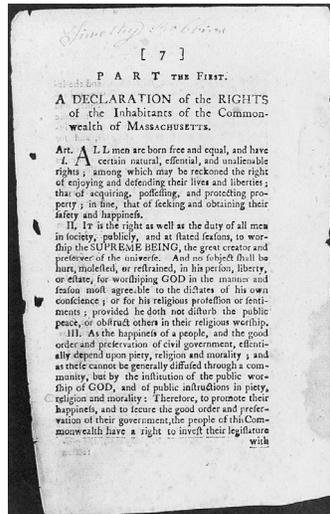


Winning *Wirzburger* and Defeating the Blaine Amendments:  
Arguing Present Efficacy Instead of Past Intent



(Massachusetts' Constitution, *circa* 1780)

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## Abstract

The case of *Wirzbarger v. Galvin*, currently on a writ of certiorari to the Supreme Court, may set the tone for all religious discrimination cases in the future. Massachusetts' constitutional amendments that proscribe any citizen initiatives from either dealing with religion in general or attempting to repeal the states Blaine Amendment are at issue in the case. Petitioner's counsel, the Becket Fund, rightly views this case as paramount in the long-march to victory over the anti-Catholic Blaine Amendments still codified in 37 state constitutions. However, they have lost almost every stage of the case.

This article argues that *Wirzbarger* and other anti-Blaine litigation should experience a paradigm shift. No longer should litigators argue the Blaine's "past intent" to discriminate against religious persons, and particularly Catholics. The 2004 *Locke v. Davey* decision confirms the Supreme Court's unwillingness to affirm the animus behind the Blaine Amendments. *Wirzbarger* and future cases should pin their claims upon the higher ground of nonpersecution, outlined in the 1993 *Lukumi Babalu Aye* case. The principles of neutrality, general applicability and non-exemption serve as fundamental tenets of this argumentative direction. This article argues that these tenets boost the strength of petitioner's Constitutional claims.

*Wirzbarger* must be won. The veil of anti-Catholic discrimination must finally be lifted and the bigoted Blaine's repealed. Only by pinning anti-Blaine litigation upon the doctrine of nonpersecution and arguing present efficacy instead of past intent, will these hopes materialize.

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Winning *Wirzburger* and Defeating the Blaine Amendments: Arguing Present Efficacy  
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I. Introduction

Grand notions of America's perfection have largely dissipated, replaced by a realistic view of the sins of the state. Perhaps this is beneficial. No nation is perfect, and America's past and present certainly fails to defy this rule. Of all America's sins, discrimination seems to top the list. In politics (white males only as eligible voters), race-relations (*de facto* discrimination spiraling into the present), and even international relations (imperialistic domination in the Philippines, Cuba and Hawaii, *et al*), the United States' record is stained. Enter religion. The Constitution's lofty First Amendment preventing Congress from making any law "respecting an establishment of religion," or "prohibiting the free exercise" of any US citizen crafts an aura of protection around both religion and religious persons.<sup>1</sup> Despite these words, no reasonable person can deny the stains of discrimination streaking through the history of religion in America. This paper focuses not on religious discrimination in general, but towards one particular faith—Catholicism.<sup>2</sup>

Anti-Catholic animus reached its apogee in the United States during the 1870s. Before and after this period, at least 37 state provisions were passed that aimed

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<sup>1</sup> See the First Amendment, United States Constitution. I refer here to an aura of protection, to avoid using Thomas Jefferson's idea of a wall between the church and state. Scholarship reveals, in my opinion, that Jefferson's words were misquoted by Justice Black in the 1947 case of *Everson v. Board of Education of Ewing*, 330 U.S. 1 (1947) and continue to be a misnomer in modern jurisprudence.

<sup>2</sup> Gregory C. Sisk, *How Traditional and Minority Religions Fare in the Courts: Empirical Evidence From Religious Liberty Cases*, 76 U. Colo. L. Rev. 1021 (2005).

specifically at debilitating the effect of a growing American Catholic influence.<sup>3</sup> Commonly called the Blaine Amendments after the sponsor of the failed federal Anti-Aid Amendment, these provisions proscribe any and all state funding from flowing to religious or “sectarian” institutions. Protestants, along with strict separationists, sought these provisions as a knee-jerk reaction to Catholic requests for parochial school funding. Open anti-Catholic animus operates pervasively throughout not only the founding of these Anti-Aid Amendments, but in their present selective (and discriminatory) enforcement.<sup>4</sup>

Those seeking to repeal state Blaine Amendments face an arduous uphill battle. The case with which this paper deals, centers not on the constitutionality of the blighted Blaines themselves but upon discriminatory exclusionary measures designed to safeguard them. *Wirzburger v. Galvin*, currently on a writ of certiorari to the Supreme Court, presents Blaine opponents’ best chance to begin the battles leading to a legal victory.<sup>5</sup> Much like the stair-step cases paving the path to Thurgood Marshall’s penultimate triumph in the *Brown v. Board of Education* decision<sup>6</sup>, *Wirzburger* may carve out the first jurisprudential niche in the cliff-face of the Blaine Amendments. To do this, however, the arguments advanced by Petitioner Susan Wirzburger’s counsel, the Becket Fund, must be extraordinarily effective. The Becket Fund has lost every stage of the case.<sup>7</sup> Petitioners seek Massachusetts to allow the Wirzburger proposed amendment freeing

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<sup>3</sup> Frederick Mark Gedicks, *Reconstructing the Blaine Amendments*, 2 First. Amend. L. Rev. 86 (2004). A broader history of the Blaine Amendments will later be offered.

<sup>4</sup> See Richard W. Garnett, *The Theology of the Blaine Amendments*, 1 First. Amend. L. Rev. (2003).

<sup>5</sup> Michael Wirzburger, et al., v. William F. Galvin, Secretary of State, et al., No. 04-1625, 2005 U.S. App. LEXIS (1<sup>st</sup> Cir. Jun. 24, 2005).

<sup>6</sup> See *Brown v. Board of Education*, 347 U.S. 483 (1954). For an example of a “stair-step” case that led to *Brown*, see *Sweatt v. Painter*, 339 US 629 (1950).

<sup>7</sup> The 1998 federal court order that allowed Wirzburger’s petition to be circulated during the pending legal battle may count as a victory. See The Becket Fund, *Wirzburger v. Galvin* (2005), <<http://www.becketfund.org/index.php/case/6.html>>

public aid to “students attending private schools, regardless of the schools’ religious affiliation”<sup>8</sup> to make the initiative ballot over the objections of the Religious Exclusion and the Anti-Aid Exclusion.<sup>9</sup> The recent First Circuit loss amplifies the necessity of winning in the Supreme Court, should the writ of certiorari be accepted. Past arguments seem rather anachronistic. In the eyes of the courts, the Becket Fund’s claims have been purposed but not exceedingly powerful. This paper presents my humble suggestions to steer the legal ship aiming at winning the *Wirzburger* case and eventually striking-down all state Blaine Amendments in a slightly different direction.

Past failures in *Wirzburger* and other anti-Blaine efforts center upon attacking the Blaine’s past discriminatory intent instead of focusing on their present discriminatory operation. The Blaine Amendments should be ruled unconstitutional simply upon an examination of their present implementation with only little evidence of their past intentions. The modern judicial branch seems hesitant to track down a new menace to the Free Exercise and Equal Protection clauses. *Locke v. Davey* (2004) illustrates the Rehnquist court’s unwillingness to enter uncharted waters and acknowledges the animus behind the Blaine Amendments.<sup>10</sup> Though the Supreme Court now hosts four Catholic members (including Chief Justice Roberts) and may receive another<sup>11</sup>, their propensity to overturn Blaine’s upon historical discrimination alone is at best, doubtful. Of the

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<sup>8</sup> (Pl. Pet. at 4).

<sup>9</sup> Both Exclusions are housed in Article 48, section 2 of the Massachusetts Constitution. These exclusions prohibit any initiatives aimed at either repealing the Anti-Aid Amendment (Article 18) or discussing religion in general from the state initiative process.

<sup>10</sup> See *Locke v. Davey*, 540 U.S. 712 (2004). The Court refused to accept that Washington’s Blaine Amendment was passed in a spirit of anti-Catholic animus. Future decisions will undoubtedly utilize this case as a strong precedent. *Wirzburger* must forge ahead, determined to delineate a new era of Blaine jurisprudence—an era unfettered by failures to display the animus inherent in the Blaine’s. Of any case, though, *Wirzburger* has the best chance of revealing the bias inherent in the passing of these amendments. The Becket Fund has done an excellent job of showcasing this throughout the case’s history.

<sup>11</sup> The high Court’s Catholic Justices: Chief Justice Roberts, Justice Scalia, Justice Thomas, Justice Kennedy, and upon his successful confirmation, Judge Alito.

Catholic justices, Justice Thomas remains most likely to side with Blaine opponents, airing this possibility in the plurality opinion of *Mitchell v. Helms*.<sup>12</sup> Whether or not the Catholic Justices would assuredly act against the Blaine Amendments, anti-Blaine litigation must ensure that it takes a road leading to long-term and not simply momentary success.

This road should be constructed from arguments dealing with efficacy and not original intent. The Becket Fund has based much of its *Wirzburger* claims upon the latter, but for good reason. More evidence depicts anti-Catholic animus in the passage both of Massachusetts' 1855 Anti-Aid Amendment and 1917-1918 Exclusions than those of perhaps any other state. However, not every case will be able to follow this course. Future plaintiffs, I believe, should only sparingly beg the Court to treat Blaine's as it treated vestigial Jim Crow laws.<sup>13</sup> The Blaine Amendments are a difficult beast to master. They are facially neutral towards religion, seem to sanctify (if not widen) the separation of church and state, and theoretically treat each religion equally.<sup>14</sup> My recommendations take this reality into account. Indeed, opponents must do more than simply focus their arguments on the Blaines' current discrimination. Besides this tactic, litigants should pin their claims upon relatively recent spheres of the Supreme Court's jurisprudence: neutrality, general applicability, and nonpersecution. Constitutional claims implicating the Free Exercise Clause and the Equal Protection clause should be refracted through these three propositions.<sup>15</sup> In this way, the paramount case of *Wirzburger v. Galvin* will be won and the path paved to the eventual demise of the other 36 state Blaine

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<sup>12</sup> *Mitchell v. Helms*. 530 US 793 (2000).

<sup>13</sup> See (Pl. Pet. at 3).

<sup>14</sup> This is not the case in *Wirzburger*. The Plaintiffs rightfully—and forcefully—showcase the selective and discriminatory modern enforcement of Massachusetts Anti-Aid Amendment. See (Pl. Pet. at 8-9).

<sup>15</sup> Of the First and 14<sup>th</sup> Amendments, respectively.

Amendments.<sup>16</sup> I first examine the Blaine Amendments at large, then delve into the Supreme Court’s recent religion and equal protection jurisprudence, while finally discussing the specifics of my proposed path for *Wirzburger* and explicating the constitutional provisions at play.

## II. An Elucidation of the Blaine Amendments: Discriminatory Then and Now

The Blaine Amendments were not born in a day. They are the result of a long-standing American Protestant<sup>17</sup> aversion to the Catholic faith. According to Arthur Schlesinger, Sr., anti-Catholic “prejudice” is the “deepest bias in the history of the American people.”<sup>18</sup> Professor Noah Feldman explains that this sentiment stems from more than a mere distrust of Catholic sympathies.<sup>19</sup> 19<sup>th</sup> century American Protestants fancied themselves to form an amalgamated conception of “nonsectarianism: the claim that there were moral principles shared in common by all Christian sects, independent of their particular theological beliefs.”<sup>20</sup> Catholic sectarianism, then, represented a threat to the inculcation of morals to the nation’s youth. And the threat only grew. The Catholic population in America spiraled from 341,000 in the 1830s to over 1.3 million by 1854.<sup>21</sup> Common schools overflowed with Catholic immigrants. Pupils were subjected to moral instruction that often consisted of reading the King James Bible. Protestants proclaimed

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<sup>16</sup> Excluding, perhaps, those Blaine Amendments that do not discriminate now and allow equal opportunity access to funding.

<sup>17</sup> The aversion of American Protestants to Catholics certainly stems from the turmoil of Luther’s Reformation and the resulting 30 years war. Not surprisingly, such long-standing animosity did not die upon reaching the American coast line. I say this to note that my examination of the Blaine’s history excludes approximately 300 years of general sectarian hatred.

<sup>18</sup> Qtd. in Richard W. Garnett, *The Theology of the Blaine Amendments* 63 (2003).

<sup>19</sup> See Noah Feldman, *Divided by God* 61-71 (2005).

<sup>20</sup> Id. at 61 (2005). Note: Nonsectarianism, as we shall see, did—and does—not include Catholicism.

<sup>21</sup> Id. at 63 (2005).

this practice holy and altogether necessary; Catholics found the practice unholy and altogether appalling. Catholic students were not allowed to read the Church-sanctioned Douay-Reims translation and were admonished by Church leadership to abstain from school readings of the supposedly “nonsectarian” King James Bible.<sup>22</sup> The American Catholic Church leadership eventually began to fight back against the majoritarian Protestant establishment. Catholic parents were exhorted to send their children to parochial schools, no matter how great the financial burden. Soon, the Catholic Church and parochial-school parents began knocking on state-house doors seeking funding for their schools. Their argument was simple. All Protestants received a government-funded public education which offers them a religious (e.g., “moral”) education. Catholic children should receive at least as much. Yet it was not to be. Most Protestants, as Professor Richard W. Garnett illustrates, simply felt that parochial schooling lacked the Republican emphasis so desperately needed in a Republic.<sup>23</sup> Schools are more than houses of learning; they are the very foundation of successful democracies. Catholics schools were continually denied funding, yet the calls for religious equity only grew louder. Unfortunately, the calls against this type of equity prevailed.

Political solutions were needed to hedge against Catholic funding requests. Legislators realized that barring aid only to Catholic recipients was out of the question.<sup>24</sup> The 18<sup>th</sup> article of Massachusetts’ Constitution, indirectly at issue in *Wirzburger*,

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<sup>22</sup> Id. at 63 (2005).

<sup>23</sup> Richard W. Garnett, *The Theology of the Blaine Amendments*, 1 First. Amend. L. Rev., 76 (2003). Note the following thought: “In the words of the father of the Common School Movement, Horace Mann, “it may be an easy thing to make a republic; but it is a very laborious thing to make Republicans.” See 1 *The People Shall Judge: Readings in the Formation of American Policy* (Univ. of Chi. Ed., 1949).

<sup>24</sup> I find the facial neutrality of the First Blaine’s quite astounding, considering that the 14<sup>th</sup> amendment had not yet been constructed. Example: Massachusetts’ Anti-Aid Amendment was passed in 1855. The 14<sup>th</sup> Amendment was ratified on July 9, 1868.

provides an excellent example of the final solution.<sup>25</sup> The Know-Nothing party won control of Massachusetts in the early 1850s. Implementing their agenda to “Americanize America,” they launched an “attack on the civil and political rights of the foreign-born and Roman Catholics that went beyond anything else found in the country.”<sup>26</sup> Overwhelming political capital led to the proposal and ratification of the Anti-Aid Amendment that prohibited any state funds from flowing to schools administered by a “religious sect.”<sup>27</sup> Of course, the Amendment’s carefully crafted language did not outlaw public funds from supporting any nonsectarian religious schools, to include public schools.<sup>28</sup> And so it began. This original Amendment was expanded and entrenched in the 1917-1918 Massachusetts Constitutional Convention. Delegates revised Article 18 to proscribe funding for any sectarian institution. The two exclusionary principles at issue were passed and ratified, forming a protective force field around the Anti-Aid Amendment.

Well before Massachusetts’ exclusions became reality, US Senator James G. Blaine of Maine proposed an 1875 federal constitutional amendment prohibiting public funds from being controlled by any “religious sect.”<sup>29</sup> Most scholars believe that Senator Blaine sought this Amendment as a means to obtain increased political capital by playing on the anti-Catholic sentiment inherent in the minds of many Americans. His

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<sup>25</sup> See Richard Fossey & Robert LeBlanc, *Vouchers for Sectarian Schools after Zelman: Will the First Circuit Expose Anti-Catholic Bigotry in the Massachusetts’ Constitution?*, 193 West’s Educ. L. Rep. 343 (Jan. 13, 2005).

<sup>26</sup> John Mulkern, *The Know-Nothing Party in Massachusetts: The Rise and Fall of a People’s Movement* 67, 102 (1990). Qtd in (Pl. Pet. at 6).

<sup>27</sup> Article 18 of the Massachusetts’ Constitution. Qtd. in (Pl. Pet. at 6).

<sup>28</sup> (Pl. Pet. at 6).

<sup>29</sup> Richard Fossey & Robert LeBlanc, *Vouchers for Sectarian Schools after Zelman: Will the First Circuit Expose Anti-Catholic Bigotry in the Massachusetts’ Constitution?*, 193 West’s Educ. L. Rep. 343, 351 (Jan. 13, 2005).

Amendment received overwhelming support from the House of Representatives but failed in the Senate. Failure only incensed nativist advocates to push the Blaine's in the next forums, the states. More than 34 Blaine-style Amendments were passed in the years following the 1875 failure of the federal initiative. Congress, unable to pass their own Blaine amendment, stipulated that "newly admitted states...adopt some form of an anti-sectarian amendment."<sup>30</sup> Some accounts suggest that as many as 47 Blaine provisions exist in the United States.<sup>31</sup>

These provisions are not without effect. Many observers commonly overlook, for instance, the galvanizing effect Anti-Aid Amendments (and their catalyzing nativist mentality) had on American jurisprudence. The court decision commonly understood to set the boundaries between the church and state, *Everson v. Board of Education* (1947), was authored by a person of anti-Catholic sentiments himself—Justice Hugo T. Black.<sup>32</sup> Constitutional law students will note that *Everson* espouses the mantra of strict separationism, even as it allows New Jersey to partially subsidize the cost of public transportation to private, even parochial schools. Though the Supreme Court authorized this allowance, numerous states rely upon their Blaine Amendments to set the boundaries between the church and state. Seven states, in the years following *Everson*, actually struck down nearly analogous transportation-funding requests in light of their anti-Aid

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<sup>30</sup> Kyle Duncan, *Secularism's Laws: State Blaine Amendments and Religious Persecution*, 26 Berkeley Electronic Press, 24 (2003), available at <<http://law.bepress.com/expresso/eps/26>> (accessed 12 November 2005). Professor Duncan discusses the Congress' requirement for states to pass such amendments as a stipulation of state Enabling Acts.

<sup>31</sup> The Wall Street Journal, Opinion Journal section in the Editorial Pages, *The Next Voucher Battleground*, (Aug. 7 2001), available at <<http://www.opinionjournal.com/editorial/feature.html?id=110002095>> (accessed 12 November 2005).

<sup>32</sup> See Richard W. Garnett, *The Theology of the Blaine Amendments*, 1 First. Amend. L. Rev. at 66 (2003).

Amendments.<sup>33</sup> What is the root of such strict separationism? Undoubtedly, it is the Blaine Amendments. John Courtney Murray condemns this separationist mantra as an “irredeemable piece of sectarian dogmatism,” carried over from the days of the Blaines.<sup>34</sup> Thus, the air of anti-Catholic animus pervades even the modern interpretation of established case-law and the minds of many of America’s most revered jurists.<sup>35</sup> The analysis of *Wirzburger v. Galvin* must be exacted with this understanding in mind, though as I have already noted, it should not comprise the central tenet of the Plaintiff’s argument.<sup>36</sup>

### III. The Evolving Doctrine of Nonpersecution: Non-exemption, Neutrality, and General Applicability

Even as anti-Catholicism pervades the Blaine Amendments, it is too weak a ground for Blaine opponents to stand upon. A single Supreme Court decision declaring that past animus plays no part in the present would sink the hopes of many private school parents currently vying for state funding. I now discuss recent areas of jurisprudence that have been catalyzed through the Supreme Court’s decisions in *Employment Division, Oregon Department of Human Resources v. Smith*<sup>37</sup> and *Church of the Lukumi Babalu Aye v. City of Hialeah*<sup>38</sup>. Justice Kennedy refers to the broad “principle that government

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<sup>33</sup> See Thomas Berg, *Anti-Catholicism and Modern Church-State Relations*, 33 Loy. Chic. L. Jour. 121, 128 (2001), (citing *Bd. Of Educ. V. Antone*, 384 P.2d 911 (Okla. 1963)).

<sup>34</sup> Qtd. in Richard W. Garnett, *The Theology of the Blaine Amendments*, 79 (2003).

<sup>35</sup> Justice Douglas is also said to have been very anti-Catholic. His father was greatly influenced by the writings of Paul Blanchard in the 1940s on the corruption of Catholic power.

<sup>36</sup> A more detailed examination of exactly what constitutional and derived provisions are impeded by the Blaine Amendments, and especially by Massachusetts’ exclusions, follows later in the analysis.

<sup>37</sup> *Employment Division, Oregon Department of Human Resources v. Smith*, 494 U.S. 872 (1990).

<sup>38</sup> *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993).

may not enact laws that suppress religious belief or practice,” as that of “nonpersecution” in the majority opinion in *Lukumi*.<sup>39</sup> The Becket Fund and other litigators should found their attacks upon this principle, as it applies to the tenets of non-exemption, neutrality and general applicability.

Non-exemption must be analyzed first, as it sets the stage for the discussion of the other two issues. Its roots stem from the “nineteenth century conflict between the Mormon Church and the territorial laws of the United States prohibiting polygamy.”<sup>40</sup> The case of *Reynolds v. United States*<sup>41</sup> held that Mormon teachings of polygamy did not exempt followers, pursuant to the Free Exercise Clause, from generally applicable anti-polygamy legislation. Legislators gained an increased ability to restrict the Free Exercise Clause rights of citizens if the burdens created were only incidental and the result of generally applicable laws. The next hundred years of jurisprudence brought an increased attention to Free Exercise rights, especially after they were incorporated to the states in the 1940 decision of *Cantwell v. Connecticut*.<sup>42</sup> States were free, in this case, to impose time, manner and place restrictions on solicitation through “general and non-discriminatory legislation.”<sup>43</sup> The Court’s words highlight the nexus of non-exemption and its fellow principles, neutrality and general applicability.

As seen from this brief non-exemption analysis, these next two tiers play a fundamental role in the discussion of religious liberties. Neutrality often appears nebulous, as Douglas Laycock notes: “[t]hose who think that neutrality is meaningless

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<sup>39</sup> Id. at 520 (1993).

<sup>40</sup> Kyle Duncan, *Secularism’s Laws*, at 48 (2003).

<sup>41</sup> See *Reynolds v. United States*, 98 U.S. 145 (1878). This is the Supreme Court’s first major religion decision.

<sup>42</sup> See *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

<sup>43</sup> Id. at 305-10 (1940).

have a point. We can agree on the principle of neutrality without having agreed on anything at all.”<sup>44</sup> But it means at least that Government may not “take sides” in religion, favoring or disfavoring a particular faith or religion in general. General applicability refers to legislation that addresses a governmental interest in a manner which is aimed at securing the public good with a means that does not aim—or place heavy incidental burdens upon—the rights of citizens. The controversial *Smith* decision elucidates this truth. *Smith* dealt with the refusal of Oregon to offer unemployment benefits for two persons fired for ingesting peyote as an aspect of the worship in the Native American Church.<sup>45</sup> Justice Scalia, writing for the majority, emphasized that the Court has never “held that an individual’s religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that a state is free to regulate.”<sup>46</sup> Oregon’s unemployment laws were not tailored to restrict upon the religious beliefs or practices of its citizens. Scalia concedes that Petitioner’s rights have certainly been restricted, but he refuses to open the judicial flood-gates to complaints from individuals claiming exemptions from neutral and general regulations. One must note that Petitioner’s rights were only incidentally restricted. Should Oregon have promulgated laws directly burdening or impeding the free exercise of the Native American Church, a decision more akin to *Lukumi* would have unfolded.

Scalia’s words in *Smith* apply directly to *Wirzburger* and future anti-Blaine litigation. He remarks that citizens seeking religious accommodation should primarily

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<sup>44</sup> Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DePaul L. Rev. 993, 994 (1990). Qtd in Kyle Duncan, *supra* at 67.

<sup>45</sup> See *Employment Division v. Smith*, 494 U.S. 872 (1990). Petitioners were discharged for work-related “misconduct.”

<sup>46</sup> *Id.* at 873.

seek “accommodation...[in] the political process” instead of the courts.<sup>47</sup> Massachusetts’ Exclusions directly restrict Susan Wirzburger and others from seeking political accommodation. Due to her strong Catholic faith, her lack of funds, and her wish to provide her children with a religious education unavailable in public schools, she seeks limited governmental support. Yet her claims are denied. In fact, her wishes are prevented from even being heard, proscribed by archaic Exclusions that force religious persons to clear a steep hurdle to participate in the state initiative process. Justice Scalia unequivocally condemns this type of content-based regulation in *Smith*:

It would be true, we think (although no case of ours has involved the point), that a State would be “prohibiting the free exercise [of religion]” if it sought to ban such acts or abstentions *only when* they are engaged in for religious reasons, or *only because* of the religious beliefs that they display.<sup>48</sup>

In 2000, the Supreme Court galvanized the principle of neutrality in the landmark decision of *Mitchell v. Helms*.<sup>49</sup> The majority opinion breathes a breath of fresh air into the doctrine of neutrality, by offering a brief analysis and definition of its modern applicability. The Establishment Clause receives the most attention in the case, with the declaration that “if the government, seeking to further some legitimate secular purpose, offers aid on the same terms, without regard to religion, to all who adequately further that purpose,” than distributed aid only furthers “that secular purpose.”<sup>50</sup> Thus, governments may achieve secular legislative ends even through organizations or persons with religious purposes. Moreover, the Becket Fund achieved a tremendous victory with Justice

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<sup>47</sup> *Id.* at 890.

<sup>48</sup> *Employment Division v. Smith*, 494 U.S. 872, 877 (1990). *Wirzburger* may be the case that involves this point.

<sup>49</sup> *See Mitchell v. Helms*, 530 U.S. 793 (2000).

<sup>50</sup> *Mitchell v. Helms*, 530 U.S. 793, 795 (2000).

Thomas' harangue of Blaine Amendments in the main opinion.<sup>51</sup> Thomas wrote that Blaines' have a "shameful pedigree" and added that "it was an open secret that "sectarian" was code for "Catholic."<sup>52</sup> Yet it is his discourse upon neutrality that matters most.

*Lukumi Babalu* was decided some seven years prior to *Mitchell*, but its display of the intermingled nature of the three issues at hand is remarkable. Justice Kennedy applied *Smith* standards to evaluate a Hialeah, Hawaii ordinance banning animal sacrifice. The Church of the Lukumi Babalu Aye, Inc., was therefore denied the right to practice its religion within the city. Church members immediately filed a suit, alleging the abrogation of their Free Exercise Rights. The Supreme Court, with Justice Kennedy at the helm, centered their examination upon the principles of neutrality and general applicability. Neutrality did not exist, according to the Court, "if the object of [the] law is to infringe upon or restrict practices because of their religious motivation."<sup>53</sup> Laws violate "general applicability" when, "through neutral in their terms, through their design, construction, or enforcement [they] target the practices of a particular religion for discriminatory treatment."<sup>54</sup> A vibrant nexus exists between these two principles, as distinguished by Justice Kennedy:

Neutrality and general applicability are [interrelated], and, as becomes apparent in this case, failure to satisfy one requirement is a likely indication that the other has not been satisfied. A law failing to satisfy these requirements must be justified by

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<sup>51</sup> The Becket Fund submitted an *amicus* brief in support of this finding.

<sup>52</sup> *Mitchell v. Helms*, 530 U.S. 793, 793-800 (2000).

<sup>53</sup> *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993).

<sup>54</sup> *Id.* at 558. From Justice Scalia's concurrence with Chief Justice Rehnquist.

a compelling governmental interest, and must be narrowly tailored to advance that interest.<sup>55</sup>

Lacking even one of these tenets necessitates strict scrutiny. And yet what has occurred should one of these principles be violated? What occurs upon breaches of neutrality or when a law carries only limited applicability?

A much larger issue is at stake. Called the “fundamental nonpersecution principle of the First Amendment” by Justice Kennedy<sup>56</sup>, this means that government cannot discriminate against a religion in particular or as a whole. Doing so violates Free Exercise Clause rights and oftentimes, Equal Protection guarantees. This principle is truly “an argument against religion-sensitive exclusion, not an argument demanding religion-based inclusion.”<sup>57</sup> Case precedent is extraordinarily slim<sup>58</sup>, as the doctrine is widely regarded as inviolable. The case of *McDaniel v. Paty*<sup>59</sup> provides one example. Tennessee legislators barred clergymen from taking office, claiming that this would safeguard religious freedom and ensure that the clergy tended to their local ministries. No sympathy came from the Supreme Court. The law was overturned, making the case the exemplar of religious nondiscrimination. Proactive attorneys and legislators, one hopes, stop such blatant discrimination from becoming law today.

However, this article attempts to reveal that 37 state constitutions contain provisions in violation of this sacred principle. Blaine Amendments violate the idea of nonpersecution because “precisely what” this principle prevents “is invidious religious

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<sup>55</sup> Id. at 531-2.

<sup>56</sup> *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 524 (1993).

<sup>57</sup> Kyle Duncan, *Secularism's Laws*, 106.

<sup>58</sup> Ibid at 524.

<sup>59</sup> See *McDaniel v. Paty*, 435 U.S. 618 (1978).

categorization.”<sup>60</sup> Categorical proscriptions that deny religious persons or entities the ability to speak (as in Massachusetts’ Exclusions) or to act (as in Massachusetts’ Anti-Aid Amendment) run contrary to nonpersecution. Government may not disenfranchise entire categories of persons. Few reasons would justify the burden placed upon religious persons should a state use a Blaine Amendment to further seal the barrier between church and state. Free Exercise concerns would be implicated, and according to *Lukumi*, strict scrutiny results. *Braunfield v. Brown*, involving an Orthodox Jew’s claims that Sunday Blue Laws violated his religious rights sheds light on this concept.<sup>61</sup> The principle of nonpersecution prevents laws having the “purpose or effect...to...impede the observance of one or all religions or is to discriminate invidiously between religions.”<sup>62</sup> Such “law[s] [are] constitutionally invalid even though the burden may be characterized as being only indirect.”

#### IV. The Instant Case: *Wirzburger v. Galvin*

*Wirzburger v. Galvin* involves a relatively simple matter: may Massachusetts exclude from the initiative process all propositions dealing with religion or attempting to amend or appeal its Anti-Aid Amendment?<sup>63</sup> Petitioners Susan Wirzburger and Rita Zubricki send their kids to Catholic schools without receiving any subsidy from Massachusetts. Thus, their taxes pay for a public education which their children do not

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<sup>60</sup> Kyle Duncan, *Secularism’s Laws*, 63.

<sup>61</sup> *Braunfield v. Brown*, 366 U.S. 599 (1961).

<sup>62</sup> *Id.* at 607.

<sup>63</sup> The Anti-Aid Amendment is located in Article 18 of the Massachusetts state Constitution.

utilize. Financial hardship led them to seek an amendment to Massachusetts' Anti-Aid Amendment preventing any state aid from flowing to their children's private school education. They began their quest for political change in the forum meant for exactly this type of citizen proposition—Massachusetts' initiative process. Susan Wirzburger and fourteen companions submitted “an initiative petition to the Attorney General to modify the Anti-Aid Amendment” by adding wording legalizing aid in the form of “loans, grants, or tax benefits to students attending private schools, regardless of the schools' religious affiliation.”<sup>64</sup> Judicial precedent as actualized in *Everson*, *Mitchell* and *Zelman* spurred their hopes. What they request, per se, is entirely constitutional as a sort of indirect funding funneled through the principle of private choice.<sup>65</sup> However, citing the two exclusions in the section of Massachusetts' constitution that enables the initiative process (the Religious Exclusion and the Anti-Aid Exclusion)<sup>66</sup>, Attorney General Reilly denied to certify the petition. Petitioners sought and won relief in federal district court in 1999. More than 800,000 signatures were gathered and the Secretary of the Commonwealth certified the petition. The next hitch arose when the petition, in accordance with the judicial mandate, arrived in the Massachusetts' legislature. Senate Counsel advised the body not to act on the petition, harkening to Attorney General Reilly's original stance. This advice led the senate to ignore the matter and the petition soon died, “as a result of the barrier posed by the Exclusions.”<sup>67</sup> Petitioner Wirzburger and her counsel seek a simple allowance: let the petition proceed. Aside from any technical argument, this should comprise the base claim of Petitioner. It is a simple request, easily bogged down

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<sup>64</sup> (Pl. Pet. at 4).

<sup>65</sup> See *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002). The court elucidates and fully authorizes the principle of private choice in accordance with the principal of neutrality.

<sup>66</sup> Both exclusions are contained in Article 48, section 2 of Massachusetts' constitution.

<sup>67</sup> (Pl. Pet. at 5).

in the complexities of a currently shaky Religion jurisprudence. The beauty of the *Wirzburger* case is that it only indirectly implicates an Anti-Aid Amendment. As I shall soon discuss, *Wirzburger* is really an issue of Free Speech.

Despite the seeming simplicity of the case and the promise of a stair-step victory, Petitioner has lost every single stage of the case, save the first injunctive victory. To win, one must first know why one loses. An examination of the reasons why the Becket Fund lost in their recent First Circuit hearing holds the secrets necessary to regain lost ground.

Petitioner lost on three grounds in the First Circuit decision of *Wirzburger* released on June 24, 2005.<sup>68</sup> Judge Torruella denied Petitioner relief on all three chief claims and grounds: Free Speech, Free Exercise, and Equal Protection.<sup>69</sup> Such a sweeping denial must be carefully analyzed, for Judge Torruella's arguments are certain to be repeated in the future. Blaine opponents must ensure that the Supreme Court does not exercise similar jurisprudence. As discussed, even a single losing case may put to rest the hopes of defeating Anti-Aid Amendments. Analyzing the First Circuit decision reveals that the Court acknowledged the restrictions on *Wirzburger*'s speech in the initiative process.<sup>70</sup> In a shocking twist, however, the Court upheld the restrictions under the intermediate scrutiny of the *O'Brien* test.<sup>71</sup> Petitioner's claim that the exclusions represent content-based speech restrictions was summarily denied. The Court viewed any burdens upon speech as merely incidental and unrelated to the suppression of free speech. Petitioner's claims fared equally poorly in the First Circuit's Free Exercise

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<sup>68</sup> See Michael Wirzburger, et al., v. William F. Galvin, Secretary of State, et al., No. 04-1625, 2005 U.S. App. LEXIS (1<sup>st</sup> Cir. Jun. 24, 2005).

<sup>69</sup> See *Id.* at 2. "In the end, plaintiffs' arguments fail, and although our analysis diverges at points, we affirm the district court's grant of summary judgment."

<sup>70</sup> See *Id.* at 5.

<sup>71</sup> See *United States v. O'Brien*, 391 U.S. 367 (1968).

holding. The court noted, as it danced around the issue, that the “Supreme Court has stated its reluctance to strike down ‘legislation which imposes only an indirect burden on the exercise of religion, i.e., legislation which does not make unlawful the religious practice itself.’”<sup>72</sup> Despite the Exclusions’ broad-based categorical and explicit denial of any political speech dealing with religion, the Court held that these restrictions were only incidental and furthered Massachusetts’ legitimate interest in deciding the church and state balance in the legislature alone. Blaine opponents worst fears actualized in Judge Torruella’s notice that the Supreme Court has previously examined animus in past Free Exercise cases, although the Court found no such animus in the *Locke v. Davey* decision.<sup>73</sup> Precedent is already guiding the court away from noticing the anti-Catholic animus and certainly from acting to end its current manifestations. The First Circuit realized that animus guided the original 1855 Anti-Aid Amendment but held that Petitioner failed to prove this same type of animus operating within the 1917-1918 Constitutional Convention. Judge Torruella neglected the Becket Fund’s expert witnesses<sup>74</sup> that testifying to exactly this truth. Further trouble arises in the court’s Equal Protection holdings. Clinging to the apparent facial neutrality of the exclusions (that disallow initiatives both favoring *and* disfavoring religion), equal protection claims failed immediately.

An all-encompassing loss like this must never happen again. Tens of thousands of persons desiring to repeal the discriminatory Blaine Amendments and finally receive limited aid to fund their children’s private school education cannot be disappointed. The

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<sup>72</sup> Michael Wirzburger, et al., v. William F. Galvin, Secretary of State, et al., No. 04-1625, 2005 U.S. App. LEXIS (1<sup>st</sup> Cir. Jun. 24, 2005). Quoting *Braunfield v. Brown*, 366 U.S. 599, 606 (1961).

<sup>73</sup> Michael Wirzburger, et al., v. William F. Galvin, Secretary of State, et al., No. 04-1625, 2005 U.S. App. LEXIS at 19 (1<sup>st</sup> Cir. Jun. 24, 2005).

<sup>74</sup> Among them, Dr. Mulkern and Dr. Glenn.

Becket Fund should recoup its losses by launching a slightly shifted strategy, some of which I have already presented.

I first note Petitioner's two claims: (1) to resolve the disagreement among courts of appeals "over the proper level of scrutiny under the Free Speech Clause of content-based censorship of political expression in state initiative processes, and (2) to denote when a law's facial neutrality proves insufficient to trump restraints imposed upon citizens' Free Speech Clause rights and Equal Protection guarantees.<sup>75</sup>

A simple mantra communicates my message: emphasize fallacious effect, not fallible intent. Litigants should prevail against the Blaines as a result of their present operation, without needing to prove overwhelming animus in their passage. Several constitutional and general principles must be touted, among them: nonpersecution and the tenets of neutrality and general applicability. In addition, I do not feel that Petitioner's current argument underlines what I call the "harmful uniqueness" of Massachusetts' two exclusions. Finally, litigators in *Wirzburger* should emphasize the thematic thought presented earlier: let the petition proceed. The argument should be simple and unburdened by arguments that have little pull in modern jurisprudence.

As much as I seem to critique the Becket Fund, I applaud much of their efforts.<sup>76</sup> They do a superb job of re-creating the anti-Catholic animus that enlivened not only the 1855 Anti-Aid Amendment, but the 1917-1918 Constitutional Convention revisions (including the two exclusions) that grew and safeguarded it.<sup>77</sup> Petitioners also

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<sup>75</sup> Petitioner presents these two claims in the ripe writ to the Supreme Court.

<sup>76</sup> I shall call these points: Ground to Re-conquer, as Petitioner must continue to advance these claims in the hope that their superb argumentation will eventually prevail.

<sup>77</sup> *See* (Pl. Pet. at 25, ft. note 15). "Plaintiffs offered the uncontroverted opinion of an expert historian that the motivation for the Religious Exclusion was anti-Catholic animus." The Declaration of Charles L. Glenn, Ph.D. was completed ignored by the First Circuit court. "By ignoring this uncontroverted expert

substantiate the need to peer beyond mere facial neutrality in matters of religious legislation. Using *Lukumi* and other cases, the Becket Fund builds an argument that was unfortunately ignored by Judge Torruella and the First Circuit. Past briefs display the soundness of Petitioners' claims that the Massachusetts' exclusions suppress communicative conduct<sup>78</sup> and thus harm not only Free Speech, but Free Expression as well. I now refract the issues on which Petitioner's argument must improve through the prism of four constitutional provisions, each of which is either directly or indirectly at issue: Establishment Clause, Free Exercise Clause, Free Speech Clause, and Equal Protection.

V. The Arguments as Viewed Through a Constitutional Prism: The Cornerstone of *Wirzbarger* and Future Anti-Aid Initiatives

The Establishment Clause is an odd place to begin this argumentative analysis. However, if this issue is not properly understood, all others will fail. Indeed, the very idea of the Establishment Clause being applied to the states is awkward in itself. Justice Black's decision in *Everson*, with its separationist dicta, may have established the separation of church and state but it did so in the face of 150 years of contrary historical precedent. As Yale Professor Akhil Amar notes,<sup>79</sup> the Establishment Clause was never intended to be incorporated to the states. The First Amendment's construction limits the

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opinion, the First Circuit misapplied the summary judgment standard." See Charles L. Glenn, *The Myth of the Common School*, 254 (1988).

<sup>78</sup> A contention expressly denied by the First Circuit.

<sup>79</sup> See Akhil Amar, *America's Constitution: A Biography*, 386-90 (2005).

powers of the federal government, while safeguarding those of the states.<sup>80</sup> Perhaps this is a non-issue, but this awareness speaks to the relationship that the Establishment Clause shares with the Free Exercise Clause. Once again, *Everson* provides grounding for a discussion of the inherent tension existing between the two clauses. “New Jersey [cannot] contribute tax-raised funds to the support of an institution which teaches the tenets and faith of any church. On the other hand, other language of the [First] Amendment commands that New Jersey cannot hamper its citizens in the free exercise of their own religion.”<sup>81</sup>

Justice Black’s words provide a helpful framework for analyzing the arguments for and against the Blaine Amendments’ attempts to strictly separate church and state. In favor of the rigid separation were (and are) many overt secularists who, as Professor Noah Feldman describes, perceived secularism as a near religion in itself.<sup>82</sup> Siding with anti-Catholic nativists, an odd bond formed that worked to grant states wide latitude in defining church-state relationships. However, these efforts were plagued by a perennial problem with which legislators must deal—being overbroad. The Blaine Amendments are incredibly overbroad, impeding upon persons Free Exercise Clause rights in favor of maintaining a wholly secular, fortress-like, state funding system. Arguments against the establishment aims of the Blaines are quite strong. Scholars Lupu and Tuttle concede that, “Over the past fifteen years, the prophylactic character of strict separationism has been under siege.”<sup>83</sup> Certainly, court precedent as catalyzed in *Mitchell* and *Zelman*

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<sup>80</sup> See the First Amendment: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people to peaceably assemble, and to petition the Government for a redress of grievances.”

<sup>81</sup> *Everson v. Board of Education*, 330 U.S. 1,1 (1947).

<sup>82</sup> See Noah Feldman, *Divided by God*, at 71-99 (2005).

<sup>83</sup> Ira C. Lupu and Robert Tuttle, *The Distinctive Place of Religious Entities in Our Constitutional Order*, 47 Vill. L. Rev.. 37, 56 (2002). Qtd in Duncan, *Secularism’s Laws*, at 5 (2003).

indicate the judiciary's willingness to adhere to the evolving principle of neutrality and general applicability. Blaine Amendments are repulsive to these principles, as their facial neutrality conceals the vigor of their discriminatory effects.

Petitioner's refusal to implicate the Establishment Clause in *Wirzburger* is certainly wise. Though it is a non-issue here, other cases will certainly offer a direct attack on this constitutional provision, claiming that the Blaines are not narrowly tailored and are overbroad in their nature and efficacy. Past court decisions generally fail to grant a "personal right" to citizens under the penumbra of the Establishment Clause, unlike the right garnered in the Free Exercise Clause. Present Judicial examinations search for compulsion or coercion on the part of the state, regarding religious practices or beliefs. Thus, it is prudent to let other cases better answer this issue.

Thankfully, Petitioner does not leave Free Exercise Clause claims out of the picture in *Wirzburger v. Galvin*. Their arguments here tend to be purposed and even powerful. The Becket Fund undoubtedly realizes that it has a golden free exercise case, as,

The most common problem respecting free exercise of religion has involved a generally applicable government regulation, whose purpose is nonreligious, that either makes illegal (or otherwise burdens) conduct that is dictated by some religious belief, or requires (or otherwise encourages) conduct that is forbidden by some religious belief.<sup>84</sup>

These words lead well into a brief discussion of Free Exercise Clause jurisprudence. The already discussed case of *Cantwell v. Connecticut* further defined the Clause and incorporated it to the states. The Court held that the Free Exercise clause "embraces two

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<sup>84</sup> Jesse H. Choper et al., *Constitutional Law: Cases—Comments—Questions*, 1092 (9<sup>th</sup> ed. 2001).

concepts,—freedom to believe and freedom to act. The first is absolute, but, in the nature of things, the second cannot be.”<sup>85</sup> The “freedom to act” may only be regulated in ways that do not “unduly...infringe” upon the “protected freedom.”<sup>86</sup> Would a state measure proscribing a citizen to place a matter dealing with religion on the state initiative ballot (itself a forum of protected speech) constitute an undue infringement upon Free Exercise rights? It certainly seems so.

Noting this, the analysis moves to a discussion of ground that the Petitioner must re-conquer should Wirzburger come before the High Court. It must be established that a law’s facial neutrality is no saving grace. Substantial guidance on this issue may be derived from the Court’s holding in *Hobbie v. Unemployment Appeals Commission*.<sup>87</sup> The court, citing an earlier case<sup>88</sup>, affirmed that,

Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or *where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs*, a burden upon religion exists (*emphasis mine*).<sup>89</sup>

For example, were a Massachusetts citizen to seek the legalization of peyote for religious purposes through the state initiative process, the Religious Exclusion would automatically proscribe his or her action. However, should he or she seek the peyote’s legalization for a merely secular purpose (such as for medicinal uses), the petition could

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<sup>85</sup> *Cantwell v. Connecticut*, 310 U.S. 296, 60 (1940).

<sup>86</sup> *Id.* at 60.

<sup>87</sup> *See Hobbie v. Unemployment Appeals Commission*, 480 U.S. 136, 107 S. Ct. 1046, 94 L. Ed. 2<sup>nd</sup> 190 (1987).

<sup>88</sup> *Thomas v. Review Board*, 450 U.S. 707 (1981).

<sup>89</sup> *Hobbie v. Unemployment Appeals Commission*, 480 U.S. 136, 107 S. Ct. 1046, 94 L. Ed. 2<sup>nd</sup> 190 (1987).

proceed. Petitioners are thus forced to choose between airing their true motivations or worse yet, changing or altogether abrogating their Free Exercise rights.<sup>90</sup> It is an untenable—and an unconstitutional—choice. Here one views the sort of facially neutral regulation Justice O’Connor describes in her concurring opinion in *Smith*. Should laws, even those neutral at face value, “unduly burden[] the free exercise of religion,” they violate the principle of neutrality.<sup>91</sup>

The Justices’ words speak to the reality that special burdens, like those imposed by the Massachusetts’ Exclusions, may not be based upon religious views or status.<sup>92</sup> Indeed, “[a]bsent the most unusual circumstances, one’s religion ought not to affect one’s legal rights or benefits.”<sup>93</sup> But what if government regulations, despite a neutral appearance, impose such unique harms? As the Court noted in *Lukumi*, “[f]acial neutrality is not determinative.”<sup>94</sup> A judicial inquiry must be made, analyzing the law’s present efficacy (such as I argue in this paper), whether it is narrowly tailored, and its original legislative intent.<sup>95</sup> The Becket Fund carries this argument effectively, demonstrating that Massachusetts’ initiative process closes the door on religious persons seeking political accommodations from the “burdens of neutral, generally applicable laws.”<sup>96</sup> Thus, Petitioners bring the argument full circle to encompass the principles of neutrality and general applicability that this paper so strongly encourages. In addition to this relative strength of the Petitioner’s argument in *Wirzburger*, I also suggest noting what Frederick Mark Gedicks entitles the “negative right” born of governmental

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<sup>90</sup> See (Pl. Pet. at 23). Petitioners’ offer a similar example from which I borrowed.

<sup>91</sup> *Employment Division v. Smith*, 494 U.S. 872, 897 (1990).

<sup>92</sup> See *McDaniel v. Paty*, 435 U.S. 618 (1978).

<sup>93</sup> *Board of Education v. Grumet*, 512 U.S. 687, 715 (1994).

<sup>94</sup> *Lukumi v. Hialeah*, 508 U.S. 520, 534 (1993).

<sup>95</sup> (Pl. Pet. at 20).

<sup>96</sup> (Pl. Pet. at 24).

neutrality.<sup>97</sup> Religious entities and persons, by this accord, are only free from added restraints on their involvement in the appropriation of state monies.<sup>98</sup> A positive right, the right to receive state funds, is not granted by the neutrality principle. The idea that petitioner *Wirzburger* does not seek the guarantee of either the passage of her amendment or moreover, the guaranteed disbursement of Massachusetts' funds, adds credence to her claims.

The foregoing arguments disclose the reality that the *Wirzburger* petitioners' rights have been abrogated by facially neutral laws that operate in a discriminatory manner. *Wirzburger*'s religious motivations serve as the basis for Massachusetts' restriction of her Free Exercise Clause rights. Injunctive relief should be granted and her petition should be allowed to proceed.

The next tier of argumentation analyzes the Equal Protection claims presented in *Wirzburger v. Galvin* and anti-Blaine litigation in general. The *Lukumi* Court found the Free Exercise Clause and Equal Protection clause to be interrelated.<sup>99</sup> Noting this, I suggest a shift in *Wirzburger*'s argument. Petitioners touted the lessons garnered from the anti-discrimination cases, *Hunter v. Erickson* and *Washington v. Seattle School District* in the writ to the Supreme Court.<sup>100</sup> These cases comprise the cornerstone of Petitioner's equal protection claims. Judge Torruella thoroughly dismisses this argument in the First Circuit decision, seeming to say that the modern judiciary is unready and unwilling to beckon in a new era of race-like anti-discrimination cases. Future litigants may not be able to affix anti-Blaine cases as followers in the line leading from *Brown*

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<sup>97</sup> Frederick Mark Gedicks, *Reconstructing the Blaine Amendments*, *supra*, at 98.

<sup>98</sup> *Id.* at 98.

<sup>99</sup> See *Lukumi v. Hialeah*, 508 U.S. 520, 540 (1993). "In determining the object of a law is a neutral one under the Free Exercise Clause, we can also find guidance in our equal protection cases."

<sup>100</sup> *Hunter v. Erickson*, 393 U.S. 385 (1969). *Washington v. Seattle School District No. 1*, U.S. 457 (1982).

onward. A new path must be paved, and as *Locke v. Davey* illustrates, the path must not lead through the craggy rocks of past discrimination but to the smooth fields of present efficacy. This is not to say that Petitioners should drop their references to these cases, but only to be keenly aware (as they likely are) of the potential fallibility of these claims. In all honesty, the Becket Fund may be able to afford a failure in their Equal Protection arguments. However, they cannot afford any failures in the argument of the next constitutional provision, Free Speech.

Certainly, the chief issue in *Wirzburger* is not Article 18 (the Anti-Aid Amendment)<sup>101</sup> of the Massachusetts Constitution—it is Article 48 (enabling the initiative process, while disabling initiatives dealing with religion or the repeal of the Anti-Aid Amendment). As a step to eventual anti-Blaine victory, *Wirzburger* should (and largely has) clung to this issue, incidental as it may be to the Anti-Aid Amendments at large. Cases at this point, to indulge in metaphor, should not attack Rome itself (the Blaine Amendments), but attack instead the smaller cities that surround it (such as Massachusetts' protectionist exclusions). Only the strength of amalgamated victories will pave the path to a final triumph.

The efficacy of the Becket Fund's current Free Speech argument must then be evaluated. I suggest that the fund does well here, but could enhance the effectiveness of their argumentation. This paper already noted the Becket Fund's brilliant example illustrating the inability of Massachusetts' citizens to acknowledge the religious motivations of desired state initiatives.<sup>102</sup> Sadly, this shining piece of metaphor is

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<sup>101</sup> The 1855 Anti-Aid Amendment was expanded in the 1917-1918 Constitutional Convention to include any and all sectarian institutions, including hospitals, non-profit agencies and businesses.

<sup>102</sup> *See* (Pl. Pet. at 23). Legalizing marijuana for medicinal purposes is legal while seeking the same end with religious means is invalid, courtesy of the Religious Exclusion.

relegated to the footnotes. Such an evocative argument should comprise a central tenet of Petitioner's argument, as it emphasizes the disparate treatment Wirzburger is receiving and the content-based nature of the exclusions restrictions.

Petitioner's Free Speech argument as applied to Massachusetts' initiative process, should aim to achieve three objectives: (1) the initiative process represents protected speech, (2) these restrictions warrant strict scrutiny, and (3) the harmful uniqueness of the exclusions merits a harsh rendering of any governmental interest supposed by Massachusetts. To begin the analysis, the Becket Fund convincingly presents the nature of the exclusion's content-based restrictions. *Consolidated Edison Co. v. Public Service Commission*<sup>103</sup> perhaps represents their strongest argument to this end. According to the case, "[c]ontent-based restrictions on speech triggering strict scrutiny are those that either prohibit speech on an entire subject or topic, or prohibit particular viewpoints on an otherwise includible subject."<sup>104</sup> This point is elucidated by the case closely mirroring the instant case, *Meyer v. Grant*.<sup>105</sup> Colorado banned any payment to initiative petition circulators from individuals or organizations. The Supreme Court first harangued and then struck down the restriction, stating that it represented content-based suppression of free speech. In towering language, the Court noted that initiative speech "is at the core of our electoral process and of the First Amendment Freedoms."<sup>106</sup> Furthermore, the initiative process is an "area of public policy where protection of robust discussion is at its zenith."<sup>107</sup> To no fault of the Becket Fund, Judge Torruella distinguished the invalidated legislation in *Meyer* as far different from that in *Wirzburger*. Au contraire,

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<sup>103</sup> *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530 (1980).

<sup>104</sup> *Id.* at 537.

<sup>105</sup> *Meyer v. Grant*, 486 U.S. 414 (1988).

<sup>106</sup> *Id.* at 425.

<sup>107</sup> *Id.* at 425.

*Meyer* represents only a slight and indirect burden on the initiative process; Massachusetts' Religious Exclusion proscribes an entire category of speech from the initiative process. A greater difference could not be had. Should *Wirzburger's* writ be accepted, I believe that the case will turn on this distinction. Yes, a state has wide latitude in defining its relationship between the church and the state. Yet a state cannot—and indeed, must not—deny public discussion of such a fundamentally important issue as religion.<sup>108</sup> The mere existence of alternative avenues of discussion does not excuse Massachusetts' abominable exclusions, for the “power to ban initiatives entirely does not include the power to limit discussion of political issues raised in initiative petitions.”<sup>109</sup>

Surely First Amendment freedoms cannot be marginalized or compartmentalized based upon the animus-aimed restrictions of a single state. First Amendment freedoms allow the chance to speak, and as shown, act freely without fear of governmental reprisal. The instant case acts nearly analogously to prior restraint provisions that pre-censor speech before it hits the public forum. The First Amendment's stance on such issues is clear. Broadly tailored provisions such as the Religious and Anti-Aid exclusions act as unconstitutional infringements on petitioner's free speech rights. This argument should be waged with vigor, for if won, future cases may begin to argue against the present discriminatory efficacy of the Blaine Amendments.

The discrimination inherent in the Massachusetts' exclusions garners a “harmful uniqueness,” when one considers that out of 27 states with initiative processes,

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<sup>108</sup> And when one considered the Free Exercise Clause, this argument becomes only more powerful.

<sup>109</sup> Syllabus in: *Meyer v. Grant*, 486 U.S. 414, 414-15 (1988) *See Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*, 487 U.S. 328 (1986).

Massachusetts is the only state that completely proscribes religion.<sup>110</sup> This is akin to Massachusetts retaining vestigial laws during the 1960s that disallowed initiatives on the ballot attempting to speak of race.<sup>111</sup> Initiatives could favor or disfavor race, but the intent of the restrictions would be clear—the legislators would wish to limit the free speech of persons seeking increased racial equity. The overly simplistic argument that the legislature wished to handle this subject itself fails a sub-facial examination. Not only would it fail a sub-facial examination, but it would—and must—fail a present efficacy examination. The Becket Fund notes a point that should entirely damn the two exclusions at issue in *Wirzburger*: the “discriminatory impact” and the selective enforcement of the Anti-Aid Amendment and its safeguarding exclusions.<sup>112</sup> Firstly, the 1917-1918 widening of Article 18 to apply to all sectarian institutions serves only as an un-enforced parchment barrier. Not a “single example of a non-public, non-school entity” being denied funding due to the expanded Amendment exists.<sup>113</sup> In fact, fifty examples depict the Commonwealth’s explicit funding of noticeably sectarian institutions that are not schools. Thus, Massachusetts has reverted to the intent and effect of the original and animus-enlivened 1855 Anti-Aid Amendment. The revealing decision of *Helmes v. Commonwealth*<sup>114</sup> in the state Supreme Court illustrates this disturbing reality. Herein, the court authorized funding to a private charitable group in direct violation of the expanded Anti-Aid Amendment. A redefining of the Amendment served as the cloak for this move, with the court proclaiming the need for the Amendment to be “consistent with

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<sup>110</sup> National Conference of State Legislatures, Section on Elections, Campaigns, and Redistricting, *Initiative Subject Restrictions*, available at <<http://www.ncsl.org/programs/legman/elect/SubRestrict.htm>> (last visited Nov 15, 2005).

<sup>111</sup> Hypothetically speaking.

<sup>112</sup> (Pl. Pet. at 29).

<sup>113</sup> *Id.* at 29.

<sup>114</sup> *Helmes v. Commonwealth*, 406 Mass. 873 (1990).

its original focus”—its original focus of overt anti-Catholic discrimination.<sup>115</sup> Certainly, the case of past animus in Massachusetts’ is more visible than perhaps in any other state. Yet it is the present operation of this Anti-Aid Amendment, as shown through the *Helmes* decision and the instances of illegal appropriations that will condemn this discriminatory amendment and others to come

If any tendency stands in the way of *Wirzburger* and future anti-Blaine litigation, it is the Court’s propensity to resort to judicial deference, as seen in *Locke v. Davey*. It is far easier to simply keep a closed door closed than open it. This article argues that only by showcasing the discriminatory effect of the Blaines and especially of the two Massachusetts exclusions, can the door be unlocked to reveal the discriminatory intent of these amendments.

## VI. Conclusion

America and its states certainly fail to achieve perfection. The sins of days past (such as the 1855 Anti-Aid Amendment promulgated by the nativist Massachusetts Know-Nothings), scar those of the present (as evidenced by petitioner Susan Wirzburger’s inability to receive even limited and indirect funding to alleviate the burden of subsidizing two separate educations). The case of *Wirzburger v. Galvin*, presently on a writ to the Supreme Court, must be accepted and the case won. Failure would exact detrimental consequences to the ability of religious persons and organizations to receive relief from facially neutral and generally applicable laws. The Becket Fund argues the case persuasively, but their ideas could gain more power when garnered by a different

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<sup>115</sup> (Pl. Pet. at 10).

emphasis. Future arguments in this case and others like it must harken to a modern evaluation of the Blaines. Attorneys and plaintiffs alike must fight, not the ghosts of the past, but the spirits of the present. Anti-Blaine litigation should not require a religious liberties historian, only an Attorney well-versed in the principle of nonpersecution and its tenets of non-exemption, neutrality and general applicability. Should these doctrinal mandates be viewed through the lense of the Free Speech Clause (especially in *Wirzburger*), the Free Exercise Clause, and Equal Protection guarantees, victory becomes increasingly likely.

Arguments against the Blaines must focus on their unconstitutional purpose: “to exclude religious persons and groups from the equal enjoyment of public benefits.”<sup>116</sup> *Wirzburger* represents the next proverbial step in the long march to legal success. The Becket Fund must be supported in this battle. Furthermore, their arguments must ensure the long-term efficacy of anti-Blaine litigation in a post-*Locke* legal environment. Specifically speaking, the fund should highlight the completely constitutional nature of Susan Wirzburger’s request to receive burden-reducing financial aid for her children’s private schooling, whether religious or not. The Religious Exclusion and the Anti-Aid Exclusion should be taken for what they are—archaic and prohibitory measures that obstruct the ability of the Petitioner to achieve beneficial legislation or to discuss her matter in the larger political sphere. As the Becket Fund proclaims, her rights have been denied and her civil liberties trumped—all as a result of her desire to act out of her religious beliefs and give her children a meaningful, religious education. Truly, her petition must proceed.

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<sup>116</sup> Kyle Duncan, *Secularism’s Laws*, 116.

Yet even if her petition does proceed, pushed along by a Supreme Court mandate, only a battle and not the war would be won. It is efficacy, not intent, that will define future Blaine battles. Should this advice be noted, the paramount case of *Wirzburger v. Galvin* will be won and the discrimination enshrined in thirty-seven state Blaine Amendments' finally erased.