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Montana's Constitutional Prohibition on Aid to Sectarian Schools: "Badge of Bigotry" or National Model for the Separation of Church and State?

Michael P. Dougherty

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MONTANA'S CONSTITUTIONAL PROHIBITION ON AID TO SECTARIAN SCHOOLS: "BADGE OF BIGOTRY" OR NATIONAL MODEL FOR THE SEPARATION OF CHURCH AND STATE?

Michael P. Dougherty*

I. INTRODUCTION

The 2015 Montana Legislature was notable for its passage of Senate Bill 410 ("SB 410").[1] This law provides a $150 tax credit for individuals who donate to a private school scholarship fund.[2] Characterized by some as a "school choice" bill,[3] this type of legislation is designed to support parental choice and encourage competition[4] in a system where the government is criticized as having a near-monopoly on education.[5] Critics of school choice legislation in Montana often question the constitutionality of these bills.[6] Opponents cite Article X, Section 6, of the Montana Constitution, which prohibits "direct or indirect" aid to sectarian schools.[7] Due to this explicit proscription on indirect aid to sectarian schools, Montana's prohibition on aid to private religious schools is stronger than the federal Constitu-

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1. 2015 Mont. Laws 457; Mont. Legislative Branch, *Montana Legislature: Action Details,* laws.leg.mt.gov, http://perma.cc/3LNP-99ET (last visited Dec. 12, 2015) (describing how the bill became law without the governor's signature).

2. *Id.*

3. Alison Noon, *School Choice Bill Becomes Law Without Bullock Signature*, GREAT FALLS TRIBUNE, May 11, 2015, *available at* http://perma.cc/6K3E-5XAR.

4. Friedman Found. for Educ. Choice, *S*chool Choice FAQS: How Does School Choice Affect Public Schools? edchoice.org, http://perma.cc/SHZ7-LNXC (last visited Dec. 15, 2015).

5. James B. Egle, *The Constitutional Implications of School Choice*, 1992 WIS. L. REV. 459, 459 (1992).

6. Mike Dennison, 'School Choice' Bills Move to Full House, Senate, MISSOULIAN, Feb. 6, 2013 *available at* http://perma.cc/2E5T-2J2V (describing how Democrats on the Senate Education Committee characterized a school choice bill as "likely unconstitutional because it essentially takes public money to be used to finance private, religious schools").

7. MONT. CONST. art. X, § 6 ("Aid prohibited to sectarian schools. (1) The legislature, counties, cities, towns, school districts, and public corporations shall not make any direct or indirect appropriation or payment from any public fund or monies, or any grant of lands or other property for any sectarian purpose or to aid any church, school, academy, seminary, college, university, or other literary or scientific institution, controlled in whole or in part by any church, sect, or denomination.").

tion's restrictions.[8] As a result, school choice legislation in Montana that indirectly diverts state money to private religious schools, such as SB 410,[9] must be subjected to an added layer of constitutional scrutiny.

To further color this debate is the fact that Montana is one of many states whose constitutions contain "Blaine Amendments," which are constitutional clauses notorious for their connections to 19th century anti-Catholic bigotry.[10] The term "sectarian" was adopted in state constitutions during the height of the 19th century Protestant majority's hostility towards a growing Catholic minority.[11] As a result, legal scholars have criticized the term as a code word for anti-Catholic motives.[12] Despite this stain on history complicating Montana's constitutional background, the flow of time has washed clear whatever animus existed in the provision's past. First, drafters rewrote this section in 1972 to be devoid of any hostility towards religion. Second, the present version stands as a strong national model of the separation of church and state due to its express prohibition on indirect aid to private religious schools. Accordingly, legislation that impermissibly funnels money to private religious schools, like SB 410, deserve rigid constitutional scrutiny by Montana courts.

This paper will explore this argument. Section two will focus on the background and history of the national Blaine Amendment, including how similar provisions were adopted by the states. In the third section, I will examine Article X, Section 6 in detail, including the 1889 and 1972 Constitutional Conventions that ratified this clause. In the fourth section, I will discuss examples of school choice programs and analyze their constitutionality under section 6. Finally, in the last section I will provide my final thoughts on the subject.

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8. Kaptein ex. rel. Kaptein v. Conrad Sch. Dist., 931 P.2d 1311, 1319 (Mont. 1997) (Nelson, J., concurring) (describing how "Montana's constitutional prohibition against aid to sectarian schools is even stronger than the federal government's.").

9. Following the passage of SB 410, the Montana Department of Revenue has proposed a rule excluding private religious schools from participating in the program created under the law. Notice of Public Hearing on Proposed Adoption, 42–2–939 Mont. Admin. R. 1682 (Oct. 5, 2015), *available at* https://revenue.mt.gov/Portals/9/rules/proposalnotices_hearinginformation/42-2-939pro-arm.pdf. However, this proposed rule was swiftly challenged by the Montana Attorney General's Office. Phil Drake, *AG's Office Opposes Rule on Tax Credit Program,* GREAT FALLS TRIBUNE, Nov. 19, 2015, *available at* http://perma.cc/S599-MRN34/. The Author will proceed through this paper under the assumption that SB 410 will be interpreted as including private religious schools in the program.

10. DOUGLAS F. JOHNSON, FREEDOM OF RELIGION: *Locke v. Davey* and State Blaine Amendments 16, 163 (2010). Blaine Amendments are named for the 19th century politician James Blaine. Ironically, though his name would be come to be associated with bigotry and intolerance, Blaine's wife was Catholic and his daughters attended a Catholic boarding school.

11. *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, 560–565 (2003) (describing the national buildup to the introduction of the Blaine Amendment).

12. JOHNSON, *supra* note 10, at 34 (citing Mitchell v. Helms, 530 U.S. 793, 828 (2000) (describing how "it was an open secret that 'sectarian' was code for 'Catholic.'")).

II. Background

A. National Blaine Amendment

Understanding what Article X, Section 6 means in terms of modern challenges requires a review of American and Montanan history. Montana's "Blaine Amendment" and other state clauses prohibiting aid to sectarian schools owe their textual lineage to a failed nineteenth century campaign to amend the federal Constitution.[13] James Blaine of Maine, a powerful member of the House of Representatives and presidential hopeful, proposed a constitutional amendment in 1875 prohibiting state support for religious schools.[14] The proposed amendment endeavored to accomplish this goal through a twofold approach: (1) apply the First Amendment to states through the incorporation doctrine;[15] and (2) prevent state funds raised through taxation from being "under the control of any religious sect."[16]

The Blaine Amendment was intended by Congress to address the long simmering "Catholic question," which dealt with the issue of the burgeoning Catholic population in the 19th century and the conflicts that arose from it.[17] The Blaine Amendment sought to address the rising friction resulting from Catholic opposition to "common schools" (i.e., public schools) where Protestant devotional exercises, prayers, and readings from the King James Bible were woven into the school curriculum.[18] Viewing public schools as Protestant schools in reality, the growing Catholic population resisted these schools in favor of securing public monetary support for sectarian schools.[19] These efforts by Catholics, viewed as attacks on public education, resulted in a Protestant counterattack culminating in the proposal of the Blaine Amendment.[20]

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13. DeForrest, *supra* note 11, at 555–556.

14. Johnson, *supra* note 10, at 27–28.

15. DeForrest, *supra* note 11, at 556–557. At the time of the introduction of the Blaine Amendment, the Bill of Rights had not been applied to the states by the United States Supreme Court through the incorporation doctrine. This doctrine would be applied by the Court in the twentieth century. *Id.* at 557.

16. H.R. Res. 1, 44th Cong., (1st Sess. 1875) ("No State shall make any law respecting an establishment of religion or prohibiting the free exercise thereof; and no money raised by taxation in any State for the support of public schools, or derived from any public fund therefore, 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.") (quoted in DeForrest, *supra* note 11, at 556); DeForrest, *supra* note 11, at 557.

17. 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, 555–556 (2002).

18. *Id.*; DeForrest, *supra* note 111, at 558–560. **R**

19. *Bybee & Newton, supra note 17,* at 556; DeForrest, *supra* note 11, at 560. **R**

20. Bybee & Newton, *supra* note 17, at 556–557. **R**

In addition to clashes over religion in public education, this period in American history was rife with anti-Catholic sentiment.[21] This is due in large part to shifting demographics caused by an increase in Catholic emigration from Europe.[22] Catholic immigrants flooded into the country throughout the nineteenth century, overtaking the historical Protestant majority in many major northern cities.[23] Irish immigrants were viewed by the majority as threats to the Protestant hegemony in culture and education.[24] The notion of papal infallibility fueled this hostility.[25] In response, Protestant newspapers and newly formed anti-Catholic organizations, such as the Know-Nothing Party, spewed venom in opposition to rising Catholic influence.[26] This bigotry seeped into politics and culminated with the Republican Party's call for a constitutional amendment banning aid to sectarian schools.[27]

At the urging of President Ulysses Grant, who had called for amendment in his 1875 annual address to Congress, Blaine introduced his amendment in the House and it passed with little debate.[28] However, due to concerns about the proper interpretation of the House version, the Senate version included language which was much broader, including a provision that prohibited construing the amendment "to prohibit the reading of the Bible in any school or institution."[29] This provision ultimately led to the death of the Blaine Amendment on the national level when the Senate failed to pass it on a 28–16 vote.[30] However, instead of disappearing into the annals of constitutional law, Blaine-type amendments found a second avenue for implementation by way of state constitutions.[31]

B. State Blaine Amendments

Following the failure of the Blaine Amendment in the Senate, states began adopting provisions in their own governing documents restricting the use of state funds in aid of religious schools.[32] By 1890, almost thirty state

21. Edward McGlynn Gaffney, Jr., *Hostility to Religion, American Style*, 42 DEPAUL L. REV. 263, 280 (1992); DeForrest, *supra* note 11, at 560.

22. DeForrest, *supra* note 11, at 560–561.

23. Elijah L. Milne, *Blaine Amendments and Polygamy Laws: The Constitutionality of Anti-Polygamy Laws Targeting Religion*, 28 W. NEW ENG. L. REV. 257, 259 (2006); Bybee & Newton, *supra* note 17, at 555. R

24. Milne, *supra* note 23, at 259; DeForrest, *supra* note 111, at 563 n.91. R

25. Bybee & Newton, *supra* note 17, at 555. R

26. Gaffney, *supra* note 21, at 280; DeForrest, *supra* note 111, at 562–563. R

27. DeForrest, *supra* note 111, at 564–565. R

28. Bybee & Newton, *supra* note 17, at 556–557. R

29. *Id.* at 558.

30. *Id.*

31. DeForrest, *supra* note 111, at 573. R

32. *Id.*

constitutions forbade use of public funds for sectarian purposes.[33] These clauses ranged from provisions that prohibited state funds from going to sectarian schools to clauses generally proscribing state support to private religious schools. For example, Alabama's version of the Blaine Amendment forbade educational funds from being "appropriated to, or used for, the support of any sectarian or denominational school."[34] In contrast, California's Constitution provided that no body of state government "shall ever . . . grant anything to or in aid of any religious sect, church, creed, or sectarian purpose."[35]

Inclusion of Blaine-type provisions in state constitutions at this time occurred primarily in one of two ways. First, states often acted independently from the national government and voluntarily adopted language restricting the flow of public funds to sectarian schools.[36] In 1876, the same year the Senate rejected the Blaine Amendment, fourteen states had already adopted constitutional provisions limiting public funding to sectarian schools.[37] Second, the federal government compelled inclusion through "congressional mandate" by requiring territories to adopt Blaine-style amendments as a condition of statehood.[38]

III. Montana's "Little Blaine" Amendment

A. The 1889 Constitution

The 1889 Enabling Act, which brought Montana into the union, compelled the state to adopt language requiring the establishment of public educational systems "free from sectarian control."[39] Montana complied with this mandate when the state's first Constitutional Convention met over the summer of 1889.[40] The delegates to the Convention went to work quickly, convening on July 4, 1889, and adjourning a little more than a month later on August 17 with a completed constitution ready for ratification.[41] Their promptness could be attributed to the territory's desire to achieve statehood, having been denied congressional acceptance after ratifying a constitution

33. Bybee & Newton, *supra* note 17, at 559. **R**

34. Ala. Const. of 1875, art. XIII, § 8.

35. Cal. Const. art. IV, § 30 (amended by art. 16, § 5 (1974)).

36. Bybee & Newton, *supra* note 17, at 559. **R**

37. *Id.*

38. *Id.*

39. State ex rel. Chambers v. Sch. Dist. No. 10 of Deer Lodge Cnty., 472 P.2d 1013, 1016 (Mont. 1970) (quoting Enabling Act of 1889, 25 Stat. 676, Ch. 10 (1889)); *see also* DeForrest, *supra* note 111, **R** at 573–574 n.173.

40. Larry M. Elison & Fritz Snyder, The Montana State Constitution: A Reference Guide 4–5 (G. Alan Tarr, ed., Ref. Guides to the State Constitutions of the U.S., 2001).

41. G. Alan Tarr, *The Montana Constitution: A National Perspective*, 64 Mont. L. Rev. 1, 3 (2003).

in 1884.[42] The 1884 Constitution borrowed heavily from the texts of the Colorado and California Constitutions.[43] Indeed, Montana's provision prohibiting aid to sectarian schools is remarkably similar to the version Colorado ratified in 1876.[44] The proposed 1884 Constitution served as the substantive model for the 1889 Constitution, with the previous version providing 90% of the final text.[45]

There was also little debate surrounding Montana's 1889 Constitution, including adoption of Montana's so-called Blaine Amendment, which was ratified as Article XI, Section 8.[46] This could be attributed to the delegates overall goal of statehood and not the desire to provide a well-reasoned document for governing.[47] Regardless, the clause clearly prohibited direct and indirect aid to sectarian schools.[48] Interestingly, where the 1884 version only addressed direct aid, the 1889 version added the "indirectly" language.[49] The ratification of the 1972 Constitution left this language largely unchanged.[50]

B. Article X, Section 6 of the 1972 Montana Constitution

Deficiencies in the 1889 Montana Constitution and questions about the document's viability led to the 1972 Constitutional Convention.[51] The delegates from this convention were tasked with updating the antiquated text.[52]

42. William C. Rava, *Toward A Historical Understanding of Montana's Privacy Provision*, 61 ALB. L. REV. 1681, 1690 (1998).

43. *Id.*

44. *Compare* MONT. CONST. OF 1884, art. IX, § 9 *with* COLO. CONST. art. IX, § 7.

45. Rava, *supra* note 42, at 1690.

46. MONT. CONST. OF 1889, art. X, § 6.

47. Tarr, *supra* note 41, at 3 (quoting ELISON & SNYDER, *supra* note 40) (describing the 1889 constitution as "enacted more as a tool to achieve statehood than to provide a well-thought-out structure of governance for the new state.")); JAMES J. LOPACH ET AL., WE THE PEOPLE OF MONTANA: THE WORKINGS OF A POPULAR GOVERNMENT 5 (James J. Lopach, ed., 1983) (stating that "[b]ecause the primary goal of the constitution writers of the 1880s was to achieve statehood, they did not struggle to hone a constitution"). R

48. MONT. CONST. OF 1889, art. XI, § 8 ("Neither the legislative assembly, nor any county, city, town, or school district, or other public corporations, shall ever make directly or indirectly, any appropriation, or pay from any public fund or moneys whatever, or make any grant of lands or other property in aid of any church, or for any sectarian purpose, or to aid in the support of any school, academy, seminary, college, university, or other literary, scientific institution, controlled in whole or in party by any church, sect or denomination whatever.").

49. *Compare* MONT. CONST. OF 1884, art. IX, § 9 *with* MONT. CONST. OF 1889, art. XI, § 8.

50. *Compare* MONT. CONST. OF 1889, art. XI, § 8 *with* MONT. CONST. art. X, § 6.

51. Rava, *supra* note 42, at 1692 n.83.

52. *Id.* at 1693 (stating that the delegates were advised to "moderniz[e] the text . . . to reflect societal change").

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Delegates rearranged and redrafted Montana's 1889 Blaine Amendment as Article X, Section 6,[53] which states:

> The legislature, counties, cities, towns, school districts, and public corporations shall not make any direct or indirect appropriation or payment from any public fund or monies, or any grant of lands or other property for any sectarian purpose or to aid any church, school, academy, seminary, college, university, or other literary or scientific institution, controlled in whole or in part by any church, sect, or denomination.[54]

Reviewing the plain text of Article X, Section 6, reveals a few key similarities between the two provisions. First, aside from some from minor grammatical changes, the newly revised version changed little from the original.[55] Like the 1889 provision, the 1972 clause clearly prohibits state aid to sectarian schools.[56] The 1972 revisions thus did not fundamentally alter the meaning of the section.[57] Indeed, the 1972 voter information pamphlet stated these changes did not alter the constitutional "[p]rohibition against legislature and other governmental units from spending money for sectarian purposes."[58] Second, like the 1889 version, the 1972 Constitution retained language restricting aid through direct and indirect means.[59] This point is notable considering few other states have constitutional texts that explicitly prohibit indirect aid to private religious schools.[60]

Even though the 1972 delegates left the principal meaning of the first clause of Article X, Section 6, unchanged, they did make some slight revisions. To start, the delegates added a heading: "Aid prohibited to sectarian schools."[61] Next, the delegates added a second clause clarifying that the section does "not apply to funds from federal sources provided to the state for the express purpose of distribution to non-public education."[62] The addi-

53. PROPOSED 1972 CONSTITUTION FOR THE STATE OF MONTANA: OFFICIAL TEXT WITH EXPLANATION 15 (1972) [hereinafter PROPOSED 1972 CONSTITUTION] (explaining how that the 1972 constitution "[r]evises [the] 1889 constitution by specifying that federal funds may be distributed to private schools. Proposed section still prohibits state aid to private schools.").

54. MONT. CONST. art. X, § 6.

55. *See id.*; MONT. CONST. OF 1889, art. XI, § 8.

56. MONT. CONST. art. X, § 6.

57. *See* 6 MONTANA CONSTITUTIONAL CONVENTION VERBATIM TRANSCRIPT 2014 (1981) [hereinafter CONSTITUTIONAL CONVENTION TRANSCRIPT VI] (Delegate Loendorf describing how proposed revisions, which were ultimately ratified, would not alter meaning of the clause because provision would "continue to mean and do whatever it does now.").

58. PROPOSED 1972 CONSTITUTION, *supra* note 533, at 4. **R**

59. MONT. CONST. art. X, § 6.

60. JOHNSON, *supra* note 10, at 155–174 (providing list of Blaine States). Of the thirty state constitutions identified by Johnson as containing Blaine Clauses, only four states, in addition to Montana, have language referring expressly to indirect aid to sectarian schools. These states are Florida, Georgia, Missouri, and Oklahoma. *Id.* at 158–159, 162, 166.

61. MONT. CONST. art. X, § 6.

62. *Compare* MONT. CONST. OF 1884, art. IX, § 9 *with* MONT. CONST. OF 1889, art. XI, § 8.

tion of this clause would ultimately dominate the delegates' debates concerning this section.

C. 1972 Constitutional Convention

The delegates debated the majority of the Convention's final drafting of Article X, Section 6, over a single day on March 11, 1972.[63] The primary focus of the debate centered on the adoption of the 1889 section, as well as an amendment to allow non-public schools to accept federal funds.[64] Ultimately, delegates discussed multiple proposed versions of the section. Delegate Burkhardt, speaking on behalf of the majority proposal produced by the Education and Public Lands Committee, started the debate by moving for the adoption of the 1889 language and a title.[65] Delegate Burkhardt explained the majority proposal recommended retention of the section for a few key reasons.

First, the 1889 provision provided unequivocal support for free public education by reinforcing the important American tradition of the separation of church and state.[66] Delegate Burkhardt warned that "[a]ny diversion of funds or effort from the public school system would tend to weaken that system in favor of schools established for private or religious purposes."[67] Second, the majority committee recognized that it is the State's function to provide public education.[68] The third issue the majority noted involved the fear that if any changes were made to the section, it could "endanger passage of the entire Constitution."[69] Delegate Burkhardt noted the issue of church and state is an emotional area for the public, and that this emotionalism could cloud people's feelings about the proposed Constitution.[70] Changes to a similar provision, Delegate Burkhardt argued, were thought to have led to the defeat of the 1967 New York Constitution.[71] The majority proposal's final reason for adopting the 1889 provision involved the threat government poses when it gets involved with religious groups and their educational systems.[72] The recommendation to keep the section as-is was not met with universal acceptance.

In response to the majority proposal, Delegate Harbaugh introduced the minority proposal and moved for the adoption of a proposed amendment

63. CONSTITUTIONAL CONVENTION TRANSCRIPT VI, *supra* note 577, at 2004–31. **R**
64. *Id.*
65. *Id.* at 2008; 2 MONTANA CONSTITUTIONAL CONVENTION DELEGATE PROPOSALS 728 (1981).
66. CONSTITUTIONAL CONVENTION TRANSCRIPT VI, *supra* note 57, at 2008–2009.
67. *Id.* at 2009.
68. *Id.*
69. *Id.*
70. *Id.*
71. *Id.*
72. CONSTITUTIONAL CONVENTION TRANSCRIPT VI, *supra* note 57, at 2009.

to the 1889 language.[73] This amendment would have removed the term "indirectly" from the section and added language that would have provided: "[t]his section shall not apply to funds from federal sources provided to the state for the expressed purpose of distribution to nonpublic [sic] education."[74] The primary reasons for this amendment, Delegate Harbaugh argued, were twofold: (1) to legitimize receipt of indirect federal aid by nonpublic schools, something that had already been occurring under "questionable methods"; and (2) to ensure sectarian schools would receive any federal funds made available in the future.[75] Interestingly, Delegate Harbaugh also stated the intention behind removing the *indirectly* language from the provision was to allow indirect aid to be permissible under the "child-benefit theory."[76] This, he clarified, "would make it possible for the state to authorize other forms of indirect aid permissible under the First Amendment."[77]

The delegates continued to debate the amendment until Delegate Loendorf moved to introduce a substitute amendment that appeared to compromise between the majority and minority proposals.[78] This amendment retained the majority proposal's use of the term *indirectly* but, like the minority proposal, added language exempting distribution of federal funds for non-public education.[79] The Convention ultimately adopted Delegate Loendorf's version in a roll call vote of 53–40.[80]

A review of the transcripts of the debate and the corresponding votes clearly show a coalition of delegates came together to adopt Delegate Loendorf's compromise proposal. Two main camps can be seen in this coalition. The first group consisted of individuals who supported the language as it existed in 1889—and thus the majority proposal—but ultimately voted for the compromise proposal. Although these individuals may have initially supported the majority proposal, they undoubtedly changed their votes after Delegate Loendorf's compromise version was introduced. Delegate Blaylock, who expressed opposition to deleting "indirectly" from the cur-

73. *Id.* at 2010.

74. *Id.* Almost identical language concerning federal funds would later be adopted by the delegates as the second clause of section 6. MONT. CONST. art. X, § 6, cl. 2.

75. *Id.* at 2010–2011.

76. *Id.* at 2011.

77. *Id.*

78. CONSTITUTIONAL CONVENTION TRANSCRIPT VI, *supra* note 57, at 2013.

79. *Id.*

80. *Id.* at 2025–2026. One final amendment was proposed by Delegate Campbell. This amendment would have added: "Nothing herein shall prevent non-state money from being distributed for the benefit of all students within the State of Montana." However, this amendment was defeated in a roll call vote of 13 ayes to 79 voting no. CONSTITUTIONAL CONVENTION TRANSCRIPT VI, *supra* note 577, at 2027, 2030–2031. **R**

rent provision, voted for the compromise proposal.[81] He, like many other delegates, would fit squarely into the first camp. The second group forming the final majority coalition consisted of individuals who initially backed the minority proposal but changed their support after the clause allowing federal funds was added. Delegates Toole and Brown, who initially urged the adoption of the minority proposal, both voted to adopt the compromise proposal and would be included with this second group.[82] However, delegates voiced additional reasons for and against the provision.

Many of the delegates who initially supported the minority proposal expressed hesitation about the provision's infamous history as a "Blaine Amendment."[83] Delegate Harbaugh, who introduced the minority proposal, criticized the 1889 provision and as being a product of 19th century hysteria in opposition to Catholics.[84] The delegate lamented how "80 years later, the State of Montana still retains in its constitution remnants of a long-past era of prejudice."[85] Delegate Driscoll, a Catholic mother of ten, criticized the majority proposal for "retain[ing] an archaic provision in our Constitution."[86] Some of the most compelling testimony came from Delegate Schiltz's description of the anti-Catholic harassment he witnessed as a boy:

> I've lived with the Blaine Amendment and the philosophy of the Blaine Amendment all the days of my life. I can remember during the Al Smith[87] campaign when they burned crosses on the rim-rocks [sic] in Billings. I can remember being let out of school in the fourth grade to erase three "Ks" on the front doors of the Catholic Church in Billings . . . To me, the Blaine Amendment is a badge of bigotry, and it should be repealed.[88]

Interestingly, all three of these delegates ultimately voted to adopt Delegate Loedorf's compromise amendment.[89] It appears these delegates put their apprehensions about bigotry aside in order to secure federal funds for non-public education.

The delegates who voiced support for the minority proposal did not universally echo the anti-Catholic animus.[90] An express concern was the detrimental effects that occur when church and state "get mixed up."[91] Delegate Harper, who was a minister, stated many of the delegates who

81. *Id.* at 2015, 2025.
82. *Id.* at 2011–2012, 2025–2026.
83. *See id.* at 2010–2012.
84. CONSTITUTIONAL CONVENTION TRANSCRIPT VI, *supra* note 57, at 2010.
85. *Id.*
86. *Id.* at 2012.
87. Al Smith is known as the first Catholic to receive a major party's nomination for President of the United States. David E. Campbell, *A House Divided? What Social Science Has to Say About the Culture War*, 15 WM. & MARY BILL RTS. J. 59, 66 (2006).
88. CONSTITUTIONAL CONVENTION TRANSCRIPT VI, *supra* note 57, at 2012.
89. *Id.* at 2025–2026.
90. *See id.* at 2012 (Delegate Harper expressing confusion at Delegate Schiltz's "bigotry idea").
91. *Id.* at 2012–2013.

supported the minority proposal were dedicated to the separation of church and state.[92] In fact, as Delegate Harper pointed out, supporters of the minority proposal did not ask to remove the entire 1889 provision.[93] Their goal was to merely ensure that federal funds would be consistently available to non-public institutions, such as Rocky Mountain College.[94] These delegates did not want to remove the wall separating church and state from the constitution; they just wanted to amend the 1889 language to declare federal aid available to private schools.[95]

One theme throughout the debate was the strictness of the 1889 language. Delegate Toole called it "an especially stringent section that perhaps is among the most stringent in the nation."[96] This description was echoed by Delegate Harbaugh who noted the provision's "extreme inflexibility."[97] Delegate Harbaugh, who begrudgingly accepted the deletion of "or indirectly" in the minority proposal, felt the addition of the language was overly repetitious because two other clauses in the Montana Constitution already addressed state support for religion.[98] "[I]f you put it in there three times, you've really got the message across," he quipped.[99]

However, some delegates felt that the amended majority proposal did not go far enough.[100] At least a few delegates, like Delegate McNeil, voted against the compromise proposal because of the addition of the federal funds provision.[101] He felt it was "fundamentally wrong to take any tax money . . . and apply it to any church purpose."[102] Representatives from three church denominations echoed this view in testimony before the convention.[103] These individuals expressed opposition to all government funds, federal or state, being allocated to churches and religious schools.[104] These groups did not want the government getting involved with their "church work."[105] Speaking for one of the churches, Delegate Conover reiterated:

92. *Id.* at 2021 (Convention biography describing Delegate Harper as a "clergyman" and Delegate Harper reiterating "that it's very difficult for a church supported by a state to be critical of the state").

93. *Id.* at 2013.

94. CONSTITUTIONAL CONVENTION TRANSCRIPT VI, *supra* note 577, at 2013. **R**

95. *Id.*

96. *Id.* at 2011.

97. *Id.* at 2010–11.

98. *Id.* at 2015; MONT. CONST. art II, § 5 ("The state shall make no law respecting an establishment of religion or prohibiting the free exercise thereof."); MONT. CONST. art. V, § 11, cl. 5 ("No appropriation shall be made for religious, charitable, industrial, educational, or benevolent purposes to any private individual, private association, or private corporation not under control of the state.").

99. CONSTITUTIONAL CONVENTION TRANSCRIPT VI, *supra* note 577, at 2015. **R**

100. *Id.* at 2016.

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. CONSTITUTIONAL CONVENTION TRANSCRIPT VI, *supra* note 577, at 2016–2017. **R**

"If we cannot support our private schools, then it's our fault. We are the ones that's [sic] running it, and we don't want nobody [sic] to interfere with us. We teach our religion and we want it this way."[106] Delegate Conover, like Delegate McNeil, voted against the compromise proposal, which would be ratified later that year.[107]

Article X, Section 6, as well as the rest of the proposed constitution, was ratified by the people of Montana on June 6, 1972.[108] Numerous informational materials such as pamphlets, newspaper inserts, and voter information guides, assisted voters in understanding the proposed constitution.[109] One such source stated the 1972 revisions did not alter the principal meaning of the provision, which was a constitutional "[p]rohibition against [the] legislature and other governmental units from spending money for sectarian purposes."[110] This interpretation was confirmed by other sources, including a newspaper insert written by Professor Richard Roeder.[111] This source stated the new proposed version retained the same prohibitions listed in the 1889 Constitution, "with only minor style revisions."[112] Professor Roeder did note the addition of the new clause, clarifying that while the state could not provide state funds to sectarian schools, it could administer federal funds.[113] However, these sources did not mention the constitutionality of "school choice" legislation.

IV. Analysis

Due to the express constitutional prohibition on direct and indirect aid to sectarian schools, Montana's Constitution provides the strictest prohibition on aid to private religious schools in the country. As a result of Article X, Section 6's strong wording, school choice programs constitutional in other states are likely prohibited under Montana law. Programs such as vouchers and tax benefits, which have survived constitutional challenges under their own state constitutions, would be subjected to a higher level of scrutiny under Montana law. As a result, school choice legislation diverting taxpayer dollars to private religious schools may be struck down as unconstitutional. Three key reasons back this assertion: (1) a textual reading of the clause supports a strict interpretation; (2) the 1972 delegates recognized

106. *Id.* at 2017.
107. *Id.* at 2025–2026.
108. State ex rel. Cashmore v. Anderson, 500 P.2d 921, 924 (Mont. 1972).
109. *See, e.g.*, Proposed 1972 Constitution, *supra* note 533. **R**
110. *Id.* at 4.
111. Univ. of Mont., *Campbell Collection*, William J. Jameson L. Library, http://perma.cc/L27J-CCT3 (last visited Dec. 12, 2015); Richard Roeder, The Proposed 1972 Constitution for the State of Montana 5 (1972), *available at* http://perma.cc/628F-4H3G.
112. Roeder, *supra* note 111.
113. *Id.*

the provision's application would be stringent; and (3) Montana case law supports a broad interpretation of what constitutes prohibited aid. After defusing any animus issues, this section will apply these arguments to hypothetical challenges to two potential school choice programs.

A. "Badge of Bigotry?"

First, preliminary concerns about animus must be addressed before addressing challenges to school choice programs on the merits. Arguably, Article X, Section 6 should not be enforced due to its connections with the national Blaine Amendment and its links to anti-Catholic bigotry.[114] The fact that Montana was required to adopt language prohibiting support for sectarian schools in order to join the union bolsters this argument.[115] Two key points counter this argument.

First, even if there was some animus attached to the national Blaine Amendment of 1875, there is no evidence Montana's 1972 delegates intended section 6 to apply strictly to Catholics. In fact, many delegates expressed concerns about the Blaine Amendment's infamous history, but ultimately voted to retain the provision's current language. Delegates Harbaugh, Driscoll, and Schiltz all spoke out against the provision's intolerant history and initially supported the minority proposal.[116] However, these delegates ultimately voted for the compromise proposal which would become section 6.[117] These delegates would not have supported a bill that solely targeted Catholics.

Second, similar arguments of anti-Catholic animus have not been successful in other courts examining clauses with alleged connections to the Blaine Amendment.[118] In *Bush v. Holmes*,[119] the court disposed of this issue by stressing the lack of a concrete answer to the question of whether these provisions are rooted in anti-Catholic prejudice.[120] There, the court refused to take up the issue of animus because the idea that "Blaine-era amendments are based on religious bigotry is a disputed and controversial

114. Martha McCarthy, *The Legal Status of School Vouchers: The Saga Continues*, 297 ED. LAW REP. 655, 660 (2013) (stating "[w]hether these state constitutional mandates represent hostility toward religion remains the source of debate, but several courts have rejected the argument that such "no aid" and "compelled support" provisions are grounded in religious bigotry").

115. DeForrest, *supra* note 111, at 573–574 n.173. **R**

116. CONSTITUTIONAL CONVENTION TRANSCRIPT VI, *supra* note 577, at 2010, 2011–2013. **R**

117. *Id.* at 2013–2026.

118. *See* McCarthy, *supra* note 1144, at 660 (stating "[w]hether these state constitutional mandates represent hostility toward religion remains the source of debate, but several courts have rejected the argument that such "no aid" and "compelled support" provisions are grounded in religious bigotry"); *see also* Locke v. Davey, 540 U.S. 712, 723 n.7 (2004) (citations omitted) (stating that "the Blaine Amendment's history is simply not before us."). **R**

119. 886 So. 2d 340 (Fla. Dist. Ct. App. 2004).

120. *Id.* at 351 n.9.

issue among historians and legal scholars."[121] Due to these reasons, it is safe to say any nineteenth century anti-Catholic hostility connected with this provision has long since been removed.

B. Background of School Choice Programs

Proponents of "school choice" legislation see it as increasing educational choices for parents, "while encouraging healthy competition among schools to better serve families' needs."[122] States that do have school choice laws provide support primarily through vouchers and tax benefit programs.[123] Voucher programs vary from state to state and generally distribute state funds directly to families in order to offset the cost of private school.[124] These programs have become very popular in the last decade. In 2010, there were two state voucher programs nationwide.[125] As of 2013, 20 voucher programs exist in at least 13 states.[126] Tax benefit programs typically operate through tax deductions and tax credits.[127] Tax deductions, which are calculated according to the filer's tax rate and rises with increased income, reduce the overall amount of taxable income.[128] Tax credits, in contrast, directly reduce taxpayer liability by a certain amount.[129] Popular contemporary tax credit programs allow an individual or corporation to receive state income tax credits for dollar-to-dollar contributions made to private school scholarship programs.[130] Tax benefit programs, like voucher programs, have also increased in popularity, with at least 15 states implementing some kind of tax benefit program related to tax credits or deductions.[131] Montana joined these states with passage of SB 410, allowing a $150 tax credit for donations to "student scholarship organizations."[132]

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121. *Id.*

122. Friedman Found. for Educ. Choice, *What is School Choice?* edchoice.org, http://perma.cc/FL7N-6L32 (last visited Dec. 12, 2015).

123. *See* McCarthy, *supra* note 1144, at 655. **R**

124. *Id.*

125. *Id.*

126. *Id.*

127. Friedman Found., *supra* note 122.

128. Tax Policy Ctr., *Income Tax Issues: What is the difference between tax deductions and tax credits?* BRIEFING BOOK, http://perma.cc/5YAB-6TUF (last updated Sept. 26, 2011) [hereinafter *Income Tax Issues*]; Tax Policy Ctr., *Our Resources: Fast Facts*, edchoice.org, http://perma.cc/7ZHJ-U7NG (last visited Dec. 12, 2015).

129. Income Tax Issues, *supra* note 128.

130. *Id.*

131. McCarthy, *supra* note 114, at 655.

132. 2015 Mont. Laws 457.

Similar types of school choice programs have survived constitutional scrutiny before the United States Supreme Court.[133] However, the fact that these programs may be permissible under the federal Constitution does not mean they will pass muster under state constitutions.[134] More restrictive state constitutions may prohibit these programs from receiving state funding due to state "no aid" clauses.[135] In *Locke v. Davey*,[136] the Court provided that states can have provisions stricter than the Establishment Clause without violating the Free Exercise Clause.[137] State supreme courts have followed this approach in striking down voucher programs.[138]

Challenges to tax benefit programs on independent state grounds, however, have seen less success. Some courts have held tax benefit programs providing support through deductions or tax credits are not actually state appropriations and therefore do not violate state provisions prohibiting aid.[139] Other courts have refused to take up the merits of the state constitutional arguments due to the issue of taxpayer standing.[140] However, this is probably not an issue in Montana. Unlike other states where taxpayer standing may be an issue, the Montana Supreme Court has interpreted the requirement of standing broadly for taxpayers.[141] This begs the question of what a potential challenge to school choice legislation would look like in Montana.

C. Challenges to School Choice Programs under Montana Law

1. Article X, Section 6 and Voucher Programs

State implemented voucher programs available for private religious schools are undoubtedly unconstitutional under Article X, Section 6 of the Montana Constitution. A plain reading of this provision prohibits "any direct or indirect appropriation or payment from any public fund or monies . . . for any sectarian purpose or to aid any . . . school . . . controlled in whole or in part by any church, sect, or denomination."[142] Voucher pro-

133. *See* McCarthy, *supra* note 1144, at 658–659 (examining three United State Supreme Court cases where school choice-type programs were upheld under the First Amendment). **R**

134. *Id.* at 659–660.

135. *Id.* at 660.

136. 540 U.S. 712 (2004).

137. McCarthy, *supra* note 1144, at 659 (citing Locke v. Davey, 540 U.S. 712 (2004)). **R**

138. *E.g.*, Cain v. Horne, 202 P.3d 1178, 1185 (Ariz. 2009) (holding that school voucher program violated aid clause of state constitution).

139. Toney v. Bower, 744 N.E.2d 351, 357–358 (Ill. App. Ct. 2001).

140. Duncan v. State, 102 A.3d 913, 917 (N.H. 2014).

141. *See* Grossman v. State, Dep't of Natural Res., 682 P.2d 1319, 1325 (Mont. 1984) (describing multiple cases where the Court has interpreted standing broadly, and even some cases where the issue of tax payer standing was never raised).

142. MONT. CONST. art. X, § 6.

grams, whether viewed as direct or indirect aid,[143] provide payments from public funds to parents who send their children to religious private schools.[144] Even if one argued vouchers are indirect payments because they pass through the hands of the parents before going to the school, this would be an indirect appropriation or payment of public funds to religious school in direct violation of Section 6. Any contrary assessment would ignore the express language of the provision.

Proponents of school choice programs have argued voucher programs would survive constitutional scrutiny in Montana.[145] They draw a distinction between aiding students and aiding schools, and claim Montana case law shows an inclination for interpreting school choice programs as aiding students.[146] Supporters cite *Montana State Welfare Board v. Lutheran Social Services of Montana*[147] for this argument.[148] However, *Montana State Welfare Board* is inapposite to the issue of school choice programs.

Montana State Welfare Board dealt with the issue of public assistance payments to indigent mothers and whether those payments were prohibited if the mother receiving the funds requested assistance from a private religious adoption agency.[149] There, the Court held the public assistance payments were neither direct nor indirect appropriations to the private adoption agency because the public assistance funds went directly to the mothers, whether or not they ultimately put their children up for adoption.[150]

Montana State Welfare Board is not controlling on the issue of school vouchers. This decision dealt with state funds that may be paid indirectly to private adoption agencies.[151] Because this case dealt with adoption agencies, and not schools, Montana's prohibition on aid to religious schools did not apply to the case; Article X, Section 6 is directed at aid to schools, not aid to adoption agencies.[152] Thus, this case has no bearing on the issue of vouchers for private schools.

Further, the constitutional drafters' decision to retain indirectly in Section 6's text forecloses any possibility that this provision can be interpreted

143. *See* Steven K. Green, *Private School Vouchers and the Confusion over "Direct" Aid*, 10 GEO. MASON U. C.R. L.J. 47, 80–81 (2000) (author describing arguments about whether vouchers are direct or indirect aid).

144. McCarthy, *supra* note 1144, at 655. **R**

145. RICHARD D. KOMER & CLARK NEILY, SCHOOL CHOICE AND STATE CONSTITUTIONS: A GUIDE TO DESIGNING SCHOOL CHOICE PROGRAMS 52 (2007), *available at* http://perma.cc/3XL8-Q4FN (stating that "[b]oth tax credit and voucher programs are school choice options for Montana").

146. *Id.*

147. 480 P.2d 181, 181–182 (Mont. 1971).

148. KOMER & NEILY, *supra* note 145, at 52.

149. *Mont. State Welfare Bd.*, 480 P.2d at 181–182.

150. *Id.* at 186.

151. *Id.* at 185–186.

152. MONT. CONST. art. X, § 6.

as only aiding students, and not private religious schools. For example, one of the reasons the minority proposal wanted to delete the word *indirectly* was to make funds available under the "student benefit theory," as supported by the United States Supreme Court.[153] This theory would allow government to provide monetary benefits to children attending private religious schools, without running afoul of the Establishment Clause, as long as those benefits directly supported the children and not the school.[154] However, as the minority proposal forecasted, arguments in favor of vouchers under this theory would be precluded as a result of retaining the term *indirectly*.[155]

Persuasive authority from other states further supports the conclusion that private school vouchers would be unconstitutional under Article X, Section 6. These states have struck down voucher programs under state constitutions containing far more liberal non-sectarian clauses.[156] Arizona's Constitution, for example, merely states that "[n]o tax shall be laid or appropriation of public money made in aid of any church, or private or sectarian school, or any public service corporation."[157] Unlike Montana's Constitution, no mention of a prohibition on indirect aid appears anywhere in the text.[158] However, this did not prevent the Arizona Supreme Court from striking down a voucher program as an unlawful appropriation in violation of the state's "Aid Clause."[159] Other states have also struck down similar voucher programs as unlawful appropriations.[160] Though not bound to them, the Montana Supreme Court cannot ignore these cases when interpreting its own prohibition on direct and indirect aid.

2. Article X, Section 6 and Tax Benefit Programs

Like voucher programs, school choice programs offering tax benefits to parents of private school students would also be unconstitutional under Article X, Section 6 of the Montana Constitution. Specifically, tax credit programs indirectly aiding sectarian schools through the use of "private school scholarship programs"[161] are unconstitutional as applied against Montana's prohibition on "[a]id to sectarian schools."[162] Three arguments

153. 2 MONTANA CONSTITUTIONAL CONVENTION DELEGATE PROPOSALS, *supra* note 655, at 744–745. **R**
154. Julie Marie Hood, *What's Past Is Prologue: Establishment Clause Jurisprudence After* Zobrest v. Catalina Foothills School District, 1994 WIS. L. REV. 1327, 1340–1341 (1994).
155. 2 MONTANA CONSTITUTIONAL CONVENTION DELEGATE PROPOSALS, *supra* note 655, at 744–745. **R**
156. *E.g.*, *Cain*, 202 P.3d at 1184–1185.
157. ARIZ. CONST. art. IX, § 10.
158. MONT. CONST. art. X, § 6.
159. *Cain*, 202 P.3d at 1184–1185.
160. *E.g.*, *Bush*, 886 So. 2d at 366.
161. McCarthy, *supra* note 1144, at 657. **R**
162. MONT. CONST. art. X, § 6.

support this result. First, the text of this provision clearly prohibits indirect aid to sectarian schools.[163] Second, the 1972 delegates recognized the overwhelming rigidness of the clause during their debates and intentionally retained its strict provisions.[164] Third, Montana case law, specifically Justice Nelson's and Justice Gray's concurring and dissenting opinions in *Kaptein ex rel. Kaptein v. Conrad School District*[165] provide a broad interpretation of this clause which supports a strict reading.[166]

As stated above, the strong textual language of Article X, Section 6 demands a broad reading. In addition to the title of the section, which announces a wide-ranging prohibition on aid to sectarian schools, the first clause contains multiple restrictions on different types of aid.[167] For example, Montana's provision goes beyond simple prohibitions on appropriations and includes direct and indirect restrictions on "payments from any public fund or monies" and "grants of land or other property."[168] Further, this provision prohibits the legislature from aiding "any church, school, academy, seminary, college, university, or other literary or scientific institution, controlled in whole or in part by any church, sect, or denomination."[169] Limiting the reading of the first clause to mere prohibitions on direct and indirect state appropriations would render the remaining language superfluous.

Second, as discussed above, the delegate discussions at the 1972 Convention support a broad interpretation to the prohibition on aid to sectarian schools. Multiple delegates acknowledged the inflexible nature of the provision in their debates.[170] Further, in addition to the mere language of the provision, the delegates voiced a strong commitment to the principle of the separation of church and state, as well as unequivocal support for a strong public school system.[171] State programs diverting financial support from public schools in favor of private religious schools would undoubtedly run afoul of this commitment.

School choice legislation like SB 410 does this in two ways. First, the legislative rationale for this program states a desire for "competition in the educational marketplace."[172] This idea impliedly favors economic support

163. *Id.*

164. CONSTITUTIONAL CONVENTION TRANSCRIPT VI, *supra* note 577, at 2011, 2025–2026 (delegates voting to retain *indirectly* language). **R**

165. 931 P.2d 1311 (Mont. 1997).

166. *Id.* at 1318 (Nelson, J., concurring) (noting that Montana's Constitution "expressly prohibits either direct or indirect aid").

167. MONT. CONST. art. X, § 6.

168. *Id.*

169. *Id.*

170. CONSTITUTIONAL CONVENTION TRANSCRIPT VI, *supra* note 577, at 2011. **R**

171. *Id.* at 2008.

172. H.R. 433, 64th Leg., 1st Sess. (Mont. 2015).

to parents who send their children to private schools and, ultimately, allows for indirect financial aid to private religious schools. This runs counter to the delegates' primary motivations for supporting Section 6. Next, school choice programs undercut the constitutional commitment to public schools in Montana by creating the potential for massive amounts of money to be diverted away from public coffers. For example, House Bill 433, a failed 2015 legislative bill that would have provided a $1000 tax credit for parents who send their kids to qualifying non-public schools, had a fiscal note forecasting millions of dollars in annual lost revenue.[173]

A third reason tax credit legislation would run into constitutional problems is the Montana Supreme Court's interpretation of Article X, Section 6. In *Kaptein ex rel. Kaptein*, the Court addressed whether a student who attended a private religious school could participate on a public school volleyball team without violating the Montana Constitution.[174] Although the majority did not address application of Article X, Section 6 in its opinion and instead based its decisions on other grounds,[175] Justice Nelson's concurring opinion, joined by Justices Gray and Leaphart, provides ample insight into how the Court interprets this provision.

Justice Nelson took a hard stance on aid to sectarian schools and said that allowing a private school student to participate in public school sports programs "is precisely what Article X, Section 6, prohibits—indirect aid to sectarian schools."[176] This opinion recognized Montana's prohibition on aid to sectarian schools is much stronger than the federal government's by prohibiting indirect aid in addition to direct aid.[177] Further, Justice Nelson stated it was the Constitutional Convention's belief that public school systems must be maintained apart from private schools in order to prevent entanglements and "to guard against the diversion of public resources to sectarian school purposes."[178] Justice Gray, who filed an opinion concurring with the majority, also expressed a broad view of Article X, Section 6.[179] In this concurring opinion, Justice Gray distinguished application of Montana's Constitution from "federal and sister state cases" that had no

173. The first fiscal note called for a net loss of $1,053,770 in revenue in the 2019 tax year. Fiscal Note 2017 Biennium, HB433_01 (Governor's Office of Budget & Program Planning Mar. 19, 2015). The second fiscal note called for a net loss of $6,760,828 in revenue in the 2019 tax year. Fiscal Note 2017 Biennium, HB433_02 (Governor's Office of Budget & Program Planning Feb. 16, 2015).

174. *Kaptein*, 931 P.2d at 1312–1313.

175. *Id.* at 1317 (Nelson, J., concurring) (holding that private school student's interest in extracurricular activities did not outweigh public school's interest in effectively integrating academics and extracurricular activities).

176. *Id.* at 1319.

177. *Id.*

178. *Id.*

179. *Id.* at 1320 (Gray, J., concurring in part and dissenting in part).

bearing on the "broad proscription contained in the Montana Constitution regarding aid to sectarian schools."[180]

Though these opinions support a broad reading of this provision, one may argue such a broad reading could endanger traditional tax exemptions afforded to churches, private schools and other religious non-profit organizations. However, this argument is undermined by Article VIII, Section 5 of Montana Constitution. This provision provides that "[t]he legislature may exempt from taxation . . . [i]nstitutions of purely public charity . . . places for actual religious worship, and property used exclusively for educational purposes."[181] Thus the Montana Constitution provides an explicit tax exemption to these institutions, preventing Article X, Section 6 from potentially affecting the tax status of these institutions. Further, any argument that this provision prohibits public services aiding private religious schools, like police or fire services, would be equally mistaken. Denying public services to religious schools under this provision would violate the Establishment Clause.[182]

V. Conclusion

As stated above, Montana's Constitution contains a broad and far reaching prohibition on aid to private religious schools. Because this Article X, Section 6 goes beyond direct aid and includes prohibitions on indirect aid, this provision provides a national model for the separation of church and state. Further, in order to protect the free exercise rights of private religious schools, this type of provision must be adopted in other state constitutions. For example, public opinion concerning sexual orientation has rapidly changed over the last decade.[183] Laws prohibiting discrimination on the basis of sexual orientation have been adopted in response.[184] This change in society could have repercussions on how states fund and manage schools. It is possible that one day a state could condition a school's accreditation on its compliance with the state's anti-discrimination policies. If accreditation is tied to eligibility for school choice programs, this could lead to schools refraining from teaching their bona fide religious beliefs—like views on homosexuality—in order to continue being eligible for funding. Adopting a provision similar to Montana's Article X, Section 6 would help defuse these potential issues.

180. *Kaptein*, 931 P.2d at 1320.

181. Mont. Const. art. VIII, § 5.

182. Everson v. Bd. of Educ. of Ewing Twp., 330 U.S. 1, 17–18 (1947).

183. Tom W. Smith, Public Attitudes toward Homosexuality 1 (2011), *available at* http://perma.cc/HN6S-NGPY.

184. *See* Human Rights Campaign, *Maps of State Laws and Policies*, Explore: State & Local Advocacy, https://perma.cc/5V55-P5DX?type=source (last visited Dec.12, 2015) (displaying 22 states that have adopted laws which prohibit discrimination of the basis of sexual orientation in places of public accommodation).