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Blaine it on Politics: The (Non-) Effect of Anti-Aid Amendments on Private School Choice Programs in the U.S. States

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Blaine it on Politics: The (Non-) Effect of Anti-Aid Amendments on Private School Choice Programs in the U.S. States

James G. Blaine was a prominent American politician of the late 19th Century. Although Blaine was an unsuccessful Republican candidate for President in 1884, U.S. Secretary of State, Speaker of the House, and a Senator from Maine, his primary legacy was the enshrinement of "anti-aid" amendments in the constitutions of 39 U.S. states. These so-called "Blaine Amendments" were designed to prohibit government funds from supporting "sectarian" religious organizations such as schools and charities. In Blaine's day, "sectarian" was widely understood to be a euphemism for "Catholic". Nondenominationally Protestant organizations such as the public schools of the day were considered to be non-sectarian and entirely worthy of government support. The Blaine Amendments ensured that government-sponsored schools in the U.S. would be pervasively Protestant, at least until religion was banned from public schools in the 1960s, and that Catholic schools would have to make do without any substantial financial assistance from the government.

Several U.S. courts and legal analysts have decried the "shameful pedigree" of the Blaine Amendments as instruments of anti-Catholic bigotry.[1] The main question before us here, however, is not whether or not the Blaine Amendments are laudatory but whether or not they are efficacious. Specifically, do Blaine Amendments appear to influence whether or not states adopt and implement government-sponsored private school choice programs in the U.S. states? If not, do they at least affect the legal form that such programs take? If Blaine Amendments do not

[1] See for example Mitchell v. Helms, 530 U.S. 793 (2000); Ira C. Lupu, "The Increasingly Anachronistic Case Against School Vouchers," *Notre Dame Journal of Law, Ethics & Public Policy* 13 (1999); Joseph P. Viteritti, *Choosing Equality: School Choice, the Constitution, and Civil Society* (Washington, DC: Brookings Institution, 1999).

seem to influence the enactment or design of private school choice programs, why is that the case?

Our answers to these questions, though merely suggestive, are quite surprising. We find that states with Blaine Amendments are at least as likely as states without them to have private school choice programs that result in government money funding sectarian religious organizations through the decisions of parents. Moreover, although financing private school choice through corporate or personal tax credits is often viewed as a necessary "Blaine workaround", states with private school choice programs and Blaine Amendments actually are less likely to fund them indirectly through the tax side, as opposed to directly through general government funds, than are states with private school choice programs that lack such anti-aid provisions in their constitutions. Blaine Amendments are not prohibiting U.S. states from implementing programs that result in students attending private sectarian schools at government expense. Senator Blaine is likely turning over in his grave, as government-sponsored private school choice involving sectarian religious schools is alive and well even in many U.S. states with constitutional provisions that could be interpreted as preventing just such a thing.

What explains the apparent fecklessness of Blaine Amendments in prohibiting school voucher and tax-credit scholarship programs? Although our limited statistical analysis prevents us from ruling out confounding factors as explanations for why government-funded private school choice is thriving in U.S. states with Blaine Amendments and absent from many states without anti-aid amendments, we suspect that the reason is politics. Whether or not a private school choice program enacted by a state legislature is judged to be constitutional appears to depend more upon the political ideology of the justices doing the judging than on the restrictiveness of the state constitution in question. State courts dominated by justices elected as

DRAFT

or appointed by Republicans tend to judge private school choice programs to be constitutional, regardless of whether or not the state constitution has a Blaine Amendment. State courts dominated by justices elected as or appointed by Democrats tend to judge private school choice programs to be unconstitutional, again regardless of whether or not the state constitution has a Blaine Amendment. If you don't like the private school voucher court rulings in a particular state, Blaine it on politics.

This paper weaves together theoretical, historical, political, and legal analyses. First, we explicate two countervailing theoretical positions on judicial behavior. Second, we describe the religious and political context in which the Blaine Amendments originally were proposed and adopted. Third, we examine the number and types of private school choice programs that have been enacted in Blaine and non-Blaine states, to show that the existence of a Blaine Amendment itself is insufficient to prevent government-financed private school choice programs from flourishing. Our review of the substantive content of the major state-level court opinions regarding private school choice and the Blaine Amendments is the fourth section of the paper and shows the general lack of consistency in both the rulings themselves and their legal justifications. Fifth, we draw upon measures of the ideological leanings of the courts that have ruled in Blaine cases to demonstrate that, in the end, as in the beginning, it all boils down to politics. The sixth section concludes.

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1. Contrasting Theories of Judicial Behavior

Space constraints prevent a full discussion here of the extensive literature on judicial behavior. Instead, we simply provide an overview of two contrasting judicial theories relevant to our topic: Constitutionalism and Judicial Politics.

The theory of Constitutionalism argues that judges arrive at their rulings in cases based on a reasonably objective read of the relevant constitutional provisions and existing statutes.[2] Constitutionalism is anchored in the famous statement in Federalist 78:

> …[T]he judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them… The Judiciary…has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgment (emphasis in original).[3]

The central idea of the judicial theory of Constitutionalism, especially when combined with the judicial practice of *stare decisis*, is that judges have to accept what is given to them and cannot shape the context in which their rulings are made. According to Constitutionalism, the outcomes of court decisions should be predictable based on the Constitution, relevant statutes, and the facts of a particular case. The characteristics of the judges involved should be largely irrelevant to court rulings, according to Constitutionalism, because it is not their will that be done.

The main general theory competing with Constitutionalism to explain judicial rulings is Judicial Behaviorism, also called Judicial Politics. David Truman generally is viewed as the father of the behavioral movement in political science and Robert Dahl solidified the behavioral

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[2] The classic work on this topic is Edward S. Corwin, *Corwin on the Constitution: The Judiciary*, edited by Richard Loss (Ithaca, NY: Cornell University Press, 1987).

[3] Attributed to Alexander Hamilton, "Federalist 78," *The Federalist*, edited with an introduction by Edward Mead Earle (New York: Random House, 1937), p. 504. For an elaboration on the judicial theory embedded in Federalist 78 see Alexander Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics*, 2nd Edition (New Haven, CT: Yale University Press, 1986).

DRAFT

school of thought with a number of theoretical and applied works.[4] Starting in the mid-1950s, social scientists began applying the principles of behaviorism to the functions of the courts.[5] According to the Judicial Behavior school of thought, the attitudes, preferences, and political ideologies of justices most influence their decisions. The judiciary does have will, contrary to Federalist #78, and by understanding the characteristics of judges that shape their will one can predict how they will rule on cases almost regardless of the constitutional and statutory constraints involved.

The Constitutional and Behavioral schools of thought provide us with sharply contrasting views of what influences judicial decisions. The Constitutionalists view constitutional and legal provisions as determinative, again given the facts of the case. According to Constitutionalism, variations in rulings across judges and courts are simply random error in judgment and not due to any systematic bias in the judiciary. The Behaviorists respond that judicial preferences trump even constitutional provisions in determining the outcomes of cases. They hold that constitutional and legal constraints hold plenty of wiggle room for judges to maneuver towards rulings that are consistent with their personal and political preferences. Variation in rulings across judges are not random error in the view of Behaviorialists, they are instead systematic variation explained by the preferences and ideologies of justices. There may be few tougher tests

[4] David B. Truman, *The Governmental Process: Political Interests and Public Opinion* (New York: Knopf, 1951); Robert Dahl, "The Behavioral Approach in Political Science: Epitaph for a Monument to a Successful Protest," *American Political Science Review* 55 (1961); Robert Dahl, Modern Political Analysis (Englewood Cliffs, NJ: Prentice Hall, 1991); *Robert Dahl, Who Governs? Democracy and Power in an American City* (New Haven, CT: Yale University Press, 1961).

[5] See for example Victor G. Rosenblum, *Law as a Political Instrument* (New York: Doubleday, 1955); Robert Dahl, "The Role of the Supreme Court as National Policy Maker," *Journal of Public Law* 61 (1957); Glendon Schubert, *Constitutional Politics* (New York: Holt, Rhinehart & Winston, 1960); Stuart Nagel, "Sociometric Relations Among American Courts," *Southwestern Social Science Quarterly* 43 (1962); H.W. Perry, Jr., *Deciding to Decide: Agenda Setting in the United States Supreme Court* (Cambridge, MA: Harvard University Press, 1994).

DRAFT

for the Judicial Behavior school of thought than state Blaine Amendments and private school choice. It is to that substantive topic of this paper that we now turn.

2. The Genesis of Blaine Amendments

State Blaine Amendments are provisions found in 39 state constitutions that prohibit appropriating public funds to aid religious schools. Some of these anti-aid amendments also prohibit government financial support of religious colleges, hospitals and social service agencies such as orphanages. They take their name from a failed effort to amend the federal Constitution in 1876, at a time long before the U.S. Supreme Court began applying the federal religion clauses, the Establishment Clause and the Free Exercise of Religion Clause of the First Amendment, to the states in the 1940's, effectively making federal law control state activities as well as federal actions. The failed federal amendment is named for its author, Senator James G. Blaine of Maine. Blaine sought the Republican Party nomination to succeed President Ulysses S. Grant, who had requested such an amendment in a speech supporting the need for both free public schools in every state and denying public funds to sectarian schools. As the U.S. Supreme Court has recognized, "sectarian" was a code word for Catholic[6] and thus the Amendment requested by Grant and introduced by Blaine was intended to prevent any funding of Catholic schools. Blaine hoped to ride the publicity garnered by his anti-Catholic Amendment to the Republican nomination, as the Catholic vote was already almost exclusively Democrat, and the amendment appealed to Republican and Protestant voters.[7]

The Amendment offered by Senator Blaine would have prohibited states from funding religious common schools operated by one sect, and many state Blaine Amendments follow that

[6] *Mitchell v. Helms*, 530 U.S. 793, 828 (2000).

[7] Steven K. Green, "The Blaine Amendment Reconsidered," *American Journal of Legal History* 36 (1992), p. 38.

pattern, and can be considered "classic Blaines." They prohibit aid to religious elementary and secondary schools, the modern day successors to the common schools of the past. Blaine modeled his Amendment on earlier provisions that several states had already incorporated into their constitutions, either when enacting their first constitution, such as Michigan did in Article 1, Section 4 of its 1836 Constitution, or by amendment, as Massachusetts did in 1855 in adding its amended Article XVIII, Section 2. These amendments that pre-date the failed federal Blaine amendment can be considered "proto-Blaines." Some states, as previously noted, have enacted Blaine Amendments with a broader prohibition that precludes aid to sectarian colleges, in some cases, and still other religious institutions in other cases, encompassing sectarian hospitals and orphanages, for example. These can be considered "super-Blaines."

As Joseph Viteritti has written:

> …[T]he history of the original Blaine Amendment and its progeny in the states underscores one of the most incredible ironies in American constitutional law. Strict separationists often point to these local provisions as safeguards of religious freedom, using them to prevent objectionable interaction between government and religious institutions. In fact, the Blaine Amendment is a remnant of nineteenth century religious bigotry promulgated by nativist religious leaders who were alarmed at the growth of immigrant populations and who had a particular disdain for Catholics.[8]

[8] Joseph Viteritti, "Blaine's Wake: School Choice, the First Amendment, and State Constitutional Law," *Harvard Journal of Law & Pub Policy* 21 (1998), p. 659.

DRAFT

Far from being religiously-neutral provisions designed to prevent the State from directly or indirectly aiding a state-established religion, the state Blaine amendments, like the federal counterpart from which their name derives, in fact were designed to rebuff efforts of the Catholic Church for a share of the school funds provided to public schools, which were at the time nondenominationally Protestant in orientation. It is simply impossible to understand the proper interpretation and original meaning of these provisions without first understanding that the common schools (as public schools used to be known) were originally intended to be, and functioned as, religious schools.[9]

The common schools -- created by the founders of the Common School Movement, Horace Mann of Massachusetts and Henry Barnard of Connecticut and Rhode Island -- were unabashedly Protestant in orientation, intended to inculcate in all children attending them a generic Protestantism acceptable to most if not all Protestant denominations. As Charles Glenn has said, "The common school was intended, by its proponents, above all as the instrumentality by which the particularities of localism and religious tradition and (in the United States) of national origin would be integrated into a single sustaining identity;"and moreover "the common school that Mann and others sought to create was profoundly and explicitly religious and saturated with moral purpose."[10]

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[9] See Carl F. Kaestle, *Pillars of the Republic: Common Schools and the American Republic, 1780-1860* (1983), p. 98 ("The growing antagonism between Protestants and Catholics may have helped Protestants close ranks on the issue of religion in the public schools. Education officials, legislators, and essayists agreed on the propriety of Christian Bible reading in the public schools. Predominantly Protestant themselves, they endorsed the notion that there was a common core of scripture and belief among Christians, and they had no qualms about supporting a common-school policy that was openly Christian, avowedly nonsectarian, and implicitly Protestant."); see also David Tyack, Thomas James, and Aaron Benavot, *Law and the Shaping of Public Education, 1785-1954* (1987), p. 163 ("Throughout most of American history, local majorities seemed to have their way with religious elements in the curriculum. These local majorities were typically Protestant, and the compromise they favored--teaching the King James Bible without comment--was hardly fair to Catholics, Jews, and non-believers.").

[10] Charles Leslie Glenn, *The Myth of the Common School* (1987), pp. 9 and 14. See also Lloyd P. Jorgenson, *The State and the Non-Public School: 1825-1925* (1987), p. 38 ("Although he had abandoned the Puritanism of his forebears, Mann's writings bear eloquent witness to his burning conviction that non-sectarian [Protestant] religion

DRAFT

Protestant reactions to Catholic objections to the Protestant nature of the public schools ranged from unsympathetic to vicious. Although there had been earlier outbreaks of anti-Catholic violence, such as the burning of the Ursuline Convent in Charlestown, Massachusetts, in 1834, in 1844 rumors that the Philadelphia school authorities were going to end the practice of reading from the Protestant King James Bible in response to Catholic protests led to two extended bouts of rioting that left some 44 persons dead and several Catholic churches burned. Their efforts to receive accommodations to their religious beliefs in the common schools having consistently failed, the Catholic church authorities determined to create a system of parochial schools so that their co-religionists could avoid the increasingly inhospitable public schools.[11]

Shortly after the Philadelphia Bible Riots, Catholics in New York requested that they receive a proportionate share of the public school funds so that they could operate their own schools. Although New York Governor Seward initially agreed to the request, the Protestant reaction led the legislature to reject the proposal unequivocally.

Catholic demands for a share of the common school funds for their schools persisted, however, and it was to rebuff those demands that early proto-Blaine Amendments such as that passed by Massachusetts in 1855 were enacted. As Douglas Laycock has explained, aid to religious schools did not become a controversial subject until Catholics began demanding the same support for their schools as that given to the generically Protestant public

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was an essential element of education.... An Episcopalian layman of orthodox religious views, Barnard was entirely convinced of the necessity of religious instruction in the schools, and he admonished that Christ was the first great teacher.") and Joseph P. Viteritti, *Choosing Equality: School Choice, the Constitution, and Civil Society* (1999), p. 150 ("The common school was meant to function as an instrument for the acculturation of immigrants, making them good, productive citizens in the image of the governing majority. The Bible, the Protestant Bible was a sacred implement to their cause".)

[11] Viteritti notes that the common school curriculum had evolved from "its open embrace of mainstream Protestantism to a blatant anti-Catholicism," citing to a study of more than a thousand commonly used textbooks of the nineteenth century public schools that found that one of two prevalent themes was "a fierce anti-Catholicism in which the church was portrayed as a national threat, loyal to a foreign power in Rome." Viteritti, supra note 3, p. 152, internal footnote omitted.

DRAFT

schools.[12] Massachusetts passed its proto-Blaine Amendment when the nativist, anti-Catholic Know Nothing Party swept to total control of the state government in the 1854 elections. Support for the public schools and opposition to any subsidies for Catholic "sectarian" schools were two planks of the Know Nothing's platform in the 1850's.[13] While the Know Nothings as a political party disappeared in the late 1850's, most of them were absorbed into the new Republican Party. By the time President Grant, himself a former Know Nothing,[14] requested a federal constitutional amendment prohibiting all states from funding "sectarian" schools, 14 states had already enacted legislation or constitutional provisions prohibiting the use of public funds for non-public religious schools.[15] Although the Federal Blaine Amendment Grant had requested passed the House of Representatives by the required two-thirds majority it fell several votes short of a two-thirds majority in the Senate. The Republican-dominated Congress then began requiring through its enabling legislation that constitutions of new states include Blaine Amendment provisions, so that by 1890 29 states had such provisions.[16] Ten more states adopted Blaine Amendments subsequent to 1890.

Not content with ensuring that no public funds were provided directly to "sectarian" schools, public school advocates had repeatedly sought to get states to require that all students attend the public schools by means of compulsory attendance laws. Although initially successful in Massachusetts, Wisconsin and Illinois, legislation to this effect had been reversed due to

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[12] Douglas Laycock, “Summary and Synthesis: The Crisis in Religious Liberty,” *George Washington Law Review* 60 (1992), p. 845.

[13] Tyler Anbinder, *Nativism and Slavery: The Northern Know Nothings and the Politics of the 1850's* (1992).

[14] *Id.*, p. 274. Anbinder notes that while Grant only revealed he was a Know Nothing in his posthumously published memoirs, both of his vice presidents, Schuyler Colfax of Indiana and Henry Wilson of Massachusetts, had been prominent Know Nothings.

[15] Viteritti, *supra* note 3, p. 670.

[16] *Id.*, p. 673.

public outcry.[17] In 1922, however, Oregon passed an initiative requiring attendance exclusively at public schools. When two private schools, including a Catholic school, sued in federal court because the initiative would put them out of business, the case ultimately reached the U.S. Supreme Court, which in 1925 delivered its landmark decision in *Pierce v. Society of Sisters*, affirming the right of parents to send their children to non-public schools. The Supreme Court held that "the child is not the mere creature of the state; those who nurture and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional responsibilities."[18] In a very real sense, *Pierce* lay the foundation stone for the modern school choice movement, because if the Supreme Court had upheld the Oregon initiative there might well be no private marketplace in education today. But just as the Court's *Pierce* ruling made private school choice possible in theory, we might expect that the restrictive Blaine Amendments might proscribe and government support of private school choice in particular states. It is to that question, which is at the heart of our paper, that we now turn.

3. Are Blaine Amendments an Obstacle to School Choice? An Empirical Analysis.

In the 2011-12 school year, over 200,000 students used a voucher or tuition tax credit to attend a private school. These students participated in one of 25 programs in 14 states across the country (See Table 1 for a full list).[19] Voucher programs are financed through general revenues and administered by governments, either directly or by contract with a program implementer. Tuition tax-credit programs are funded indirectly, by providing a full or partial tax credit to corporations or individuals who donate to a scholarship-providing non-profit organization and

[17] Jorgenson, *supra* note 5, pp. 186-204.

[18] *Pierce v. Society of Sisters*, 268 U.S. (1925), p. 535.

[19] New programs have been added so far in 2012 in Louisiana, New Hampshire, Pennsylvania, and Virginia.

Table 1. School Choice Programs in the U.S., 2011-12 School Year

Blaine Amendment?	Location	Year Enacted	2011-12 Enrollment	Type
YES	Arizona	1998	25,343	Individual Tax Credit
YES	Arizona	2006	4,578	Corporate Tax Credit
YES	Arizona-Lexie's Law	2006	115	Special Corporate Tax Credit
YES	Florida	1999	22,861	Special-Needs Voucher
YES	Florida	2001	37,998	Corporate Tax Credit
YES	Georgia	2007	2,965	Special Needs Voucher
YES	Georgia	2008	8,131	Corporate and Individual Tax Credit
YES	Indiana	2009	590	Corporate and Individual Tax Credit
YES	Indiana	2011	3,919	Voucher
NO	Iowa	2006	10,280	Individual and Corporate Tax Credit
NO	Louisiana	2008	1,848	Voucher
NO	Louisiana	2010	186	Special Needs Voucher
NO	North Carolina	2011	N/A	Special Needs Tax Credit
YES	Ohio-Cleveland	1995	5,603	Voucher
YES	Ohio-Autism	2003	2,236	Special Needs Voucher
YES	Ohio-EdChoice	2005	16,136	Voucher
YES	Ohio-Special Needs	2011	N/A	Special Needs Voucher
YES	Oklahoma-Special Needs	2010	160	Special Needs Voucher
YES	Oklahoma	2011	N/A	Corporate and Individual Tax Credit
YES	Pennsylvania	2001	40,876	Corporate Tax Credit
NO	Rhode Island	2006	341	Corporate Tax Credit
YES	Utah	2005	635	Special Needs Voucher
YES	Washington D.C.	2004	1,615	Voucher
YES	Wisconsin-Milwaukee	1990	23,198	Voucher
YES	Wisconsin-Racine	2011	228	Voucher

Sources: Richard D. Komer and Clark Neily, *School Choice and State Constitutions: A Guide to Designing School Choice Programs* (Washington D.C.: The Institute for Justice and The American Legislative Exchange Council, 2007); Malcom Glenn and Michelle Gininger, *School Choice Now: The Year of School Choice, School Choice Yearbook 2011-12* (Washington, DC: The Alliance for School Choice, 2012).

DRAFT

operate at arm's length from government. Programs ranged greatly in size. Several private school choice programs enrolled fewer than 200 students, while the two largest programs, the Florida and Pennsylvania corporate tax credit programs, enrolled almost 38,000 and 41,000 students, respectively. Programs also ranged in age. The oldest initiative, the Milwaukee Parental Choice Program, was enacted in 1990, while five new programs began in the 2011-12 school year. What all of these private school choice programs have in common, however, is that they all permit parents to enroll students in sectarian religious private schools at government expense.

Constitutionalism predicts that Blaine Amendments, enacted to proscribe government support of sectarian religious schools, would prohibit states from operating private school choice programs that include religious schools. If one were a Constitutionalist, one might expect that legislators in states with Blaine Amendments would not even try to establish private school choice programs that included sectarian religious schools because they could anticipate such a program being struck down by state courts. Were legislators in Blaine-Amendment states to be so bold as to attempt to enact school voucher programs that include sectarian schools, the courts would swiftly and surely invalidate such laws, at least according to the Constitutionalist school of thought. The Constitutionalist view of the relationship between Blaine Amendments and state-level school voucher and tuition tax-credit programs is essentially a syllogism: If Blaine Amendment, then no program.

The Constitutionalist syllogism clearly does not hold in this case. Eleven of the fourteen states offering private school choice programs also have Blaine Amendments, meaning that 20 of

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the 25 programs are offered in Blaine-Amendment states. Empirical analysis confirms what even a cursory glance at the landscape reveals, that there is no relationship between a state having a Blaine Amendment and a state offering a private school choice program. To test for this relationship, we constructed a cross-tabulation of the 50 states and District of Columbia organized by whether or not they have a Blaine Amendment and whether of not they have a private school choice program (see table 2). Eleven of the 14 states that offer private school choice programs also have Blaine Amendments, and nine of the 37 states that do not offer private school choice programs do not. A relationship in a cross-tabulation table is best understood by how observations cluster around the “primary diagonal”. If there is a strong negative relationship between having a Blaine Amendment and not having a private school choice program, as Constitutionalism predicts, the observations should cluster in the upper left and lower right cells of the table. This would show the majority of the observations in the No Blaine/Voucher cell and the Blaine/No voucher cell, implying that having a Blaine Amendment prevents a state from having a private school choice program.

As table 2 clearly shows, almost half of the observations fall outside of the primary diagonal. While there are a significant number of observations in the Blaine/No Voucher cell, there are only three states that have no Blaine Amendment and a voucher program. In fact, the lion’s share of states that have voucher programs also have Blaine Amendments. This outcome is most likely explained by the fact that the vast majority of states (39) have Blaine Amendments, but a much smaller number (14) have school choice programs. Statistically, a chi-squared test on the cross-tabulation of state programs finds no evidence of a systematic relationship (p-value=. 83) between a state having a Blaine Amendment and a state having a private school choice program.

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Table 2: Cross-Tabulation of States with and Without Private School Choice Programs by Blaine Amendment

	No Blaine	Blaine	Total
Voucher/Credit	3	11	14
No Voucher/Credit	9	28	37
Total	12	39	51

Interestingly, it appears that states that have a Blaine Amendment are more likely to have a voucher program over a tax credit program. This is especially surprising since tuition tax credit initiatives were pioneered as Blaine Amendment "workarounds" because the money that finances them never touches government hands. Constitutionalists might grudgingly admit that Blaine Amendments might not succeed in their intended purpose of absolutely prohibiting public support for sectarian private schools but they might readily respond that at least the Amendments influence how such programs must be structured.

By limiting the sample to states that offer private school choice programs and then cross-tabulating the number of voucher programs and tax credit programs for these states, a clear pattern develops. Of the nine states that offer voucher programs, eight of them have Blaine Amendments (Table 3). However, of the three states that offer only a tax-credit program, only one has a Blaine Amendment. A chi-squared test on the cross-tabulation of the subset of states that have a voucher or tax credit program yielded a p-value of .02, confirming the positive relationship between having a Blaine Amendment and having a voucher program. Not only are private school choice programs with sectarian schools common in Blaine-Amendment states, they are actually <u>more likely</u> to take the form of explicit government-financed and government-run programs than they are to take the form of tuition tax-credit Blaine "workarounds". How can this be? An examination of actual court cases involving Blaine Amendments and support for sectarian private schools sheds some light on this question.

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Table 3: Cross-Tabulation of States with Private School Choice Programs by Blaine Amendment

	No Blaine	Blaine	Total
Voucher	1	8	9
Tax Credit Only	2	1	3
Total	3	9	12

4. The Courts' Interpretation of State Blaine Amendments

As demonstrated in Section 2, far from being a benign effort to apply the principle of separation of church and state at a time when the federal constitution's Religion clauses had not yet been applied to state actions, the Blaine Amendments found in so many state constitutions were if anything precisely the opposite -- an effort to preserve and protect Protestant hegemony over the burgeoning public school systems, specifically by defeating Catholic efforts to obtain an equal share of public funding for their parochial schools. These schools had been established by the Catholics because, while they shared the belief of the public school advocates that public education should include religious training, they recognized that the Protestant establishment that controlled the public schools would not accommodate Catholic requests to temper the generically Protestant nature of the public schools. As increasing numbers of Catholics immigrated to America, particularly impoverished Catholics from Ireland and Italy, anti-Catholic sentiment increased, including in the textbooks and curricula of the public schools. Events in Maine in 1854 illustrate this development. Maine was the state that James G. Blaine represented in the U.S. Congress, where he proposed his amendment to the federal Constitution.

Amanda Donohoe, a young Catholic girl enrolled in the public schools of Ellsworth, Maine, was expelled when, on the instruction of her father and her priest, she refused to read

from the Protestant King James Bible. She sued in state court and the Maine Supreme Court ultimately affirmed her expulsion, upholding the Protestant practice of Bible reading without commentary.[20] Her priest, Father John Bapst, a Jesuit, began holding classes for Catholic children in a newly built chapel. Encouraged by the town fathers, a Protestant mob burned down the chapel and tarred and feathered Father Bapst, threatening to burn him at the stake. The same year these events were transpiring in Ellsworth, Maine elected a Know Nothing as Governor, and another mob burned down the Old South Congregational Church in Bath, Maine, because it had been rented to Catholics for church services.

Thus it was the hostile environment presented to Catholics by the nondenominationally Protestant public schools that led to the Catholics establishing their own schools, to inculcate elements of their own religion, just as the public schools were inculcating common elements of Protestantism. When, however, Catholics sought public funds for their schools the Protestant establishment generally reacted with disdain, emphasizing that the public schools were nondenominational, while the Catholic schools were "sectarian." Although there were rare exceptions among the Protestants, such as Governor Seward of New York, who was supportive of Catholic requests for a share of the public school funds, such apostates were vilified by the larger Protestant community. That community supported efforts to constitutionalize the rejection of Catholic demands, and the state Blaine Amendments were born. Accordingly, what every state Blaine Amendment has in common is language rejecting public funds for sectarian schools. As noted, sometimes the language prohibits funding of sectarian colleges as well, and even other social service agencies like hospitals and orphanages.[21] Because of the clarity with which Blaine

[20] *Donahoe v. Richards*, 38 Me. 379 (Me. 1854).

[21] The state of Washington, for example, has two Blaines in its constitution: Article IX, Section 4, a "classic" Blaine that provides that "[a]ll schools supported wholly or in part with public funds shall be forever free from sectarian

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Amendments serve their original purpose of rejecting direct funding of sectarian schools, there are few court cases involving aid to religious schools, with most decisions involving other social service agencies, such as the 1879 ruling in *Trost v. Ketteler Manual Training School* in which the Illinois Supreme Court held that the state's Blaine Amendment did not prohibit the state from paying for childcare services at religious institutions where the children were not required to attend religious services and the state funds were not used to fund such services.[22]

After the U.S. Supreme Court in 1925 affirmed the right of parents to use private schools to educate their children, a number of states began to experiment with various forms of funding for families using private schools and for the schools themselves. Of particular interest for our purposes is how the courts reacted to aid provided to families and to the children themselves, because that is the form that school choice programs take. The experience of New York is instructive. In the 1930's the New York legislature enacted legislation requiring the transportation of all schoolchildren to their schools, including children attending religious schools. Opponents of the program claimed it violated New York's Blaine Amendment adopted in 1890. That Amendment, Article XI, Section 3, prohibits the state and its subdivisions from using its public money or property "directly or indirectly, in aid or maintenance ... 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." New York's highest court, the Court of Appeals, ruled in *Judd v. Board of Education* that although busing the children to their schools was primarily for the benefit of the children, it provided an incidental benefit to the religious schools they attended and thus constituted "indirect" aid to those

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control," and Article I, Section 11, a "super-Blaine" that provides that "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."

[22] *Trost v. Ketteler Manual Training School*, 118 N.E. 743 (Ill. 1879).

DRAFT

schools.[23] Although the specific result in *Judd* was reversed when the electorate amended the Blaine amendment to allow transportation to religious schools, the issue of whether aid to students constituted "indirect" aid to religious schools recurred again in 1967 when the Court of Appeals was asked to rule on a Blaine Amendment challenge to a program of loaning free secular textbooks to all schoolchildren, including those attending religious schools. In *Board of Education v. Allen* the Court of Appeals overruled *Judd*, holding that the Amendment did not prohibit aid to students that incidentally provided some benefit to the schools they attended.[24] The Court also held that such incidental benefits to religious schools did not violate the federal Establishment Clause.

The plaintiffs appealed this latter ruling to the U.S. Supreme Court, which affirmed the New York Court of Appeals decision regarding the Establishment Clause.[25] This decision was important because it reaffirmed the willingness of the U.S. Supreme Court to uphold some forms of assistance to students under the Establishment Clause, even though their religious schools arguably derived some secondary or incidental benefit from the aid provided to their students. The Supreme Court had first established this approach in *Everson v. Board of Education* in which it upheld a student transportation program from New Jersey similar to the one the New York Court of Appeals had struck down in *Judd* a decade before.[26] The result in *Allen* was surprising, however, since many observers had believed that decisions since *Everson* had indicated the Court was willing to overrule that case if provided the opportunity. Because under the federal structure of the governance in the United States a state law must pass muster

[23] *Judd v. Board of Education*, 15 N.E.2nd 576 (N.Y. 1938).

[24] *Board of Education v. Allen*, 228 N.E.2nd 791 (N.Y. 1967).

[25] *Board of Education v. Allen*, 392 U.S. 236 (1968).

[26] *Everson v. Board of Education*, 330 U.S. 1 (1947).

under both the federal and state constitutions with the federal constitution reigning supreme, a broad reading of the Establishment Clause as prohibiting aid to students that incidentally benefitted their schools would have doomed any possibility of school choice programs in the states. Conversely, the fact that the Supreme Court unequivocally upheld a school choice scholarship program in the 2002 ruling *Zelman v. Simmons-Harris* means that the remaining impediment to the permissibility of private school choice programs, if any, must be found in state constitutions.[27]

New York's cases involving student aid demonstrate both the restrictive reading of state Blaine Amendments, which finds that even incidental benefits to religious schools violates the state's Blaine amendment (the *Judd* case), and the more generous reading that distinguishes between providing direct and indirect benefits to the schools, which is prohibited, and providing benefits to students that may incidentally benefit the schools they choose to attend (the *Allen* case). But New York's cases involved relatively minor forms of student assistance, transportation and secular textbooks, raising the obvious question of whether these two readings also apply to the more substantial form of assistance represented by student voucher or tax-credit scholarship programs.

Comparison of a pair of other cases indicates that courts do in fact apply these two contrasting approaches to voucher and scholarship programs. Wisconsin is home to the Milwaukee Parental Choice Program ("MPCP"), which has provided school vouchers to low-income families in Wisconsin's poorest performing school district since 1991.[28] Wisconsin has a Blaine Amendment, Article I, Section 18, which states that no money shall be drawn from the

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[27] *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).

[28] For a brief overview and history of the program see Patrick J. Wolf, *The Comprehensive Longitudinal Evaluation of the Milwaukee Parental Choice Program: Summary of Final Reports*, School Choice Demonstration Project, University of Arkansas, Fayetteville, AR, 2012, http://www.uark.edu/ua/der/SCDP/Milwaukee_Eval/Report_36.pdf

treasury for the benefit of religious societies or religious or theological seminaries, which is understood to encompass religious schools. The teachers unions and other parties challenged the constitutionality of the MPCP after it was expanded in 1995 to permit voucher recipients to use their scholarships at religious schools, which in Milwaukee as everywhere else constitute the majority of private schools. In *Jackson v. Benson* the Wisconsin Supreme Court upheld the constitutionality of the program, holding that any benefits the religious schools received were incidental to their having been drawn from the treasury for the benefit of the students.[29]

Like Wisconsin, Alaska also has a Blaine Amendment, and Alaska's Blaine also prohibits aid to religious colleges as well as religious elementary and secondary schools. Alaska's Article VII, Section 1 provides that "No money shall be paid from public funds for the direct benefit of any religious or other private educational institution." As the forty-ninth state to join the Union, Alaska's Blaine is the second youngest Blaine, older only than Hawaii's. Despite its youth, however, Alaska's Blaine has already been used by the Alaska Supreme Court to invalidate both a student transportation program and a college scholarship program, on the grounds that these programs benefit private and religious schools and colleges.[30] In the *Sheldon Jackson College* case, the Alaska Supreme Court specifically rejected the idea that there was a legal distinction to be made between giving money to the students and giving money to the colleges they chose to attend, despite the fact that Alaska's Blaine prohibits only money paid for the *direct* benefit of religious educational institutions, in contrast to, for example, New York's Blaine, which prohibits public money from being used *directly or indirectly* for the benefit of religious schools and colleges. New York's courts, faced with language plainly more expansive than Alaska's,

[29] *Jackson v. Benson*, 578 N.W.2d 602 (Wis.), *cert. denied*, 525 U.S. 997 (1998).

[30] *Matthews v. Quinton*, 362 P.2nd 932 (Alaska 1961), *cert. denied*, 368 U.S. 517 (1962) (invalidating transportation program); *Sheldon Jackson College v. State*, 599 P.2d 127 (Alaska 1979) (invalidating college scholarship program).

distinguish between direct and indirect aid to religious schools, which is prohibited, and incidental aid, which is not. Alaska's courts, faced with language plainly more limited than New York's, prohibiting only direct aid to religious educational institutions, refuse to distinguish between direct, indirect, and incidental aid, viewing all as prohibited. It is almost as if for some state courts the actual language of their Blaine Amendment hardly matters at all.

5. When Blaine Amendments ARE an Obstacle to School Choice: It's the Politics, Stupid

Over the years there have been 14 state court cases that have ruled on school choice programs and Blaine Amendments. In 10 of the 14 cases, courts have ruled in favor of school choice programs (see table 4).

To test the Behavioralist hypothesis that politics might play some role in the rulings, we classified all of the courts that have ruled on these cases by the political identification of the judges that heard the case. In cases where the judges were elected we used the party that they ran as a member of, and in cases where they were appointed we used the political identification of the governor of the state at the time of their appointment. This is, admittedly, a crude measure of political ideology, but it does give us a rough look at the role political orientation might play in the jurisprudence on school choice cases. Nationally, the Democratic Party is opposed to government-funded private school choice programs whereas the Republican Party supports such initiatives.[31]

[31] Terry M. Moe, *Schools, Vouchers and the American Public* (Washington, DC: Brookings, 2002).

DRAFT

Table 4: State Court Cases on School Choice and Blaine Amendments

Court Case	State	Program	Number of Judges	Appointed by	+ School Choice?
Chittenden v. Vermont Department of Education (1999)	VT	Vermont Tuitioning system	5	D, D, D, D, D	No
Jackson v. Benson (1998)	WI	Milwaukee School Choice program	7	R, R, R, D, D, R	Yes
Arviso v. Honig (1992)	CA	Failing Schools Voucher	7	R, R, R, R, R, R, R	No
Toney v. Bower (2001) and Griffith v. Bower (2001)	IL	Education Tax Credits	7	R, D, D, R, R, R, R	Yes
Simmons-Harris v. Goff (1999)f/ Zelman v. Simmons-Harris (2002)	OH	Cleveland School Choice Program	7	R, D, R, R, D, R, R	Yes
Holmes v. Bush (1999)	FL	Florida Opportunity Scholarship program	7	D, D, R, R, D, D, D	No
Kotterman vs. Killian (1999)	AZ	Arizona Tax Credits	5	R, R, D, R, R	Yes
Doolittle v. Meridian Joint School District (1996)	ID	Special education placements	5	D, D, D, D, D	Yes
Embry v. O'Bannon (2002)	IN	Dual-enrollment programs for private school students	5	R, R, D, D, D	Yes
Commonwealth v. School Committee of Springfield (1981)	MA	Public funds for Special Education Services	5	R, R, R, D, D	Yes
Almond v. Day (1955)	VA	Vouchers for veteran's children	7	D, D, D, D, D, D, D	No
Gissy v. Board of Education (1928)	WV	Town Tuitioning	5	R, R, R, R, R	Yes
Davis v. Grover (1992)	WI	Milwaukee Parental Choice Program	7	D, D, D, R, R, D, R	Yes
State ex rel. Warren v. Nusbaum (1974)	WI	Private services for disabled children	7	R, D, D, D, R, R, R	Yes

DRAFT

We created a simple index, the number of judges that we identified as Democrats over the total number of judges that heard the case, to measure the political ideology of the court. Scores ranged from 0 (if all judges were Republicans) to 1 (if all judges were Democrats). Rulings were coded with a simple dichotomous dummy variable, 1 if the court ruled in favor of the school choice program and 0 if the court ruled against the school choice program.

Calculating a simple, bivariate correlation on the political identity of judges and their ruling on court cases shows a moderate negative relationship between judges that identify as Democrats and positive private school choice rulings. The Pearson's-*r* correlation coefficient between the index of political ideology and the school choice dummy variable is -.37, indicating a negative relationship of modest size.

Our partisan ideology variable is admittedly a crude measure. For example, it is not unreasonable to believe that the five Democrats that ruled for school choice in Idaho in *Doolittle* might be fundamentally different from the five Democrats that ruled against school choice in Vermont in *Chittenden*. Both of these courts are most likely extremely different from the seven Democrats that ruled against school choice in Virginia in 1955 in *Almond*. Short of developing a comprehensive rating system, involving the meticulous coding of individual judges based on multiple indicators of partisan ideology, which is a level of field research beyond the scope of this initial descriptive study, our simple partisan ideology scale is as close as we can get to capturing the effect of political preferences on judicial rulings regarding private school choice. The fact that such a blunt instrument, which undoubtedly measures partisan ideology with a substantial degree of error, still was systematically correlated with case outcomes at least suggests that a more precise ideological measure would reveal an even clearer association between judges' partisan affiliations and their rulings on voucher and tuition tax-credit programs.

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This result, coupled with earlier empirical analysis on the prevalence of private school choice programs, underscores the finding that Blaine Amendments in and of themselves appear to have little to do with the creation or constitutionality of a private school choice program. In all 14 of these cases, states had Blaine Amendments, and in 11 cases, the courts ruled that private school choice programs did not violate them. While it appears that to some extent politics was a driver of the pattern of results, it is abundantly clear that a state having a Blaine Amendment was not.

6. Conclusions

Two contrasting theories of what explains judicial rulings, Constitutionalism and Behaviorism, have clashed in the scholarly literature about the U.S. Judiciary over the past half century or more. Behaviorism has had the upper hand in those battles, especially more recently. The case of Blaine Amendments and private school choice would seem to be an especially tough test for Behaviorism, however, since the anti-aid amendments are explicit constitutional provisions with the clear, historically established, intent of preventing governments from providing financial assistance to private schools.

Our legal and empirical analyses, crude as they are, strongly suggest that, in this case, politics matters more than constitutional language. State anti-aid amendments are unlikely to preclude private school choice policies at the state level where Republicans dominate the judiciary. When it comes to school choice policy-making, a state judiciary controlled by Republicans functions as the equivalent of a “get-out-of-Blaine-jail-free” card. The more a given court is comprised of Democratic judges, the less likely that court is to judge a private school program to be constitutionally permissible. Under circumstances of Democratic control of the

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state judiciary, policy-makers would be well advised to design their private school choice policies with tax-credit funding as opposed to direct government funding, so that judges inclined to rule such programs unconstitutional have less ready access to Blaine Amendments to justify their decisions. James G. Blaine can be blamed for many things, but no longer can he and his legacy of anti-aid amendments be blamed exclusively or even primarily for standing in the way of the government support of private schools through the schooling choices of parents.

One important caveat is that the Blaine Amendments in 39 state constitutions and the Anti-Establishment Clause in the U.S. Constitution apparently have shaped private school choice programs in one important way. In all cases, such programs provide resources directly to parents who then channel the funds to sectarian religious schools only through the school choices that they make. This funding procedure is in contrast to policies of government support of private religious schools in many countries of Europe and Canada, where national governments pay sectarian private schools directly to provide educational services to students.[32] The fact that no private school choice program involves the direct funding of sectarian religious schools by governments would seem to represent a minor victory for Constitutionalism over Behaviorism. Still, the fact that the mighty Blaine's have been felled by the sling-shot pebble of indirect funding mechanisms, especially when many Blaines explicitly proscribe even indirect support for religious schools, if anything demonstrates how utterly complete is the triumph of politics over Constitutionalism in this case; or, more specifically, how anachronistic the Blaine Amendments have become in the debate over government-funded private school choice.

What does all this mean for American federalism? The fact that state constitutional anti-aid amendments have virtually no influence on private school choice policies at the state level

[32] See Patrick J. Wolf and Stephen Macedo (eds.), with David Ferrero and Charles Venegoni, *Educating Citizens: International Perspectives on Civic Values and School Choice* (Washington, DC: Brookings, 2004).

DRAFT

might appear to be a blow against federalism, at least judicial federalism. We see the fact that Blaine Amendments sometimes fail to prevent states from operating private school choice programs as more of a victory for federalism, especially political federalism. After all, the virulent anti-Catholic bigotry that birthed the Blaine Amendments in the first place has, thankfully, exited the scene in most if not all of the U.S. states. The fact that political conditions on the ground have permitted many states to enact private school choice programs, even if 19th Century constitutional provisions otherwise might seem to prohibit them, demonstrates that the contemporary will of the people in individual states often can be successfully expressed through the institutions of their state governments, including their state judiciary. Few validations of the principles of American federalism could be stronger than that.

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