

FREE EXERCISE AND *COMER*: ROBUST ENTRENCHMENT OR SIMPLY MORE OF A MUDDLE?

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INTRODUCTION

Several states are barred by their own constitutions from spending public monies in support of sectarian institutions. The United States Supreme Court has manifested great ambivalence about the constitutionality of such limitations. Sometimes, the Court has impliedly endorsed them as a reasonable measure to assure that Establishment Clause guarantees are respected. At other times, the Court has suggested that such limitations are constitutionally disfavored, although the Court has not yet held that such amendments are *per se* unconstitutional. The Court's most recent decision addressing state constitutional spending limitations, *Trinity Lutheran Church of Columbia, Inc. v. Comer*,¹ adds another layer of complexity and confusion to an already muddled jurisprudence. That decision, unless modified, could have surprising implications that the Court is avowedly unwilling to endorse.

Part I of this article discusses both a former proposed amendment to the Federal Constitution, the Blaine Amendment ("Federal Blaine Amendment"), that bans the use of public monies to support sectarian schools and several state constitutional amendments ("State Blaine Amendments") that bar such expenditures. Part I also explains some of the difficulties in showing that these amendments were motivated by animus and why demonstrating such animus might not be sufficient to establish that such laws should be struck down as a violation of constitutional guarantees. Part II discusses the Court's inconsistent attitudes towards State Blaine Amendments, detailing some of the ways in which *Comer* makes a confusing jurisprudence even more confusing. Part II.A discusses *Everson v. Board of Education*,² a seminal case that the

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1. 582 U.S. __, __, 137 S. Ct. 2012, 2017 (2017).

2. 330 U.S. 1 (1947).

Comer Court misinterprets. Part II.B discusses the Court's ambivalent attitudes toward State Blaine Amendments as reflected in *Mitchell v. Helms*³ and *Locke v. Davey*.⁴ Part II.C discusses *Comer* and its misleading interpretation and application of *Everson*. The article concludes that the Court's most recent foray into this area is, at best, regrettable for a number of reasons and must be modified or overruled.

I. THE PASSAGE OF THE STATE BLAINE AMENDMENTS

Many states have constitutional amendments limiting or prohibiting spending state monies on sectarian schools. Although these amendments differ in word⁵ and effect,⁶ they are nonetheless sometimes grouped together and called State Blaine Amendments.⁷ That designation is itself biased because of the taint associated with the proposed amendment to the Federal Constitution sponsored by Senator James Blaine in 1884. However, that taint, even if deserved, may not sufficiently establish the constitutional invalidity of those state constitutional amendments.

3. 530 U.S. 793 (2000).

4. 540 U.S. 712 (2004).

5. See Mark Edward DeForrest, *An Overview and Evaluation of State Blaine Amendments: Origins, Scope, and First Amendment Concerns*, 26 HARV. J.L. & PUB. POL'Y 551, 554 (2003) (discussing "a collection of state constitutional provisions known collectively and generically as 'Blaine Amendments'"); Jill Goldenziel, *Blaine's Name in Vain?: State Constitutions, School Choice, and Charitable Choice*, 83 DENV. U. L. REV. 57, 67 (2005) ("Some states' provisions do not even have language similar to the original Blaine Amendment, but are dubbed 'Blaine Amendments' because they prohibit public funding of religious schools."); Steven K. Green, *The Insignificance of the Blaine Amendment*, 2008 BYU L. REV. 295, 297 (2008) [hereinafter Green, *Insignificance*] ("Several of those provisions contain language that bears a similarity to language that appeared in one of the many versions of Mr. Blaine's proposed amendment. But the majority do not.")

6. See Luke A. Lantta, *The Post-Zelman Voucher Battleground: Where to Turn After Federal Challenges to Blaine Amendments Fail*, 67 LAW & CONTEMP. PROBS. 213, 226 (2004) ("The generally accepted taxonomy set forth by Professor Frank R. Kemmerer divides state constitutions into three general categories with respect to Blaine amendments: restrictive, permissive and uncertain.")

7. See Kyle Duncan, *Secularism's Laws: State Blaine Amendments and Religious Persecution*, 72 FORDHAM L. REV. 493, 495 (2003) (discussing "a class of state constitutional provisions that appear in over thirty-five state constitutions and are known collectively as 'State Blaine Amendments'"); Erica Smith, *Blaine Amendments and the Unconstitutionality of Excluding Religious Options from School Choice Programs*, 18 FEDERALIST SOC'Y REV. 48, 53 (2017) ("Now, 37 states have Blaine Amendments in their state constitutions."). *But see* Green, *Insignificance*, *supra* note 5, at 297 ("[T]he legal connection between the Blaine Amendment and a majority of the state no-funding provisions—I will resist referring to them as 'Baby Blaines'—is uncertain at best." (emphasis added)).

A. *The State Blaine Amendments*

James Blaine, an ambitious representative from Maine, who later became a United States Senator and sought the Republican nomination for the presidency, proposed an amendment to the Federal Constitution, the Federal Blaine Amendment, that barred state funding of sectarian schools.⁸ It read:

[N]o money raised by taxation in any State for the support of public schools, or derived from any public fund therefor, nor any public lands devoted thereto, shall ever be under the control of any religious sect, nor shall any money so raised or lands so devoted be divided between religious sects or denominations.⁹

The Federal Blaine Amendment received more than the requisite number of votes in the House of Representatives.¹⁰ However, because it failed to receive the necessary votes in the Senate, it was never sent to the states for ratification.¹¹

Commentators debate whether the Federal Blaine Amendment was prompted by anti-Catholic animus.¹² Senator Blaine, himself,

8. Jay S. Bybee & David W. Newton, *Of Orphans and Vouchers: Nevada's "Little Blaine Amendment" and the Future of Religious Participation in Public Programs*, 2 NEV. L.J. 551, 557 n.31 (2002) ("Blaine aspired to run for the presidency in 1876, [but] . . . failed to secure the nomination."). Blaine was later the Republican nominee for President in 1884. Barclay Thomas Johnson, *Credit Crisis to Education Emergency: The Constitutionality of Model Student Voucher Programs Under the Indiana Constitution*, 35 IND. L. REV. 173, 202 (2001).

9. 4 CONG. REC. 205 (1875).

10. See Meir Katz, *The State of Blaine: A Closer Look at the Blaine Amendments and Their Modern Application*, 12 ENGAGE 111, 112 (2011) ("[T]he Blaine Amendment . . . sailed through the House by a vote of 180-7. . . .").

11. See *id.* ("[T]he Blaine Amendment . . . failed to achieve the necessary two-thirds majority in the Senate."); see also U.S. CONST. art. V ("The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution . . . which . . . shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress . . .").

12. Compare Katz, *supra* note 10, at 111 ("The Blaine Amendments have a dark and unfortunate history. As the Supreme Court has explained, they 'arose at a time of pervasive hostility to the Catholic Church and to Catholics in general.' They were both adopted on the basis of anti-Catholic animus and enforced in a discriminatory fashion."), and Frank S. Ravitch, *Locke v. Davey and the Lose-Lose Scenario: What Davey Could Have Said, but Didn't*, 40 TULSA L. REV. 255, 264 (2004) [hereinafter Ravitch, *Lose-Lose Scenario*] ("There is no doubt that the motivations of those who originally supported state Blaine amendments were heavily influenced by anti-Catholic animus."), and Joseph P. Viteritti, *Blaine's Wake: School Choice, the First Amendment, and State Constitutional Law*, 21 HARV. J.L. & PUB. POL'Y 657, 659 (1998) ("In fact, the Blaine Amendment is a remnant of nineteenth-century religious bigotry promulgated by nativist political leaders who were alarmed by the growth of immigrant populations and who had a particular disdain for Catholics."), with Steven K.

denied having any animus towards Catholics—his mother was Catholic, and he sent his daughters to Catholic boarding school.¹³ Further, perhaps because he had already failed to secure the Republican nomination for the presidency that year,¹⁴ Senator Blaine was one of twenty-seven senators absent when the vote on the Federal Blaine Amendment was taken.¹⁵ But even if it were true that Senator Blaine, himself, felt no personal animus toward Catholics, that would not end the discussion—a separate question was whether he was trying to capitalize on the anti-Catholic animus felt by others.¹⁶

After the defeat of the Federal Blaine Amendment, several states amended their constitutions to prohibit state funding of sectarian schools.¹⁷ Just as there is debate about whether the Federal Blaine Amendment was motivated by anti-Catholic animus, there is a similar debate about the motivations behind the adoptions of the State Blaine Amendments. However, analysis of whether passage of the State Blaine Amendments was motivated by anti-Catholic animus is more complicated because these amendments were adopted at different times and under different conditions.¹⁸ Some of the State Blaine Amendments were adopted prior to the attempt to amend the Federal Constitution,¹⁹ so it would be anachronistic

Green, *“Bad History”: The Lure of History in Establishment Clause Adjudication*, 81 NOTRE DAME L. REV. 1717, 1742 (2006) (“[M]y own research and that by Professor Noah Feldman indicates that history provides no definitive conclusions about the rationales behind the Amendment and the no-funding principle.”).

13. Duncan, *supra* note 7, at 509.

14. See Bybee & Newton, *supra* note 8, at 557 n.31.

15. *Id.*; DeForrest, *supra* note 5, at 573 (“The yeas were 28 and the nays were 16, with 27 senators absent, including, ironically enough, James Blaine himself . . .”).

16. Cf. Katz, *supra* note 10, at 116 (“The court stated that the author of Kentucky’s Blaine Amendment himself had clean hands. Even if true, the virulently anti-Catholic social and political climate, largely ignored by the court, is relevant.”); Viteritti, *supra* note 12, at 659 (“[T]he Blaine Amendment is a remnant of nineteenth-century religious bigotry promulgated by nativist political leaders who were alarmed by the growth of immigrant populations and who had a particular disdain for Catholics.”).

17. See Jonathan D. Boyer, *Education Tax Credits: School Choice Initiatives Capable of Surmounting Blaine Amendments*, 43 COLUM. J.L. & SOC. PROBS. 117, 131 (2009) (“[W]ithin a year of its defeat at the national level, fourteen states had passed some type of Blaine legislation.”).

18. Noah Feldman, *Non-Sectarianism Reconsidered*, 18 J.L. & POL. 65, 110 (2002) (“According to one scholar, in 1876 there were state laws or constitutional amendments to this effect in fourteen states. By contrast, in 1890, fourteen years after the proposed Blaine Amendment, fully twenty-nine states had adopted some sort of state constitutional amendment or statute guaranteeing no funding.”); cf. *id.* (“[T]here was probably some significant variation from state to state.”).

19. See Johnson, *supra* note 8, at 200–01 (“Indiana’s 1851 Constitution was enacted

to impute the animus associated with the Federal Blaine Amendment to those State Blaine Amendments that had already passed through state legislatures.²⁰ That said, however, those state amendments might nonetheless have been adopted because of anti-Catholic animus, so the fact that the state amendments had already been passed would not guarantee that they were not invidiously based.²¹

Some of the State Blaine Amendments that were adopted after the failed attempt to pass the Federal Blaine Amendment may well have been motivated by animus, although others may well not have been.²² At the very least, these differing state histories suggest that a challenge to a particular state amendment based on the claim that it was invidiously motivated would require an assessment of the motivations behind the adoption of *that particular amendment*—it simply will not do to assume that because an amendment in one state was adopted out of an invidious motivation, an amendment in a different state must also have been adopted out of animus.²³ Further, even if it could be established that a particular state constitutional amendment had been

nearly a quarter-century before then Governor Rutherford B. Hayes of Ohio and Representative James G. Blaine began to publicly oppose the use of state funds to support Catholic schools in 1875.”).

20. See Goldenziel, *supra* note 5, at 66 (“Many of these so-called ‘Blaine Amendments’ and related provisions were enacted before the Federal Blaine Amendment debate began.”).

21. See Robert William Gall, *The Past Should Not Shackle the Present: The Revival of a Legacy of Religious Bigotry by Opponents of School Choice*, 59 N.Y.U. ANN. SURV. AM. L. 413, 423 (2003) (“The defeat of the amendment in Congress by no means quieted anti-Catholic animus, which had produced several Blaine-like amendments in state legislatures even before the amendment’s consideration, and continued to do so in the decades that followed.”).

22. See Katz, *supra* note 10, at 112 (“Blaine Amendments were not simply grounded in anti-Catholic animus.”); Ira C. Lupu & Robert W. Tuttle, *Zelman’s Future: Vouchers, Secular Providers, and the Next Round of Constitutional Battles*, 78 NOTRE DAME L. REV. 917, 969 (2003) (“Even if the case for anti-Catholic animus as a motivating force is supported by substantial historical evidence in some states, the case may not be nearly so easy to make in others.”); Ravitch, *Lose-Lose Scenario*, *supra* note 12, at 264 (“There is no doubt that the motivations of those who originally supported state Blaine amendments were heavily influenced by anti-Catholic animus.”); see also Green, *Insignificance*, *supra* note 5, at 330 (“As with the national proposal, state legislators may have been motivated by concerns about ensuring the stability of still nascent public schools, preserving the integrity of public school funds, avoiding religious competition, and adhering to a principle of nonestablishment.”); Lantta, *supra* note 6, at 225 (“[E]vidence of anti-Catholic animus behind the federal Blaine amendment cannot necessarily be imputed to the states, for even those enacted immediately following Blaine’s amendment lack the same animus.”).

23. See Smith, *supra* note 7, at 53 (“[A]n individual assessment would be required before drawing conclusions about any particular Blaine Amendment . . .”).

adopted out of anti-Catholic animus, a separate question would be whether that illegitimate pedigree would render such an amendment unconstitutional.

B. *Animus and Constitutionality*

Suppose that animus clearly motivated a legislature to pass anti-religious legislation. If challenged soon after it became law, such a statute would almost certainly be struck down. The Court has made clear that a new law passed out of anti-religious animus would have to survive strict scrutiny to pass constitutional muster.²⁴ Further, the mere passage of time does not immunize an unconstitutional statute from review and invalidation.²⁵ Nonetheless, the Court has also suggested that statutes that may have previously failed to pass constitutional muster may now be upheld if the purposes behind them have changed.²⁶

In *McCreary County v. ACLU of Kentucky*, the Supreme Court rejected that the history behind the adoption of a particular practice was irrelevant to the analysis of whether that practice violated Establishment Clause guarantees.²⁷ At issue were the postings of the Ten Commandments in two Kentucky courthouses, although a complicating factor in the analysis was the constitutionality of a third display that had been mounted at a different time.²⁸

In attempting to discern the purpose behind the third display, the Court found that consideration of the purpose behind mounting the first two displays was relevant to its inquiry.²⁹ Yet, the Court was not suggesting that a state practice, once tainted because of

24. See *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993).

25. Smith, *supra* note 7, at 53 (“[T]he Supreme Court has made clear that the passage of time is insufficient to cleanse a law of its tainted history.”).

26. See *McCreary County v. ACLU*, 545 U.S. 844, 873–74 (2005).

27. *Id.* at 863–64 (“The Counties would . . . cut context out of the enquiry, to the point of ignoring history, no matter what bearing it actually had on the significance of current circumstances. There is no precedent for the Counties’ arguments, or reason supporting them.”).

28. *Id.* at 850–55.

29. See *id.* at 872 (“No reasonable observer could swallow the claim that the Counties had cast off the objective so unmistakable in the earlier displays.”).

an unconstitutional purpose, would forever preclude such a practice from being adopted—the Court denied “that the Counties’ past actions forever taint any effort on their part.”³⁰

How could a particular display, once deemed unconstitutional, be deemed constitutional at a later time? That would depend upon why the display was deemed unconstitutional. If it was initially struck down because its purpose had been to promote religion,³¹ then such a display might be upheld at a different time or place if there was no indication that the latter had been mounted for a religious purpose.³² Because one state might mount a particular display for a religious purpose, while a different state might mount an identical display for a non-religious purpose, the former display might violate constitutional guarantees even if the latter did not.³³ Similarly, the purposes behind a state’s action might change over time—a state actor at one time might mount a display for religious reasons, but at a different time might mount that same display for non-religious reasons.³⁴ That said, not much time had elapsed between the displays at issue in *McCreary County*.³⁵ Further, some aspects of the last display made it seem even more sectarian than the first two displays.³⁶ The *McCreary County* Court had no difficulty in affirming that the third display had been mounted for a religious purpose.³⁷

30. *Id.* at 873–74. Not all commentators read *McCreary County* this way. See Douglas W. Kmiec, *Overview of the Term: The Rule of Law & Roberts’s Revolution of Restraint*, 34 PEPP. L. REV. 495, 500 (2007) (“It also appears that if the government changes its position out of concern that its initial purpose or motivation was too religious, the government may be confessing unconstitutionality, from which there can be no judicial redemption.”).

31. See *Wallace v. Jaffree*, 472 U.S. 38, 56 (1985) (“[T]he First Amendment requires that a statute must be invalidated if it is entirely motivated by a purpose to advance religion.”).

32. Cf. *McCreary County*, 545 U.S. at 874 (“Nor do we have occasion here to hold that a sacred text can never be integrated constitutionally into a governmental display on the subject of law, or American history.”).

33. See Kmiec, *supra* note 30, at 501 (“[O]ne consequence of its inquiry into the purpose of ‘past actions was that the same government action may be constitutional if taken in the first instance and unconstitutional if it has a sectarian heritage,’ suggesting that Kentucky’s third display may have been constitutional had it been erected first.” (quoting *McCreary County*, 545 U.S. at 866 n.14)).

34. See *Rudolph v. Alabama*, 375 U.S. 889, 890 n.3 (1963) (Goldberg, J., dissenting) (“Time works changes, brings into existence new conditions and purposes.”).

35. See *McCreary County*, 545 U.S. at 855 (“They then installed another display in each courthouse, the third within a year.” (quoting *McCreary County*, 545 U.S. at 866 n.14)).

36. See *id.* at 872 (“[T]he sectarian spirit of the common resolution found enhanced expression in the third display, which quoted more of the purely religious language of the Commandments than the first two displays had done . . .”).

37. *Id.* at 872, 881 (discussing “the ample support for the District Court’s finding of a

Suppose that the facts of *McCreary County* are changed. This time, the first display, while not per se unconstitutional, is nonetheless held to violate constitutional guarantees because it is displayed for religious purposes. After much time has passed, new town officials mount a new, second display with the same content, offering non-religious reasons that are both plausible and sincerely made. Merely because the previous display mounted for a religious purpose had violated constitutional guarantees³⁸ it would not establish that the second display mounted for a non-religious purpose would also be unconstitutional. Arguably, the modified *McCreary County* scenario involves two different displays that happen to have the same content; the displays might even have been created by different people. At least one issue is whether the fact that there were *two* different displays would have constitutional significance—the Court might hold that the first religiously motivated display was and continues to be unconstitutional, whereas the second non-religiously motivated display is and always has been constitutionally permissible.

Contrast the scenario involving *two* different displays with a scenario involving *one* continuing display, where the purpose behind the original exhibition was to promote religion, but the purpose behind continuing to exhibit the display is non-religious. The implicated constitutional issue is whether the impermissible purpose behind the display's creation would infect the display for constitutional purposes, so that its continued exhibition, even if for a permissible purpose, would nonetheless fail to pass constitutional muster.

Certainly, it would be important to establish whether the true purpose behind continuing to exhibit the display in question was permissible. If the purpose behind continuing the display was no different from the impermissible purpose behind the display's creation, then the continued exhibition would also be constitutionally impermissible. But that same analysis would apply even if there were two different displays—if the purpose behind each display was impermissible, then each would be prohibited. The problem posed here is whether a previously impermissible purpose would continue to render a display unconstitutional, even if the purpose

predominantly religious purpose behind the Counties' third display").

38. *Cf. id.* at 870 ("[T]he display and resolution presented an indisputable, and undisputed, showing of an impermissible purpose.").

behind the continued exhibition of the display did not offend constitutional guarantees. If the answer is “no,” then the fact that a state constitutional amendment, which might at one time have been held unconstitutional because of an impermissible purpose, might survive a constitutional challenge now if it served legitimate purposes. When the *McCreary County* Court rejected that a previously impermissible purpose would forever taint a state actor’s actions,³⁹ it at least *suggested* that a display that once would have been held unconstitutional because of impermissible purpose may no longer be unconstitutional if the purpose behind it had changed. Else, the promise that there would be no permanent taint would be false.

Consider *Van Orden v. Perry*, which involved the constitutionality of a Ten Commandments monument on the Texas State Capitol grounds.⁴⁰ The plurality and concurring opinions suggested that the purpose behind placing and retaining the monument on capitol grounds was not religious,⁴¹ whereas the dissenting opinions suggested that the monument had been placed and retained on capitol grounds for a religious purpose.⁴² Suppose, instead, that the plurality and concurring opinions had suggested that the monument, although initially erected for a religious purpose, was now being maintained for non-religious purposes and was constitutional. Such an analysis would demonstrate that a monument or display, initially unconstitutional because of the purpose behind it, might later pass constitutional muster if the impermissible purpose was no longer present.⁴³

39. *See id.* at 873–74.

40. 545 U.S. 677, 681 (2005) (plurality opinion) (discussing “the display of a monument inscribed with the Ten Commandments on the Texas State Capitol grounds”).

41. *Id.* at 682–83 (“The District Court also determined that a reasonable observer, mindful of the history, purpose, and context, would not conclude that this passive monument conveyed the message that the State was seeking to endorse religion. The Court of Appeals affirmed . . . with respect to the monument’s purpose . . . We . . . now affirm.”); *see also id.* at 701 (Breyer, J., concurring) (“The circumstances surrounding the display’s placement on the capitol grounds and its physical setting suggest that the State itself intended the latter, nonreligious aspects of the tablets’ message to predominate.”).

42. *See id.* at 722 (Stevens, J., dissenting) (“God, as the author of its message, the Eagles, as the donor of the monument, and the State of Texas, as its proud owner, speak with one voice for a common purpose—to encourage Texans to abide by the divine code of a ‘Judeo-Christian’ God.”); *see also id.* at 738 (Souter, J., dissenting) (“[T]he Ten Commandments constitute a religious statement, that their message is inherently religious, and that the purpose of singling them out in a display is clearly the same.”).

43. *See, e.g., Braunfeld v. Brown*, 366 U.S. 599, 600–09 (1961) (explaining that Sunday Closing Laws, which historically had an unconstitutional, religious purpose, now have a

In *Braunfeld v. Brown*, the Court implied that a law that once would have been held unconstitutional because of an impermissible purpose might nonetheless pass muster if the purpose behind it had changed.⁴⁴ At issue was a challenge to a Pennsylvania law precluding the sale of certain items on Sundays.⁴⁵ The appellants were Orthodox Jews, who had to close their businesses from sundown on Friday to sundown on Saturday for religious reasons.⁴⁶ Being prohibited from opening their stores on Sundays put them at an economic disadvantage, because they essentially had to close their stores from Friday evening to Monday morning.⁴⁷

The *Braunfeld* Court explained that although the Sunday Closing Law had been adopted for religious reasons, they had been retained for non-religious reasons.⁴⁸ Because there were legitimate, non-religious reasons to have such laws in place, their having initially been adopted to support religion did not render them constitutionally offensive.⁴⁹

constitutional, secular purpose). It might be argued that the Ten Commandments are inherently religious and cannot be exhibited by a state under any circumstances. But the Court has not adopted that view. Indeed, Justice Stevens did not suggest such a view in his *Van Orden* dissent but, instead, that there should be a strong presumption against displaying religious symbols on public property. See *Van Orden*, 545 U.S. at 708 (Stevens, J., dissenting) (citing *County of Allegheny v. ACLU*, 492 U.S. 573, 650 (1989) (Stevens, J., concurring in part and dissenting in part) (“[A]t the very least, the Establishment Clause has created a strong presumption against the display of religious symbols on public property.”)).

44. 366 U.S. at 600–09.

45. *Id.* at 600 (“This case concerns the constitutional validity of the application to appellants of the Pennsylvania criminal statute, enacted in 1959, which proscribes the Sunday retail sale of certain enumerated commodities.”).

46. *Id.* at 601.

47. See *id.* at 601–02.

48. *Id.* at 602 (discussing “the evolution of Sunday Closing Law from wholly religious sanctions to legislation concerned with the establishment of a day of community tranquility”).

49. *Id.* at 602–03 (discussing Pennsylvania’s Sunday Closing Laws and finding a state interest in creating a day of rest, despite their religious origin).

[W]e cannot find a State without power to provide a weekly respite from all labor and, at the same time, to set one day of the week apart from the others as a day of rest, repose, recreation and tranquillity—a day when the hectic tempo of everyday existence ceases and a more pleasant atmosphere is created, a day which all members of the family and community have the opportunity to spend and enjoy together, a day on which people may visit friends and relatives who are not available during working days, a day when the weekly laborer may best regenerate himself.

Id. at 607. Even *Braunfeld* is not entirely clear on whether the same statute, formerly unconstitutional because of an improper purpose, might now be constitutionally permissible because of a noninvidious purpose. *Id.* In *McGowan v. Maryland*, the Court considered equal protection and establishment challenges to Sunday Closing Laws. 366 U.S. 420, 422 (1961). The *McGowan* Court wrote:

A separate question was whether the law at issue in *Braunfeld* had been retained for constitutionally adequate reasons. The majority of the states with Sunday Closing Laws at the time provided an exception, specifying that, if a business was closed on a day other than Sunday, that business would not also have to close on Sunday.⁵⁰ Those states providing such an exception did not have significant additional problems with noise or enforcement,⁵¹ although Pennsylvania chose not to include such an exception in its law.⁵² If the federal constitutional protections for free exercise are robust, then the articulated state interests in *Braunfeld* to justify the Pennsylvania law,⁵³ although legitimate, were arguably insufficiently compelling to justify the burden imposed on free exercise.⁵⁴ If that is so, then the Pennsylvania Sunday Closing Law was unconstitutional, although not because it initially had been

In light of the evolution of our Sunday Closing Laws through the centuries, and of their more or less recent emphasis upon secular considerations, it is not difficult to discern that as presently written and administered, most of them, at least, are of a secular rather than of a religious character, and that presently they bear no relationship to establishment of religion as those words are used in the Constitution of the United States.

Id. at 444. The *McGowan* Court was suggesting that the purpose behind the new Sunday Closing Laws was not to promote religion, and the *Braunfeld* Court might have been considering the *evolving* Sunday Closing Laws rather than the original ones enacted for an impermissible purpose. *See id.*; *Braunfeld*, 366 U.S. at 602 (“We also took cognizance, in *McGowan*, of the evolution of Sunday Closing Laws from wholly religious sanctions to legislation concerned with the establishment of a day of community tranquillity, respite and recreation, a day when the atmosphere is one of calm and relaxation rather than one of commercialism, as it is during the other six days of the week.”). The *Braunfeld* Court might not have been thinking that the *same* law, formerly unconstitutional, was now constitutionally permissible, but that the former law was unconstitutional because it was religiously motivated and the newer law was constitutional because it was not religiously motivated. Nonetheless, the Court emphasized that the purposes behind (rather than the wording of) the law had changed, at least implying that the same law, once unconstitutional, now passed muster. *Braunfeld*, 366 U.S. at 602.

50. *Braunfeld*, 366 U.S. at 614 (Brennan, J., concurring in part and dissenting in part) (“[A] majority—21—of the 34 States which have general Sunday regulations have exemptions of this kind.”).

51. *Id.* at 614–15 (“We are not told that those States are significantly noisier, or that their police are significantly more burdened, than Pennsylvania’s.”).

52. *Id.* at 600 (majority opinion) (“[T]he Pennsylvania criminal statute . . . proscribes the Sunday retail sale of certain enumerated commodities.”).

53. *See id.* at 608 (“[R]eason and experience teach that to permit the exemption might well undermine the State’s goal of providing a day that, as best possible, eliminates the atmosphere of commercial noise and activity. Although not dispositive of the issue, enforcement problems would be more difficult since there would be two or more days to police rather than one and it would be more difficult to observe whether violations were occurring.”).

54. *See id.* at 613–14 (Brennan, J., concurring in part and dissenting in part) (“What, then, is the compelling state interest which impels the Commonwealth of Pennsylvania to impede appellants’ freedom of worship? . . . It is the mere convenience of having everyone rest on the same day.”).

adopted to promote religion. Perhaps *Braunfeld* should be overruled.⁵⁵ But the fact that it remains good law poses a difficulty for those suggesting that the State Blaine Amendments should be struck down on federal constitutional grounds.

Those challenging the constitutionality of State Blaine Amendments would likely have to establish that the adoption of the challenged amendment *in particular* had been motivated by anti-religious animus.⁵⁶ The lack of extensive, recorded legislative history might severely hamper the efforts of those attempting to establish the motivations behind the adoption of such a ban in a particular state.⁵⁷ Even if one could establish that the initial motivation behind the adoption of a particular amendment was constitutionally suspect, that alone would not suffice to establish the invalidity of the amendment, as *Braunfeld* illustrates. If such an amendment currently promotes legitimate state interests,⁵⁸ then the amendment's unconstitutional origins might not suffice to establish the amendment's constitutional illegitimacy.⁵⁹

A complicating factor in any analysis of the constitutionality of State Blaine Amendments is that the Court's view on these matters seems to be shifting, and members of the Court sometimes offer surprising accounts of previous decisions to obscure the changes that are occurring in the jurisprudence.⁶⁰ Decisions that previously provided support for the constitutionality of such amendments are

55. See *Sherbert v. Verner*, 374 U.S. 398, 418 (1963) (Stewart, J., concurring) (“I think the *Braunfeld* case was wrongly decided and should be overruled . . .”).

56. See *supra* notes 31–33 and accompanying text (noting that establishing that one amendment had been adopted out of animus would not establish that a different one had also been adopted out of animus); cf. *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 741 (2003) (Scalia, J., dissenting) (“There is no guilt by association, enabling the sovereignty of one State to be abridged under § 5 of the Fourteenth Amendment because of violations by another State, or by most other States . . .”).

57. See Goldenziel, *supra* note 5, at 62 (“Only scant historical records and incomplete constitutional convention journals document the enactment of these amendments in the states, and the few available accounts reveal little evidence of bigotry.”).

58. Frank S. Ravitch, *The Supreme Court's Rhetorical Hostility: What Is “Hostile” to Religion Under the Establishment Clause?*, 2004 BYU L. REV. 1031, 1045–46 (2004) (“The motivations of state officials who currently support such ‘no aid’ amendments, and of parties who sue to prevent government funding of religious entities, may have nothing to do with enmity or hostility toward religion generally or a specific religion.”).

59. Cf. Goldenziel, *supra* note 5, at 62 (“Whatever anti-Catholic animus might have lain behind the no-funding provisions at their inception has not yet been shown to influence current state jurisprudence.”).

60. See *infra* notes 162–212 and accompanying text (discussing *Comer*'s possible reworking of the jurisprudence surrounding the Establishment Clause and the Free Exercise Clause).

now implausibly characterized as supporting the opposite conclusion,⁶¹ which may have important implications, not only for the constitutionality of these state amendments in particular, but also for the prevailing interpretation of the Establishment Clause and the Free Exercise Clause (collectively the “Religion Clauses”) more generally.

II. STATE REFUSALS TO SUPPORT SECTARIAN SCHOOLS AND THE SUPREME COURT

The Supreme Court has been sending mixed signals about the constitutionality of state refusals to provide public funding to support religious institutions. At times, the Court has implied that such a policy is, of course, permissible, although not constitutionally required. At other times, members of the Court have implied that the refusal to use public funds to support religious institutions is constitutionally disfavored, if not impermissible. The Court’s most recent decision in this area, *Trinity Lutheran Church of Columbia, Inc. v. Comer*,⁶² makes the jurisprudence even more confusing than it already was.⁶³

A. *Everson’s Mixed Messages*

*Everson v. Board of Education*⁶⁴ is a seminal case in Establishment Clause jurisprudence.⁶⁵ In that case, the Court suggested that the purpose of the Establishment Clause was to erect a wall

61. See Goldenziel, *supra* note 5, at 58 (discussing how two years after holding that a school voucher program “did not violate the federal establishment clause . . . two years later, the Supreme Court implicitly approved the use of state constitutional amendments to provide stronger protection from religious establishment than that guaranteed by the federal constitution”); see, e.g., *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. ___, 137 S. Ct. 2012, 2017 (2017).

62. 582 U.S. ___, 137 S. Ct. 2012.

63. See *infra* Part II.C.

64. 330 U.S. 1 (1947).

65. Edward J. Eberle, *Roger Williams’ Gift: Religious Freedom in America*, 4 ROGER WILLIAMS U. L. REV. 425, 476 (1999) (describing “*Everson v. Board of Education* [as] the seminal Establishment Clause case”); Wanda I. Otero-Ziegler, *The Remains of the Wall: From Everson v. Board of Education to Strout v. Albanese and Beyond*, 10 TEMP. POL. & C.R. L. REV. 207, 220 (2000) (“An analysis of the evolution of Establishment Clause jurisprudence must begin with the seminal case of *Everson v. Board of Education*.”); Kirk A. Kennedy, Note, *Opportunity Declined: The Supreme Court Refuses to Jettison the Lemon Test in Zobrest v. Catalina Foothills School District*, 113 S. Ct. 2462 (1993), 73 NEB. L. REV. 408, 412 (1994) (“The genesis of contemporary Establishment Clause jurisprudence is the seminal case of *Everson v. Board of Education*.”).

of separation between church and state that was to “be kept high and impregnable.”⁶⁶ However, the wall described was more permeable than the Court’s words seemed to suggest⁶⁷ because the Court upheld the permissibility of the state helping children to attend parochial schools.⁶⁸

A little background is required to understand what the *Everson* Court did and did not do. Ewing Township did not provide school buses for all of its students.⁶⁹ Instead, some of the children used public carriers to get to public school,⁷⁰ and the township reimbursed the parents for those transportation costs⁷¹ based on the school attendance sheets indicating the days that the children were present.⁷²

The provision authorizing reimbursement was later amended.⁷³ In the words of the trial court, the amended authorization “includ[ed] the transportation of school children to and from school other than a public school, except such school as is operated for

66. *Everson*, 330 U.S. at 18; see William P. Marshall, “We Know It When We See It”: *The Supreme Court and Establishment*, 59 S. CAL. L. REV. 495, 495 (1986) (“In its first application of the establishment clause to the states in *Everson v. Board of Education*, the Court . . . state[d] that the establishment clause was intended to erect ‘a wall of separation’ between church and state.”).

67. *Everson*, 330 U.S. at 17; Timothy L. Hall, *Sacred Solemnity: Civic Prayer, Civil Communion, and the Establishment Clause*, 79 IOWA L. REV. 35, 37 (1993) (“*Everson* itself, allowing public funding of transportation expenses for students attending parochial schools, amply demonstrated how permeable the ‘no aid’ barrier was in the welfare state.”).

68. William W. Bassett, *Changing Perceptions of Private Religious Schools: Public Money and Public Trust in the Education of Children*, 2008 BYU L. REV. 243, 250 (2008) (“In light of its hyperbolic rationale, the Court’s holding that the state could assist parents in providing bus fares for their children to attend parochial schools was astounding.”); Thomas C. Berg, *Anti-Catholicism and Modern Church-State Relations*, 33 LOY. U. CHI. L.J. 121, 127 (2001) (“The *Everson* decision did narrowly permit states to reimburse families for bussing their children to parochial schools”); Donald L. Beschle, *The Conservative as Liberal: The Religion Clauses, Liberal Neutrality, and the Approach of Justice O’Connor*, 62 NOTRE DAME L. REV. 151, 153 (1987) (discussing *Everson*’s “holding that the first amendment permits reimbursement for the cost of bus transportation to religious schools”).

69. *Everson v. Bd. of Educ.*, 39 A.2d 75, 77 (N.J. Sup. Ct. 1944) (Heher, J., dissenting) (“Here, the school district did not operate the transport.”), *rev’d*, 44 A.2d 333 (N.J. 1945), *aff’d*, 330 U.S. 1 (1947).

70. *Everson*, 330 U.S. at 20 (Jackson, J., dissenting) (“All school children are left to ride as ordinary paying passengers on the regular busses operated by the public transportation system.”).

71. *Everson*, 39 A.2d at 75 (discussing “the township paying . . . the costs of transportation advanced by parents or other relatives”).

72. *Everson v. Bd. of Educ.*, 44 A.2d 333, 335 (N.J. 1945) (“The payments to parents were in satisfaction of advancements made by them; and the amount was fixed upon the basis of the actual number of days’ attendance as indicated upon each pupil’s report card.”), *aff’d*, 330 U.S. 1 (1947).

73. *Everson*, 39 A.2d at 75 (citing 1903 N.J. Laws 45–46 and 1941 N.J. Laws 581).

profit in whole or in part.”⁷⁴ That amendment permitted parents who sent their children to parochial school to be reimbursed, and the challenge at issue in *Everson* was the reimbursement of the parochial school travel costs.⁷⁵

The *Everson* Court began its analysis by discussing the history of religious discord that had been imported from Europe⁷⁶ to the American colonies.⁷⁷ In the colonies, “dissenters were compelled to pay tithes and taxes to support government-sponsored churches whose ministers preached inflammatory sermons designed to strengthen and consolidate the established faith by generating a burning hatred against dissenters.”⁷⁸ The Court then explained that “[t]hese practices . . . shock[ed] the freedom-loving colonials into a feeling of abhorrence.”⁷⁹ That feeling of abhorrence translated into legislative action on both federal and state levels. For example, Virginia enacted religion-protecting legislation: “That no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested, or burthened in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief”⁸⁰ The Virginia statute provided the model for the First Amendment protections found in the Federal Constitution.⁸¹ In addition, many states followed Virginia’s example to “provide similar constitutional protections for religious liberty.”⁸²

The *Everson* Court made clear that the First Amendment’s Religion Clauses have been incorporated through the Fourteenth

74. *Id.* at 76 (citing 1941 N.J. Laws 581).

75. *Everson*, 330 U.S. at 3 (citing 1941 N.J. Laws 581) (“The appellant, in his capacity as a district taxpayer, filed suit in a state court challenging the right of the Board to reimburse parents of parochial school students.”).

76. *See id.* at 8–9 (“[A]t various times and places, Catholics had persecuted Protestants, Protestants had persecuted Catholics, Protestant sects had persecuted other Protestant sects, Catholics of one shade of belief had persecuted Catholics of another shade of belief, and all of these had from time to time persecuted Jews.”).

77. *See id.* at 9 (“These practices of the old world [treating religious minorities unfairly] were transplanted to and began to thrive in the soil of the new America.”).

78. *Id.* at 10.

79. *Id.* at 11.

80. Act for Establishing Religious Freedom, ch. 34, 1786 Va. Acts 3, 26–27.

81. *Everson*, 330 U.S. at 13 (“[T]he provisions of the First Amendment, in the drafting and adoption of which Madison and Jefferson played such leading roles, had the same objective and were intended to provide the same protection against governmental intrusion on religious liberty as the Virginia statute.”).

82. *Id.* at 13–14.

Amendment to apply to the states,⁸³ and then it explained that the Establishment Clause at the very least means the following: “No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion.”⁸⁴ The Establishment Clause precluded “New Jersey [from] . . . contribut[ing] tax-raised funds to the support of an institution which teaches the tenets and faith of any church.”⁸⁵ That said, the Court also explained that the Free Exercise Clause precluded the State from “exclud[ing] individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, *because of their faith, or lack of it*, from receiving the benefits of public welfare legislation.”⁸⁶

The Court’s suggestion that states cannot deny public benefits to individuals because of their faith requires interpretation. Consider the reimbursement practices prior to the amendment that authorized payment to parents of children attending parochial schools.⁸⁷ Nowhere did the Court suggest that Ewing Township was discriminating against religious individuals because of their faith when only providing reimbursement for parents sending their children to public schools. Indeed, the Court expressly disavowed that it was offering such a view: “We do not mean to intimate that a state could not provide transportation only to children attending public schools”⁸⁸

At least one reason that such a view might be disavowed is that people with a variety of religious views might send their children to parochial school if, for example, the parents believed that the children would thereby receive a better education than they would

83. *See id.* at 8 (“The First Amendment, as made applicable to the states by the Fourteenth, . . . commands that a state ‘shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.’”(quoting *Murdock v. Pennsylvania*, 319 U.S. 105, 108 (1943))).

84. *Id.* at 16.

85. *Id.*

86. *Id.*

87. *See id.* at 5.

88. *Id.* at 16; *see also* *Locke v. Davey*, 540 U.S. 712, 729 (2004) (Scalia, J., dissenting) (“[T]he State . . . could respect both its unusually sensitive concern for the conscience of its taxpayers *and* the Federal Free Exercise Clause. It could make the scholarships redeemable only at public universities”); *Norwood v. Harrison*, 413 U.S. 455, 469 (1973) (“This does not mean, as we have already suggested, that a State is constitutionally obligated to provide even ‘neutral’ services to sectarian schools.”).

receive from public school.⁸⁹ Parents who sent their children to parochial schools would not be denied reimbursement *because of* their faith (or lack thereof), but merely because the children had been sent to a non-public school.

The issue before the *Everson* Court was *not* whether Ewing Township was permitted to reimburse only those parents whose children attended public schools. Rather, the issue was whether Ewing Township was permitted to reimburse not only those parents whose children attended public school, but also those parents whose children attended parochial school.⁹⁰

When holding that such reimbursements did not offend constitutional guarantees,⁹¹ the Court admitted that such a policy might enable some students to attend parochial school who would not otherwise be able to do so.⁹² But, the Court reasoned, the same point might be made about the provision of a variety of public services—“parents might be reluctant to permit their children to attend schools which the state had cut off from such general government services as ordinary police and fire protection, connections for sewage disposal, public highways and sidewalks.”⁹³ But “cutting off church schools from these services, so separate and so indisputably marked off from the religious function, . . . is obviously not the purpose of the First Amendment.”⁹⁴ Because the Court interpreted the New Jersey program as doing “no more than provid[ing] a general program to help parents get their children, regardless of their religion, safely and expeditiously to and from accredited schools,” the Court upheld the constitutionality of the spending.⁹⁵

It might seem surprising that reimbursement would be viewed as a safety measure.⁹⁶ The Court implied that reimbursement of

89. *Cf. Zelman v. Simmons-Harris*, 536 U.S. 639, 704 (2002) (Souter, J., dissenting) (“Evidence shows, however, that almost two out of three families using vouchers to send their children to religious schools did not embrace the religion of those schools.”).

90. *See Everson*, 330 U.S. at 3.

91. *Id.* at 17 (“[W]e cannot say that the First Amendment prohibits New Jersey from spending tax-raised funds to pay the bus fares of parochial school pupils as a part of a general program under which it pays the fares of pupils attending public and other schools.”).

92. *Id.* (“There is even a possibility that some of the children might not be sent to the church schools if the parents were compelled to pay their children’s bus fares out of their own pockets when transportation to a public school would have been paid for by the State.”).

93. *Id.* at 17–18.

94. *Id.* at 18.

95. *Id.*

96. *See id.* at 20 (Jackson, J., dissenting) (“This expenditure of tax funds has no possible effect on the child’s safety or expedition in transit.”).

the monies might mean that children would “ride in public busses to and from schools rather than run the risk of traffic and other hazards incident to walking or ‘hitchhiking.’”⁹⁷ Of course, children might still hitchhike, which would allow the family to use the reimbursement for other costs,⁹⁸ e.g., defraying tuition expenses, but the Court did not address that possibility.

The *Everson* Court also did not discuss the implications of its comparison of school travel reimbursement to the provision of fire and police services. If, indeed, the provision of travel reimbursement was permitted, but not required, then one would assume that the provision of police and fire services to religious institutions was permitted, but not required. But Ewing Township would not have been permitted to deny police and fire services to religious institutions,⁹⁹ which suggests one of the ways in which the analogy between travel reimbursement and the provision of police and fire services was inapt. Regrettably, the Court did not offer an account distinguishing between those services that could not be denied to religious institutions and those services that states were permitted, but not required, to deny to religious institutions.¹⁰⁰

In his dissent, Justice Jackson explored the travel and police analogy. He noted:

A policeman protects a Catholic, of course—but not because he is a Catholic; it is because he is a man and a member of our society. The fireman protects the Church school—but not because it is a Church school; it is because it is property, part of the assets of our society.¹⁰¹

However, Justice Jackson argued that the statute at issue authorized reimbursement of “parents for the fares paid, provided the children attend either public schools or Catholic Church

97. *Id.* at 7 (majority opinion) (citing *Barbier v. Connolly*, 113 U.S. 27, 31 (1884)).

98. Mark Strasser, *Repudiating Everson: On Buses, Books, and Teaching Articles of Faith*, 78 *MISS. L.J.* 567, 577 (2009) (“[I]t may be that those students (if any) who were hitchhiking or walking to school would still do so and the monies paid in ‘reimbursement’ would be used to defray other costs.”).

99. See Christopher L. Eisgruber & Lawrence G. Sager, *Unthinking Religious Freedom*, 74 *TEX. L. REV.* 577, 586 (1996) (book review) (“[T]o deny any of these forms of support to religious projects and enterprises [e.g. police and fire services for religious institutions] would be intolerably antireligious.”).

100. See *infra* notes 203–08 and accompanying text (discussing this point in the context of *Comer*).

101. *Everson*, 330 U.S. at 25 (Jackson, J., dissenting).

schools,”¹⁰² implying that parents would not be reimbursed if their students had been attending a non-profit Protestant school.

[B]efore these school authorities draw a check to reimburse for a student’s fare they must ask just that question, and if the school is a Catholic one they may render aid because it is such, while if it is of any other faith or is run for profit, the help must be withheld.¹⁰³

Basically, Justice Jackson was offering a literal interpretation of the minutes of the meeting in which the additional reimbursement was authorized. Those minutes read: “The transportation committee recommended the transportation of pupils of Ewing to the Trenton and Pennington High Schools *and Catholic Schools* by way of public carrier as in recent years. On Motion of Mr. Ralph Ryan and Mr. M. French the same was adopted.”¹⁰⁴

It may well be that this amendment only included Catholic schools because there were no other kinds of private, non-profit¹⁰⁵ schools to which students may have gone.¹⁰⁶ Had there been non-profit schools affiliated with other faith traditions, then Establishment Clause guarantees would have been implicated if the town had reimbursed the transportation costs of children attending Catholic but not other religious schools.¹⁰⁷

To some extent, *Everson* is a dispute about statutory interpretation.¹⁰⁸ On its face, the challenged resolution picked out Catholic

102. *Id.* at 20.

103. *Id.* at 25.

104. *Id.* at 62 n.59 (Rutledge, J., dissenting).

105. The Court noted that there had been no challenge to the statute for failing to provide reimbursement to students attending for-profit schools. *See id.* at 4 n.2 (majority opinion) (“Appellant does not challenge the New Jersey statute or the resolution on the ground that either violates the equal protection clause of the Fourteenth Amendment by excluding payment for the transportation of any pupil who attends a ‘private school run for profit.’”).

106. *See id.* (“Although the township resolution authorized reimbursement only for parents of public and Catholic school pupils, appellant does not allege, nor is there anything in the record which would offer the slightest support to an allegation, that there were any children in the township who attended or would have attended, but for want of transportation, any but public and Catholic schools.”).

107. *Cf. id.* at 25–26 (Jackson, J., dissenting) (“Could we sustain an Act that said police shall protect pupils on the way to or from public schools and Catholic schools but not while going to and coming from other schools, and firemen shall extinguish a blaze in public or Catholic school buildings but shall not put out a blaze in Protestant Church schools or private schools operated for profit? That is the true analogy to the case we have before us and I should think it pretty plain that such a scheme would not be valid.”); *see Strasser, supra* note 98, at 578 (noting that the statute “did not provide reimbursement for students attending non-Catholic religious schools, and thus *Everson* upheld a statute that facially distinguished among religions”).

108. *Cf. Everson*, 330 U.S. at 21 (“I think [the taxpayer challenging the constitutionality

schools for special treatment—parents of children attending any other type of religious school would not be entitled to reimbursement for transportation costs.¹⁰⁹ But the lower court had interpreted the resolution nonliterally: “The result, of course, is to provide for free transportation of children at the expense of the home municipality and of the State school fund to and from any school, other than a public school, which is not operated for profit”¹¹⁰ Under that interpretation, a parent whose child attended a non-profit Protestant school would also have transportation costs reimbursed.

The Court did not specify whether it was simply adopting the trial court’s interpretation of the resolution, express language notwithstanding, or whether it was reading the resolution that way, for example, to forestall the next resolution that would have been worded more carefully so as not to facially benefit one religion over another.¹¹¹ Basically, the *Everson* Court interpreted the resolution as authorizing the reimbursement of travel expenses for all children attending public and parochial schools, including Catholic schools.¹¹² The Court then upheld the authorization, even while maintaining the necessity of “erect[ing] a wall between church and state. That . . . must be kept high and impregnable.”¹¹³ That said, however, the Court nowhere stated or even implied that the state would have been acting unconstitutionally had it continued to refuse to reimburse parents whose children attended parochial schools.

B. Court Members Discuss Blaine Amendments

In *Mitchell v. Helms*,¹¹⁴ several members of the Court expressed their strong disapproval of the Federal Blaine Amendment. At issue was whether the federal government’s financial aid to public

of the reimbursement] is entitled to have us consider the Act just as it is written.”).

109. *Id.* at 20 (“[T]he Court also insists that we must close our eyes to a discrimination which does exist. The resolution which authorizes disbursement of this taxpayer’s money limits reimbursement to those who attend public schools and Catholic schools.”).

110. *Everson v. Bd. of Educ.*, 39 A.2d 75, 76 (N.J. Sup. Ct. 1944).

111. *Cf. Everson*, 330 U.S. at 17 (“[W]e cannot say that the First Amendment prohibits New Jersey from spending tax-raised funds to pay the bus fares of parochial school pupils as a part of a general program under which it pays the fares of pupils attending public and other schools.”).

112. *See id.* at 4 n.2, 18.

113. *Id.* at 17–18.

114. 530 U.S. 793 (2000) (plurality opinion).

and private schools, including religious schools, violated the Establishment Clause.¹¹⁵ In upholding the constitutionality of the federal funding of parochial and non-parochial schools,¹¹⁶ the plurality explained that “hostility to aid to pervasively sectarian schools has a shameful pedigree that we do not hesitate to disavow.”¹¹⁷

The *Mitchell* plurality explained that “[o]pposition to aid to ‘sectarian’ schools acquired prominence in the 1870’s with Congress’s consideration (and near passage) of the Blaine Amendment.”¹¹⁸ That amendment was considered “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.’”¹¹⁹ The plurality concluded that “nothing in the Establishment Clause requires the exclusion of pervasively sectarian schools from otherwise permissible aid programs [and that] . . . [t]his doctrine, born of bigotry, should be buried now.”¹²⁰

The plurality’s argument that the exclusion of pervasively sectarian schools from aid programs should end was not particularly persuasive. Merely because the Federal Blaine Amendment was proposed at a time of pervasive hostility to the Catholic Church does not establish that State Blaine Amendments, which might have been adopted before or after the Federal Blaine Amendment was proposed, were also motivated by anti-Catholic animus. Further, that a particular state amendment was unconstitutional because of an impermissible purpose would not establish that an identically worded amendment adopted to promote other (permissible) purposes would also be constitutionally infirm. Basically, the *Mitchell* plurality implied that because some State Blaine Amendments might have had an impermissible purpose, all such bans are unconstitutional.

The *Mitchell* plurality implied that opposition to funding pervasively sectarian schools was born of bigotry.¹²¹ But *Everson*’s high

115. *Id.* at 801.

116. *See id.* at 835 (“[W]e hold that Chapter 2 is not a law respecting an establishment of religion.”).

117. *Id.* at 828.

118. *Id.*

119. *Id.* (citing Steven K. Green, *The Blaine Amendment Reconsidered*, 36 AM. J. LEGAL HIST. 38 (1992)).

120. *Id.* at 829.

121. *See id.* at 912 (Souter, J., dissenting) (“The plurality . . . equates a refusal to aid religious schools with hostility to religion . . .”).

wall precluded “contribut[ing] tax-raised funds to the support of an institution which teaches the tenets and faith of any church,”¹²² which means that tax-raised funds cannot be used to support pervasively sectarian schools teaching religious doctrine throughout the curriculum.¹²³ One might have expected the *Mitchell* plurality to have condemned *Everson* for having espoused a position that was allegedly born of bigotry; instead, the plurality approvingly cited *Everson* as part of the Establishment Clause canon.¹²⁴ Apparent approval of the decision notwithstanding, the *Mitchell* plurality gave short shrift to *Everson*’s limitation on the use of tax-raised funds to support religion, instead offering a very narrow interpretation of what the Establishment Clause prohibits.¹²⁵

The *Mitchell* plurality claimed that the Establishment Clause only precluded “aid itself [that] has an impermissible content,”¹²⁶ suggesting that something fungible like money is permissibly given to pervasively sectarian schools regardless of how those funds are spent,¹²⁷ for example, even to buy Bibles.¹²⁸ But such a policy is simply incompatible with *Everson*’s prohibition on using state funds to help teach religious doctrine.¹²⁹

122. *Everson v. Bd. of Educ.*, 330 U.S. 1, 16 (1947).

123. *Cf. Roemer v. Bd. of Pub. Works*, 426 U.S. 736, 755 (1976) (suggesting that in pervasively sectarian schools, “secular activities cannot be separated from sectarian ones”); *Mitchell*, 530 U.S. at 885–86 (Souter, J., dissenting) (“[T]he overriding religious mission of certain schools, those sometimes called ‘pervasively sectarian,’ . . . permeates their teaching.” (citations omitted)).

124. *See Mitchell*, 530 U.S. at 807 (plurality opinion).

125. *See id.* at 808 (“Chapter 2 does not create an excessive entanglement. . . . [I]t neither results in religious indoctrination by the government nor defines its recipients by reference to religion. We therefore hold that Chapter 2 is not a ‘law respecting an establishment of religion.’” (quoting U.S. CONST. amend. I)).

126. *Id.* at 822.

127. *Id.*; Steven G. Gey, *Vestiges of the Establishment Clause*, 5 FIRST AMEND. L. REV. 1, 40 (2006) (“*Mitchell* fine-tunes this analysis by making it clear that so long as a program satisfies the formal neutrality requirement, the Constitution is not violated if the religious organization receiving the government funds converts those funds to specifically religious purposes . . .”).

128. Gey, *supra* note 127, at 40 (“In other words, the government cannot give a religious school Bibles, but it may give the religious school money that the school can use to buy Bibles.”).

129. *See Everson v. Bd. of Educ.*, 330 U.S. 1, 16 (1947); *Mitchell*, 530 U.S. at 877, 901, 911 (Souter, J., dissenting) (“[T]here is no mistaking the abandonment of doctrine that would occur if the plurality were to become a majority.”); *see also* Ira C. Lupu, *Government Messages and Government Money: Santa Fe, Mitchell v. Helms, and the Arc of the Establishment Clause*, 42 WM. & MARY L. REV. 771, 807–08 (2001) (“[The Court’s] decision . . . in *Mitchell v. Helms* . . . broke new ground in a number of ways, and upheld an aid program that never would have survived at the time of either *Everson* or *Lemon*.”).

Gaps in its reasoning notwithstanding, the *Mitchell* plurality's attitude toward bans on funding sectarian schools is clear. Yet, the Court manifested a much different attitude in *Locke v. Davey*.¹³⁰ At issue was Washington State's "Promise Scholarship Program . . . [which] assist[ed] academically gifted students with post-secondary education expenses."¹³¹ The Washington Constitution had been interpreted to preclude funding for those who wished to pursue a degree in devotional theology.¹³² Joshua Davey, a scholarship recipient, wanted to "pursue a double major in pastoral ministries and business management/administration."¹³³ But, he could only receive the scholarship if he were willing to certify that he would not use the money to pursue a degree in devotional theology.¹³⁴ He was unwilling to so certify and was not awarded the scholarship.¹³⁵ Davey then challenged the denial of the scholarship as a violation of the guarantees of the Establishment, Free Exercise, and Equal Protection Clauses.¹³⁶

The *Locke* Court suggested that Washington could have chosen to fund devotional theology studies without violating federal constitutional guarantees.¹³⁷ But a separate issue was whether Washington's choice not to fund devotional theology studies was either born of animus or forbidden by the Federal Constitution.¹³⁸ The *Locke* Court could "find neither in the history or text of Article I, § 11, of the Washington Constitution, nor in the operation of the Promise Scholarship Program, anything that suggest[ed] animus toward religion."¹³⁹ Not only was there no animus, but the Court

130. 540 U.S. 712 (2004).

131. *Id.* at 715.

132. *Id.* ("In accordance with the State Constitution, students may not use the scholarship at an institution where they are pursuing a degree in devotional theology.")

133. *Id.* at 717.

134. *Id.* ("[T]o receive the funds appropriated for his use, he must certify in writing that he was not pursuing such a [devotional theology] degree . . .").

135. *Id.*

136. *Id.* at 718 ("He argued the denial of his scholarship based on his decision to pursue a theology degree violated, *inter alia*, the Free Exercise, Establishment, and Free Speech Clauses of the First Amendment, as incorporated by the Fourteenth Amendment, and the Equal Protection Clause of the Fourteenth Amendment.")

137. *Id.* at 719 ("[T]here is no doubt that the State could, consistent with the Federal Constitution, permit Promise Scholars to pursue a degree in devotional theology . . .").

138. *Id.* at 719–21, 725.

139. *Id.* at 725.

could “think of few areas in which a State’s anti-establishment interests come more into play,”¹⁴⁰ which suggested that state constitutional bans on support of sectarian institutions may serve legitimate and important state interests.¹⁴¹

The *Locke* Court understood that its holding permitted states to distinguish between secular and religious professions, providing funding for the one and not the other, even though that meant that religious professions were being picked out for unfavorable treatment.¹⁴² But the Court believed that states have a reason to treat religion differently—“the subject of religion is one in which both the United States and state constitutions embody distinct views—in favor of free exercise, but opposed to establishment—that find no counterpart with respect to other callings or professions.”¹⁴³

The difference in tone in the *Locke* majority and *Mitchell* plurality opinions is unmistakable.¹⁴⁴ The former suggests that the refusal to fund religious education may be for legitimate reasons, while the latter suggests that such refusals reflect animus. In *Trinity Lutheran Church of Columbia, Inc. v. Comer*,¹⁴⁵ the Court made its position on state refusals to fund religious institutions even more confusing.

C. *Comer Further Muddies the Waters*

At issue in *Comer* was the constitutionality of a decision by the Missouri Department of Natural Resources to deny a grant to the Trinity Lutheran Church Child Learning Center (“Center”) to help resurface its playground because of the School’s affiliation with the

140. *Id.* at 722.

141. *See id.* at 725; Goldenziel, *supra* note 5, at 58 (“[T]he Supreme Court implicitly approved the use of state constitutional amendments to provide stronger protection from religious establishment than that guaranteed by the federal constitution.” (citing *Locke*, 540 U.S. at 715)).

142. *Locke*, 540 U.S. at 721 (“Because the Promise Scholarship Program funds training for all secular professions, Justice Scalia contends the State must also fund training for religious professions.”).

143. *Id.*

144. Ironically, Chief Justice Rehnquist and Justice Kennedy joined the *Mitchell* plurality opinion. *Mitchell v. Helms*, 530 U.S. 793, 801 (2000) (plurality opinion). Chief Justice Rehnquist wrote the *Locke* opinion with Justice Kennedy joining in it. *Locke*, 540 U.S. at 713.

145. 582 U.S. ___, 137 S. Ct. 2012 (2017).

Trinity Lutheran Church (“Church”).¹⁴⁶ Had it not been affiliated with a church, it almost certainly would have received a grant.¹⁴⁷

The Church challenged the denial as a violation of free exercise guarantees.¹⁴⁸ Both the federal district court and the Eighth Circuit Court of Appeals sided with the Department of Natural Resources, citing *Locke*.¹⁴⁹ The *Comer* Court disagreed.¹⁵⁰

The Court began its analysis by noting that all parties agreed that the Establishment Clause “does not prevent Missouri from including Trinity Lutheran in the Scrap Tire Program.”¹⁵¹ Therefore, that was not at issue, and the Court set out to analyze whether the Department’s grant denial was constitutionally permissible under the Free Exercise Clause, given the “play in the joints’ between what the Establishment Clause permits and the Free Exercise Clause compels.”¹⁵²

The *Comer* Court noted that the *Everson* Court had upheld the reimbursement of travel expenses to parents sending their children to parochial schools, and then echoed *Everson* by explaining

that a State “cannot hamper its citizens in the free exercise of their own religion. Consequently, it cannot exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, *because of their faith, or lack of it*, from receiving the benefits of public welfare legislation.”¹⁵³

Regrettably, the Court did not explain why it had included that quotation from *Everson* nor why it had retained emphasis on those particular words, although one might reasonably infer that the

146. *Id.* at __, 137 S. Ct. at 2017–18 (“[T]he Center was deemed categorically ineligible to receive a grant. . . . [T]he program director explained that, under Article I, Section 7 of the Missouri Constitution, the Department could not provide financial assistance directly to a church.”).

147. *See id.* at __, 137 S. Ct. at 2018 (“The Center ranked fifth among the 44 applicants in the 2012 Scrap Tire Program. . . . The Department ultimately awarded 14 grants as part of the 2012 program.”); *see also id.* at __, 137 S. Ct. at 2024.

148. *Id.* at __, 137 S. Ct. at 2018 (“The Church alleged that the Department’s failure to approve the Center’s application, pursuant to its policy of denying grants to religiously affiliated applicants, violates the Free Exercise Clause of the First Amendment.”).

149. *See id.* at __, 137 S. Ct. at 2018–19; *Trinity Lutheran Church of Columbia, Inc. v. Pauley*, 788 F.3d 779, 781 (8th Cir. 2015); *Trinity Lutheran Church of Columbia, Inc. v. Pauley*, 976 F. Supp. 2d 1137, 1140 (W.D. Mo. 2013).

150. *Comer*, 582 U.S. at __, 137 S. Ct. at 2019.

151. *Id.* at __, 137 S. Ct. at 2019.

152. *Id.* at __, 137 S. Ct. at 2019 (quoting *Locke v. Davey*, 540 U.S. 712, 718 (2004)).

153. *Id.* at __, 137 S. Ct. at 2019–20 (quoting *Everson v. Bd. of Educ.*, 330 U.S. 1, 16 (1947)).

Court cited that passage because it believed that Missouri was somehow violating the letter or spirit of *Everson*.

Yet, Missouri did not appear to be denying individual Catholics, Protestants, Jews, Muslims, et cetera, the benefits of public legislation because of their faith or lack thereof. People of a variety of faiths sent their children to the Center, and the Center had not been denied the funds because of the parents' religious beliefs or lack thereof.¹⁵⁴ So, too, in *Everson*, before the reimbursement authorization had been modified,¹⁵⁵ individual parents sending their children to parochial schools had not been denied travel reimbursement because of their beliefs but, because the Center to which they were sending their children was parochial rather than public.¹⁵⁶

Everson held that the Establishment Clause does not bar affording any and all public benefits to sectarian institutions¹⁵⁷ and that affording the particular benefit at issue was not barred by Establishment Clause guarantees.¹⁵⁸ But *Everson's* focus was not on whether New Jersey was permitted to refuse funding transportation costs of those attending parochial schools, and to the extent that issue was addressed, the Court suggested that such a refusal did not offend constitutional guarantees.¹⁵⁹ Further, when upholding the reimbursement of the parents of children attending parochial schools for transportation costs,¹⁶⁰ the Court emphasized that

154. *See id.* at __, 137 S. Ct. at 2017 (“The Center admits students of any religion, and enrollment stands at about 90 children ranging from age two to five.”).

155. *Everson v. Bd. of Educ.*, 39 A.2d 75, 75 (N.J. Sup. Ct. 1944) (citing 1903 N.J. Laws 45–46 and 1941 N.J. Laws 581).

156. *See Everson*, 330 U.S. at 3; *cf. Brusca v. State of Missouri ex rel. State Bd. of Educ.*, 332 F. Supp. 275, 279 (E.D. Mo. 1971), *aff'd sub nom. Brusca v. State Bd. of Educ.*, 405 U.S. 1050 (1972) (“All children of every or no religious denomination have the same right to attend free secular public schools maintained with tax funds.”).

157. *Everson*, 330 U.S. at 17–18 (“[C]ut[ing] off [religious institutions] from such general government services as ordinary police and fire protection, connections for sewage disposal, public highways and sidewalks. . . . is obviously not the purpose of the First Amendment.”).

158. *Id.* at 18 (“The First Amendment has erected a wall between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach. New Jersey has not breached it here.”).

159. *Id.* at 5, 17–18.

160. *Id.* at 5, 16, 18 (“[W]e must be careful, in protecting the citizens of New Jersey against state-established churches, to be sure that we do not inadvertently prohibit New Jersey from extending its general state law benefits to all its citizens without regard to their religious belief.”); *see also Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. __, __, 137 S. Ct. 2012, 2020 (2017) (discussing *Everson's* “ruling that the Establishment Clause allowed New Jersey to extend that public benefit to all its citizens regardless of their religious belief”).

no money was going to sectarian schools.¹⁶¹ But these aspects of *Everson* were ignored by the *Comer* Court.

There are at least three constitutionally significant respects in which the issues addressed by the *Comer* Court differed from those addressed by the *Everson* Court:

(1) *Comer* addressed whether state funds can be given to a sectarian institution rather than to a parent, and the *Everson* Court emphasized that “[n]o tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion.”¹⁶²

(2) Even if *Everson* were somehow read to permit funding sectarian institutions, *Comer* addressed whether Missouri was precluded from refusing to do so.¹⁶³ The *Everson* Court was unwilling to say that New Jersey had to reimburse parents for their children’s transportation costs to parochial school¹⁶⁴ and so would hardly have held that Missouri was required to fund sectarian institutions. Yet, the *Comer* Court used *Everson* for support.¹⁶⁵

(3) When the *Everson* Court said that New Jersey “cannot exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, *because of their faith, or lack of it*, from receiving the benefits of public welfare legislation,” the Court was discussing individual “citizens,”¹⁶⁶ such as the parents of children attending parochial schools. However, the *Comer* Court’s focus was not on the beliefs of the individual parents sending their children to the Center, but on the beliefs of the Center itself.¹⁶⁷ Because those beliefs

161. *Everson*, 330 U.S. at 18 (“The State contributes no money to the schools. It does not support them.”); see *Comer*, 582 U.S. at __, 137 S. Ct. at 2028 (Sotomayor, J., dissenting) (“The government may not directly fund religious exercise.” (citing *Everson*, 330 U.S. at 16)).

162. *Everson*, 330 U.S. at 16; see *Comer*, 582 U.S. at __, 137 S. Ct. at 2017 (discussing Missouri’s policy of categorically denying grants to churches and religious organizations).

163. Compare *Everson*, 330 U.S. at 5 (discussing parents’ ability to access state funds to reimburse bus transportation costs to a parochial school), with *Comer*, 582 U.S. at __, 137 S. Ct. at 2017 (determining whether Missouri violated the Free Exercise Clause by denying grants to religious organizations).

164. *Everson*, 330 U.S. at 16 (“[W]e do not mean to intimate that a state could not provide transportation only to children attending public schools . . .”).

165. See *Comer*, 582 U.S. at __, 137 S. Ct. at 2019–20 (suggesting that *Everson* supported the *Comer* result).

166. *Everson*, 330 U.S. at 16.

167. *Comer*, 582 U.S. at __, 137 S. Ct. at 2021–22 (“The Department’s policy expressly

were religious, the Court implied that the Center was being treated unfairly.¹⁶⁸ But this is a significant change in focus. If *Everson's* warning that individuals should not be denied public benefits because of their beliefs was meant to include individual religious institutions, then it would be unlikely for the Court to have suggested that it was permissible for New Jersey to deny reimbursement of transportation costs to religious schools. Indeed, *Everson* suggested that the Establishment Clause *prevents* the state from giving funds to individual religious institutions precisely because of their character, which of course picks out religious institutions and disfavors them, at least with respect to their receiving state funding.

Suppose that Ewing Township had initially reserved reimbursement for parents of children attending public schools precisely because the only nonprofit schools that were not public were religious, and the New Jersey Constitution precluded giving public funds to religious schools. *Comer* implied that reserving funds for public schools for that reason would have violated constitutional guarantees,¹⁶⁹ whereas the *Everson* Court suggested that reimbursement of travel funds to private schools was permissible, but not required.¹⁷⁰

The Missouri Department of Natural Resources did not refuse to award the grant to the Center out of animus, but because of a provision in the Missouri Constitution providing:

That no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect or denomination of religion, or in aid of any priest, preacher, minister or teacher thereof, as such; and that no preference shall be given to nor any discrimination made against any church, sect or creed of religion, or any form of religious faith or worship.¹⁷¹

One question is whether that constitutional provision actually prevents such grants from being awarded to religious preschools.

discriminates against otherwise eligible recipients by disqualifying them from a public benefit solely because of their religious character.”)

168. *See id.* at __, 137 S. Ct. at 2019 (“The Free Exercise Clause ‘protect[s] religious observers against unequal treatment’ and subjects to the strictest scrutiny laws that target the religious for ‘special disabilities’ based on their ‘religious status.’” (quoting *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533, 542 (1993) (alteration in original))).

169. *See id.* at __, 137 S. Ct. at 2020.

170. *Everson*, 330 U.S. at 4–5.

171. *Comer*, 582 U.S. at __, 137 S. Ct. at 2017 (quoting MO. CONST. art. I, § 7).

Perhaps that provision is best interpreted as not barring religious schools from receiving certain public benefits,¹⁷² although that would be a question best left to the Missouri Supreme Court.¹⁷³ However, rather than wait for a clarification of state law,¹⁷⁴ the *Comer* Court instead addressed whether the state was constitutionally permitted to deny the benefit at issue.¹⁷⁵

The *Comer* Court held that states are prohibited from discriminating against religious entities, in particular, with respect to the distribution of *certain* public benefits.¹⁷⁶ This holding is not surprising, depending upon which public benefits are included within that limitation. Few people, if any, would suggest that states are permitted to deny police and fire services to religious institutions.¹⁷⁷ The difficulty posed by *Comer* is in figuring out which

172. See *id.* at __, 137 S. Ct. at 2024 n.3 (“This case involves express discrimination based on religious identity with respect to playground resurfacing.”); *cf. id.* at __, 137 S. Ct. at 2021 (“The Department’s policy expressly discriminates against otherwise eligible recipients by disqualifying them from a public benefit solely because of their religious character.”). The Missouri Supreme Court has construed this provision in different cases. *Compare* *Ams. United v. Rogers*, 538 S.W.2d 711 (Mo. 1976) (upholding the constitutionality of tuition grants even if used to attend religious institutions as long as certain conditions were met), *with* *Paster v. Ussey*, 512 S.W.2d 97 (Mo. 1974) (holding a statute unconstitutional insofar as it permitted textbooks to be loaned free of charge to students attending religious schools).

173. See, e.g., *Puget Sound Power & Light Co. v. County of King*, 264 U.S. 22, 27 (1924) (“The objections based on the state constitution of Washington have been settled adversely and conclusively for us by the decision herein of the State Supreme Court.”); see also Lawrence Friedman, *The Constitutional Value of Dialogue and the New Judicial Federalism*, 28 HASTINGS CONST. L.Q. 93, 100 (2000) (“[S]tate supreme courts have the unquestioned, final authority to interpret their state constitutions.”); Eric M. Hartmann, *Preservation, Primacy, and Process: A More Consistent Approach to State Constitutional Interpretation in Iowa*, 102 IOWA L. REV. 2265, 2285 (2017) (“[S]tate supreme courts are the final arbiters of their respective state constitutions.”).

174. See Verity Winship, *Cooperative Interbranch Federalism: Certification of State-Law Questions by Federal Agencies*, 63 VAND. L. REV. 181, 182 (2010) (“When an unresolved state-law question arises in federal court, the court may ‘certify’ it to the relevant state court.”).

175. *Comer*, 582 U.S. at __, 137 S. Ct. at 2019. There is some basis for believing that the Missouri Supreme Court would have upheld the department’s interpretation of its state constitutional obligation. See *Harfst v. Hoegen*, 163 S.W.2d 609, 614 (Mo. 1941) (“The constitutional policy of our State has decreed the absolute separation of church and state, not only in governmental matters, but in educational ones as well.”).

176. See *Comer*, 582 U.S. at __, 137 S. Ct. at 2021, 2024–25; *id.* at __, 137 S. Ct. at 2026–27 (Breyer, J., concurring) (likening the denial of the grant to promote health and safety in the instant case to the denial of police and fire services that *Everson* suggested would be impermissible (citing *Everson v. Bd. of Educ.*, 330 U.S. 1, 17–18 (1947))).

177. See Sanford Levinson, *Some Reflections on Multiculturalism, “Equal Concern and Respect,” and the Establishment Clause of the First Amendment*, 27 U. RICH. L. REV. 989, 998 (1993) (“Few persons, though, are so relentlessly anti-clerical as to deny police and fire protection to a church.”); Ira C. Lupu & Robert Tuttle, *The Distinctive Place of Religious Entities in Our Constitutional Order*, 47 VILL. L. REV. 37, 49 (2002) (“Secularists believe that religious entities must survive entirely on private support, excepting only those public

public benefits must be accorded to sectarian institutions¹⁷⁸ and why.

The *Comer* Court implied that the implicated constitutional difficulty was that the policy at issue “single[d] out the religious for disfavored treatment.”¹⁷⁹ The Court acknowledged that the Missouri policy triggered “the most exacting scrutiny.”¹⁸⁰ However, the Court did not make clear whether it triggered strict scrutiny because, *as a general matter*, such scrutiny is triggered when religious entities are picked out for less favorable treatment,¹⁸¹ or because it was picking out religious entities for less favorable treatment with respect to the provision of (a particular kind of) public benefit.¹⁸²

Locke rejected that strict scrutiny was triggered merely because a religious program was receiving less favorable treatment¹⁸³ and, further, suggested that Washington had “substantial” interests served in not funding devotion studies.¹⁸⁴ Assuming that *Locke* is still good law,¹⁸⁵ the mere fact that a religious group is treated less

goods, such as police and fire protection, available to all as a common right.”).

178. *Cf.* *Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 781 (1973) (“In *Everson*, the Court found the bus fare program analogous to the provision of services such as police and fire protection, sewage disposal, highways, and sidewalks for parochial schools.” (citing *Everson*, 330 U.S. at 17–18)).

179. *Comer*, 582 U.S. at ___, 137 S. Ct. at 2020.

180. *Id.* at ___, 137 S. Ct. at 2021 (citing *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 546 (1993)).

181. *Id.* at ___, 137 S. Ct. at 2025–26 (Gorsuch, J., concurring in part) (“And the general principles here do not permit discrimination against religious exercise—whether on the playground or anywhere else.”); *cf.* *Hialeah*, 508 U.S. at 546 (“A law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny.”).

182. *Compare Comer*, 582 U.S. at ___, 137 S. Ct. at 2026–27 (Breyer, J., concurring) (“But I find relevant, and would emphasize, the particular nature of the ‘public benefit’ here at issue.”), *with id.* at ___, 137 S. Ct. at 2026 (Gorsuch, J., concurring in part) (“I worry that some might mistakenly read it to suggest that only ‘playground resurfacing’ cases, or only those with some association with children’s safety or health, or perhaps some other social good we find sufficiently worthy, are governed by the legal rules recounted in and faithfully applied by the Court’s opinion.”).

183. *See Locke v. Davey*, 540 U.S. 712, 725 (2004) (“Without a presumption of unconstitutionality, Davey’s claim must fail.”); *see also Comer*, 582 U.S. at ___, 137 S. Ct. at 2025 (Thomas, J., concurring in part) (“*Locke* did not subject the law at issue to any form of heightened scrutiny.”).

184. *Locke*, 540 U.S. at 725.

185. *But see Comer*, 582 U.S. at ___, 137 S. Ct. at 2025 (Thomas, J., concurring in part) (“This Court’s endorsement in *Locke* of even a ‘mil[d] kind’ of discrimination against religion remains troubling.” (alteration in original) (quoting *Locke*, 540 U.S. at 720)).

favorably neither establishes animus,¹⁸⁶ nor even that the practice at issue is presumptively invalid.¹⁸⁷

Like Washington, Missouri had important anti-establishment interests implicated,¹⁸⁸ and at least one of the questions at hand was why strict scrutiny was employed in *Comer*, but not in *Locke*. In one interpretation, it was because a kind of public benefit analogous to police and fire services was being withheld from a religious entity.¹⁸⁹ In another interpretation, it was merely because the state benefit withheld in *Comer* was for something other than the pursuit of devotional studies.¹⁹⁰

Comer is regrettable, at least in part, because its analysis obscures rather than clarifies free exercise guarantees in particular, and the Religion Clauses more generally. The Court offered language suggesting that religious entities should not be treated differently than others, but did not strike down Missouri's State Blaine Amendment requiring that differentiation, nor cast doubt upon the legitimacy of state anti-establishment interests.¹⁹¹ Members of the Court hinted that the nature of the benefits might be important in its analysis, but seemed not to consider, much less spell out, the ramifications of the differing positions.¹⁹²

Presumably, all members of the Court agree that a state could not deny police and fire services to a religious institution.¹⁹³ But that is because fire and police services should be provided to all. When Justice Jackson discussed the police and travel expense

186. *Locke*, 540 U.S. at 725 (“[W]e find neither in the history or text of Article I, § 11, of the Washington Constitution, nor in the operation of the Promise Scholarship Program, anything that suggests animus toward religion.”).

187. *Id.* (noting that no “presumption of unconstitutionality” was at issue).

188. *Comer*, 582 U.S. at ___, 137 S. Ct. at 2032 (Sotomayor, J., dissenting) (“Missouri has decided that the unique status of houses of worship requires a special rule when it comes to public funds. . . . Missouri’s decision, which has deep roots in our Nation’s history, reflects a reasonable and constitutional judgment.”); *Locke*, 540 U.S. at 722.

189. *Comer*, 582 U.S. at ___, 137 S. Ct. at 2026–27 (Breyer, J., concurring) (citing *Everson v. Bd. of Educ.*, 330 U.S. 1, 17–18 (1947)).

190. *See Comer*, 582 U.S. at ___, 137 S. Ct. at 2025 (Thomas, J., concurring in part) (“But [the *Locke* Court] also did not suggest that discrimination against religion outside the limited context of support for ministerial training would be similarly exempt from exacting review.”).

191. *See id.* at ___, 137 S. Ct. at 2024–25 (majority opinion).

192. *See supra* notes 179–82 and accompanying text.

193. *Cf. Comer*, 582 U.S. at ___, 137 S. Ct. at 2027 (Breyer, J., concurring) (“The Court stated in *Everson* that ‘cutting off church schools from’ such ‘general government services as ordinary police and fire protection . . . is obviously not the purpose of the First Amendment.’” (alteration in original) (quoting *Everson*, 330 U.S. at 17–18)).

analogy in his *Everson* dissent,¹⁹⁴ he was suggesting that members of society as a general matter should be afforded those services.¹⁹⁵ But, as Justice Breyer recognized in his *Comer* concurrence, the benefit at issue in *Comer* was only awarded to a limited number of recipients.¹⁹⁶ While he rightly noted that the fact that this was a limited benefit did not itself justify precluding religious entities from receiving the benefits,¹⁹⁷ he seemed to ignore why the State was not awarding that benefit to religious schools.

The Missouri Department of Natural Resources did not deny the grant because of administrative convenience or out of whim or animus,¹⁹⁸ but because of Missouri's State Blaine Amendment.¹⁹⁹ If the State's anti-establishment interests are legitimate or important, then there is a basis for distinguishing between religious and other schools, assuming that the constitutional amendment does indeed require that deserving religious schools not be awarded this benefit.²⁰⁰ It was not merely the fact that the Center was religious that justified the differential treatment. Rather, it was because, in addition, Missouri's State Blaine Amendment precluded the Church from receiving this grant²⁰¹ and because that amendment (presumably) serves valid and legitimate state interests.²⁰²

Justice Breyer's observation that the benefit at issue could only be awarded to a limited number of people is important for an additional reason. One of the reasons that the police and fire analogy is so powerful is that this is the kind of benefit that all should receive. But one of the lessons of *Everson* is that a state is permitted,

194. See *supra* notes 101–03 and accompanying text.

195. *Everson*, 330 U.S. at 25 (Jackson, J., dissenting) (“A policeman protects a Catholic, of course—but not because he is a Catholic; it is because he is a man and a member of our society. The fireman protects the Church school—but not because it is a Church school; it is because it is property, part of the assets of our society.”).

196. *Comer*, 582 U.S. at __, 137 S. Ct. at 2027 (Breyer, J., concurring) (“[T]he program at issue ultimately funds only a limited number of projects . . .”).

197. *Id.* at __, 137 S. Ct. at 2027 (“The fact that the program at issue ultimately funds only a limited number of projects cannot itself justify a religious distinction.”).

198. *Cf. id.* at __, 137 S. Ct. at 2027 (“Nor is there any administrative or other reason to treat church schools differently.”).

199. *Id.* at __, 137 S. Ct. at 2017 (majority opinion) (“That policy, in the Department's view, was compelled by Article I, Section 7 of the Missouri Constitution . . .”).

200. See *supra* notes 172–75 and accompanying text.

201. *But see supra* note 171 and accompanying text.

202. See *supra* notes 140–43 and accompanying text (discussing the *Locke* Court's description of Washington's legitimate anti-establishment interests).

but not required, to accord some health and safety benefits to religious institutions. If the benefit at issue in *Comer* is like the benefit at issue in *Everson* in that respect, then it would be the kind of benefit that the Establishment Clause would permit, but the Free Exercise Clause would not require awarding. Basically, by implying that *Everson* supports the *Comer* holding,²⁰³ *Comer* rewrites *Everson* to suggest that according the benefit was not only permissible, but required.

The Court *may* have been rewriting *Everson* in another respect, namely, to suggest that the *Everson* Court's cautioning that individual citizens should not be denied public benefits because of their faith²⁰⁴ has now been expanded to include individual religious institutions.²⁰⁵ But such a reading would require a reworking of Establishment Clause jurisprudence. *Everson* interprets the guarantees of the Establishment Clause as precluding state funding of sectarian institutions, which picks out sectarian institutions for less favorable treatment and, hence, would violate *Comer's* prohibition of targeting such institutions.

In his *Locke* dissent, Justice Scalia recognized that the Constitution would have permitted Washington to restrict the scholarship to public universities.²⁰⁶ Presumably, Missouri might have limited its tire program to public entities, for example, city parks and public schools who could have used rubberized surfaces to make their playgrounds safer. According to Justice Scalia, were Missouri to have done that, the State would not have been subjecting religious institutions to facial discrimination.²⁰⁷ But one of the questions before the Court in *Comer* was whether Missouri could offer rubberized surface grants to deserving, secular, private institutions.²⁰⁸

Comer may be interpreted to impose new restraints on those states with constitutional amendments banning support of sec-

203. See *Comer*, 582 U.S. at ___, 137 S. Ct. at 2019–20.

204. See *Everson v. Bd. of Educ.*, 330 U.S. 1, 16 (1947).

205. See *Comer*, 582 U.S. at ___, 137 S. Ct. at 2025 (stating that “the exclusion of Trinity Lutheran from a public benefit . . . solely because it is a church . . . cannot stand”).

206. *Locke v. Davey*, 540 U.S. 712, 729 (2004) (Scalia, J., dissenting) (“[The state] could make the scholarships redeemable only at public universities . . .”).

207. *Id.* (noting that limiting the scholarships to public universities “would replace a program that facially discriminates against religion with one that just happens not to subsidize it”).

208. *Comer*, 582 U.S. at ___, 137 S. Ct. at 2019.

tarian institutions. Consider university scholarships: *Comer*, combined with a State Blaine Amendment, may prevent a state from affording scholarships to students at private, *secular* universities.

Comer suggests that the Federal Constitution precludes the state from picking out religious schools, in particular, for adverse treatment.²⁰⁹ Missouri's State Blaine Amendment precludes the state from giving state funds to religious institutions.²¹⁰ That State Blaine Amendment has not been struck down and, depending upon how it is interpreted,²¹¹ may preclude the state from affording scholarships to religious institutions.²¹² But combining the state and federal constitutional limitations would seem to require that the state only provide scholarships to public institutions. Further, if indeed the Court takes seriously that individual religious institutions cannot be treated less favorably because of their faith, then there may be other kinds of benefits that states will be precluded from offering to non-religious, private entities without also awarding them to religious, private entities. Basically, if the state constitutional limitation on giving state aid to religious institutions is interpreted broadly, and if *Comer* is interpreted to preclude picking out religious institutions for less favorable treatment with respect to almost all public benefits rather than to only a limited number of public benefits, then states with such constitutional provisions may be severely limited with respect to the kinds of benefits that they can accord to private, secular institutions.

CONCLUSION

In *Comer*, the Court struck down Missouri's refusal to provide a grant to otherwise deserving sectarian institutions on free exercise grounds.²¹³ But the Court failed to offer a coherent rationale for its holding and made the existing jurisprudence even more muddled than it was before.

209. *See id.* at ___, 137 S. Ct. at 2019.

210. *See supra* note 171 and accompanying text.

211. *See supra* notes 172–75, 191 and accompanying text.

212. *Cf. Brusca v. State of Missouri ex rel. State Bd. of Educ.*, 332 F. Supp. 275, 279 (E.D. Mo. 1971) (“We find nothing arbitrary or unreasonable in the determination of the State to deny its funds to sectarian schools or for religious instruction.”).

213. *Comer*, 582 U.S. at ___, 137 S. Ct. at 2017, 2019, 2021–22.

Various states have State Blaine Amendments.²¹⁴ The Court did not say that such amendments were motivated by animus or even that they were unconstitutional. But, as the *Locke* Court explained, such amendments pick out sectarian institutions for disfavored treatment out of legitimate anti-establishment interests.²¹⁵ Without casting doubt on *Locke's* assessment of the implicated anti-establishment interests as legitimate and important, the *Comer* Court struck down Missouri's actions based on state law because doing so allegedly violated the guarantees of the Free Exercise Clause.²¹⁶

Comer would have been more understandable if Missouri had been denying a public benefit to a sectarian institution, like police or fire services, that all should receive. But the benefit at issue could only be accorded to some, and Missouri's decision to promote legitimate anti-establishment interests rather than, for example, choose the recipients randomly, would seem to have been entitled to some deference.

Comer would also have been easier to understand if the lower courts had thought Missouri was barred from awarding that benefit by federal Establishment Clause guarantees because the *Comer* Court might then have reasonably suggested that *Everson* was controlling. But the question was whether Missouri was required, rather than merely permitted, to award the benefit. *Comer* is difficult to understand, at least in part, because the Court suggests that *Everson* governs the analysis without seeming to appreciate the constitutionally significant differences between the two cases or even how *Comer* undercuts the *Everson* Court's reasoning.

Certainly, the opinions can be reconciled—*Everson* suggested that certain public benefits cannot be denied to religious institutions,²¹⁷ and it might be argued that the provision of a grant to acquire a rubberized surface for a playground is more like police and fire services²¹⁸ than the reimbursement of travel costs to parochial schools. If that is so, however, then one must wonder what justification could be offered for denying such a good to anyone.

214. See Jonathan D. Boyer, *Education Tax Credits: School Choice Initiatives Capable of Surmounting Blaine Amendments*, 43 COLUM. J.L. & SOC. PROBS. 117, 131 (2009).

215. *Locke v. Davey*, 540 U.S. 712, 721–22 (2004).

216. *Comer*, 582 U.S. at ___, 137 S. Ct. at 2022–24.

217. *Everson v. Bd. of Educ.*, 330 U.S. 1, 16 (1946).

218. See *Comer*, 582 U.S. at ___, 137 S. Ct. at 2027 (Breyer, J., concurring).

Certainly, it would not be permissible to award police and fire services to *only some* deserving recipients, regardless of how the deserving are defined.

Comer did too much and too little. It suggested that religious entities cannot be disfavored without specifying the implications of such a position for Establishment Clause jurisprudence.²¹⁹ If the Court merely meant that religious institutions cannot be disfavored with respect to their eligibility for the provision of certain benefits, then the Court should have done more to explain which benefits could not be denied and why.

The Court did not address whether states have legitimate or important anti-establishment interests nor how such interests should be weighed in the balance if *Locke's* recognition of such interests remains good law. Overall, the Court made Religion Clause jurisprudence even murkier without any apparent awareness of which doctrines were being undermined.

Comer can, and likely will, be read in a host of different ways by the lower courts, which will make Religion Clause guarantees even more uncertain and variable across the circuits. At its earliest opportunity, the Court must provide clarification, if only to make clear whether the Court is substantially reworking the Religion Clauses²²⁰ or, instead, is only adding a benefit to the list of those that cannot be denied to a religious institution because of its beliefs.²²¹

219. *Id.* at ___, 137 S. Ct. at 2024.

220. *See id.* at ___, 137 S. Ct. at 2027 (Sotomayor, J., dissenting) (“This case is about nothing less than the relationship between religious institutions and the civil government—that is, between church and state. The Court today profoundly changes that relationship by holding, for the first time, that the Constitution requires the government to provide public funds directly to a church.”).

221. *See id.* at ___, 137 S. Ct. at 2027 (“To hear the Court tell it, this is a simple case about recycling tires to resurface a playground.”).