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THE THEOLOGY OF THE BLAINE AMENDMENTS

RICHARD W. GARNETT*

INTRODUCTION

In *Zelman v. Simmons-Harris*,[1] the Supreme Court of the United States held that Ohio could, consistent with the First Amendment, include religious schools in that State's pilot school-choice program. Writing for the majority, Chief Justice Rehnquist observed that "[t]he Ohio program is entirely neutral with respect to religion. It provides benefits directly to a wide spectrum of

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*Associate Professor Law, Notre Dame Law School. This Essay is based on remarks offered at an outstanding conference sponsored by the Pew Forum on Religion and Public Life and the *First Amendment Law Review*. The conference, *Separation of Church and States: An Examination of State Constitutional Limits on Government Funding for Religious Institutions*, was held on March 28, 2003, at the University of North Carolina School of Law in Chapel Hill, North Carolina. I received helpful suggestions and constructive criticism from Tom Berg, Rev. John Coughlin, Fred Gedicks, John McGreevy, Michael Perry, Michael Scaperlanda, and Steven Smith; and also from the participants in a faculty workshop at the Arizona State University College of Law.

I should note that I have discussed elsewhere, and in more detail, some of the issues addressed in this Essay. *See, e.g.*, Nicole Stelle Garnett & Richard W. Garnett, *School Choice, the First Amendment, and Social Justice*, 4 TEX. REV. L. & POL. 301 (2000); Richard W. Garnett, *The Right Questions About School Choice: Education, Religious Freedom, and the Common Good*, 23 CARDOZO L. REV. 1281 (2002); Richard W. Garnett, *The Story of Henry Adams's Soul: Education and the Expression of Associations*, 85 MINN. L. REV. 1841 (2001) [hereinafter *Henry Adams*]; Richard W. Garnett, *Taking* Pierce *Seriously: The Family, Religious Education, and Harm to Children*, 76 NOTRE DAME L. REV. 109 (2000); Richard W. Garnett, Brown's *Promise, Blaine's Legacy*, 17 CONST. COMM. 651 (2000) (reviewing JOSEPH P. VITERITTI, CHOOSING EQUALITY: SCHOOL CHOICE, THE CONSTITUTION, AND CIVIL SOCIETY (1999)).

1. 536 U.S. 639 (2002).

individuals, defined only by financial need and residence in a particular school district. It permits such individuals to exercise genuine choice among options public and private, secular and religious."[2] Accordingly, he concluded, Ohio had not unconstitutionally established or endorsed religion merely by permitting the program's low-income beneficiaries to direct their scholarship funds to religious schools.

I believe that Ohio's voucher program is sound public policy, that further choice-based education reform is warranted,[3] and that *Zelman* was both correctly decided and defensibly reasoned.[4] That is, the decision is consistent both with the relevant precedents and with the better understandings of the history, purpose, and meaning of the Establishment Clause.[5] All that said, it is worth remembering that the Supreme Court's decision *permitting* us to experiment with school-choice programs—in particular, with programs that include religious schools—does not

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2. *Id.* at 662–63.

3. Such additional experimentation is already underway. *See, e.g.*, Justin Blum, *Voucher Lessons Not Quite Complete,* WASH. POST., May 4, 2003, at C6 ("Last week, in a sign of frustration with the slow pace of improvement of the school system, D.C. Mayor Anthony A. Williams reversed his previous opposition to vouchers and said he now believes they could offer hope for some children who have been failed by the traditional public schools."); Ryan Morgan, *K–12 Voucher Win Lifts GOP Despite College Setback,* DENV. POST, May 4, 2003, at 2B (describing school voucher program recently enacted in Colorado).

4. For a comprehensive analysis of the *Zelman* opinions—one that embraces many of the Court's conclusions while criticizing some of its arguments—see Ira C. Lupu & Robert W. Tuttle, Zelman's *Future: Vouchers, Sectarian Providers, and the Next Round of Constitutional Battles,* 78 NOTRE DAME L. REV. 917 (2003). Professor Tom Berg has also provided an excellent review and analysis of the decision and its implications. Thomas C. Berg, *Vouchers and Religious Schools, The New Constitutional Questions,* 72 U. CINN. L. REV. 151, *passim* (2003).

5. I believe, however, that contemporary (*i.e.,* post-*Everson*) Establishment Clause doctrine reflects poorly that provision's "history, purpose, and meaning." For a powerful argument that the Framers and ratifiers intended the Establishment Clause merely to disable the new federal government from interfering with the religion-related decisions of the states' legislatures, see STEVEN D. SMITH, FOREORDAINED FAILURE: THE QUEST FOR A CONSTITUTIONAL PRINCIPLE OF RELIGIOUS FREEDOM (1995).

compel the conclusion that we *should* so experiment. *Zelman* is not, nor does it purport to be, the end of our public conversations about education reform, public funds, and church-state relations. Indeed, one of the virtues of Chief Justice Rehnquist's opinion is precisely that it invites further developments and deliberation, in the chambers of our legislatures and in the courts of public opinion.

These conversations, acknowledged and anticipated in *Zelman,* are worthy and important. Many believe that the case for school choice sounds not only in the register of efficiency, competition, and measurable outputs, but also in terms of authentic pluralism, religious freedom, and social justice.[6] Some fear, on the other hand, that voucher programs will harm the low-income and at-risk students they are intended to help, by diverting funds from government schools. Still others worry that private and religious education could undermine shared liberal values, impair the inculcation of civic virtue, and threaten social cohesion.[7] Again, *Zelman* does not purport high-handedly to co-opt or pretermit the discussion; rather, it "permits this debate to continue, as it should in a democratic society,"[8] and as it does with this timely Symposium.

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6. *See, e.g.*, JOSEPH P. VITERITTI, CHOOSING EQUALITY: SCHOOL CHOICE, THE CONSTITUTION, AND CIVIL SOCIETY (1999); Garnett, *The Right Questions About School Choice, supra* note *; Michael W. McConnell, *Governments, Families, and Power: A Defense of Educational Choice,* 31 CONN. L. REV. 847 (1999); John E. Coons, *School Choice and Simple Justice*, FIRST THINGS, Apr. 1992, at 15.

7. A thoughtful op-ed by Senator Dianne Feinstein of California illustrated and explored the concerns of many reasonable people about school vouchers. Although she has "never before supported a voucher program," and believes that "we must continue to do everything we can to strengthen and improve our nation's public schools," she believes also that "local leaders should have the opportunity to experiment with programs that they believe are right for their area," and that "[u]ltimately [the school-choice] issue is not about ideology or political correctness. It is about providing a new opportunity for good education, which is the key to success." Dianne Feinstein, *Let D.C. Try Vouchers,* WASH. POST., July 22, 2003, at A17.

8. Washington v. Glucksberg, 531 U.S. 702, 735 (1997) ("Throughout the Nation, Americans are engaged in an earnest and profound debate about the morality, legality, and practicality of physician assisted suicide. Our holding permits this debate to continue, as it should in a democratic society."); *cf.* Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833,

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Given recent cases like *Agostini v. Felton*[9] and *Mitchell v. Helms*,[10] *Zelman* came as no surprise, either to those who welcomed it, or to those for whom the decision is another step down a dangerously misguided path. For this reason, perhaps, the ink was barely dry on the slip opinions when commentators, scholars, litigators, and activists took to the editorial pages, airwaves, and email listservs, insisting that the "voucher wars"[11] are far from over. In particular, it was widely noted that, in addition to the difficult political task to come of convincing skeptical suburban voters and wary legislators to embrace voucher programs, such experiments continue to face formidable legal obstacles.[12] (Again, the Court in *Zelman* had no occasion to consider whether such schools *must* be permitted to participate, on an equal footing with other private schools, in voucher programs; the Justices decided only that they *may* be included, consistent with the Constitution of the United States.)[13] As the *cognoscenti* pointed out, the constitutions of nearly forty States contain provisions that speak more directly—and, in many cases, more restrictively—than does the First Amendment to the flow of public funds to the "coffers"[14] of religious schools.[15]

866–68 (1992) (joint opinion) (describing the "dimension present whenever the Court's interpretation of the Constitution calls the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution.").

9. 521 U.S. 203 (1997).

10. 530 U.S. 793 (2000).

11. C. BOLICK, VOUCHER WARS: WAGING THE LEGAL BATTLE OVER SCHOOL CHOICE (2003).

12. *See, e.g.*, Mary Leonard, *Private School Aid Efforts Will Face State Challenges,* BOSTON GLOBE, June 28, 2002, at A29 ("[P]olitical and legal challenges in states still could impede moves to expand programs . . . ."); Jodie Morse, *A Victory for Vouchers,* TIME, July 8, 2002, at 32 ("[A]head are more court skirmishes.").

13. *See, e.g.*, Lupu & Tuttle, *supra* note 4, at 955 ("Unlike those landmark court decisions which terminate a government practice . . . *Zelman* is merely permissive. . . . As such, its significance in American life will turn very heavily on the political energies and legal phenomena which emerge in its wake.").

14. The Justices have acquired the unfortunate habit in school-aid cases

These provisions are commonly and generically called "Blaine Amendments."[16] They take several forms, employ diverse terms, and are interpreted and applied in different ways, with varying effects.[17] Still, notwithstanding the important distinctions that can and should be drawn among the various formulations, the bottom line is fairly clear: In many cases, these state-law provisions, if enforced, might well prohibit school-funding and other measures that the Establishment Clause permits. In other words, although the Court has ruled that voucher programs may, consistent with the First Amendment's Establishment Clause, include religious schools, the constitutions of many States seem clearly to provide—or, at least, have been interpreted by courts to provide—that they may not.

It is often argued—and at least one prominent court has so

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of assuming that religious schools have "coffers" rather than, say, "checking accounts." *See, e.g., Zelman v. Simmons-Harris,* 536 U.S. at 695 (Souter, J., dissenting); *Mitchell,* 530 U.S. at 848 (O'Connor, J., concurring); *Agostini,* 521 U.S. at 228; Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1, 10 (1993).

15. *See* ERIC W. TREENE, THE GRAND FINALE IS JUST THE BEGINNING: SCHOOL CHOICE AND THE COMING BATTLE OVER BLAINE AMENDMENTS 3 ("Thirty-seven state constitutions have provisions placing some form of restriction on government aid to religious schools beyond that in the United States Constitution."), *available at* http://www.becketfund.org/other/FedSocBlaineWP.html.pdf. (last visited Jan. 14, 2003).

For more on these provisions, see, for example, Steven K. Green, *The Blaine Amendment Reconsidered*, 36 AM. J. LEGAL HIST. 38 (1992); Joseph P. Viteritti, *Blaine's Wake: School Choice, the First Amendment, and State Constitutional Law*, 21 HARV. J.L. & PUB. POL'Y 657 (1998); and Toby J. Heytens, Note, *School Choice and State Constitutions*, 86 VA. L. REV. 117 (2000).

16. *See* Lupu & Tuttle, *supra* note 4, at 960 ("Because of Senator [James G.] Blaine's national influence . . . , these state provisions are now frequently referred to generically—especially by their enemies—as the 'Blaine Amendments.' ").

17. For a helpful taxonomy of the "Blaine Amendments," see The Pew Forum on Religion and Public Life, *School Vouchers: Settled Questions, Continuing Disputes* 7–8 (2002) (grouping the States' no-aid provisions into three categories). *See also* Mark Edward DeForrest, *An Evaluation of First Amendment Objections to Blaine Amendment Language in State Constitutions,* 26 HARV. J. L. & PUB. POL'Y 551 (2003).

far held[18]—that because state constitutions may neither authorize nor permit that which the Constitution of the United States has been interpreted to forbid,[19] at least some of the Blaine Amendments are, in at least some of their applications, unconstitutional. In other words, the argument goes, because the Free Speech Clause forbids "viewpoint discrimination" in the disbursal of public-welfare benefits through forum-like programs; and because the Equal Protection Clause does not permit governments to deny such benefits on the basis of religion; and because the Free Exercise Clause does not permit governments to single out religious practice, belief, or institutions for special disadvantage, no State may rely on its own constitution to justify discrimination against religious schools and the beneficiaries who choose them in the administration of a school-choice program.[20]

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18. *See* Davey v. Locke, 299 F.3d 748, 759–60 (9th Cir. 2002), *cert. granted*, 123 S. Ct. 2075 (2003). I should note that I co-authored a brief *amicus curiae*, filed on behalf of the Becket Fund for Religious Liberty, the Catholic League for Religious and Civil Rights, and numerous historians and legal scholars in support of the Respondent in *Davey*.

19. *See* U.S. CONST. art. VI ("This Constitution . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."); *see also, e.g.*, Widmar v. Vincent, 454 U.S. 263, 277–78 (1981) (rejecting argument that compliance with the State of Missouri's arguably more restrictive constitutional provisions justified discrimination against student groups and speakers on the basis of their religious speech and activity); McDaniel v. Paty, 435 U.S. 618, 629 (1978) (holding that discrimination against clergy was unconstitutional even though authorized by the state constitution).

20. *See, e.g.*, Berg, *supra* note 4, at 168.

> Underlying these [federal constitutional] challenges [to the Blaine Amendments] is a single argument: it is unjust for a state to deny educational benefits, to which a child or family would otherwise be entitled, because the family chooses to educate the child in a religious setting or integrate religious teaching into the schooling.

Id.

As Justice O'Connor put it:

> [T]he Religion Clauses—the Free Exercise Clause, the Establishment Clause, the Religious Test Clause, Art. VI, cl. 3, and the Equal Protection Clause as applied to

Others have fleshed out and evaluated these arguments in careful and critical detail; I will not do so here.[21] Nor will I attempt to describe or dissect the several lawsuits challenging various Blaine Amendments' constitutional validity.[22] Instead, with respect to these arguments and challenges, I offer two brief observations: First, I am convinced that when government enhances parents' freedom of educational choice by disbursing financial aid through religion-neutral programs, it respects, rather than undermines, liberal and democratic values (properly understood).[23] Neither the Constitution nor an appropriate care for civic virtue requires or even countenances discrimination against religious belief, expression, choices, and institutions.[24] Thus, the arguments that the

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> religion—all speak with one voice on this point: Absent the most unusual circumstances, one's religion ought not affect one's legal rights or duties or benefits.

Bd. of Educ. v. Grumet, 512 U.S. 687, 715 (1994) (O'Connor, J., concurring in part and concurring in the judgment).

21. *See, e.g.*, Berg, *supra* note 4, at 168–208; Lupu & Tuttle, *supra* note 6, at 957–72; Michael S. Paulsen, *Religion, Equality, and the Constitution: An Equal Protection Approach to Establishment Clause Litigation*, 61 NOTRE DAME L. REV. 311 (1986); Eugene Volokh, *Equal Treatment Is Not Establishment*, 13 NOTRE DAME J.L. ETHICS & PUB. POL'Y 341 (1999).

22. To cite just one example, the Becket Fund for Religious Liberty recently filed a case, in the United States District Court for the District of South Dakota, contending that South Dakota's Blaine Amendment "violates federal constitutional guarantees against religious discrimination" and therefore "should be struck down." Plaintiffs' Complaint at 1, Pucket v. Rounds, Civ. No. 03-CV-5033 (D.S.D. filed Aug. 25, 2003), http://www.becketfund.org/litigate/SD-BlaineComplaint.pdf (on file with First Amendment Law Review). In addition, the United States Supreme Court has heard oral argument this session to address the alleged conflict between the Washington Constitution's no-aid provision and the First Amendment. *See* Davey v. Locke, 299 F.3d 748, 759–60 (9th Cir. 2002), *cert. granted*, 123 S. Ct. 2075 (2003).

23. *See generally, e.g.*, WILLIAM A. GALSTON, LIBERAL PLURALISM: THE IMPLICATIONS OF VALUE PLURALISM FOR POLITICAL THEORY AND PRACTICE (2002); Michael W. McConnell, *Education Disestablishment: Why Democratic Values Are Ill-Served by Democratic Control of Schooling, in* , MORAL AND POLITICAL EDUCATION (Stephen Macedo et al. eds., American Society for Political and Legal Philosophy, Nomos 43, 2002); Michael W. McConnell, *The New Establishmentarianism*, 75 CHI.-KENT L. REV. 453 (2000).

24. *See, e.g.*, Volokh, *supra* note 21, at 351 ("[M]y sense of the Framers'

Blaine Amendments are unconstitutional to the extent they purport to prohibit the non-discriminatory treatment of religion in the context of public-welfare programs strike me as plausible, and even compelling.

My second observation is offered in response to what might be called the "federalism defense" of the Blaine Amendments. Assume for now that many of the States' Blaine Amendments prohibit religion-inclusive school-choice programs that the Establishment Clause would permit. So what? Let a thousand flowers bloom! Remember, for example, Justice Brandeis's celebrated observation that "[i]t is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."[25] What about Justice Brennan's passionate defense of rights-protecting localism and his plea that state courts correct the Supreme Court's conservative turn by using their own States' constitutions to raise the barrier between the government's aims and individual rights?[26] And, did not even Justice Thomas—surely a reliable opponent of anti-religious discrimination—write separately in *Zelman* precisely to urge courts in Religion Clause cases to "strike a proper balance between the demands of the Fourteenth Amendment on the one hand and the federalism prerogatives of States on the other"?[27] And so, a federalism-loving defender of the Blaine Amendments might ask, aren't the attacks on these provisions—particularly when

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worldview is that they did not think the government was required to discriminate against religion.").

25. New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

26. *See generally* William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights,* 61 N.Y.U. L. REV. 535 (1986); William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977). According to Professor Lawrence Friedman, Justice Brennan's defense of judicial federalism has "suffered criticism for its programmatic, result-oriented cast." Lawrence Friedman, *The Constitutional Value of Dialogue and the New Judicial Federalism*, 28 HASTINGS CON. L. Q. 93, 94 (2001).

27. *Davey,* 299 F.3d at 768 (McKeown, J., dissenting) (quoting Zelman v. Simmons-Harris, 536 U.S. 639, 679 (2002) (Thomas, J., concurring)).

pressed by those who claim to support school choice as an exercise in de-centralization—misplaced attempts at homogenizing the existing healthy diversity of approaches to educational funding and church-state relations?[28]

I do not think so. Yes, the Rehnquist Court has done much to bring back to our constitutional-law conversations an appreciation for the role and prerogatives of the States, and for the notion that the federal Constitution is a "charter for a government of limited and enumerated powers[.]"[29] It is true that contemporary scholars are taking a fresh look at the works of localist thinkers from Tocqueville to Tiebout,[30] and that "subsidiarity"[31] seems to be

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28. *See, e.g.*, Lupu & Tuttle, *supra* note 4, at 966 ("[W]e believe that each state should be free to make its own constitutional policy of church-state relations, and to extend it beyond the federal policy, so long as the state approach serves reasonable purposes of the sort associated with the regime of Separationism."). Professors Lupu and Tuttle have devoted impressive efforts to identifying such "reasonable purposes," and rehabilitating this "regime." Ira C. Lupu & Robert W. Tuttle, *The Distinctive Place of Religious Entities in Our Constitutional Order*, 47 VILL. L. REV. 37 (2002); Ira C. Lupu & Robert W. Tuttle, *Sites of Redemption: A Wide-Angle Look at Government Vouchers and Sectarian Service Providers*, 18 J.L. & POL. 539 (2002). *But see, e.g.*, PHILIP HAMBURGER, SEPARATION OF CHURCH AND STATE 491–92 (2002) (concluding "the history of separation between church and state cannot be understood simply as the history of religious liberty and its protection by American institutions. On the contrary,... separation became a popular vision of religious liberty in response to deeply felt fears of ecclesiastical and especially Catholic authority.").

29. Richard W. Garnett, *The New Federalism, the Spending Power, and Federal Criminal Law*, 89 CORNELL L. REV. 1, 1 (2003). *See generally*, John O. McGinnis, *Reviving Tocqueville's America: The Rehnquist Court's Jurisprudence of Social Discovery*, 90 CAL. L. REV. 485 (2002) (arguing that the approach of the Rehnquist Court to federalism reveals skepticism toward centralization). *But, see, e.g.*, ROBERT F. NAGEL, THE IMPLOSION OF AMERICAN FEDERALISM 30 (2001) (arguing "[w]hat *Lopez* confirms is that the national government is for all practical purposes already a government of general regulatory powers and that... there is little that the judiciary can be expected to do about it").

30. *See generally* Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956) (exemplifying Tiebout's localist theory and suggesting an economic justification for state sovereignty).

31. "Subsidiarity" is "the principle of leaving social tasks to the smallest social unit that can perform them adequately." Mary Ann Glendon, *Civil*

the watchword in political theory. Nevertheless, the better course is to treat the Blaine Amendments not as liberty-enhancing experiments,[32] but rather as precisely the kind of discriminatory provisions that—principles of judicial federalism and enumerated powers notwithstanding—the Bill of Rights and the Fourteenth Amendment have removed from the menu of local legislative options. Even full-throated support for the present federalism revival does not require one to regard these provisions as "courageous" efforts by particular communities to provide greater protection to religious freedom, by insisting on a more rigid "separation of church and state." In fact, the Blaine Amendments might better be seen as representing the failures of particular communities to fully appreciate the nature, demands, and implications of religious freedom and liberal pluralism.

More particularly, and perhaps more prosaically, it is hard to see how the proffered "laboratories of democracy" defense can avoid foundering on the Supremacy Clause.[33] After all, federalism does not mean that the States cannot lose or may do whatever they please; it means that there are judicially enforceable limits even on the far-reaching regulatory and other powers of the government of

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Service, NEW REPUBLIC, Apr. 1, 1996, at 39, 40 (reviewing MICHAEL J. SANDEL, DEMOCRACY'S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY (1996)). Similarly, in the Catholic Social Thought tradition, subsidiarity is the principle according to which "a community of a higher order should not interfere in the internal life of a community of a lower order, depriving the latter of its functions, but rather should support it in case of need and help to co-ordinate its activity with the activities of the rest of society, always with a view to the common good." Pope John Paul II, *Centesimus Annus* [*Hundredth Anniversary*] ¶ 48 (1991) (encyclical letter on the hundredth anniversary of *Rerum Novarum*).

32. *See* DeForrest, *supra* note 17, at 573–76; *cf. Davey*, 299 F.3d at 761 (McKeown, J., dissenting) ("[W]e must start where the State of Washington began over a hundred years ago . . . when it defined its vision of religious freedom as one completely free of governmental interference . . . ."). In fact, Washington was *required* by the 1889 Enabling Act—that is, by the Congress of the United States—to include a Blaine-type amendment in its constitution. *See* Act of Feb. 22, 1889, ch. 180, sec. 4, 25 Stat. 676, 677 (1889).

33. U.S. CONST. art. VI ("This Constitution . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.").

the United States. And so, if we assume that the States' no-aid provisions are inconsistent with the equal-treatment and non-discrimination principles discussed and applied in the Court's Free Speech, Free Exercise, and Equal Protection precedents,[34] the case for the Blaine Amendments as plucky experiments in stricter separation seems doomed. After all, a State would not likely succeed with the argument that its own experiment with a more communitarian or public-safety-oriented approach to the balance between privacy and law-enforcement needs should permit a federalism-based dispensation from the Court's Fourth Amendment case law. What is it, then, about super-separationism that should permit it to trump—or, more technically, to serve as a "compelling state interest" sufficient to authorize intrusions upon—fundamental free-exercise, free-speech, and equal-treatment rights? Justice Brennan was correct, of course, to remind us that the States are free to provide through their own constitutions greater protection to individuals from government than does the Bill of Rights. But while it is fairly easy to see that the Constitution provides a floor, not a ceiling, in the context of consent searches, it is far from obvious that the States may provide extra "protection" to citizens from "establishments" of religion if, in so doing, they purport to authorize violations of rights protected by the First Amendment and the Equal Protection Clause.[35]

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34. Absent some conflict with a constitutionally protected right, and absent the authorization in state law of government action at least arguably prohibited by the First and Fourteenth Amendments, then *of course* the states ought to be able to experiment, and to go their own way, in matters of education funding (subject, of course, to the no-establishment floor imposed by the First Amendment).

35. There are good reasons to believe that the Establishment Clause, unlike the Free Exercise and Free Speech Clauses, would today be better understood not so much as an individual-rights provision, whose protection individuals may invoke when they are aggrieved by excessively religious state action, but as a "structural" provision that promotes religious liberty by forbidding, *inter alia*, institutional entanglements between religious communities and government agencies. *See, e.g.*, Carl H. Esbeck, *The Establishment Clause as a Structural Restraint on Government Power*, 84 IOWA L. REV. 2 (1998) (considering whether the primary function of the Establishment Clause is to secure individual rights or to restrain government

Now, it can and should be conceded that a State's desire to construct a higher "wall of separation"[36] than is required by the First Amendment, by insisting on more rigid limitations upon the flow of once-public money to religious institutions and uses, is not necessarily an invidious one (unlike, for example, a State's desire to experiment with *de jure* segregation in schools). There is no need to dispute that there might be "reasonable purposes . . . associated with the regime of Separationism."[37] By the same token, though, it might be "reasonable" to prefer enhanced security and improved law enforcement capabilities over warrant requirements, exclusionary rules, and *Miranda* warnings. But even "reasonable purposes" are not generally thought to justify the denial of constitutionally protected fundamental rights.

Returning, then, to Justice Brandeis's tribute to local experimentation, the best response might be the one offered by Chief Justice Rehnquist in the recent *Boy Scouts* case.[38] Justice Stevens had turned to Justice Brandeis in defense of New Jersey's application of its anti-discrimination laws to the Boy Scouts' internal policies regarding homosexuality.[39] Putting aside for now the difficult question whether this application infringed the Scouts'

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power); Carl H. Esbeck, *The Establishment Clause as a Structural Restraint: Validations and Ramifications*, 18 J. LAW & POL. 445 (2003) (arguing that the Supreme Court has interpreted the Establishment Clause as a limitation on government power over religious matters); *cf.* Zelman v. Simmons-Harris, 536 U.S. 639, 679 n.4 (Thomas, J., concurring) (noting that the Free Exercise Clause, "unlike the Establishment Clause[,] protects individual liberties of religious worship").

36. Everson v. Bd. of Educ., 330 U.S. 1, 16 (1947) (citing Reynolds v. United States, 98 U.S. 145, 164 (1878)); *cf.* McCollum v. Bd. of Educ., 333 U.S. 203, 247 (1948) (Reed, J., dissenting) ("A rule of law should not be drawn from a figure of speech.").

37. Lupu & Tuttle, *supra* note 4, at 966. Again, however, Professor Hamburger's study suggests that church-state "separation" in the United States owes as much to anti-religious ideology, and anti-Catholic theology, as to any such purposes. *See* HAMBURGER, *supra* note 28, *passim*.

38. Boy Scouts of America v. Dale, 530 U.S. 640 (2000).

39. *Id.* at 664 (Stevens, J., dissenting) ("Because every state law prohibiting discrimination is designed to replace prejudice with principle, Justice Brandeis' comment on the States' right to experiment with 'things social' is directly applicable to this case.").

First Amendment rights, Chief Justice Rehnquist's remarks concerning the balance between local experimentation and the protection of fundamental rights seems on point: "Justice Brandeis, a champion of state experimentation in the economic realm, . . . was never a champion of state experimentation in the suppression of free speech. To the contrary, his First Amendment commentary provides compelling support for the [Boy Scouts' position] in this case."[40] Or, as Professor Viteritti has put it:

> Diversity is expected under our system of judicial federalism. It is problematic, however, when state courts impose limitations on the free exercise of religion that transgress constitutional guidelines set down by the Court. Our system of federalism permits states to define state rights more broadly than analogous federal rights but not to abridge those liberties that are protected by the Constitution.[41]

At least at the level of constitutional doctrine, then, the "federalism" defense of the Blaine Amendments fails. But Professor Viteritti's statement points to another, broader defense of these provisions, one that also draws on the Court's federalism decisions: The argument of the Blaine Amendments' defenders is not simply that, as a matter of positive law, the States are authorized to experiment with a higher wall of separation, even at the expense of (possible) burdens on individuals' equal-treatment rights. Rather, the claim is also that such experimentation, and the diversity in church-state relations that results, *ought* to be permitted.[42]

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40. *Id.* at 660–61.

41. Joseph P. Viteritti, *Choosing Equality: Religious Freedom and Educational Opportunity Under Constitutional Federalism*, 15 YALE L. & POL'Y REV. 113, 160 (1996).

42. *See, e.g.*, Davey v. Locke, 299 F.3d 748, 768 (9th Cir. 2002) (McKeown, J., dissenting) , *cert. granted*, 123 S. Ct. 2075 (2003).

> No less than the State of Ohio's decision to fund students' sectarian education, which the Court endorsed in *Zelman*, the State of Washington's decision not to 'experiment' in the funding of religious indoctrination should represent an

This normative dimension to the Amendments' defense is entirely appropriate and, for the most part, consistent with the tone and leading themes of the New Federalism generally.[43] Indeed, Professor Chemerinsky has observed that "[o]ne of the most frequently advanced justifications for federalism is that the division of power between federal and state governments advances liberty."[44] Federalism, in other words, is about more than efficiency, competition, experimentation, and diversity; it is also, in the end, about securing freedom.

So, perhaps I was too quick to reject the "Blaine Amendments as courageous experiments" claim. The present Court's understanding of federalism might seem, at first blush anyway,[45] to weigh in favor of tolerating some States' decisions to find their own way on matters of no-aid separationism. At the same time, I suspect that few would maintain that the fracturing and diffusion of power *necessarily* produces "more" liberty or better promotes authentic human flourishing.[46] In any event, it

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> equally valid concern—both as a matter of federalism and with respect to the more explicit limitations of the Religion Clauses.

Id.

43. *See generally* Garnett, *supra* note 29.

44. Erwin Chemerinsky, *Does Federalism Advance Liberty?*, 47 WAYNE L. REV. 911, 911 (2001).

45. On the other hand, the fact that several of the States were required by the United States—notwithstanding the failure of the Blaine Amendment at the federal level—to adopt their strict no-aid provisions, seems to point in the other direction. *See generally* Joseph P. Viteritti, *Blaine's Wake: School Choice, the First Amendment, and State Constitutional Law*, 21 HARV. J.L. & PUB. POL'Y 657, 672–73 (1998).

46. *See, e.g.*, Chemerinsky, *supra* note 44, at 913 ("[T]he Supreme Court's federalism decisions are 'rights regressive'—that is, they limit rather than enhance individual liberties. [Also,] as a more theoretical matter there is no reason to believe that federalism will increase freedom."); Douglas Laycock, *Federalism as a Structural Threat to Liberty*, 22 HARV. J.L. & PUB. POL'Y 67, 80 (1998).

> It is hardly news that there is a conflict between states' rights and federal protections for liberty. If a state violates a citizen's liberty, and if the federal government attempts to protect the citizen's liberty, then any residuum

seems appropriate to ask not simply whether these Amendments are permissible departures from a federal baseline, but also whether they contribute to one purported "end game" of federalism—namely, promoting the freedom and dignity of the human person.[47]

In my view, federalism's normative content and functions provide little support for the Blaine Amendments. This is certainly not to say that religious freedom goes unprotected, and must languish, in a legal regime of church-state separation. (By the same token, religious freedom can survive and thrive in a regime of "mild and equitable"[48] religious establishments.[49]) Rather, the claim is that whatever marginal increase in religious freedom might attend the operation of a local rule forbidding absolutely even the indirect flow of public funds to religious institutions is more than offset by the harms caused to that freedom by subjecting beneficiaries and their educational choices to special disabilities. The meaningful ability to pursue a religious education, for oneself or for one's children, would seem a crucial component of any attractive account of religious freedom.[50] Thus, as John Courtney Murray once

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> of states' rights may limit the effectiveness of the federal protection. This sort of conflict between federalism and liberty is most pronounced when a rogue state or region is deeply opposed to a liberty to which the nation as a whole is committed.

Id.

47. *See, e.g.*, Viteritti, *supra* note 41, at 160 ("Judicial activism at the state level is a welcome phenomenon only to the extent that it makes for a freer society.").

48. John Witte, Jr., *"A Most Mild and Equitable Establishment": John Adams and the Massachusetts Experiment*, 41 J. CHURCH & ST. 213 (1999).

49. *See* MICHAEL J. PERRY, UNDER GOD? RELIGIOUS FAITH AND LIBERAL DEMOCRACY 30, 45 (2003) ("[I]f a constitution vigorously protects the free exercise of religion, then the fact that it does not forbid government to establish religion does not imperil anyone's human rights.").

50. *See, e.g.*, Second Vatican Council, *Dignitatis Humanae* [*Declaration on Religious Freedom*] ¶ 2 (1965), *available at* http://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_decl_19651207_dignitatis-humanae_en.html.

> It is in accordance with their dignity as persons . . . that all men should be at once impelled by nature and also bound by a moral obligation to seek the truth, especially

observed, when "separation as an absolute principle"—*i.e.,* of the kind enshrined in many States' no-aid provisions[51]—"is ruthlessly thrust into the field of education, the result is juridical damage to the freedom of religion."[52]

In sum, the Supreme Court's present understanding of the Establishment Clause—particularly its awareness that the institutional and juridical separation of church and state need not be conflated with discrimination in the disbursal of public benefits or the operation of public forums—arguably facilitates and protects the freedom of religion. The States' ersatz experiments with rigid no-aid separationism—notwithstanding their defenders' misplaced reliance on Justice Brandeis, diversity, and federalism—do not.

II.

In fact, the Blaine Amendments were not simply local experiments with recalibrated church-state relations,[53] and they illustrate more than the diversity of possible approaches to funding public education or constructing "walls of separation." Instead, the Amendments were primarily the products of widespread concern about the political and cultural effects of what were thought to be the teachings and ambitions of the Roman Catholic Church, of

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> religious truth. They are also bound to adhere to the truth, once it is known, and to order their whole lives in accord with the demands of truth.

Id.

51. This "separation as an absolute principle" can and should be distinguished from other notions of separation—for example, the idea of "separationism as a tradition." *See* Steve D. Smith, *Separation as a Tradition*, 18 J.L. & POL. 215 (2002).

52. John Courtney Murray, *Law or Prepossessions?*, 14 LAW & CONTEMP. PROBS. 23, 40 (1949).

53. *Cf.* Davey v. Locke, 299 F.3d 748, 762, 768 (9th Cir. 2002) (McKeown, J., dissenting) (referring to "Washington's longstanding practice of prohibiting religious funding as a matter of *encouraging* the unfettered free exercise of religion," "Washington's decision not to 'experiment' in the funding of religious indoctrination" and asserting that "Washington's decision not to fund religious education simply reflects its strong desire . . . to insulate itself from the appearance of endorsing religion"), *cert. granted*, 123 S. Ct. 2075 (2003).

liberal anti-clericalism more generally, and also of a less considered, virulent "Maria Monk"-style hostility[54] toward the Church's traditions, clergy, schools, and immigrant members.[55] To be sure, and notwithstanding the Amendments' often unsavory origins and premises, their "social meaning" has evolved.[56] We should therefore avoid reducing them simplistically to the paranoia of the Know Nothings or to the Republican, Protestant triumphalism of Thomas Nast's *Harper's Weekly* illustrations.[57] It remains the case,

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54. *See* MARIA MONK, THE AWFUL DISCLOSURES OF MARIA MONK (1836); *see also* Kurt T. Lash, *The Second Adoption of the Establishment Clause: The Rise of the Nonestablishment Principle,* 27 ARIZ. ST. L.J. 1085, 1119 & n.156 (1995). As Professor Lash reports, this infamous account of kidnapping, sexual perversion, and child murder in a "nunnery" was a "runaway best seller;" indeed, "[n]o other book in America sold more copies until the publication of *Uncle Tom's Cabin.*"

55. *See, e.g.*, Mitchell v. Helms, 530 U.S. 793, 828–29 (2000) (plurality opinion); Kotterman v. Killian, 972 P.2d 606, 624 (Ariz. 1999); Lupu & Tuttle, *supra* note 4, at 959 ("These provisions have a common and troubled historical provenance; virtually all of them seem to have been a product of Protestant-Catholic conflict over education in the nineteenth and early twentieth centuries."); Treene, *supra* note 15, at 4 ("[The Blaine Amendments] were a direct result of the nativist, anti-Catholic bigotry that was a recurring theme in American politics throughout the 19th and early 20th centuries."). For more detailed discussions of the connections between the Common School movement and the various no-aid Amendments, on the one hand, and nineteenth (and twentieth) century nativism and anti-Catholicism, on the other, see, for example, CHARLES LESLIE GLENN, THE MYTH OF THE COMMON SCHOOL (1988); HAMBURGER, *supra* note 28; LLOYD P. JORGENSON, THE STATE AND THE NON-PUBLIC SCHOOL: 1825–1925 (1987); JOHN T. MCGREEVY, CATHOLICISM AND AMERICAN FREEDOM (2003); and VITERITTI, *supra* note 6.

56. *See* Frederick Mark Gedicks, *Reconstructing the Blaine Amendments,* 2 FIRST. AMEND. L. REV. 85 (2003).

57. Throughout the post-Civil War years, rapacious popes and priests, bent on weakening America by, *inter alia,* destroying its public schools and its separationist, and Protestant, traditions, figured prominently in Nast's work. For examples, see RAY ALLEN BILLINGTON, THE PROTESTANT CRUSADE 1800–1860: A STUDY OF THE ORIGINS OF AMERICAN NATIVISM (1938) (illustrations); JORGENSON, *supra* note 55, at 113; and MCGREEVY, *supra* note 55, at 94, 97. In addition, several of Nast's anti-Catholic cartoons are available online. *See, e.g., Anti Catholic Nativism* (Roland Marchand, ed.), *at* http://historyproject.ucdavis.edu/imageapp.php?Major=RE&Minor=D (last visited Jan. 17, 2004); Ohio State Univ. Libraries, *Thomas Nast, at*

however, that the Blaine Amendments reflected more than reactionary nativism or a principled dedication to the protection of religious liberty through no-aid separationism. They cannot be fully understood without reference to the irreducibly anti-Catholic ideology that inspired and sustained them.[58]

It would be a mistake, however, as we think about the meaning and message of these no-aid provisions, to focus too closely on Maria Monk and Thomas Nast, on the Know Nothings and the Ku Klux Klan, or even on Horace Mann and James Blaine. Such emphases would be misguided, and not only because they could blind us to real changes over the years in the Amendments' social meaning, but also because antipathy toward the Roman Catholic Church and deep-seated disagreement with that Church's pronouncements and perceived teachings shaped our culture, discourse, and laws well before, and long after, the immigration booms and school wars of the Nineteenth and early Twentieth Centuries.

Arthur Schlesinger, Sr., once wrote that "prejudice" against the Catholic Church is "the deepest bias in the history of the American people."[59] Setting aside for now the question whether this attitude is best characterized as a "prejudice" or "bias," there is no getting around the fact that, from the Puritans to the Framers

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http://www.lib.ohio-state.edu/cgaweb/nast/ (last visited Jan. 17, 2004).

58. It should be emphasized that the doctrinal arguments against the Blaine Amendments—i.e., the constitutional arguments that they may not be used to require the exclusion from public welfare programs of otherwise eligible religious believers and institutions—do not depend on the amendments' historical origins in xenophobia, prejudice, and religious disagreement. It could well be that the discriminatory motives and purposes of those who enacted the laws, combined also with the laws' continuing discriminatory effects, provide adequate grounds for striking them down. *See, e.g.*, Hunter v. Underwood, 471 U.S. 222, 223 (1985) ("Without deciding whether [section] 182 would be valid if enacted today without any impermissible motivation, we simply observe that its original enactment was motivated by a desire to discriminate against blacks on account of race and the section continues to this day to have that effect."). For a detailed analysis and critique of this line of argument, see, for example, Lupu & Tuttle, *supra* note 4, at 969–70. In any event, the doctrinal arguments sketched by Professor Berg and others are powerful, wholly and apart from these motives and aims.

59. JOHN TRACY ELLIS, AMERICAN CATHOLICISM 151 (2d ed. 1969).

and beyond, anti-"popery" was thick in the cultural air breathed by the early Americans, who were raised on tales of Spanish Armadas and Inquisitions, Puritan heroism and Bloody Mary, Jesuit schemes and Gunpowder Plots, and lecherous confessors and baby killing nuns.[60] American anti-Catholicism was not simply a reaction to Irish immigration, Tammany-style corruption, or the anti-liberal *Syllabus of Errors*. It arrived on the Mayflower and with Foxe's *Book of Martyrs*;[61] it was preached by Williams and Whitefield; and it helped to inspire the Revolution.[62] It went beyond the legal penalties imposed upon, and disabilities endured by, Catholics in the American colonies and States.[63] Rather, in keeping with traditions, debates, and premises that crossed the Atlantic with the

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60. *See, e.g.*, BILLINGTON, *supra* note 57, at 1.

> Hatred of Catholics and foreigners had been steadily growing in the United States for more than two centuries before it took political form with the Native American outburst of the 1840's and the Know-Nothingism of the 1850's. These upheavals could never have occurred had not the American people been so steeped in antipapal prejudice that they were unable to resist the nativistic forces of their day.

Id.

61. A prominent historian of religion has noted that "John Foxe did as much as anyone to fire the anti-Catholic spirit that the English needed to spur them to mission and conquest.... He resolved to fight the pope and Queen Mary by writing *Actes and Monuments*, also known as *The Book of Martyrs*, which was full of gruesome stories about how Catholics persecuted faithful servants of Christ." MARTIN E. MARTY, PILGRIMS IN THEIR OWN LAND: 500 YEARS OF RELIGION IN AMERICA 45 (1984).

62. The Quebec Act of 1774 granted free exercise of religion to Roman Catholics living in Canada. Typical of the American reaction is this short poem, quoted by Professor Stokes: "If Gallic Papists have a right / To worship their own way / Then farewell to the Liberties / Of poor America." ANSON PHELPS STOKES, 1 CHURCH AND STATE IN THE UNITED STATES 260 (1950). Or, as Boston firebrand Samuel Adams insisted, "much more is to be dreaded from the growth of Popery in America, than from Stamp-Acts or *any other* Acts destructive of men[']s *civil* rights." *Id.* at 261.

63. *See* Peter H. Schuck, *The Perceived Values of Diversity, Then and Now*, 22 CARDOZO L. REV. 1915, 1925 (2001) ("Indeed, before the Revolutionary War, every colony enacted anti-Catholic laws restricting certain religious practices, public and private activities, and some other rights attached to common citizenship.").

colonists and their culture, Americans' thinking about religious freedom, and religious faith itself, was in no small measure shaped and defined in reaction and opposition to the Roman "Whore of Babylon" and all her works.[64]

In addition, Professors Hamburger, McGreevy, and others have reminded us that anti-Catholicism remained a powerful force in American life—particularly in the circles of the political, legal, and cultural elites—well after Blaine and the Know Nothings shuffled off the political stage.[65] If anti-"popery" helped shape American ideology in the Colonies and at the Founding, then, as McGreevy puts it, "discussion of Catholicism [also] . . . helped to define the terms of mid-twentieth century liberalism."[66] More

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64. Of course, it is neither possible nor necessary in this Essay fully to document these claims. It is, perhaps, a testament to the pervasiveness of anti-Catholicism in early America that, even today, so much of what "every schoolchild knows"—if they know anything at all—about the matters and actors mentioned in this paragraph tracks, more or less, colonial Protestant narratives. In any event, as one historian has observed:

> In every American colony, . . . specific test laws or the possibility of being challenged to subscribe to a test or oath of abjuration, with refusal leading to prosecution as a 'popish recusant,' ensured the exclusion of Catholics from public life. Even more than these statutes, a pervasive opinion that 'Popery' was synonymous with tyranny relegated Catholics to a position beyond the realm of acceptability.

THOMAS J. CURRY, THE FIRST FREEDOMS: CHURCH AND STATE IN AMERICA TO THE PASSAGE OF THE FIRST AMENDMENT 80 (1986). For more detailed discussions of attitudes and actions toward Catholics, and of religious freedom more generally, in early America, see, for example, BILLINGTON, *supra* note 57; GERARD V. BRADLEY, CHURCH-STATE RELATIONSHIPS IN AMERICA (1987); HAMBURGER, *supra* note 28, at 21–89; MARTY, *supra* note 61, at 41–166; STOKES, *supra* note 62; and JOHN WITTE, JR., RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT: ESSENTIAL RIGHTS AND LIBERTIES (2000).

65. *See* HAMBURGER, *supra* note 28; MCGREEVY, *supra* note 55; *see also* MARTY, *supra* note 61, at 337–426; ; Thomas C. Berg, *Anti-Catholicism and Modern Church-State Relations,* 33 LOY. U. CHI. L.J. 121 (2001); Barbara Welter, *From Maria Monk to Paul Blanshard: A Century of Protestant Anti-Catholicism, in* R. BELLAH & F. GREENSPAHN, UNCIVIL RELIGION: INTERRELIGIOUS HOSTILITY IN AMERICA (1987).

66. John T. McGreevy, *Thinking on One's Own: Catholicism in the*

generally, the revival of the Ku Klux Klan in the 1920's, and that organization's agitation—in the name of, among other things, the "separation of church and state"—in opposition to Catholic parochial schools; the anxieties prompted across the Nation by Governor Al Smith's presidential campaigns; the judgment of prominent public intellectuals like Santayana, Dewey, and Lippmann that Catholicism was "hostile to democracy and to every force that tended to make people self-sufficient";[67] academic and other arguments, inspired by Fr. Coughlin's demagoguery, widespread Catholic anti-Semitism, and the Church's apparent support of Franco in Spain, linking Catholicism with totalitarian governments and authoritarian personalities;[68] and, of course, Paul Blanchard's runaway best sellers, *American Freedom and Catholic Power* and *Communism, Democracy, and Catholic Power,* which called for popular resistance to Catholic and Soviet aggression alike, are only a few illustrations and highlights of what was for decades a pervasive and dominant cultural theme: Namely, that there is a vast chasm, one that liberal institutions cannot safely ignore, "between the presuppositions of a free society and the inflexible authoritarianism of the Catholic religion."[69]

Law both follows and shapes culture, so it should come as no surprise that this longstanding and widespread opposition to the perceived agenda and teachings of the Catholic Church influenced the incorporation and interpretation of the Establishment Clause.[70] As Professor McGreevy reminds us, the *Everson* and *McCollum* decisions—the twin fountainheads of constitutionalized strict-

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American Intellectual Imagination, 1928–1960, 84 J. AM. HIST. 97, 98 (1997).

67. *Id.* at 102 (quoting WALTER LIPPMAN, DRIFT AND MASTERY: AN ATTEMPT TO DIAGNOSE THE CURRENT UNREST 115 (1961)).

68. "In their famous 1950 study of the connection between psychological tendencies and political views, *The Authoritarian Personality,* Theodor Adorno and his colleagues clearly included Catholics when they warned of overly restrictive, religious families whose children might channel their frustration into fascist politics." McGreevy, *supra* note 66, at 118.

69. *Id.* at 98 (quoting REINHOLD NEIBUHR, THE CHILDREN OF LIGHT AND THE CHILDREN OF DARKNESS: A VINDICATION OF DEMOCRACY AND A CRITIQUE OF ITS TRADITIONAL DEFENSE 128 (1944)).

70. *See* HAMBURGER, *supra* note 28, at 449–78; MCGREEVY, *supra* note 55, at 183–86; Berg, *supra* note 65, at 127–32.

separationism—are best understood if placed "in the context of an ongoing discussion about Catholicism and democracy."[71] To be clear: the point is not merely that several Justices at mid-century were sympathetic to Blanchard's claims and concerns, or even that Justice Hugo Black—the lead voice in both cases—was a former Klansman who remained anti-Catholic.[72] It is, instead, that *Everson*'s historical and theoretical premises, and the body of legal doctrine these premises inspired and produced, were both reactionary and aggressive. They reflected elite reactions to and fears about Catholicism's aims and effects, as well as a determination to counter them through law.[73] Even twenty years after *Everson*—well after President Kennedy's election, Archbishop Sheen's genial television presence, and the Second Vatican Council are often supposed to have to put our Nation's "deepest bias" to rest—the "residual anti-Catholicism"[74] of Justices Black and Douglas, expressed in landmark cases like *Allen* and *Lemon*, remained palpable.[75]

It is a project for another day to explore fully the extent to

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71. McGreevy, *supra* note 66, at 122.

72. *See* HUGO T. BLACK, MY FATHER: A REMEMBRANCE 104 (1975) ("He suspected the Catholic Church. He used to read all of Paul Blanchard's books exposing power abuse in the Catholic Church."); *see also* HAMBURGER, *supra* note 28, at 422–34 (documenting Black's relationship with the Klan during the 1920s); Berg, *supra* note 65, at 127–32 (discussing how Black's distrust of Catholicism manifests in his judicial opinions.

73. *See* HAMBURGER, *supra* note 28, at 454–92.

74. Douglas Laycock, *The Underlying Unity of Separation and Neutrality*, 46 EMORY L.J. 43, 58 (1997).

75. *See, e.g.*, Lemon v. Kurtzman, 403 U.S. 602, 630–31 (1971) (Douglas, J., concurring) (claiming that Catholic schools "give the church the opportunity to indoctrinate its creed delicately and indirectly, or massively through doctrinal courses"); *id.* at 636 (quoting approvingly an anti-Catholic tract, L. BOETTNER, ROMAN CATHOLICISM 375 (1962), for the proposition that "the people who support a parochial school have no voice at all in [its] affairs"); Bd. of Educ. v. Allen, 392 U.S. 236, 260 n.9 (1968) (Douglas, J., dissenting) (warning of a "creeping sectarianism [that] avoids the direct teaching of religious doctrine but keeps the student continually reminded of the sectarian orientation of his education"); *id.* at 251 (Black, J., dissenting) (warning of "powerful sectarian religious propagandists . . . looking toward complete domination and supremacy of their particular brand of religion").

which settled First Amendment principles and premises can be seen as the remnants of centuries of Anglo-American reaction and opposition to Catholic doctrine and culture.[76] Nor is this an appropriate occasion to evaluate the claim that anti-Catholicism is spent as a force in American culture or constitutional law.[77] For now, the claim is only that we ought to take care, in our discussions

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76. Professor Hamburger has provided such an exploration in his recent work. *See* HAMBURGER, *supra* note 28, at 480 ("Separation became a substantial part of American conceptions of religious liberty only in the nineteenth and twentieth centuries, when Americans felt growing fears of churches, especially the Catholic Church."); *id.* at 483 ("The separation of church and state not only departed from the religious liberty guaranteed by the U.S. Constitution but also undermined this freedom."); *id.* at 488 ("[O]ften with an eye on the Supreme Court, advocates of separation have contributed to a huge semihistorial literature that blurs together different types of early American religious liberty under the rubric of separation.").

77. *See* Berg, *supra* note 65, at 168, 169 (noting that, although "explicit dislike of Catholicism continues to appear in church-state debates," this dislike "does not play the overwhelming role in church-state debates that it did in the 1940s and 1950s"); Lupu & Tuttle, *supra* note 4, at 994 ("The pervasive anti-Catholic sentiment that drove Separationism from the 1940s to the 1980s is well behind us . . . ."). For a recent argument that anti-Catholicism remains a potent cultural force, see PHILIP JENKINS, THE NEW ANTI-CATHOLICISM: THE LAST ACCEPTABLE PREJUDICE 1–22, 207–16 (2003). In a similar vein, see generally MARK S. MASSA, ANTI-CATHOLICISM IN AMERICA: THE LAST ACCEPTABLE PREJUDICE (2003) (discussing a resurgence of anti-Catholic sentiment in the last quarter of the twentieth century). Peter Steinfels recently observed that:

> Yes, anti-Catholic animus rooted in the theological polemics of the 16th century Reformation still exists in the United States. But the anti-Catholic animus rooted in the political politics of the eighteenth century Enlightenment and the cultural polemics of nineteenth century American nativism have long since taken over all the traditional themes: The church is an authoritarian monolith; its doctrines are hopelessly premodern; its rites are colorful but mindless; its sexual standards are unnatural, repressive and hypocritical; its congregations are anti-Semitic and racist; its priests are harsh and predatory; its grip on the minds of believers is numbing.

Peter Steinfels, *Beliefs: Of Bob Jones U., American Culture, and Anti-Catholicism*, N.Y. TIMES, Mar. 4, 2000, at A13.

about whether and to what extent anti-Catholicism inspired the Blaine Amendments, not to neglect the possibility that much in the American tradition of thinking and legislating about church-state relations, religious freedom, and religion itself was a reaction to and against the Roman Catholic Church.

At the same time, we ought also to avoid another mistake. It is common in contemporary discussions of the Blaine Amendments to refer to the "anti-Catholicism" behind these provisions as "prejudice," "bias," or "bigotry." To be sure, such labels are understandable and, in many cases, accurate.[78] But they can also mislead. Specifically, these labels make it too easy, particularly in polite and well-educated circles, to dismiss without reflection salient cultural facts and trends, and to avoid meaningful engagement with influential contentions.[79] A "prejudice," after all, is an "[i]rrational suspicion or hatred of a particular group, race, or religion;" an "adverse judgment or opinion formed . . . without knowledge or examination of the facts."[80] Because few in contemporary discourse are likely to thoughtfully unpack and examine, let alone defend, prejudice, bias, or bigotry, there is the risk that such epithets will serve more as convenient conversation stoppers than as useful descriptions and starting points for meaningful analysis.[81]

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78. *See* Steinfels, *supra* note 77 ("There is often an astonishing lack of awareness about stereotypes of Catholicism").

79. Peter Steinfels observed, in the midst of the controversy a few years ago about then-Governor George W. Bush's visit to South Carolina's Bob Jones University, that there was something strange about the fact that right-thinking people everywhere quickly and loudly condemned the University for its alleged "anti-Catholicism," when, in fact, "[o]pposing anti-Catholicism in the United States by denouncing Bob Jones is about as relevant to today's reality as combating medical errors by condemning leeches and snake oil." *Id.*

80. THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (Joseph P. Picket et al. eds., 4th ed. 2000), http://www.bartleby.com/61.

81. *See* Berg, *supra* note 65, at 131–32 ("The term 'anti-Catholicism' often has a normative judgment embedded in it: that a person's opposition to Catholicism is an unjustified prejudice. Throughout this Article, however, I use the term to describe any view that rests on a fear or distrust of Catholicism, whether or not the view is justified").

The anti-Catholicism running through American history, law, and culture is not so easily reduced to widespread, irrational dislike—or, as the Justices unhelpfully put it in *Romer*, "animus"[82]—toward Irish immigrants, Pope Pius IX, or Al Smith. The Common School Movement, the Blaine Amendments, and *McCollum*-style separationism reflected the views and vision of many decent, liberal, and intelligent people.[83] These were efforts,

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82. Romer v. Evans, 517 U.S. 620, 632 (1996).

83. Marc Stern's point is well taken:

> It is often said that [the Blaine Amendments] reflect anti-Catholic prejudices of the Protestant majority. Indeed they did, surely in tone, and, in some measure, in substance as well. Some of that rhetoric, many of the fears, and some of the resulting legislation is nothing less than an embarrassing relic of outdated religious bigotry. But twentieth century Americans make the mistake of measuring the import of that anti-Catholic response against the post-Vatican II Catholic Church, a church which, under the influence of the American Jesuit, John Courtney Murray, has accepted the validity of church state separation. That was not the nineteenth century Roman Catholic Church, whose leaders vigorously opposed the separation idea as a dangerous, even heretical, doctrine. The Protestant reaction must be judged against that reality.

Marc D. Stern, *School Vouchers: The Church-State Debate that Really Isn't*, 31 CONN. L. REV. 977, 987 (1999). I would add to Mr. Stern's observation the friendly amendment that the Catholic Church had, of necessity, been struggling for "church state separation" long before Murray, and the pre-Vatican II "reality" to which Protestants reacted was considerably more complicated than Mr. Stern describes or Nineteenth Century Protestants appreciated. In fact, and notwithstanding the Holy See's frequent criticisms of the aggressively anti-clerical and anti-Catholic brand of liberalism with which the Roman Catholic Church was contending in Europe, Catholics in the United States throughout the nineteenth century tended—with some exceptions, to be sure—to campaign not for domination of American life and politics, but instead merely for evenhanded treatment. *See, e.g.*, HAMBURGER, *supra* note 28, at 210 n.36 (quoting Orestes Brownson, *The Know-Nothings*, BROWNSON'S Q. REV., Jan. 1855, at 117) ("[The Church's] wish is to pursue her spiritual mission in peace, and keep aloof from politics, so long as they leave her the opportunity.")). New York's Bishop John Hughes expressed passionately what appears to have been the frustration of many American

however clumsy and boorish in some cases, to translate into law certain arguments and commitments regarding the meaning of citizenship, democracy, freedom, religious faith, and education. That American Protestants often misunderstood Catholicism, and labored under mistakes about Catholic doctrine, practice, and history, does not change the fact that many strongly disagreed with, and were not merely "biased" against, the Catholic Church.[84] As many Americans understood it, the Church had certain aims, and it made certain claims about things that matter. And, as many Americans understood it, these claims were false, these aims were dangerously un-American, and they needed to be resisted.[85] To be clear: Americans' widely shared opinions and fears of Catholicism

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Catholics:

> The man must be blind to clear evidence, who does not see the existence of a dark conspiracy, having for its ultimate object, to make the Presbyterian Church the dominant religion of this country.... Under the pretense of solicitude for the preservation of CIVIL AND RELIGIOUS LIBERTY, the Catholics are to be robbed of both.

HAMBURGER, *supra* note 28, at 214 n.52; *see also* JOHN COURTNEY MURRAY, WE HOLD THESE TRUTHS: CATHOLIC REFLECTIONS ON THE AMERICAN PROPOSITION 67 (1960) (distinguishing American constitutionalism from the "system against which the Church waged its long-drawn-out fight in the nineteenth century, namely, Jacobinism[,]" and noting that "the Church opposed the 'separation of church and state' of the sectarian Liberals because in theory and in fact it did not mean separation at all but perhaps the most drastic unification of church and state which history as known").

84. McConnell, *supra* note 23, at 459 (2000) ("[I]t is important to recognize that the establishmentarians of this earlier era were not merely narrow-minded bigots. They had genuine reasons for fearing that the moral and cultural underpinnings of Americanism were endangered by the influx of strangers to these shores.").

85. *Harper's Weekly* warned, for example, that "the primary object of the Roman party is not the education of the children, but the maintenance and extension of the Roman sect. The plan is to make the schools nurseries of Roman Catholicism—a plan which every good citizen should strenuously oppose." *The Parochial Schools*, HARPER'S WKLY., Apr. 10, 1875, at 294. And, in the 1940s, the "ferocity" with which liberals opposed aid to parochial schools reflected "a desire to create a common culture in the midst of totalitarian foes, as well as a conviction that hierarchical religious institutions undermined the individual autonomy necessary for a healthy commonweal." McGreevy, *supra* note 66, at 130.

reflected a culture that for centuries was saturated with the polemics and rhetorical excesses of anti-"popery," with a thoroughly Protestant version of English and European history, and with religious individualism and anti-clericalism. Still, we should not be too quick to dismiss as "bigoted" the decision to take the Church seriously enough to oppose it.

III.

The Blaine Amendments, like much else in the American experience, were anti-Catholic, but they are best understood as more than just that. These provisions should be confronted not only as historical artifacts, as evidence of long-dead biases, or as the latest hurdles in voucher related litigation. Instead, they should also be engaged as moves in important and ongoing arguments about faith, authority, and democracy; about what it means, and what is required, to be a citizen; and about the roles of education and religion in shaping the kind of citizen that our constitutional order requires. Today, the Blaine Amendments are at the center of the education reform debate, and are engaged primarily as obstacles to school voucher programs. But if we step back briefly from the arena of school-choice litigation, we can see that these provisions are also part of a long and continuing effort to harness and employ effectively the process and content of education for the purpose of generating a certain kind of citizen and a certain kind of polity.

Indeed, this effort is the focus of a rich and growing scholarly literature on "civic education," and on the challenges posed by religious faith, teachings, and communities to certain conceptions of political liberalism.[86] Prominent thinkers argue

86. For a few recent and leading contributions to the discussion, see, *e.g.*, BRUCE A. ACKERMAN, SOCIAL JUSTICE AND THE LIBERAL STATE (1980); STEPHEN L. CARTER, THE DISSENT OF THE GOVERNED: A MEDITATION ON LAW, RELIGION, AND LOYALTY 35 (1998); AMY GUTMANN, DEMOCRATIC EDUCATION (1987); MEIRA LEVINSON, THE DEMANDS OF LIBERAL EDUCATION (1999); STEPHEN MACEDO, DIVERSITY AND DISTRUST: CIVIC EDUCATION IN A MULTICULTURAL DEMOCRACY (2000) [hereinafter MACEDO, DIVERSITY & DISTRUST]; MAKING GOOD CITIZENS: EDUCATION

today—as others did in the 1840s, 1870s, 1920s, and 1940s—that even a liberal state committed to pluralism, tolerance, and diversity cannot take for granted the existence and perpetuation of the values required for its health and survival. As Professor (now Judge) Michael McConnell puts it:

> [A] liberal society is always at risk. One can hope that the free institutions of civil society will produce virtuous citizens, each in its own way, and believe that the structure of liberal pluralism will tend in that direction. But there is no guarantee. Liberalism is vulnerable at its foundations.[87]

McConnell contends that the authentically liberal response to this vulnerability is to protect and rely upon the norm-generating capacity of families, private associations, and civil society.[88] Others

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AND CIVIL SOCIETY (Diane Ravitch et al. eds. 2001); MORAL AND POLITICAL EDUCATION (Stephen Macedo et al. eds., American Society for Political and Legal Philosophy, Nomos 43, 2002); William A. Galston, *Civic Education in the Liberal State, in* LIBERALISM AND THE MORAL LIFE (Nancy L. Rosenbaum ed., 1989); Stephen G. Gilles, *On Educating Children: A Parentalist Manifesto*, 63 U. CHI. L. REV. 937 (1996); Michael W. McConnell, *Multiculturalism, Majoritarianism, and Educational Choice: What Does Our Constitutional Tradition Have to Say?*, 1991 UNIV. CHI. LEGAL F. 123.

87. McConnell, *supra* note 23, at 457–58; *cf.* CARTER, *supra* note 86, at 35 ("[A] religious community's efforts to transmit its understandings of the world over time—to ensure the survival of its narrative—will often be most vital, and also most at risk, in the education of the community's children").

88. Professor McConnell has put it well:

> America's founders appreciated that republican government would require public virtue, and that public virtue requires the underpinnings of religion and morality. But they also realized that America was too diverse to permit agreement on religious fundamentals and, thus, that an attempt to establish an official church would produce division and discord. The great solution to the republican problem was to promote public virtue *indirectly*, by protecting freedom of speech, association, and religion, and leaving the nation's communities of belief free to inculcate their ideas of the good life, each in their own way. To attempt to direct and control this

insist, however, that it is sometimes the task of public, "civic" education to inculcate and shore up liberal values by countering the possibly illiberal influence on young people of churches, families, associations, ethnic traditions, and other particularistic institutions.

In other words, there appears to be increasing skepticism concerning what might once have been a core tenet of liberalism—namely, the idea that it is neither the task nor the right of the liberal state, through its schools or other instrumentalities, to tend to citizens' values or instill particular notions of the good. To many, liberalism today is at risk from the rival values being promoted by religious fundamentalists and other allegedly intolerant subgroups, in the same way that Republican virtue and national cohesion were once threatened by European immigrants and authoritarian Catholicism. In the face of these dangers, the argument goes, a commitment to liberal democracy requires that we tend to political ends as well as processes, that we "think very broadly about how liberal citizens become capable of their great office[,]"[89] and that we do so openly through a transforming process of civic education.

This is not a new argument. What is more, the civic education debate was long inseparable from the respectable anti-Catholicism of America's judicial and intellectual elites. The hopes of Horace Mann and his successors to forge a cohesive and engaged citizenry in the crucible of government education went hand in hand with their aggressive Protestantizing, and later secularizing, aspirations. The conclusion of an 1854 decision in Maine, affirming the dismissal of a lawsuit brought by a fifteen year old girl who was

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> process—to establish a new public orthodoxy through the noncoercive powers of government—will not succeed, because it cannot. In a pluralistic society, such as ours, common values are not determined by central authorities, but emerge from the overlapping consensus of free private associations.

McConnell, *supra* note 23, at 475. In a similar vein, Professor Galston has argued recently for a liberal politics that would tolerate and protect diversity, and permit illiberalism in the private sphere, while still defending those core commitments necessary for a functioning democracy. *See generally* GALSTON, *supra* note 23.

89. MACEDO, DIVERSITY & DISTRUST, *supra* note 86, at 275.

expelled from her public school for refusing to read the King James Version of the Bible, illustrates vividly these aspirations. After stating that "[t]he education of the people is . . . a matter of public concern, and of . . . paramount importance," the court went on to note:

> Large masses of foreign population are among us, weak in the midst of our strength. Mere citizenship is of no avail, unless they imbibe the liberal spirit of our laws and institutions, unless they become citizens in fact as well as in name. In no other way can the process of assimilation be so readily and thoroughly accomplished as through the medium of the public schools.[90]

Thus, as Professor John Coons has written, "[t]he machinery of public monopoly" was chosen specifically by "brahmins . . . to coax the children of immigrants from the religious superstitions of their barbarian parents."[91] To those inclined to doubt civil society's ability to nurture the values required for a free and democratic polity, the villain was clear: Writing in 1949, but speaking in this respect for his Common School forebears, Paul Blanchard warned that the Catholic parochial school was "the most important divisive instrument in the life of American children."[92]

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90. Donohoe v. Richards, 38 Me. 379, 391, 413 (1854). The *Donohoe* court's worries were repeated, thirty five years later, in testimony before Congress, by an opponent of parochial schools, who insisted that the "task of absorbing and Americanizing these foreign masses can only be successfully overcome by a uniform system of American schools, teaching the same political creed." GLENN, *supra* note 55, at 252.

91. Coons, *supra* note 6, at 19 ("Today that antique machinery continues its designated role, and if this function was ever benign, it has long since ceased to be so.").

92. PAUL BLANCHARD, AMERICAN FREEDOM AND CATHOLIC POWER 67 (1949); *see also* MACEDO, DIVERSITY & DISTRUST, *supra* note 86, at 132 (noting the "incompatibility of Catholicism and the republican civic aims" of "early common schooling"); *id.* at 88 ("It is too simple to say that the early common schools were in the business of 'Protestantizing' Catholic immigrants. . . . To a significant degree, the common schools represented a shared civic vision. Convergence on that vision could not . . . be taken for granted."); *cf.* McDaniel v. Paty, 435 U.S. 618, 640 (1978) (Brennan, J., concurring) ("The mere fact that a purpose of the Establishment Clause is to

In all fairness, however, it is difficult to criticize liberal theorists, past and present, for worrying about the "reproduction" of the values, habits, and attitudes thought necessary for life in and service to the liberal state.[93] These thinkers have a point: the liberal state can no more perpetuate itself without attending carefully to the dispositions of its citizens than a religious community that does not evangelize each new generation can hope to thrive and survive.[94] In the words of the father of the Common School Movement, Horace Mann, "it may be an easy thing to make a republic; but it is a very laborious thing to make Republicans."[95] In this vein, Henry Adams once complained that education is "a sort of dynamo machine for polarizing the popular mind; for turning and holding its lines of force in the direction supposed to be the most effective for State purposes."[96]

Was Adams right? Is "polarizing the popular mind," or what Professor Amy Gutmann has called "conscious social

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reduce or eliminate religious divisiveness or strife, does not place religious discussion, association, or political participation in a status less preferred than rights of discussion, association, and political participation generally.").

93. GUTMANN, *supra* note 86, at 39 ("We are committed to collectively re-creating the society that we share.... The substance of this core commitment is conscious social reproduction.").

94. *See* MACEDO, DIVERSITY & DISTRUST, *supra* note 86, at 278–79 ("We should not take for granted a shared civic life robust enough to master the many centrifugal forces to which modern life gives rise."); William A. Galston, *Expressive Liberty, Moral Pluralism, Political Pluralism: Three Sources of Liberal Theory*, 40 WM. & MARY L. REV. 869, 870 (1999) ("Liberal democratic citizens are made, not born...."); *cf.* McConnell, *supra* note 23, at 458.

> In light of this vulnerability, it is not surprising that establishmentarianism also has its advocates. It is tempting to say that the government should take a more direct role in the inculcation of public virtue. Such an important matter should not be left to chance, or to the market, or to the private sphere.

Id.

95. CARTER, *supra* note 86, at 42 (quoting Horace Mann, *The Importance of Universal, Free, Public Education* (1867), *available in* 1 THE PEOPLE SHALL JUDGE: READINGS IN THE FORMATION OF AMERICAN POLICY 589 (Univ. of Chi. ed., 1949)).

96. HENRY ADAMS, THE EDUCATION OF HENRY ADAMS: AN AUTOBIOGRAPHY 78 (Popular ed., Houghton Mifflin 1927).

reproduction," what education really is and is for? Certainly, Justices of the United States Supreme Court have assumed as much.[97] Professor Stephen Macedo, one of the leading contemporary civic education theorists, agrees: "Public schools" are, for him, "instruments for the most basic and controversial of civic ends[,] . . . [t]he project of creating citizens."[98]

The Blaine Amendments can also helpfully be framed as arguments proceeding from Macedo's, and Adams's, premises. In other words, it was the question, "what should be the purpose, and content, of 'education'?" that was—along with a colorful grab-bag of fears, misunderstandings, biases, and conspiracy theories—that was at the heart of the Blaine Amendment controversies and that remains a central problem of political morality today. Although we confront the Blaine Amendments today primarily as constraints imposed by positive law on local policy choices about school funding, these provisions take us to the heart of perennial questions about both statecraft and soulcraft. That is, the Blaine Amendments represent, among other things, the enactment into law of certain claims about the aims of education, the prerogatives of the liberal state, the proper scope of religious obligation, and even the nature and end of the human person.[99] We should engage these claims.

For example: I believe that education is "the indivisible process of acquiring beliefs, premises, and dispositions that are our windows on the world, that mediate and filter our experience of it, and that govern our evaluation and judgment of it. Education is

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97. *See, e.g.*, Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 681 (1986) (noting that the objective of public education is the inculcation of " 'fundamental values necessary to the maintenance of a democratic political system' " (quoting Ambach v. Norwick, 441 U.S. 68, 76–77 (1979)). *But see* West Virginia State Board of Education v. Barnette, 319 U.S. 624, 641 (1943) ("There is no mysticism in the American concept of the State or of the nature or origin of its authority.... Authority here is to be controlled by public opinion, not public opinion by authority.").

98. MACEDO, DIVERSITY & DISTRUST, *supra* note 86, at ix.

99. *See* Michael A. Scaperlanda, *Producing Trousered Apes in Dwyer's Totalitarian State,* 7 TEX. REV. L. & POL. 175, 219 (2002) (noting that the "purpose of education is to fashion a new human being") (quoting LUIGI GUISSANI, THE RISK OF EDUCATION 80 (2001)).

what attaches us to those goods and ends that attract, almost gravitationally, our decisions and actions."[100] As the French philosopher Jacques Maritain once wrote, "the chief task of education is above all to shape man, or to guide the evolving dynamism through which man forms himself as man."[101] In fact, Pope John Paul II goes so far as to suggest that the educator is "a person who 'begets' in a spiritual sense"[102] and that education should "be considered a genuine apostolate,"[103] or mission. Indeed, it is precisely because education is the process and craft of soul making, and is as much about transmitting values and loyalties to our children as it is about outfitting them with useful data and skill sets, that we care, argue, and even fight so much about it. This is why today's debates concerning choice-based reform are as heated as they are, why the Common School Movement was so widely embraced, why the Blaine Amendments were enacted, and why Paul Blanchard and Justice Douglas worried about Catholic schools. As those involved in the civic education conversation recognize, we care about education not just because we think it matters what facts and figures our children and our fellow citizens know. We care also because it matters what they value, it matters what and in what they believe, and it matters to and for what they aspire. This is, of course, why many of us cherish the right to send our children to religious schools, and also why many in the 19th Century, like more than a few today, feared the political effects of its exercise.

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100. Garnett, *Henry Adams*, *supra* note *, at 1846.

101. JACQUES MARITAIN, EDUCATION AT THE CROSSROADS 1 (1943). At first, Maritain sounds here not unlike the authors of the *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), mystery passage, who celebrated the development of a certain kind of agent, an autonomous and unencumbered self capable of determining for himself the meaning of life and the mystery of the Universe. *See id.* at 851 (joint opinion). It is worth noting too, though, that in the opinion of these Justices, "[b]eliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State." *Id.* at 851.

102. Pope John Paul II, *Letter to Families* ¶ 16 (1994), *available at* http://www.vatican.va/holy_father/john_paul_ii/letters/documents/hf_jp-ii_let_02021994_families_en.html.

103. *Id.*

CONCLUSION

The Blaine Amendments are best understood in the context of long-running public debates about Catholicism's compatibility with American democracy and the fitness of Roman Catholics for American citizenship.[104] These provisions embodied, among other things, the argument that Catholic schools were unlikely to inculcate the kind of values and produce the kind of persons required for the success of the American experiment. As my colleague Professor McGreevy has observed, though, "concerns that Catholicism—or any religion—improperly prepares its adherents for democratic life risks becoming a theological claim."[105] This is an important and profound observation. I will close, then, with the suggestion that the Blaine Amendments are best understood, and might most profitably be engaged, not simply as rules of positive law, but as *theological* arguments about the nature, content, and scope of religious belief, truth, and obligation.

In a similar vein, more than fifty years ago, in the wake of the *Everson* and *McCollum* decisions, John Courtney Murray lamented, vividly, that "[t]he First Amendment has been stood on its head. And in that position it cannot but gurgle juridical nonsense."[106] He went on to argue provocatively that the version of strict-separationism the Justices embraced in those decisions—and that is preserved in many of the Blaine Amendments—is not only bad constitutional law, but also represents both an "irredeemable piece of sectarian dogmatism."[107] The celebrated "wall of separation," according to Murray, represents "a religious absolute,

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104. John Courtney Murray once quipped, "The question [whether Catholicism is compatible with American democracy] is invalid as well as impertinent; for the manner of its position inverts the order of values. It must . . . be turned round to read, whether American democracy is compatible with Catholicism." MURRAY, *supra* note 83, at ix–x.

105. McGreevy, *supra* note 66, at 131; *cf.* McDaniel v. Paty, 435 U.S. 618, 640–41 (1978) (Brennan, J., concurring) (insisting that the government may not "treat religion and those who teach or practice it, simply by virtue of their status as such, as subversive of American ideals").

106. Murray, *supra* note 52, at 23.

107. *Id.* at 30; *see also* MURRAY, *supra* note 83, at 48–56 (discussing the "theologies of the First Amendment").

a sectarian idea of religion" that proceeds from a "theological premise"; the "wall . . . is built, not by an idea of liberty, but by an idea of religion."[108]

It strikes me that Professor Hamburger's recent history provides strong support for Murray's arguments.[109] Hamburger's work makes a strong case that the notion of "separation of church and state," as it has developed and been implemented in the United States, and as it was codified in many States' Blaine Amendments, is as much a cluster of substantive religious tenets than an "article[] of peace".[110] This notion of "separation" has served not only as a neutral means of clearing out the space in life and law required for the freedoms of belief and conscience and guaranteeing the independence of religious associations and institutions. It has functioned also as a profession of faith, a body of doctrine, and a cluster of highly individualistic assertions about religious belief, authority, obligation, and truth.[111] It is not only a claim about

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108. Murray, *supra* note 52, at 30.

109. *See, e.g.*, HAMBURGER, *supra* note 28, at 489 ("[T]he idea of separation between church and state seems to have been part of a reconceptualization of religious liberty that had particular appeal for Americans who conceived of themselves as independent of clerical and ecclesiastical claims of authority."). As Professor Hamburger further recounts:

> Gradually, in response to their fears of church authority, especially Catholic Church authority, Americans reconceptualized their religion, their citizenship, and their sense of themselves in highly individualistic ways, and, concomitantly, they redefined their religious liberty to protect themselves from the groups they feared, making separation of church and state part of their broader reconception of their individual, religion, and national identity.

Id. at 490.

110. MURRAY, *supra* note 83, at 49. In Murray's view, the First Amendment's Religion Clauses ought to be regarded as "articles of peace," not "articles of faith." *Id.* They were "the work of lawyers, not theologians or even of political theorists," and reflected the "necessity or utility for the preservation of the public peace." *Id.* at 56–57.

111. *See id.* at 48–49 ("[T]here are those who read into [the First Amendment] certain ultimate beliefs, certain specifically sectarian tenets with regard to the nature of religion, religious truth, the church, faith, conscience,

religion; it is also a religious claim.

The suggestion that the Blaine Amendments are the codifications of particular, contestable theological assertions is no doubt unsettling. I neither purport nor intend to explore it fully here.[112] Still, let us assume, for present purposes, that the claim is plausible. If we approach the Blaine Amendments not as school funding experiments but as endorsements of particular religious arguments as well as constitutionalized rejections of others,[113] what then?

It is tempting to proceed from this characterization of the Blaine Amendments as codified sectarian dogma to the conclusion that they are unconstitutional. Putting aside the question whether the circumstances surrounding their enactments makes these provisions vulnerable under, for example, the Equal Protection Clause,[114] it is black-letter doctrine that the Constitution does not permit government to propose, endorse, evaluate, or enforce theological claims,[115] just as it is a staple of contemporary church-

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divine revelation, human freedom, etc. . . They are true articles of faith"); *see also id.* at 50 (attributing dogmatic separationism, in part, to the "Puritan" "notion that American democratic institutions are the necessary secular reflection of Protestant anti-authoritarian religious individualism"); PERRY, *supra* note 49, at 30 (contending that certain separationist claims "import into the Constitution a controversial conception of the proper relation between morality and religion," a conception that is, "in a word, sectarian and has no claim on the large majority of Americans for whom religious faith and moral judgment are often inextricably linked").

112. Of course, as my friend Steve Smith once reminded me, "nearly everything of any lasting significance is at some level a theological position." Email from Steven D. Smith to Richard W. Garnett (June 10, 2003, 15:28:56 EST) (on file with author); *see also, e.g.,* PERRY, *supra* note 49, at 50–51, 109 (arguing that the moral claim at the heart of liberalism—*i.e.,* the claim that every human being, by virtue of being human, is inviolable—is, at bottom, a *religious* claim).

113. *Cf.* RICHARD J. NEUHAUS, THE NAKED PUBLIC SQUARE: RELIGION AND DEMOCRACY IN AMERICA 82 (1984) ("Because government cannot help but make moral judgments of an ultimate nature, it must, if it has in principle excluded identifiable religion, make those judgments by 'secular' reasoning that is given the force of religion.").

114. *See* Lupu & Tuttle, *supra* note 4, at 968–69.

115. *See, e.g.*, Jones v. Wolf, 443 U.S. 595, 609 (1976) (courts may not "pass on questions of religious doctrine"); Andrew Koppelman, *Secular*

state law that the "Establishment Clause is infringed when the government makes adherence to religion relevant to a person's standing in the political community."[116] Indeed, we are often told that "if there is one thing that the First Amendment forbids with resounding force it is the intrusion of a sectarian philosophy of religion into the fundamental law of the land."[117] Justice Robert Jackson, in ringing terms and with characteristic flair, went even further:

> [F]reedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order.
>
> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.[118]

How, then, can the Blaine Amendments, to the extent they are prescriptions of religious orthodoxy, be sustained?

Purpose, 88 VIRG. L. REV. 87, 108 (2002) (arguing that the "Establishment Clause forbids the state from declaring religious truth").

116. Wallace v. Jaffree, 472 U.S. 38, 69 (1985) (O'Connor, J., concurring in the judgment); *see also* MURRAY, *supra* note 83, at 54 ("If it be true that the First Amendment is to be given a theological interpretation and that therefore it must be 'believed,' made an object of religious faith, it would follow that a religious test has been thrust into the Constitution.").

117. Murray, *supra* note 52, at 30. In Michael Perry's words, the Establishment Clause means:

> [g]overnment may not take any action that favors a church in relation to another church, or in relation to no church at all, on the basis of the view that the favored church is, as a church—as a community of faith—better along one or another dimensions of value (truer, for example, or more efficacious spiritually, or more authentically American).

PERRY, *supra* note 49, at 24.

118. West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

The problem with the assertion that the Blaine Amendments are unconstitutional because they codify religious propositions is that Justice Jackson's celebrated tribute to the "fixed star in our constitutional constellation" falls apart under close inspection. Indeed, as Steve Smith argues, Jackson's "no orthodoxy" principle "committed the Court (and the judges and lawyers and scholars, and indeed the nation) to a massive collective delusion."[119] Of course, the government "prescribe[s]" orthodoxy—of a kind that can fairly be described as "religious"—all the time. Assertions to the contrary are "radically incongruent with our constitutional traditions."[120] The government consciously and purposely articulates positions, stakes claims, and take stands; it approves, endorses, and subsidizes some controversial and contestable ideas, and rejects others. Indeed, our government, in particular, was founded upon, and dedicated to, certain ideas and propositions.

It should come as no surprise, then, that—as was described in Part III—many believe it is a necessary task of the state in a liberal democracy like ours *precisely* to "prescribe[]" orthodoxy, through the education of the young as well as by other means, so as to shore up the values and form the citizens it requires.[121] In particular, it

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119. Steven D. Smith, Barnette's Big Blunder 1 (unpublished manuscript on file with author); *see also id.* at 4 ("[T]he 'no orthodoxy' position memorably articulated in *Barnette* has had a beguiling but baneful influence on our First Amendment discourses—and hence on our understanding of our community, and of ourselves.").

120. *Id.* at 14; *see also id.* at 18 ("A government must act, and hence it must act on some set of beliefs; so government could hardly avoid endorsing the beliefs it acts upon.").

121. Michael McConnell has argued, in contrast, that "it is difficult or impossible for a liberal state to engage in the direct inculcation of public virtue without compromising its liberal commitment to neutrality among the different and competing reasonable worldviews of the society." McConnell, *supra* note 23, at 455. He warns, also, that "[e]stablishmentarianism is neither liberal in theory nor successful in practice." *Id.* at 475. In my view, it is true *both* that our government *does* prescribe "orthodoxy" (and, indeed, could hardly do otherwise), *and* that the "new establishmentarianism" described by McConnell is illiberal (i.e., inconsistent with liberal premises) and normatively unsound. *See generally, e.g.*, Garnett, *Henry Adams*, *supra* note *. As Steve Smith points out, though, the better response to the "new establishmentarianism" might not be to assert that government may not

seems that arguments for, or constitutional provisions protecting, religious freedom will, in the end, rest on foundational and anthropological claims that can fairly be characterized as religious.[122] As Dean John Garvey succinctly put it, the freedom of religion is protected by our laws because "religion is important" and because "the law thinks religion is a good thing."[123]

If this is true, then we have reached a strange place in our consideration of the Blaine Amendments. It turns out that these purportedly secular, separationist, and religion-neutral provisions are, in fact, religious, even sectarian, arguments about the meaning, nature, and spheres of religious liberty and religion itself.[124] Still, although I believe that some of these provisions, and some of their applications, run afoul of present-day constitutional doctrine, this is not why. Yes, the Blaine Amendments "prescribe orthodoxy" in religion, but—liberal protestations to the contrary notwithstanding—they could hardly do otherwise. Arguments about religious freedom and church-state relations are, ultimately, religious arguments.[125]

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prescribe orthodoxy, but to "consider or criticize the substance of what [the establishmentarians] would have the community stand for." Smith, *supra* note 119, at 54.

122. I am grateful to Tom Berg for reminding me of this possibility. For an explication of Berg's view, see, for example, Thomas C. Berg, *Religion Clause Anti-Theories*, 72 Notre Dame L. Rev. 693 (1997). For some different views, see generally John H. Garvey, *Free Exercise and the Values of Religious Liberty*, 18 CONN. L. REV. 779, 798, 801 (1986) (contending that we rightly protect the free exercise of religion because "religion is a lot like insanity" and that "[w]e protect [religious claimants'] freedom . . . because they are not free"); and Douglas Laycock, *Religious Liberty as Liberty*, 7 J. CONTEMP. LEGAL ISSUES 313, 316–19 (1996) (setting out a "religion-neutral case for religious liberty").

123. JOHN H. GARVEY, WHAT ARE FREEDOMS FOR? 42, 57(1996).

124. *Cf.* Steven D. Smith, *The Rise and Fall of Religious Freedom in Constitutional Discourse,* 140 U. PA. L. REV. 149, 150 (1991) (suggesting that the "internal, self-negating quality of our commitment to religious freedom renders us incapable of interpreting and applying that commitment in a coherent fashion").

125. The principal historical justification for our constitutional commitment to religious freedom was a religious rationale. The justification relied upon religious premises and worked within a religious world view. Moreover, quite apart from its historical significance, the religious

Maybe we should welcome this conclusion. Perhaps, instead of ignoring the Blaine Amendments' religious meaning, or treating it as a constitutional strike against them, we could use the possibility that separationism is theology to enrich our conversations, not only about the Amendments, but also and more generally about education, citizenship, religious freedom. After all, if the Blaine Amendments are not merely legal constraints on statute legislatures' funding options, but also claims about the content and proper sphere of religious beliefs, obligations, and loyalties, then it would seem perfectly appropriate to raise constructive, yet unapologetic and unbracketed, religious counterclaims about these matters in response.[126] It would seem perfectly appropriate to propose, for example, that the "right of the human person to religious freedom"[127] "has its foundation in the very dignity of the human person as is known through the revealed word of God and by reason itself."[128]

> justification is also the most satisfying, and perhaps the only adequate justification for a special constitutional commitment to religious liberty.

See id. at 149.

126. For arguments that religious believers ought not to be required to censor or bracket their religious beliefs when participating in politics and public life, see generally STEPHEN L. CARTER, THE CULTURE OF DISBELIEF (1993); NEUHAUS, *supra* note 113; and PERRY, *supra* note 49.

127. Second Vatican Council, *supra* note 50, ¶ 2.

128. *Id.*