



## TAXATION AND BUDGET REFORM COMMISSION

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### Staff Analysis and Economic Impact Statement

Measure:	CP 20	REFERENCE:	ACTION:
Sponsor:	Commissioner Levesque	1. GPSC	Pre-meeting
Subject:	Blaine Amendment	2.	
		3.	
Date:	January 16, 2008		

#### I. Summary:

Constitutional Proposal 20 repeals a limit on the power of the state to spend funds directly or indirectly in aid of sectarian institutions. The measure also prevents the state from excluding individuals and entities from a generally available public benefit or a contract to provide government services on the basis of religion. This measure does not appear to be designed to authorize the Legislature to re-enact a school voucher program.

This Constitutional Proposal substantially amends section 3 of article I of the Florida Constitution.

#### II. Present Situation:

##### *Establishment Clauses, Free Exercise Clauses, and the Blaine Amendment*

The First Amendment to the U.S. Constitution states:

Congress shall make no law respecting an *establishment of religion*, or prohibiting the *free exercise thereof*; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.<sup>1</sup>

Similarly, section 3 of article I of the Florida Constitution states:

There shall be no law respecting the *establishment of religion* or prohibiting or penalizing the *free exercise thereof*. Religious freedom shall not justify practices inconsistent with public morals, peace or safety. *No revenue of the state or any political subdivision or agency thereof shall ever be taken from the public treasury directly or indirectly in aid of any church, sect, or religious denomination or in aid of any sectarian institution.*<sup>2</sup>

<sup>1</sup> (Emphasis added).

<sup>2</sup> (Emphasis added).

The U.S. Constitution and the Florida Constitution both contain an Establishment Clause and a Free Exercise Clause. The Establishment Clauses are based on the clause including the words “establishment of religion.” The Free Exercise Clauses are based on the clause including the words “free exercise.” The last sentence of section 3 of article I of the Florida Constitution is known as the “Blaine Amendment” or “no-aid” provision.<sup>3</sup> The U.S. Constitution does not contain a similar provision.

### ***Free Exercise Clauses***

“Florida courts have generally interpreted Florida’s Free Exercise Clause as coequal to the federal clause.”<sup>4</sup> “At a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons.”<sup>5</sup>

Under the Free Exercise Clauses:

a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice. Neutrality and general applicability are interrelated, and . . . failure to satisfy one requirement is a likely indication that the other has not been satisfied. A law failing to satisfy these requirements must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest.<sup>6</sup>

A law is *not* neutral if it discriminates against religious practice on its face or “if the object of a law is to infringe upon or restrict practices because of their religious motivation.”<sup>7</sup>

The following are examples of the Free Exercise Clause violations:

- An ordinance that prohibited the ritual slaughter of animals as part of the Santaria religion;<sup>8</sup>
- Laws that disqualify members of the clergy from holding a public office;<sup>9</sup>
- An ordinance that prohibited preaching in a public park by Jehovah’s witnesses while allowing preaching during a Catholic mass or a protestant service;<sup>10</sup> and
- A state statute that treated some religious denominations more favorably than others.<sup>11</sup>

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<sup>3</sup> *Bush v. Holmes*, 886 So. 2d 340, 344, 348-349 (Fla. 1st DCA 2004) (“*Holmes II*”).

<sup>4</sup> *Id.* at 365 (citing *Toca v. State*, 834 So. 2d 204, 208 (Fla. 2d DCA 2002)).

<sup>5</sup> *Church of the Lukimi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993).

<sup>6</sup> *Id.* at 531 (citation omitted).

<sup>7</sup> *Id.* at 533.

<sup>8</sup> *Lukimi*, 508 U.S. 520.

<sup>9</sup> *McDaniel v. Paty*, 435 U.S. 618 (1978).

<sup>10</sup> *Fowler v. Rhode Island*, 345 U.S. 67 (1953).

<sup>11</sup> *Larson v. Valente*, 456 U.S. 228 (1982).

However, under the Free Exercise Clause of the First Amendment, a state *may* exclude individuals and entities from a generally available government benefit on the basis of religion.<sup>12</sup>

### ***Establishment Clauses***

The Establishment Clause of the U.S. Constitution was intended to afford protection against three main “evils:” sponsorship, financial support, and active involvement of the sovereign in religious activity.<sup>13</sup> Thus, the Establishment Clause “prevents a State from enacting laws that have the ‘purpose’ or ‘effect’ of advancing or inhibiting religion.”<sup>14</sup> The test to determine whether government aid violates the Establishment Clause of the U.S. Constitution is whether the aid:

- Results in governmental indoctrination;
- Defines its recipients by reference to religion or is neutral with respect to religion; or
- Creates an excessive entanglement.<sup>15</sup>

The conditions under which government may aid a religious institution under the Establishment Clause of the U.S. Constitution were identified by the U.S. Supreme Court in *Zelman v. Simmons-Harris*.<sup>16</sup> The *Zelman* Court stated:

that where a government aid program is neutral with respect to religion, and provides assistance directly to a broad class of citizens who, in turn, direct government aid to [a] religious [institution] wholly as a result of their own genuine and independent private choice, the program is not readily subject to challenge under the Establishment Clause. A program that shares these features permits government aid to reach religious institutions only by way of the deliberate choices of numerous individual recipients. The incidental advancement of a religious mission, or the perceived endorsement of a religious message, is reasonably attributable to the individual recipient, not to the government, whose role ends with the disbursement of benefits.<sup>17</sup>

Accordingly, neutrality must be a key feature of government aid programs that benefit a religion. Aid is neutral if the aid has been directed to a religion by a private choice, rather than a government choice. Aid is neutral if “aid is allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and is made available for both religious and secular beneficiaries on a nondiscriminatory basis.”<sup>18</sup>

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<sup>12</sup> *Locke v. Davey*, 540 U.S. 712, 722 (2004).

<sup>13</sup> *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971)

<sup>14</sup> *Zelman v. Simmons-Harris*, 536 U.S. 639, 648-649 (2002).

<sup>15</sup> *Agostini v. Felton*, 521 U.S. 203, 234 (1997).

<sup>16</sup> *Zelman*, 536 U.S. at 652.

<sup>17</sup> *Id.*

<sup>18</sup> *Zelman*, 536 U.S. at 533-654 (quoting *Agostini*, 521 U.S. at 231).

Courts have found that the following types of aid did not violate the Establishment Clause of the U.S. Constitution:

- Annual subsidies directly to qualifying colleges and universities in Maryland, including religiously affiliated institutions;<sup>19</sup>
- Bussing services for both public and private school children;<sup>20</sup>
- The provision of secular textbooks for both public and private school students;<sup>21</sup>
- Construction grants to colleges and universities regardless of affiliation with or sponsorship by a religious body;<sup>22</sup>
- The provision of grants to religious and other institutions to provide counseling on teenage sexuality;<sup>23</sup> and
- Payment of tuition to private religious schools for children in Cleveland, Ohio who attended poor quality public schools.<sup>24</sup>

***Interaction of the Establishment Clauses and the Free Exercise Clause***

“[T]he Establishment Clause and the Free Exercise Clause[] are frequently in tension.”<sup>25</sup> This tension results from the idea that “there are some state actions permitted by the Establishment Clause but not required by the Free Exercise Clause.”<sup>26</sup>

The majority opinion of the U.S. Supreme Court in *Locke v. Davey* stated that a state, consistent with the Establishment Clause of the U.S. Constitution, could include students seeking a degree in theology within the class of students eligible for academic achievement scholarships.<sup>27</sup> However, the majority also held that the Free Exercise of the U.S. Constitution, does not require a theology student to be included within a generally available scholarship program.<sup>28 29</sup>

The dissenting opinion in *Locke* found that the exclusion of theology students from a widely available scholarship program is in violation of the Free Exercise Clause. The test asserted by the dissent to determine whether a state may withhold a benefit as the result of religion was as follows:

When the State makes a public benefit generally available, that benefit becomes part of the baseline against which burdens on religion are measured; and when the State withholds that benefit from some

<sup>19</sup> *Roemer v. Maryland Bd. of Pub. Works*, 426 U.S. 736 (1976).

<sup>20</sup> *Everson v. Board of Education*, 330 U.S. 1 (1947).

<sup>21</sup> *Board of Education v. Allen*, 392 U.S. 236 (1968).

<sup>22</sup> *Tilton v. Richardson*, 403 U.S. 692 (1971).

<sup>23</sup> *Bowen v. Kendrick*, 487 U.S. 589 (1988).

<sup>24</sup> *Zelman*, 536 U.S. 639.

<sup>25</sup> *Locke*, 540 U.S. at 718.

<sup>26</sup> *Id.* at 719.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> Similarly, s. 1009.89, F.S., creates the Florida Resident Access Grant Program to provide tuition assistance for students to attend certain private independent nonprofit colleges and universities in this state. However, the tuition assistance is not available to a student “enrolled in a program of study leading to a degree in theology or divinity.” Section 1009.89(4)(b)2., F.S.

individuals solely on the basis of religion, it violates the Free Exercise Clause no less than if it had imposed a special tax.<sup>30</sup>

Accordingly, the *Locke* Court clearly rejected the idea that the failure to include theology students within the scholarship program was discrimination in violation of the Free Exercise Clause.<sup>31</sup>

### ***Blaine Amendments***

“Florida’s no-aid provision was adopted into the 1868 Florida Constitution during the historical period in which so-called ‘Blaine Amendments’ were commonly enacted into state constitutions.”<sup>32</sup>

Blaine Amendments are provisions in many state constitutions that prohibit the use of state funds at “sectarian” schools. They’re named for James G. Blaine, who proposed such an amendment to the U.S. Constitution while he was Speaker of the U.S. House of Representatives in 1875.

The amendment passed overwhelmingly (180-7) in the House, but failed narrowly (by 4 votes) in the Senate. Supporters of the amendment then turned their attention to the individual states, where they had much more success. In some states, Blaine Amendments were adopted by the usual constitutional amendment process. In the case of states just entering the Union, they were forced to adopt similar language as a requirement for gaining statehood.

Today, 37 states have provisions placing some form of restriction on government aid to “sectarian” schools that go beyond any limits in the U.S. Constitution.<sup>33</sup>

According to the Florida First District Court of Appeal:

[w]hether the Blaine-era amendments are based on religious bigotry is a disputed and controversial issue among historians and legal scholars. Certain commentators contend that the original Blaine-era no-aid provisions were based in part on anti-Catholic religious bigotry. Other commentators argue, however, that anti-Catholic bigotry did not play a significant role in the development of Blaine-era no-aid provisions in state constitutions.<sup>34</sup>

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<sup>30</sup> *Locke*, 540 U.S. at 726-727.

<sup>31</sup> *Holmes II*, 886 So. 2d at 366.

<sup>32</sup> *Id.* at 351-352.

<sup>33</sup> The Becket Fund for Religious Liberty, What are Blaine Amendments?, <http://www.blaineamendments.org/Intro/whatis.html> (last visited Jan. 14, 2008).

<sup>34</sup> *Holmes II*, 886 So. 2d at note 9 (citations omitted).

In contrast, a plurality opinion of the U.S. Supreme Court, authored by Justice Thomas, asserts that Blaine Amendments were motivated by an anti-Catholic bias.<sup>35</sup>

Florida's Blaine Amendment or no-aid provision imposes "further restrictions on the state's involvement with religious institutions than the Establishment Clause" of the U.S. Constitution.<sup>36 37</sup>

The constitutional prohibition in the no-aid provision involves three elements: (1) the prohibited state action must involve the use of state tax revenues; (2) the prohibited use of state revenues is broadly defined, in that state revenues cannot be used "directly or indirectly in aid of" the prohibited beneficiaries; and (3) the prohibited beneficiaries of the use of state revenues are "any church, sect or religious denomination" or "any sectarian institution."<sup>38</sup>

Florida's Blaine Amendment became widely known recently as it was used as a basis, by the First District Court of Appeal in *Bush v. Holmes*, to invalidate the Opportunity Scholarship Program (OSP).<sup>39</sup>

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<sup>35</sup> *Mitchell v. Helms* 530 U.S. 793 828-829 (2000). Justice Thomas wrote:

Finally, hostility to aid to pervasively sectarian schools has a shameful pedigree that we do not hesitate to disavow. Although the dissent professes concern for "the implied exclusion of the less favored," . . . the exclusion of pervasively sectarian schools from government-aid programs is just that, particularly given the history of such exclusion. Opposition to aid to "sectarian" schools acquired prominence in the 1870's with Congress' consideration (and near passage) of the Blaine Amendment, which would have amended the Constitution to bar any aid to sectarian institutions. Consideration of the amendment arose at a time of pervasive hostility to the Catholic Church and to Catholics in general, and it was an open secret that "sectarian" was code for "Catholic." Notwithstanding its history, of course, "sectarian" could, on its face, describe the school of any religious sect, but the Court eliminated this possibility of confusion when, in *Hunt v. McNair*, 413 U.S., at 743, 93 S.Ct. 2868, it coined the term "pervasively sectarian"—a term which, at that time, could be applied almost exclusively to Catholic parochial schools and which even today's dissent exemplifies chiefly by reference to such schools.

In short, nothing in the Establishment Clause requires the exclusion of pervasively sectarian schools from otherwise permissible aid programs, and other doctrines of this Court bar it. This doctrine, born of bigotry, should be buried now.

*Id.* (citations omitted).

<sup>36</sup> *Holmes II*, at 344.

<sup>37</sup> One could argue that the Establishment Clause of the First Amendment permits a state to discriminate on the basis of religion and that Florida's Blaine Amendment requires such discrimination. *See Locke v. Davey* 540 U.S. 712 (2004); *Holmes II*, 886 So. 2d 340.

<sup>38</sup> *Holmes II*, 886 So. 2d at 352.

<sup>39</sup> *Holmes II*, 886 So. 2d 340. The Florida Supreme Court also invalidate the Opportunity Scholarship Program for violating the uniformity requirement of section 1 of article IX of the Florida Constitution. *Bush v. Holmes*, 919 So. 2d 392 (Fla. 2006).

The Legislature created the OSP to allow a student attending a “failing” public school to attend a private school, sectarian or non-sectarian, with the financial assistance of the state. Under the OSP, the state make[s] available opportunity scholarships in order to give parents and guardians the opportunity for their children to attend a public school that is performing satisfactorily or to attend an eligible private school when the parent or guardian chooses to apply the equivalent of the public education funds generated by his or her child to the cost of tuition in the eligible private school. . . .

For the student attending a private school with assistance under the OSP, a state warrant is made payable to a student’s parent or guardian and is mailed by the Department of Education directly to the private school chosen by the parent or guardian; the parent or guardian then is to restrictively endorse the warrant to the private school.<sup>40</sup>

Most of the OSP vouchers went to sectarian schools.

### ***State Programs Potentially in Violation of the Blaine Amendment***

The dissenting opinion in *Bush v. Holmes* repeated the concerns of the Attorney General that the majority opinion “would prohibit any religious institution from acting as a government service provider or participating in secular general welfare programs where there is only an incidental benefit to religion.”<sup>41</sup> As a result, “various legislative programs, in addition to Opportunity Scholarships, that eligible persons may utilize at private educational institutions across Florida, including those that are religiously affiliated or operated,” may be unconstitutional under the Blaine Amendment.<sup>42</sup> These programs include the:

- Florida Bright Futures Scholarship Program;
- John M. McKay Scholarships for Students with Disabilities Program;
- Florida Private Student Assistance Grant Program;
- William L. Boyd, IV, Florida Resident Access Grants;
- Florida Partnership for School Readiness;
- Florida Postsecondary Student Assistance Grant Program;
- Jose Marti Scholarship Challenge Grant Program;
- Mary McLeod Bethune Scholarship Program;
- Critical Teacher Shortage Student Loan Forgiveness Program; and
- Minority Teacher Education Scholars Program.

No fewer than 23 religiously affiliated or operated private four-year universities in Florida are eligible to receive Bright Futures scholarship funds.<sup>43</sup>

<sup>40</sup> *Holmes II*, 886 So. 2d at 347.

<sup>41</sup> *Holmes II*, 886 So. 2d at 376-377 (Polston, J., dissenting).

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

<sup>43</sup> *Id.*

However, the majority in *Bush v. Holmes* stated that its opinion “leaves for another day, if need be, a decision on the constitutionality of any other government program or activity which involves a religious or sectarian institution.”<sup>44</sup>

### III. Effect of Proposed Changes:

Constitutional Proposal 20 repeals a limit on the power of the state to spend funds directly or indirectly in aid of sectarian institutions. Specifically, the measure repeals the Blaine Amendment or no-aid provision of section 3 of article I of the Florida Constitution.

The measure also replaces the Blaine Amendment or no-aid provision with the following statement: “Individuals or entities may not be barred from participating in public programs because of their religion.” Accordingly, the measure prevents the state from excluding individuals and entities from a generally available public benefit or a contract to provide government services on the basis of religion.

#### *Establishment Clause*

Constitutional Proposal 20 will remove a limit on the power of the state to spend funds “directly or indirectly in aid of any church, sect, or religious denomination or in aid of any sectarian institution.” However, the state spending will continue to be limited by the Establishment Clauses of the Florida and U.S. Constitutions. Under the Establishment Clauses, government aid may not:

- Result in governmental indoctrination;
- Define its recipients by reference to religion; or
- Create an excessive entanglement.<sup>45</sup>

#### *Free Exercise Clause*

The new language added to the Florida Constitution conforms the Florida Free Exercise Clause to the interpretation of the Free Exercise Clause of the First Amendment as stated in the dissenting opinion in *Locke v. Davey*. That opinion stated:

[w]hen the State makes a public benefit generally available, that benefit becomes part of the baseline against which burdens on religion are measured; and when the State withholds that benefit from some individuals solely on the basis of religion, it violates the Free Exercise Clause no less than if it had imposed a special tax.<sup>46</sup>

Thus, under the measure, a generally available public benefit or a contract to provide government services may not be withheld from an individual or entity solely on the basis of religion. Consistent with the measure, the state could decline to make government aid

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<sup>44</sup> *Id.* at 362.

<sup>45</sup> *Agostini*, 521 U.S. at 234.

<sup>46</sup> *Locke*, 540 U.S. at 726-727 (2004) (Scalia, J., dissenting).



generally available. Moreover, the state could perform government services itself rather than relying on private contractors.

By operation of subsection (e) of section 5 of article XI of the Florida Constitution, this measure will take effect January 6, 2009.

#### **IV. Constitutional Issues:**

##### **A. Constitutional or Legislative Matter:**

This constitutional proposal repeals a limit on the power of the state to spend funds which is contained in the Florida Constitution. As such, the effect of the measure must be accomplished through a constitutional amendment, rather than a statutory change.

##### **B. Other Constitutional Issues:**

Subsection (d) of section 6 of article XI of the Florida Constitution requires the Commission to:

examine the state budgetary process, the revenue needs and expenditure processes of the state, the appropriateness of the tax structure of the state, and governmental productivity and efficiency; review policy as it relates to the ability of state and local government to tax and adequately fund governmental operations and capital facilities required to meet the state's needs during the next twenty year period; determine methods favored by the citizens of the state to fund the needs of the state, including alternative methods for raising sufficient revenues for the needs of the state; determine measures that could be instituted to effectively gather funds from existing tax sources; *examine constitutional limitations on taxation and expenditures* at the state and local level; and review the state's comprehensive planning, budgeting and needs assessment processes to determine whether the resulting information adequately supports a strategic decision-making process.

Courts have clearly held that the Blaine Amendment or no-aid provision of section 3 of article I of the Florida Constitution is a limit on the power of the state to make expenditures.<sup>47</sup>

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<sup>47</sup> See *Bush v. Holmes*, 886 So. 2d 340 (Fla. 1st DCA 2004).

**V. Economic Impact and Fiscal Note:****A. Tax/Fee Issues:**

None.

**B. Private Sector Impact:**

The measure may insulate government programs providing funds to sectarian institutions from lawsuits alleging that the programs violate the Blaine Amendment. The measure may also result in the use of more sectarian institutions to provide government services.

**C. Government Sector Impact:**

The measure may insulate government programs providing funds to sectarian institutions from lawsuits alleging that the programs violate the Blaine Amendment. The measure may also result in the use of more sectarian institutions to provide government services.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

The language added to section 3 of article I of the Florida Constitution states: "Individuals or entities may not be barred from participating in public programs because of their religion." The inclusion of the word "their" could be read to allow the government to discriminate against all religions. Accordingly, the Commission may wish to delete the word "their" to prevent government discrimination "because of religion."