Hoop Jumping: Overcoming Obstacles to School Vouchers in Georgia

I. Introduction

Education is consistently a hot-button issue with politicians—perhaps due to the fact that there are continuing reports that Georgia’s public schools are sub par.\(^1\) Even improvements by some Atlanta public schools have been besmirched.\(^2\) Debates rage both in legislative bodies and on campaign trails as to the best way to improve public schools. The usual proposals consist of increasing school funding, increasing teacher pay, and reducing class size, yet all of these solutions require greater resources. If these resources are simply unavailable, bureaucrats may attempt more drastic solutions. One such solution to this chronic problem of poorly performing public schools that seems to generate an extraordinary amount of controversy is voucher programs.

The term “voucher” has become mired in political controversy and may have a negative connotation,\(^3\) but it simply

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\(^1\) See, e.g., James Salzer, *1 in 5, and More, Flunk Part of Crucial Test*, ATLANTA JOURNAL and CONSTITUTION, August 16, 2001, at 1A (indicating that although student performance on state curriculum tests had improved 18 to 41% of children still failed sections of these tests that they will, in a few years, be required to pass to be promoted to the next grade).

\(^2\) See Paul Donsky, *Sudden Rise in Test Scores Stirs Concern; Suspicion Grows as Atlanta Schools Fall Off Failing List*, ATLANTA JOURNAL and CONSTITUTION, September 30, 2001, at 1C (explaining that testing experts, and even one school board official, are suspicious about the validity of tests scores showing 30 or more percentage point gains over last year’s results).

\(^3\) See, e.g., Danny Weil, *SCHOOL VOUCHERS and PRIVATIZATION: A REFERENCE HANDBOOK* 83 Danny Weil ed., ABC-CLIO 2002 (“According to some voucher opponents, advocates of an educational market
means a written or printed authorization to disburse money.\textsuperscript{4} In an educational context a voucher program works something like this: (1) the state gives parents some sort of document, perhaps a certificate, which they take to a school of their choosing; (2) they then sign the voucher over to that school; (3) and the school receives money from the state equaling the amount of the voucher. It is this first component—allowing parents to choose which school their children will attend by designating which school will receive the voucher—that forms the basis of much of the controversy surrounding voucher programs. The father of school vouchers, Milton Friedman,\textsuperscript{5} argues—as do many other modern neoliberal economists—that vouchers will allow families to make their own contribution to the cost of education. As families try to select the best schools for their children, a market for education will be created, and the competition generated in this market will improve all schools.\textsuperscript{6}

However, these voucher plans—or opportunity scholarships as they are sometimes euphemistically called\textsuperscript{7}—are not without critics. Some opponents of voucher programs question the

\textsuperscript{4} BLACK’S LAW DICTIONARY 1571-1572 (7th ed. 1999).
\textsuperscript{5} See, e.g., Weil, supra note 3 at 87.
\textsuperscript{6} Friedman’s perspective basically supports a form of trickle-down educational economics, under which innovations filter down to basic schools once they have been institutionalized for those who can initially afford them. Thus, according to the theory, they luxury for a few will eventually become the norm for the many.
\textsuperscript{7} See Weil, supra note 3 at 83.
proposition that market-based competition will improve public schools because true competition would require a level playing field.\textsuperscript{8} Other activists oppose vouchers on a legal basis arguing that vouchers, if spent at private, religious schools, would violate the separation of church and state.\textsuperscript{9} The primary focus of this paper is the legal arguments against vouchers with a particular emphasis on the laws of Georgia.

Part II of this paper explains how the Establishment Clause of the First Amendment has previously been viewed as an obstacle to voucher programs and how that obstacle has been removed. Part III discusses how Georgia’s Blaine amendment might hinder the implementation of a voucher program in this state, and Part IV gives a brief history of how the Blaine amendments came into being. Part V examines whether Georgia’s Blaine amendment could survive a federal Equal Protection challenge. Finally, Part VI posits that an obscure article of the Georgia Constitution intended to restrict the use of local tax monies to fund only public schools might be a further legal barrier to voucher programs being implemented in this state.

\textsuperscript{8} See Weil, supra note 3 at 97.
If public funds were bequeathed to private schools, PFAW [People for the American Way] argues, private schools would almost certainly have access to entrepreneurial venture capital or seed monies, while public schools would quickly see needed monies and crucial resources vanish. Competition between public and private schools could not possibly work…because the market concept creates a win-lose situation in which public schools would be left bereft of funds while private would enjoy private infusions of public and private venture capital.

\textsuperscript{9} See also Weil, supra note 3 at 98.
\textsuperscript{9} See Weil, supra note 3 at 101.
II. Establishment Clause Jurisprudence

Until recently, the Establishment Clause of the First Amendment might have been the most potent legal impediment to voucher programs. The Supreme Court, however, has consistently interpreted the Establishment Clause liberally. One of the earliest cases in which the Establishment Clause was used to challenge a publicly funded education program was Everson v. Board of Education. In that case petitioners claimed that a New Jersey statute which allowed the use of public funds to provide transportation to children attending private religious schools violated the Establishment Clause. In rejecting this argument and holding that the statute was constitutional, the Court said, “The Amendment [First Amendment] requires the state to be a neutral in its relations with religious believers and nonbelievers; it does not require the state to be their

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10 U.S. Const. amend. I (“Congress shall make no law respecting an establishment of religion…”).
11 Many progressive activists and other civil libertarians opposed to voucher believe that the required separation between church and state, as embodied within the U.S. Constitution, will in the end force states and municipalities to abandon their support for private choice [vouchers]. They ardently maintain that if the church-state separation argument against vouchers can be made successfully, then much of the privatization sought through the voucher movement will need not be confronted politically….”

See Weil, supra note 3 at 101.
12 Although the Court has been consistently interpreted the Establishment Clause liberally in that it was not read in such a way as to bar all state aid benefiting religious institutions, the Court has wavered on precisely how liberal a reading to give this clause. See Linda S. Wendtland, Beyond the Establishment Clause: Enforcing separation of Church and State Through State Constitutional Provisions, 71 Va. L. Rev. 625, 626-28 (1985) (Wendtland explains that the Court’s reading of the Establishment clause has evolved in three phases: (1) tolerating church-state involvement in the first phase, (2) broadening the reach of the Establishment Clause in the second phase and restricting church state involvement, and (3) relaxing its interpretation of the Establishment Clause once again.
14 Id. at 5.
adversary. State power is no more to be used so as to handicap religions, than it is to favor them.”

Later, in *Lemon v. Kurtzman* the Court developed a three-part test—often called the “Lemon” test—by which to analyze church-state cases. Note that even under this test, created in an era in which the Court more strictly interpreted the Establishment Clause, some forms of state aid would be permissible. The Court has never, even under its most strict interpretation of the Establishment Clause, read it in such a way as to conclude that it bars all state aid to religious institutions. Thus, reading *Lemon v. Kurtzman* in conjunction with *Everson v. Board of Education* and more modern Establishment Clause cases, one can discern an unvarying judicial philosophy steering the Court’s vacillating Establishment Clause jurisprudence. Apparently, statutes appropriating monies that flow to, or in some way benefit, sectarian schools will not, per se, violate the Establishment Clause of the First Amendment.

The culmination of this judicial philosophy came in the landmark case *Zelman v. Simmons-Harris* which removed, or at least greatly reduced, the Establishment Clause as a legal

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15 *Id.* at 18.
16 See, e.g., Weil *supra* note 3 at 103.
17 *Lemon v. Kurtzman*, 403 U.S. 602 (1971) at 611 (“First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion...finally, the statute must not foster an excessive government entanglement with religion.”).
18 Wendtland *supra* note 12 at 627.
barrier to voucher programs.\textsuperscript{20} In Zelman, the state of Ohio had established a pilot program whereby parents who had children attending the poorly performing schools of the Cleveland City School District would get tuition aid (vouchers) to attend a participating public or private school of the parents’ choosing. A group of Ohio taxpayers filed suit claiming the Cleveland program violated the Establishment Clause. They argued that the program would create a public perception that the State was endorsing religious practices.\textsuperscript{21} They further asserted that parents lacked a genuine choice to enroll their children in non-sectarian schools as evidenced by the fact that the vast majority of children receiving vouchers enrolled in religious schools.\textsuperscript{22}

The Court, in rejecting these arguments, explained that a voucher program that was neutral with respect to religion, provided benefits to a wide spectrum of individuals, and gave parents genuine choice between public and private schools would not offend the Establishment Clause.\textsuperscript{23} In response to the argument that the program put the state’s imprimatur on religion, the court stated, “...{W}e have repeatedly recognized that no reasonable observer would think a neutral program of

\textsuperscript{20} 536 U.S. 639 (2002).
\textsuperscript{21}  Id. at 654.
\textsuperscript{22}  Id. at 658.
\textsuperscript{23}  Id. at 663.
private choice, where state aid reaches religious schools solely as a result of the numerous independent decisions of private individuals, carries with it the imprimatur of government endorsement.”24 As to the argument that the large numbers of parents choosing to enroll their children in sectarian schools demonstrated a lack of genuine choice, the Court responded that the constitutionality of a neutral education program simply does not turn on whether and why, in a particular area, at a particular time, most private schools are run by religious organizations, or most recipients choose to use the aid at a religious school.25 Consequently, the Cleveland program was deemed to be within the bounds of the Establishment Clause because the parents had legitimate freedom to chose which school would received their child’s tuition aid, and the mere fact that a large majority of the parents chose to spend that aid at a religiously affiliated school was irrelevant as to whether the parents had genuine choice between sectarian and non-sectarian schools.

III. Georgia’s Blaine Amendment as a Possible Obstacle to Voucher Programs

The Zelman case, however, should not be seen as the “green light” for voucher programs in Georgia. One might think that

24 Id. at 654-55; See also Mueller v. Allen, 463 U.S. 388, 399.
25 Id. at 658.
because *Zelman* was a Supreme Court case that states lack the power to block voucher programs using the Establishment Clause, but this is not the case. Professor Kermer’s research indicates a good number of states do not consider themselves to be bound by the United States Supreme Court’s Establishment Clause Jurisprudence\(^{26}\), and some states go so far as to say that their state constitutional standards are more demanding in terms of the level of church-state separation required than the Federal Constitution.\(^{27}\)

One of those states with more demanding standards is Washington. *Witters v. State Commission for the Blind* is a good example of how state supreme courts can apply stricter church-state separation standards than the United States Supreme Court. In *Witters* a blind man named Larry Witters applied for vocational rehabilitation funds from the Washington State Commission for the Blind which he planned to use to enroll in seminary. His request was denied, and his case went all the way to the Washington Supreme Court which upheld the state’s decision to deny Witters funding request.\(^{28}\) The Supreme Court granted certiorari and unanimously reversed the decision of the Washington Supreme Court but in remanding the case stated, “the


\(^{27}\) See Heytens *supra* note 26 n.52. (The twelve states are Alaska, California, Delaware, Hawaii, Idaho, Michigan, Minnesota, Missouri, Nebraska, South Dakota, Virginia, and Washington.)

state court is of course free to consider the applicability of the ‘far stricter’ dictates of the Washington State Constitution. On remand the Washington Supreme Court again upheld the state’s decision to deny Witters funding relying not on the Establishment Clause but rather on the state’s Blaine amendment. The court wrote:

The applicant urges that we examine the vocational rehabilitation program and not focus on his individual participation in the program. His argument ignores the ‘sweeping and comprehensive’ language of Const. art. 1, § 11, which prohibits not only the appropriation of public funds for religious instruction, but also the application of public funds to religious instruction. Herein lies a major difference between our state constitution and the establishment clause of the first amendment to the United States Constitution.

Like Washington, Georgia also has a Blaine amendment, which could be interpreted, as the Washington court interpreted their

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30 Wa. CONST. art. I, § 11 (…No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment…).
31 771 P.2d 1119, 1121-22.
Blaine amendment, as being a much stricter standard for church-state separation than the federal Establishment Clause. It reads: “No money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect, cult, or religious denomination or of any sectarian institution.”  

Because voucher programs have not been implemented in this state, Georgia Courts have not had to determine whether this state’s Blaine amendment prevents such programs.

Of course, Georgia legislators may try to circumvent a Blaine amendment challenge by prohibiting vouchers from being spent at private sectarian schools. This is unlikely, however. The whole purpose of a voucher program is to foster improvement among school systems through competition by giving parents a choice as to what school their children will attend. If private religious schools were eliminated from the available pool of schools from which to choose, the options available to parents would be significantly reduced. This would dilute the competition for students by schools necessary to force schools to improve thereby hampering the effectives of vouchers. Thus, for voucher programs in this state to have maximum effectiveness

32 G.A. CONST. art. I, § 2, ¶ VII.
33 See Weil supra note 3 at 87-89.
34 See Toby J. Heytens supra note 26 at 121 (Since over 85% of private primary and secondary schools [in the U.S.] are religiously affiliated, it is difficult to implement a viable voucher program that does not include religiously affiliated schools.”). See also David Boaz and R. Morris Barrett, What Would a Voucher Buy? The Real Coast of Private Schools, Cato Briefing Paper #25 (1996) at http://www.cato.org/pubs/briefs/bp-025.html. (In a listing of private high schools in Dekalb and Fulton Counties, Georgia over 60% had terms in their title indicating religious affiliation).
parents must be able to spend those vouchers at religious schools.

One can only speculate how the Georgia courts might rule on a challenge to a voucher program that included sectarian schools, but there are several sources which are instructive. On its face Georgia’s Blaine amendment seems far more restrictive than the federal Establishment Clause because it expressly prohibits public money from aiding, either directly or indirectly, religious institutions.\textsuperscript{35} No such language is found in the Establishment Clause, and one aspect of its interpretation on which the Supreme Court has not wavered is that it does not prohibit “indirect” support of religious institutions.\textsuperscript{36} A former Attorney General of this state also believed Georgia’s Blaine amendment to be more broadly prohibitive than the Establishment Clause. In a 1960 opinion he wrote:

\begin{quote}
It is to be noted that the State Provision is far more explicit than the Federal, as the State Constitution deals with State-Aid to churches, while the Federal does so only inferentially. Moreover, the State provision refers to money being granted
\end{quote}

\textsuperscript{35} See G.A. CONST. art. I, § 2, ¶ VII.
\textsuperscript{36} See Wendtland \textit{supra} note 12 at 627-28.
“directly or indirectly”, which indicates on its face the broadest type of proscription. That the State provision quoted above was intended to have a stronger application than the Federal is indicated by the fact that the State Constitution contains in the immediately proceeding paragraph...a more general religious freedom guarantee...37

Moreover, the Supreme Court of Georgia does not have a propensity for activism. On numerous occasions the court has stated that when a statute is plain on its face judicial gloss is unnecessary and forbidden.38

Although Georgia’s Blaine amendment may be more precise than the Establishment Clause, there may still be some room for judicial construction because “indirect aid” is not expressly defined. Furthermore, there is now a provision in the Georgia Constitution authorizing the General Assembly to expend public funds for educational assistance programs such as grants, scholarships, loans, etc. Interestingly, the money can be given to students or to parents.39 The potential tension between these

38 See City of Jesup v. Bennett, 226 Ga. 606, 609 (1970) (“...[W]here the language of an Act is plain and unequivocal, judicial construction is not only unnecessary but is forbidden.”) See also Minnix v. Department of Transportation, 272 Ga. 566.
39 G.A. CONST. art. VII, § 7, ¶ 1 (a) Pursuant to laws now or hereafter enacted by the General Assembly, public funds may be expended for any of the following purposes: (1) to provide grants, scholarships,
two constitutional provisions further obfuscates the applicability of the Blaine amendment.

A sampling of how other state courts have ruled on Blaine amendment challenges to voucher programs is informative but not conclusive. Both Florida and Wisconsin have Blaine amendments, but the Wisconsin Supreme Court upheld its state’s voucher program while Florida’s Circuit Court did not. In the early 1990s Wisconsin instituted a school choice program. It was subsequently amended but is still very similar to the Cleveland program. Under this plan parents were allowed to choose which school their child would attend. The state would send a check to the school, but the parents had to restrictively endorse it before that particular school could receive the funds. This way the money was deemed to be given to the parents rather than the school. Plaintiffs filed suit claiming, among other things, that the choice plain violated Wisconsin’s Blaine amendment because some parents chose to send their children to religious schools. The facts of the Florida case are almost identical to this. So why the different results, and which case is the better indicator for how Georgia courts will interpret its Blaine amendment?

loans, or other assistance to students and to parents of students for educational purposes. See also Frank R. Kermer, State Constitutions and School Vouchers, 120 Ed. Law Rep. 1, 5 n.17 (1997).

42 578 N.W. 2d 602 at 609.
43 Id. at 609
The Florida case is probably the better of the two. Wisconsin’s Blaine amendment is quite different from Georgia’s. Specifically, it does not contain the “directly or indirectly” language of the Georgia provision, yet Florida’s Blaine amendment tracks the Georgia provision very closely. It reads:

There shall be no law respecting the establishment of religion or prohibiting or penalizing the free exercise thereof…. 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.

Also, the Wisconsin court did not seem to give the Blaine amendment in their constitution much deference while the above-quoted provision was the linchpin of the case in Florida. In deciding its case the Wisconsin court seemed to follow the Supreme Court’s Establishment Cause jurisprudence as if its constitution had the exact same wording. The court said, “The crucial question under art. I, § 18, as under the Establishment Clause, is ‘not whether some benefit accrues to a religious

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44 Wi. CONST. art. I, § 18 (“…[N]or shall any money be drawn from the treasury for the benefit of religious societies, or religious or theological seminaries.”
45 See G.A. CONST. art. I, § 2, ¶ VII.
46 Fl. CONST. art. I, § 13.
47 2002 WL 1809079.
institution as a consequence of the legislative program but whether its principal or primary effect advances religion.”

Given their long-established precedent of not construing a statute that is plain on its face, the Georgia courts would not be inclined to follow Establishment Clause jurisprudence when the wording of the state’s Blaine amendment is so much more precise. Therefore, because of Florida’s constitutional language tracking more closely that of Georgia’s and the unlikelihood of Georgia courts not following the well-established principle of not putting judicial gloss on a plainly worded statute, the Florida case is probably a better indicator of whether voucher programs could survive under the Blaine amendment of this state.

IV. A Brief History of the Blaine Amendments

Georgia’s Blaine amendment—as are many other similar amendments in other state constitutions—is a derivative of an amendment proposed by Representative James G. Blaine of Maine in 1875. The motivation for Representative Blaine’s amendment was strong anti-Catholic sentiment. From about the mid-1860s to the late 1910s, the number of Catholic Americans increased

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48 578 N.W. 2d 602 at 621.
51 See 4 Cong. Rec. 205 (1875).
exponentially.\textsuperscript{52} Even though their numbers had increased dramatically, Catholics did not easily assimilate into the Protestant-dominated society, especially the school system\textsuperscript{53}. Catholics found that the Protestants who controlled the schools had instituted policies counter to their faith. For example, public schools in Massachusetts required daily reading of the King James version of the Bible, and while not made mandatory, another seventy-five to eighty percent of the rest of the schools in the country voluntarily followed the practice of reading daily from a Protestant Bible.\textsuperscript{54}

In response to these unfavorable public school policies, Catholics became politically active. Just three years before Blaine introduced his original amendment, Catholic activists achieved a major victory when the Ohio Supreme Court sustained the Cincinnati Board of Education’s decision to remove the King James Bible from the public school curriculum.\textsuperscript{55} This decision,

\begin{itemize}
\item \textsuperscript{52} Heytens \textit{supra} note 26 at 135 (2000) (“The Catholic population nearly doubled between 1864 and 1884, a time when the overall population grew 59%. By 1891, 8,277,000 made up 12.9% of the nation’s population. Through a combination of immigration and domestic birth rate, the number of Catholic Americans grew by over two million each decade from 1891 until 1921, by which time they constituted 16.5% of the nations population.”).
\item \textsuperscript{53} Heytens \textit{supra} note 26 at 136 (“These Catholic immigrants were not easily assimilated into the Protestant-dominated civil society that had characterized the United States prior to the Civil War…. Catholics often perceived Protestant-controlled public schools as hostile to their faith values.”); \textit{See also} Viteritti \textit{supra} note 50 at 667 (1998) (“One cannot separate the founding of the American common school and the strong nativist movement that had its origins at the Protestant pulpit. By the time Mann [Massachusetts secretary of education] had opened the doors of his first school in 1837, a network of Protestant newspapers was in circulation delivering their distinctly anti-Catholic message.”). Viteritti goes on to state the Catholic experience in Massachusetts was indicative of the national mood.
\item \textsuperscript{54} Viteritti \textit{supra} note 50 at 666-67.
\item \textsuperscript{55} Heytens \textit{supra} note 26 at 136.
\end{itemize}
and others like it, coupled with the fact that Catholics in many states lobbied to receive public funds to support their parochial schools, sparked a wave of anti-Catholic rhetoric.  

All of this simmering political pressure caused President Grant to respond by proposing a constitutional amendment outlawing public support of religious institutions. The Congressional sponsor for this amendment was none other than James G. Blaine. Under the guise of correcting a constitutional defect, Blaine submitted his proposed amendment to the Congress in the winter of 1875. Blaine’s original proposal read:

No State shall make any law respecting an establishment of religion or prohibiting the free exercise thereof; and no money raised by taxation in any state for the support of public schools, or derived from any public fund thereof, nor public lands devoted thereto, shall ever be under the control of

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56 Heytens supra note 26 at 137 (“Both sets of efforts [removing Protestant bias from public schools and gaining public funding for Catholic schools] were met with fierce resistance from nativist Protestant groups. Overtly anti-Catholic periodicals proliferated, and anti-Catholic sermons thundered from Protestant pulpits. Anti-Catholic activists pushed for compulsory schooling laws that would require all children to attend public schools.”).

57 Viteritti supra note 50 at 670.

58 Viteritti supra note 50 at 670-71 (“In order for Grant’s proposal to be realized, it would need a Congressional sponsor. That role was enthusiastically filled by Congressman James G. Blaine of Maine, who aspired to obtain the Republican party nomination to succeed Grant as president and who fully appreciated the wide political appeal of the nativist and anti-Catholic rhetoric that accompanied the President’s proposal.”).
any religious sect, nor shall any money so raised or lands so devoted be divided between religious sects or denominations.\textsuperscript{59}

Although the proposal does not specifically mention Catholics, there is little doubt that Blaine’s proposed amendment was aimed directly at them.\textsuperscript{60} Particularly noteworthy is that the majority of religiously affiliated schools at the time the Blaine amendment was introduced were Catholic.\textsuperscript{61}

The amendment was never passed into law,\textsuperscript{62} but Blaine amendments were enacted in many state constitutions following the defeat at the federal level\textsuperscript{63} and now pose a high hurdle for voucher proponents to overcome.

**V. Georgia’s Blaine Amendment and Equal Protection Doctrine**

If, indeed, the Georgia courts interpreted this state’s Blaine amendment in such a way as to forbid parents from spending vouchers at religious schools, then it is plausible that the Blaine amendment would be subject to an Equal Protection challenge\textsuperscript{64}. Generally, when a statute is challenged

\textsuperscript{59} See 4 Cong. Rec. 5191-92 (1876). See also Heytens supra note 26 at 132.

\textsuperscript{60} See Viteritti supra note 50 at 671.

\textsuperscript{61} See Heytens supra note 26 at 138.

\textsuperscript{62} See, e.g., Heytens supra note 26 at 134.

\textsuperscript{63} See Viteritti supra note 50 at 672-73 (explaining that many southern states adopted Blaine amendments during Reconstruction and new territories seeking statehood would be required to incorporate Blaine amendments into their state constitutions in order to receive congressional approval).

\textsuperscript{64} U.S. CONST. amend. XIV, § 1 (“...[N]or Shall any State Deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws”).
based on Equal Protection grounds, the Court will evaluate the legislation using a rational basis test; however, if a statute discriminates against a suspect class, the Court applies strict scrutiny analysis to determine its constitutionality.

A state statute can discriminate against suspect classes by either being facially discriminatory or by being facially neutral toward suspect classes yet having been enacted with discriminatory intent. An example of this later type of discrimination can be found in the case of Hunter v. Underwood. In that case the state of Alabama had enacted a constitutional provision which disenfranchised persons convicted of crimes involving moral turpitude. The Court conceded that the statute was facially neutral with regard to race, but because the statute had been enacted out of racial animus, it was still held to be unconstitutional.

Clearly, Georgia’s Blaine amendment is facially discriminatory. It applies different standards to private sectarian institutions than it does to private nonsectarian institutions. It prohibits public funds from aiding private institutions only if those institutions are religiously

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65 See San Antonio Indep. Sch. Dist. v. Rodriguez 411 U.S. 1, 17 (1973) (stating that even if the statute sub judice is not subject to strict scrutiny it will still be evaluated to determine if it rationally furthers some legitimate state purpose and does not invidiously discriminate).
66 See id.
67 See Heytens supra note 26 at 141.
68 471 U.S. 222.
69 Id. at 223.
70 See id. at 231-33.
Second, it was enacted with a discriminatory purpose—namely, to keep Catholic schools from receiving public funds. The historical record is replete with evidence that the impetus for the proposal of the original Blaine amendment, and its derivatives, was anti-Catholic sentiment by the Protestant majority and an abhorrence of the idea of state funds being used to aid this religion.

Of course, Georgia’s Blaine amendment was first enacted in 1877. That was a relatively long time ago, but passage of time, standing alone, does not purge the original invidious intent of the legislation. In Hunter the Court, in striking down the Alabama provision, dismissed Alabama’s argument that the original intent of the legislation is not controlling. Appellants argued that over eighty years had passed since the enactment of the original legislation. Since then some of the more discriminatory selections of the statute had been struck down by courts, and those provisions that remained served a legitimate, nondiscriminatory state interest. The Court responded: “Without deciding whether § 182 would be valid if enacted today without any impermissible motivation, we simply observe that its original enactment was motivated by a desire to

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71 See G.A. CONST. art. I, § 2, ¶ VII.
72 See generally Heytens supra note 26; Viteritte supra note 50.
73 See generally Viteritti supra note 50.
74 471 U.S. 222 at 232-33.
75 Id. at 233.
discriminate against blacks on account of race.... As such, it violates equal protection..." 76 Although it may be possible for a legislature to vitiate the original discriminatory intent of a piece of legislation, 77 that is irrelevant in this particular case. Removing the invidious, discriminatory intent of a statute that discriminates on its face would be of scant value.

Whether Georgia’s Blaine amendment is facially discriminatory or enacted with a discriminatory purpose or both matters little unless religion is held to be a suspect class, for without suspect class status there is no strict scrutiny. The Supreme Court has stated that distinctions based on religion are suspect. In United States v. Armstrong the Court, in discussing criminal prosecutions, said that a decision to prosecute could not be based on a unjustifiable standard such as race, religion, or other arbitrary classification. 78

But the issue has not been conclusively resolved. Even Heytens, in determining that religion is a suspect class, admits to a couple of factors that may cast doubts on his conclusion. First is that the modern Supreme Court has never analyzed a claim of discrimination against a religious group or against

76 Id. at 233.
77 Heytens supra note 26 at 148 (“Explicit legislative reauthorization purges the taint of prior discriminatory purpose; the newly authorized, facially neutral provision is therefore constitutional unless a fresh showing of discriminatory purpose is made.”).
78 571 U.S. 456 at 464. See also Burlington N. R. R. Co. v Ford, 504 U.S. 648.
religion in general under the Equal Protection Clause.\textsuperscript{79} Also, applying strict scrutiny to discrimination against religious groups as a whole or Catholics in particular may not involve the same policy concerns that have been touted as reasons for giving other groups suspect-class status.\textsuperscript{80}

It seems disingenuous to argue that religious groups are discrete and insular minorities\textsuperscript{81}. Given that over 80\% of Americans believe in God\textsuperscript{82}, one would have to admit that religious people are the super majority rather than an insular minority. But the Supreme Court has bestowed the coveted suspect class classification on non-minorities. In \textit{Richmond v. J. A. Croson Co.} the Court held that the Fourteenth Amendment requires strict scrutiny of all race-based actions by state and local governments. The Court stated, “...[T]he standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification.”\textsuperscript{83} Therefore, caucasian males, certainly not a discrete and insular minority, can be a suspect class. And if they can be, religious groups might could be too.

If religious groups are deemed to be a suspect class, could Georgia’s Blaine amendment survive strict scrutiny? To pass

\textsuperscript{79} Heytens \textit{supra} note 26 at 143.
\textsuperscript{80} Heytens \textit{supra} note 26 at 143.
\textsuperscript{81} “Discrete and insular minorities” comes from \textit{United States v. Caroline Products Co.}, 304 U.S. 144 n.4 (1938).
\textsuperscript{82} Heytens \textit{supra} note 26 at 143-44.
\textsuperscript{83} 488 U.S. at 494 (1989).
strict scrutiny analysis, the state must have a compelling interest to justify its discrimination. This is a very difficult standard for states to meet, and consequently, very few pieces of legislation have been upheld under strict scrutiny analysis. However, in some cases states have been permitted to discriminate on the basis of a suspect classification. One such example would be the use of racial preferences to remedy past racial discrimination caused by a government body.\(^8^4\) Admittedly, compliance with the Establishment Clause is also a compelling state interest.\(^8^5\) Interestingly, the Washington court, in \textit{Witters}, concluded that it had a compelling state interest in maintaining strict separation of church and state.\(^8^6\) This seems a bit dubious, however, because the court invoked a compelling state interest to enforce a law that is more restrictive and provides less protection to religious groups than the Establishment Clause. While there is no direct legal precedent on point, it seems unlikely that the Supreme Court would countenance this circuitous use of a compelling state interest. Therefore, if religious groups are given suspect class status, it seems doubtful that Georgia’s Blaine amendment could survive the demanding test that is strict scrutiny.

\(^{8^4}\text{Id. at 491-92.}\)
\(^{8^6}\text{689 P. 2d at 1123.}\)
VI. Local Tax Dollars and Private Schools

Finally, perhaps the most potent legal restriction to a voucher program in Georgia could be a constitutional provision that governs only local funding of education. G.A. Const. art. 8, § 6, ¶ 1 (b) reads: “School tax funds shall be expended only for the support and maintenance of public schools, public vocational-technical schools, public education, and activities necessary or incidental thereto, including school lunch purposes.” One might wonder why this particular provision has any relevance at all since it pertains exclusively to local tax revenues (property taxes). After all, if Georgia legislators model a voucher program after the Cleveland pilot project—and presumably they would since the Supreme Court has already determined that the Cleveland program passes Constitutional muster, at least with regards to the Establishment Clause—money would come from state, not local, tax revenues.

To understand why this provision could be a significant impediment to a voucher program, one must delve into the almost impenetrable complexities of Georgia’s Quality Basic Education Act (QBE). The code provisions of this act set up the system through which local school districts receive state aid. Local school districts raise money by levying taxes on the real

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property located inside the district. The tax is assessed against 40% of the fair market value of each piece of real property.\textsuperscript{89} Each district is required to levy a tax of at least five mills against that 40% (often called the local fair share contribution) that goes directly to support the QBE.\textsuperscript{90} The amount of state aid each district is entitled to is determined by the weighted full time equivalent pupils (WFTE) attending school in that district.\textsuperscript{91} The calculation of the WFTE is complex\textsuperscript{92}, but its purpose is to determine the number of students in each district. The WFTE is then multiplied by what the state has estimated to be the cost of educating one child (about $2,300),\textsuperscript{93} and the product is the amount of that school district’s entitlement for that year. From this total the local five mill share is subtracted, and the difference is the amount


\textsuperscript{90} Sielke \textit{supra} note 89 at 2 (“Local districts are required to levy five mills (the local fair share contribution) to support the QBE.”). See Ga. Code ANN. § 20-2-164 (explaining how the local five mill share of each school district is calculated).

\textsuperscript{91} Sielke \textit{supra} note 89 at 1 (“Funding is a foundation program based on weighted full time equivalent students in 14 programs.”).

\textsuperscript{92} See Sielke \textit{supra} note 89 at 5 (“The Georgia State Board of Education designates specific dates upon which the student count shall occur; one count date occurs in [sic] fall and the second one occurs in the spring of the current school year. Counts are reported based on one-sixth segments of the school day. Only students in authorized courses are included in the count…. Local school districts count the number of one-sixth segments of the school day for which each student is enrolled in each authorized program…The total number of segments counted for each program is divided by six, resulting in the FTE count for each respective state program.”); See also Ga. Code ANN. § 20-2-160 to 161 (describing in more precise, albeit more cryptic, statutory language how the FTE count is to be conducted).

of money the state actually sends to the school district.\textsuperscript{94}

Notice that even though the five mill share is raised through local property taxes it is still considered part of the state’s QBE funding. But one could argue that this is a commingling of state and local funds because the five mill share is derived from local property taxes. This is where Ga. Const. art. 8, § 6, ¶ 1 (b) becomes relevant. If these arguably commingled funds—originally appropriated to fund the QBE—were doled out in the form of vouchers to parents who in turn spent that voucher at a nonpublic institution, one could further argue that this would violate the aforementioned constitutional provision. On the other hand, a court might conclude that this local five mill share is part of the state’s contribution to education making G.A. Const. art. 8, § 6, ¶ 1 inapplicable. The point, simply, is that a strong argument can be made the local five mill contribution is governed by this constitutional provision, and if a Georgia court found that argument persuasive, it could pose a significant hurdle to voucher programs being implemented in this state.

\textbf{VII. Conclusion}

As it currently stands, a voucher program in Georgia modeled after the Cleveland plan would be on tenuous legal footing. Although the federal Establishment Clause may no

\textsuperscript{94} See Sielke \textit{supra} note 89 at 6-7.
longer be a legal hindrance to a voucher program in this state, both Georgia’s Blaine amendment and the constitutional provision prohibiting local tax funds from being expended at private schools could pose formidable obstacles to voucher legislation.

Despite the fact that there is no case law directly on point and it is not entirely clear how strictly Georgia courts would interpret Georgia’s Blaine amendment, an action to enjoin the State from implementing a voucher program based on this provision would, at minimum, be colorable. The Georgia Supreme Court has repeatedly said that when a statute is plain on its face the court will not apply judicial gloss. Of course that begs the question: Is the Blaine amendment plain on its face? Even if one were to argue that “indirect” is a nebulous term, the opinion of the state attorney general stating that he believed Georgia’s Blaine amendment was more prohibitive of church-state interaction than the Establishment Clause of the federal constitution further bolsters the argument that the Georgia Supreme Court would use this provision to strike down a voucher program that included religious schools.

If that were to happen, the amendment could be challenged using the Equal Protection Clause of the Fourteenth Amendment. If challenged, Georgia’s Blaine amendment would be subject to strict scrutiny provided that religion is deemed to be a suspect class. If strict scrutiny analysis is used, it is inconceivable
that this amendment would survive the compelling state interest test strict scrutiny analysis requires—although the Washington court concluded that its compelling state interest of maintaining strict separation of church and state permitted it to strike down funding that aided religious schools.

Furthermore, even if the Blaine amendment were struck down on Equal Protection grounds, one still has to deal with the school tax funding provision clearly forbidding use of local public funds at any place other than public schools. Therefore, it seems unlikely that vouchers can exist under the current legal scheme. There are just too many hoops to jump through. And, unless there is a groundswell of support for vouchers that is so great as to cause this state’s legislature to amend the constitution, vouchers probably will not be implemented in Georgia.95

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