes.”<sup>103</sup> In order to amend the Nevada Constitution, the resolution had to pass both houses of the legislature in two succeeding legislative sessions, and then be approved by the voters of the state.<sup>104</sup> The Assembly adopted the Joint Resolution unanimously

<sup>96</sup> Nev. Journal of the Senate, Fifth Session, 101, 109 (1871); Nev. Journal of the Assembly, Fifth Session, 103, 158, 319 (1871). The Act appropriated \$5000 to the Asylum for two years.

<sup>97</sup> Butler, *supra* note 63, at 156. See also Nevada State Archives and Records Management, *State Children’s Home History*, at <http://dmla.clan.lib.nv.us/docs/nsia/archives/archival/exec/orphange.htm> (last visited June 14, 2000); Nev. Journal of the Assembly 138, 202, 224 (1873).

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* at 159.

<sup>100</sup> 1873 Nev. Stat. 103-04.

<sup>101</sup> There was no legislation concerning the Nevada Orphan Asylum in 1875.

<sup>102</sup> *Nevada Legislature*, EUREKA DAILY REPUBLICAN, Feb. 20, 1877, at 2.

<sup>103</sup> 1877 Nev. Stat. 221.

<sup>104</sup> NEV. CONST. art. XVI, § 1.



on the day it was introduced,<sup>105</sup> and the Senate passed the measure a week later with only two dissenting votes.<sup>106</sup> The *Nevada Daily Tribune* praised Assemblyman Botsford for introducing the legislation and implied that the amendment had its origins in the same anti-Catholic fervor sweeping the rest of the nation.

This is a move in the right direction and will, we trust, meet with the hearty approval of every citizen of Nevada . . . for this is a stepping stone to the final breaking up of a power that has long cursed the world, and that is obtaining too much of a foothold in these United States.<sup>107</sup>

Ironically, at the same time the legislature was considering the amendment, Senator Frank Stewart of Storey County introduced a bill requesting a "fund for the relief of the several orphan asylums" in the state.<sup>108</sup> The Senate passed the bill easily.<sup>109</sup> The Assembly, however, rejected the bill on the first reading.<sup>110</sup> The *Territorial Enterprise* supported the appropriation, arguing that the State Orphan Home was full and that it would be less expensive for the state to house any remaining orphans at other institutions within the state rather than having to ship them to shelters in other states, the "other institutions" being the Asylum operated by the Sisters of Charity in Virginia City. The *Enterprise* urged that "[i]t is no appropriation of money for a sectarian purpose and by no fair construction can be so esteemed. It is simply a matter of bread and clothes for the children of Protestants, Catholics, Jews, and others who had no religion but whose children need protection."<sup>111</sup>

The irony continued during the following legislative session. The Assembly again approved the proposed amendment unanimously, and this time the Senate did as well.<sup>112</sup> The proposal to amend the Constitution to prohibit public funding of sectarian purposes could now be placed on the ballot in the 1880 general election. Just one month later, Senator Farrell, who had voted in favor of the proposed amendment, introduced a bill authorizing funding for the Asylum.<sup>113</sup> When the Senate Standing Committee on Judiciary recommended rejection of the bill, the Senate voted to table the bill.<sup>114</sup>

Question Two in the 1880 Nevada general election gave the voters their chance to approve Section 10, which they did overwhelmingly by a vote of 14,216 to 672.<sup>115</sup> At that time, there were 62,266 people living in Nevada, with 16,115 of those living in Storey County, home to the Asylum.<sup>116</sup> There is

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<sup>105</sup> Nev. Journal of the Assembly, Eighth Session, 238 (1877). Unfortunately, there are no extant records of the debate, if any, over the Joint Resolution.

<sup>106</sup> Nev. Journal of the Senate, Eighth Session, 272 (1877).

<sup>107</sup> *A Much Needed Amendment*, DAILY NEV. TRIB., Feb. 21, 1877, at 3.

<sup>108</sup> Nev. Journal of the Senate, *supra* note 106, at 233.

<sup>109</sup> *Id.* at 293-94.

<sup>110</sup> Nev. Journal of the Assembly, *supra* note 105, at 330.

<sup>111</sup> *The Orphan Bill*, TERRITORIAL ENTERPRISE, Feb. 25, 1877, at 2.

<sup>112</sup> Nev. Journal of the Senate, Ninth Session 77, 79 (1879).

<sup>113</sup> *Id.* at 252.

<sup>114</sup> *Id.* at 263, 311.

<sup>115</sup> The vote meant that 95.5 percent approved the measure and only 4.5 percent rejected it. DEAN HELLER, POLITICAL HISTORY OF NEVADA 269 (10th ed. 1997). The bill was mistakenly placed on the ballot in some counties in 1878, prior to its having been approved twice by the legislature as required.

<sup>116</sup> U.S. Census 1900 at 30.

some question as to how much interest this question received in other parts of the state. Several years after the passage of this Section 10, G. R. Alexander, Superintendent of Schools for Lincoln County, stated that his district was experiencing problems with sectarianism in their schools. Apparently some teachers were using *The Book of Mormon* as a reader. His proposed solution to this problem was that "every teacher should take the Constitutional oath, as our Constitution provides, and that there should be a non-sectarian clause in addition."<sup>117</sup> While this is far from conclusive evidence of a lack of statewide interest or knowledge of this amendment, it may help demonstrate the localized nature of the concern generated by the activities of the Asylum.

## 2. Section 10 Before the Nevada Supreme Court

During the first legislative session following the approval of the amendment, Assemblyman Mooney of Storey County introduced Bill 87, which once again appropriated funds "for the relief of the several orphan asylums of this State."<sup>118</sup> The Assembly referred the bill to the Committee on State Institutions, which recommended passage.<sup>119</sup> The Committee of the Whole also recommended passage, and the bill passed by a vote of thirty-seven to two.<sup>120</sup> The *Carson Daily Index* warned that passage of the bill threatened to make the Asylum "a mere branch of the State Orphans' Home, so far as participation in the funds of the State is concerned."<sup>121</sup> The *Daily Index* went on to state that any money granted to the Asylum "is in contravention to the principle that no moneys [sic] should be appropriated from the State Treasury for religious or sectarian purposes."<sup>122</sup> A few days later, the same newspaper stated that "[t]his State has a charity of its own for which to provide, in the care of orphan children. So long as the State expends its money in that direction, it ought not to be called upon to support private sectarian charities of a similar nature."<sup>123</sup> Despite the editorial pressure, the Senate passed the measure by a nineteen to four vote,<sup>124</sup> and the Governor signed it into law.<sup>125</sup> A *Daily Index* editorial stated that "[t]he disbursement of this money will be clearly for sectarian purposes, contrary to the amendment to the Constitution that was adopted at the last general election," adding that the State Controller, Treasurer, or Governor could refuse to release the payment or that legal proceedings could be undertaken "to restrain the payment of the monies, although we have not been advised of any."<sup>126</sup>

In July 1881, the Asylum attempted to collect the first installment of the funding approved by the legislature.<sup>127</sup> From the Governor to the Controller,

<sup>117</sup> BIENNIAL REPORT OF THE SUPERINTENDENT OF PUBLIC INSTRUCTION OF THE STATE OF NEVADA, 1883-1884, at 10.

<sup>118</sup> Nev. Journal of the Assembly, Tenth Session, 125 (1881).

<sup>119</sup> *Id.* at 205.

<sup>120</sup> Nev. Journal of the Assembly, Tenth Session, 213-14 (1881).

<sup>121</sup> *The Catholic Asylum Bill*, CARSON DAILY INDEX, Feb. 20, 1881, at 2.

<sup>122</sup> *Id.*

<sup>123</sup> *News of the Day*, CARSON DAILY INDEX, Feb. 23, 1881, at 2.

<sup>124</sup> Nev. Journal of the Senate, Tenth Session, 265 (1881).

<sup>125</sup> *Catholic Orphan Asylum*, CARSON DAILY INDEX, June 3, 1881, at 3.

<sup>126</sup> *Id.*

<sup>127</sup> *That Sectarian Bill*, DAILY NEV. ST. J., Aug. 3, 1881, at 3.

Nevada's executive officials doubted whether they could fund the Asylum consistent with the Nevada Constitution. Governor John Kinkead signed the bill, but stated that, in his view, the bill conflicted with the state constitution. "This I believe is beyond the power of the Board of Examiners to determine and must be settled by judicial decision."<sup>128</sup> Secretary of State Jasper Barcock also signed the bill, but stated that he doubted the constitutionality of the bill.<sup>129</sup> Attorney General M. A. Murphy declined to sign the bill "because I believe it to be appropriating money for sectarian purposes, which we are forbidden to do by Section 10 of Art. XI."<sup>130</sup> State Controller J. F. Hallock refused to sign or pay the warrant for the same reasons.<sup>131</sup>

When Hallock refused to release the Asylum's funds authorized by the legislature, the Asylum filed an original action in the Nevada Supreme Court, seeking a writ of mandamus against the state controller to compel payments of \$1,279.79.<sup>132</sup> In *State ex rel. Nevada Orphan Asylum v. Hallock*, the Nevada Supreme Court, in a unanimous opinion by Chief Justice Orville Leonard, denied the writ on the grounds that the Asylum was a sectarian institution, and therefore could not obtain state funding under Section 10.

Counsel for the Asylum offered a two-fold argument. First, they argued that the term "sectarian" referred to those Christian doctrines upon which various Christian denominations disagreed. By contrast, they argued, the word "sectarian" did not include "the teaching of any doctrines upon which all Christian denominations agree . . . Christianity [being] a part of the common law of the state of Nevada."<sup>133</sup> To the extent that the Asylum taught Protestant children Christian doctrines, the Asylum was not engaged in "sectarian" activities.<sup>134</sup> Second, counsel for the Asylum contended that, in any event, monies received from the state were used for housing and feeding children. Accordingly, even if the Nevada Orphan Asylum were a "sectarian institution," state monies were not being used for "sectarian purposes."<sup>135</sup> The Attorney General denied that Christianity was part of Nevada's law. He further argued that "sectarian" meant "all religious denominations."<sup>136</sup> Since the Nevada Orphan Asy-

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<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *State ex rel. Nev. Orphan Asylum v. Hallock*, 16 Nev. 373, 376 (1882).

<sup>133</sup> *Id.* at 374 (argument for counsel for the Asylum).

<sup>134</sup> There was conflicting testimony given at the hearing about the daily prayers. Sister Vibianna testified that only Catholic children received Catholic instruction, while other children could read works from the library during this time. She also stated that non-Catholic children could attend the church of their choice if accompanied by a responsible party. Testimony of Sister Vibianna at 5, *Nev. Orphan Asylum v. Hallock*, 16 Nev. 373 (1882). Ida Morgan, who had attended the Asylum school as a child, testified that no religious instruction occurred during her time at the Asylum. Testimony of Ida Morgan at 1, *Hallock*. However, Mary Elizabeth Stewart testified that the Sisters would not allow her to repeat the prayers her mother taught her as a child, and that the Sisters required her to learn the Catechism. Testimony of Mary Elizabeth Stewart at 2, *Hallock*. Clara Kenney also stated that the Sisters required her to learn the Catechism, and that when she failed to repeat a portion of it upon request from Sister Frederica, she was "whipped with a strap." Testimony of Clara Kenney at 1-2, *Hallock*.

<sup>135</sup> *Hallock*, 16 Nev. at 375 (argument for counsel for the Asylum).

<sup>136</sup> *Id.* at 376 (argument for the Attorney General).

lum by its nature was a “sectarian institution,” it was barred from receiving state funding for any purposes.<sup>137</sup>

The Supreme Court characterized the issue as whether “the Nevada Orphan Asylum [was] a sectarian institution, and would the payment of its claim be using the state’s funds for sectarian purposes.”<sup>138</sup> The court observed that “it [was] not plain, from the amendment itself, what the people meant by the words ‘sectarian purposes,’” and that the court would examine the history of state appropriations. The court found that, “with one exception, [the Nevada Orphan Asylum] has been, and is the only applicant for state aid, where the question of sectarianism could have been raised.”<sup>139</sup> From the fact that the Nevada Orphan Asylum was the only institution “of a sectarian character” to have applied and received state funds, the court deduced that “in the minds of the people, the use of public funds for the benefit of [the Asylum] and kindred institutions, was an evil which ought to be remedied.”<sup>140</sup> Indeed, the court said, “[the Asylum’s] continued applications greatly, if not entirely, impelled the adoption of the constitutional amendment.”<sup>141</sup>

The court thus suggested that the term “sectarian” had to be understood against the background for the Amendment. If the Amendment did not apply to the Asylum then, the court reasoned, it is not clear that it applied to any other applicant for or recipient of state funds; the Amendment would have been anticipatory, but would have had no relevance to any current problem. Since the only party to which the Amendment could conceivably have applied was the Nevada Orphan Asylum, the Asylum’s activities must be the “sectarian purposes” referred to in the Amendment.

The court addressed and rejected the Asylum’s argument that “sectarian” meant the matters of doctrine that divided religious denominations. Instead, the court adopted a broader reading – the court called it the “popular sense” – in which a religious sect defines a “distinct organization or party . . . . The framers of the constitution undoubtedly considered the Roman Catholic a sectarian

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<sup>137</sup> *Id.* at 375-76 (argument for the Attorney General). The Attorney General’s argument to the Court demonstrates that the Attorney General did not believe that the Constitution forbade moral instruction, or even prayer in school:

The only institutions that are entitled to receive any portion of the State appropriation under the Act of 1881, are those that are not controlled by any religious sect, are not confined to any one class, are not presided over by any one religious sect or denomination. It must be open to all, and no particular creed or religion be taught therein, but each and every inmate thereof is to be permitted to say prayers that their mothers taught them, or need not say any if they do not feel so disposed, nor should be they be required to be present while others are saying their’s, should they not be so inclined. This is the only construction that can be placed upon the Act, in face of Section ten, Article Eleven of our Constitution.

Brief for Respondent at 9, *Hallock*.

<sup>138</sup> *Hallock*, 16 Nev. at 378.

<sup>139</sup> *Id.* at 380. *See also id.* at 383. The court quoted extensively from the 1866 report of the “senate committee of ways and means.” *See id.* at 381. The report was prepared by the Ways and Means Committee in the Assembly. *See supra* text accompanying notes 76-80.

<sup>140</sup> *Hallock*, 16 Nev. at 383. The court’s mention of “kindred institutions” probably referred to the St. Mary’s school, which the Sisters of Charity operated next to the Asylum. *See id.* at 375 (argument of the Attorney General).

<sup>141</sup> *Id.* at 383.

church.”<sup>142</sup> It was therefore irrelevant whether “*Protestant* children are taught only those things which are common to all Christian people.” Nor did it matter that

Catholic parents desire their children taught the Catholic doctrines, or that Protestants desire theirs to be instructed in Protestantism. The constitution prohibits the use of any of the public funds for such purposes, whether their parents wish it or not . . . . It is what is taught, not who are instructed, that must determine this question.<sup>143</sup>

Finally, the court rejected the Asylum’s claim that, even though it was a sectarian institution, the funds went to non-sectarian purposes. For the court, the state funds “would be used for the relief and support of a sectarian institution, and in part, at least, for sectarian purposes . . . [I]t is impossible to separate the legitimate use from that which is forbidden.”<sup>144</sup>

In 1897, the Asylum and the St. Mary’s school closed.<sup>145</sup>

#### D. *Subsequent Decisions in Nevada*

Since the *Hallock* decision, no Nevada court, so far as we can determine, has cited either *Hallock* or Section 10 for their substance. In fact, *Hallock* has been cited exactly once by Nevada courts for any purpose. In *State v. Grey*, the Nevada Supreme Court cited *Hallock* as evidence of the proper manner in which to amend the Nevada Constitution.<sup>146</sup> Thirteen other courts have cited *Hallock*,<sup>147</sup> most notably Justice Brennan in his concurring opinion in *Lemon v. Kurtzman*,<sup>148</sup> a case dealing with a constitutional challenge to state aid to non-public, parochial schools.

Despite this dearth of additional judicial explanation of Section 10, the Nevada Attorney General’s office has published a number of opinions citing Section 10 and referring to *Hallock*. These opinions, although quite uneven, may add to our understanding of how Section 10 should be interpreted and applied.

##### 1. *Religious Use of Public Facilities*

In 1954 and 1955, public officials in Clark County requested the Attorney General’s opinion on whether religious groups could use public buildings. In the first of these opinions, six religious denominations had applied to use “school buildings for religious purposes, with or without rent for the prem-

<sup>142</sup> *Id.* at 385.

<sup>143</sup> *Id.* at 386.

<sup>144</sup> *Id.* at 388.

<sup>145</sup> Butler, *supra* note 63, at 163.

<sup>146</sup> *State v. Grey*, 32 P. 190, 193 (Nev. 1893) (Bigelow, J., concurring).

<sup>147</sup> See *Roberts v. Bradfield*, 12 App. D.C. 453, 474 (1898); *Bowker v. Baker*, 167 P.2d 256, 259 (Cal. Ct. App. 1946); *Bennett v. City of La Grange*, 112 S.E. 482, 485 (Ga. 1922); *Cook County v. Chicago Indus. Sch. for Girls*, 18 N.E. 183, 187 (Ill. 1888); *Knowlton v. Baumhover*, 166 N.W. 202, 211 (Iowa 1918); *Craig v. Mercy Hosp.-St. Mem’l*, 45 So. 2d 809, 820 (Miss. 1950); *Synod of Dakota v. State*, 50 N.W. 632, 635 (S.D. 1891); *State ex rel. Weiss v. Dist. Bd. of Sch. Dist. No. 8 of City of Edgerton*, 44 N.W. 967, 980 (Wis. 1890); *In re Cummins*, 20 Haw. 518, 525 (1911); *Bd. of Ed. of Balt. County v. Wheat*, 199 A. 628, 631 (Md. 1938); *Chance v. Miss. State Textbook Rating & Purchasing Bd.*, 200 So. 706, 715 (Miss. 1941); *State v. Weedman*, 226 N.W. 348, 359 (S.D. 1929).

<sup>148</sup> 403 U.S. 602, 649 (1971) (Brennan, J., concurring).

ises.”<sup>149</sup> The opinion advised that the school board had “no authority under the Constitution to let school buildings for religious purposes, with or without rent for the premises.”<sup>150</sup> The Attorney General referred to various provisions of the Nevada Constitution and *Hallock*, but relied, in large measure, on broad principles derived from recent U.S. Supreme Court decisions. The following year, however, the Attorney General issued a “clarification.” Noting the lack of municipal auditoria throughout the state, and the fact that, in smaller communities, the only structure capable of housing a large gathering was the school gymnasium, the Attorney General opined that the Nevada Constitution would not be violated if a “school board [rented] a school auditorium or gymnasium to a religious group for the purpose of presenting an exhibition or show, open to the general public, which in no way attempted to impart, promulgate or disseminate religious teachings or doctrines.”<sup>151</sup> The Attorney General also observed that churches had requested permission to use schools and other public buildings after hours for church services; the opinion, however, did not address this question directly. The ruling neither forbade nor approved use of public property for church services, but the opinion contemplated that such groups would pay rent for use of the facility.

In 1993, the Attorney General had occasion to reconsider those opinions when she was asked whether the Clark County School District could open “its limited public forum facilities to sectarian groups for religious teaching or purpose.”<sup>152</sup> The Attorney General found that such use would be permissible under the Establishment Clause of the U.S. Constitution. With respect to Section 10, however, the Attorney General concluded that

[i]f worship services were permitted in the limited public forum free of charge, Nev. Const. art. 11, § 10 would clearly be violated. However, if the use of the facility was conditioned upon a rental fee reflecting the cost to the school district for the proposed use, no public funds would be expended for the sectarian purpose.<sup>153</sup>

The opinion was notable because the Attorney General admitted that Section 10 imposed constraints not found in the Establishment Clause, namely, that religious organizations using public facilities must pay for such use.

## 2. *Accommodation of Religious Practices in Public Programs*

The Attorney General issued several opinions on the relationship between public and parochial schools. In 1948, the Attorney General concluded that public school officials had the discretion to dismiss children from school at their parents’ request in order to receive religious instruction.<sup>154</sup> By 1954, however, the Attorney General disapproved of a “release time” proposal under

<sup>149</sup> Op. Nev. Att’y Gen. 316 (1954).

<sup>150</sup> *Id.*

<sup>151</sup> Op. Nev. Att’y Gen. 14 (1955).

<sup>152</sup> Op. Nev. Att’y Gen. 93-2 (1993).

<sup>153</sup> *Id.* This opinion reversed Op. Nev. Att’y Gen. 316 (1954), discussed above. The question of access to public facilities continues. See Glenn Puit, *City Will Permit Praying; Policy Changes After Interfaith Council Protests Ban From Public Facility*, LAS VEGAS REV.-J., Feb. 26, 2001, at 1B (City of Las Vegas initially refused permission to an interfaith group to use a public center because the tribute to Dr. Martin Luther King would have included prayers; the city reversed itself).

<sup>154</sup> Op. Nev. Att’y Gen. 684 (1948).

which children in public schools could attend religious instruction off campus during their study hall.<sup>155</sup> The opinion cited Section 10 and other provisions of the Nevada Constitution as evidence that Nevada had “effectively erected ‘a wall of separation between Church and State,’” but largely tracked U.S. Supreme Court decisions. The Attorney General also opined that Section 10 barred the school district from providing educational services to parochial students who were ill and at home.<sup>156</sup> In 1965 the Attorney General disapproved a “shared time” arrangement under which parochial students would enroll in public school courses not offered in their private school.<sup>157</sup>

The Attorney General subsequently considered whether state funds could be used to hire a Chaplain for the Nevada Youth Training Center at Elko. Under the proposal, the chaplain would not hold formal church services, but would provide “religious instruction covering faith without referral to sect, creed, or denomination.”<sup>158</sup> He would also interview each new inmate of the Center to determine “religious interests, training and background and other information concerning the family constellation.”<sup>159</sup> The Attorney General ruled that such instruction would violate state and federal constitutions, stating that there was no demonstration as to how the “religious counselling [sic] and advice” or “religious instruction” contemplated by the contract “can be free of sectarian indoctrination of some kind and to some degree.”<sup>160</sup> The Attorney General also expressed concern over the captive nature of the audience; “the element of coercion is indubitably present.”<sup>161</sup> The Attorney General concluded, however, that his opinion would not forbid the “mere reading of the Bible without comment of any kind.”<sup>162</sup>

The Attorney General revisited the issue again in 1963, when the office reviewed the constitutionality of NRS 209.050, which authorized the Nevada State Prison to pay for chaplain services. The Attorney General stated that Section 10’s prohibition dealt primarily with “preventing sectarian religious instruction in the public schools.”<sup>163</sup> This concern grew in part from the captive nature of the school audience, and the receptiveness of the children’s minds to religious thought. As long as attendance to religious services was not compulsory, the Attorney General had no objection to a prison chaplain conducting services or to the state paying for the chaplains.

Section 10 also arose in the context of state employees taking leave with pay in order to attend “Good Friday” services. The Attorney General ruled this unconstitutional, stating that “attendance of Good Friday services would most likely be viewed as a ‘sectarian purpose’ within the meaning” of the state con-

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<sup>155</sup> Op. Nev. Att’y Gen. 320 (1954).

<sup>156</sup> Op. Nev. Att’y Gen. 56-209 (1956).

<sup>157</sup> Op. Nev. Att’y Gen. 278 (1965).

<sup>158</sup> Op. Nev. Att’y Gen. S-16 (1962).

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> *Id.* The Attorney General relied on language from *Engel v. Vitale*, 370 U.S. 421, 442-44 (1962).

<sup>163</sup> Op. Nev. Att’y Gen. 67 (1963).

stitution.<sup>164</sup> The Attorney General added that it would be permissible for a state employee to take leave without pay to attend such services, or attempt to adjust their working hours to allow such attendance.

### 3. *Public Funds and Religious Institutions*

In 1941, the Attorney General considered whether state funds could be used to support the hospitalization of crippled children at St. Mary's Hospital in Reno. The Attorney General ruled that this use would not violate the state constitution, as there would be "no attempt to instruct or guide these patients in religious tenents [sic]" during their stay at the hospital, in contrast to the "children in the orphan asylum [in *Hallock*, who] were given definite religious instruction."<sup>165</sup> Section 10 was not intended to "prevent necessary hospitalization in sectarian hospitals where no instruction of any kind was imparted."<sup>166</sup>

In 1965, the Superintendent of Public Instruction asked if the State Department of Education could accept federal funds under the Elementary and Secondary Education Act.<sup>167</sup> One section of the Act allotted funds to state education agencies to meet the needs of "educationally deprived children . . . from low-income families." The law specifically included such children enrolled in private schools. The Attorney General opined that the federal requirement that state agencies provide for children in private schools might "easily result in a violation of Article XI, Sections 2 and 10 [of the Nevada Constitution]."<sup>168</sup> Unfortunately, having made such a portentous statement, the opinion offered no further analysis of those sections. Instead, quoting from *Hallock* and referring generally to prior Attorney General opinions, the Attorney General concluded, unhelpfully, that the Department of Education could accept federal funds so long as the Department maintained "'separate the legitimate use (of funds) from that which is forbidden.'"<sup>169</sup>

In 1970, the Nevada Educational Communications Commission began a program of providing instructional television broadcasts to schools within the state, charging a flat fee for the service. The Commission asked the Attorney General if it would be constitutionally permissible to offer these services to private and parochial schools under the same fee schedule. The Attorney General ruled that this plan conformed to the state constitution, as the costs of the programming would not increase due to the larger distribution, and in fact the costs to the public schools would actually decline. The state was not providing benefits to the parochial schools on account of their religious orientation.<sup>170</sup>

The Attorney General opinions we have considered span nearly sixty years. It is difficult to make generalizations about Nevada's Little Blaine

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<sup>164</sup> Op. Nev. Att'y Gen. 79-A (1979). Curiously, the Attorney General borrowed the definition of the term "sectarian" not from *Hallock*, but rather from *Gerhardt v. Heid*, 267 N.W. 127 (N.D. 1936).

<sup>165</sup> Op. Nev. Att'y Gen. B-40 (1941).

<sup>166</sup> *Id.*

<sup>167</sup> Elementary & Secondary Education Act, Pub. L. No. 89-10, 79 Stat. 27. See *Agostini v. Felton*, 521 U.S. 203 (1997).

<sup>168</sup> Op. Nev. Att'y Gen. 276 (1965).

<sup>169</sup> *Id.* (quoting *State ex rel. Nev. Orphan Asylum v. Hallock*, 16 Nev. 373, 388 (1882)).

<sup>170</sup> Op. Nev. Att'y Gen. 668 (1970).



Amendment because the Attorney General's opinions (with a couple of exceptions) make little effort to distinguish Section 10 from the federal Establishment Clause. Thus, while frequently citing Article 11, Section 10, the opinions largely reach conclusions that reflect the then-current views of the U.S. Supreme Court. This is understandable, of course, but it does not help us understand what, if anything, Section 10 adds to the Establishment Clause. Only recently has the Attorney General recognized that Section 10 serves a role independent of the Establishment Clause jurisprudence.

In general, the Attorney General has concluded that Section 10 does not bar state subsidies to sectarian institutions, such as hospitals or parochial schools, where the purpose for the expenditure can be clearly identified and is not sectarian in nature; the Attorney General has thus made some effort to distinguish legitimate from illegitimate purposes. The Attorney General has also held, generally, that Section 10 does not bar reasonable accommodations to state employees or state prisoners. By contrast, the Attorney General, in various opinions dealing with after-hours use of public facilities, remains focused on the idea that use of public facilities subsidizes religious purposes; the Attorney General has reached a similar conclusion with respect to offers of services to religious institutions. In these instances, the Attorney General has made clear that religious institutions must pay a reasonable fee for the use of public buildings or receipt of government services and that this is a requirement imposed by Section 10 of the Nevada Constitution and not necessarily by the federal Establishment Clause. Accordingly, there does appear to be an area in which Section 10 stands as a constraint independent of the U.S. Constitution.

### III. RELIGIOUS PARTICIPATION IN PUBLIC PROGRAMS: SOME RECENT TRENDS

The states' Little Blaine Amendments have lain dormant for many years. So far as we can determine, until very recently, no state has had the occasion to decide any matter under its Little Blaine Amendment. Furthermore, the U.S. Supreme Court has never had before it a challenge to the constitutionality of a Little Blaine Amendment. Either no state had considered programs that might run afoul of the amendments, or the Supreme Court's views of the Establishment Clause of the U.S. Constitution precluded, as a practical matter, the need to consider state legislation under the Little Blaine Amendments.

The time may have arrived when state and federal courts will have to reexamine the application and constitutionality of the Little Blaine Amendments. There has been a clear shift in the Supreme Court's Establishment and Free Exercise Clause jurisprudence. At one time hostile to any notion of government funding of educational or charitable activities that were religiously sponsored, the Court has become more solicitous of innovative partnerships between governments and religious institutions. The Court's recent decisions suggest that the Establishment Clause may not impede new government programs that involve religious institutions. The question becomes, do the Little Blaine Amendments stand as such an impediment and, if so, are the Little Blaine Amendments themselves constitutional?

*A. Religion, Liberty, and Equality*

Professor Kurland once noted that the proper division between church and state was an issue destined “to generate heat rather than light.”<sup>171</sup> In this section, we review some of the recent trends in the religion clause cases in the Supreme Court. What follows is an effort to make sense of some perceptible changes in the Court’s approach during the past decade. It is not an effort to reformulate the Constitution’s norms, but an effort to describe what the Court has done.

Prior to 1990, the Supreme Court’s religion clause jurisprudence employed “religious liberty” as its guiding principle. For the Free Exercise Clause, this meant that the First Amendment prohibited government from regulating religious beliefs.<sup>172</sup> Additionally, government could not interfere with religious practices unless the government had a compelling interest and its regulation was narrowly tailored to that interest. As announced, this was a very religion-protective standard. For example, in *Sherbert v. Verner*,<sup>173</sup> South Carolina refused unemployment benefits to a Seventh-day Adventist who quit because her employer required her to work on her Sabbath. The Court held that South Carolina violated her Free Exercise rights: “The ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand.”<sup>174</sup> By denying her benefits, South Carolina had “penalize[d]” her free exercise and “constrained[ed]” her to abandon her religious convictions.<sup>175</sup> *Sherbert* and the cases that followed it<sup>176</sup> appeared to require governments to exempt religiously motivated persons from the laws. Unfortunately, the Court had an easier time announcing the principle than enforcing it. The Court rejected most free exercise claims, even where the government’s actions interfered with religious practices.<sup>177</sup>

<sup>171</sup> PHILLIP KURLAND, *RELIGION AND THE LAW* 15 (1962).

<sup>172</sup> *Reynolds v. United States*, 98 U.S. 145 (1878).

<sup>173</sup> 374 U.S. 398 (1963).

<sup>174</sup> *Id.* at 404.

<sup>175</sup> *Id.* at 406, 410.

<sup>176</sup> *See, e.g.*, *Frazee v. Ill. Dep’t of Employment Sec.*, 489 U.S. 829 (1989) (applying *Sherbert* to unemployment compensation claimant who refused to work on Sunday, though not a member of a recognized sect); *Hobbie v. Unemployment Appeals Comm’n*, 480 U.S. 136 (1987) (applying *Sherbert* to unemployment compensation claimant who adopted new religious beliefs after she began work and then refused to work on her Sabbath); *Thomas v. Review Bd. of the Ind. Employment Sec. Div.*, 450 U.S. 707 (1981) (holding that Indiana violated the Free Exercise Clause when it denied unemployment benefits to a Jehovah’s Witness who quit his job in plant manufacturing military equipment); *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (holding that Wisconsin violated the Free Exercise Clause by sanctioning Amish parents who refused for religious reasons to send their children to school); *Sherbert v. Verner*, 374 U.S. 398 (1963) (holding that South Carolina violated the Free Exercise Clause when it denied unemployment benefits to Seventh Day Adventist who refused to work on Saturdays).

<sup>177</sup> *See, e.g.*, *Lyng v. N.W. Indian Cemetery Protective Ass’n*, 485 U.S. 439 (1988) (denying a Free Exercise claim by various Indian tribes that a Forest Service plan for harvesting timber would destroy an area sacred to the tribes); *O’Lone v. Estate of Shabazz*, 482 U.S. 342 (1987) (denying a Free Exercise claim by Muslim prisoners that a Pennsylvania work-release policy interfered with their required worship services); *Bowen v. Roy*, 476 U.S. 693 (1986) (denying a Free Exercise claim by Native Americans that the use of a social security

On the Establishment Clause side, the Court regularly disqualified religious organizations from participating in many government programs, even as a means of accommodating the religiously inclined.<sup>178</sup> For example, in *Aguilar v. Felton*,<sup>179</sup> the Court struck down Title I of the Elementary and Secondary School Act of 1965 insofar as it authorized financial assistance to private schools serving at-risk students in low-income areas. New York had implemented Title I by providing remedial reading and mathematics services to parochial school students; the classes were taught by public school teachers who volunteered to teach in the parochial schools. The Court concluded that the program “inevitably result[ed] in the excessive entanglement of church and state.”<sup>180</sup>

There was a certain logic and symmetry to the “liberty” theme in the Court’s religion cases. The Court came down hard on cozy relationships between government and organized religion, but it also intervened to shield religionists from especially intrusive government actions, particularly those that trampled minority religious practices. While the Court barred organized religions under the Establishment Clause from participating in many governmental programs, the disability was balanced out on the Free Exercise side because the Court privileged religionists whose practices conflicted with the requirements of the law. Religious affiliation was both benefit and curse under this scheme. Indeed, the scheme was very conscious of religion.

The Court had difficulty maintaining the “liberty” model. The Court had a terrible time distinguishing between government actions that directly benefited religion and those that incidentally benefited religion. As a result, the Court’s Establishment Clause jurisprudence was a mess. On the other hand, the Court, for all of its professed admiration for religionists forced to choose between their religious practices and government programs, had a hard time figuring out how to exempt religionists from the laws.

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number to obtain AFDC benefits violated their religious beliefs); *Goldman v. Weinberger*, 475 U.S. 503 (1986) (denying a Free Exercise claim by a Jewish serviceman that Air Force policy would not allow him to wear his yarmulke).

<sup>178</sup> See, e.g., *Edwards v. Aguillard*, 482 U.S. 578 (1987) (holding unconstitutional a Louisiana statute requiring public schools to teach “creation science” if they taught the theory of human evolution); *Aguilar v. Felton*, 473 U.S. 402 (1985) (holding unconstitutional a federal program providing remedial education to deprived children attending parochial schools), *overruled by Mitchell v. Helms*, 530 U.S. 793 (2000); *Grand Rapids Sch. Dist. v. Ball*, 473 U.S. 373 (1985) (holding unconstitutional a Michigan program in which parochial school teachers were paid with public monies to conduct evening community education classes at the parochial school), *overruled by Mitchell v. Helms*, 530 U.S. 793 (2000); *Wallace v. Jaffree*, 472 U.S. 38 (1985) (holding unconstitutional an Alabama statute requiring schools to have a moment of silence at the beginning of the day); *Comm. for Pub. Educ. v. Nyquist*, 413 U.S. 756 (1973) (holding unconstitutional a New York statute giving direct money grants for building repair and maintenance to schools, public or private, that served low-income areas); *Lemon v. Kurtzman*, 403 U.S. 602 (1971) (holding unconstitutional a Rhode Island statute reimbursing nonpublic schools for teachers’ salaries and textbooks used in certain secular courses); *Illinois ex rel. McCollum v. Bd. of Educ.* 333 U.S. 203 (1948) (holding unconstitutional an Illinois program releasing public school students to attend religious classes conducted at the public school).

<sup>179</sup> 473 U.S. 402 (1985), *overruled by Mitchell v. Helms*, 530 U.S. 793 (2000).

<sup>180</sup> *Id.* at 409.

In 1990, without overruling any of its prior cases, the Court made a dramatic shift away from the theme of “religious liberty” to one of “religious equality.” Some cases decided during the 1980s under the Establishment Clause presaged the shift,<sup>181</sup> but the change was most obvious in *Employment Division v. Smith*.<sup>182</sup> In *Smith*, Oregon denied unemployment benefits to two members of the Native American Church who were fired as drug rehabilitation counselors for their use of peyote, a controlled substance. The Court held that the Oregon decision did not violate the counselors’ Free Exercise rights because it had not singled the counselors out for their religious beliefs. In other words, so long as Oregon dealt with all peyote-ingesting persons in the same way, it would not violate the Free Exercise Clause; the Clause was violated when a state prohibited acts “only when they are engaged in for religious reasons, or only because of the religious belief that they display.”<sup>183</sup> The Court refused to excuse the counselors, on the basis of their religiously motivated conduct, from Oregon law: “the State is free to withhold unemployment compensation from respondents for engaging in work-related misconduct, despite its religious motivation.”<sup>184</sup> *Smith* caused a firestorm because it appeared to be a reversal of course.<sup>185</sup> In fact, “the constitutional history of the free Exercise Clause is almost completely against religious exemptions . . . [T]he aberrations are *Sherbert* and [*Wisconsin v.*] *Yoder*, not *Smith*.”<sup>186</sup>

*Smith* put the Court in an uncomfortable position, one that appeared hostile to religion. If the Court followed its “liberty” cases, the Establishment Clause prevented religious institutions from participating in certain government programs on the same basis as secular institutions. On the other hand, after *Smith*, there was no *quid pro quo* on the Free Exercise side; so long as the

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<sup>181</sup> See, e.g., *Bowen v. Kendrick*, 487 U.S. 589 (1988) (Adolescent Family Life Act, which authorized federal grant recipients to involve “religious and charitable organizations,” did not violate the Establishment Clause on its face); *Mueller v. Allen*, 463 U.S. 388 (1983) (upholding a Minnesota tax deduction for tuition at private schools (including parochial schools)); *Witters v. Wash. Dep’t of Serv. for the Blind*, 474 U.S. 481 (1986) (upholding a Washington program which paid for vocational rehabilitation services for a blind student who used the grant at a Christian college to study for the ministry); *Widmar v. Vincent*, 454 U.S. 263 (1981) (holding unconstitutional a University of Missouri-Kansas City rule forbidding student organizations from using university facilities for religious worship or teaching).

<sup>182</sup> 494 U.S. 872 (1990).

<sup>183</sup> *Id.* at 877. Following *Smith*, the Court held in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), that the City of Hialeah had singled out a religious group when it enacted a city ordinance barring the ritual slaughter of animals. The ordinance barred only ritual slaughter, not slaughter for other purposes, such as consumption.

<sup>184</sup> *Smith*, 494 U.S. at 876 (quoting *Employment Div. v. Smith*, 485 U.S. 660, 872 (1988)).

<sup>185</sup> See, e.g., James D. Gordon III, *Free Exercise on the Mountaintop*, 79 CAL. L. REV. 91 (1991); Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109 (1990). *Smith*’s defenders were slow to defend the Court’s opinion, even as they defended the result. See, e.g., William P. Marshall, *In Defense of Smith and Free Exercise Revisionism*, 58 U. CHI. L. REV. 308 (1991).

<sup>186</sup> Frederick Mark Gedicks, *An Unfirm Foundation: The Regrettable Indefensibility of Religious Exemptions*, 20 U. ARK. LITTLE ROCK L.J. 555, 561-62 (1998). See also Jay S. Bybee, *Substantive Due Process and Free Exercise of Religion: Meyer, Pierce and the Origins of Wisconsin v. Yoder*, 25 CAP. U. L. REV. 887, 927-29 (1996) (explaining why *Yoder* was “long on rhetoric and short on substance” and had “limited impact”).

government had not singled out religionists, they were to be treated the same as everybody else. This appeared to be a very religion-hostile turn.

The Court closed this gap with a series of cases in which it held that religious institutions might participate in government programs on the same basis as other institutions. The Court held, for example, that the Establishment Clause does not forbid a university from funding student magazines, even if one of the magazines was religious in nature.<sup>187</sup> A state may fund, under a broad program to assist handicapped students, a signer for a deaf child, even though the child attends parochial schools.<sup>188</sup> More recently, in *Agostini v. Felton*, the Court approved federal programs that offer public diagnostic and remedial services, even if the services are provided to parochial students at school.<sup>189</sup> And, in *Mitchell v. Helms*, the Court approved a Louisiana program that loaned educational materials such as computers, projectors, and VCRs, to private schools, including sectarian institutions.<sup>190</sup> In both *Agostini* and *Mitchell*, the Court overruled several of its Establishment Clause decisions that religionists had long derided as religion-hostile.<sup>191</sup>

In sum, although the norm has shifted, once again there is symmetry and logic to the Court's cases. In general, the Free Exercise Clause means that the law may not discriminate against religionists; it does not mean that religionists enjoy preferred status. On the Establishment Clause side, it means that the First Amendment does specially disable religious institutions; they may participate in broad government programs on the same basis as non-sectarian institutions. If the "liberty" model was religion-intensive, the Court's "equality" model prefers to ignore religion. The shift also makes the religion clauses easier to administer because it reduces the courts' need to balance government's impact on religious practices, or religious institutions' influence on government.

### B. Religion, Liberty and "Charitable Choice"

The shift in the Court's approach to religion cases has two important consequences for our discussion. First, it makes it more likely that the Court will approve of some form of "charitable choice" provisions or educational voucher programs in which religious institutions seek to participate on an equal basis in government programs. Second, if the Establishment Clause no longer bars these programs, it makes it more likely that state courts will have to construe their own constitutions, including their Little Blaine Amendments. The Court's shift from "liberty" to "equality" in the Religion Clauses will place new empha-

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<sup>187</sup> *Rosenberger v. Rectors & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995).

<sup>188</sup> *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993). See also *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753 (1995); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993).

<sup>189</sup> *Agostini v. Felton*, 521 U.S. 203 (1997).

<sup>190</sup> *Mitchell v. Helms*, 530 U.S. 793, 825-29 (2000) (plurality opinion of Thomas, J.).

<sup>191</sup> *Agostini* overruled *Felton* and *Ball*. See *Agostini*, 521 U.S. at 236. The *Mitchell* Court overruled *Meek v. Pittenger*, 421 U.S. 349 (1975) and *Wolman v. Walter*, 433 U.S. 229 (1977). See *Mitchell*, 530 U.S. at 835 (plurality opinion of Thomas, J.); *id.* at 837 (O'Connor, J., concurring in the judgment).

sis on state free exercise and establishment clause provisions.<sup>192</sup> Although a number of states have already construed their own establishment clauses or Little Blaine Amendments to place greater restrictions on religious institutions' participation in vouchers or other public programs,<sup>193</sup> the Court's recent jurisprudence raises the possibility that such religion-restrictive provisions are themselves unconstitutional.<sup>194</sup>

Cases from Washington and Arizona provide an interesting context in which to view these issues because the state supreme courts were construing identical Little Blaine Amendments. Larry Witters was legally blind and qualified for vocational assistance under Washington law. Washington, however, denied his request for assistance because he would have used the assistance to study at a Bible college in preparation for the ministry. The Washington Supreme Court, construing the First and Fourteenth Amendments to the U.S. Constitution, stated that "[i]t is not the role of the state to pay for the religious education of future ministers" and held that providing assistance to Witters

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<sup>192</sup> See, e.g., Heytens, *supra* note 17, at 117; Linda S. Wendtland, Note, *Beyond The Establishment Clause: Enforcing Separation of Church and State Through State Constitutional Provisions*, 71 VA. L. REV. 625 (1985).

<sup>193</sup> See, e.g., *Simmons-Harris v. Zelman*, 234 F.3d 945 (6th Cir. 2000) (finding that the Ohio Pilot Scholarship Program violated the Establishment Clause of the First Amendment), *cert. granted*, Nos. 00-1751, 00-1777, 00-1779 (argued Feb. 20, 2002); *Strout v. Albanese*, 178 F.3d 57 (1st Cir. 1999) (upholding Maine statute authorizing direct grants for tuition reimbursement for students attending non-sectarian high schools), *cert. denied*, 528 U.S. 931 (1999); *R.I. Fed'n of Teachers, AFL-CIO v. Norberg*, 630 F.2d 855 (1st Cir. 1980) (finding unconstitutional under Establishment Clause of First Amendment a state statute allowing for a state income tax deduction for expenses incurred by citizens having children in private schools); *Pub. Funds for Pub. Sch. of N.J. v. Byrne*, 590 F.2d 514 (3d Cir. 1979) (holding that state statute allowing state income tax deduction for taxpayers with children attending non-public schools unconstitutional under Establishment Clause of First Amendment); *Columbia Union Coll. v. Oliver*, 2000 U.S. Dist. Lexis 13644 (D. Md. Aug. 17, 2000) (allowing for private, religiously affiliated college to receive state funds under state's Seller Program); *Opinion of the Justices*, 616 A.2d 478 (N.H. 1992) (advisory opinion finding unconstitutional proposed legislation allowing parent to send child to state approved school, including sectarian schools, with state funding offsetting at least some of the tuition, as violative of Part I, art. 7 of state constitution); *People ex rel. Klinger v. Howlett*, 305 N.E.2d 129 (Ill. 1973) (holding that state program providing state grant for partial expenses to parents of children attending non-public schools unconstitutional under Establishment Clause of First Amendment); *Bagley v. Raymond Sch. Dep't*, 728 A.2d 127 (Me. 1999) (upholding state education tuition program statute that excluded religious schools from receipt of funds under program), *cert. denied*, 528 U.S. 947 (1999); *Exeter-West Greenwich Reg'l Sch. Dist. v. Pontarelli*, 460 A.2d 934 (R.I. 1983) (affirming ruling that school district which did not maintain its own high school, but paid tuition for its students to attend named high school, did not have to pay high school student's tuition to attend religiously affiliated school of student's choice); *Chittenden Town Sch. Dist. v. Dep't of Educ.*, 738 A.2d 539 (Vt. 1999) (finding a tuition reimbursement scheme in violation of Ch. I, Art. 3 of state constitution), *cert. denied*, 528 U.S. 1066 (1999); *Campbell v. Manchester Bd. of Sch. Dir.*, 641 A.2d 352 (Vt. 1994) (finding no Establishment Clause violation resulting from program where school board paid costs of high school student attending sectarian school as a result of district not having its own high school); *Jackson v. Benson*, 578 N.W.2d 602 (Wis. 1998) (upholding constitutionality of Milwaukee Parental Choice Program), *cert. denied*, 525 U.S. 997 (1998).

<sup>194</sup> Heytens, *supra* note 17, at 125-31.

would violate the Establishment Clause.<sup>195</sup> The U.S. Supreme Court reversed. "Washington's program is 'made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited,'" and is in no way skewed towards religion."<sup>196</sup> The Court remanded the case, however, for consideration under the Washington Constitution. On remand, the Washington Supreme Court held that funding Witters's education would violate Washington's Little Blaine Amendment.<sup>197</sup> Witters's petition fell "precisely within the clear language of the state constitutional prohibition against applying public moneys to any religious instruction."<sup>198</sup> Three justices dissented. They would have held that "in granting Mr. Witters money for his vocational training, the state is neither appropriating nor applying funds for religious instruction. The state is merely appropriating public funds for a neutral vocational rehabilitation program."<sup>199</sup> The U.S. Supreme Court denied the petition for certiorari.<sup>200</sup>

Contrast *Witters* with a recent decision of the Arizona Supreme Court construing an identical provision in the Arizona Constitution. In *Kotterman v. Killian*,<sup>201</sup> the petitioners challenged an Arizona statute that allowed a state tax credit of up to \$500 for a donation to a "school tuition organization," insofar as such donations went to sectarian schools. Construing Arizona's Little Blaine Amendment,<sup>202</sup> the Arizona Supreme Court held that the tax credit did not constitute "public money" under its Little Blaine Amendment. A dissenting justice identified Arizona's provision as identical to Washington's and noted their connection to the larger debate over the federal Blaine Amendment and Catholic education. He would have concluded that "the history and text of Arizona's religion clauses make it clear that the delegates to the 1910 [Arizona constitutional] convention were well aware of the recent sectarian battles and the resulting Blaine Amendment and did not intend to give the Legislature the power to subsidize a private, sectarian school system."<sup>203</sup>

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<sup>195</sup> *Witters v. State Comm'n for the Blind* ("*Witters I*"), 689 P.2d 53 (Wash. 1984), *rev'd sub nom.*, *Witters v. Wash. Dep't of Serv. for the Blind*, 474 U.S. 481 (1986).

<sup>196</sup> *Witters I*, 474 U.S. at 487-88 (quoting Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 782-83 n.38 (1973)).

<sup>197</sup> WASH. CONST. art. I, § 11 ("No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment."); see *Witters I*, 689 P.2d at 64-65 (Utter, J., dissenting) (discussing the anti-Catholic origins of the Washington provision).

<sup>198</sup> *Witters v. State Comm'n for the Blind* ("*Witters II*"), 771 P.2d 1119, 1121 (Wash. 1989), *cert. denied*, 489 U.S. 850 (1989).

<sup>199</sup> *Id.* at 1125 (Utter, J., dissenting).

<sup>200</sup> 489 U.S. 850 (1989).

<sup>201</sup> 972 P.2d 606 (Ariz. 1999).

<sup>202</sup> ARIZ. CONST. art. II, § 12 ("No public money or property shall be appropriated for or applied to any religious worship, exercise, or instruction, or to the support of any religious establishment."). See *Kotterman*, 972 P.2d at 624-25 (discussing the Blaine Amendment and the history of the Arizona provision); *Kotterman*, 972 P.2d at 631-38 (Feldman, J., dissenting) (same). See also ARIZ. CONST. art. IX, § 10 ("No tax shall be laid or appropriation of public money made in aid of any church, or private or sectarian school, or any public service corporation"); art. XI, § 7 ("No sectarian instruction shall be imparted in any school or State education institution that may be established under this Constitution.").

<sup>203</sup> *Kotterman*, 972 P.2d at 639 (Feldman, J., dissenting).

The cases are not necessarily irreconcilable, but the contrasts are striking. Arizona took a broader, more forgiving view of its Little Blaine Amendment, even as it drew a narrow distinction between tax credits and "public money." Washington took a much harder view of its Little Blaine Amendment, construing its provision to be narrower than the Establishment Clause of the U.S. Constitution. Although the Supreme Court denied the petition for a writ of certiorari in *Witters II*, little can be read into that action. The U.S. Supreme Court has since built upon its *Witters* decision in *Bowen*, *Zobrest*, *Lamb's Chapel*, *Rosenberger*, and *Mitchell*. These not only reaffirm *Witters*, but also may suggest that it would violate the First Amendment for Washington to refuse to allow Larry Witters to participate in a state program because of his religious activities.

#### IV. NEVADA'S "LITTLE BLAINE AMENDMENT" AND THE FUTURE OF RELIGIOUS PARTICIPATION IN PUBLIC PROGRAMS

All of this leads to the ultimate question: What does Section 10 mean today? What does it mean for a charitable choice or educational choice system in the state of Nevada? The question does not simply invite speculation. Although Nevada has not adopted a school voucher program nor, so far as we are aware, have any affirmative steps been taken in that direction,<sup>204</sup> vouchers have been the subject of much discussion in the recent presidential election, and new proposals may be forthcoming. Aside from the question of vouchers, however, Nevada has adopted a charitable choice provision. During the 1999 legislative session, the legislature passed Assembly Bill 318, which revised provisions granting city and county authorities to expend money and convey property to nonprofit organizations. Nev. Rev. Stat. 244.1505, for example, currently provides that a county commission "may expend money for any purpose which will provide a substantial benefit to the inhabitants of the county. The board may grant all or part of the money to a nonprofit organization created for religious, charitable or educational purposes to be expended for the selected purpose."<sup>205</sup> County commissions may also donate certain "[c]ommodities, supplies, materials, and equipment" to nonprofit organizations, including religious ones.<sup>206</sup> When making the grant, the county commission must specify the purpose for the grant or donation and any conditions on the expenditure or use of the property.<sup>207</sup> Does Section 244.028, authorizing the "grant . . . [of] money to a nonprofit organization created for religious . . . purposes" violate Section 10, which prohibits the use of "public [County] funds . . . for sectarian purposes?"

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<sup>204</sup> A bill to establish a voucher program in Nevada died in committee during the 1999 legislative session. See Jennifer Crowe, *Nevada Playing Catch-Up in Public School Alternatives*, RENO GAZETTE-J., Dec. 5, 1999, available at [http://www.rgj.com/news\\_old/stories/reno/944373450.htm](http://www.rgj.com/news_old/stories/reno/944373450.htm).

<sup>205</sup> NEV. REV. STAT. 244.1505.1 (1999). The legislature granted similar authority to cities. NEV. REV. STAT. 268.028 (1999).

<sup>206</sup> NEV. REV. STAT. 244.1505.2(a) (1999). Cf. NEV. REV. STAT. 268.028.2 (1999) (similar authority granted to cities).

<sup>207</sup> NEV. REV. STAT. 244.1505.3 (1999). Cf. NEV. REV. STAT. 268.028.3 (1999) (similar requirement for cities).



In this final part we discuss how Nevada courts might construe Section 10. We do not consider how the U.S. Supreme Court would view Nevada's charitable choice program, aid to the Nevada Orphan's Asylum, or any other Nevada program. We will, however, refer to U.S. cases as an aid to understanding how Nevada courts might interpret Section 10 and to comprehending how, if at all, decisions under the U.S. Constitution might inform that judgment.

*A. Section 10 and the Meaning of "Public Funds"*

Section 10 prohibits the use of "public funds," whether the funds originate with the state, a county or a municipality, in support of sectarian purposes. First, we should note that Nevada's Little Blaine Amendment is at least a constraint on state *spending*. Not everything that state government does involves "public funds," but spending covers substantial territory; nearly every program administered or supported by the state can be said to involve state funding. Does Section 10 apply broadly to all matters in which "public funds" played some role, or is it a more narrow constraint on line item spending? To illustrate: Is there a difference between direct state funding of the Nevada Orphan's Asylum, which was religiously-sponsored, and state funding of public buildings, which might subsequently be made available to religious organizations on a non-discriminatory basis? The Attorney General, at least, has taken the position that the use of public buildings comes within Section 10's restriction on the use of "public funds."<sup>208</sup>

The Attorney General's expansive construction of Section 10 may have significant collateral consequences for state and local administration. Suppose that state and local governments were willing to make public property such as schools or community and recreation centers available for occasional use by private groups. Under the Attorney General's reading of Section 10, Nevada must charge religious groups a fee for the use of the property. May Nevada charge religious groups for the use of the property if it does not charge non-religious groups? Such a policy would likely violate either the Free Exercise Clause or the Equal Protection Clause of the federal constitution,<sup>209</sup> and might even violate the Liberty of Conscience Clause of the Nevada Constitution.<sup>210</sup> If so, Section 10 has become a much broader constraint on state activities, because Nevada will have to choose between charging all groups for the use of public property or not making public property available at all, neither of which it was inclined to do in the first place.<sup>211</sup>

<sup>208</sup> See Op. Nev. Att'y Gen. 93-2 (Mar. 16, 1993).

<sup>209</sup> See, e.g., *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993) (striking down a school rule that permitted secular use of school property, but forbidding use for religious purposes); *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995) (invalidating university policy that authorized payment for student publications, but forbid payment for student publications that promoted belief in deity or an ultimate reality).

<sup>210</sup> NEV. CONST. art. I, § 4 ("The free exercise and enjoyment of religious profession and worship without discrimination or preference shall forever be allowed in this State, and . . . the liberty of conscience hereby secured . . .").

<sup>211</sup> See Op. Nev. Att'y Gen. 93-2 (Mar. 16, 1993) (noting that under Clark County School District rules some uses of school buildings were permitted free of charge, while others required a fee; concluding that Section 10 requires sectarian groups to pay the cost associated with the use of the building).

Furthermore, Article 11, Section 10, is not just a constraint on *state* spending. By its literal terms, Section 10 prohibits a particular use of “public funds.” We should note that Section 10 is phrased in the passive voice, thereby disguising the party(ies) to which it applies.<sup>212</sup> We assume that the various branches of state and local government are barred from using public funds for sectarian purposes, but Section 10 is not limited to state actors. Had that been the framers’ intention, they could easily have forbidden the legislature from appropriating, and the executive from spending, funds for sectarian purposes. Instead, the framers of Section 10 simply constrained the “use[ ]” of public funds, a restriction that applies to private, as well as public, entities.

At what point do public funds cease to be the public’s funds, so that Section 10 no longer constrains their use? Suppose Nevada awarded a block grant to the United Way to support efforts to feed the homeless, and the United Way then devoted some part of the grant to Catholic Charities? Or suppose that an individual donated foodstuffs purchased with state-issued food stamps to the Salvation Army? Aside from the question whether feeding the homeless constitutes a religious purpose, are the funds still public? Must the state place conditions on the further use of state funds?<sup>213</sup> In the education context, could Nevada issue vouchers to parents, who could then use the voucher at a private religious school? Can the parents act as a filter to avoid the restrictions Section 10 might impose on direct aid to a religious school? Or, consider Nevada’s new charitable choice provision. Suppose a county donated “[c]ommodities, supplies, materials and equipment that the [county] determines to have reached the end of their useful lives”<sup>214</sup> to religious nonprofit organizations. The commodities, supplies, materials and equipment are not, strictly speaking, “public funds,” but they are likely items that the county purchased with public funds. Is the donation subject to the Little Blaine Amendment? From an economic perspective, there is no difference between donating funds and donating commodities, but government might have greater concerns over contributing money than contributing commodities.<sup>215</sup> From a historical perspective, there is, of course, an explanation for why Section 10 refers to “public funds”: At the time Nevadans adopted Section 10, their immediate concern was the line-item grant of public funds, not public commodities, to a Catholic orphanage.

### *B. Section 10 and the Meaning of “Sectarian Purposes”*

Nevada’s Little Blaine Amendment revives a question raised during the debates in Congress over the Blaine Amendment: Does the phrase “sectarian”

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<sup>212</sup> See Jay S. Bybee, *Common Ground: Robert Jackson, Antonin Scalia, and A Power Theory of the First Amendment*, 75 TUL. L. REV. 251, 319-21 (2000) (discussing the use of passive voice and active voice in the U.S. Constitution). See also David M. Skover, *The Washington Constitutional “State Action” Doctrine: A Fundamental Right to State Action*, 8 PUGET SOUND L. REV. 221, 224-45 (1985) (discussing the implications of use of passive voice in the Washington Constitution).

<sup>213</sup> See *Mitchell v. Helms*, 530 U.S. 793, 815-19 (2000) (discussing “direct” and “indirect” aid to religious institutions) (plurality opinion).

<sup>214</sup> NEV. REV. STAT. 244.1505.2(a), 268.028.2 (2001).

<sup>215</sup> See *Mitchell*, 530 U.S. at 818-20.

refer to various religious sects or to religious denominations generally?<sup>216</sup> If “sectarian” refers to religious sects, then Section 10 is largely a non-discrimination provision. It would not prevent Nevada from enacting a law that benefited all private schools, including religious ones, because the law would not serve “sectarian purposes.” But it would forbid the state from picking and choosing among religious sects – refusing to fund Baptist schools, for example, or funding only Lutheran schools. On the other hand, if “sectarian” refers to religion generally, then Nevada could not enact a program under which private schools might participate if that includes parochial schools.

There is language in *Hallock* that might be read to support either reading of “sectarian.” The court stated, somewhat ambiguously, that Section 10 means that “public funds should not be used, directly or indirectly for the building up of any sect,”<sup>217</sup> which suggests that Section 10 would bar public funding of a program that benefited any religious sect or denomination, irrespective of whether the legislature made the program available on a nondiscriminatory basis to all sects or denominations.<sup>218</sup> Elsewhere in *Hallock*, however, the court read “sectarian” in its “popular sense” as a body of number of persons united in tenets, but constituting a distinct organization or party, by holding sentiments or doctrines different from those of other sects or people.”<sup>219</sup> The latter reading is consistent with Section 10’s history. As the court noted in *Hallock*, the Nevada Orphan Asylum’s “continued application greatly, if not entirely, impelled the adoption of the constitutional amendment.”<sup>220</sup> Section 10 was a silver bullet, a constitutional fix for a particular problem: “the use of public funds for the benefit of [the Asylum] and kindred institutions [St. Mary’s School], was an evil which ought to be remedied.”<sup>221</sup>

Given a choice, Nevada courts may wish to construe Section 10 to bar state aid that is targeted to specific religious sects, and not to bar more inclusive measures. In *Mitchell*, the plurality noted the “shameful pedigree” of state and federal hostility to aid that found its way to religious institutions.

Opposition to aid to “sectarian” schools acquired prominence in the 1870’s with Congress’s consideration (and near passage) of the Blaine Amendment, which would have amended the Constitution to bar any aid to sectarian institutions. Consideration of the amendment arose at a time of pervasive hostility to the Catholic Church and to

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<sup>216</sup> See *supra* text accompanying note 39. The term “sectarian” appears in two other provisions of the Nevada Constitution; neither sheds light on this question. See NEV. CONST. art. 11, § 2 (the legislature shall provide for a uniform system of common schools . . . and any school district which shall allow instruction of a sectarian character therein may be deprived of its proportion of the interest of the public school fund”) and § 9 (“No sectarian instruction shall be imparted or tolerated in any school or university that may be established under this Constitution.”).

<sup>217</sup> *State ex rel. Nev. Orphan Asylum v. Hallock*, 16 Nev. 373, 387 (1882).

<sup>218</sup> See also *Op. Nev. Att’y Gen.* 685 (Oct. 4, 1948) (citing *Hallock* and concluding that “the reading of the Bible . . . singing of religious hymns, or the . . . introduction in the schools of books, tracts, or papers of a *sectarian or denominational* character is forbidden by . . . the Constitution of the State.”) (emphasis added).

<sup>219</sup> *Hallock*, 16 Nev. at 385.

<sup>220</sup> *Id.* at 383.

<sup>221</sup> *Id.*

Catholics in general, and it was an open secret that "sectarian" was code for "Catholic."<sup>222</sup>

The Nevada courts may cure this latent hostility by reading Section 10 to mean that the state cannot fund the purposes of a single religious sect, but that Section 10 does not disqualify religious institutions from receiving state aid or participating in state programs under a neutral scheme.

Second, what constitutes a sectarian "purpose"? Are all purposes for which a sectarian institution might receive state funds, by definition, sectarian? This is a difficult question. If everything a sectarian institution does serves a sectarian purpose, then Nevada's charitable choice statutes are unconstitutional on their face. In *Hallock*, the court was unwilling to separate the purely religious activities of the Asylum from those more generic activities such as housing, feeding, and clothing the orphans. The court found that, since at least some part of any funds granted to the Asylum would support sectarian purposes, that fact was sufficient to bring the funding within the Little Blaine Amendment. "[I]t is impossible to separate the legitimate use from that which is forbidden."<sup>223</sup> By contrast, the Attorney General has indicated a greater willingness to separate legitimate and illegitimate uses of state funds by religious organizations.<sup>224</sup>

For federal Establishment Clause purposes, the U.S. Supreme Court has taken a different approach. The Court once asked if the recipient of funds was "pervasively sectarian," that is, whether state aid "flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission or when it funds a specifically religious activity in an otherwise substantially secular setting."<sup>225</sup> The Court expressed concern, as did the Nevada Supreme Court in *Hallock*, that an institution might be "so permeated with religion that the secular side cannot be separated from the sectarian."<sup>226</sup> Yet even prior to *Mitchell*, the Court had noted that not every act by a religious institution was necessarily religious: "the proposition that the Establishment Clause prohibits any program which in some manner aids an institution with a religious affiliation has consistently been rejected."<sup>227</sup> The Court had upheld government grants to religious institutions. In *Bradfield v. Roberts*, the U.S. Supreme Court upheld a grant to a Catholic hospital for building construction. Even though the hospital was "conducted under the auspices of the Roman Catholic Church," which "exercise[d] great and perhaps controlling influence over the management of the hospital," the hospital had a limited mission and the Court declined to inquire into "the individual beliefs upon religious matters of the various incorporators."<sup>228</sup> And in *Bowen v. Kendrick*,<sup>229</sup> the Court held that the Adolescent Family Life Act did not violate the Establishment Clause on its face. The Act authorized the funding of demon-

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<sup>222</sup> *Mitchell v. Helms*, 530 U.S. 793, 828 (2000).

<sup>223</sup> *Hallock*, 16 Nev. at 388.

<sup>224</sup> See, e.g., Op. Nev. Att'y Gen. 276 (Nov. 5, 1965).

<sup>225</sup> *Hunt v. McNair*, 413 U.S. 734, 743 (1973).

<sup>226</sup> *Roemer v. Bd. of Pub. Works of Md.*, 426 U.S. 736, 759 (1975).

<sup>227</sup> *Hunt*, 413 U.S. at 742.

<sup>228</sup> *Bradfield v. Roberts*, 175 U.S. 291, 298 (1899).

<sup>229</sup> 487 U.S. 589 (1988).

stration grants for services and research in the area of adolescent sexual relations and pregnancy and required that grant applicants demonstrate how they would, as appropriate, “involve religious and charitable organizations.”<sup>230</sup> “[It] is clear from the face of the statute that the [Act] was motivated primarily, if not entirely, by a legitimate secular purpose – the elimination or reduction of social and economic problems caused by teenage sexuality, pregnancy, and parenthood.”<sup>231</sup> The Court had “never held that religious institutions are disabled by the First Amendment from participating in publicly sponsored social welfare programs.”<sup>232</sup>

More recently, in *Mitchell*, the plurality discarded the “pervasively sectarian” terminology as “born of bigotry,” “unnecessary,” and “offensive.”<sup>233</sup> It was also inconsistent with the way the Court had historically and more recently applied the Establishment Clause to government partnerships with religious institutions. Lower courts, however, have been slow to embrace the point because there was no majority opinion in *Mitchell*.<sup>234</sup>

These cases also help point a significant difference between the U.S. Supreme Court’s construction of the Establishment Clause and the text of Section 10. Under the Supreme Court’s traditional (and controversial) “*Lemon* test,”<sup>235</sup> the Court asks whether a statute has a “secular legislative purpose,” whether “its principal or primary effect . . . [is] one that neither advances nor inhibits religion,” and whether the statute fosters “excessive government entanglement with religion.”<sup>236</sup> Note that under the *Lemon* test, the U.S. Supreme Court asks whether the legislation has a *secular purpose*; it does not ask whether the legislation might also serve some *sectarian purpose*. For the Establishment Clause, it is sufficient if there is secular purpose, so long as any other sectarian purpose does not result in the legislation’s “principal or primary effect” fostering religion. Section 10, by contrast, bans the use of public funds for any “sectarian purpose” – apparently, irrespective of whether the uses of

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<sup>230</sup> 42 U.S.C. § 300z-5(a)(21).

<sup>231</sup> *Bowen*, 487 U.S. at 602.

<sup>232</sup> *Id.* at 609.

<sup>233</sup> *Mitchell v. Helms*, 530 U.S. 793, 828 (2000). Justice Thomas, almost a year prior to his plurality opinion in *Mitchell*, stated that the Court should discard the “pervasively sectarian” test “and reaffirm that the Constitution requires, at a minimum, neutrality not hostility towards religion.” See *Columbia Union Coll. v. Clark*, 119 S. Ct. 2357, 2358 (2000) (mem.) (Thomas, J., dissenting from the denial of certiorari).

<sup>234</sup> See *Steele v. Indus. Dev. Bd. of the Metro. Gov’t of Nashville & Davidson County*, 117 F. Supp. 2d 693 (M.D. Tenn. 2000) (finding that the “pervasively sectarian” test still applicable in the wake of the plurality opinion in *Mitchell*); *Va. Coll. Bldg. Auth. v. Lynn*, 538 S.E.2d 682 (Va. 2000) (same); *Columbia Union Coll. v. Oliver*, 2000 U.S. Dist. Lexis 13644 (D. Md. Aug. 17, 2000) (same).

<sup>235</sup> *Lemon v. Kurtzman*, 403 U.S. 602 (1971). For background on the controversy over whether *Lemon* remains good law, see Michael Stokes Paulsen, *Lemon Is Dead*, 43 CASE W. RES. L. REV. 795 (1993), and the responses thereto; Daniel O. Conkle, *Lemon Lives*, 43 CASE W. RES. L. REV. 865 (1993); Ira C. Lupu, *Which Old Witch: A Comment on Professor Paulsen’s Lemon is Dead*, 43 CASE W. RES. L. REV. 883 (1993); Richard S. Myers, *A Comment on the Death of Lemon*, 43 CASE W. RES. L. REV. 903 (1993).

<sup>236</sup> *Lemon*, 403 U.S. at 612-13. In *Mitchell*, the Court applied two criteria: whether the government’s conduct advanced or endorsed religion. See *Mitchell*, 530 U.S. at 835.

public funds would also serve a legitimate public purpose.<sup>237</sup> Unless the Nevada Supreme Court reads Section 10 to bar only the use of public funds that serve “[*principally*] sectarian purposes,” Section 10 is a more religion-hostile constraint than the Establishment Clause.<sup>238</sup>

### C. Section 10, Liberty and Equality

In the previous section, we suggested that there are a number of ambiguities in the terms “public funds” and “sectarian purposes” that Nevada courts may have to resolve. The choices Nevada courts have to make in construing Section 10 fall along a broad continuum between “religion-hostile” and “religion friendly.” Although, as we pointed out in the contrast between Washington’s and Arizona’s approaches to their own identically-phrased Little Blaine Amendments, Nevada has some leeway under the U.S. Constitution in its interpretation of Section 10, not all choices that Nevada could conceivably make will pass muster under the federal Constitution. In its most recent decisions, the U.S. Supreme Court has plainly favored treating religion on the same basis as competing institutions – neither specially favored, nor specially disabled under the federal constitution.

Suppose that Nevada construed Section 10 – in every respect – against religious participation in public programs. Could Nevada fund private education institutions through a voucher program if it excluded religious institutions in order not to violate its Little Blaine Amendment? The Court’s decisions in *Witters*, *Zobrest*, *Agostini*, and *Mitchell*, suggest that a state *may* adopt neutral programs that benefit religious institutions or persons participating in the program. But *Lambs’ Chapel* and *Rosenberger* further suggest that a state violates some combination of the Free Speech, Free Exercise, or the Equal Protection Clauses when it creates public programs from which it excludes religious institutions or persons because of their manifest religious affiliation. Does this mean that when a state creates a program, it *must* include religious persons or institutions in the program?

We are not yet prepared to say that the Supreme Court will demand that states permit religious institutions to participate in public programs to the same extent as other private, secular institutions. There are too many nuances in the public programs, public participation, and religious worship to make such a sweeping statement. Indeed, even as the Court approved a Louisiana program loaning education materials and equipment to parochial schools, the plurality warned that there are “‘special Establishment Clause dangers’ when money is

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<sup>237</sup> *Mitchell*, 530 U.S. at 827 (plurality opinion) (“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”).

<sup>238</sup> If the Little Blaine Amendment applies to funding of any sectarian organization (because their purposes must likewise be sectarian), then it is far more restrictive than the Establishment Clause, because the federal programs approved in *Agostini* and *Mitchell* would surely run afoul of a provision that forbid spending that benefited any sectarian purpose. Such a construction, moreover, would be inconsistent with the Nevada Attorney General opinions approving of chaplain services in Nevada prisons. See *supra* text accompanying notes 158-62.

given to religious schools or entities directly rather than . . . indirectly.”<sup>239</sup> Moreover, both *Lamb’s Chapel* and *Rosenberger* involved religious institutions excluded from programs because of the context of things they wished to say or publish. Thus, both cases arose in the context of suppression of expression in a limited public forum; charitable choice programs need not arise in such a context. If the Court’s Free Exercise and Equal Protection decisions would forbid strict application of Section 10, the Court’s Establishment Clause decisions might inform any remaining applications, thus making Section 10 coextensive with Establishment and Free Exercise Clauses of the U.S. Constitution. There is sufficient ambiguity in the federal Constitution to make the construction of Section 10 important, but it is also not clear how much room the U.S. Supreme Court’s most recent pronouncements have even left Nevada (or any other state) to maneuver.

Finally, Nevada could adopt the path of least resistance and announce that, although Nevada has no formal Establishment Clause, the combination of the Little Blaine Amendment and the Conscience Clause means that Nevada’s provisions are largely coextensive with federal protections found in the First and Fourteenth Amendments.<sup>240</sup> This argument is plainly ahistorical, since the Conscience Clause predates the Fourteenth Amendment and the Little Blaine Amendment, although adopted after the adoption of the Fourteenth Amendment, and was adopted at a time when incorporation was controversial and long before the U.S. Supreme Court recognized the doctrine.<sup>241</sup> It is an argument that is born of pragmatism, however. Perhaps, in the long view, it is the most workable view of the Nevada Constitution. It would mean that there is no effective gap between the federal and the state constitutions; Nevada will simply follow the lead of cases construing the U.S. Constitution.

## V. CONCLUSION

The Bush Administration’s focus on “charitable choice” programs, together with a national trend towards innovative educational programs such as vouchers, makes it likely that the Nevada courts will have to revisit Article 11, Section 10 in the near future. And when the courts do, they will have to decide how to construe an amendment that was drafted in a different era and for a relatively narrow purpose, one goal of which to inhibit the influence of Catholicism. Our history is replete with examples of laws motivated by prejudice. Many such laws remain on the books, typically because those laws are no longer enforced. Ironically, Nevada’s Little Blaine Amendment found early enforcement and fell into desuetude for more than a century. As faith-based groups seek access on an equal basis to public programs and facilities, Section 10 may enjoy something of a revival. Nevada’s courts will face some demand-

<sup>239</sup> *Mitchell*, 530 U.S. at 818-19 (quoting *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 842 (1994)).

<sup>240</sup> See *Op. Nev. Att’y Gen.* 320 (Mar. 3, 1954) (citing NEV. CONST. art. 1, § 4 and concluding that “the Nevada Constitution, aside from the Fourteenth Amendment . . . prohibits the Legislature from making any law respecting the establishment of religion or prohibiting the free exercise thereof”).

<sup>241</sup> See Jay S. Bybee, *Taking Liberties With the First Amendment: Congress, Section 5, and the Religious Freedom Restoration Act*, 48 VAND. L. REV. 1539, 1596-604 (1995).

ing interpretive challenges as they seek to give modern meaning to its Little Blaine Amendment.