The Locke Exception: What Trinity Lutheran Means for the Future of State Blaine Amendments

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The *Locke* Exception: 
What *Trinity Lutheran* Means for the Future of State Blaine Amendments

Abstract

At its core, this Article is about whether states have the discretion to discriminate against religious organizations by excluding them from generally available secular government aid programs. In the wake of the Supreme Court’s 2004 decision in Locke v. Davey, the federal courts have developed conflicting interpretations of whether the Court’s holding in Locke permits states to exclude religious organizations from generally available secular aid programs. However, the Court’s 2017 decision in Trinity Lutheran v. Comer has cast doubt on the ability of states to exclude religious organizations from such programs and seemingly restricts the Court’s prior decision in Locke to a narrow reading. Reconciling both holdings is difficult, but Locke seemingly provides an exception from Trinity Lutheran’s general rule that prohibits the withholding of aid on the basis of the recipient’s religious character. This Article seeks to reconcile those two holdings and, in the process, posits that the Supreme Court’s current “play in the joints” framework is problematic primarily because it rests on a series of mistakes about the nature and purpose of the Religion Clauses. As a result, the Court’s framework bestows upon the states a large amount of discretion in how to draw the line between discrimination and non-discrimination. Ultimately, foreclosing a state’s discretion to unconstitutionally target religious organizations for exclusion from generally applicable secular aid requires rebuilding a theoretical framework from a proper understanding of the relationship between the Establishment and Free Exercise Clauses as well as acknowledging the importance of substantive neutrality.
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I. INTRODUCTION

In the beginning of George Orwell’s satirical novel Animal Farm, farm animals begin a rebellion to overthrow the humans running a farm.1 After the rebellion, the animals establish a set of seven principles that govern their new regime with the most important principle being that “all animals are equal.”2 By the end of the novel, many years have passed, and it is discovered that the ruling class of animals revised the seven fundamental principles into a single illogical command: “All animals are equal but some animals are more equal than others.”3 The original principle that had once served to ensure equality without distinction was altered to proclaim relative, rather than absolute, equality.4

At certain critical junctures in the Supreme Court’s First Amendment religious clause jurisprudence, the Establishment Clause and Free Exercise Clause of the First Amendment have been applied in a manner that is fundamentally different from the Founders’ intent and design for these clauses.5 This misreading of the First Amendment religion clauses derives from the theory that the Establishment and Free Exercise Clauses are frequently in

2. Id. at 8.
3. Id. at 148–49 (emphasis added).
4. Id.
5. See Carl H. Esbeck, Differentiating the Free Exercise and Establishment Clauses, 42 J. CHURCH & ST. 311, 323 (2000) [hereinafter Differentiating the Free Exercise and Establishment Clauses] (“[T]he task of the Establishment Clause is independent of the Free Exercise Clause’s protection of individual religious rights. Neither clause is subordinate or instrumental to the other. Nor is there ‘tension’ between the clauses . . . .”); see also Thomas C. Berg & Douglas Laycock, The Mistakes in Locke v. Davey and the Future of State Payments for Services by Religious Institutions, 40 TULSA L. REV. 227, 245–46 (2004) [hereinafter The Mistakes in Locke] (asserting that the Establishment Clause and the Free Exercise Clause “should be read as complementary aspects of a single principle” and that interpreting them as conflicting is “a mistake at the most fundamental level”). For further discussion of the misconstrued framework of the First Amendment religion clauses, see the discussion infra Section V.A.1.
tension with one another.  


7. Carl H. Esbeck, “Play in the Joints Between the Religion Clauses” and Other Supreme Court Catachreses, 34 Hofstra L. Rev. 1331, 1333 (2006) [hereinafter Supreme Court Catachreses].

8. Walz, 397 U.S. at 668–69. For instance, government action to accommodate the free exercise of religion, specifically an individual’s religious beliefs, could be challenged as an impermissible establishment of religion. See Chemerinsky, supra note 6, at 1674. Whereas, government attempts to refrain from establishing religion may be challenged as a restraint on the free exercise of religion. Id. at 718–19 (emphasis added).


10. Id. at 718–19 (emphasis added).


12. See discussion infra Sections III.B–C.

Court’s numerous holdings interpreting the Establishment Clause do not impose such a strict separation between government and religious organizations, some states continue to actively avoid—and in some instances even impede—the provision of government aid to religiously affiliated entities, in order to maintain the appearance of separation between church and state. Continued implementation of this strict separationist approach to its logical ends would require, and eventually result in, a strictly secular public square, creating a society undoubtedly antithetical to the society rooted in personal freedom that was envisioned by the Founders. Thus, much in the same way that revising the foundational principles in Animal Farm altered the fundamental rights guaranteed to the animals on the farm, the theoretical approach applied throughout much of the Court’s jurisprudence addressing government aid flowing to religious organizations has allowed states to single out and discriminate against religion in a manner that infringes upon fundamental First Amendment rights and principles.

However, in Trinity Lutheran Church of Columbia v. Comer, the most recent decision regarding state government aid and religious organizations, the Court held that attempts by states to single out and withhold generally available secular aid from religious organizations solely because of their religious status violates the Free Exercise Clause. Despite the momentous

14. See discussion infra Sections III.B–C.
15. Differentiating the Free Exercise and Establishment Clauses, supra note 5, at 330. Rather, [t]he founders’ desire for the separation of the institutions of church and state reflected a desire to respect not only religion but also the moral choices of citizens. [The Establishment Clause] was not a provision to remove religion as such from public life. . . .

. . .

The authors of the Constitution seemed to be saying that religion and politics occupied two different “spheres.” This was not secular in the modern sense. . . . Yet the Constitution, without ever spelling it out precisely, nonetheless still acknowledges that the functions of government in society have a different role than the functions of religion. Both are important, and important to each other. But they are different.


16. See discussion infra Section IV.A.
18. Id. at 2019, 2024. Chief Justice Roberts began the Free Exercise Clause analysis by stating the principle that “[t]he Free Exercise Clause ‘protect[s] religious observers against unequal treatment’ and subjects to the strictest scrutiny laws that target the religious for ‘special disabilities’ based on their ‘religious status.’” Id. at 2019 (quoting Church of Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520, 533, 542 (1993)). From that fundamental Free Exercise principle, the Court has consistently held
importance of this decision, it was only “an incremental step in a large and continuing evolution” and did not render state Blaine Amendments collectively unconstitutional. Rather, Blaine Amendments remain in place in thirty-seven states and provide a means by which states may take a markedly

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that “denying a generally available benefit solely on account of religious identity imposes a penalty on the free exercise of religion that can be justified only by a state interest ‘of the highest order,'” meaning that such state action is subject to strict scrutiny. Trinity Lutheran, 137 S. Ct. at 2019 (quoting McDaniel v. Paty, 435 U.S. 618, 628 (1978) (plurality opinion)).


20. Michael Bindas & Tim Keller, Answers to Frequently Asked Questions About the Blaine Amendments, INSTITUTE FOR JUSTICE, https://ij.org/issues/school-choice/blaine-amendments/answers-frequently-asked-questions-blaine-amendments/ (last accessed Oct. 24, 2018). Each state constitutional provision varies in scope and language. See, e.g., ALA. CONST. OF 1901, art. XIV, § 263 (1901) (“No money raised for the support of the public schools shall be appropriated to or used for the support of any sectarian or denominational school.”) (emphasis added); ALASKA CONST. art. VII, § 1 (1956) (“The legislature shall by general law establish and maintain a system of public schools open to all children of the State, and may provide for other public educational institutions. Schools and institutions so established shall be free from sectarian control. No money shall be paid from public funds for the direct benefit of any religious or other private educational institution.”) (emphasis added); ARIZ. CONST. art. II, § 12 (1912) (“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.”);

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.”) (emphasis added)); CAL. CONST. art. IX, § 8 (1879) (“No public money shall ever be appropriated for the support of any sectarian or denominational school . . . .”) (emphasis added)); COLO. CONST. art. V, § 34 (1876) (“No appropriation shall be made for charitable, industrial, educational or benevolent purposes to any person, corporation or community not under the absolute control of the state, nor to any denominational or sectarian institution or association.”) (emphasis added)); COLO. CONST. art IX, § 7 (1876) (“Neither the general assembly, nor any county, city, town, township, school district or other public corporation, shall ever make any appropriation, or pay from any public fund or moneys whatever, anything in aid of any church or sectarian society, or for any sectarian purpose . . . .”) (emphasis added)); DEL. CONST. art. X, § 3 (1897) (“No portion of any fund now existing, or which may hereafter be appropriated, or raised by tax, for educational purposes, shall be appropriated to, or used by, or in aid of any sectarian, church or denominational school . . . .”) (emphasis added)); FLA. CONST. art. I, § 6 (1885) (“No preference shall be given by law to any church, sect or mode of worship, and no money shall ever be taken from the public treasury directly or indirectly in aid of any church, sect or religious denomination, or in aid of any sectarian institution,”) (emphasis added)); GA. CONST. art. I, § II, § VII (1873) (“No money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect, cult, or religious denomination or of any sectarian institution.”) (emphasis added)); HAW. CONST. art. X, § 1 (1950) (“The State shall provide for the establishment, support and control of a statewide system of public schools free from sectarian control . . . .”) (emphasis added)); IDAHO CONST. art. IX, § 5 (1890) (“Neither the legislature nor any county, city, town, township, school district, or other public corporation, shall ever make any appropriation, or pay from any public fund or moneys whatever, anything in aid of any church or sectarian or religious society, or for any sectarian or religious purpose . . . .”) (emphasis added)); ILL. CONST. art X, § 3 (1870) (“Neither the General Assembly nor any
county, city, town, township, school district, or other public corporation, shall ever make any appropriation or pay from any public fund whatever, anything in aid of any church or sectarian purpose . . ." (emphasis added); INDIANA CONST. art. I, § 6 (1851) ("No money shall be drawn from the treasury, for the benefit of any religious or theological institution."); KAN. CONST. art. 6, § 6(c) (1859) ("No religious sect or sects shall control any part of the public educational funds."); KY. CONST. § 189 (1891) ("No portion of any fund or tax now existing, or that may hereafter be raised or levied for educational purposes, shall be appropriated to, or used by, or in aid of, any church, sectarian or denominational school." (emphasis added)); MASS. CONST. amend. art. XVIII, § 2 (adopted 1917 as art. XLVI) ("[N]o . . . grant, appropriation or use of public money or property or loan of public credit shall be made or authorized for the purpose of founding, maintaining or aiding any church, religious denomination or society."); MICH. CONST. art. I, § 4 (1864) ("No money shall be appropriated or drawn from the treasury for the benefit of any religious sect or society, theological or religious seminary; nor shall property belonging to the state be appropriated for any such purpose."); MINN. CONST. art. XIII, § 3 (1877) ("In no case shall any public money or property be appropriated or used for the support of schools wherein the distinctive doctrines, creeds, tenets of any particular Christian or other religious sect are promulgated or taught."); MISS. CONST. art. VIII, § 208 (1890) ("No religious or other sect or sects shall ever control any part of the school or other educational funds of this state; nor shall any funds be appropriated toward the support of any sectarian school . . . ." (emphasis added)); MO. CONST. art. I, § 7 (1875) ("[N]o money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect or denomination of religion, or in aid of any priest, preacher, minister or teacher thereof, as such . . . ."); MONT. CONST. art. X, § 8 (1889) ("Neither the legislative assembly, nor any county, city, town, school district, or other public corporations, shall ever make directly or indirectly, any appropriation, or pay from any public fund or moneys whatever . . . in aid of any church, or for any sectarian purpose, or to aid in the support of any school . . . controlled in whole or in part by any church, sect or denomination whatever." (emphasis added)); NEB. CONST. art. VIII, § 11 (1875) ("[N]o shall the state accept any grant, conveyance, or bequest of money, . . . to be used for sectarian purposes." (emphasis added)); NEV. CONST. art. 11, § 10 (1880) ("No public funds of any kind or character whatever, State, County or Municipal, shall be used for sectarian purpose." (emphasis added)); N.Y. CONST. pt. II, art. 83 (amended 1877) ("[N]o money raised by taxation shall ever be granted or applied for the use of the schools or institutions of any religious sect or denomination."); N.M. CONST. art. XII, § 3 (1911) ("[N]o . . . funds appropriated, levied or collected for educational purposes, shall be used for the support of any sectarian, denominational or private school, college or university." (emphasis added)); N.M. CONST. art. XXI, § 4 (1911) ("Provision shall be made for the establishment and maintenance of a system of public schools which shall be open to all the children of the state and free from sectarian control . . . ." (emphasis added)); N.Y. CONST. art. IX, § 4 (1894) ("Neither the State nor any subdivision thereof, shall use . . . any public money, or authorize or permit . . . to be used, directly or indirectly, in aid or maintenance, other than for examination or inspection, of any school or institution of learning wholly or in part under the control or direction of any religious denomination, or in which any denominational tenet or doctrine is taught."); N.D. CONST. art. VIII, § 1 (1889) ("[T]he legislative assembly shall make provision for and the establishment and maintenance of a system of public schools which shall be . . . free from sectarian control." (emphasis added)); N.D. CONST. art. VIII § 5 ("No money raised for the support of the public schools of the state shall be appropriated to or used for the support of any sectarian school."); OKLA. CONST. art. I, § 5 (1905) ("Provisions shall be made for the establishment and maintenance of a system of public schools, which shall be . . . free from sectarian control." (emphasis added)); OKLA. CONST. art. II, § 5 (1905) ("No public money or property shall ever be appropriated, applied, donated, or used, directly or indirectly, for the use, benefit, or support of any sect, church, denomination, or system of religion, or for the use,
separationist approach to the provision of generally applicable secular aid, even where no barrier exists under the Establishment Clause. The Court's decision in Trinity Lutheran suggests that state Blaine Amendments are problematic, if not unconstitutional, where a state government goes too far and improperly disapproves of religion in general, discriminates against some or all religious beliefs, or imposes special disabilities on the basis of religious status.

Part II of this Article examines the constitutional boundaries of state action with regard to government aid and religious organizations by exploring the historical context of the First Amendment's religion clauses, the Supreme

benefit, or support of any priest, preacher, minister, or other religious teacher or dignitary, or sectarian institution as such." (emphasis added); PA. CONST. art. III, § 15 (1874) ("No money raised for the support of the public schools of the Commonwealth shall be appropriated to or used for the support of any sectarian school.") (emphasis added); S.D. CONST. art. VI, § 3 (1889) ("No money or property of the state shall be given or appropriated for the benefit of any sectarian or religious society or institution." (emphasis added)); TEX. CONST. art. I, § 7 (1876) ("No money shall be appropriated, or drawn from the Treasury for the benefit of any sect, or religious society, theological or religious seminary; nor shall property belonging to the State be appropriated for any such purposes."); id. art. VII, § 5(c) (1876) ("The permanent school fund and the available school fund may not be appropriated to or used for the support of any sectarian school." (emphasis added)); UTAH CONST. art. X, § 1 (1895) ("The Legislature shall provide for the establishment and maintenance of the state's education systems . . . which] shall be free from sectarian control." (emphasis added)); VA. CONST. art. IV, § 16 (1902) ("The General Assembly shall not make any appropriation of public funds, personal property, or real estate to any church or sectarian society, or any association or institution of any kind whatever which is entirely or partly, directly or indirectly, controlled by any church or sectarian society." (emphasis added)); WASH. CONST. art. IX, § 4 (1889) ("All schools maintained or supported wholly or in part by the public funds shall be forever free from sectarian control or influence." (emphasis added)); WYO. CONST. art. 1, § 19 (1889) ("No money of the state shall ever be given or appropriated to any sectarian or religious society or institution." (emphasis added)).

21. Kyle Duncan, Secularism’s Laws: State Blaine Amendments and Religious Persecution, 72 FORDHAM L. REV. 493, 493 (2003); see, e.g., Eulitt ex rel. Eulitt v. Maine Dep’t of Educ, 386 F.3d 344, 356 (1st Cir. 2004) (rejecting an equal protection challenge to Maine’s refusal to provide tuition assistance to children in private sectarian schools); Taxpayers for Pub. Educ. v. Douglas Ct. Sch. Dist., 351 P.3d 461, 485–86 (Colo. 2015) (holding by the Colorado Supreme Court that the inclusion of religious schools in Denver’s school choice program violated Colorado’s Blaine Amendment, even though the program complied with the Establishment Clause as interpreted by the Supreme Court in Zelman v. Simmons-Harris, 536 U.S. 639 (2002)); Moses v. Skandera, 367 P.3d 838, 848–49 (N.M. 2015) (holding by the New Mexico Supreme Court that including private schools in a statewide program that provided textbooks and educational materials to students in public and private schools violates New Mexico’s Blaine Amendment).

22. See Erica Smith, Blaine Amendments and the Unconstitutionality of Excluding Religious Options from School Choice Programs, 18 FED. SOC’Y REV. 90, 48, 49 (2017) (acknowledging that “Blaine Amendments have both the purpose and the effect of discriminating against religion, and this discrimination cannot be justified by a compelling government rationale.”).
Court’s modern theoretical underpinnings regarding both clauses, and the current constitutional standards applied by the Court to each clause respectively. This part also explores the historical background of the failed federal constitutional Blaine Amendment that subsequently gave birth to the state constitutional provisions primarily at issue. Part III reviews decisions where the Supreme Court has either discussed state Blaine Amendments in the context of generally applicable secular aid flowing to religious organizations or decided cases where a state seeks to withhold such aid on the basis of religious status. Part IV examines the impact and significance of the Court’s seemingly conflicting holdings in Locke and Trinity Lutheran and proposes that the Court’s holding in Locke should be limited to instances where (1) the receipt of a government benefit is not conditioned on religious belief or status, (2) there is a compelling state interest in not funding essentially religious endeavors, and (3) there is no evidence of animus or hostility towards religion. Part V of this Article analyzes the Court’s application of the “play in the joints” framework and argues this rationale is problematic because it provides a manner by which states may discriminate against religion. In addition, this part argues that the Court’s reasoning contains misconceptions regarding the previously established constitutional boundaries and the underlying purpose of the religion clauses. Finally, this section concludes that state Blaine Amendments are facially unconstitutional.

II. BACKGROUND

The language of the First Amendment explicitly protects individuals against laws made by Congress that seek to establish religion or prohibit the free exercise of religion. The Supreme Court has selectively incorporated the protections provided by the Establishment and Free Exercise Clauses into

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23. See infra Part II.
24. See infra Section II.B.
25. See infra Part III.
26. See infra Part IV.
27. See infra Part V.
28. See infra Section V.A.
29. See infra Section V.B.
30. U.S. CONST. amend. I. The relevant text of the First Amendment reads as follows: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .” U.S. CONST. amend. I.
the Due Process Clause of the Fourteenth Amendment\textsuperscript{31} pursuant to the understanding that “the values protected by the religion clauses are fundamental aspects of liberty in our society.”\textsuperscript{32} Therefore, because the Establishment and Free Exercise Clauses have been made applicable to the states, the Supreme Court’s Establishment and Free Exercise Clause jurisprudence provides the necessary constitutional constraints and a starting point for analyzing whether, and to what extent, state government aid can be made available to religious organizations under the Constitution.\textsuperscript{33}

A. \textit{The Constitutional Constraints of the Establishment Clause and Free Exercise Clause}

1. Establishment Clause

In order to fully understand the bounds of the Establishment Clause and determine the constitutional constraints for state government aid available to religious organizations, it is critical to consider the historical context in which the First Amendment was adopted.\textsuperscript{34} The confusion surrounding the Supreme Court’s religious clause jurisprudence suggests that the Framers’ intent for the Establishment Clause is somewhat unclear; yet, the historical context is informative and provides the foundation necessary to accurately shape the constitutional discourse.\textsuperscript{35}

\textsuperscript{31} See Cantwell v. Connecticut, 310 U.S. 296, 303 (1940) (“The Fourteenth Amendment has rendered the legislatures of the states as incompetent as Congress to enact [laws prohibiting the free exercise of religion].”); Everson v. Bd. of Educ., 330 U.S. 1, 15 (1947) (“The Fourteenth Amendment was interpreted to make the prohibitions of the First applicable to state action abridging religious freedom. There is every reason to give the same application and broad interpretation to the ‘establishment of religion’ clause.”).

\textsuperscript{32} John E. Nowak & Ronald D. Rotunda, Constitutional Law 1412 (7th ed. 2004).

\textsuperscript{33} See Cantwell, 310 U.S. at 303; Everson, 330 U.S. at 15.

\textsuperscript{34} See Jesse H. Choper, The Religion Clauses of the First Amendment: Reconciling Conflict, 41 U. Pitt. L. Rev. 673, 676 (1980) (“It is both appropriate and useful to begin all constitutional interpretation by consulting the historical intent of the Framers. Indeed, perhaps [n]o provision of the Constitution is more closely tied to or given content by its generating history than the religious clause of the First Amendment.”) (quoting Everson, 330 U.S. at 33 (Rutledge, J., dissenting)).

\textsuperscript{35} See Chemerinsky, supra note 6, at 1676 (acknowledging that debates over the historical context and the Framers’ intent have been and are likely to remain critical to the Supreme Court’s Religion Clause analysis). The weight given to the historical context may be the subject of welcomed debate, but it does nonetheless provide the necessary understanding of the Framers’ intent for the Establishment Clause. But see Nowak & Rotunda, supra note 32, at 1411 (“There is a seemingly irresistible
a. Historical Context at the Founding

In the minds of the Founders, the Establishment Clause was a rejection of the religious establishment tradition that afforded a specified state religion "special patronage and protection." The Founders who were in favor of including such a provision argued that it would prevent the government from prescribing one religious belief (thereby violating the principles of liberty); from providing preferential treatment to one religious sect over another (thereby violating the principles of equality between religions); and from influencing or becoming influenced by religious institutions. Moreover, the Establishment Clause provided a guarantee that the federal government would be prohibited from tampering with the close relationships that existed between established religious sects and their respective states at the time of the Founding.

With regard to the issue of funding for religious organizations, the historical context of the Founding provides incomplete evidence. The Establishment Clause was in part the resolution of a founding-era debate over religious

impulse to appeal to history when analyzing issues under the religion clauses . . . [which] is unfortunate . . . ."

For an argument against application of the religion clauses to the states on federalism grounds, see Stuart D. Poppell, Federalism, Fundamental Fairness, and the Religion Clauses, 25 CUMB. L. REV. 247, 267–68 (1995) ("[G]rand searches for original intent . . . are futile once it is understood that, while the Framers of the First Amendment might have had an intention regarding the application of the Religious Clauses to the national government, they had no such intention regarding application of the clauses to the states . . . .")

36. John Witte, Jr., & Joel A. Nichols, Religion and the American Constitutional Experiment 169 (3d ed. 2011); see generally Leo Pfeffer, Church, State, and Freedom 63–70 (1953) (discussing the development of religious freedom historically). Justice Story was adamant that "[t]he real object of the [First] Amendment was . . . to exclude all rivalry among Christian sects, and to prevent any national ecclesiastical establishment, which should give to an hierarchy the exclusive patronage of the national government." Joseph L. Story, Commentaries on the Constitution of the United States 728 (1833).

37. Witte & Nichols, supra note 36, at 169; see also Lawrence H. Tribe, American Constitutional Law 1158–60 (2d ed. 1988) (describing the evangelical view, the Jeffersonian view, and the Madisonian view).


39. See John C. Jeffries, Jr., & James E. Ryan, A Political History of the Establishment Clause, 100 Mich. L. Rev. 279, 292–94 (2001) (arguing that, at the time of the adoption of the First Amendment, "no American state could have been found in compliance with the modern understanding of separation of church and state" to show that "the original Establishment Clause embraced no substantive conception of the proper relation of church and state").
assessments, which were an “earmarked tax to support the religious functions of churches—most commonly the salaries of clergy, and sometimes also the construction of church buildings.” The Founders’ desire to prohibit Congress from earmarking federal funding for the religious functions of churches fails to elucidate their perspective on “religiously neutral funding of some broader category of private activity—medical care, social services, education, or, as in Trinity Lutheran, playground surfaces.” However, this fundamental aspect of the Establishment Clause has been relied upon by some Justices on the Supreme Court and some legal scholars to support a prohibition on providing any funding to religious organizations. Yet the historical context of the Founding, “a time when government funded almost nothing else in the private sector” suggests that the Founders simply did not envision the modern day government funding of programs and services in which both religious and secular organizations partake.

b. Modern Theoretical Development

The modern theoretical underpinnings that have shaped the Supreme Court’s jurisprudential framework present an equally important guide to understanding the constitutional constraints of the Establishment Clause. In the spectrum of interpretive approaches to the Establishment Clause there are three major theories, only two of which have been espoused by the Supreme Court in instances where religious organizations are seeking government aid.

40. Churches, Playgrounds, Government Dollars, supra note 19, at 142–43.
41. Id. at 143.
42. See, e.g., Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2033–35 (2017) (Sotomayor, J., dissenting) (“This Court has repeatedly warned that . . . payments from the government to a house of worship—would cross the line drawn by the Establishment Clause.”).
43. Churches, Playgrounds, Government Dollars, supra note 19, at 142.
44. See Richard A. Epstein, The Classical Liberal Constitution 482 (2014); see also Nowak & Rotunda, supra note 32, at 1430 (“[O]ne must go through the history of Supreme Court cases concerning aid to religion in general, and aid to religiously affiliated schools in particular, if one is to attempt to determine what standards the Justices are actually using in establishment clause cases.”).
45. See Chemerinsky, supra note 6, at 1708–13 (outlining the three major theories in Establishment Clause jurisprudence).
46. See Witte & Nichols, supra note 36, at 173–81 (mapping out the evolution of the Establishment Clause’s theoretical framework, as adopted by the Supreme Court). This Article will not
To one end of the spectrum lies the theory of “strict separation,” which posits that government and religion should be separated to the greatest extent possible.47 This strict separationist approach was first articulated by Justice Black in Everson v. Board of Education48 when he borrowed from Thomas Jefferson's metaphor that there should be “a wall of separation between Church and State,” which “must be kept high and impregnable,” and that the Court “could not approve the slightest breach.”49 Ironically, despite Justice Black’s strict separationist language, the Everson Court held that a statute allowing local school districts to reimburse parents of both public and parochial (private) schoolchildren for the cost of bus transportation did not violate the Establishment Clause.50 Instead, this holding relied upon the theoretical approach of “neutrality,”51 which eventually was adopted by the Court as the predominant theory in cases regarding government aid to religious organizations.52 To further support its deviation from strict separation, the Everson

underwrite an analysis of “accommodation,” which lies at the opposite end of the interpretation spectrum and maintains that “the government violates the Establishment Clause only if it literally establishes a church or coerces religious participation.” Chemerinsky, supra note 6, at 1711–12. The accommodationist approach has primarily found its application in cases where legislation accommodates religious services or the use of religious symbols. See Witte & Nichols, supra note 36, at 177. But the Court has never solely relied on an accommodationist approach in cases involving aid to religious organizations; thus, it is outside the scope of this Article. Chemerinsky, supra note 6, at 1713. 47. Chemerinsky, supra note 6, at 1708. 48. 330 U.S. 1 (1947). 49. Id. at 16, 18 (quoting Reynolds v. United States, 98 U.S. 145, 164 (1878)). Some scholars argue that the majority opinion misconstrues Jefferson’s “wall of separation between Church and State” by failing to consider that his aim was for Virginia’s state government to disassociate with the Anglican Church, “not [to] mandate that the government disavow all support for religion” generally. See Douglas W. Kmiec, Stephen B. Presser & John C. Eastman, Individual Rights and the American Constitution 61 (4th ed., 2014); see also Witte & Nichols, supra note 36, at 173–75 (providing that the separation of Church and State was equally as important to the protection of the church and religion as it was to the protection of politics and the state). 50. Everson, 330 U.S. at 18. 51. Id. at 59–60. The [First] Amendment requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions, than it is to favor them. Id. (emphasis added). 52. See infra text accompanying notes 56–70; see also Ira C. Lupu, The Lingering Death of Separationism, 62 Geo. Wash. L. Rev. 230, 233 (1993) (chronicling the transformation of the Religion Clauses, including the transformation of the Establishment Clause “from the structural norm of separationism to more individual-oriented norms that forbid governmental endorsement and coercive imposition of religion”); Carl H. Esbeck, A Constitutional Case for Governmental Cooperation with
Court acknowledged the public policy basis for its decision, specifically noting that segregating religious schools from “general government services” was “not the purpose of the First Amendment.” A prohibition on withholding of general government services that are “indisputably [separable] from the religious function” of a particular religious organization made strict separationism untenable in its purest form, as initially introduced by the Everson Court, and laid the groundwork for the Court’s shift from separationism to neutrality.

The theory of “neutrality” is centrally located in the spectrum of interpretive approaches to the Establishment Clause and posits that the government must be neutral on religion such that it “minimize[s] the extent to which it either encourages or discourages religious belief or disbelief, practice or nonpractice, observance or nonobservance.” Chief Justice Burger solidified the Court’s shift to neutrality while writing for the majority in both Walz v. Tax Commission of New York and Lemon v. Kurtzman. In Walz, the Chief Justice set forth the neutrality principle “that [the Court] will not tolerate either governmentally established religion or governmental interference with religion,” and that absent either of “those expressly proscribed governmental

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53. Everson, 330 U.S. at 17–18. Justice Black further extrapolated that “[o]f course, cutting off church schools from these [general government services, including ordinary police and fire protection, connections for sewage disposal, public highways and sidewalks], so separate and so indisputably marked off from the religious function, would make it far more difficult for the schools to operate. But such is obviously not the purpose of the First Amendment.” Id.

54. Id.; see also Epstein, supra note 44, at 497 (“There is no possible separability for the state provision of public goods, which under the standard economic definition must be supplied to all people whenever they are supplied to some.”).


56. 397 U.S. 664 (1970). In Walz, a real estate owner sought an injunction “to prevent the New York Tax Commission from granting property tax exemptions to religious organizations for religious properties used solely for religious worship.” Id. at 666. The real estate owner’s argument was that the tax exemptions “indirectly require[d] the [real estate owner] to make a contribution to religious bodies,” thereby violating the Establishment Clause. Id. at 667.

57. 403 U.S. 602 (1971). In Lemon, the appellants challenged the constitutionality of two state programs that sought to subsidize a certain salary percentage for private-school teachers that were teaching secular subjects. Id. at 606.

58. Walz, 397 U.S. at 669.
acts there is room for play in the joints\textsuperscript{59} productive of a benevolent neutrality.\textsuperscript{60} The Walz Court applied this benevolent neutrality principle to uphold a state law “granting property tax exemptions to religious organizations for religious properties used solely for religious worship.”\textsuperscript{61}

The following year in Lemon, Chief Justice Burger specified a more formal neutrality approach in the form of a three-prong purpose-and-effect test to analyze whether a government action that does not facially discriminate in regards to religious sects violates the Establishment Clause.\textsuperscript{62} The Lemon test requires that a specified government aid program: (1) “have a secular legislative purpose,” (2) have neither the primary effect of “advanc[ing] nor inhibit[ing] religion,” and (3) “must not foster ‘an excessive government entanglement with religion.’”\textsuperscript{63}

Under this test, the Lemon Court held two state statutes unconstitutional: the first provided “financial support to nonpublic elementary and secondary schools by way of reimbursement for the cost of teachers’ salaries, textbooks, and instructional materials in specified secular subjects,” while the second directly paid “teachers in nonpublic elementary schools a supplement of 15% of their annual salary,” provided that they taught courses offered in public schools and did not teach courses on religion.\textsuperscript{64} In determining whether an excessive entanglement existed, the Lemon Court examined “the character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority.”\textsuperscript{65} The Lemon Court concluded that the state statutes resulted in the kind of excessive entanglement that the Establishment Clause forbids because the statutes would require “pervasive monitoring” to ensure

\textsuperscript{59} See infra discussion Section III.B.1. The genesis of “play in the joints” in Walz is a foundational aspect of the Court’s current interpretation of the interplay between the Establishment Clause and the Free Exercise Clause.

\textsuperscript{60} Walz, 397 U.S. at 669 (emphasis added). Benevolent neutrality is accommodationist in nature and is best exemplified “in cases upholding various legislative accommodations and . . . has also recurred in the Court’s solicitude toward government cooperation and even funding of faith-based organizations on an equal basis with other groups.” Witte & Nichols, supra note 36, at 177.

\textsuperscript{61} Walz, 397 U.S. at 666.

\textsuperscript{62} See Lemon, 403 U.S. at 612–13.

\textsuperscript{63} Lemon, 403 U.S. at 612–13 (quoting Walz, 397 U.S. at 674); see also Witte & Nichols, supra note 36, at 178 (providing a more detailed explanation of the Lemon test’s three-prongs).

\textsuperscript{64} Lemon, 403 U.S. at 602, 606–07.

\textsuperscript{65} Id. at 615.
that the aid was not being used for religious purposes.  

Chief Justice Burger’s opinions in Walz and Lemon hinted that the Court’s neutrality approach would be malleable, making it amenable to interpretation from either end of the spectrum and facilitating both strict separationist and accommodationist perspectives.  

Notably, in Walz, the Chief Justice noted that “neutrality in this area cannot be an absolutely straight line,” and added in Lemon that “the line of separation, far from being a ‘wall,’ is a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship.” Over the next few decades, the Supreme Court’s jurisprudence would wander a winding path between “strict neutrality” and “benevolent neutrality” when applying the Lemon test in deciding matters related to the withholding or provision of government financial aid for religious organizations.

Inconsistent application of the Lemon test over time has proven to be controversial, as the test is seen by some scholars as a “markedly separationist interpretation” of the Establishment Clause because it requires strict government neutrality towards religious matters. The more conservative justices

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66. *Id.* at 619–20, 622, 627.
67. See Witte & Nichols, *supra* note 36, at 178–79 (asserting that the Court applied an accommodationist reading in Walz, then adopted a separationist reading in Lemon).
68. Walz, 397 U.S. at 669.
69. Lemon, 403 U.S. at 614.
70. See Witte & Nichols, *supra* note 36, at 174, 177–81 (describing the general trend of neutrality including application of accommodationist and separationist approaches to Walz and Lemon respectively); Epstein, *supra* note 44, at 498 (“Since Everson, the Supreme Court has vacillated in the types of benefits that the state can provide to students in parochial schools.”). For the Court’s application of benevolent neutrality, see, e.g., Agostini v. Felton, 521 U.S. 203 (1997), which held that a state does not violate the Establishment Clause when it provides remedial education by public school teachers in private sectarian schools; Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1 (1993), which held that a state does not violate the Establishment Clause when it provides an interpreter for a deaf student in a parochial school; and Mueller v. Allen, 463 U.S. 388 (1983), which held that a state does not violate the Establishment Clause by allowing parents who send children to private schools to deduct expenses incurred in providing “tuition, textbooks and transportation.”

In contrast, for the Court’s application of strict neutrality, see, e.g., AgUILAR v. Felton, 473 U.S. 402 (1985) (overruled by Agostini, 521 U.S. at 236), which held that a state program sending teachers to both religious and public schools to provide remedial instruction to children from low-income families violated the Establishment Clause, and *Sch. Dist. of Grand Rapids v. Ball*, 473 U.S. 373 (1985) (overruled by Agostini, 521 U.S. at 236), which held that a state program that provided classes to private school students taught by public school teachers at public expense in classrooms leased from private schools violated the Establishment Clause.

of the Court argue that the Lemon test misconstrued the clause’s original purpose of prohibiting government preference for specific religious sects and mistakenly interpreted it as a general prohibition on even-handed government aid to religion.\textsuperscript{72} Regardless of the Court’s application of either strict or benevolent neutrality in determining Establishment Clause matters, the most significant outcome from Walz and Lemon was the Court’s acknowledgement that strict separation between church and state was untenable, and that a shift towards neutrality was increasingly necessary.\textsuperscript{73}

Through the 1970s and into the early 1980s, the Burger Court’s application of the Lemon test’s neutrality principles vacillated between validating and invalidating government programs that directly and indirectly aided religious organizations.\textsuperscript{74} However, the installment of Justice Rehnquist as Chief Justice in 1986, and the addition of Justice Kennedy in place of Justice Powell in 1988, marked the beginning of an accommodationist shift in the Court’s interpretation and application of the Lemon test and resulted in the reprisal of benevolent neutrality towards religious organizations seeking government aid.\textsuperscript{75} The blurred, winding line of separation between church and state that

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72. McDonald, supra note 71, at 2186; CHEMERINSKY, supra note 6, at 1720 (acknowledging criticism by several Supreme Court justices of the Lemon test and calls for it to be overruled); see also Keith O. McArthur, A Conservative Struggle with Lemon: Justice Anthony M. Kennedy’s Dissent in Allegheny, 26 TULSA L.J. 107, 112, 117 (1990) (citing Justice Kennedy’s dissent in Allegheny, which argued that government accommodation becomes “an impmissible establishment of religion when it coerces religious affiliation or aid,” and Justice Rehnquist’s dissent in Jaffree, which argued that the Framers’ intent was to prohibit “governmental preferences for one religious denomination or sect over others”).

73. Lemon, 403 U.S. at 614. “Our prior holdings do not call for total separation between church and state; total separation is not possible in an absolute sense. Some relationship between government and religious organizations is inevitable.” Id.

74. McDonald, supra note 71, at 2193. Most of the Burger Court’s decisions to invalidate government programs that violated the Establishment Clause were subsequently overruled. See supra note 70. There were a few exceptions to this. See, e.g., Levitt v. Comm. for Pub. Ed. & Religious Liberty, 413 U.S. 472 (1973) (holding that state’s reimbursement to private schools for the cost of testing and recordkeeping violated the Establishment Clause because the payments were lump-sum and not properly accounted for); Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756 (1973) (holding, in a case involving indirect aid, that a state’s provision of tax benefits to the parents of children attending private schools had the primary effect of advancing religion thereby violating the Establishment Clause).

75. McDonald, supra note 71, at 2196; see, e.g., Zobrest v. Catalina Foothills Sch. Dist., 509 U.S.
Chief Justice Burger warned of had seemingly settled, leading the Rehnquist Court to solidify the modern approach to neutrality through a reformulation of the *Lemon* test in *Agostini v. Felton.*

**c. Current Constitutional Standard**

Writing for the majority in *Agostini,* Justice O’Connor distilled *Lemon*’s three-prong inquiry into two prongs: (1) “whether the government acted with the *purpose* of advancing or inhibiting religion,” and (2) “whether the aid has the ‘effect’ of advancing or inhibiting religion.” In abandoning the *Lemon* test’s third prong, Justice O’Connor reasoned that the factors used “to assess whether an entanglement is ‘excessive’ are similar to the factors [the Court] use[s] to examine ‘effect,’” therefore, eliminating the third prong was a product of simplification. Justice O’Connor further clarified that under the Court’s revamped approach there are three primary factors when examining the effect of advancing religion under the second prong: (a) whether the aid results in governmental indoctrination of religion, (b) whether the government program defines recipients by reference to religion, and (c) the creation of an excessive entanglement of government and religion.

Justice O’Connor’s distillation of the *Lemon* test in *Agostini* is a more lenient inquiry and results in an increased likelihood of benevolent

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76. *Agostini,* 521 U.S. 203 (1997). In *Agostini,* the Court re-addressed Title I of the Elementary and Secondary Education Act of 1965, the same federal program that was at issue in *Aguilar* twelve years earlier. *Id.* at 208–09. In *Aguilar,* the court held that the Establishment Clause prohibited public school teachers from entering private schools in order to provide remedial education. *Id.* at 208. The costs of complying with the Court’s mandate in *Aguilar* were significant and adversely affected the very children the original program was meant to benefit. *Id.* at 213–14. As a result, the school board and a new group of parents sought relief from the Court’s earlier decision in *Aguilar* and argued that the judicial precedent since that decision had changed. *Id.* at 226–27.

77. *Id.* at 222–23 (emphasis added).

78. *Id.* at 232–33. In *Agostini,* Justice O’Connor pointed out the duplicative nature in that the Court’s assessment of *effect* was carried out by “examining the character of the institutions benefited . . . and the nature of the aid that the State provided,” while the assessment of *entanglement* was carried out by looking to “the character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and religious authority.” *Id.* (emphasis added) (internal quotation marks omitted) (quoting *Lemon,* 403 U.S. at 615).

79. *Agostini,* 521 U.S. at 234.

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neutrality.80 The folding of the Lemon test’s third prong (examining excessive entanglement) into merely one factor under the second prong (examining the government program’s effect) diminished a barrier that had inhibited government aid to religion in the Court’s previous applications of the Lemon test.81 Practically, removal of Lemon’s excessive entanglement prong more accurately reflects the neutrality principles espoused in Walz and Lemon because it “has allowed for greater cooperation between religious and political officials” in instances where religious organizations receive direct government aid, so long as the aid program is facially neutral and does not have the effect of advancing religion.82

The Supreme Court’s jurisprudence regarding direct government aid to religious organizations initially wandered a path between strict and benevolent neutrality, but it ultimately settled on favoring cooperation, rather than hostility, between the government and religious organizations.83 The Court’s adoption of a benevolent neutrality approach to the constitutional constraints of the Establishment Clause sets the limit against which state action can be measured and makes clear that cooperation between state governments and religious organizations is permitted and perhaps even favored.84

80. See infra text accompanying notes 81–82.

81. McDonald, supra note 71, at 2197–98 (asserting that Rehnquist had long sought to overcome the excessive entanglement dilemma created by government aid to religion: “such aid could only be used for secular purposes, but if the government established a monitoring program to make sure of that, the Court would frequently strike it down on the grounds that it excessively entangled the government with the funded organizations.”). But see Mitchell v. Helms, 530 U.S. 793 (2000) (a majority of the Court, joined by Chief Justice Rehnquist, upheld a state program that lends educational materials and equipment to public and private schools alike).

82. Witte & Nichols, supra note 36, at 180; see also McDonald, supra note 71, at 2197–98 (noting O’Connor’s elimination of the excessive entanglement prong provided that “even pervasive monitoring by the government to ensure aid was being put to secular purposes would not be deemed to impermissibly advance religion”). Moreover, Justice O’Connor acknowledged that the Burger Court’s prior presumption that provision of aid to religious institutions required pervasive monitoring—and therefore constituted excessive entanglement—had been undermined. Agostini, 521 U.S. at 234.

83. See supra text accompanying notes 47–82; see also McDonald, supra note 71, at 2199 (concluding that the Rehnquist Court narrowed Establishment Clause limitations on direct and indirect aid to religion by shifting focus from operative neutrality to facial neutrality). Some scholars perceive that the Roberts Court has further narrowed Establishment Clause constraints by seemingly abandoning Lemon neutrality in favor of “permitting government approval of religion in general so long as it is non-sectarian and non-proselytizing in nature.” McDonald, supra note 71, at 2184.

84. See discussion infra Parts III & IV. In addition to instances where religious organizations receive government aid directly, the Supreme Court has undertaken the question of whether
2. Free Exercise Clause

Some legal scholars assert that the Free Exercise Clause provides a perfect companion to the Establishment Clause because the two religious provisions seemingly cut in opposite directions. The convergence of the Establishment and Free Exercise Clauses provides that “[a]ny protection of religious liberty above and beyond” other constitutionally mandated protections “could be read as an establishment of religion,” while simultaneously, “any restriction on activity of religious institutions could be read as limiting the free exercise of its members.” Thus, ascertaining the bounds of the Free Exercise Clause is critical to determining when state action to withhold government aid from religious organizations is unconstitutional.

a. Historical Context at the Founding

Essential to analyzing the Free Exercise Clause is an understanding of the origins of religious liberty in America. One primary goal of the American government aid that is received by individuals but is then passed on to religious organizations, violates the Establishment Clause. See, e.g., Zelman v. Simmons-Harris, 536 U.S. 639 (2002); Mueller v. Allen, 463 U.S. 388 (1983). The question of indirect government aid to religious institutions was most recently addressed in Zelman, where Chief Justice Rehnquist, writing for the majority of the Court, upheld a state program that provided tuition aid to parents of children in financial need for enrollment in both public and private, sectarian and non-sectarian schools. Zelman, 536 U.S. at 639. The Chief Justice applied neutrality principles from prior indirect government aid decisions to hold that there is no Establishment Clause violation “where a government aid program is neutral with respect to religion” and provides aid broadly to individuals who through “their own genuine and independent private choice” direct that aid to a sectarian school. Id. at 652 (referencing Mueller, 463 U.S. at 388 (1983); Witters v. Wash. Dep’t. of Servs. for the Blind, 474 U.S. 481 (1986); Zobrest, v. Catalina Foothills Sch. Dist., 509 U.S. 1 (1993)). In the majority’s view, the “parents were the ones to select a religious school as the best learning environment for their handicapped child,” and in doing so, “the circuit between government and religion was broken, and the Establishment Clause was not implicated.” Zelman, 536 U.S. at 652. Compare supra text accompanying notes 6–10, with discussion infra Section V.A.1.

6. EPSTEIN, supra note 44, at 461.

8. See Witte & Nichols, supra note 36, at 132 (“At the heart of a free exercise case is a conflict between the exercise of governmental power and the exercise of a private party’s religion. The private party challenges the exercise of governmental power as a violation of rights protected by the free exercise clause.”). See John Witte, Jr., The Essential Rights and Liberties of Religion in the American Constitutional Experiment, 71 Notre Dame L. Rev. 371, 376 (1996) [hereinafter Essential Rights and Liberties] (“A plurality of theological and political views helped to inform the early American constitutional experiment in religious rights and liberties, and to form the so-called original intent of the
The Locke Exception

The American experiment in religious rights and liberties cannot, in [Witte’s] view, be reduced to the First Amendment religion clauses alone . . .

89. Id. at 388. Notably, twelve articles of amendment were submitted to the states for ratification in 1789, but only ten were ratified. Differentiating the Free Exercise and Establishment Clauses, supra note 5, at 314. Of these twelve articles, the third article contained the free exercise and no-establishment language, and when the first two articles were not approved by the states, the third article became the “First Amendment.” Id. at 314 n.13.

90. Essential Rights and Liberties, supra note 88, at 389–90. The state constitutions of each of the original thirteen colonies contained provisions that guaranteed liberty of conscience for all state citizens. Id. at 393. Legislative history from debates in the House of Representatives does not provide sufficient evidence to explain the meaning of the Free Exercise Clause, therefore, understanding is perhaps best informed by the First Congress’ successive drafts of the clause. Michael W. McConnell, The Origins and Historical Understanding of Free Exercise of Religion, 103 HARV. L. REV. 1409, 1481 (1990) [hereinafter Origins and Historical Understanding].

91. Essential Rights and Liberties, supra note 88, at 390. James Madison contended that religion “must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as [conviction and conscience] may dictate.” James Madison, Memorial and Remonstrance Against Religious Assessments, ¶ 1, NAT’L ARCHIVES (1785), https://founders.archives.gov/documents/Madison/01-08-02-0163.


93. Id. at 394. The language ultimately adopted by Congress in the Free Exercise Clause does not preclude protection for liberty of conscience, rather the clause includes such protection within protecting the free exercise or the public manifestation of religion. Id.

94. 1 ANNALS OF CONG. 451 (Joseph Gales ed., 1834) (emphasis added) (proposal of James Madison, June 8, 1789).
extension of the liberty of conscience because free exercise of religion encompasses “the right to act publicly on the choices of conscience once made, without intruding on or obstructing the rights of others or the general peace of the community.” Thus, Madison’s initial draft of the Free Exercise Clause suggests two important theoretical frameworks underlying the clause that was subsequently adopted by Congress. First, Madison’s draft contained the phrase “full and equal rights of conscience,” implying that there are both substantive and equality components inherent in the liberty of conscience, meaning that liberty of conscience is not only entitled to equal protection under the law “but also to some absolute measure of protection apart from mere governmental neutrality.” Second, Madison’s draft stated that rights of conscience shall not “in any manner nor on any pretext” be infringed, suggesting protection from direct and indirect, as well as express and implied, infringement by the government. Examining the theoretical foundation of the Free Exercise

95. Essential Rights and Liberties, supra note 88, at 394. Nearly all of the early states had free exercise provisions, in one form or another, in their respective state constitutions. Id. at 395.

96. Origins and Historical Understanding, supra note 90, at 1481. Madison preferred the phrase “rights of conscience” over the phrase “free exercise of religion,” but the legislative history seems to indicate that the two phrases were used interchangeably. Id. at 1482. Madison’s formulation of the First Amendment was cast aside as the First Congress eventually adopted the “free exercise” language featured in three of the five state proposals for the First Amendment. Id.

97. Id. at 1481 (emphasis added). The phrase “full and equal rights of conscience” was amended to “equal rights of conscience” by the House Select Committee even before the bill was debated on the House floor. See 1 ANNALS OF CONG. 757 (1789) (Joseph Gales ed., 1834). Issues regarding the Establishment Clause resulted in the adoption of language that stated “Congress shall make no law establishing religion, or to prevent the free exercise thereof, or to infringe the rights of conscience.” Id. at 796 (proposals of Fisher Ames). Upon arrival in the house, multiple versions of the clause were adopted, including the phrases “rights of conscience” and “free exercise of religion,” but the latter ultimately ratified. Origins and Historical Understanding, supra note 90, at 1482–84.

98. Id. at 1482 (emphasis added). Madison’s expansive protection against infringement was watered down in the version of the bill adopted by the House, as the language read “prevent the free exercise of” or “infringe upon the rights of conscience.” See 1 ANNALS OF CONG. 796 (proposal of Fisher Ames, Aug. 20, 1789) (emphasis added). When the bill came under consideration by the Senate, the verb “prevent” had changed to “prohibit,” and remained until the bill was ratified. Origins and Historical Understanding, supra note 90, at 1483. Although the origins of the change in verbiage is unclear, the impact has been significant as the Supreme Court has previously adopted a restrictive reading of the term “prohibit” in the Free Exercise Clause. See Lyng v. Nw. Indian Cemetery Protective Ass’n, 485 U.S. 439, 450–51 (1988) (reasoning that the term “prohibit” in the Free Exercise Clause “does not . . . imply that incidental effects of government programs, which may make it more difficult to practice certain religions but which have no tendency to coerce individuals into acting contrary to their religious beliefs, require government to bring forward a compelling justification for its otherwise lawful actions”).

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Clause makes it clear that “[f]rom the outset [of the United States], the prevention of persecution, penalties, or incapacities on account of religion has served as a common ground among all the various interpretations of religious liberty.”

b. Modern Theoretical Development

Understanding of the Supreme Court’s modern interpretation of the Free Exercise Clause further clarifies the constitutional constraints on state action that denies a generally available public benefit on the basis of religious status. The Supreme Court has identified a variety of circumstances in which the Free Exercise Clause is implicated as a result of government action. Most common are instances where government action prohibits certain conduct that is required by an individual’s religious belief or requires certain conduct that an individual’s religious belief forbids. When such conflicts between the free exercise of religion and religiously neutral laws of general applicability occur, the religious adherent may challenge the alleged burden imposed on religion by the neutral and generally applicable law. To alleviate this burden, the adherent usually seeks a “religious-based exemption” from the generally applicable law as a form of religious accommodation.

99. Origins and Historical Understanding, supra note 90, at 1474.
100. See infra text accompanying notes 101–58.
101. See Chemerinsky, supra note 6, at 1684 (describing three situations in which the Free Exercise Clause is invoked, including when government action prohibits certain conduct that is required by an individual’s religious belief, when government action requires certain conduct that an individual’s religious belief forbids, and when an individual claims that laws burden religious exercise); see also McDonald, supra note 71, at 2208–09 (explaining the types of Free Exercise based constitutional challenges that will increasingly be brought in the wake of the Religious Freedom Restoration Act).
102. See Chemerinsky, supra note 6, at 1684; see also Jesse H. Choper, et al., Constitutional Law 1238 (11th ed., 2011) (discussing conflicts between free exercise and state regulation). This Article will not undertake an analysis of religious exemption cases, because Blaine Amendments facially discriminate against religion and therefore are neither generally applicable nor religiously neutral. See discussion infra Section V.B.
103. See Epstein, supra note 44, at 462–63 (describing the conflict between generally applicable laws and religious beliefs as a choice between permissible disparate impact and accommodation); see also McDonald, supra note 71, at 2185 (introducing the Warren Court’s approach to Free Exercise exemption cases).
104. See Kmiec, Presser & Eastman, supra note 49, at 162 (“[G]overnment action which indirectly burdens a religious practice falls within a constitutional limitation on prohibiting religious practice.”).
The focus of this Article is on another primary instance where the Free Exercise Clause is implicated: where a law or other government action violates the “fundamental non-persecution and non-discrimination principle of the First Amendment” by targeting religion.\(^{105}\) The Court has consistently invalidated laws that target religion or otherwise discriminate on the basis of religious status or identity.\(^{106}\) Examining prior instances in which the Court has ruled on state action that targets religion provides a clear picture of principles inherent in the Free Exercise Clause.\(^{107}\) Moreover, understanding these principles is essential in analyzing whether state action to restrain the flow of government aid to—or withhold a generally available public benefit from—religious organizations is outside the constitutional limits of the Free Exercise Clause.\(^{108}\)

The principle of non-persecution has been a cornerstone of the Supreme Court’s free exercise of religion jurisprudence from the time the Free Exercise Clause was made applicable to the states in *Cantwell v. Connecticut*.\(^{109}\) In a unanimous decision, the *Cantwell* Court declared unconstitutional a state statute that prohibited individuals from soliciting for any religious cause, unless the cause had been previously approved by a state official.\(^{110}\) Writing for the

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105. *Church of the Lukumi Bahalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 523, 533–34 (1993) (reasoning that “a law targeting religious beliefs as such is never permissible,” nor is “[a]fficial action that targets religious conduct for distinctive treatment”). Laws “designed to burden religious beliefs, speech, or practice . . . receive stringent scrutiny by the Court . . . and [are] generally . . . invalidated.” *McDonald, supra* note 71, at 2185 (distinguishing the Court’s treatment of laws that target religion from those that incidentally burden religion). Protection afforded against government action that targets religion is very strong and “so well understood that few violations” have come before the Supreme Court. *Lukumi*, 508 U.S. at 523; *see also* *McDonald, supra* note 71, at 2189 (asserting that “government officials usually know [of the strong protection afforded against government action] and hence seldom” target religion); *Chemerinsky, supra* note 6, at 1683 (acknowledging that “[t]he Supreme Court repeatedly has stated that the government may not . . . punish religious beliefs”); NOWAK & ROTUNDA, *supra* note 32, at 1409 (“If the government were to impose burdens on a group of persons solely because of their religious beliefs, its actions would violate the free exercise clause unless the action was necessary to promote a compelling interest.”).

106. *See infra* text accompanying notes 109–58.


108. *See discussion infra* Part V.


110. *Id.* at 301–02. The statute, in relevant part, reads as follows:

No person shall solicit money, services, subscriptions or any valuable thing for any alleged religious . . . cause, from other than a member of the organization for whose benefit such person is soliciting or within the county in which such person or organization is located unless such cause shall have been approved by the secretary of the public welfare council.
unaligned Court, Justice Roberts distinguished between “freedom to believe and freedom to act,” with the former being absolute in nature, and the latter being “subject to regulation for the protection of society.”111 The Court tempered its acknowledgment that the government is able to regulate certain religious action by stating that “[i]n every case the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom.”112 The Cantwell Court’s approach of affording greater protection to religious expression under the “belief-act” dichotomy marked the beginning of a shift away from the Court’s prior deference to laws regulating religious expression and towards heightened scrutiny of such laws.113 Through this shift, the Court made clear that, with the exception of generally applicable laws that sought the safety and security of the public, prohibitions or even infringements on the free exercise of religion were forbidden, and laws that were discriminatory in nature on the basis of religion would not stand.114

In addition to the principle of non-persecution, the Court has also held

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that the Free Exercise Clause requires government action to be non-discriminatory in nature.\textsuperscript{115} In \textit{Torcaso v. Watkins},\textsuperscript{116} the Court invalidated a state constitutional provision that required state government officeholders to profess “belief in the existence of God” in order to hold office.\textsuperscript{117} The Court admonished that the purpose established by the state constitutional provision was a “religious test which was designed to . . . bar every person who refuses to declare a belief in God from holding a public office.”\textsuperscript{118} This discriminatory purpose had the effect of tipping the power and authority of the state to the side of the believer—or at least individuals “willing to say they believe in ‘the existence of God.’”\textsuperscript{119} Interestingly, the \textit{Torcaso} Court’s invalidation of the state constitutional provision was on Free Exercise grounds rather than Establishment Clause grounds.\textsuperscript{120} In concluding that the religious test contained in the state constitution “unconstitutionally invade[d] the appellant’s freedom of belief and religion,”\textsuperscript{121} despite the appellant’s atheistic beliefs, the \textit{Torcaso} Court underscored the principle that the Free Exercise Clause “prohibits government from regulating, prohibiting, or rewarding religious beliefs.”\textsuperscript{122}

Building upon the requirement that governmental action be non-discriminatory in regards to belief, the Court has further clarified the requirement that government action not be discriminatory on the basis of religious affiliation or status.\textsuperscript{123} In \textit{McDaniel v. Paty},\textsuperscript{124} the Court invalidated a state constitutional

\textsuperscript{115} See infra text accompanying notes 116–21.
\textsuperscript{116} 367 U.S. 488 (1961).
\textsuperscript{117} Id. at 489 (quoting Md. Const. art. 37). In \textit{Torcaso}, the appellant “was appointed to the office of Notary Public by the Governor of Maryland but was refused a commission to serve because he would not declare belief in God.” Id.
\textsuperscript{118} Id. at 489–90 (internal quotation marks omitted). The relevant provision of the Maryland Constitution provided: “[N]o religious test ought ever to be required as a qualification for any office of profit or trust in this State, other than a declaration of belief in the existence of God.” Id. at 489.
\textsuperscript{119} Id. at 490.
\textsuperscript{120} Id. at 495–96. The Court elaborated further, stating that “neither a State nor the Federal Government can constitutionally force a person ‘to profess a belief or disbelief in any religion.’ Neither can constitutionally pass laws or impose requirements which aid all religions as against non-believers.” Id. at 495. Some scholars have asserted that the inverse of the Court’s logic, “that [the] government also cannot express raw preferences for the non-religious over the religious” is applicable from the Court’s holding in \textit{Torcaso}. See Duncan, supra note 21, at 537.
\textsuperscript{121} Torcaso, 367 U.S. at 496.
\textsuperscript{122} McDaniel v. Paty, 435 U.S. 618, 626 (1978) (citing Torcaso, 367 U.S. at 496).
\textsuperscript{123} See infra text accompanying notes 124–28.
\textsuperscript{124} 435 U.S. 618 (1978). In \textit{McDaniel}, “a candidate for delegate to a Tennessee constitutional convention” brought an action for declaratory judgment against his opponent, “who was a Baptist
 provision that prohibited clergy “from serving as delegates to the State’s limited constitutional convention.”\textsuperscript{125} In Chief Justice Burger’s plurality opinion, a distinction was raised between the discrimination of religious beliefs deemed unconstitutional in \textit{Torcaso} and the discrimination faced by clergy members in \textit{McDaniel}.\textsuperscript{126} According to Chief Justice Burger, the disqualification of clergy from serving as state delegates was on the basis of the claimant’s “\textit{status} as a ‘minister’ or ‘priest.’”\textsuperscript{127} Despite the state’s “assert[ion] that its interest in preventing the establishment of a state religion [was] consistent with the Establishment Clause,” the Chief Justice concluded that a state action to disqualify clergy on the basis of religious status—and even disqualification “directed primarily at status, acts, and conduct”—violates the free exercise of religion.\textsuperscript{128} The decision reached in \textit{McDaniel} also reaffirmed the understanding that state action that is discriminatory in nature, including a law regarding a status-based disqualification, requires the state to prove a \textit{compelling state interest} in order to avoid invalidation.\textsuperscript{129}

Three years later, in \textit{Widmar v. Vincent},\textsuperscript{130} the Court strengthened the non-

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\textsuperscript{125}\textit{Id.} at 620. The Tennessee constitutional provision provided: “Whereas Ministers of the Gospel are, by their profession, dedicated to God and the care of Souls, and ought not to be diverted from the great duties of their functions; therefore, no minister of the gospel, or priest of any denomination whatever, shall be eligible to a seat in either House of the Legislature.” \textit{Id.} at 621 n.1 (citing TENN. CONST. art. VIII, § 1 (1796)).

\textsuperscript{126} \textit{Id.} at 626–27.

\textsuperscript{127} \textit{Id.} at 627.

\textsuperscript{128} \textit{Id.} at 628 (emphasis added). Although the decision in \textit{McDaniel} does not feature a majority of the Court, the concurrence in the judgment authored by Justice Brennan, which Justice Marshall joins, provides support for the conclusion reached by the Court. \textit{Id.} at 631–32 (Brennan, J., concurring) (“[T]he provision establishes a religious classification—involvement in protected religious activity—governing the eligibility for office, which I believe is \textit{absolutely prohibited}.” (emphasis added)).

\textsuperscript{129} See \textit{id.} at 627–28. The Court had officially introduced strict scrutiny fifteen years earlier in \textit{Sherbert v. Verner}, 374 U.S. 398 (1963). Writing for the majority of the Court, Justice Brennan concluded that “to condition the availability of benefits upon [an] appellant’s willingness to violate a cardinal principle of . . . religious faith effectively penalizes the free exercise of . . . constitutional liberties.” \textit{Id.} at 406. In the view of the Court, such a burden on sincere and good faith could be justified only if the state could demonstrate the pursuit of a “compelling state interest” through the “least restrictive alternative” for achieving that interest, which was devoid of any religious discrimination. \textit{Id.} at 403, 406, 408–09.

\textsuperscript{130} 454 U.S. 263 (1981). In \textit{Widmar}, members of a religious student group at the University of Missouri at Kansas City challenged a University regulation that prohibited the use of University
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discrimination principle in an eight to one decision, striking down a university regulation that prohibited the use of generally available university facilities by religious student groups “for purposes of religious worship or religious teaching.” In defense of its exclusion of religious student groups, the university claimed “a compelling interest in maintaining strict separation of church and State” that derived “from the ‘Establishment Clauses’ of both the Federal and [state] Constitutions.” Writing for the majority, Justice Powell applied the three-prong Lemon test to find that the university had no Establishment Clause concern because under the first and third prongs, “an open-forum policy, including nondiscrimination against religious speech, would have a secular purpose and would avoid entanglement with religion,” while under the second prong a “public forum, open to all forms of discourse, would” not have the primary effect of advancing religion.

Upon finding no Establishment Clause concern, Justice Powell turned to the state’s argument that it had merely “gone further than the Federal Constitution in proscribing indirect state support for religion” and that it had a compelling interest “in achieving greater separation of church and State than is already ensured under the Establishment Clause of the Federal Constitution.” In response, Justice Powell concluded that the state’s action of withholding equal access to a generally available benefit from a religious student group, simply on the basis of that group’s speech content and religious viewpoint, was not justified by the asserted state interests and therefore violated the Free Exercise Clause. Thus, in Torcaso, McDaniel, and Widmar, the Court clarified that the boundaries of the Free Exercise Clause prohibits state action from discriminating on the basis of religious belief, on the basis of

buildings or grounds “for the purposes of religious worship or religious teaching.” Id. at 265.

131. Id. at 265.

132. Id. at 270. The provision in Missouri’s Constitution that the state claimed adherence to provides, in relevant part: “That no person can be compelled to erect, support or attend any place or system of worship, or to maintain or support any priest, minister, preacher or teacher of any sect, church, creed or denomination of religion.” MO. CONST. art. I, § 6 (2016).

133. Widmar, 454 U.S. at 271–73. The Court found that although it was possible and even foreseeable that the religious student groups would benefit from access to the university’s facilities, such religious benefits were merely “incidental.” Id. at 274.

134. Id. at 275–76.

135. Id. at 276. The Court in Widmar concluded that it was “unable to recognize the State’s interest as sufficiently ‘compelling’ to justify content-based discrimination against respondents’ religious speech.” Id.
religious affiliation and status, or on the basis of religious speech content and viewpoint. 136

c. Current Constitutional Standard

In the wake of Employment Division v. Smith, 137 the Court’s approach to Free Exercise cases have fallen into two categories: (1) those featuring “laws [that] are neutral and generally applicable and therefore subject only to rational basis review” under Smith, and (2) those in which the Court has held that Smith is inapplicable; therefore, preserving a “higher level of protection for free exercise rights” under strict scrutiny. 138 In Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 139 the Court held that constitutional protection of the free exercise of religion mandates that government action targeting religion, whether through a law designed to burden or suppress religion or a law that prohibits an action solely because of its religious belief, must meet the two prongs of neutrality and general applicability from Smith. 140 Where the government action fails to satisfy either of these two prongs the action will be subjected to strict scrutiny, which requires justification “by a compelling governmental interest” that is “narrowly tailored to advance that interest,” thereby bringing laws that target religion within the latter category of those to which Smith’s lower standard of rational basis review is inapplicable. 141

Lukumi arose out of a conflict between the City of Hialeah, Florida and the Church of the Lukumi Babalu Aye and its congregants who are adherents of

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136. See supra text accompanying notes 116–35
140. DURHAM & SMITH, supra note 138, at § 3:11; see Lukumi, 508 U.S. at 531–33.
141. Lukumi, 508 U.S. at 531–33 (citing Emp. Div. v. Smith, 494 U.S. 872 (1990)). In Smith, the Court indicated that,
[i:]n addressing the constitutional protection for free exercise of religion, our cases establish the general proposition that a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice. Neutrality and general applicability are interrelated, and, as becomes apparent in this case, failure to satisfy one requirement is a likely indication that the other has not been satisfied. A law failing to satisfy these requirements must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest.”
Id. (internal citations omitted) (emphasis added).
the Santeria religion—a combination of Roman Catholicism and traditional native African religion—which regularly practices animal sacrifice as part of their religious rituals. Plans for the Church to establish a house of worship in the City of Hialeah distressed and concerned citizens of the community, resulting in emergency city council meetings where the city council adopted a number of ordinances to prevent animal sacrifice within the city. Although none of the city ordinances passed by the city council targeted the Santeria religion by name, the Court noted that, when the ordinances’ operation was considered, it was evident that the ordinances targeted animal sacrifices reminiscent of those in the Santeria religion.

Writing for the seven-member majority of the Court, Justice Kennedy began an analysis of whether the city council’s ordinances violated the Free Exercise Clause by acknowledging that the “First Amendment forbids an official purpose to disapprove of a particular religion or of religion in general,” and that, “at a minimum[,] the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs,” while also protecting against laws that “impose[] special disabilities on the basis of . . . religious status.”

142. Id. at 524–25.
143. Id. at 525–28.
144. Id. at 535. “The city council adopted three substantive ordinances” that addressed the issue of animal sacrifices. Id. at 527. The first ordinance “defines sacrifice” as “to unnecessarily kill, torment, torture, or mutilate an animal in a public or private ritual or ceremony not for the primary purpose of food consumption,” and prohibited owning or possessing an animal “intending to use such animal for food purposes.” Id. However, the city council restricted this application of this ordinance “to any individual or group that ‘kills, slaughters or sacrifices animals for any type of ritual, regardless of whether or not the flesh or blood of the animal is to be consumed.’” Id. (internal quotations omitted). The second ordinance went on to declare that “the city council has determined that the sacrificing of animals within the city limits is contrary to the public health, safety, welfare[,] and morals of the community.” Id. at 528. “The final Ordinance . . . defined ‘slaughter’ as ‘the killing of animals for food’ and prohibited slaughter outside of areas zoned for slaughterhouse use,” but “provided an exemption . . . for the slaughter or processing for sale of ‘small numbers of hogs and/or cattle per week in accordance with an exemption provided by state law.’” Id.


146. Lukumi, 508 U.S. at 532–33 (quoting Smith, 494 U.S. at 877). As discussed above, Justice Kennedy noted that it was “historical instances of religious persecution and intolerance that gave concern to those who drafted the Free Exercise Clause.” Id. (quoting Bowen v. Roy, 476 U.S. 693, 703.
Moving to an analysis of the neutrality prong under Smith, Justice Kennedy asserted that targeting religious beliefs is never permissible and a law is not neutral if the object of the law is to infringe upon religion, restrict religious practice, or suppress religion or religious conduct. In determining whether the object or purpose of a law is not neutral—and therefore impermissible—Justice Kennedy considered the text of the law, the operation of the law, and the amount of religious conduct proscribed. For additional guidance on determining whether the object of a law is neutral, Justice Kennedy turned to the Court’s Equal Protection Clause jurisprudence, which indicated that other relevant evidence includes: “the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decisionmaking body.” Upon consideration of these guiding factors, Justice Kennedy concluded that the city council’s ordinances were not neutral and, in fact, “had as their object the suppression of religion.”

Turning to an analysis of the general applicability prong under Smith, Justice Kennedy asserted that the Free Exercise Clause “protect[s] religious
observers against unequal treatment,"151 and essential to the protection of these rights is "[t]he principle that government, in pursuit of legitimate interests, cannot in a selective manner impose burdens only on conduct motivated by religious belief."152 The city council’s ordinances were of such a suspect nature that Justice Kennedy did not proceed further with defining the standard for determining general applicability, instead stating: "In this case we need not define with precision the standard used to evaluate whether a prohibition is of general application, for these ordinances fall well below the minimum standard necessary to protect First Amendment rights."153 However, Justice Kennedy’s analysis did focus on the underinclusive nature of the ordinances with regard to nonreligious conduct,154 concluding “that each of Hialeah’s ordinances pursues the city’s governmental interests only against conduct motivated by religious belief” and that the city council’s ordinances "ha[ve] every appearance of a prohibition that society is prepared to impose upon [Santeria worshippers] but not upon itself . . . . This precise evil is what the requirement of general applicability is designed to prevent."155 Upon finding that the City of Hialeah’s ordinances were neither neutral nor generally applicable, and instead targeted the Church of the Lukumi Babalu Aye and its congregants, Justice Kennedy applied strict scrutiny to strike down the ordinances on the basis that the ordinances were overbroad or underinclusive in substantial respects and that the governmental interests were not pursued with respect to analogous non-religious conduct.156 Justice Kennedy reasoned the governmental interests could be achieved by narrower ordinances that burdened religion to a far lesser degree.157 Ultimately, the Court unanimously struck down the

151. Id. (internal quotation marks omitted) (alterations in original) (quoting Hobbie v. Unemployment Appeals Comm’n of Fla., 480 U.S. 136, 148 (1987) (Stevens, J., concurring)). Justice Kennedy acknowledged that “[a]ll laws are selective to some extent, but categories of selection are of paramount concern when a law has the incidental effect of burdening religious practice.” Id.
152. Id. at 543.
153. Id.
154. Id. The City of Hialeah argued that the ordinances advanced two interests: protecting the public health and preventing cruelty to animals. Id. Yet Justice Kennedy found that the ordinances were “underinclusive for those ends” and “fail[ed] to prohibit nonreligious conduct” that endangered such interests “in a similar or greater degree than Santeria sacrifice does.” Id.
155. Id. at 545–46 (quoting Fla. Star v. B.J.F., 491 U.S. 524, 542 (1989) (Scalia, J., concurring in part and concurring in judgment) (internal quotations omitted)).
156. Id. at 542.
157. Id. at 545. Once it is determined by the Court that “[a] law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny” and “[t]o satisfy
ordinances, holding that the laws were contrary to Free Exercise Clause principles and therefore void.158

B. Imposing New Constraints through State Blaine Amendments

Since the Court’s adoption of benevolent neutrality, the constitutional constraints placed on government aid to religious organizations by the Establishment Clause have become significantly more permissive, merely requiring that the government program is facially neutral and does not have the purpose of advancing religion.159 As a result, religious access to government funding for secular purposes does not face the high and impregnable wall of separation between church and state under the Establishment Clause once envisioned by Justice Black in Everson.160 Instead, religious organizations seeking generally available secular aid are turned away under state “Blaine Amendments,” which present an impediment that is more restrictive on government aid accessible by religious organizations than is required under the federal Constitution.161 In effect, the application of state Blaine Amendments have redefined the limitations on government aid to religion by allowing for a markedly separationist approach to the provision of aid, even where there is no barrier under the Establishment Clause of the First Amendment.162

As applied, state Blaine Amendments fail to adhere to benevolent neutrality principals espoused by the Court throughout modern Establishment Clause jurisprudence and instead err on the side of strict neutrality, if not strict separationism.163 This approach becomes problematic, and results in charges of unconstitutionality, when a state government goes too far and improperly disapproves of religion in general, discriminates against some or all religious

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158. Id. at 547.
159. WITTE & NICHOLS, supra note 36, at 180; see also McDonald, supra note 71, at 2197–98.
160. Duncan, supra note 21, at 493; see also DOUGLAS F. JOHNSON, FREEDOM OF RELIGION: LOCKE V. DAVEY AND STATE BLAINE AMENDMENTS 15 (2010).
161. Duncan, supra note 21, at 493; see also DeForrest, supra note 13, at 554–55 (asserting that Blaine Amendments provide the strongest legal argument against school choice vouchers).
162. See Duncan, supra note 21, at 493.
163. Erica Smith, Blaine Amendments and the Unconstitutionality of Excluding Religious Options from School Choice Programs, 18 FEDERALIST SOC’Y REV. 48, 49 (2017) [hereinafter Blaine Amendments and Unconstitutionality].

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the commands of the First Amendment, a law restrictive of religious practice must advance ‘interests of the highest order’ and must be narrowly tailored in pursuit of those interests.” Id. at 546 (quoting McDaniel v. Paty, 435 U.S. 618, 628 (1978)).
beliefs, or imposes special disabilities on the basis of religious status.\textsuperscript{164} Before analyzing the constitutionality of state constitutional provisions that seek to maintain a high wall between church and state, an understanding of the origins of such state constitutional provisions provides necessary context.\textsuperscript{165}

1. Common-Schools and Religious Conflict

In the early 1800s, public education in America was sparse, and most educational instruction was administered by churches and clergy who combined education with religious instruction.\textsuperscript{166} The rise of American common-schools in the late 1830s ushered in questions over the proper place of religion in American education.\textsuperscript{167} Common-schools were “founded on the pretense that religion had no legitimate place in public education,” and Horace Mann, the creator of the nation’s first public school system, “called for the ‘entire exclusion of religious teaching’ from public schools.”\textsuperscript{168} Despite a professed dedication to secular education that promised to be free of “separatism,”\textsuperscript{169}

\textsuperscript{164} See id. (“Blaine Amendments have both the purpose and the effect of discriminating against religion, and this discrimination cannot be justified by a compelling government rationale.”).

\textsuperscript{165} DeForrest, supra note 161, at 556.

\textsuperscript{166} Duncan, supra note 21, at 502–03; Joseph P. Viteritti, Blaine’s Wake: School Choice, the First Amendment, and State Constitutional Law, 21 HARV. J.L. & PUB. POL’Y 657, 663 (1998); see also ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 320 n.4 (Phillips Bradley ed., Random House 1945 ed.) (1839) (acknowledging that at the time in America “[a]lmost all education [was] entrusted to the clergy”). Professor Akhil Amar asserts that Tocqueville’s observation of the role religion played in education in America is one illustration of the free exercise clause at work in our democracy. Akhil Reed Amar, The Bill of Rights as a Constitution, 100 YALE L.J. 1131, 1162 (1991) (“[T]he free exercise clause protected not simply the ‘private’ worship of an individual, but also the nongovernmental yet ‘public’ (Tocqueville’s word) education of citizens—the very foundation of democracy.”).

\textsuperscript{167} Viteritti, supra note 166, at 665.

\textsuperscript{168} Id. at 666. Mann created the nation’s first public school system in 1837 as the Secretary of Education for the Commonwealth of Massachusetts. Id.

\textsuperscript{169} The term “separatist” has been accepted by many legal and historical scholars as nineteenth century common parlance for “Catholic” and indicative of the anti-Catholicism prevalent at the time as discussed infra. See, e.g., U.S. COMM. ON CIV. RTS., SCHOOL CHOICE: THE BLAINE AMENDMENTS & ANTI-CATHOLICISM 11 (2007), https://www.usccr.gov/pubs/docs/BlaineReport.pdf [hereinafter USCCR] (statement of Anthony R. Picarello, Jr.) (claiming that “no historical evidence was presented by any [ ] witness to contradict the substantial historical evidence . . . tending to show that anti-Catholicism was indeed an animating force behind the federal and state Blaine Amendments”); id. at 41 (statement of Richard D. Komer) (positing that “‘separatist’ was understood to be a code word for Catholic”); Richard G. Bacon, Rum, Romanism and Romer: Equal Protection and the Blaine Amendment in State Constitutions, 6 DEL. L. REV. 1, 2–5 (2003) (focusing on anti-Catholic factors as creating Blaine provisions); Jay S. Bybee & David W. Newton, Of Orphans and Vouchers: Nevada’s “Little
the common-school curriculum actually promulgated a generic Protestantism, which had become infused in mainstream culture as the dominant viewpoint, and was not viewed as “sectarian” in nature.170 Most Americans viewed Christianity and morality as so inseparable that the promulgation of Protestantism, even within common-schools, was believed to be critical to the promotion of democratic values and the preservation of a republican form of society.171 This foundation on Protestant religiosity “was intolerant of those who were non-believers”172 and generally excluded other religions that were not yet mainstream, including Catholics, Jews, and Jehovah’s Witnesses.173

The condemnation of “sectarian” education within Protestant-dominated common-schools served as a proxy battleground for a greater societal conflict by “pitting Catholics’ desires for educational and social equality against ‘nativist’ Protestants’ fears of Catholic influence.”174 An influx of Catholic immigrants had sharply increased the Catholic population in America from one percent in 1789 to ten percent by 1866175 and, as a result, the contemporary social and political climate was rife with anti-Catholic animus primarily

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170. USSCR, *supra* note 169, at 8 (noting that Protestant teachings were promulgated through a curriculum that included readings of the King James translation of the Bible, the recital of prayers, and the singing of hymns).

171. Steven K. Green, *The Blaine Amendment Reconsidered, 36* Am. J. Legal Hist. 38, 45 (1992) (“Most nineteenth century Americans believed that morality and Christianity were inseparable and that both were necessary for the preservation of republican society. However, too many people failed to attend church to risk leaving the instruction of morality to religious institutions. Thus, the common school quickly became the primary institution for inculcating public morality.”); *see also* DeForrest, *supra* note 161, at 556. Mann and other advocates believed that the Protestant religiosity contained in the common-school curriculum provided a moral education that was central to “assimilat[ing] immigrants and their children into American society by encultering them with American values and attitudes.” *Id.* at 559.


173. Duncan, *supra* note 21, at 504.

174. *Id.* at 505; *see also* Mitchell v. Helms, 530 U.S. 793, 828–29 (2000) (plurality opinion) (“[I]t was an open secret that ‘sectarian’ was code for Catholic.”); DeForrest, *supra* note 161, at 559 (“The prevalent condemnations on ‘sectarian’ education were directed toward the Catholic Church.”).

espoused by the nativist Protestant population.\footnote{176} As the Catholic population grew, adherents attempted to push back against Protestant-biased common-schools by opposing Protestant religious practices, including advocating for “remov[al] of the King James Bible from the curriculum and ending Protestant devotional activity in the classrooms.”\footnote{177} Catholic leaders and politicians undertook a systematic effort to lobby state legislatures for public funding to develop their own Catholic parochial education system.\footnote{178} At its core, the quest to obtain government funding for Catholic schools was a quest for equity as “Catholics were forced to pay taxes to support the Protestant common schools, and it was only fair, from the Catholic perspective, that Catholic schools also be eligible for public funding.”\footnote{179} Attempts by Catholics in the 1850s to push back against the Protestant establishment “provoked a display of majoritarian politics of unprecedented brutality”\footnote{180} and resulted in the passage of the first state law to prohibit any diversion of public aid to sectarian schools in 1854.\footnote{181}

\footnote{176. Philip Hamburger, \textit{Separation of Church and State: A Theologically Liberal, Anti-Catholic, and American Principle}, \textsc{Univ. Chi. L. Occasional Paper}, No. 43., at 11 (2002), https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1022&context=occasional_papers (“Fearful of the foreigners, many native-born Protestants self-consciously identified themselves with America and its native population and, on this basis, these ‘nativists’ opposed foreign immigration, especially by Irish Catholics.”).}

\footnote{177. DeForrest, \textit{supra} note 161, at 560. Protestant religious practices were an affront to Catholic adherents’ religious beliefs as, the Catholic Church [did] not recognize the King James translation of the Bible—the only officially approved English translation of the Bible was the Douay version—but daily “unaccompanied Bible reading, which was the cornerstone of the Protestant consensus,” violated Catholic conviction that scripture should be read only in the context of the Church’s authoritative doctrinal tradition.}

\footnote{178. Viteritti, \textit{supra} note 166, at 69; see also Gerard V. Bradley, \textit{An Unconstitutional Stereotype: Catholic Schools as “Pervasively Sectarian”}, \textsc{7 Tex. Rev. L. & Pol.} 1, 9 (2002) (“[A] separate Catholic school system was started in this country to protect Catholic children from the scandal of aggressive Protestantism in the public schools.”).}

\footnote{179. DeForrest, \textit{supra} note 13, at 560.}

\footnote{180. Viteritti, \textit{supra} note 166, at 669; see also DeForrest, \textit{supra} note 161, at 561 (noting multiple incidents to turn back Catholic attempts to gain state aid for parochial schools, including in 1851 when a New York court ruled against Catholic attempts to obtain a portion of public funds set aside for common-schools).}

\footnote{181. Viteritti, \textit{supra} note 166, at 669. In 1854, the fanatically anti-Catholic “Know-Nothing Party” gained control of the Massachusetts state legislature and passed laws to prohibit the flow of aid to sectarian schools. \textit{Id.} Around 1875, “fourteen states had passed state laws—some in the form of constitutional amendments—to seal off public funds from sectarian control.” Duncan, \textit{supra} note 21,
By the 1860s, Catholic political power had grown and efforts to protect against Protestant hegemony in common schools had garnered some success, including an allocation of $700,000 by the New York city government to the Catholic diocese of New York for its parochial school system.182 Efforts by Catholics to eradicate Protestant influence in common schools had far-reaching effects and “many Protestants became aware of challenges to the cultural and religious hegemony in America,”183 leading to “fierce attacks on the rise of Catholic influence.”184

Conflict between Catholics and Protestants over the government aid to sectarian Catholic schools reached national prominence and eventually took on partisan overtones as politicians from both major political parties sought to seize on the issue for political gain, particularly in advance of the coming 1876 Presidential election.185 On September 30, 1875, in a speech before the convention of the Society of the Army of Tennessee, President Ulysses S. Grant took a stance on the issue:

Now, the centennial year of our national existence, I believe, is a good time to begin the work of strengthening the foundations of the structure commenced by our patriotic forefathers one hundred years ago at Lexington. Let us all labor to add all needful guarantees for the security of free thought, free speech, a free press, pure morals, unfettered religious sentiments, and of equal rights and privileges to all men irrespective of nationality, color, or religion. Encourage free schools, and resolve that not one dollar, appropriated for their support, shall be appropriated to the support of any sectarian schools. Resolve that neither the State nor Nation, nor both combined shall support institutions of learning other than those sufficient to afford to

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182. DeForrest, supra note 161, at 562. Later that same year, the New York legislature “passed a bill prohibiting aid to sectarian schools, but four years later the Catholic diocese was still receiving over $370,000 a year through indirect state aid.” Id.

183. DeForrest, supra note 161, at 563 (quoting Green, supra note 170, at 47).

184. Id. Protestant press attacked Catholic efforts to remove Protestant influence from common schools as “efforts to remove ‘Christian thought’ from the public schools.” Id. In Protestant churches, anti-Catholic sermons became commonplace, and there was an increase in anti-Catholic organizations. Id.

185. Green, supra note 171, at 44 (citing Editorial, A Coming Struggle, N.Y. TRIB., Jul. 8, 1875, at 4; INDEX, Aug. 5, 1875, at 365).
every child growing up in the land the opportunity of a good common school education, *unmixed with sectarian, pagan, or atheistical dogmas.* Leave the matter of religion to the family altar, the Church, and the private school, supported entirely by private contributions. Keep the Church and State forever separate.\textsuperscript{186}

Grant’s speech was lauded as “full of wisdom” by the country’s Protestant majority because it sought to prevent public money from going to sectarian Catholic schools and reaffirmed a commitment to a common-school education that had become infused with Christian morality.\textsuperscript{187} Catholics admitted that “if the President’s speech could be accepted at face value, Catholics would have few complaints with its content,” because they too were in support of sectarian free common-schools, which, from their perspective, included Protestantism.\textsuperscript{188} Absent such a condition, Grant’s speech was criticized by the Catholic minority as anti-Catholic and was generally understood as a veiled attack on Catholicism.\textsuperscript{189} As a result, most observers recognized the political motivation for Grant’s speech and the partisan nature of his proposal, which “clearly aligned the Republican Party with the Protestant cause.”\textsuperscript{190}

A little over two months later, on December 7, 1875, President Grant proposed that a constitutional amendment be adopted to prohibit government aid to “any religious sect or denomination” in his annual address to Congress:

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

\textsuperscript{186} *Id.* at 47–48 (emphasis added) (citing a reprint of Grant’s speech in INDEX, Oct. 28, 1875, at 513).

\textsuperscript{187} Green, *supra* note 171, at 48 (quoting CHRISTIAN ADVOCATE, Oct. 7, 1875, at 316; INDEX, Nov. 4, 1875, at 522).

\textsuperscript{188} Green, *supra* note 171, at 48. Catholics argued that “the reading of the Protestant Bible in the schools Protestant, ‘sectarian’ institutions, and therefore unjust towards all other religious bodies.” *Id.* at 48 n.67 (quoting The President’s Speech at Des Moines, CATHOLIC WORLD, Jan. 1876, at 438).

\textsuperscript{189} Green, *supra* note 171, at 48.

\textsuperscript{190} *Id.*; see also Viteritti, *supra* note 166, at 670 (discussing the connection between politics and Protestantism). Grant understood the political advantage that he would gain by taking such a stance on the issue. Green, *supra* note 171, at 48–49. In addition to seeking re-nomination for a third term, Grant sought to recast the Republican Party as the party of free education and, by extension, “appear moral and once again the party of reform.” *Id.* at 49.
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 taxes, or any part thereof, either by the legislative, municipal, or other authority, for the benefit or in aid, directly or indirectly, of any religious sect or denomination, or in aid or for the benefit of any other object of any nature or kind whatever.191

Once again, Grant’s proposed amendment was met with warm reception by the press192 and was criticized by Catholic press who asserted that it was “only the entrance of a wedge that, driven home, will disturb the foundations of our government; will create religious strife, and blast the hopes of freedom.”193 Grant’s alignment of the Republican Party with the prevailing anti-Catholic animus and his calls for a constitutional amendment that prohibited government aid to “any religious sect or denomination” created the political atmosphere necessary for Representative James G. Blaine of Maine to submit his proposed amendment.194

2. Blaine’s Constitutional Amendment in Congress

Representative James G. Blaine, who previously lost the House Speaker’s chair in the midterm elections of 1874, had aspirations to obtain the Republican Party Presidential nomination for the election of 1876.195 Understanding that there was political capital to be gained from Grant’s proposed

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191. Green, supra note 171, at 52 (emphasis added) (citing ULYSSES S. GRANT, 1822–1885, at 92 (P. Moran ed. 1968)).
192. Green, supra note 171, at 52–53 (citing N.Y. TIMES, Dec. 8, 1875, at 6; N.Y. TRIB., Dec. 8, 1875, at 6; HARPER’S WkLY, Jan. 1, 1876, as reprinted in INDEX, Jan. 13, 1876, at 15; CHIC. TRIB., Dec. 8, 1875, at 4).
193. Green, supra note 171, at 53–54 (quoting The President’s Message, Cath. World, Feb. 1876, at 707, 711) (internal quotation marks omitted).
194. See Green, supra note 171, at 52–53; see also Viteriti, supra note 166, at 670–71 (outlining the historical context of Blaine’s rise to power).
195. See Green, supra note 171, at 49. At the time Blaine’s amendment was proposed in the House of Representatives, Blaine was “untainted by scandal and considered a viable candidate for the presidency,” unlike Grant, whose “administration was racked by corruption.” Id.; see also Viteriti, supra note 166, at 670–71 (discussing Blaine’s rise and actions therein).
amendment, Blaine quickly submitted a resolution to the House of Representatives one week later on December 14, 1875; it read:

No State shall make any law respecting an establishment of religion or prohibiting the free exercise thereof; and no money raised by taxation in any State for the support of public schools, or derived from any public fund therefor, nor any public lands devoted thereto, shall ever be under the control of any religious sect; nor shall any money so raised or lands so devoted be divided between religious sects or denominations.196

Although Blaine’s resolution was met with approval by the Protestant press and disapproval by the Catholic press, most recognized that Blaine’s underlying political aims were driving his resolution.197 Despite criticism regarding the purpose of Blaine’s resolution and its intended effect, Blaine consistently “maintained that he was not anti-Catholic and that the amendment was intended to remove the school issue from the public forum” by de-politicizing and resolving the issue of funding sectarian Catholic schools.198 The Democratic Party, which controlled the House of Representatives at that time, was suddenly caught in the middle of the common-school battle and did not want to alienate Catholic voters, especially ahead of the 1876 election.199 At the same time, they recognized the importance of Blaine’s proposed

197. Sister Marie Carolyn Klinkhamer, The Blaine Amendment of 1875: Private Motives for Political Action, 42 Cath. Hist. Rev. 15, 23 (1956). Even the Nation, a publication that was supportive of the amendment’s aims, admitted “Mr. Blaine did, indeed, bring forward ... a constitutional amendment directed against the Catholics, but the anti-Catholic excitement was, as every one [sic.] knows now, a mere flurry; and all that Mr. Blaine means to do or can do with his amendment is, not to pass it but to use it in the campaign to catch anti-Catholic votes.” Nation, Mar. 16, 1876, at 173; see also Green, supra note 171, at 53–54 (discussing public reaction to Blaine’s proposal).
198. Green, supra note 171, at 54. However, the true motive for Blaine’s support of the amendment is still disputed. See DeForrest, supra note 161, at 566. Green contends that “[e]vidence exists to substantiate Blaine’s lack of personal animosity toward Catholics” and cites Blaine’s ties to Catholicism through his mother and daughters, his general disregard for the proposed amendment once he had lost the presidential nomination, and his failure to reference the amendment in his autobiography. Green, supra note 169, at 54 n. 103. But see 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, 464 (1988) (“Blaine continued to support an amendment during the remainder of his long political career.”).
199. See DeForrest, supra note 161, at 566.
amendment to the common-school issue and did not want to be weighed down by supporting the unpopular position of the Catholic minority.\textsuperscript{200} Thus, the Democrats submitted an alternate version of Blaine’s resolution in an attempt to kill the proposal for the time being, a move that proved successful when the resolution died after being referred to the House Judiciary Committee.\textsuperscript{201}

Political and public interest in Blaine’s resolution waned until after the parties held their national conventions.\textsuperscript{202} Democratic leadership initially hoped to delay voting on the resolution until after the November 1876 elections, but the recently-nominated Democratic candidate Samuel J. Tilden pressed for removal of the Catholic school funding issue from public debate, which resulted in the resolution passing the House by a vote of 180 to 7.\textsuperscript{203} The Republican-controlled Senate had no desire to pass the House version of the resolution because it had been weakened by a limiting clause, and before the resolution could be referred to the Senate Judiciary Committee, three Republican Senators proposed alternate versions that sought to strengthen the resolution considerably.\textsuperscript{204} Upon considering the House resolution and the subsequently proposed substitutions, the Senate Judiciary Committee issued a report on August 11, 1876 that proposed a revised version of Blaine’s amendment, which read:

\begin{quote}
\textit{This article shall not vest, enlarge, or diminish legislative power in the Congress.} \textit{Id.} at 5189. Much of the House debate focused on the addendum of this limiting clause, which Democrats argued effectively limited Congress’s power to enforce the proposed amendment and made it a simple declaration of principles. Green, supra note 171, at 59.
\end{quote}

\begin{quote}
\textit{The Locke Exception}  
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\end{quote}

\textsuperscript{200} See id.

\textsuperscript{201} 4 CONG. REC. 441 (1876); see also DeForrest, supra note 161, at 566–57. The Democrats alternative proposed amendment was submitted by William J. O’Brien (D-Maryland) on January 17, 1876. Green, supra note 171, at 55. It incorporated much of Blaine’s original language but added a prohibition on requiring religious tests in order to hold public office, which was meant to protect Catholics seeking inclusion on school boards and other offices. \textit{Id.}

\textsuperscript{202} Green, supra note 171, at 56–57.

\textsuperscript{203} 4 CONG. REC. 5189–92 (1876). Before the House Judiciary Committee reported the proposed amendment back to the full House for a vote, an addendum was attached that read: “This article shall not vest, enlarge, or diminish legislative power in the Congress.” \textit{Id.} at 5189. Much of the House debate focused on the addendum of this limiting clause, which Democrats argued effectively limited Congress’s power to enforce the proposed amendment and made it a simple declaration of principles. Green, supra note 171, at 59.

\textsuperscript{204} 4 CONG. REC. 5245. Senator Frederick Frelinghuysen (R-N.J.) proposed a version that sought to “prohibit direct grants from state treasuries or general appropriations” in addition to indirect grants, and expand the scope of religious institutions covered from only sectarian schools to seminaries and reformatories. Green, supra note 171, at 59; see also 4 CONG. REC. 5245. Senator Isaac Christiany (R-Michigan) proposed that the resolution not only covered state action but federal action as well, and that it “prohibit[ed] the teaching of any religion or religious belief as a course of study in a public or tax-supported school.” Green, supra note 171, at 60; see also 4 CONG. REC. 5245–46.
No State shall make any law respecting an establishment of religion, or prohibiting the free exercise thereof; and no religious test shall ever be required as a qualification to any office or public trust under any State. No public property and no public revenue of, nor any loan of credit by or under the authority of, the United States, or any State, Territory, District, or municipal corporation, shall be appropriated to or made or used for the support of any school, educational or other institution under the control of any religious or anti-religious sect, organization, or denomination, or wherein the particular creeds 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.205

The Senate’s revised version of Blaine’s amendment seemingly sought to remove religion from common-schools by announcing a broad prohibition against support for any sectarian religious institution through public revenue, loans, or property.206 However, consideration of two facts makes clear that the revised Senate resolution actually sought to “preserv[e] the dominant Protestant character of the common schools.”207 First, the resolution’s final provision did not prohibit reading the Bible in schools, a predominantly Protestant activity, and instead left the issue to state legislatures.208 Second, the resolution did nothing to rectify the pre-existing infusion of general Protestant practices and teachings in common-schools, which had been accepted to a broader extent by society as a whole.209

205. 4 CONG. REC. 5453 (emphasis added).
206. Id.
207. DeForrest, supra note 161, at 568.
208. Id. Specifically, the final provision stated: “This article shall not be construed to prohibit the reading of the Bible in any school or institution, and it shall not have the effect to impair rights of property already vested.” 4 CONG. REC. 5453.
209. See DeForrest, supra note 161, at 568.
In the context of the mid-to-late 1800s, the political movement to adopt a constitutional amendment that prohibited state aid to religious institutions was effectually an attempt by the Protestant majority to stamp out demands by the Catholic minority for equal government funding of schools that maintained a predominantly Catholic character.210 Three points are critical in reaching this conclusion: (1) the failure of Blaine amendment proponents to acknowledge and attempt to eradicate Protestant influence in common-schools,211 (2) the overt anti-Catholicism on display during the Senate debates over the revised resolution,212 and (3) claims by secularist Liberals that the Blaine amendment did not go “far enough in extirpating all vestiges of religion from government.”213

In the end, Blaine’s proposed amendment garnered twenty-eight votes in favor and sixteen votes against, falling four votes short of the necessary two-thirds majority to pass the Senate.214 The vote was split down party lines with all present Republicans voting in favor and all present Democrats voting against.215 Blaine lost interest in the proposed amendment after he lost his political opportunity by failing to secure the Republican Party’s nomination; he failed to even show up to the congressional debates and the subsequent Senate vote on the resolution he initially proposed.216 However, the Blaine Amendment’s failure to garner the necessary votes to pass the Senate and become a federal constitutional amendment would not be the end of Representative James Blaine’s legacy.217 The proposed federal amendment failed to pass in Congress because of partisan politics, but state legislatures began to

210. See id. at 568–69.
211. Id.
212. See id. at 570–72. In an attack on the proposed amendment, Senator Whyte of Maryland, who identified himself as a Protestant from the Senate floor, declared that the amendment was an attack on the loyalty of the Catholic citizenry. 4 Cong. Rec. 5580, 5583 (1876) (statement of Sen. Whyte). In response, Senator Morton, a supporter of the amendment, began to denounce the Catholic citizenry as a “large and growing class of people in this country who are utterly opposed to our present system of common schools, and who are opposed to any school that does not teach their religion.” Id. at 5585 (statement of Sen. Morton).
213. Duncan, supra note 21, at 511.
214. 4 Cong. Rec. at 5595.
215. Id.
216. Green, supra note 171, at 67–68. By the time Blaine’s amendment came to a vote in either Houses of Congress, James Blaine had been appointed as a Senator and even failed to attend the Senate vote on the amendment bearing his own name. Id.
217. See DeForrest, supra note 13, at 573; Duncan, supra note 21, at 512.
implement state constitutional provisions quite similar to those proposed in Congress. 218

3. Adoption of Blaine Amendment Language in State Constitutions

The Blaine Amendment’s failure to pass in the Senate marked the beginning of state legislation aimed at prohibiting the use of public funds for the support of “sectarian” religious entities. 219 By the end of 1876, fourteen states had passed Blaine-like legislation, primarily in the form of constitutional amendments, thereby adopting the separationist cause promoted by President Grant, Representative Blaine, and the Republican Party. 220 By 1890, the number of states that had incorporated Blaine-like provisions into their constitutions swelled to twenty-nine. 221 The spread of state Blaine-like provisions continued through the first decade of the nineteenth century, bringing the tally of states with Blaine-like constitutional provisions to thirty-six. 222 The admission of Alaska and Hawaii into the Union in 1959 raised the total to thirty-eight, as each state brought Blaine-like constitutional provisions upon admission. 223

Although many state legislatures adopted Blaine-like constitutional provisions voluntarily, a significant factor in the surge of these state constitutional provisions can be attributed to pressure from Congress. 224 The Republican Party’s vision for common-schools and solidifying Protestant control and influence had become an agenda issue that would be impressed upon states seeking to receive aid for education from federal grants or territories seeking admission to the Union as new states. 225 Ultimately, the proliferation

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218. See infra notes 219–26 and accompanying text.
219. Viteritti, supra note 166, at 673.
220. Id.; see also Hamburger, supra note 176, at 322 (asserting that President Grant’s 1875 speeches “made separation part of the Republicans’ agenda” and sought to blend “Republican ideas about federal protection and nativist concepts of ‘American’ liberty”).
221. Green, supra note 171, at 43 (citing W. Blakely, American State Papers 237–66 (1890)).
222. Duncan, supra note 21, at 520.
223. Id. at 520–21.
224. DeForrest, supra note 161, at 573.
225. Viteritti, supra note 166, at 672–73 (citing David Tyack et al., Law and the Shaping of Public Education, 1785–1954, at 22 (1987)); see DeForrest, supra note 13, at 573–74. A prime example of congressional compulsion of the adoption of state Blaine-like provisions was the Enabling Act of 1889 in which Congress required the constitutional convention of each new state to include a Blaine Amendment provision in its state constitution. Frank J. Conklin & James M. Vache, The
of state Blaine-like constitutional amendments arose out of the confluence of religious conflict within America’s common-schools and the political opportunism of President Grant and Representative Blaine through their appeals to the strong nativist and anti-Catholic sentiment of the mid-nineteenth century. Unfortu-
nately, the Blaine-like provisions adopted by—and, in many instances, thrust upon—state legislatures towards the latter-half of the nineteenth century have remained, albeit dormant, and recently have been increasingly used to curtail aid to religious organizations more broadly.

III. CURRENT STATE OF THE LAW

The controversial origins and nature of state Blaine Amendments invites inquiry as to why these state constitutional provisions have been largely disregarded for over a century. One contributing factor is that much of the Court’s jurisprudence since Representative Blaine’s failed constitutional amendment has been focused on refining the “blurred, indistinct, and variable barrier” between church and state alluded to by Justice Black in Lemon. The shift towards the Court’s benevolent neutrality approach to the provision of government aid flowing to religious organizations that has occurred since the beginning of the Rehnquist Court—in marked distinction to the prior approach under the Burger Court—has lowered barriers and allowed for the inclusion of religious organizations in secular, generally available government aid programs. The softening of federal constitutional barriers that affect the

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Establishment Clause and the Free Exercise Clause of the Washington Constitution—A Proposal to the Supreme Court, 8 U. Puget Sound L. Rev. 411, 436 (1985). Specifically, the Act required that each state provide for “establishment and maintenance of systems of public schools which shall be open to all the children of said States and free from sectarian control.” Id.

226. See Viteritti, supra note 166, at 675.

227. See id. at 674; Duncan, supra note 21, at 515 (acknowledging that today state Blaine-like provisions “are a widespread mechanism for separating public benefits from all religious institutions and religious individuals”).

228. See supra Section II.B (discussing the illustrious history of the Federal Blaine Amendment and subsequent state Blaine Amendments).


230. See The Mistakes in Locke, supra note 5, at 227 (noting that “the Rehnquist Court changed direction and permitted the inclusion of religious institutions in more and more funding programs”); see also Duncan, supra note 21, at 493; (discussing the increasing relevance of state Blaine Amendments); Johnson, supra note 160, at 15; (discussing the Rehnquist Court’s impact); see generally McDonald, supra note 71 (discussing the impact of the changing Courts on religious liberty
flow of government aid to religious organizations has resulted in application
of state Blaine Amendments as a means by which states may exclude religious
organizations from such aid programs.\textsuperscript{231}

This development has raised constitutional concern over whether states
can exclude religious institutions from generally available secular aid pro-
grams and created a novel issue for the Court, especially within the present
framework, juxtaposing relaxed federal constitutional barriers against much
 stricter state Blaine Amendments. In recent years, the Court has either heard
cases related to state Blaine Amendments or directly addressed such provi-
sions in dicta on four occasions, but in each of these instances, “the Blaine
issues were largely tangential to the case and were thus not properly before
the Court.”\textsuperscript{232} However, the Court’s discussion of Blaine Amendments and
 approach to attempts by states to limit the flow of government aid to religion
is necessary in order to properly address the constitutionality of state Blaine
Amendments writ large.\textsuperscript{233}

\textbf{A. State Blaine Amendments and the Supreme Court}

1. \textit{Mitchell v. Helms}

In \textit{Mitchell}, six members of the Court upheld the use of federal funds by
local school districts to provide educational materials and equipment to public
and private schools.\textsuperscript{234} The state program required that allocation of the fund-
ing be “based on the number of children enrolled in each school” and that the
materials and equipment “must be secular, neutral, and non-ideological.”\textsuperscript{235}

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{231} See \textit{The Mistakes in Locke}, supra note 5, at 227 (asserting that, under the Rehnquist Court’s change, “the pressing constitutional question became whether the Free Exercise and Free Speech Clauses permit government to \textit{exclude} religious institutions from programs that fund private secular institutions,” which “arose because many states are likely to exclude religious schools . . . because of state constitutional restrictions on providing funds to ‘sectarian’ institutions or instruction”).
\item \textsuperscript{232} See \textit{Johnson}, supra note 160, at 38.
\item \textsuperscript{233} \textit{Id.} at 19 (describing the importance of understanding the Court’s decision in \textit{Locke}).
\item \textsuperscript{234} \textit{Mitchell v. Helms}, 530 U.S. 793, 801–02. (2000). Specifically, the federal program at issue
was Chapter 2 of the Education Consolidation and Improvement Act of 1981, which provided federal
funds to local educational agencies, consisting primarily of public school districts, “to implement pro-
grams to assist children in elementary and secondary schools.” \textit{Id.}
\item \textsuperscript{235} \textit{Id.} at 802 (internal quotation marks omitted). Chapter 2 provides aid “for the acquisition and
use of instructional and educational materials, including library services and materials, . . .
\end{enumerate}
\end{footnotesize}
In spite of these requirements, the state’s program was challenged as violating the Establishment Clause because approximately thirty percent of the program’s aid was allocated to private schools, a vast majority of which were Catholic institutions.\textsuperscript{236} Writing for a plurality of the Court, Justice Thomas applied the \textit{Lemon} test as modified in \textit{Agostini} to hold that the state program at issue did not violate the Establishment Clause because it offered broad eligibility for the state aid program and did not single out religious institutions specifically as beneficiaries for that aid, and, therefore, did not have the effect of advancing religion under \textit{Lemon}’s second prong.\textsuperscript{237}

After upholding the constitutionality of the aid program at issue, Justice Thomas then turned to a discussion of one factor that the dissenting Justices proffered as relevant to the constitutionality of the school aid program at issue: "whether [an institution] that receives aid . . . is pervasively sectarian."\textsuperscript{238} In response, Justice Thomas stated that "[t]he dissent is correct that there was a period when this factor mattered . . . but that period is one that the Court should regret, and it is thankfully long past," and further provided five reasons to dispense of such a consideration.\textsuperscript{239} Ultimately, Justice Thomas concluded assessments, reference materials, computer software and hardware for instructional use, and other curricular materials." \textit{Id} (quoting 20 U.S.C. § 7351(b)(2)).

\textsuperscript{236} \textit{Mitchell}, 530 U.S. at 803–04. On average, approximately thirty percent of the Chapter 2 funds spent in Jefferson Parish, Louisiana were allocated to private schools. \textit{Id} at 803. In 1986–87, 46 private schools participated in Chapter 2 and of those participating, "34 were Roman Catholic; 7 were otherwise religiously affiliated; and 5 were not religiously affiliated." \textit{Id} Interestingly, the anti-funding provisions in the constitution of Louisiana—the state whose allocation of federal funds to both public and private schools was at issue in \textit{Mitchell}—were removed when it was revised in 1974. Duncan, \textit{supra} note 21, at 518 n.109. \textit{Compare} Blaine Amendments discussed \textit{supra} note 21, with LA. CONST. OF 1879 art. LI (1879) ("No money shall ever be taken from the public treasury, directly or indirectly in aid of any church, sect or denomination of religion, or in aid of any priest, preacher, minister or teacher thereof . . ."), \textit{and} LA. CONST. OF 1879 art. CCXXVIII (providing that no school funds "shall be appropriated to or used for the support of any sectarian schools"), \textit{and} LA. CONST. OF 1879 art. CXL (1868) (creating an antifunding provision prior to the anti-Catholic movement that prohibited appropriation to "any private, school or any private institution of learning whatever" but lacking any reference to "sectarian" schools).

\textsuperscript{237} \textit{Mitchell}, 530 U.S. at 807–08. The respondents “[d]id not challenge the District Court’s holding that Chapter 2 has a secular purpose” and “the Fifth Circuit also did not question that holding,” which led Justice Thomas to “consider only Chapter 2’s effect.” \textit{Id} at 808.

\textsuperscript{238} \textit{Id} at 826. The respondents contended “that the Establishment Clause requires that aid to religious schools not be impermissibly religious in nature or be divertible to religious use.” \textit{Id} at 820.

\textsuperscript{239} \textit{Id} at 826–29. Justice Thomas’s plurality opinion provides the following reasons why the pervasively sectarian doctrine should be dispensed of: (1) the relevance of the pervasively sectarian doctrine in the Court’s precedents is in decline, \textit{id} at 826–27; (2) “the religious nature of a recipient should
that the “[pervasively sectarian] doctrine, borne of bigotry, should be buried” because “nothing in the Establishment Clause requires the exclusion of pervasively sectarian schools from otherwise permissible aid programs, and other doctrines of [the] Court bar it.” This dismissal of the pervasively sectarian doctrine by Justice Thomas acknowledged the pedigree underlying hostility to aid for pervasively sectarian schools—the same pedigree that resulted in Blaine’s failed constitutional amendment. Despite Justice Thomas’s call to bury Blaine Amendments because of their exclusionary and hostile approach to government aid for sectarian schools, the plurality opinion represented just four Justices of the Court and thus set no binding authority.

2. Zelman v. Simmons-Harris

Two years after Mitchell, in Zelman v. Simmons-Harris, a five to four majority of the Court upheld the constitutionality of an Ohio school voucher program that provided tuition aid to the parents of students for use in both public and private schools. Chief Justice Rehnquist’s majority opinion

not matter to the constitutional analysis, so long as the recipient adequately furthers the government’s secular purpose,” id. at 827; (3) “inquiry into the recipient’s religious views required by a focus on whether a school is pervasively sectarian is not only unnecessary but also offensive,” id. at 828; (4) “the application of the ‘pervasively sectarian’ [doctrine] collides with [the Court’s] decisions that have prohibited governments from discriminating in the distribution of public benefits based upon religious status or sincerity,” id. at 828; and “hostility to aid to pervasively sectarian schools has a shameful pedigree that [the Court does] not hesitate to disavow.” Id.

240. Id. at 829.
241. Id. at 828–29.
242. See JOHNSON, supra note 160, at 43. The plurality opinion written by Justice Thomas was joined by Chief Justice Rehnquist and Justices Kennedy and Scalia and found that religiously neutral aid could be given to schools without violating the Establishment Clause, even where the schools were pervasively sectarian and the aid was divertible to religious uses. Mitchell, 530 U.S. at 820–28. Justice O’Connor’s concurrence in the judgment was joined by Justice Breyer and found that religiously neutral aid programs should be upheld, unless there was a showing that the aid was actually diverted for religious purposes. Id. at 836, 856 (O’Connor, J., and Breyer, J., concurring).
243. Zelman v. Simmons–Harris, 536 U.S. 639, 644–46 (2002). Ohio’s Pilot Project Scholarship Program was enacted in response to a Federal District Court placing “the entire Cleveland school district under state control” because “Cleveland’s public schools were in the midst of a ‘crisis that is perhaps unprecedented in the history of American education.’” Id. at 644 (quoting Cleveland School District Performance Audit Form 2–1 (March 1996)).
244. Zelman, 536 U.S. at 662–63. Ohio’s program provided two kinds of assistance to parents of children in the Cleveland School District. Id. at 645. “First, the program provide[d] tuition aid for students . . . to attend a participating public or private school of their parent’s choosing. . . . Second,
applied the Lemon-Agostini test, focusing on whether the program had the 
impermissible effect of advancing religion, in order to determine whether the 
program violated the Establishment Clause.245 Chief Justice Rehnquist’s ma-

majority opinion quickly made the “distinction between government programs 
that provide aid directly to religious schools and programs of true private 
choice, in which government aid reaches religious schools only as a result of 
the genuine and independent choices of private individuals.”246 Upon exam-

ining the Court’s precedent “confront[ing] Establishment Clause challenges 
to neutral government programs that provide aid directly to a broad class of 
individuals, who, in turn, direct the aid to religious schools or institutions of 

their own choosing,” the Chief Justice concluded that such programs that fea-
ture a true “private choice” are “not readily subject to challenge under the 
Establishment Clause.”247

In Zelman, the Court did not have the opportunity to consider Ohio’s 
Blaine-like constitutional provisions248 because the Ohio Supreme Court had 
already ruled that the voucher program at issue did not violate the state’s 
Blaine Amendment, thereby preventing the state Blaine Amendment itself 
from properly appearing before the Court.249 Chief Justice Rehnquist did not 
discuss Blaine Amendments in his majority opinion, but Justice Breyer’s dis-
sent recounted the historical developments that culminated in the adoption of

the program provide[d] tutorial aid for students who [chose] to remain enrolled in public school.” Id. 
(internal citations omitted).

245. Id. at 649. The Chief Justice determined that “[t]here is no dispute that the program challenged 
here was enacted for the valid secular purpose of providing educational assistance to poor children in 
a demonstrably failing public school system.” Id. Thus, like Mitchell, the focus was again on “whether 
the Ohio program . . . ha[d] the forbidden ‘effect’ of advancing or inhibiting religion.” Id.

246. Id. (emphasis added) (internal citations omitted).

247. Zelman, 536 U.S. at 649, 652. Upon examining the Court’s precedent, the Chief Justice con-
cluded that no Establishment Clause violation exists “where a government aid program is neutral with 
respect to religion, and provides assistance directly to a broad class of citizens who, in turn, direct 
government aid to religious schools wholly as a result of their own genuine and independent private 
choice.” Id. at 652.

248. See OHIO CONST. art. VI, § 2. Article VI, section 2 of the Ohio Constitution states that “no 
religious or other sect, or sects, shall ever have any exclusive right to, or control of, any part of the 
school funds of this state.” Id.

249. See Simmons-Harris v. Goff, 711 N.E.2d 203, 212 (Ohio 1999); see also JOHNSON, supra note 
160, at 44. The Ohio Supreme Court concluded that “the School Voucher Program does not result in 
a sectarian school having an ‘exclusive right to, or control of, any part of the school funds of this 
state,’” and therefore did not violate the Blaine-like state constitutional provision. Goff, 711 N.E.2d 
at 212 (quoting OHIO CONST. art. VI, § 2).
state Blaine Amendments. Justice Breyer acknowledged that Protestant practices in the nation’s first public schools may have discriminated against members of minority religions, yet serious social conflict did not arise until immigration and growth changed American society around the mid-nineteenth century. Justice Breyer posited that, with this social change, the Catholic minority “began to resist the Protestant domination of the public schools” and, in response, the Protestant majority began to terrorize Catholics resulting in beatings or expulsions for refusing to adhere to Protestant traditions. The conclusion of Justice Breyer’s historical account describes the fallout from the religious conflict of the time, as “Catholics sought equal government support . . . in the form of aid for private Catholic schools,” while Protestants demanded that public schools be nonsectarian and that public money “not support ‘sectarian’ schools (which in practical terms meant Catholic).” Justice Breyer credited these sentiments as playing “a significant role in creating a movement that sought to amend several state constitutions (often successfully), and to amend the United States Constitution (unsuccessfully) to make certain that government would not help pay for ‘sectarian’ (i.e., Catholic) schooling for children.”

The Mitchell plurality opinion that asserted Blaine Amendments were “borne of bigotry” and “should be buried” garnered the votes of Justices Thomas, Scalia, Rehnquist, and Kennedy. Justice Breyer’s dissent in Zelman—which acknowledged discrimination against religious minorities and the subsequent battle between Protestants and Catholics over government aid for schools—was joined by Justices Stevens and Souter, bringing the number of justices on the Court who acknowledged the anti-Catholic intent and presumptive unconstitutionality of state Blaine Amendments to seven. As a

250. Zelman, 536 U.S. at 719–21 (Breyer, J., dissenting). Justice Breyer acknowledged that “during the early years of the Republic, American schools—including the first public schools—were Protestant in character. Their students recited Protestant prayers, read the King James version of the Bible, and learned Protestant religious ideals.” Id. at 720.
251. Id. at 720.
252. Id.
254. Id. (internal quotations omitted) (quoting John C. Jeffries, Jr., & James E. Ryan, A Political History of the Establishment Clause, 100 Mich. L. Rev. 279, 301 (2001)).
255. Zelman, 536 U.S. at 721.
257. See supra notes 250–55 and accompanying text.
result, it seemed as though state Blaine Amendments were doomed, until the Court stemmed the tide in *Locke v. Davey*.258

B. *Permitted Withholding and Prohibited Discrimination Through the Use of State Aid*

The constitutional question of whether the Free Exercise Clause permits or prohibits a state from singling out religious organizations by withholding generally available secular aid in pursuit of antiestablishment interests had not yet been placed before the Court.259 However, in *Locke v. Davey*, the Court addressed a similar question: whether a state can withhold the funding benefits of a scholarship program from religious students who chose to pursue religious instruction or whether such an action violates the Free Exercise Clause by discriminating against personal religious choice.260


In *Locke*, a seven-member majority of the Court held that the State of Washington did not violate the Free Exercise Clause by excluding students who were pursuing a degree in devotional theology from a scholarship program designed to assist academically qualifying students with higher education expenses.261 Washington’s scholarship program contained an enrollment requirement that allowed students receiving a scholarship to attend private institutions, including those that were religiously affiliated, but prohibited students from pursuing a degree in theology while receiving the scholarship.262 Both parties in *Locke* conceded that this restriction on pursuing a degree in theology was a mere codification of Washington’s Blaine Amendment-like constitutional provision which read in relevant part that “[n]o public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment.”263

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258. 540 U.S. 712 (2004); see discussion infra Section III.B.1.
259. See *Locke*, 540 U.S. at 718–19.
260. Id. at 719.
261. Id. at 715.
262. Id. at 716.
263. Id. at 720 (quoting WASH. CONST. art. I, § 11 (1889)). There are strong indications that Article I, § 11 of the Washington state constitution is “both textually and ideologically linked to the three versions of the failed Blaine Amendment.” Mark Edward DeForrest, *Locke v. Davey: The Connection*
In rejecting the Free Exercise claim at issue in *Locke*, Chief Justice Rehnquist revived the “play in the joints” rationale initially raised by Chief Justice Burger in *Walz* to address the interaction between the Establishment Clause and the Free Exercise Clause. Chief Justice Burger’s reasoning in *Walz* operated from an understanding that there is an inherent tension between the two religion clauses in the First Amendment, with the perspective that “both . . . are cast in absolute terms, and either of which, if expanded to a logical extreme, would tend to clash with the other.” Chief Justice Rehnquist applied this rationale from *Walz* and reasoned that there is space for state action between the religion clauses because “there are some state actions permitted by the Establishment Clause but not required by the Free Exercise Clause” and that *Locke* fell within this space.

Chief Justice Rehnquist’s majority opinion in *Locke* addressed two arguments: the first was the constitutionality of the State’s denial of funding and the second was the State’s anti-establishment interest in denying funding for the devotional training of clergy. The Chief Justice rejected the argument...
that the State’s scholarship program was presumptively unconstitutional under *Lukumi* “because it [was] not facially neutral with respect to religion.”

Instead the Chief Justice distinguished *Lukumi*, reasoning that “the State’s disfavor of religion” in the present case was “of a far milder kind” because it imposed “neither criminal nor civil sanctions on any type of religious service or rite,” did not “deny to ministers the right to participate in the political affairs of the community,” and did not “require students to choose between their religious beliefs and receiving a government benefit.”

Turning to the second argument, the Chief Justice concluded that the State had a substantial interest in denying funding for training in the ministry. In reaching this conclusion, the Chief Justice distinguished between “training for religious professions and training for secular professions,” stating that training for ministry was “an essentially religious endeavor.” In upholding the State’s refusal to fund religious instruction that prepare students for ministry, the majority opinion acknowledged the lack of animus or hostility of the State’s scholarship program, which, according to the Chief Justice went “a long way toward including religion in its benefits.” Chief Justice Rehnquist further noted that treating “religious education for the ministry” differently than education for other callings was “not evidence of hostility toward religion,” but is instead a product of the distinct views the Constitution has regarding the subject of religion.

268. Id. at 720 (discussing Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993)). Joshua Davey, the student challenging Washington’s scholarship program, also contended that the program was an unconstitutional viewpoint restriction on speech and that it violated the Equal Protection Clause by discriminating on the basis of religion. Id. at 720 n.3. Chief Justice Rehnquist quickly disposed of these claims by asserting that the scholarship program was not a forum for speech, and that the State’s interests passed the rational-basis scrutiny required under the Equal Protection Clause and that speech forum-related arguments were “simply inapplicable.” Id.

269. Id. at 720–21. This cryptic distinction from *Lukumi* by Chief Justice Rehnquist suggests that the Court’s holding in *Locke* could apply to any refusal by the State to fund more broadly than the state’s decision not to fund training for the ministry that was at issue in *Locke*. *Churches, Playgrounds, Government Dollars*, *supra* note 19, at 159.


271. Id. at 721.

272. Id. at 724. In finding that the state scholarship program at issue lacked animus, Chief Justice Rehnquist noted that the program “permit[ted] students to attend pervasively religious schools so long as they are accredited,” and allowed students to take devotional theology courses, so long as the students were not pursuing such a degree. Id. at 724–26 n.9.

273. Id. at 721 (“[T]he subject of religion is one in which both the United States and state constitutions embody distinct views—in favor of free exercise, but opposed to establishment—that find no
The most important takeaway from Locke is found in a mere footnote where the Chief Justice expressly limited the State’s interest at issue in the case to “not funding the religious training of clergy,” and not the State’s broader philosophical preferences.274 The majority opinion expressly noted this limitation in response to Justice Scalia’s dissent, which warned that the majority’s decision would allow for states to “justify the singling out of religion for exclusion from public programs in virtually any context.”275 As a result of the Court’s decision in Locke, Justice Scalia’s ominous forecast has come true, as states continue to single out religious institutions for exclusion from generally applicable government aid programs, not just those funding the religious training of clergy.276

C. Trinity Lutheran v. Comer

In Trinity Lutheran, a seven-member majority of the Court held that the State of Missouri violated the rights of Trinity Lutheran Church under the Free Exercise Clause by expressly denying the “qualified religious entity a public benefit solely because of its religious character.”277 At issue in Trinity Lutheran was a state grant program that sought “to help public and private counterpart with respect to other callings or professions. That a State would deal differently with religious education for the ministry than with education for other callings is a product of these views, not evidence of hostility toward religion.”).  

274. Id. at 722 n.5 (noting that “the only interest at issue here is the State’s interest in not funding the religious training of clergy,” and that “[n]othing in [the Court’s] opinion suggests that the State may justify any interest that its ‘philosophical preference’ commands”).  

275. See id. at 722, 730 (Scalia, J., dissenting).  


schools, nonprofit daycare centers, and other nonprofit entities purchase rubber playground surfaces made from recycled tires.”\textsuperscript{278} Due to the state’s limited resources, grants were awarded on a competitive basis to applicants that scored the highest based on several criteria.\textsuperscript{279} The Trinity Lutheran Church Child Learning Center, a preschool and daycare center, ranked fifth among the forty-four applicants for the grant program; but despite its high score, the Center was deemed ineligible for the program as a religious-based organization that is “owned or controlled by a church, sect, or other religious entity.”\textsuperscript{280} The State argued that the program’s exclusionary policy was compelled by language in the state constitution’s Blaine Amendment prohibiting the “aid of any church, sect or denomination of religion.”\textsuperscript{281} This brought the Court to the question of whether a state could exclude the otherwise eligible religious organization from a generally applicable secular and neutrally applied grant program solely because the organization was a church.\textsuperscript{282}

Chief Justice Roberts, writing for the majority of the court, began the Court’s analysis by again citing the “play in the joints” rationale as describing the relationship between the Establishment and Free Exercise Clauses.\textsuperscript{283}

\textsuperscript{278} Id. at 2017.

\textsuperscript{279} Id. (including as criteria, among other things, “the poverty level of the population in the surrounding area and the applicant’s plan to promote recycling”); see also Playground Scrap Tire Surface Material Grant Application Instructions for Form 780-2143, Mo. Dep’t of Nat. Res. (Dec. 2014), [hereinafter Grant Application Instructions], http://dnr.mo.gov/pubs/pub2425.htm [https://perma.cc/ MR7L-3PHK].

\textsuperscript{280} Trinity Lutheran, 1437 S. Ct. at 2014; Grant Application Instructions, supra note 279. The Missouri Department of Natural Resources awarded fourteen grants the year the Child Learning Center applied, and the Center would have won an award but for the exclusion from the program based on its religious status. Trinity Lutheran, 137 S. Ct. at 2017–18.

\textsuperscript{281} Trinity Lutheran, 137 S. Ct., at 2017. The Court stated that the policy of denying grants to any applicant owned or controlled by a church . . . was compelled by Article I, Section 7 of the Missouri Constitution, which provides: “That no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect or denomination of religion, or in aid of any priest, preacher, minister or teacher thereof, as such; and that no preference shall be given to nor any discrimination made against any church, sect or creed of religion, or any form of religious faith or worship.”

\textsuperscript{282} Id.

\textsuperscript{283} Churches, Playgrounds, Government Dollars, supra note 19, at 135 (articulating the issue presented as: “[m]ay an otherwise eligible organization be excluded from a grant program to protect the safety of children, where the only reason for exclusion is that the organization is a church?”).
Turning to a recounting of the Court’s Free Exercise jurisprudence, the Chief Justice set forth the principle that the Clause “‘protect[s] religious observers against unequal treatment’ and subjects to the strictest scrutiny laws that target the religious for ‘special disabilities’ based on their ‘religious status,’” and he further noted that, from this principle, the Court has consistently held “denying a generally available benefit solely on account of religious identity imposes a penalty on the free exercise of religion that can be justified only by a state interest ‘of the highest order.’”284 The Chief Justice carefully distinguished the Court’s holdings rejecting Free Exercise challenges to laws that are neutral and generally applicable under Smith.285 Applying these principles to the facts presented, the Chief Justice’s analysis made clear that, where the State conditions the benefits of a public program for which the religious recipient is otherwise fully qualified on the recipient’s willingness to surrender its religiously impelled status, such state action “punish[e] the free exercise of religion” and “effectively penalizes the free exercise of . . . constitutional liberties.”286 In the opinion of seven Justices of the Court, the State of

when the “play in the joints” rationale is applied in a manner consistent with the Walz Court’s application, the Free Exercise Clause cannot be said to compel any form of action, rather it is a negative restriction on action. See discussion infra Section V.A.

284. Trinity Lutheran, 137 S. Ct. at 2019 (quoting Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 533, 542 (1993); McDaniel v. Paty, 435 U.S. 618, 628 (1978) (alteration in original)). The Court acknowledged decisions in Everson and McDaniel as examples of prior decisions in which the Court held that penalizing religious status was deemed unconstitutional. See Trinity Lutheran, 137 S. Ct. at 2019–20. From Everson, the Chief Justice noted Justice Black’s assertion that a State “cannot hamper its citizens in the free exercise of their own religion. Consequently, it cannot exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, because of their faith, or lack of it, from receiving the benefits of public welfare legislation.” Id. at 2020 (quoting Everson v. Bd. of Educ., 330 U.S. 1, 16 (1947)). From McDaniel, the Chief Justice noted Chief Justice Burger’s assertion that the law at issue “discriminated against McDaniel by denying him a benefit solely because of his ‘status as a “minister,”’” and thus the law “effectively penalize[d] the free exercise of [McDaniel’s] constitutional liberties.” Id. (quoting McDaniel, 435 U.S. at 626–27) (second alteration in original).


286. Trinity Lutheran, 137 S. Ct. at 2022 (quoting McDaniel, 435 U.S. at 626).
Missouri’s policy forced Trinity Lutheran to make a choice to either “participate in an otherwise available benefit program or remain a religious institution.” The Court concluded that “such a policy imposes a penalty on the free exercise of religion that triggers the most exacting scrutiny.”

IV. IMPACT/SIGNIFICANCE

In the wake of the Court’s 2004 decision in Locke, the lower courts have developed conflicting interpretations and applications of whether the Court’s holding in Locke permits states to exclude religious organizations from generally available secular aid programs. In some instances, courts have expanded the holding in Locke to allow for the exclusion of religious institutions from otherwise generally available government aid programs, even where the state’s interest is not limited to essentially religious endeavors. Other courts have limited Locke’s holding to the religious training of ministers where states have a particular historical interest or concern. However, the Court’s 2017

287. Id. at 2021–22.
288. Id. (citing Lukumi, 508 U.S. at 546).
289. Compare discussion infra note 290 (discussing Eulitt ex rel. Eulitt v. Maine Dep’t of Educ., 386 F.3d 344 (1st Cir. 2004), and the Court’s reliance on a broad interpretation of Locke), with discussion infra note 291 (discussing Colo. Christian Univ. v. Weaver, 534 F.3d 1245 (10th Cir. 2008), where the Tenth Circuit concluded that the Supreme Court’s decision in “Locke does not leave states unfettered discretion to exclude the religious from generally available secular benefits” (quoting Trinity Lutheran, 137 S. Ct. at 2019)).
290. See, e.g., Eulitt, 386 F.3d at 344. Only eight months after the Court’s decision in Locke, the First Circuit decided Eulitt. Id. The Eulitt Court relied exclusively on a broad interpretation of Locke to uphold a state tuition program that pays for students to attend public or private secular secondary schools of their choice but categorically excludes sectarian schools from the tuition payment program. Id. at 346–47. In rejecting the argument that Locke was limited to funding the religious training of clergy, the Eulitt court asserted that “no authority that suggests that the ‘room for play in the joints’ identified by the [Court in Locke] is applicable to certain education funding decisions but not others.” Id. at 355. Rather, the Eulitt Court expressly stated that it was interpreting Locke broadly to mean the following: “the decision [in Locke] recognized that state entities, in choosing how to provide education, may act upon their legitimate concerns about excessive entanglement with religion, even though the Establishment Clause may not require them to do so.” Id. at 355. However, this broad reading of the Court’s decision in Locke blatantly ignores the majority’s express limitation that the state’s “only interest at issue” in Locke was “not funding the religious training of clergy.” Locke v. Davey, 540 U.S. 712, 722 n.5 (2004); see also supra notes 274–75 and accompanying text.
291. The Tenth Circuit’s decision in Colorado Christian University v. Weaver, 534 F.3d 1245, 1255–57 (10th Cir. 2008) [hereinafter, Colorado Christian], concluded that the Supreme Court’s decision in Locke does not leave states unfettered discretion regarding the exclusion of religion from generally available secular benefits. Colorado Christian involved a challenge to Colorado’s tuition

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decision in *Trinity Lutheran* cast doubt on the ability of states to exclude religious organizations from generally available secular aid programs and seemingly restricts the Court’s prior decision in *Locke* to a narrow reading.292

### A. Religious Organizations and Government Aid After Locke and Trinity Lutheran

The prohibition against denying an otherwise eligible religious organization a public benefit solely on the basis of its religious character, as set forth

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292. See discussion supra Section III.D and Part IV; see also Churches, Playgrounds, Government Dollars, supra note 19, at 133 (“*Trinity Lutheran* moves *Locke* towards the narrower reading” of “[the] case [as] specifically about funding the training of clergy.”).
by the *Trinity Lutheran* Court, resolved questions that lingered after the Court’s decision in *Locke*.\(^{293}\) Reconciling both holdings is difficult, but *Locke* seemingly provides an exception from *Trinity Lutheran*’s general rule prohibiting the withholding of aid on the basis of the recipient’s religious character.\(^{294}\) To fall within this *Locke* exception, the following elements must be met: (1) the receipt of a government benefit must not be *not conditioned on religious belief or status*, (2) the compelling state interest must be founded on not funding *essentially religious endeavors*, and (3) there must be no evidence of *animus or hostility* towards religion.\(^{295}\) Given the language of the Court’s decision in *Locke* and subsequent decision in *Trinity Lutheran*, there are strong arguments for reading *Locke* narrowly.\(^{296}\) As such, it is important that the scope of that exception be adequately defined.\(^{297}\)

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293. *Lukumi Bablu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993) (citing *McDaniel v. Paty*, 435 U.S. 618, 626 (1978); *Cantwell v. Connecticut*, 310 U.S. 296, 303–04 (1940); Emp’t Div. v. Smith, 494 U.S. 872, 878–79 (1990)) ("[A] law targeting religious beliefs as such is never permissible, if the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral; and it is invalid unless it is justified by a compelling interest and is narrowly tailored to advance that interest.") (emphasis added).

294. *Churches, Playgrounds, Government Dollars, supra note 19*, at 133.

295. *Locke*, 540 U.S. at 725 ("In short, we find neither in the history or text of Article I, § 11, of the Washington Constitution, nor in the operation of the Promise Scholarship Program, anything that suggests *animus toward religion*. Given the *historic and substantial state interest* [not funding the pursuit of devotional degrees], we therefore cannot conclude that the denial of funding for vocational religious instruction alone is inherently constitutionally suspect.") (emphasis added).

296. *Churches, Playgrounds, Government Dollars, supra note 19*, at 133 ("*Trinity Lutheran* moves *[Locke]* towards the narrower reading" of "a case specifically about funding the training of clergy."); *The Mistakes in Locke*, supra note 5, at 247 ("[Locke] can easily be read much more narrowly, and in view of our criticisms of the decision, we think the narrow reading is much to be preferred.").

297. *Douglas Laycock, Theology Scholarships, the Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes but Missing the Liberty*, 118 HARV. L. REV. 155, 213–14 (2004) (hereinafter *Missing the Liberty*). It is critical that the exception be defined because *Locke* and *Trinity Lutheran* applied differing standards of scrutiny. *Compare Locke*, 540 U.S. at 712–13, *with Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2019, 2019–20 (2017). The *Locke* Court upheld a law that facially discriminated against religion without meeting the requirement of a compelling justification. *Locke*, 540 U.S. at 725 ("The *State’s interest* in not funding the pursuit of devotional degrees is *substantial*, and the exclusion of such funding places a relatively minor burden on Promise Scholars") (emphasis added)). Justice Scalia addressed the failure to apply strict scrutiny to the state’s action in his dissent:

[T]he State has a rational basis for treating religion differently. If that is all the Court requires, its holding is contrary not only to precedent, but to common sense. If religious discrimination required only a rational basis, the Free Exercise Clause would impose no constraints other than those the Constitution already imposes on all government action.

*Id.* at 730 n.2 (Scalia, J., dissenting) (internal citations omitted). Whereas, the *Trinity Lutheran* Court...
1. Prohibition Against Conditioning Government Benefits on Religious Belief

The Trinity Lutheran Court clearly set forth the rule that a state cannot condition a generally available government aid program on the basis of religious status or belief, and in doing so, the Chief Justice further expounded upon the scope of conduct that is prohibited under the rule. In Trinity Lutheran, the State of Missouri contended that it was “merely declining to extend funds . . . that the State had no obligation to provide in the first place.”

A decision, the State argued, that did not rise to the level of a prohibition on the exercise of religion because it “does not prohibit the Church from engaging in any religious conduct or otherwise exercising its religious rights,” and “does not meaningfully burden the Church’s free exercise rights.”

The Chief Justice’s opinion rejected the State’s contention by acknowledging that the Free Exercise Clause does not only protect against the criminalization or prohibition of religious belief or practice, but also “protects against ‘indirect coercion or penalties on the free exercise of religion,’” or where religious liberty is “infringed by the denial of or placing a condition upon a benefit or privilege.” For a majority of the Court, “Trinity Lutheran [was] not claiming any entitlement to a subsidy;” rather, it was simply a member of the community that was asserting “[the] right to participate in a government benefit program without having to disavow its religious character.”

The Court concluded that odious nature of the State’s action was “not the
denial of a grant, but rather the refusal to allow the Church—solely because it is a church—to compete with secular organizations for a grant.”  The Court’s response to Missouri’s arguments makes clear that, not only does the Free Exercise Clause forbid outright prohibition of religious exercise, but it also forbids indirect coercion and penalties that a state attempts to apply as a result of religious status or belief.

Chief Justice Roberts also expressed that the conditioning of aid on religious belief or status is dispositive and must be absent before the Court will move on to consider whether the state’s funding is going towards an essentially religious endeavor or whether there is evidence of animus or hostility towards religion. Thus, where a state conditions the receipt of generally available secular aid on the recipient’s choice between receiving the aid or retaining their religious beliefs or status, the court’s analysis under Locke is at an end.

2. Essentially Religious Endeavors

In his dissent in Locke, Justice Scalia asserted that the state cannot withhold generally available benefits solely on the basis of religion. Chief Justice Rehnquist’s majority opinion responded by suggesting that “[t]raining someone to lead a congregation is an essentially religious endeavor” and that “majoring in devotional theology is akin to a religious calling.” According to the Chief Justice, the state had “merely chosen not to fund a distinct category of instruction,” meaning that “the only interest at issue [in Locke was]

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303. Id.
304. Id. The State of Missouri relied on Locke to argue that the State’s “constitutional tradition of not furnishing taxpayer money directly to churches” was akin to the State of Washington’s antiestablishment interest in Locke. Id. at 203. However, the Chief Justice distinguished Locke by stating that the Locke Court “took account of Washington’s antiestablishment interest only after determining . . . that the scholarship program did not ‘require students to choose between their religious beliefs and receiving a government benefit.’” Id. (quoting Locke v. Davey, 540 U.S. 712, 720–21 (2004)).
305. Locke, 540 U.S. at 726–27. Perhaps the late Justice Scalia was making an argument that the Court was not yet ready to accept, but in this author’s opinion, it is more likely that the funding essentially religious endeavors lies on the side of the line between church and state that is constitutionally prohibited. See id.
306. Id. at 721. As the basis for this assertion, Chief Justice Rehnquist cited the distinct approach to religion assumed by both the United States and state constitutions that finds no counterpart in other callings or professions. Id.
307. Id.
the State’s interest in not funding the religious training of clergy."\textsuperscript{308} The Locke Court’s insistence upon excluding only vocational religious instruction from the state’s funding program suggests that the withholding of government aid to religious institutions must be limited to instances where the activity is an essentially religious endeavor, an understanding that was affirmed by the Trinity Lutheran Court.\textsuperscript{309} The majority opinion in Trinity Lutheran distinguished Locke on the grounds that the student in Locke “was not denied a scholarship because of who he was . . . [but] because of what he proposed to do—use the funds to prepare for the ministry,” whereas “Trinity Lutheran was denied a grant simply because of what it is—a church.”\textsuperscript{310} Thus, distinguishing between a state withholding generally available secular aid that may be used for essentially religious endeavors or withholding such aid because of the religious status of the recipient is a critical determination to be made by the court.\textsuperscript{311}

\textsuperscript{308} Id. at 722 n.5. The Chief Justice noted that “early state constitutions saw no problem in explicitly excluding only the ministry from receiving state dollars,” which “reinforce[d] [the Court’s] conclusion that religious instruction is of a different ilk.” Id. at 713.

\textsuperscript{309} See Trinity Lutheran, 137 S. Ct. at 2023. In response to the State of Missouri’s argument that the Court’s decision in Locke controlled the case at hand, Chief Justice Roberts distinguished the “program to use recycled tires to resurface playgrounds” at issue in Trinity Lutheran, 137 S. Ct. at 2016, from the “essentially religious endeavor . . . akin to a religious calling as well as an academic pursuit” at issue in Locke, 540 U.S. at 721.

\textsuperscript{310} See Trinity Lutheran, 137 S. Ct. at 2023.

\textsuperscript{311} Id. Activities that are essentially or inherently religious may be defined as actions taken pursuant to religious belief, such as the pursuit of the devotional theology degree at issue in Locke. See McGowan v. Maryland, 366 U.S. 420, 465–66 (1961) (Frankfurter, J., concurring in the judgment) (“The Establishment Clause withdrew from the sphere of legitimate legislative concern and competence a specific, but comprehensive, area of human conduct: man’s belief or disbelief in the verity of some transcendental idea and man’s expression in action of that belief or disbelief. Congress may not make these matters, as such, the subject of legislation, nor, now, many any legislature in this country.”). Understandably, where the secular aid is being used for essentially religious endeavors, the restraints of the Establishment Clause are implicated. See, e.g., Lemon v. Kurtzman, 403 U.S. 602, 657–58 (1971) (Brennan, J., concurring) (asserting that a “common ingredient” of the Lemon test is “whether the statutes involve government in the ‘essentially religious activities’ of religious institutions”); Central Board of Educ. v. Allen, 392 U.S. 236, 249 (1968) (Harlan, J., concurring) (stating that Establishment Clause constraints are not exceeded “where the contested governmental activity is calculated to achieve nonreligious purposes otherwise within the competence of the State, and where the activity does not involve the State ‘so significantly and directly in the realm of the sectarian’”).
3. Lack of Hostility Towards Religion

The Locke Court acknowledged that a state may have a legitimate interest in withholding funding that may be used for vocational religious instruction and, further, that such an interest is not indicative of hostility or animus towards religion.312 The Court further emphasized that the state’s asserted anti-establishment interest in denying funding to students who may use that funding to train for religious ministry was well established in the state’s history, and nothing on the face of Washington’s state constitutional provision suggested an animus towards religion.313 Rather, the Court noted evidence to the contrary, concluding that Washington’s scholarship program took significant steps to include religion in its benefits by “permit[ting] students to attend pervasively religious schools” and allowing students “to take devotional theology courses,” so long as they are not pursuing a theology degree.314 Therefore, in instances where there is evidence of hostility towards religion—particularly where the Blaine Amendment history is connected to the state constitutional provision at issue—the withholding of generally available secular aid to religious institutions will likely violate the religious liberties guaranteed by the First Amendment.

V. ANALYSIS

The Court’s continued “play in the joints” approach to the complex relationship between the Establishment Clause and the Free Exercise Clause has resulted in the Court bestowing upon the states a large amount of discretion in how to draw the line between those joints.315 Indeed, some scholars have treated Locke as “accord[ing] greater room for state discretion in choosing to

312. Locke, 540 U.S. at 722. In Locke, the Court could not conclude that “the denial of funding for vocational religious instruction alone is inherently constitutionally suspect” because of “the historic and substantial state interest at issue.” Id. at 725.
313. Id. at 722–25. In the Court’s view, the state constitutional provision at issue was not a Blaine Amendment because “[n]either Davey nor amici have established a credible connection between the Blaine Amendment and . . . the relevant constitutional provision,” leaving the Court to conclude that “the Blaine Amendment’s history [was] simply not before [the Court].” Id. at 723 n.7.
314. Id. at 724–25.
315. See The Mistakes in Locke, supra note 5, at 245 (asserting that “the Court’s ruling [in Locke] ultimately rests on giving the states wide discretion in making policy toward religion”); see also Johnson, supra note 160, at 68–72 (discussing the “play in the joints” principle and its application).
exclude religious programs.” Other scholars have suggested that although *Locke* seems limited to the training of clergy on its face, this limitation “may well turn out to be illusory.” While still other scholars have argued that *Locke* “constricted the reach of the neutrality principle” such that “government spending programs . . . will not be required to adhere to standards of viewpoint neutrality,” even going so far as to conclude that “treating religion equally is not required by our constitutional order.” At the core, this discussion is about whether states have the discretion to discriminate against religious organizations by excluding them from generally available, secular government aid programs.

The Court’s current framework is problematic primarily because it “rests on a series of mistakes about the nature and purpose of the Religion Clauses,” which are further explored below. But practically, this framework has allowed states to withstand challenges to state Blaine Amendments that are applied in a discriminatory manner. Thus, foreclosing state discretion to target religious organizations through the withholding of generally applicable secular aid first requires rebuilding a theoretical framework from a proper understanding of the relationship between the Establishment and Free Exercise.

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316. See Recent Case, *Tenth Circuit Strikes Down Colorado Law Exempting “Pervasively Sectarian” Religious Colleges from State Scholarship Program*: Colorado Christian University v. Weaver, 122 HARV. L. REV. 1255, 1260 (2009) [hereinafter *Tenth Circuit Strikes Down*] (arguing that “[a]lthough the outcome in Colorado Christian was the correct one, the Tenth Circuit avoided confronting the implications of Davey, and in doing so, sidestepped important considerations regarding extending states greater discretion under the Religion Clauses”).


318. *Tenth Circuit Strikes Down*, supra note 316, at 1261 (internal quotation omitted).


320. See id. Green argues against evenhanded-neutrality because, in his view, it “is inconsistent with our civil public order that privileges secular values in government programs over comparable religious ones.” *Id.*

321. See *The Mistakes in Locke*, supra note 5, at 230.

Clauses as well as acknowledging the importance of substantive neutrality.323

A. Rebuilding a Theoretical Framework: Where Locke and Trinity Lutheran Went Wrong

1. The Problem of “Play in the Joints”

The revival of the “play in the joints” rationale as the theoretical framework for the Court’s interpretation of the religion clauses in the First Amendment is dubious for two reasons.324 The first reason is that, at the time of its application in Locke, the “play in the joints” rationale had not been a foundation for any decision by the Court on state action that benefitted or interfered with religion in over thirty years.325 But more importantly, in Locke, the majority applied the “play in the joints” rationale in a manner that was wholly inconsistent with prior applications, and in doing so, only partially quoted the Walz Court, stating: “[W]e have long said that ‘there is room for play in the joints’ between [the Establishment Clause and Free Exercise Clause].”326 Yet the Walz Court’s full articulation of play in the joints—“there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference”—reflected the Court’s benevolent neutrality perspective (as previously discussed in this Article) and served as the foundation for the Court’s modern approach

323. See discussion infra Sections V.A & B.
324. See Locke v. Davey, 540 U.S. 712, 718 (2004) (leaving out the end of the quotation, which makes the statement contradict the Court’s assertion); see also Trinity Lutheran v. Comer, 137 S. Ct. 2012, 2019 (2017) (explaining that even with the analysis of the program under the Establishment Clause, the question is still not answered because of the different requirements of the Establishment Clause and the Free Exercise Clause).
326. Locke, 540 U.S. at 718 (quoting Walz v. Tax Comm’n, 397 U.S. 664, 669 (1970)). Compare Locke, 540 U.S. at 712 (holding that state refusal to extend scholarship aid to a student pursuing a devotional theology degree did not violate the Free Exercise Clause), with Norwood, 413 U.S. at 456 (noting that a court “sustained the validity of [a state] statutory program under which textbooks are purchased by [the state and lent to students in both public and private schools”], and Sloan v. Lemon, 413 U.S. 825, 835 (1973) (invalidating as violating the Establishment Clause a state statutory tuition reimbursement program for parents that send their children to nonpublic school, but acknowledging that there is room for “play in the joints” in spite of the Establishment Clause), and Walz, 397 U.S. at 664 (holding that a state statute exempting from real property tax realty owned by association organized exclusively for religious purposes and used exclusively for carrying out such purposes does not violate the Establishment Clause).
to Establishment Clauses cases. Moreover, the Court’s analysis is problematic because the *Trinity Lutheran* majority cites the “play in the joints” rationale as what the Free Exercise Clause *compels*, yet the Court’s holding is perhaps more accurately understood as what the Free Exercise Clause *prohibits*—the state’s withholding of a benefit from Trinity Lutheran Church solely on the basis of the Church’s religious character.

The second reason that the “play in the joints” rationale is problematic is somewhat more complex, and yet more dangerous, because it involves a fundamental misapplication of the religion clauses of the First Amendment. At its most basic level, the Constitution bestows upon the federal government enumerated and limited powers, an understanding made plain through the Tenth Amendment. Ratification of the Bill of Rights did not vest further powers in the federal government; rather, the first eight Amendments were designed to deny or negate the assumption of certain powers by the federal government. Simply put, the Establishment Clause and the Free Exercise Clause both set out to restrict the power of the federal government in different ways. The role of the Establishment Clause is a *structural restraint* on government power, while the Free Exercise Clause is a safeguard against

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330. *Supreme Court Categorical*, supra note 7, at 1333; see also Robert J. Pushaw Jr., *The Inherent Powers of Federal Courts and the Structural Constitution*, 86 IDAHO L. REV. 735, 823–24 (2001) (“Because the Constitution locates sovereignty in the People, federal officials cannot claim that any of their powers inhere in the government’s sovereign nature. Furthermore, by enumerating the powers of each branch in a written Constitution, the People by negative implication withheld whatever was not granted”). The Tenth Amendment provides that “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” U.S. CONST. amend. X.

331. *Supreme Court Categorical*, supra note 7, at 1334. Indeed, the Bill of Rights is primarily concerned with protection of the people against a self-interested government because “the people . . . delegate power to run day-to-day affairs to a small set of specialized government officials, . . . who may try to rule in their own self-interest, contrary to the interests and expressed wishes of the people.” *Amar, The Bill of Rights as a Constitution, supra* note 166, at 1133. As a preventative measure, “the Bill of Rights protected the ability of local governments to monitor and deter federal abuse . . . and preserved the transcendent sovereign right of a majority of the people themselves to alter or abolish government and thereby pronounce the last word on constitutional questions.” Id.

332. *Supreme Court Categorical*, supra note 7, at 1334.
government intrusion on individual rights. In its purest structural form, the Establishment Clause exists “to keep two centers of authority—government and religion—in their proper relationship,” whereas the “redressing of a personal harm to an individual’s religious belief or practice is the Free Exercise Clause’s only function.” Thus, these two forms of negation upon the federal government cannot conflict, although they most certainly can overlap in working to restrict the power of the federal government.

Interpreting the Religion Clauses in this way directly refutes framing the issue of state aid flowing to religious organizations as whether the Free Exercise Clause “compel[s] [states] to provide public grant money directly to a church.” Of course, the Locke Court’s adoption of the “play in the joints” rational was no mistake because showing that there is conflict between the religion clauses allows “the reach of one clause or both . . . to be cut down.” Abridging the religious freedoms guaranteed under the Free Exercise Clause allowed the Locke Court (and subsequently allowed the lower courts) to carve

333. Differentiating the Free Exercise and Establishment Clauses, supra note 5, at 311.
334. Id. at 315. The “Establishment Clause can be a means of redress for individual harms,” but only when those harms are not religious in nature, in which case the remedy is the operation of the Establishment Clause to its fullest structural order. Id. at 317–18.
335. Id. at 320.
336. Id. at 324; Supreme Court Catachreses, supra note 7, at 1334. Moreover, to interpret the religion clauses as in conflict “imputes incoherence to the Founders,” and it ignores the historical record that “[t]he Religion Clauses were no compromise of conflicting interests, but the unified demand of the most vigorous advocates of religious liberty.” The Threat to Religious Liberty, supra note 32, at 1088. In contrast to the view that tension between the religion clauses was inherent, Chief Justice Rehnquist viewed the tension as a result of three causes: “the growth of social welfare legislation during the latter part of the 20th century,” which “greatly magnified the potential for conflict between the two Clauses”; “the decision by [the] Court that the First Amendment was ‘incorporated’ into the Fourteenth Amendment and thereby made applicable against the States,” thereby multiplying the manner “in which ‘tension’ might arise”; and the Court’s “overly expansive interpretation of both Clauses.” Thomas v. Rev. Bd. of Ind. Emp’t Sec. Div., 450 U.S. 707, 721 (1981) (Rehnquist, J., dissenting).
337. Trinity Lutheran Church of Columbia, Inc. v. Pauley, 788 F.3d 779, 784 (8th Cir. 2015) (emphasis in original), rev’d and remanded sub nom. Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012 (2017) (“The issue here is not what the State is constitutionally permitted to do, but whether the Free Exercise Clause, the Establishment Clause, or the Equal Protection Clause compel Missouri to provide public grant money directly to a church, contravening a long-standing constitutional provision that is not unique to Missouri.”).
338. The Mistakes in Locke, supra note 5, at 245. However, “the matter is different if the two clauses are not conflicting, but complementary—if they constitute two aspects of a single statement or principle about religion and the government.” Id.
out room for states to operate in withholding generally available secular aid from religious organizations solely because of their religious status through application of state Blaine Amendments.\(^{339}\) The first step in rebuilding a theoretical framework that reflects a proper understanding of the relationship between the Establishment and Free Exercise Clauses requires acknowledging that the Court’s strict separationist principle as set forth by Justice Black in Everson is untenable in a society founded on constitutional assurances of freedom and equality.\(^{340}\) As soon as the Court acknowledges the unworkable nature of the principles set forth in Everson, then it can begin to resolve “the question of where the boundary between government and religion lies.”\(^{341}\)

\(^{339}\) See id at 245-49 (noting that “[b]y emphasizing the state’s discretion, the majority was able to find that the discrimination against theology majors was permitted”). Justice Scalia’s dissent in Locke highlighted the fallacy of play in the joints: “The Court does not dispute that the Free Exercise Clause places some constraints on public benefits programs, but finds none here, based on a principle of ‘play in the joints.’ . . . There is nothing anomalous about constitutional commands that abut.” Locke, 540 U.S. at 728 (Scalia, J., dissenting).

\(^{340}\) See Everson, 330 U.S. 1 (1947). In Everson, Justice Black asserted the principle that “[n]o tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion.” Id at 16 (emphasis added). Despite the number of absolutes Justice Black states, “the absolutes were never true, not even in Everson itself.” Churches, Playgrounds, Government Dollars, supra note 19, at 137–38. In fact, Justice Black’s very next paragraph in Everson sets forth the principle that a state “cannot exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, because of their faith, or lack of it, from receiving the benefits of public welfare legislation,” only serves to underscore this point. Everson, 330 U.S. at 16 (emphasis omitted).

\(^{341}\) Differentiating the Free Exercise and Establishment Clauses, supra note 5, at 325. However, expecting a simple resolution to such a question may be unrealistic as “[t]he boundary has been disputed for over two thousand years, so it would be naive to suppose that there is an easy formula for determining ‘what is Caesar’s and what is God’s.’” Id at 326. Even James Madison upon the end of a life well-lived stated: “I must admit moreover that it may not be easy, in every possible case, to trace the line of separation between the rights of religion and the Civil authority with such distinctness as to avoid collision & doubts on unessential points.” Letter from James Madison to the Reverend Adams (1832), in THE WRITINGS OF JAMES MADISON IX, at 484, 487 (Gaillard Hunt ed., G.P. Putnam’s Sons, 1910); see also McCollum v. Bd. of Educ., 333 U.S. 203, 237–38 (1948) (Jackson, J., concurring) (“The task of separating the secular from the religious in education is one of magnitude, intricacy and delicacy. . . . It is idle to pretend that this task is one from which we can find in the Constitution one word to help us as judges to decide where the secular ends and the sectarian begins . . . .”).
2. Forsaking Governmental Discretion for Substantive Neutrality

In view of the primary goals of the religion clauses—religious liberty for all faiths and the freedom from the governmental establishment of a religion—it is clear that the Framers understood that the best way to achieve these freedoms is through minimum government interference. The principle of "substantive neutrality" towards religion has developed as the best method that of ensuring minimum government interference. The concept of substantive neutrality posits that "the religion clauses require government to minimize the extent to which it either encourages or discourages religious belief or disbelief, practice or nonpractice, observance or nonobservance. . . . Religion [should] be left as wholly to private choice as anything can be. It should proceed as unaffected by government as possible." Central to this concept is the notion that "[g]overnment must be neutral so that religious belief and practice can be free" because "religious belief and disbelief is maximized when government encouragement and discouragement is minimized."

In the context of government funding, the risk of government interference with religion is least, and even nonexistent, when the government funds nothing; likewise, interference is minimal when the government funds everything within a neutrally defined category created with standards that "prevent the state from dictating policies or views to the groups or activities it funds." However, government interference is at a maximum "if the state has broad discretion to fund, not to fund, or to fund with conditions," which is the exact situation the Court has created through the use of the "play in the joints"

342. See The Mistakes in Locke, supra note 5, at 232 ("The ultimate goal [of the Constitution's provisions on religion] is that every American should be free to hold his own views on religious questions, and to live the life that those views direct, with a minimum of government interference or influence.").
343. Id.
345. Id.
346. See Laycock, Missing the Liberty, supra note 297, at 195–96. Where the government does provide funding, it may refrain from infringing on private individuals' choices about religion by providing benefits on the same terms to all parties. See The Mistakes in Locke, supra note 5, at 234; Thomas C. Berg, Religion Clause Anti-Theories, 72 Notre Dame L. Rev. 693, 745 (1997) ("[G]overnment can respect religious pluralism when it gives financial aid, by giving aid to any group (religious as well as nonreligious) that provides the requisite services . . . .")
rationale.\textsuperscript{347} Within such a framework, states are permitted to apply Blaine Amendments in a manner that “discriminates against otherwise eligible [aid] recipients by disqualifying them from a public benefit solely because of their religious character,” and “[t]o condition the availability of benefits . . . upon a recipient’s willingness to . . . surrender his religiously impelled status effectively penalizes the free exercise of his constitutional liberties.”\textsuperscript{348} Thus, the second step to rebuilding a theoretical framework that reflects a proper understanding of the relationship between the Establishment and Free Exercise Clauses requires acknowledging that, when the government funds everything or everyone within a generally applicable and neutrally defined category, then it is maintaining substantive neutrality.

\textbf{B. Finding Blaine Amendments Unconstitutional}

The Court’s decision in \textit{Trinity Lutheran} casts doubt on the constitutionality of state Blaine Amendments and may eventually lead to such a decision, but the Court has not yet held the Amendments unconstitutional.\textsuperscript{349} An analysis of state Blaine Amendments under the Court’s current jurisprudence would likely result in a finding that many, if not all, of these state constitutional provisions are facially unconstitutional under both the Free Exercise and Establishment Clauses.\textsuperscript{350} Notably, use of the term “sectarian” in state Blaine Amendments could provide grounds for a claim of facial discrimination against religion, particularly because many legal and historical scholars have accepted the word as nineteenth century common parlance for

\begin{footnotesize}
\begin{enumerate}
\item[\textsuperscript{347}] See Laycock, \textit{Missing the Liberty}, supra note 297, at 196. In \textit{Locke}, the Court upheld that the state of Washington, after choosing to fund private education, then had the power to pick and choose some forms of religious education and not others. \textit{Locke} v. \textit{Davey}, 540 U.S. 712, 724–25 (2004) (“The Promise Scholarship Program goes a long way toward including religion in its benefits. The program permits students to attend pervasively religious schools, so long as they are accredited.”).
\item[\textsuperscript{349}] \textit{Churches, Playgrounds, Government Dollars}, supra note 19, at 133 (asserting that the holding in \textit{Trinity Lutheran} “is an incremental step in a large and continuing evolution . . . [that] may lead to bigger steps, but \textit{Trinity Lutheran} does not take those steps”).
\item[\textsuperscript{350}] See Erica Smith, \textit{Blaine Amendments and the Unconstitutionality of Excluding Religious Options from School Choice Programs}, 18 \textit{FEDERALIST SOC’Y REV.} 90, 93 (2017) [hereinafter \textit{Blaine Amendments and Unconstitutionality}] (coming to the conclusion that Blaine Amendments are unconstitutional and violate both the Establishment Clause and the Free Exercise Clause in the context of school choice programs).
\end{enumerate}
\end{footnotesize}
“Catholic” and representative of anti-Catholicism.\textsuperscript{351}

Assuming, \textit{arguendo}, that the Court were to find state Blaine Amendments facially neutral, the provisions would still likely be struck down as unconstitutional under the \textit{Lukumi} Court’s Free Exercise Clause analysis. First, the historical background, the series of events leading to the enactment, and the legislative history of state Blaine Amendments suggest the object of the provisions is the suppression of religion or religious conduct.\textsuperscript{352} \textit{Lukumi} provides that this finding shows the provisions are not neutral towards religion.\textsuperscript{353} Second, it is quite clear that state Blaine Amendments fall short of the general applicability standard set forth by Justice Kennedy in \textit{Lukumi} because the state provisions are underinclusive of nonreligious conduct and instead pursue government interests only as applied to religion.\textsuperscript{354}

As the court held in \textit{Lukumi}, laws that discriminate on the basis of religion are subject to strict scrutiny, “under which discrimination can be justified only if it is narrowly tailored to achieve a compelling state interest,” regardless of whether the violation arises under the Establishment Clause or Free Exercise Clause.\textsuperscript{355} In subjecting discriminatory laws to strict scrutiny, the Court has held that a discriminatory purpose or a discriminatory effect is sufficient to find that the law fails strict scrutiny and is unconstitutional.\textsuperscript{356} Thus, where

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\item \textsuperscript{351} See \textit{supra} notes 169–73 and accompanying text. Further, see \textit{supra} note 20 for a list of state constitutional provisions using the term “sectarian,” and \textit{supra} notes 238–41 and accompanying text for the Court’s disapproval of such language.
\item \textsuperscript{352} See \textit{supra} notes 251–55 and accompanying text for the Court’s discussion of the aim of state Blaine Amendments as ensuring the government not pay for “‘sectarian’ (i.e., Catholic) schooling for children.”
\item \textsuperscript{353} See \textit{supra} notes 147–49 and accompanying text for the \textit{Lukumi} neutrality test. For the historical background and the series of events leading to enactment of state Blaine Amendments see \textit{supra} Section II.B.1, and for the legislative history see \textit{supra} Sections II.B.2, 3.
\item \textsuperscript{354} See \textit{supra} notes 151–55 and accompanying text for the \textit{Lukumi} general applicability test.
\item \textsuperscript{356} \textit{Blaine Amendments and Unconstitutionality, supra} note 350, at 93. In \textit{Lukumi}, the Court examined whether (1) “the object or purpose of a law is the suppression of religion or religious conduct,” or (2) whether it “impose[d] burdens only on conduct motivated by religious belief” in establishing a Free Exercise violation. 508 U.S. at 533, 543. Whereas, under the \textit{Lemon} test, the Court examines (1) it has a “secular purpose” that is not simply secondary to a “religious objective,” and (2) it has a “principal or primary effect . . . that neither advances nor inhibits religion” in determining an Establishment Clause violation. \textit{Lemon} v. Kurtzman, 403 U.S. 602, 612 (1971).
\end{itemize}
Blaine Amendments are challenged as unconstitutional for excluding religion from a generally available secular government aid program, the discriminatory purpose and discriminatory effect of Blaine Amendments (as discussed above) will likely result in a finding that the state constitutional provisions at issue are unconstitutional.357

VI. CONCLUSION

The Court’s use of “play in the joints” as a framework for approaching the complex relationship between the Establishment and Free Exercise Clauses of the First Amendment has fundamentally impacted how the Court approaches the flow of generally applicable secular aid to religious organizations. Further, the Court’s 2004 decision in Locke has impacted how lower courts have analyzed challenges to state Blaine Amendments, as the “play in the joints” rationale has created a carve out allowing states to exclude religion from generally available secular aid in a discriminatory manner.358 Conferring upon states the discretion to discriminate against religious organizations concerning government aid violates the principle that the government must remain substantively neutral towards religion and “minimize the extent to which it either encourages or discourages religious belief or disbelief, practice or nonpractice, observance or nonobservance.”359 Further, this discretion threatens religious liberty, as seen in the many cases since Locke, because the Court has “maximized government power over religious institutions.”360

Ultimately, in determining whether the government can withhold funding religious organizations generally, the answer is unequivocally yes. There is very little the government is constitutionally required to fund. However,

357. See Blaine Amendments and Unconstitutionality, supra note 350, at 97. It is quite clear and has even been accepted by several members of the Court that state Blaine Amendments stem from a history of religious animus. See supra discussion Section II.B.
358. See discussion supra notes 289–91. The primary concern is that some states attempt to separate government from all that could be said to be religious, which results in a relationship between state governments and religion that is “hostile, suspicious, and even unfriendly.” Zorach v. Clauson, 343 U.S. 306, 312 (1952) (“The First Amendment, however, does not say that in every and all respects there shall be a separation of Church and State. Rather, it studiously defines the manner, the specific ways, in which there shall be no concert or union or dependency one on the other. That is the common sense of the matter. Otherwise the state and religion would be aliens to each other—hostile, suspicious, and even unfriendly.”).
359. Laycock, Missing the Liberty, supra note 297, at 160.
360. Id. at 161.
where the government decides to provide a public benefit and then excludes entities from that benefit solely on the basis of religion, such action is rank discrimination that violates the protections guaranteed under the First Amendment of the Constitution.\footnote{See Locke v.Davey, 540 U.S. 712, 726–27 (2004) (Scalia, J., dissenting); Davey v. Locke, 299 F.3d 748, 752 (9th Cir. 2002) ("We recur to basic principles. The First Amendment declares: 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.' Thus, the state may neither favor, nor disfavor, religion. A law targeting religious beliefs as such is never permissible.").}

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