

**THE ORIGINAL INTENT OF
CALIFORNIA'S BLAINE PROVISIONS**

Brian R. Callanan

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INTRODUCTION

In *Zelman v. Simmons-Harris*, the U.S. Supreme Court deprived school choice opponents of a central argument in their legal arsenal. But the battleground for vouchers in the courts is increasingly turning to state “Blaine Amendments.” Named after failed 1875 amendment to the U.S. Constitution, these 19th century state constitutional provisions prohibit public funding to “sectarian” institutions. Despite *Zelman’s* green light past the federal Establishment Clause, choice programs that include religious schools will have to pass constitutional muster in state courts. This study examines the development of California’s Blaine provisions in the hope of better understanding the legal prospects for vouchers in the Golden State.

Simply put, Blaine amendments are only relevant if state courts interpret them *more* restrictively than *Zelman’s* application of the First Amendment. California is among the roughly twenty states with constitutional requirements that do indeed appear more stringent — and certainly more explicit — than the Establishment Clause.¹ Without amendment to constitutions like California’s, defending vouchers before state courts will likely require a return to the original intent of the Blaine progeny in each constitution, in each state, based upon twenty-odd legislative histories. The Institute for Justice, the Becket Fund and other organizations have championed efforts to uphold choice programs against Blaine challenges in Washington, Arizona, Maine, Florida, South Dakota and elsewhere. These cases have helped illuminate the intent and effect of the amendments in question. This report modestly attempts to do the same for California.

¹ Based upon an analysis by Richard Komer of the Institute for Justice. “Signals from State Courts on School Choice,” Blaine Amendment map. Available at <http://www.ij.org/cases/index.html>.

Justice Clarence Thomas, writing for Chief Justice Rehnquist and Justices Kennedy and Scalia in *Mitchell vs. Helms*, acknowledges the Blaine amendments' common roots:

[H]ostility to aid to pervasively sectarian schools has a shameful pedigree that we do not hesitate to disavow. Opposition to aid to "sectarian" schools acquired prominence in the 1870s with Congress' consideration (and near passage) of the Blaine Amendment, which would have amended the Constitution to bar any aid to sectarian institutions. Consideration of the Amendment arose at a time of considerable hostility to the Catholic Church and to Catholics in general.... This doctrine, born of bigotry, should be buried now.²

It is unclear whether the U.S. Supreme Court, or any state high court, might be persuaded by an argument that these state provisions were similarly motivated by hostility to religion, or Catholicism exclusively. If nothing else, legislative histories of the most restrictive Blaine amendments promise to shed light on their compatibility (or incompatibility, as they case may be) with the federal Establishment Clause.

Though several obscure articles and books recount the history of California's 19th century sectarian schools question, and a handful of law review articles address the constitutionality of vouchers in California, we found no full treatment of the subject in light of the California Constitutional Convention debates and proceedings (1878-1879). With this in mind, Part I of this report examines the history and origins of school funding squabbles from California's Founding to the "Refounding." Part II focuses on the debates of the 1878-79 Convention, during which the Blaine provisions were drafted and adopted. Part III recounts seven California cases in which the state Supreme Court faced legal challenges based upon the 1879 Blaine provisions.

² *Mitchell v. Helms*. 530 U.S. 793, 810, 147 L. Ed. 2d 660, 120 S. Ct. 2530-814 (2000).

I. THE ORIGINS OF CALIFORNIA'S SCHOOL FUNDING DISPUTE

Mighty influences are bearing on us in high conflict...We must educate the whole nation while we may.

LYMAN BEECHER

The story of efforts to deny California Catholic schools public funding begins in the 1850s, but has roots still deeper. New England Protestant missionaries understood the settlement of California as a potentially crowning victory in the decades-long effort to rescue the American West from Roman Catholicism. Lyman Beecher's 1835 *A Plea for the West* captured the ambitions and fears that sent generations of New England Protestants beyond the Mississippi. The coming challenge, Beecher said, will "decide the destiny of the West, will be a conflict of institutions for the education of her sons, for purposes of superstition, or evangelical light; of despotism, or liberty."¹ Staving off Catholicism was an inextricable part of the New England Protestant mission—a mission that promised both spiritual salvation and deliverance of the American republic from Europe's tyrannous monarchies and the pontiff they revered.² California, the U.S. territory once ruled by Catholic Spain and still menaced by Franciscans and Jesuits, seemed a matchless prize.

The common portrait of Catholicism, popularized by Beecher and the Protestant press, was not merely of a competing faith but a dangerous foreign influence. The spread and success of "popery" imperiled not only soul-saving, but freedom of the mind and the

¹ Lyman Beecher, *Plea for the West*, 1835, p. 12; available from www.artsci.wustl.edu/~acsp/courses/hist366/beecher.html.

² Kevin Starr, *Americans and the California Dream: 1850-1915* (New York: Oxford University Press, 1973), 93.

American regime itself. The late 1830s saw the fusion of two virulent strains of Nativism, anti-Catholic sentiment and suspicion of immigrants. As R. A. Billington explains, “effective propaganda” had convinced most Protestant Americans that European immigrants and the Catholic Church were joined in an underhanded “alliance.”³ These foreigners, much like the Mexicans of California, were captives of the Church’s shackles of ignorance. Catholicism came to represent the three evils of unchristian superstition, treacherous disloyalty and mental infantilism.⁴ The Catholic project of proselytizing western settlers relied heavily on parochial schools, funded by the “royal munificence of European-Catholics.”⁵

A good Protestant education was just the fix. In his clarion call west, Beecher identified this crucial battleground:

If we do not provide the schools which are requisite for the cheap and effectual education of the children of the nation, it is perfectly certain that the Catholic powers of Europe intend to make up our deficiency, and there is no reason to doubt that they will do it, until by immigration and Catholic education we become to such an extent a Catholic nation, that, with their peculiar power of acting as one body, they will become the predominant power of the nation.⁶

Beecher was specifically concerned, in fact, about the school *funding* problem. Rome had equipped Catholic missionaries, he insisted, with the powerful means to provide “underbidding and gratuitous instruction to monopolize the education” even to Protestant children in the West.⁷ One can imagine the how such suspicions, of an ecclesiastical foreign Church using its unholy excess to vanquish Protestant America, galvanized many well and ill-intentioned Congregationalists, Presbyterians, Baptists and others. The

³ Ray Allen Billington, *The Protestant Crusade* (New York: Macmillan, 1938), 118.

⁴ As President Ulysses S. Grant would alter put it, “superstition, ambition and ignorance,” as quoted by Philip Hamburger, *Separation of Church and State* (Cambridge: Harvard University Press, 2002), 322.

⁵ Beecher, *Plea for the West*, 14.

⁶ *Ibid*, 155-165

⁷ *Ibid*, 71.

stakes were clear for the Protestant domestic mission: as one transplanted Easterner told the New England Society of San Francisco in 1852, they would “MAKE CALIFORNIA THE MASSACHUSETTS OF THE PACIFIC.”⁸ The common school, in the New England tradition, would match and surpass Catholic influence in the West.

Not unlike the rest of the nation, California’s first common schools were Protestant from their inception. In December 1849, the San Francisco First Baptist Church opened its own elementary school, which four months later became the state’s first official “common school.”⁹ By the end of 1851, the city council had established a school district comprised of the new network of Protestant-affiliated schools.¹⁰ San Francisco’s Board of Education members were all New England Protestants who “held faithfully to old-time precedents,” according John Swett, the future State Superintendent and author of California’s 1879 Blaine amendment. In the early 1850s, the same Board of Education enforced daily readings of the King James Bible and opening prayers, a rule adopted from school regulations in New York City.¹¹ This modest but constant evangelism characterized San Francisco schools as distinctly, overtly Protestant.

The inclusion of the Protestant Bible in taxpayer-funded curricula became the central controversy between California Catholics and Protestants, as it had been in the Northeast. Catholics opposed reading from what they considered an unauthorized version of the Scriptures, while Protestants insisted that inculcating public morality

⁸ Timothy Dwight Hunt, *Address before the New England Society of San Francisco*, San Francisco, CA 1851, as quoted by Kevin Starr, *Americans and the California Dream: 1850-1915*, 86.

⁹ Mark Hurley, *Church-State Relationships in Education in California*, PhD. Dissert., The Catholic University of America (Washington: Catholic University, 1948), 1.

¹⁰ Robert M. Senkewicz, “Religion and Non-Partisan Politics in Gold Rush San Francisco,” *Southern California Quarterly*, 61(Winter 1979): 351-378.

¹¹ John Swett, *Public Education in California* (New York: American Book Company, 1911), 115; Nicholas Polos, *John Swett: California’s Frontier Schoolmaster*, (Washington: University Press of America, 1978), 75; Starr, *Americans and the California Dream: 1850-1915*, 94.

required it.¹² Dispute over “THE BIBLE QUESTION,” as John Swett described it,¹³ cut both ways: it would lend credence to both the *Catholic* argument for separately funded schools and the *Protestant* allegations that “priestcraft”¹⁴ aimed to win not true believers but unthinking supplicants. This allegation proved especially effective in the education question, as Catholic ecclesiasticism was easily cast as opposition to free thought and serious learning.¹⁵ In addition, Protestants argued that the Biblical lessons in common schools were useful for the “harmonizing of our heterogeneous population into one people.”¹⁶ While Catholic schools planted the seeds of divisive “sectarianism” from a foreign soil, the popular argument went, common schools steeped Americans in the Bible’s all-embracing lessons. Swett, who by 1864 was State Superintendent of Public Instruction, believed that Bible reading free of “sectarian interpretation” should ideally be included in common schools, but with the effectively meaningless caveat that the question be decided “locally.” Swett was by his own account a moderating influence on San Francisco’s Protestant zealots (and often the object of their ire), but he too distinguished between “sectarianism” and good Christian learning; the former was impermissible, the latter desirable as a *local* option.¹⁷ And though Swett’s own writings portray a genuine sensitivity to Catholics’ conscientious concerns, *The California Teacher*, a publication he co-edited at the time, dismissed objections to Bible reading as subterfuge that concealed a larger aim: “It is not the reading of the bible in the schools to which Catholics object but the whole system of free Public Schools.”¹⁸ *The Sacramento*

¹² Billington, *Protestant Crusade*, 143-144.

¹³ Swett, *Public Education*, 188.

¹⁴ Billington, *Protestant Crusade*, 119.

¹⁵ Hamburger, *Separation of Church and State*, 194.

¹⁶ Starr, *Americans and the California Dream: 1850-1915*, 94.

¹⁷ Swett, *Public Education*, 188-89; Polos, *John Swett*, 76-77.

¹⁸ *The California Teacher*, “The Bible in School,” May 1865, II, 289.

Daily Union similarly protested that Protestants and Jews alike “admire and support cheerfully our public schools,” while Catholics “assail the American Common School System.” “American Protestants,” the paper continued, “will never consent to see their educational system destroyed by the interference of Romish priests.”¹⁹ This idea of a Catholic plot to undermine American public education was widely held by California Protestants.

The Bible reading dispute propelled the 1850s legislative volley on sectarian school funding: granted in '51, denied in '52, returned in '53, rescinded in '55 and finally prohibited in the 1879 California constitution. The first state school law established a system of common schools but permitted that if a private school with satisfactory standards “be formed by the enterprise of a religious Society,” it would receive a *pro rata* share of public dollars.²⁰ However, before the state school fund actually had any considerable money to dole out, the legislature changed its mind.²¹ In 1852, California required that schools eligible for funding must “be free from all denominational and sectarian bias, control and influence whatsoever,” and use “no book of a sectarian or denominational character.”²² Unabated, common school classrooms continued opening with prayer and readings from the King James Bible, and an extended

¹⁹ *Sacramento Daily Union*, 15 April 1861, as quoted by Hurley, *Church-State Relationships in Education in California*, 33.

²⁰ California, *Statutes* (1851), chapter 126, p. 499. Interestingly, this first law provided for what we would know today as public school choice (section 4) and private school choice (section 10). Also, following section 10 on religious schools, section 11 provided for funding of religious orphanages. These twin issues would arise in the debates of the 1879 Constitutional Convention, with different resolutions.

²¹ Paul Goda, “The Historical Background of California’s Constitutional Provisions Prohibiting Aid to Sectarian Schools,” *California Historical Society Quarterly*, 1967 46(2), 150.

²² California, *Statutes* (1852), chapter 53, 125.

Bible study on Monday mornings.²³ Common school textbooks were similarly objectionable to Catholics, with references to “marshaled monks,” “deceitful Catholics,” and to the Pope as the “man of sin, mystery of iniquity, son of perdition.”²⁴

“Sectarian” schools, however, did not receive funding. San Francisco Catholics predictably objected to this arrangement, and the city’s Catholic archbishop, José Sadoc Alemany, petitioned the State Superintendent to grant a “pro-rate appropriation” to Catholic schools. The Superintendent agreed with Alemany and persuaded the legislature in 1853 to pass a new law granting Catholic schools “all the rights and privileges of any other city Common School in the *pro rata* division of school money raised by taxation.”²⁵ Soon after this allocation, approximately one-third of San Francisco children were in Catholic school classrooms, funded by the state and, in 1854, the city government as well. Despite the fact that the same funds would flow to numerous private schools connected with Protestant “sects,” Swett considered this bill a “sugar-coated pill” designed to benefit Catholics.²⁶ A San Francisco Protestant weekly, *The Pacific*, also reacted acutely to the new law:

In our paper of week before last we exposed to some extent the conspiracy, demagogism and chicanery by which the putrid carcasses of sectarian bigotry and ghostly priestcraft were saddled upon our Common School System in the expiring moments of our last legislature. It is evident from the documents and proofs we then adduced that the State Superintendent was party to and prominent actor in that disgraceful transaction, and that it was connected and consummated by and between him and the Catholic bishop and their satellites, for selfish and sinister purposes...and we are sold to Rome.²⁷

²³ Lee S. Dolson, “The Administration of the San Francisco Public Schools, 1857-1947,” Diss. University of California at Berkeley, 1964, p. 58; also, *Pacific* (San Francisco), May 4, 1855, as cited by Senkewicz, n. 43.

²⁴ Senkewicz, “Religion and Non-Partisan Politics,” 362., Dolson, “The Administration of San Francisco Public Schools,” 58.

²⁵ California, *Statutes* (1853), chapter. 156, 231.

²⁶ Swett, *First Biennial Report of the Superintendent of Public Instruction of the State of California*, as quoted by Hurley, *Church-State Relationships in Education in California*, 23.

²⁷ *Pacific*, 17 June 1853, as quoted by Hurley, *Church-State Relationships in Education in California*, 23.

The superintendent was defeated in the next election, owing in part to his sympathy for Catholics²⁸; the new law he supported would last less than two years.

For reasons not entirely clear, around the time Catholic ward schools began receiving city and state funds, common schools “no longer rigidly enforced” the Bible reading requirement.²⁹ Swett explained in retrospect that the new school superintendent thought, as did he, that “under the conditions of a cosmopolitan city, in which there were large numbers of the children of Catholic and Jews, it was an unwise policy to continue the reading of the Bible as a school exercise.”³⁰ The extent to which King James Bible reading actually stopped, however, was a decision left to individual schools and teachers. Precisely *why* Protestant religious exercises in common schools were “unwise,” Swett does not elaborate. It may well have been that falling enrollment coupled with new competition from Catholic schools hastened the policy change.³¹ *The Pacific’s* comparison between discerning Catholic parents and foolish Protestants describes the problem competition would pose to common schools. The paper explained that Protestant common schools wanted to educate Catholic children, just as Catholic schools “would like to educate ours.” But, *The Pacific* laments, “However blind some Protestant may be to the influence of the Jesuits and nuns over their children, Papists are too shrewd to commit their sons and daughters to us.”³² Facing a publicly financed Catholic alternative and “shrewd” parents, common schools no longer had the free hand that a monopoly on government dollars once (and later) afforded.

²⁸ Hurley, *Church-State Relationships in Education in California*, 145; William Warren Ferrier, *Ninety Years of Education in California: 1846:1936*, (Berkeley: Sather Gate Book Shop, 1937), 7.

²⁹ Swett, *Public Education*, 115. See also, Senkewicz, “Religion and Non-Partisan Politics,” 363.

³⁰ *Ibid.*

³¹ Senkewicz, “Religion and Non-Partisan Politics,” 363; Dolson, “The Administration of San Francisco Public Schools,” 58.

³² *Pacific*, 3 Sept 1852, as quoted by Hurley, *Church-State Relationships in Education in California*, 45.

Not only did common school supporters have to worry about the risk of falling enrollment, they also likely realized that an official school board policy on Bible reading armed Catholics with a persuasive objection. One commentator warned, “The use of the Bible in the schools aids the Catholics in securing a division of the public school money...If we exclude the Bible from the state schools, we deprive Catholics of their chief pretext for a division of the public money.”³³ Swett’s “local option” Bible reading policy seemed the next best choice. Interestingly, in 1855, roughly a year after Bible reading had become more subdued in common schools, the Protestant press swiftly turned the old Catholic argument for separate funding against them. *The Pacific* complains that Catholic ward schools’ overtly religious curricula impose a “sense of degradation” on their Protestant students.³⁴ Swett explains that Protestant dissatisfaction with the “fusion of parochial schools with the public schools” soon became kindling for the inflammatory Know Nothing faction in California.³⁵

The rapid rise of the Know Nothings would soon dry up public funding for Catholic ward schools. Infamous adherents to the most vicious brand of Nativism, the Know Nothings were committed to saving America for Americans — and *from* “Papists.” Consistent with their national ascent to power, the newly organized party won control of San Francisco city government in 1854, defeating a Democrat opposition comprised largely of Irish and German immigrants, many Catholic.³⁶ Shortly afterward, Assemblyman Delos Ashley shepherded through legislation that finally revoked aid to all

³³ *Chronicle*, 27 April 1855, as quoted by Senkewicz, “Religion and Non-Partisan Politics,” 367.

³⁴ *Pacific*, 24 March 1854, as quoted by Senkewicz, 364.

³⁵ Swett, *Public Education*, 115.

³⁶ Peyton Hurt, “The Rise and Fall of the Know Nothings in California,” *Quarterly of the California Historical Society*, vol. IX, no. 1 & 2, March and June, 1930. In the same year, the Know Nothing Party won control of the Massachusetts legislature and drafted one of the first state laws to prohibit aid to sectarian schools. Joseph P. Viteritti, “Blaine’s Wake: School Choice, the First Amendment, and State Constitutional Law,” 21 *Harv. J.L. & Pub. Pol’y* 657, Summer 1998, p. 5. Accessed via Lexis-Nexis.

sectarian schools, partly at the behest of the new San Francisco government.³⁷ The political momentum of San Francisco propelled the Know Nothings to capture majorities in the State Assembly and Senate and a clean sweep of every statewide office in the election of September 1855.³⁸ That year, a new name was placed before the Know Nothing Party convention: Delos R. Ashley of Monterey and Santa Cruz.³⁹ Though the Know Nothings were roundly defeated in 1856 and powerless ever after, the sectarian school law stuck.

After the Ashley law, Protestant church schools that had been receiving public money simply merged with the public school system; those that actually ended Bible reading and prayer did so only *voluntarily*. We must bear in mind that the 1852 ban, the 1855 Ashley law and the 1879 constitutional provisions did not prohibit publicly funded schools from teaching *religious* or Christian doctrines. Their steady refrain demanded only that common schools be free from “denominational and sectarian” doctrine. Protestants of course understood Presbyterians, Baptists, Congregationalists, Episcopalians, as “sects” or “denominations.” Catholicism, too, was a sect; Protestantism, the great *corpus* of the Christian faith, was not a sect. An 1862 report on religious instruction in public schools commissioned by the Board of Managers of the Industrial School of San Francisco described the rationale:

It may be said that every denomination may claim the same privilege. It is true they may do so, but this is not at all probable; for the general religious instruction of the school is Protestant in its character and sufficiently anti-sectarian to suit nearly all the Protestant denominations.⁴⁰

³⁷ Senkewicz, “Religion and Non-Partisan Politics,” 364.

³⁸ Hurt, *Rise and Fall of the Know Nothings*, 40-41.

³⁹ Goda, “Historical Background,” 153.

⁴⁰ Archives of the Archdiocese of San Francisco, *Report of the Investigating Committee of the Industrial School of San Francisco*, Dec. 11, 1862, as quoted by Hurley, *Church-State Relationships in Education in California*, 53.

It comes, then, as no surprise that Swett and other observers constantly refer to the sectarian funding issue as a uniquely *Catholic* problem: the “no sectarian doctrine” requirements in 1852, 1855 and 1879, targeted non-Protestant faiths, and not religion simply.

The funding battle raged on intermittently over the next two decades. In an 1861 letter to a California assemblyman, Archbishop Alemany bemoaned “the instances of insults offered to Catholic children by both teachers and fellow scholars [in the public schools] ridiculing jewdaism or romanism [*sic*] or some other ism, perhaps dearer to the parents of the abused children than all the education the State can give.” Enclosing a packet of complaints from Catholic parents, Alemany complained also that “many books too frequently use with detriment to [constitutionally secured] rights of conscience.”⁴¹ Catholics continued to protest that common schools were funded “by taxation, and yet the Protestant Bible is used in them, and their entire influence is directed to the fostering and building up of Protestantism at the expense of Catholicism.”⁴² Much of the Protestant press and ministers continued to argue that the Bible had too little influence in common schools, and every effort to extend funding to sectarian schools met easy defeat.

Though the dispute had certainly not lain dormant after the Know Nothing party’s dissolution, President Ulysses S. Grant helped renew nationwide concern about the Catholic threat in 1875. As Philip Hamburger explains, Grant, who had briefly been a Know Nothing two decades earlier, “astutely relied on some of his old Nativist ideas.”⁴³ He wrapped anti-Catholicism in red, white and blue. Grant sought to capitalize on

⁴¹ Archives of the Archdiocese of San Francisco, letter of Joseph S. Alemany to Murray Morrison, San Francisco, April 4, 1861, included in *Appendix to Hurley, Church-State Relationships in Education in California*, 156.

⁴² *Monitor*, February 2, 1867, as quoted by Goda, “Historical Background,” 157.

⁴³ Hamburger, *Separation of Church and State*, 322.

Nativist antipathies by adding to the Republic platform a doctrine of strict separation between church and state. In his speech to a Des Moines army reunion, he framed it as a contest “between patriotism and intelligence” versus “superstition, ambition and ignorance.” The allusions were unmistakable, the mission clear: “Encourage free schools, and resolve that not one of them shall be applied to the support of any sectarian schools.”⁴⁴ While most newspapers applauded Grants’s speech, *The New York Herald* saw through his rhetoric, which was *on its face* “sound” and supported by “the great mass of the American people.” But, the *Herald* speculated, “The President was, really, under the form of an address to his old comrades of the war, making a stump speech for the Ohio canvass, where the Republicans have wantonly and without justification brought in as one of the political issues opposition to Roman Catholic interference in the schools.”⁴⁵ Grant returned to the same message in his December 7, 1875, address to Congress, in which he called for a series of constitutional amendments separating church from state — as Hamburger comments, “particularly, the Catholic Church from the American states.”⁴⁶ Grant’s specific proposals principally targeted parochial schools and untaxed Church property. Grant bound together the dual worries that the “educated few” or the Church would tighten their grip on schooling; this, he said, would spell ruin for uneducated masses, whether at the hands of “the demagogue or by priestcraft.”⁴⁷

California reaction to Grant was predictably split between Catholic criticism and Protestant praise. San Francisco’s Catholic weekly, the *Monitor*, scorned Grant’s Des Moines speech as the “crude essay of a school boy.” The paper continued, “It is but the

⁴⁴ U.S. Grant, *American State Papers*, William Blakely, ed., New York: National Religious Liberty Association (1891), 203-204. See also Hamburger, *Separation of Church and State*, 322.

⁴⁵ *New York Herald*, “The Speech of the President,” October 1, 1875.

⁴⁶ Hamburger, *Separation of Church and State*, 322.

⁴⁷ *Congressional Record*, U.S. Senate, 7 December 1875, 175.

echo of a word of command that went forth from Washington some six months ago, that the religious issues and public school agitation were the card to be played in the State elections, and if these are successful, the granted rallying cry for the Presidential campaign.” The echo was indeed reverberating in California by June 1875, when the California Republican Convention platform declared, “[A]ny effort to divide the school fund for the purpose of supporting sectarian schools...shall be met with all resistance in our power.”⁴⁸

Soon after Grant’s December 7th address, Congressman James G. Blaine – a Republican presidential hopeful – championed the constitutional amendment against sectarian school funding in the states. Blaine’s proposal sailed through the House 180-7, but fell narrowly shy of a two-thirds Senate majority. With the question of prohibiting public funds to Catholic schools alive as ever and yet unsettled, the task fell to state legislatures.

⁴⁸ Winfield Davis, *History of Political Conventions in California 1849-1882* (Sacramento: California State Library, 1893), 337.

II. HOSTILITY TO CATHOLICISM IN THE CALIFORNIA CONSTITUTIONAL CONVENTION OF 1878-1879

Unlike most states that adopted bans on sectarian school funding as discrete constitutional amendments, the occasion of California's 1878-1879 "Refounding" allowed delegates to tuck in a Blaine provision with little debate. Convention delegates included 85 non-partisans, 50 "Workingmen," 9 Republicans, and 8 Democrats.¹ As we have explained, the 1855 ban on funding was merely statutory, and Catholic agitation had not subsided since. Three years after James G. Blaine's failed federal sectarian schools amendment, California delegates took up the issue. The Convention would produce what amendment author John Swett proudly called an "iron-bound section" that prohibited public payments to "sectarian or denominational" schools.² We aim here to examine the original intent of that "iron bound section"—just precisely *what* or *whom* it was crafted to bind. While any legislative and constitutional debate, even under the closest analysis, seldom reveals a uniformity of intention, the records of the Sacramento convention do indeed suggest that hostility toward Catholic schools helped fuel the passage of California's Blaine provisions.³

¹ The Convention's party politics appear to have been irrelevant to the sectarian school funding question, and so we do not discuss them here in any detail here. The Workingman's Party of California was a short-lived Marxist party founded in San Francisco. For a full treatment of the Workingmen's Party, see Neil Shumsky, *The Evolution of Political Protest and the Workingmen's Party of California*, (Columbus: Ohio State University Press, 1991); and Philip Foner, *The Workingmen's Party of the United State: A History of the First Marxist Party in the Americas* (Minneapolis: MEP Publications, 1984).

² Swett, as quoted by Mark Hurley, *Church-State Relationships in Education in California*, PhD. Dissert., The Catholic University of America (Washington.: Catholic University, 1948), 71.

³ The provisions in question follow, in order of relevance to the sectarian schools question and in their original form: CA Const. art. IX, § 8: "No public money shall ever be appropriated for the support of any

A striking sense of urgency to curb “sectarian influence” permeated the convention debates. The broad consensus of delegates supported denying public funds to sectarian schools, and they proposed at least nine different versions throughout the convention, most of which targeted only “sectarian” and/or “denominational” schools.⁴ On the school question in particular, there were no dissenting voices, as the ban was “concurred in without opposition.”⁵ Throughout the convention, delegates (often out of order) offered a flurry of amendments to tax church property, prohibit any form of “aid to any sectarian purpose,” deny “grants to religious societies,” keep “sectarian books and creeds” out of schools, keep “religious sects” from gaining “use of control” of any public funds, stop “sectarian tests” for teachers, withhold *pro rata* funds from sectarian asylums and orphanages, etc.⁶ The most heated and revealing debate surrounded issues tangential to sectarian school funding. Controversy over allocating state funds to religiously affiliated orphanages especially illuminates the original intent of California’s Blaine provisions, but discussion of English-only requirements and illiberal attitudes toward immigrants are also revealing.

sectarian or denominational school, or any school not under the exclusive control of the officers of the public schools; nor shall any sectarian or denominational doctrine be taught, or instruction thereon be permitted, directly or indirectly, in any of the common schools of this State.” Article IV, § 30 (now Art. XVI, § 5): “Neither the Legislature, nor any county, city and county, township, school district, or other municipal corporation, shall ever make an appropriation, or pay from any public fund whatever, or grant anything to or in aid of any religious sect, church, creed, or sectarian purpose, or help to support or sustain any school, college, university, hospital, or other institution controlled by any religious creed, church, or sectarian denomination whatever; nor shall any grant or donation of personal property or real estate ever be made by the State, or any city, city and county, town, or other municipal corporation for any religious creed, church, or sectarian purpose whatever; provided, that nothing in this section shall prevent the Legislature granting aid pursuant to Section 3 of Article XVI.” Art. IV, § 22 (now included in Article XVI, § 3): “...no money shall ever be appropriated or drawn from the state Treasury for the use or benefit of any corporation, associations, asylum, hospital, or any other institution not under the exclusive management and control of the State, as a state institution, nor shall any grant or donation of property every be made thereto by the state.”

⁴ *The Debates and Proceedings of the California Constitutional Convention, 1878-1879* (Sacramento: 1880), pp. 83, 92, 101, 110, 117, 134, 180, 693, 819. Hereafter, *Debates*.

⁵ *Ibid*, 1473.

⁶ *Ibid*, 85, 104, 110, 113, 119, 129, 139, 180, 819, 1262.

On October 9, 1878, Judge Joseph Winans presented eight proposed sections for the article on education, among them, “Section 8. No religious sect or sects shall ever have use of or control of any part of the School or University Funds of this State.”⁷ For two months, Committee on Education, which Winans chaired, prepared a draft Article on Education. Commissioned by the California State Teacher’s Association, former Superintendent John Swett authored and had placed before that committee several articles, included a revised Section 8. All but Swett’s version of what would become Article IX, section 8, target only “support of any sectarian or denominational school.” The Convention adopted Swett’s draft without material change⁸ and added to it an amendment governing religious instruction.⁹ Unlike many state Blaine amendments, California’s final version did not explicitly isolate sectarian schools:

No public money shall ever be appropriated for the support of any sectarian or denominational school, *or any school not under the exclusive control of the officers of the public schools*; nor shall any sectarian or denominational doctrine be taught, or instruction thereon be permitted, directly or indirectly, in any of the common schools of this State.¹⁰

Of course, the crucial question is *which* schools are eligible to be under that “exclusive control” in the first place. The only restriction this amendment contains is that such schools must not teach “any sectarian or denominational doctrine.” The additional “exclusive control” language in the amendment seems rather curious when one considers the provision in this light. To say public dollars cannot fund a school “not under the exclusive control of the officers of public schools” is merely to say public money is limited to public schools: the first clause says nothing of what kind of school can *become* a public school. As we have learned about California, common schools were a really an

⁷ *Debates*, 85

⁸ John Swett, *Public Education in California* (New York: American Book Company, 1911), 229-230.

⁹ *Debates*, 1109

¹⁰ California Constitution, Art. IX, § 8. Italics mine.

assemblage of once-Protestant church schools, and religious instruction continued. Not surprisingly, out of nine proposed versions of this section, eight were limited to “sectarian or denominational schools.” As we have argued and shall argue here, this language effectively targeted Catholicism — or at least *excepted* Protestantism; Swett himself, after all, favored permitting daily readings from the King James Bible reading in the common school classroom. The politic addition of an “exclusive control” clause masks the provision’s probable intent.¹¹

“Sectarianism” meant in 1878 what it meant in the 1850s and what it meant to Grant and Blaine three years prior to the Convention: religions *other than* all-embracing Protestantism, almost invariably Catholicism.¹² The debates reflect this identity. In fact, delegates were very careful to display their religiosity. The Blaine provision they supported did not target religion generally, but instead the perceived threat posed by the Catholic sect. Many delegates shared the view, common for decades, that Catholics harbored dangerous plans for American common schools. Thomas McFarland of Sacramento County thinks he has uncovered a “deep seated design [to] cripple and injure

¹¹ Massachusetts’ Blaine amendment (Mass. Const. art. XVIII, § 2), with its roots in Know-Nothingism, also includes “exclusive control” language that appears similarly neutral: “...no grant, appropriation or use of public money or property or loan of public credit shall be made or authorized by the commonwealth or any political division thereof for the purpose of founding, maintaining or aiding any other school or institution of learning, whether under public control or otherwise, wherein any denominational doctrine is inculcated, or any other school, or any college, infirmary, hospital, institution, or educational, charitable or religious undertaking which is not publicly owned and *under the exclusive control*, order and superintendence of public officers or public agents authorized by the commonwealth or federal authority or both.” Italics mine.

¹² Also, on a few occasions, delegates refer to Asian beliefs, namely Buddhism and Confucianism, as sects or denominations. *Not a single statement* we have come upon in the debates even intimates that *Protestantism* is understood as a sect or denomination. This casts serious doubt whether the requirements imposed by Section 8 were understood to apply to the Protestant faith; worries over “sectarianism” were limited to Catholicism and foreign religions. Regarding Chinese faiths, one delegate warns, “Suppose a Buddhist church establish itself, as has been threatened, in San Francisco? It is a religious sect. Suppose it connects itself with the support of orphans? Then the Legislature can grant to it donations of money and in that way uphold the sect; and so with every other sect. Suppose that the Chinese – as they will do if they are permitted to continue coming here, and get the right of suffrage – connect their Joss houses with the support of orphans, or charities of some other character? Then the Legislature may make an appropriation to support a Joss house. It seems to me that we are running wild on the subject.” *Debates*, 819.

and, if possible, destroy” public schools, hatched by people “who do not like the public schools, because they teach certain ideas which they think ought not to be taught and because they do not teach certain ideas which they think ought to be taught.”¹³ Taken in context of the full issue, this vague allusion likely refers to Protestant religion in public schools, long opposed by Catholics. During the debate over public funding for “sectarian or denominational” orphan asylums, one delegate similarly recognizes the sectarian funding question stems from the “rivalry existing between the Protestants and the Catholics.”¹⁴ Delegates generally show a fondness for the Protestant common school tradition, including daily Bible reading and prayer in public schools. Those practices, in fact, were so important to at least one delegate (who also supported the Swett’s Blaine amendment) that he proposed a protection for “prayer, or reading of the Bible” in common schools as part of the Preamble.¹⁵ One delegate, John Wickes, sent the Committee on Education an amendment that betrays the convention’s prevailing assumptions: “The standard of moral instruction in our public schools shall be that set forth in the Bible, precluding sectarianism.”¹⁶

Not every delegate was deaf to the convention’s occasional undertone of anti-Catholicism — in its well-worn cloak of anti-sectarianism. In the midst of the asylum debate, James Murphy of Del Norte declares, “I scorn the idea of raising the cry of sectarian schools upon the floor of this House. I am an American myself, in every regard sense of the word – born and raised here. I have as much reverence and regard for the public school system as any gentleman upon this floor.” Murphy views talk of

¹³ *Debates*, 1094

¹⁴ *Ibid*, 1079.

¹⁵ *Ibid*, 89.

¹⁶ *Ibid*, 146.

sectarianism as an attempt to “make political capital.”¹⁷ Clitus Barbour also decries the “small thin prejudice” that animates delegates who fear that Catholics entertain “designs against the State or against free institutions.”¹⁸ His fellow San Franciscan, William Grace, is outraged by the convention’s anti-Catholic rhetoric, “appeals to the worst prejudices of human nature.” He argues that Protestants are treating Catholics unjustly on the sectarian school funding question: “The Catholics do not tell you that in your institutions only the Catholic religion shall be taught. I am in favor of the public school system; but when you undertake with an iron hand to cram it down the throats of people, you are injuring your cause.”¹⁹ Delegates clearly had no illusions about the implications of prohibiting, once and for all, appropriations to “sectarian” schools. Catholic hopes to win direct funding would be dashed in a single provision, while common schools would, effectively, be free to include in their curricula any instruction apart from “sectarian or denomination doctrine” – that is, apart from Catholic doctrine!

The noteworthy vitriol in these proceedings emerged in debate over the seemingly insignificant issue of how to care for orphans. In 1878, there were sixteen “asylums” in the entire state: nine Catholic, three Protestant, one Jewish and three controlled by secular charities. Protestants bristled at Catholic churches’ procurement of \$320,000 from the total \$510,000 annual state funds for orphans.²⁰ With the passage of Swett’s ban on funds to sectarian schools a foregone conclusion, all the heat of that issue was concentrated on the orphanage debate. An 11-4 majority of the Committee on

¹⁷ *Debates*, 1263.

¹⁸ *Ibid*, 788.

¹⁹ *Ibid*, 1265.

²⁰ *Ibid*, 784.

Education's members opposed *pro rata* funding to Catholic institutions.²¹ They looked suspiciously upon such an arrangement as a Catholic attempt to keep their foot in the door – a door opponents wanted slammed and locked shut. Barbour wondered, why worry about a such an insignificant “flea-bite” on public dollars? As the debate unfolded, it became clear that many delegates — particularly those behind Article IX, Section 8 — saw this an especially infectious flea bite.

In the orphan debate, sympathetic discussion of caring for “these poor waifs” led delegates constantly back to the school question. An opponent of aid to sectarian orphanages, John West admits his suspicions: “I believe that the animus of this whole thing is to build up an opposition system of schools against the common schools of the State.”²² West and his like-minded colleagues were content simply to repeat this allegation about Catholic orphanages, unsupported by any evidence. Opponents pursue other lines of argument, for example that counties and not the state are responsible for orphan care, but as Education Committee member James Reynolds of San Francisco acknowledges, “I am in favor of [banning funds to sectarian institutions] for another reason, and why? Because this is an appropriation to sectarian schools in disguise.”²³ The delegates did finally break with the Committee on Education's recommendation and voted to permit funding to all private orphanages.²⁴ J. A. Filcher complained, “The Committee of the Whole saw fit to open the door...which we had closed.”²⁵ Many delegates concluded that the fiscally strapped state could simply not *afford* to build competent public orphanages. This risk of turning abandoned children onto the streets

²¹ *Debates*, 787.

²² *Ibid*, 1261.

²³ *Ibid*, 1265.

²⁴ This concession came as an explicit exception to Art. IV, § 22 (now Article XVI, § 3).

²⁵ *Debates*, 1265.

was, alas, enough to overcome fears about designs to extend the Catholic reach by winning allies among the California orphans.

The classic Nativist suspicion of seething sectarianism was only sharpened by a tacit understanding that Catholic institutions were simply unfit to rear good Americans. Though certainly watered-down in the Convention, this understanding takes its political roots in the Know Nothing argument that Catholics were unfit to *be Americans* in the first place. Catholic fealty to Rome was incompatible with the American Common School — and with its project of producing pious (Protestant) patriots. After a heated exchange over sectarian schools in the asylum debate, a round of applause followed Alphonse Vacquerel’s argument that Catholic schools cannot impart American ideals. “I guess the cat is out of the bag,” he remarked, “Mr. [James] Reynolds says that there is sectarianism in the whole question, and I have no doubt he meant it.”²⁶ Speaking against funding for sectarian institutions, Vacquerel declared,

“I say that these children ought to be educated in the common schools in order to make thorough American citizens of out of them, who will know the rights and duties of American citizens, and if they are educated in the sectarian schools they will know everything else but their duties as citizens.”

Moments later, J. A. Filcher rose to argue much the same. After reading aloud with admiration what would become Article IX, Section 8, Filcher explained that the great aim of this provision, and the ban on funding to sectarian orphanages, is to lift off the yoke of sectarianism. He supports provisions that will “bring [the children and the asylums] out from under sectarian influences, and that is one of the great aims of government.”²⁷ The prevailing view, certainly among the Blaine provisions’ most ardent backers, was that Catholic education was antithetical to the moral and patriotic habituation required to

²⁶ *Debates*, 1265

²⁷ *Ibid.*

make “thorough American citizens.” West similarly argues the state should never interfere in free exercise of religion, but neither should it maintain sectarian schools. California must “stamp the spirit of American institutions upon the minds of its own children.”²⁸ The delegates seem to perceive a dichotomy between Catholic aims and American aims. Religion generally was no threat, and often a great advantage. The split loyalty that concerned these delegates was not between God and the state, but Rome and the American regime. California’s Blaine provisions were uniquely hostile to this perceived threat – that is, hostile to Catholicism.

The connection between the talk of Americanism and latent anti-Catholicism becomes still clearer in the delegates’ attitudes toward heavily Mexican and Spanish southern California. To a far greater extent than San Francisco and Sacramento, the south was still deeply under Franciscan and Jesuit influence. In the discussion of sectarian influence in the state, many delegates argue for provisions to mandate English only in schools and public business. These amendments were proposed despite the fact, as one delegate objects, “[I]n Southern California there are districts and communities that are so entirely Spanish that if you deprive them of the right to continue their proceedings in Justices’ Courts in Spanish, you will deprive them of justice.”²⁹ Interestingly, one proposed version of the Blaine provisions mandates that “no other than the English language shall be taught” in public school, nor shall “sectarian or denominational instruction” be tolerated.³⁰ The Catholic, Spanish-speaking south remained a great obstacle to reshaping California in the New England Protestant tradition. In this light, English only requirements and the ban on sectarian teaching are two peas in a pod.

²⁸ *Debates*, 1265.

²⁹ *Ibid*, 802.

³⁰ *Ibid*, 1101.

Delegates indeed understand the provisions against sectarian teaching were targeted at the southern California Catholic population. In perhaps the most remarkable statement by an opponent of sectarian schools, West expresses his concern about unnamed forces that aim to make use of California's "foreign elements" through "demagogism." He then says this of Catholic Mexican immigrants:

We have opened the doors of our public schools to them and their children, and attempted to educate them under the general influence of our schools, and if thirty years will not do it, I think we had better send missionaries into the county from which the gentleman from San Bernardino comes.³¹

Common schools were part of the Protestant mission, as we have learned and as West's comments attest. If the gradual indoctrination by public schooling has failed, he remarks, it may well be time to send full-fledged Protestant missionaries to the Catholic south. This remark, like others, does much to dispel any understanding of the sectarian funding bans as religiously neutral statement on church and state.

Because the "sectarian and denominational" school funding question was exposed to frank debate only in the context of other issues and relatively few delegates among the 152 present spoke on the question, it is difficult to discern with certainty the intent of the Blaine provisions. We cannot call every delegate a Nativist scoundrel and consider the case closed. We can, however, surmise from the remarks recorded in these debates that hostility to Catholicism helped spawn California's Blaine provisions, at least judging from the ban's most vocal supporters. And of this we can be certain: the debates emphatically identify "denominational" and "sectarian" with Catholicism and foreign sects, and never with Protestantism. Read the Blaine provisions, particularly Section 8,

³¹ *Ibid*, 802.

with this in mind, and you are nearer reading them as those who adopted it did — in Sacramento, in 1879.

III. CALIFORNIA'S BLAINE CASELAW

Since 1879, the California Supreme Court has heard seven cases that bear directly on the meaning of the three original “Blaine provisions.”¹ Until 1981, state court precedent applied the “child benefit” theory not only to the federal establishment clause but also the state provisions; this left the constitutionality of vouchers for religious schools at least an open question. But with the rejection of the child benefit theory in *California Teachers Association v. Riles*, California’s governing precedent is today decidedly inhospitable to school choice, for religious *or* secular private schools. In this section, we summarize each case and then offer some observations.

In *Aid Society v. Reis* (1887) [71 Cal. 627, 12 P. 796], the California Supreme Court dealt principally with the “exclusive management and control” language in the state constitution. The Boys’ and Girls’ Aid Society challenged the city and county of San Francisco for refusing to reimburse expenses for maintenance of juvenile delinquents. Section 1388 of the state penal code permitted county judges to designate a private, non-sectarian charitable corporation “for the purpose of reclaiming criminal minors.” Respondents argued that this section violated Article IV, § 22², which prohibited payments to institutions “not under the exclusive management and control of the state,” and Article IX, § 8, which similarly prohibits funds to schools not under the

¹ The state Legislature modestly amended and renumbered two of the three as Article XVI, § 3 and 5, and left Article IX, § 8 left unchanged, as noted in detail below when each is mentioned.

² Since amended and renumbered as Article 16, § 3. Derivation: former Art. 13, § 21, formerly Art. 4, § 22, adopted May 7, 1879, amended Nov. 8, 1910; Nov. 2, 1920; Nov. 6, 1928; Nov. 8, 1949; Nov. 4, 1952; Nov. 8, 1960; renumbered Art. 13, § 21 and amended Nov. 8, 1966. The significant Blaine language found in Article IV, § 22, adopted in the 1879 Constitution remains in Article 16, § 3.

state's "exclusive control." The Court determined that the former constitutional provision concerned only funds from the *state* treasury, while Section 1388 authorized judges to disburse county funds. The latter provision, the Court said, was limited to "*common and public schools.*" The lower court's judgment was affirmed, and San Francisco was ordered to reimburse the private Aid Society.

The next and more interesting case concerning the Blaine provisions required the Court to grapple the term "sectarian" as it is used in Article IX, § 8, and related statutes. In *Evans v. Selma Union High School District* (1924) [193 Cal. 54, 222 P. 801], the appellant argued that the purchase of twelve copies of the Bible (King James Version) for a school library constituted a violation of Article IX, § 8, which prohibits "sectarian or denominational" instruction "directly or indirectly" in common schools. More immediately, however, the Court dealt with a 1917 law that required boards of education to "exclude from school and school libraries all books, publications, or papers of a sectarian, partisan or denominational character," and that "no publication of a sectarian, partisan or denominational character must be used or distributed in any school or be made part of *any school library.*"³ Though Section 8 deals more narrowly with "instruction," this specific implementing statute required the Court to evaluate precisely what constitutes "sectarian" literature.

In a unanimous decision, the court determined that any widely accepted version of the Bible (King James and Douai alike, or the Talmud and Koran for that matter) can be legally purchased and placed on public school library shelves. The Court set out to properly construe the "intent and purpose" of the statute. "'Sect,' strictly defined," the

³ Italics mine. The 1917 statute derived from an 1870 statute that prohibited "books, tracts, papers, catechisms or other publications of a sectarian or denomination character" in schools.

Court explained, “means ‘a body of persons distinguished by peculiarities of faith and practice from other bodies adhering to the same general system’ (Standard Dictionary).” This statute aimed to prohibit “publications of factional religion.” A religious book that treated “broad principles and simply fundamentals” with a “partisan tone” was impermissible. Alive to the Catholic objection, the Court speaks equally of the King James and Douai versions as scholarly translations of a classic text, each with their own merits. That one is of Protestant authorship and readership, and the other Catholic, does not render either “sectarian” simply. If, however, the King James Bible were chosen to the exclusion of other versions, or for use as a textbook, or for use in daily devotional readings, the appellant’s claim might be sustained. “So used and under such circumstances,” the Justices continues, “it might be justly claimed to be used as a basic for sectarian instruction.” The Court is careful to leave this larger question unsettled and simply denies the appellant’s claim.

In 1946, the Court heard *Bowker v. Baker* [73 Cal.App.2d 653, 167 P.2d 256], the first challenge based on an allegation of support for a sectarian schools. The Porterville School District had passed a resolution to provide for the transportation of private and parochial school students on the District’s public school buses. This resolution was passed under the authority of a state education statute that permitted school boards voluntarily to provide transportation to all “pupils entitled to attend the schools of the district, but in attendance at a school other than a public school.” The District’s limited busing program changed neither the buses’ routes nor stops, and required no additional staff. Students of St. Anne’s Parochial schools, which was a block from the district elementary school, were permitted to fill otherwise vacant seats; the only additional

expense, the Court determined, “was the small additional cost caused by the added weight in the buses.” Nonetheless, the appellant argued that this program, and indeed the authorizing section of the state Education Code, violated of Article IX, § 8 and § 4,⁴ and Article IV, § 30.⁵

The Court’s decision turned on the child benefit theory, common to the line of reasoning found in numerous decision in other jurisdictions⁶ and endorsed by the U.S. Supreme Court in *Cochran v. Louisiana State Board of Education* (1930) [50 S. Ct. 335]. In *Bowker*, the state Supreme Court explains, “While these cases do not directly touch on the main question before us they do support the theory that where the main purpose of an enactment is lawful, and an incidental or immaterial benefit results to some person or organization, which benefit is not directly permitted by law, this incidental benefit alone will not defeat the legislation, its main purpose being lawful.” Though transporting pupils might confer an incidental benefit on St. Anne’s Parochial School, that benefit is not “sufficient to deprive the Legislature of the power to authorize a school district to transport such pupils.” In discharging the “broad police powers of the state to promote educational welfare and safety,” the Legislature may authorize public expenditures that confer indirect benefits upon denominational schools and institutions of higher learning.

⁴ Article IX, § 4, was repealed Nov. 3, 1964.

⁵ Now substantially included in Article XVI, § 5. Art. IV, § 30, adopted May 7, 1879, renumbered Art. 13, § 24, and amended Nov. 8, 1966, prohibiting appropriation of public funds in aid of religious purposes or institutions, was repealed Nov. 5, 1974.

⁶ *Board of Education v. Wheat*, 174 Md. 314 [199 A. 628]; *Adams v. County Commissioners*, 180 Md. 550 [26 A.2d 377]; *Everson v. Board of Education*, 133 N.J.L. 350 [44 A.2d 333]; *Nichols v. Henry*, 301 Ky. 434 [191 S.W.2d 930]; *Borden v. Louisiana State Board of Education*, 168 La. 1005 [123 So. 655, 67 A.L.R. 1183]; *Cochran v. Louisiana State Board of Education*, 168 La. 1030 [123 So. 664]; *Cochran v. Louisiana State Board of Education*, 281 U.S. 370 [50 S.Ct. 335, 74 L.Ed. 913]; *Chance v. Mississippi etc. Board*, 190 Miss. 453 [200 So. 706]; *Gerhardt v. Heid*, 66 N.Dak 444 [267 N.W. 127]; *State v. Johnson*, 170 Wis. 251 [176 N.W. 224]; *Nichols v. School Directors*, 93 Ill. 61 [34 Am.Rep. 160], and *Cost v. Shinault*, 113 Ark. 19 [166 S.W. 740, Ann. Cas. 1916C 483].

In *Gordon v. Board of Education* (1947) [78 Cal.App.2d 464, 178 P.2d 488], the Court considered whether a “released-time” religious education program violated Section 8. In 1943, the Los Angeles Board of Education established an “Interfaith Committee” to oversee a weekly religious education program for students during the regular school day. Public schools were responsible for preparing and mailing literature and response cards to parents, which included options for off-site Catholic, various Protestant denominational and Jewish instruction. The Court determined this program passed constitutional muster because it showed no partiality for any particular sect or religion. In a cursory account of the 1878-79 California Constitutional Convention, the Court argued that “there was no thought whatsoever in the minds of the framers of that document in opposition to or of hostility to religion as such.” Their purpose was to fortify the separation between church and state and forbid state authority from being “devoted to the advancement of any particular sect of denomination.” With regret that the convention proceedings “are not well indexed,” the Court concludes that “our pioneer forefathers” did not intend a “jejune godless state,” but instead understood the “general acceptance of religion” as a source of great strength. The salient point that the Court seizes upon is that 1879 Refounders intended no hostility toward religion, but instead impartiality. The Los Angeles Released Time Religious Education Program’s administrative support for religious instruction *generally* did not constitute a violation of Section 8.

In *California Educational Facilities Authority v. Priest* (1974) [116 Cal.Rptr. 361, 12 Cal.3d 593, 526 P.2d 513], the Court interpreted relevant state constitutional provisions in light of *Bowker*’s application of the child benefit theory and *Gordon*’s reading of the debates. At issue was whether the state may establish an authority that

issues bonds for the purpose of providing capital expansion funds to private and sectarian colleges and universities, thereby reducing the recipient's cost of financing the improvement projects. The California Education Facilities Authority (CEFA) was established to fund a wide variety of facilities but none "to be used for sectarian instruction or as a place for religious worship." The CEFA Act empowered the Authority neither to appropriate nor expend public funds; the bonds issued under the Act were the obligation of the Authority only. No general state revenue would be required to sustain the Authority, which would function essentially as a "self-supporting mechanism." On the basis of the tripartite *Lemon* test, the Court dismissed respondent's claim that the Authority violated the federal establishment clause.

With regard to the state constitution, the Court determined that neither Article XIII, § 24⁷ and Article IX, § 8, precluded the state from conferring a "benefit" upon sectarian institutions if the benefit is "incidental to a primary public purpose." These provisions formed the respondents' principal legal grounds for challenge. The 1974 Court relies in part on what they call *Gordon's* "examination" of the debates (perhaps an overstatement of that decision's thoroughness). These sections, adopted in 1879, "have never been interpreted...to require governmental hostility to religion, nor to prohibit a religious institution from receiving an indirect, remote, and incidental benefit from a statute which has a secular primary purpose." The Court reasons that the CEFA Act does not "have a substantial effect of supporting religious activities," because benefits are granted equally to sectarian and nonsectarian colleges, aid to specifically religious

⁷ Now Article XVI, § 5. Formerly Art. IV, § 30, adopted May 7, 1879, renumbered Art. XIII, § 24 and amended Nov. 8, 1966

projects is strictly prohibited, and the state assumes no financial burden. The Act was upheld.

In *Board of Trustees of Leland Stanford Jr. University v. Cory* (1978) [145 Cal.Rptr. 136, 79 Cal.App.3d 661], the Court struck down a statute that authorized annual payments to private university medical schools. Intended to “increase the number of competent physicians and surgeons,” this section of the Education Code established a Student Aid Commission to contract on behalf of the state with private medical schools. Payments of \$12,000 from the state treasury would be made for each eligible medical student, directly to the medical school. The Court ruled that this program violated Section 8, as a payment of state funds to a school not under the exclusive control of the state. “The Legislature has tried to do indirectly what it is prohibited by the Constitution from doing directly,” the Court concluded. The Court rejected petitioner’s claim that the benefit must be construed as “incidental” by means of a contract for services rendered for a legitimate public purpose. The statute in question violates section 8, “which was “approved at the [1879] convention without significant debate and the reports of the proceedings furnish no solace to petitioner.” The decision continues, “The delegates were seriously concerned with assuring that public funds should only be used for support of the public school system they were in drafting Article IX of the Constitution. Thus, in another context of a delegate expressed concern about any ‘opposition system of schools against the common schools of the State.’” This reading of the debates satisfies the Court that they must take seriously the prohibition of *direct* benefits to private education institutions.

Interestingly, however, the Court offers this caveat in *Board of Trustees v. Cory*, based upon *Bowker* and *California Educational Facilities Authority*: “a payment of funds in the amount of...tuition...to a student or to a public or private school on behalf of a special student, such as a veteran, who designates the school of his choice, is not unconstitutional, since any benefit to a private school is an ‘incidental’ or ‘indirect’ effect of the benefit to the student.” The Court observed, however, that the \$12,000 per student was not connected to the actual cost of tuition and was paid directly in a lump sum to Leland Stanford University; such a broad grant has the character of a subsidy. The constitutionality of school vouchers, based upon tuition and paid directly to the student, is left an open question.

California Teachers Association v. Riles [176 Cal.Rptr. 300, 29 Cal.3d 794, 632 P.2d 953 (1981)] deals more directly than any other case with Article IX, § 8, and Article XVI, § 5, and peripherally with the federal Establishment Clause. The Court held that parochial schools were the primary beneficiaries of a textbook loan program. In the administration of the loan, private schools (most Roman Catholic) housed the supply of publicly purchased textbooks and parents signed a book request form. The textbook requests were forwarded through the archdiocese office, in bulk, to the state, which then authorized book distribution to students. After a survey of *Everson v. Board of Education* (1947) 330 U.S. 1 [67 S. Ct. 504], *Board of Education v. Allen* (1968) 392 U.S. 236 [88 S. Ct. 1923], *Lemon v. Kurtzman* (1971) [91 S. Ct. 2105], and *Meek v. Pittenger* (1975) [95 S. Ct. 1753], the California Supreme Court determined that the “child benefit” theory was the subject of “dissonant decisions,” and leads to “results which are logically indefensible.” The Court subscribed to Justice Brennan’s dissent in *Meek*, in which he

called it “pure fantasy” to treat a textbook loan program as a loan to *students*. The benefit to the pupil and to the sectarian school, California’s high court agreed, are inseparable.

Indeed, the Court went so far as to dismiss the child benefit theory as “not relevant,” because a loan of textbooks cannot be construed “as providing sectarian schools with only indirect, remote, and incidental benefits.” Regardless of the federal Establishment Clause (which was likely also violated), the textbook loan did not meet the more restrictive requirements of the California Constitution. “Those provisions [Article IX, § 8, and Article XVI, § 5] do not confine their prohibition against financing sectarian schools in whole or in part to support for their religious teaching function, as distinguished from secular instruction,” the Court wrote. The textbook loan program violated both sections.

Clearly, and perhaps unsurprisingly, none of these seven decisions reveal any serious contemplation of the Blaine provisions’ original intent. The scant interpretation of the 1878-79 Convention debates in *Gordon* leads one to wonder if that court (or any) read beyond the poor index about which they complain. As we have suggested, the debates cast considerable doubt on the view, adopted in *Gordon* and swallowed by subsequent courts, that the 1879 provisions were born of neither favoritism nor hostility to any religion, but intended rather “impartiality.” This reading is too generous to the 1879 Refounders. It is worth noting, however, that three of the seven decisions reveal at least a passing familiarity with the Nativist roots of opposition to sectarian schools and doctrine, and certainly the special status of Roman Catholic schools as a losing party in the matter.⁸ *Bowker* cautions, for example, that references exclusively to a Roman

⁸ *California Teachers Assn.* reiterates *Bowker*’s hesitation, and in *Evans* the Court is careful to defend the Douai translation of the Bible.

Catholic school “should not arouse any historical...prejudice.” Ironically, the misreading of the original intent as “impartiality” imputes to the California constitution a greater harmony with the federal establishment clause than the 1879 Refounders likely intended (to the extent the First Amendment was on the delegates’ minds at all). Mimicking the federal Blaine Amendment, state Blaine provisions were an attempt to fortify the existing wall of separation between church and state with a more explicit, stringent prohibition. California’s was no exception. However, the “impartiality” interpretation that prevailed from *Gordon* (1947) through *Board of Trustees of Leland Stanford* (1978) was effectively quite similar to what would become the *Lemon* test.

Though *California Teachers Association* did not explicitly revise the “impartiality” or no hostility/no favoritism interpretation, it differed from the all previous decisions in this: the Court deemed the requirements imposed by Article XVI, § 3 and 5, and Article IX, § 8, as decisively more restrictive than the federal Establishment Clause. The textbook loan program struck down in *California Teachers Association* was crafted similarly to school choice programs in some important respects. Rather than simply reimbursed or donated by the state, the textbooks were always remained (at least technically) state-owned, though stored at the private schools. It was only through *parent’s* formal request of books – not unlike a parent’s request for tuition payments by a voucher – that the state permitted the use of the textbooks. Even in light of *Zelman v. Simmons-Harris* (2002), *California Teacher’s Association* would appear to stand on its own grounds because the California Supreme Court’s determination relied ultimately on the state Blaine provisions.

CONCLUSION

California's constitutional Blaine provisions may spell bad news for school choice advocates. Their language, and the state high court's interpretation of what it requires, is among the most restrictive in the nation. Unlike the Blaine amendment language in, for example, Washington, Florida and New York, California's provisions governing state appropriations do not specify that only religious or sectarian schools are ineligible for public funds. The "exclusive control and management" language in California's Blaine provisions gives at least a cover of neutrality to religion — and legal cover from the argument that they are hostile to religion or violate free exercise. Of course, speculation about whether California's bans can be overcome is premature. There is after all no school choice program *to challenge*, must less defend.

These observations notwithstanding, we have learned something important about the stock from which California's provisions come. The sectarian school funding dispute in the mid 19th century in California was driven by the "rivalry existing between the Protestants and the Catholics."¹ Common schools promoted the common Protestant faith; Roman Catholic schools promoted a foreign, sectarian "superstition." The statutory resolution in 1854, during the ascent of the Know Nothings, was followed by an "iron-bound" constitutional resolution in 1879 Convention.² The debates of the Refounding certainly are not a specimen of rabid anti-Catholicism, but they do suggest that the funding ban was understood to target California's emerging foreign sects and long agitating Catholic sect — with the happy exception of Protestantism. To this extent, the ghost of Nativism still haunts the legal prospects for school choice today, in California.

¹ *Debates*, 1079

² John Swett, as quoted by Mark Hurley, *Church-State Relationships in Education in California*, 71.

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