

REFERENDA, INITIATIVES, AND STATE CONSTITUTIONAL NO-AID CLAUSES

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In the 2012 general election, voters in Florida were asked to approve eleven amendments to the state's constitution. One of the proposals—Amendment 8—had been placed on the ballot by the state legislature to delete constitutional language prohibiting the use of state funds to support, directly or indirectly, any church, religious denomination, or sectarian institution and adding language prohibiting the denial of government benefits and support on the basis of religious identity or belief.¹ The measure had the support of the Florida Chamber of Commerce, former Governor Jeb Bush, United States Senator Marco Rubio, and numerous religious organizations, including the Florida Conference of Catholic Bishops, the Florida Baptist Convention, and the Union of Orthodox Jewish Congregations of America.² Proponents argued that the amendment was needed to eliminate discrimination against religious groups providing social services in the state, protect long-standing partnerships between state government and faith-based social service organizations, and remove a clause from the state constitution rooted in anti-Catholic bias.³

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¹ See FLA. CONST. art. I, § 3; FLA. DIV. OF ELECTIONS, PROPOSED CONSTITUTIONAL AMENDMENTS TO BE VOTED ON NOVEMBER 6, 2012 (2012) [hereinafter PROPOSED AMENDMENTS ON NOV. 6, 2012], available at http://election.dos.state.fl.us/publications/pdf/2012/2012_Constitutional_Amendments_English_9-28-12.pdf. The proposal included deleting the third sentence of the Florida Constitution set out in Article 1, Section 3:

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

PROPOSED AMENDMENTS ON NOV. 6, 2012, *supra*, at 23.

² *Support for Amendment 8 Expands*, FLA. CHAMBER OF COMMERCE (Oct. 30, 2012), <http://www.flchamber.com/article/support-for-amendment-8-expands>.

³ Eric Giunta, *Florida Religious Freedom Amendment: Pro-Religious Liberty, or Anti-*

Opponents of Amendment 8 included the Florida Education Association, the Florida Parent-Teachers Association, the American Civil Liberties Union of Florida, the League of Women Voters, and the editorial boards of many of the state's largest newspapers, including the *Miami Herald*, *Orlando Sentinel* and *Tampa Bay Times*.⁴ They asserted that the proposed amendment was not intended to protect religious freedom or ensure continued delivery of social services in the state but was meant to promote the public funding of religious groups and schools.⁵ Needing a sixty-percent affirmative vote for ratification,⁶ Amendment 8 failed at the ballot.⁷ It did not receive over sixty-percent support in any Florida county, and received majority support in only six of sixty-seven counties in the state.⁸ After the vote, some explained its defeat and the defeat of seven other proposed amendments on ideological grounds, while others asserted support was lacking because of voters' difficulties in understanding the purpose or impact of the proposals.⁹

The campaign over Amendment 8 in Florida was a recent battle in the war against clauses appearing in a majority of state constitutions that prohibit public support of religious schools and institutions that have been applied by many state courts to strike down programs that otherwise would be constitutional under the First Amendment's Establishment Clause.¹⁰ These provisions often are referred to as state "Blaine amendments" because of their similarity to the proposed Federal constitutional amendment introduced by Representative James G. Blaine on Maine in 1875, that many assert was intended to take advantage of anti-Catholic feeling in the country in an attempt to bolster his chances to win the

Church/State Separation?, SUNSHINE ST. NEWS (Oct. 10, 2012), <http://www.sunshinestatenews.com/story/florida-religious-freedom-amendment-pro-religious-liberty-or-anti-churchstate-separation>.

⁴ See *id.*; see also VOTE NO ON 8, <http://www.voteno8.com> (last visited Jun. 14, 2013) (a website of the campaign against Amendment 8 which sets out newspaper editorials opposing the proposition).

⁵ See VOTE NO ON 8, *supra* note 4.

⁶ See FLA. CONST. art. XI, § 5(e).

⁷ *Election Results: Constitutional Amendment*, FLA. DEPARTMENT OF ST.: DIVISION OF ELECTIONS (Nov. 6, 2012), <http://election.dos.state.fl.us/elections/resultsarchive/Index.asp?ElectionDate=11/6/2012>.

⁸ *Id.*

⁹ Dara Kam, *Why Florida Voters Rejected Amendments This Year When They Usually Don't*, PALM BEACH POST (Nov. 12, 2012, 10:11 AM), <http://www.palmbeachpost.com/news/news/state-regional-govt-politics/why-florida-voters-rejected-amendments-this-year-w/nS4hd>.

¹⁰ See Ellen M. Halstead, Note, *After Zelman v. Simmons-Harris, School Voucher Programs Can Exclude Religious Schools*, 54 SYRACUSE L. REV. 147, 166-68 (2004); Toby J. Heytens, Note, *School Choice and State Constitutions*, 86 VA. L. REV. 117, 129-31 (2000).

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1876 Republican presidential nomination.¹¹ State Blaine amendments, as a group, have been criticized and challenged for perpetuating this prejudice because of their similarity and connection to Blaine's original proposal.¹² Some claim that these provisions should be removed from state constitutions because they violate the First Amendment's Free Exercise Clause and discriminate against religious schools and institutions seeking to participate in state assistance programs.¹³

Beyond legal challenges to Blaine amendments or, as referred to here, state no-aid clauses,¹⁴ opponents also have pointed to formal amendment and revision as a way to rid state constitutions of these provisions or limit their application.¹⁵ This could be through outright repeal as was attempted in Florida or through an

¹¹ A discussion of the historical background of the failed federal proposal and the state provisions can be found in several books and a number of law review articles. *See, e.g.*, PHILIP HAMBURGER, *SEPARATION OF CHURCH AND STATE* 296, 323–26 (2002); 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, 556–58, 573 (2003); Steven K. Green, *The Blaine Amendment Reconsidered*, 36 AM. J. LEGAL HIST. 38, 38 (1992); Ward M. McAfee, *The Historical Context of the Failed Federal Blaine Amendment of 1876*, 2 FIRST AMEND. L. REV. 1, 4–5 (2003); G. Alan Tarr, *Church and State in the States*, 64 WASH. L. REV. 73, 73–75 (1989); Joseph P. Viteritti, *Blaine's Wake: School Choice, The First Amendment, and State Constitutional Law*, 21 HARV. J.L. & PUB. POL'Y 657, 659–60 (1998).

¹² *See, e.g.*, Kyle Duncan, *Secularism's Laws: State Blaine Amendments and Religious Persecution*, 72 FORDHAM L. REV. 493, 493 (2003); Robert William Gall, *The Past Should Not Shackle the Present: The Revival of a Legacy of Religious Bigotry by Opponents of School Choice*, 59 N.Y.U. ANN. SURV. AM. L. 413, 414–16 (2003); Brandi Richardson, Comment, *Eradicating Blaine's Legacy of Hate: Removing the Barrier to State Funding of Religious Education*, 52 CATH. U. L. REV. 1041, 1046–49 (2003).

¹³ *See, e.g.*, Richard G. Bacon, *Rum, Romanism and Romer: Equal Protection and the Blaine Amendment in State Constitutions*, 6 DEL. L. REV. 1, 1, 34–40 (2003); Thomas C. Berg, *Why A State Exclusion of Religious Schools from School Choice Programs is Unconstitutional*, 2 FIRST AMEND. L. REV. 23, 23–24 (2003). *See generally* DeForrest, *supra* note 11, at 601–25; Heytens, *supra* note 10, at 140–53.

¹⁴ In this article, I refer to all state constitutional provisions that specifically prohibit the use of public funds to aid religious schools or institutions as “no-aid” clauses. Many refer to these as a group as “Blaine amendments” or “Baby Blaines.” However, some have questioned the extent of their connection to the federal proposal. *See* Steven K. Green, “Blaming Blaine”: *Understanding the Blaine Amendment and the “No-Funding” Principle*, 2 FIRST AMEND. L. REV. 107, 109–14 (2004). In addition, some use the term “Blaine amendment” to refer only to those state no-aid clauses that have some connection to the federal proposal. *See* Jill Goldenziel, *Blaine's Name in Vain?: State Constitutions, School Choice, and Charitable Choice*, 83 DEN. U. L. REV. 57, 60–62 (2005).

¹⁵ *See* Meir Katz, *Religious Liberties: The State of Blaine: A Closer Look at the Blaine Amendments and Their Modern Application*, 12 ENGAGE 111, 117 (2011) (“Legislative repeal seems to be a viable shorter-term solution for opponents of Blaine Amendments in some states.”). *But see* Luke A. Lantta, Note, *The Post-Zelman Voucher Battleground: Where to Turn After Federal Challenges to Blaine Amendment Fails*, 67 LAW & CONTEMP. PROBS. 213, 219–21 (2004) (describing difficulties in amending state constitutions to permit school voucher programs).

amendment authorizing the government to undertake a particular program that otherwise might be constitutionally suspect. In this article, I evaluate modern efforts to repeal or amend state no-aid clauses, focusing specifically on proposals involving religious elementary and secondary schools. Was the result in past proposals consistent with the result in Florida? If not, which efforts have been successful and why? What are the future prospects for change?

I find that there has only been a single successful repeal of a no-aid clause since 1965. Most constitutional proposals to repeal or amend state no-aid clauses have failed, particularly those put before voters through the initiative process.¹⁶ Most amendments proposed have been designed to direct or authorize the legislature to undertake a particular aid program—and the few that were successful generally have been directed at overturning previous state court decisions applying the state’s no-aid clause restrictively.¹⁷ Proposals to amend state no-aid clauses often have faced well-funded and well-organized opposition, and future proposals likely will as well, which suggests that continuing efforts to remove these provisions through formal constitutional change will face difficult challenges.

I. NO-AID CLAUSES AND THEIR CRITICS

When a state court addresses a claim involving separation of church and state, it may resolve it using the Federal Establishment Clause or relevant state constitutional provisions, or both. If turning to the state constitution, the court may find that the state constitution places greater restrictions on the state government than the Federal Establishment Clause, thus voiding the program that would otherwise be permitted under the federal doctrine.¹⁸

¹⁶ See, e.g., Viteritti, *supra* note 11, at 674–75 (explaining how state restrictions that “curtail” aid to religious schools continue to have a powerful effect, and that seventeen states currently have constitutional provisions or judicial interpretations that allow for such “restrictive” laws).

¹⁷ See John Dinan, *Foreword: Court Constraining Amendments and the State Constitutional Tradition*, 38 RUTGERS L.J. 983, 1003 (2007) (explaining how the New Jersey Constitution of 1947 included an amendment that essentially preempted future state court rulings by allowing for the legislature to provide certain support to children in both public and parochial schools and noting that “court-constraining amendments regarding religious establishment mostly took the form of court-overturning amendments”).

¹⁸ See, e.g., *Visser v. Nooksack Valley Sch. Dist.* No. 506, 207 P.2d 198, 204–05 (Wash. 1949) (en banc) (noting that provisions within the Washington state constitution allow the court to “respectfully disagree” with a Supreme Court decision upholding a law providing

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Consequently, a complete understanding of constitutional limitations of governmental support of religious institutions must include an appreciation of restrictions appearing in state constitutions.¹⁹

States use different types of constitutional provisions to restrict government support of religion.²⁰ Only a handful of states have language that mirrors the Federal Establishment Clause.²¹ Rather, most state constitutional restrictions fall into three categories—compelled support clauses, no preference clauses, and no-aid clauses.²² Compelled support clauses are found in twenty-nine state constitutions and protect individuals (oftentimes collectively) from being forced to support religious institutions.²³ An example comes from the Iowa constitution: “nor shall any person be compelled to attend any place of worship, pay tithes, taxes, or other rates for building or repairing places of worship, or the maintenance of any minister, or ministry.”²⁴

Although textually different from the Federal Establishment Clause, state courts generally have not interpreted compelled support clauses to place any greater restrictions on government than those imposed under the First Amendment.²⁵

The second category of state constitutional restrictions and found in thirty-two state constitutions are “no-preference” clauses.²⁶ Again, these clauses by and large have not been interpreted by state courts to be more restrictive than the Federal Establishment

transportation to children enrolled within religious schools at public expense, and further explaining that though the law in question would be upheld under the Establishment Clause within the First Amendment of the Constitution, it did not foreclose the fact that the law offended the state's own constitution); *see also* Dinan, *supra* note 17, at 1003 (“Religion clauses in state constitutions are generally more detailed and separationist than the Federal Establishment Clause.”).

¹⁹ *See, e.g., Visser*, 207 P.2d at 204–05; *see also* Dinan, *supra* note 17, at 1003.

²⁰ *See* Appendix A (providing a complete listing of religion clauses in state constitutions—which is the listing that provides the basis for my discussion of state religion clauses).

²¹ Linda S. Woodland, Note, *Beyond the Establishment Clause: Enforcing Separation of Church and State Through State Constitutional Provisions*, 71 VA. L. REV. 625, 638 (1985) (stating that ten states have constitutional provisions that are identical to the First Amendment's Establishment Clause).

²² *See id.* at 631–34.

²³ *See, e.g., IOWA CONST. art. I, § 3; see also* Joseph Viteritti, *Davey's Plea: Blaine, Blair, Witters, and the Protection of Religious Freedom*, 27 HARV. J.L. & PUB POL'Y 299, 323 (2003).

²⁴ IOWA CONST. art. I, § 3.

²⁵ *See* Woodland, *supra* note 21, at 639 (asserting that no state court has ever construed compelled support language as more restrictive than the First Amendment).

²⁶ *See e.g., ALA. CONST. art. I, § 3* (“[N]o preference shall be given by law to any religious sect, society, denomination, or mode of worship. . .”).

Clause.²⁷

The third category of state constitutional provisions restricting government support of religion, no-aid clauses, appear in thirty-eight state constitutions²⁸ and, unlike the other categories of state religion clauses, have often been interpreted to place greater restrictions on state support of religion than the Federal Establishment Clause.²⁹ With some variation in language, these provisions explicitly prohibit state support of religious schools and/or institutions.³⁰ In some constitutions, no-aid clauses are part of the bill of rights;³¹ other states include them in the education article,³² and some states have them in more than one location in the constitution.³³ No-aid clauses are often referred to as state “Blaine amendments”³⁴ because of their similarity to the Federal Constitutional amendment proposed in 1875 by Representative James G. Blaine of Maine.³⁵ That proposal, approved in the House of Representatives but failing to obtain two-thirds support in the Senate, would have applied the First Amendment’s religion clauses to the states and prohibited government aid to religious schools.³⁶

²⁷ See Woodland, *supra* note 21, at 640 (finding that most state courts have interpreted their no-preference clauses consistent with the Establishment Clause, but identifying decisions from California and Colorado using their state no-preference clauses to place greater restrictions on state government).

²⁸ See Aaron E. Schwartz, *Dusting Off the Blaine Amendment: Two Challenges to Missouri’s Anti-Establishment Tradition*, 73 MO. L. REV. 129, 129–30 (2008).

²⁹ See Heytens, *supra* note 10, at 129–31; Halstead, *supra* note 10, at 166–68.

³⁰ See, e.g., Schwartz, *supra* note 28, at 129–30.

³¹ E.g., MO. CONST. art. 1, § 7.

³² E.g., NEB. CONST. art. VII, § 11.

³³ E.g., WYO. CONST. art. I, § 19; *id.* art. III, § 36.

³⁴ As noted above, many scholars refer to some or all no-aid clauses as “Blaine amendments” but there is some disagreement as to the exact number of Blaine amendments in state constitutions. See Duncan, *supra* note 12, at 514 n.95 (noting dispute and placing number of state Blaine amendments at thirty-seven); Goldenzeil, *supra* note 14, at 69 (placing number of Blaine amendments at thirty-eight); Heytens, *supra*, note 10 at 123 n.32 (addressing a dispute over how many state constitutional provisions should be considered Blaine amendments). Whatever their label and leaning toward being over inclusive, I identified thirty-eight state constitutions that contain provisions explicitly restricting government aid to or in support of religious schools or institutions. See Frank R. Kemmerer, *State Constitutions and School Vouchers*, 120 ED. LAW REP 1 (2002) (discussing differing state constitutional provisions that prohibit both direct and indirect aid to private sectarian schools).

³⁵ See, e.g., Schwartz, *supra* note 28, at 131–32.

³⁶ Green, *supra* note 11, at 57–68; HAMBURGER, *supra* note 11, at 298. Congressman’s Blaine’s proposal read:

No State shall make any law respecting an establishment of religion or prohibiting the free exercise thereof; and no money raised by taxation in any State, for the support of public schools, or derived from any public fund 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.

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Congressman Blaine's proposal was prompted by the religious conflict generated by the common schools movement of the early 1800s advocating for the development of free public education systems in the states.³⁷ Catholic immigrants saw the public schools as hostile to their faith and values, so, in many states, they sought a share of public education funds for their own schools, resulting in hostile responses from Protestants and nativists.³⁸ Focused on the 1875 Republican presidential nomination, Blaine's proposed rewrite of the First Amendment tapped into this sentiment. It was in a form most popular with anti-Catholic voters, as it still permitted Protestantism in public schools so long as it was not Protestantism of any one sect.³⁹

At the time of the proposed Blaine amendment, fifteen states already had enacted some type of legal restriction on public support of religious schools, sometimes by amendments to their constitutions, and many more states included these restrictions in their constitutions in the decades after the federal proposal's defeat.⁴⁰ State constitutional scholar G. Alan Tarr has noted that while some states adopted no-aid clauses to address local conflicts over school funding, other states adopted them to avoid such conflicts arising in the future. Additionally, some states included these provisions merely because other states were doing so.⁴¹ Finally, many states, particularly those in the west, included no-aid clauses in their state constitutions because of Congressional requirements to do so as a condition of statehood.⁴² Regardless when adopted and under what circumstances, many link all state constitutional no-aid provisions to the nineteenth century anti-Catholic sentiment existing at the time of the federal proposal.⁴³

H.R.J. Res. 1, 44th Cong., 1st Sess., 4 CONG. REC. 205 (1875) (noting Senator Blaine's proposed amendment to Article XVI). See also Green, *supra* note 11, at 57–68; HAMBURGER, *supra* note 11, at 298.

³⁷ Mark Edward DeForrest, *Locke v. Davey: The Connection Between the Blaine Amendment and Article I, § 11 of the Washington State Constitution*, 40 TULSA L. REV. 295, 320 (2004).

³⁸ Viteritti, *supra* note 11, at 669.

³⁹ HAMBURGER, *supra* note 11, at 298.

⁴⁰ Stephen K. Green, *The Insignificance of the Blaine Amendment*, 2008 BYU L. REV. 295, 327–29.

⁴¹ Tarr, *supra* note 11, at 92–94.

⁴² Duncan, *supra* note 12, at 516–21. For example, the enabling act for the admission of North Dakota, South Dakota, Montana and Washington required: “[t]hat provision be made for the establishment and maintenance of a system of public schools, which shall be open to all children of said States, and free from sectarian control.” Enabling Act of 1889, ch.180, § 4, 25 Stat. 677 (1889).

⁴³ Green, *supra* note 40, at 329.

Although no-aid clauses are often identified collectively as a single type of state constitutional restrictions, the restrictiveness of their text varies significantly. The most restrictive language, in seven state constitutions, prohibits both “direct” and “indirect” aid to religious schools and/or institutions.⁴⁴ For example, the Missouri constitution provides “[t]hat no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect or denomination of religion.”⁴⁵ The Oklahoma constitution is similarly restrictive, providing, “[n]o public money or property shall ever be appropriated, applied, donated, or used, directly or indirectly, for the use, benefit, or support of any sect, church, denomination, or system of religion”⁴⁶

The least restrictive no-aid clauses appear in seven constitutions⁴⁷ and restrict aid to religious schools in some way but do not completely prohibit it. In addition, most in this category restrict support of religious schools but do not extend restrictions to government aid to religious institutions. For example, Delaware’s no-aid clause sets out that “[n]o portion of any fund now existing, or which may hereafter be appropriated, or raised by tax, for educational purposes, shall be appropriated to, or used by, or in aid of any sectarian, church or denominational school.”⁴⁸ Similarly, the no-aid clause in the Kansas constitution provides, “[n]o religious sect or sects shall control any part of the public educational funds.”⁴⁹ As these least restrictive provisions only prohibit support from particular sources, aid from other sources might fall outside the scope of the constitutional restriction.

The remaining no-aid clauses fall between the restrictive and least restrictive categories. Their text varies somewhat, but they all prohibit aid to or the support of religious schools and/or institutions, although without any explicit prohibition against “indirect” aid or support. For example, Utah’s Constitution reads: “[n]either the state of Utah nor its political subdivisions may make any appropriation for the direct support of any school or educational

⁴⁴ See DeForrest, *supra* note 11, at 587. No-aid clauses in the Florida, Georgia, Michigan, Missouri, Montana, New York, and Oklahoma constitutions prohibit both direct and indirect aid. *See id.*

⁴⁵ MO. CONST. art. I, sec. 7.

⁴⁶ OKLA. CONST. art. II, sec. 5.

⁴⁷ Alabama, Delaware, Kansas, Kentucky, New Mexico, North Dakota, and Ohio. *See, e.g.*, DeForrest, *supra* note 11, at 578–81.

⁴⁸ DEL. CONST. art. X, § 3.

⁴⁹ KAN. CONST. art. VI, § 6(c).

institution controlled by any religious organization.”⁵⁰ Indiana’s no-aid clause provides: “[n]o money shall be drawn from the treasury, for the benefit of any religious or theological institutions.”⁵¹

No-aid clauses have been identified as a major impediment to the adoption of state programs providing secular benefits to religious schools that otherwise would be permissible under the First Amendment’s Establishment Clause.⁵² The battle against them has been and continues to be waged in a variety of ways. For example, critics have sought, so far unsuccessfully, to have the United States Supreme Court strike down no-aid clauses on free exercise or equal protection grounds, or limit their scope because they restrict participation in public programs on the basis of religion.⁵³ In addition, some have attacked their validity in state courts,⁵⁴ or asserted that, notwithstanding their restrictive language, no-aid clauses should be interpreted consistently with the Supreme Court’s interpretation of the Establishment Clause.⁵⁵ Some state courts

⁵⁰ UTAH CONST. art. X, § 9.

⁵¹ IND. CONST. art. I, § 6.

⁵² See, e.g., Berg, *supra* note 13, at 23–24; Michael J. Dailey, Comment, *Blaine’s Bigotry: Preventing School Vouchers in Oklahoma . . . Temporarily*, 39 TULSA L. REV. 207, 228 (2003); Ira C. Lupu & Robert W. Tuttle, *Zelman’s Future: Vouchers, Sectarian Providers, and the Next Round of Constitutional Battles*, 78 NOTRE DAME L. REV. 917, 957–58 (2003) (addressing hurdles to school choice programs posed by state constitutions); Viteritti, *supra* note 11, at 680–99.

⁵³ See, e.g., Brief of Amici Curiae the Becket Fund for Religious Liberty et al. in Support of Respondent, at 1, *Locke v. Davey*, 540 U.S. 712 (2004) (No. 02-1315), 2003 WL 22118852, at *3; Brief Amicus Curiae of The Interfaith Religious Liberty Foundation et al. in Support of Respondents, at 1, *Mitchell v. Helms*, 530 U.S. 793 (2000) (No. 98-1648), 1999 WL 792155, at *1–2. “The Becket Fund for Religious Liberty is a non-profit, public-interest legal and educational institute” focused on protecting religious liberty. *Our Mission*, BECKET FUND, <http://www.becketfund.org/our-mission> (last visited Jun. 14, 2013). It is one of the leading critics of state Blaine amendments—active in state and federal cases seeking to overturn the provisions or limit their application. See *id.* The website has a listing of past and current cases in which the institute has been involved. See *id.* In neither Supreme Court decision did the Court accept the constitutional arguments against the state provisions. *Locke v. Davey*, 540 U.S. 712, 725 (2004); *Mitchell v. Helms*, 530 U.S. 793, 867 (2000) (plurality opinion). However, in the Supreme Court’s plurality opinion in *Mitchell v. Helms*, Justice Thomas referenced the anti-Catholic sentiment at the time of the Blaine amendment proposals, noting that “hostility to aid to pervasively sectarian schools has a shameful pedigree that we do not hesitate to disavow.” *Mitchell*, 530 U.S. at 828 (citing *Chicago v. Morales*, 527 U.S. 41, 53–54 n.20 (1999)). But in *Locke v. Davey*, the Court found no connection between Washington’s no-aid clause and the proposed federal Blaine amendment. *Locke*, 540 U.S. at 725.

⁵⁴ See, e.g., *Univ. of the Cumberlands v. Pennybacker*, 308 S.W.3d 668, 681 (Ky. 2010) (rejecting claim that section 189 is a Blaine amendment that should be struck down as a violation of Federal Free Exercise and Equal Protection Clauses); *Witters v. Wash. Comm’n for the Blind*, 771 P.2d 1119, 1123–24 (Wash. 1989) (stating denial of vocational rehabilitation funds for program at religious college under state no-aid clause did not violate Free Exercise or Equal Protection Clauses).

⁵⁵ Lantta, *supra* note 15, at 219 (arguing that a narrow interpretation of state no-aid clauses is one approach to circumvent their restrictive language).



have interpreted their clauses to be coextensive with the Establishment Clause,⁵⁶ while others have not, finding that the clauses place greater restrictions on state government than the Federal Constitution.⁵⁷ A third line of attack against state no-aid clauses has been through the formal amendment process.⁵⁸ As the success of efforts seeking change through the formal amendment process may be influenced, at least in part, by the difficulty of the amendment process in the state, I address in the next section the formal amendment requirements in no-aid clause states and how variations across states might affect the success of these efforts.

II. AMENDING NO-AID CLAUSES

The average state constitution is almost five times longer than the Federal Constitution.⁵⁹ One reason for this difference is the greater frequency with which state constitutions are changed through the formal amendment and revision process—the rate of amendment of state constitutions is approximately nine times higher than the rate of amendment of the Federal Constitution.⁶⁰ The high frequency of state constitutional change has been attributed to a number of factors, including evolving political attitudes in the states, the need to keep constitutions in tune with needs of a modern society and, maybe most importantly, the less arduous legal requirements for altering the document.⁶¹

Formal constitutional change at the state level occurs in two stages: the proposal of an amendment or new constitution (i.e., revision) and its approval. Four techniques exist in the states to propose formal constitutional change—proposal by the state

⁵⁶ See, e.g., *Kotterman v. Killian*, 972 P.2d 606, 625 (Ariz. 1999) (en banc) (holding the tuition tax credit program did not violate federal or state constitutions); *Bd. of Educ. v. Bakalis*, 299 N.E.2d 737, 744–45 (Ill. 1973) (upholding school transportation program finding that the state no-aid clause was not more restrictive than the federal Constitution).

⁵⁷ See, e.g., *Epeldi v. Engelking*, 488 P.2d 860, 866–68 (Idaho 1971) (using Idaho's no-aid clause to strike down school transportation program that would be permissible under the federal Constitution); *Bloom v. Sch. Comm. of Springfield*, 379 N.E.2d 578, 585–86 (Mass. 1978) (holding the textbook loan program violated the state no-aid clause).

⁵⁸ See *Katz*, *supra* note 15, at 117 (explaining repeal through amendment as one approach to take against state Blaine amendments); *Lantta*, *supra* note 15, at 219–21 (addressing amendment as option to authorize voucher programs in states with Blaine amendments).

⁵⁹ Christopher W. Hammons, *State Constitutional Reform: Is it Necessary?*, 64 ALB. L. REV. 1327, 1328 (2001) (citations omitted).

⁶⁰ See *id.* at 1333–34; see also Donald S. Lutz, *Toward a Theory of Constitutional Amendment*, 88 AM. POL. SCI. REV. 355, 359 (1994) (measuring rates of amendment of state constitutions).

⁶¹ See G. ALAN TARR, *UNDERSTANDING STATE CONSTITUTIONS* 30–35 (1998).

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legislature, proposal by initiative, proposal by constitutional convention, and proposal by constitutional commission. Legislative proposals predominate, as approximately ninety percent of all amendments to state constitutions began in this manner.⁶² All of the states with no-aid clauses permit state constitutional change through legislative proposals, although they differ with regard to the level of legislative support needed. Some no-aid clause states require a majority vote in each house to propose amendments,⁶³ a handful require a three-fifths vote in each house,⁶⁴ and others require a two-thirds vote in each house.⁶⁵ Some require the vote to take place over two legislative sessions.⁶⁶

Proposal by initiative is the most direct and controversial method of proposing state constitutional change.⁶⁷ It empowers citizens to suggest constitutional amendments and, in a few states, to call a constitutional convention. First adopted in Oregon in 1902,⁶⁸ constitutional initiatives can be used to propose changes to no-aid clauses in fifteen states, thereby allowing supporters of constitutional change to bypass the legislature, whose members' interests may be a barrier to constitutional change, and access the ballot directly.⁶⁹ Four of these states adopted the initiative process

⁶² Gerald Benjamin, *Constitutional Amendment and Revision*, in 3 STATE CONSTITUTIONS FOR THE TWENTY-FIRST CENTURY: THE AGENDA OF STATE CONSTITUTIONAL REFORM 181 (G. Alan Tarr & Robert F. Williams eds., 2006).

⁶³ The states are Arizona, Indiana, Massachusetts, Minnesota, Missouri, Nevada, New Mexico, New York, North Dakota, Oklahoma, Pennsylvania, South Dakota, Virginia, and Wisconsin. COUNCIL OF STATE GOVERNMENTS, 44 THE BOOK OF THE STATES 13 tbl.1.2 (2012) [hereinafter COUNCIL OF STATE GOVERNMENTS 2012], available at <http://knowledgecenter.csg.org/drupal/content/book-states-2012-chapter-1-state-constitutions>.

⁶⁴ The states are Alabama, Florida, Illinois, Kentucky, Nebraska (a unicameral legislature), New Hampshire, and Ohio. *Id.*

⁶⁵ The states are Alaska, California, Colorado, Delaware, Georgia, Idaho, Kansas, Michigan, Mississippi, Montana, South Carolina, Texas, Utah, Washington, and Wyoming. *Id.*

⁶⁶ A majority vote over two sessions is required in: Indiana, Massachusetts, Nevada, New York, Pennsylvania, Virginia, and Wisconsin. *Id.* Delaware requires two-thirds vote in two legislative sessions. *Id.* Hawaii permits two-thirds vote in each house in one session or majority vote in each house in two sessions, and South Carolina requires a two-thirds vote in each house to propose and a majority vote after popular ratification. *Id.* at 13 tbl.1.2, 14 tbl.1.2.

⁶⁷ See Marvin Krislov & Daniel M. Katz, *Taking State Constitutions Seriously*, 17 CORNELL J.L. & PUB. POL'Y 295, 297–300, 339–41 (2007) (providing overview and criticisms of use of initiatives in state constitutional change).

⁶⁸ See Norman R. Williams, *Direct Democracy, the Guaranty Clause, and the Politics of the "Political Question" Doctrine: Revisiting Pacific Telephone*, 87 OR. L. REV. 979, 979 (2008).

⁶⁹ See Benjamin, *supra* note 62, at 186. The states with no-aid clauses that permit its amendment by initiative are Arizona, California, Colorado, Florida, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, North Dakota, Ohio, Oklahoma, Oregon, South Dakota. See COUNCIL OF STATE GOVERNMENTS 2012, *supra* note 63, at 15 tbl.1.3. Mississippi



for constitutional change during the period under study here—Florida (1972), Mississippi (1992), Montana (1972), and South Dakota (1972).⁷⁰ Although Illinois is a no-aid clause and initiative state,⁷¹ it only permits use of the initiative to amend its legislative article,⁷² and Massachusetts, also a no-aid clause and initiative state,⁷³ explicitly excludes the no-aid clause from the initiative process, a restriction that has been challenged by some seeking to amend the provision.⁷⁴

The rise in the use of constitutional initiative has been attributed to a number of factors. The proposal itself oftentimes will generate increased media attention to the issue, both statewide and sometimes nationally. Voter frustration with government and the growth of the initiative industry also has contributed to its expansion. Finally, elected officials and their supporters have increasingly used the initiative process in an attempt to afford their policies constitutional protection.⁷⁵ The use of initiatives for constitutional change is not without its critics, as some argue that the process lacks deliberative effort, places undue pressures on voters who may be unfamiliar with the subject of the initiative, can be manipulated by moneyed interests, and jeopardizes minorities because constitutional change is placed in the hands of the majority.⁷⁶

Ballot access in initiative states is not a simple matter, and the overwhelming majority of initiative proposals never make it before the voters. Two of the more difficult burdens to overcome to place a proposal on the ballot are the signature requirements and the extent to which the signatures need to be distributed across the state.⁷⁷ All of the no-aid clause states where initiative is available,

has an indirect initiative process in that proposals meeting all requirements must be submitted to the legislature for its review before appearing on the ballot. *Comparison of Statewide Initiative Processes*, INITIATIVE & REFERENDUM INST. UNIV. S. CAL. (2013), <http://www.iandrinstute.org/New%20IRI%20Website%20Info/Drop%20Down%20Boxes/Requirements/A%20Comparison%20of%20Statewide%20I&R%20Processes.pdf> (last visited Jun. 14, 2013) [hereinafter *Comparison of Statewide Initiative Processes*].

⁷⁰ William B. Fisch, *Constitutional Referendum in the United States of America*, 54 AM. J. COMP. L. 485, 496 nn.49, 50 (2006).

⁷¹ ILL. CONST. art. X, § 3; see also Benjamin, *supra* note 62, at 186.

⁷² See Benjamin, *supra* note 62, at 186.

⁷³ MASS. CONST. amend. XVIII, § 2; see also Benjamin, *supra* note 62, at 186.

⁷⁴ MASS. CONST. art. XLVIII, § 2; see also Benjamin, *supra* note 62, at 186. The exclusion was challenged unsuccessfully in *Wirzburger v. Galvin*, 412 F.3d 271, 274 (1st Cir. 2005).

⁷⁵ David B. Magleby, *Let the Voters Decide?: An Assessment of the Initiative and Referendum Process*, 66 U. COLO. L. REV. 13, 28–30 (1995).

⁷⁶ See, e.g., Benjamin, *supra* note 62, at 186.

⁷⁷ See generally Magleby, *supra* note 75, at 23–24 (noting the different standards related to

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except for Nebraska and North Dakota, tie the number of signatures needed to the percentage of the population that voted in a previous election,⁷⁸ with the highest percentages required by Arizona⁷⁹ and Oklahoma⁸⁰ and the lowest percentages Colorado⁸¹ and Missouri.⁸² Six of these states where change to the no-aid clause through initiative is available—Florida, Mississippi, Missouri, Montana, Nebraska, and Ohio—impose distribution requirements for initiative proposals, ensuring that there is some minimum level of support for the proposal across the state.⁸³ For example, the Nebraska Constitution requires that the required signatures must include “five percent of the registered voters of each of two-fifths of the counties of the state.”⁸⁴

Although constitutional change in no-aid clause states primarily begins with legislatively proposed amendments and, where permitted, amendments proposed through popular initiative, there also are other methods that could lead to the repeal or modification of these provisions—the constitutional convention and the constitutional commission. Conventions as a method of constitutional change have decreased in recent years, likely due to the uncertainty of the results and the unwillingness of the legislature to cede authority over state constitutional change.⁸⁵ Since 1965, state constitutional conventions have been held in ten no-aid clause states, although the most recent one held was almost thirty years ago.⁸⁶ Most state constitutions authorize the legislature to call a convention, sometimes without the question

signature requirements across various states); *see also id.* at tbl.1.

⁷⁸ COUNCIL OF STATE GOVERNMENTS 2012, *supra* note 63, at 15 tbl.1.3. Nebraska requires signatures equal or greater than ten percent of registered voters and North Dakota’s minimum requirement is four percent of the state population. *Id.*

⁷⁹ *Id.* (“Fifteen percent of total votes cast for all candidates for governor at last election.”).

⁸⁰ *Id.* (“Fifteen percent of legal voters for state office receiving highest number of voters at last general state election.”).

⁸¹ *Id.* (“Five percent of total legal votes for all candidates for secretary of state at last general election.”).

⁸² *Id.* (“Eight percent of legal voters for all candidates for governor at last election.”).

⁸³ *Id.*

⁸⁴ NEB. CONST. art. III, § 2; *see also* COUNCIL OF STATE GOVERNMENTS 2012, *supra* note 63, at 15 tbl.1.3.

⁸⁵ Benjamin Kogan, *supra* note 62, at 195.

⁸⁶ Vladimir Kogan, *The Irony of Comprehensive State Constitutional Reform*, 41 RUTGERS L.J. 881, 892 app’x. 1 (2010). Some of these conventions were limited in the matters they were convened to address. *See id.* The conventions held since 1965 in no-aid clause states and year(s) convened are New Hampshire (1966, 1974, 1984), New York (1967), Pennsylvania (1967–68), Hawaii (1968, 1978), New Mexico (1969), Illinois (1969–70), Montana (1971–72), North Dakota (1971–72), Texas (1974). *Id.* At the time the Louisiana convention was held in 1973–74, it was a no-aid clause state, although it is not today. *See id.*

being submitted to the voters, but even where authority is not expressly given to the legislature, courts have often recognized the implied authority of the legislature to call.⁸⁷ There are a handful of no-aid clause states that periodically submit the question whether to hold a constitutional convention to voters,⁸⁸ but, across all states, most periodic calls are rejected; between 1970 and 2002, voters approved questions calling for conventions on only four occasions, but rejected them twenty-five times.⁸⁹ In two no-aid clause states—Florida and Montana—conventions also can be called through citizen initiative, although neither state has convened a convention using this process.⁹⁰

The method least available to propose amendments to state no-aid clauses is through a constitutional commission. Legislatures have often created temporary commissions to assist with constitutional revision or amendment but without the authority to place proposals on the ballot. Florida has the only constitutionally created commission with the authority to propose amendments for submission directly to the electorate.⁹¹ It created a thirty-seven member Constitutional Revision Commission in 1968 that first met in 1978 and meets every ten years to consider changes to the constitution.⁹² It proposed eight amendments in the 1978 election and none were approved.⁹³ Criticism of the commission after those defeats led to a legislatively proposed amendment in 1980 to abolish it, but voters rejected the proposal.⁹⁴ Lessons learned from the earlier experiences resulted in a more successful meeting of the commission in 1998 when eight out of nine of its more tempered proposals were ratified by voters.⁹⁵

⁸⁷ G. Alan Tarr & Robert F. Williams, *Getting from Here to There: Twenty-First Century Mechanisms and Opportunities in State Constitutional Reform*, 36 RUTGERS L.J. 1075, 1078–79 (2005).

⁸⁸ COUNCIL OF STATE GOVERNMENTS 2012, *supra* note 63, at 16 tbl.1.4. The no-aid clause states with periodic question put to voters whether to call a convention are Alaska, Hawaii, Illinois, Michigan, Missouri, Montana, New Hampshire, New York, Ohio, and Oklahoma. *Id.*

⁸⁹ Gerald Benjamin, *The Mandatory Constitutional Convention Question Referendum: The New York Experience in National Context*, 65 ALB. L. REV. 1017, 1020 (2002).

⁹⁰ Tarr & Williams, *supra* note 87, at 1081.

⁹¹ *See* Benjamin, *supra* note 62, at 191.

⁹² *Id.*; P. K. Jameson & Marsha Hosak, *Citizen Initiatives in Florida: An Analysis of Florida's Constitutional Initiative Process, Issues, and Alternatives*, 23 FLA. ST. U. L. REV. 417, 423–24 (1995).

⁹³ Joseph W. Little, *The Need to Revise the Florida Constitutional Revision Commission*, 52 FLA. L. REV. 475, 485 (2000).

⁹⁴ Benjamin, *supra* note 62, at 191 (citing Robert Williams, *The Role of the Constitutional Commission in State Constitutional Change*, in THE NEW YORK STATE CONSTITUTION: A BRIEFING BOOK 78 (Gerald Benjamin ed., 1994)).

⁹⁵ Little, *supra* note 93, at 488–92 (indicating that only one of the eight proposals was

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In all no-aid states but Delaware,⁹⁶ proposals for constitutional change, whatever their source, must be placed before the voters for ratification. Of the no-aid clause states, all require a majority vote for approval of legislatively proposed amendments,⁹⁷ except for Florida, which requires a three-fifths majority,⁹⁸ and New Hampshire, which requires a two-thirds majority.⁹⁹ For most states, the necessary majority is based on those voting on the amendment, but Minnesota and Wyoming require a majority voting in the election, so that voters choosing not to cast a ballot in the referendum will harm the chances of approval.¹⁰⁰ In the no-aid clause states where initiative is available, two states place higher vote requirements on amendments proposed through initiative than through legislative proposal; otherwise the vote required for approval is the same.¹⁰¹

The need for popular ratification of proposals contributes to the complexity and dynamics of the process, given that the ratifiers of the change differ from the groups that control the proposal for change.¹⁰² This has led state constitutions increasingly being viewed as “political documents,” involving campaigns for and against proposals that resemble campaigns of candidates for electoral office. But there are some differences between ballot measures elections and candidate elections. For example, constitutional ballot propositions generally attract fewer voters, with significant ballot drop-off between the number participating in elections for office and those who vote on the ballot proposition.¹⁰³

rejected by voters in 1998). *See generally* Anne Permaloff, *Methods of Altering State Constitutions*, 33 CUMB. L. REV. 217, 237–44 (2003) (describing roles of commissions in state constitutional change with emphasis on Florida experience).

⁹⁶ COUNCIL OF STATE GOVERNMENTS 2012, *supra* note 63, at 13 tbl.1.2.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.* Illinois permits approval with a majority voting in the election or three-fifths voting on the amendment. *Id.* at 13 tbl.1.2, 14 tbl.1.2. In Hawaii, the majority vote on the amendment must be at least fifty percent of the total votes cast at the election, and in Nebraska the majority vote on the amendment must be at least at least thirty-five percent of the total votes cast in the election. *Id.*

¹⁰¹ *See id.* at 13 tbl.1.2, 15 tbl.1.3. Mississippi requires a majority but there is a threshold requirement for constitutional initiatives. *See id.* Nevada requires a majority vote in two consecutive general elections to ratify constitutional initiatives. *See id.*

¹⁰² TARR, *supra* note 61, at 34.

¹⁰³ *See* THOMAS E. CRONIN, DIRECT DEMOCRACY: THE POLITICS OF INITIATIVE, REFERENDUM, AND RECALL 66–67 (1989) (“[A] 5 to 15 percent drop-off or falloff of voter participation is common in state issue elections.”); DAVID B. MAGLEBY, DIRECT LEGISLATION: VOTING ON BALLOT PROPOSITIONS IN THE UNITED STATES 90 (1984); *see also* Becky Kruse, *The Truth in Masquerade: Regulating False Ballot Proposition Ads Through State Anti-False*

In addition, voters participating in a constitutional amendment election tend to be less representative as voters as a whole and oftentimes have less information on these proposals than they have on candidates.¹⁰⁴

Legislatively proposed amendments, the proposals most often on the ballot, generally deal with issues of governing that do not generate significant opposition, resulting in a relatively high approval rate.¹⁰⁵ For example, between 2000 and 2009, there was a 77.7% approval rate for legislatively proposed constitutional amendments (780 on the ballot),¹⁰⁶ which was significantly higher than the 39.9% approval rate (158 on the ballot) for initiatives.¹⁰⁷ A few factors contribute to this lower approval rate for initiatives. The issues placed on the ballot by initiative tend to reflect positions espoused by ideological or reform groups that have not fared well before the legislature.¹⁰⁸ In addition, given that they are not the product of legislative debate and revision, initiatives oftentimes may be poorly worded, leading to more confusion and ultimately increased opposition by the voters.¹⁰⁹

In the end, for formal state constitutional change to occur, two requirements must be met: the procedural requirement to put the proposal before the voters and the election-day requirement for the proposal to be approved.¹¹⁰ Procedurally, the direct initiative is the

Speech Statutes, 89 CALIF. L. REV. 129, 143–44 (2001) (noting that the complexity of certain initiatives often leads to voter drop-off as such propositions are harder to understand).

¹⁰⁴ See CRONIN, *supra* note 103, at 66–84; see generally MAGLEBY, *supra* note 103, 78–95, 103–18 (addressing voter turnout and behavior in referendum and initiative contests).

¹⁰⁵ TARR, *supra* note 61, at 142 (explaining that “the infrequency of organized opposition to [legislatively proposed] amendments” contributes to a high rate of ratification).

¹⁰⁶ This number was calculated by the author from data contained in Tables 1.2 and 1.3 appearing in various volumes of THE BOOK OF THE STATES. See COUNCIL OF STATE GOVERNMENTS, 37 BOOK OF THE STATES 12 tbl.1.2, 14 tbl.1.3 (2005) [hereinafter COUNCIL OF STATE GOVERNMENTS 2005]; COUNCIL OF STATE GOVERNMENTS, 38 BOOK OF THE STATES 11 tbl.1.2, 13 tbl.1.3 (2006) [hereinafter COUNCIL OF STATE GOVERNMENTS 2006]; COUNCIL OF STATE GOVERNMENTS, 41 BOOK OF THE STATES 14 tbl.1.2, 16 tbl.1.3 (2009) [hereinafter COUNCIL OF STATE GOVERNMENTS 2009]; COUNCIL OF STATE GOVERNMENTS, 42 BOOK OF THE STATES 13 tbl.1.2, 15 tbl.1.3 (2010) [hereinafter COUNCIL OF STATE GOVERNMENTS 2010]. Over that same time period, no proposals were initiated by constitutional conventions, and four were initiated by constitutional commissions, three of which were adopted. John Dinan, *State Constitutional Developments in 2011*, in 44 THE BOOK OF THE STATES 3 (2012), available at <http://knowledgecenter.csg.org/drupal/content/state-constitutional-developments-2011>.

¹⁰⁷ This number was calculated by the author from data contained in Tables 1.2 and 1.3 appearing various volumes of THE BOOK OF THE STATES. See sources cited *supra* note 106.

¹⁰⁸ Magleby, *supra* note 75, at 45.

¹⁰⁹ *Id.* at 43–44.

¹¹⁰ See Arthur Lupia et al., *Why State Constitutions Differ in their Treatment of Same-Sex Marriage*, 72 J. POL. 1222, 1225 (2010) (addressing how contemporary constitutional outcomes on same-sex marriage is explained by integrating state level attitudes with state requirements for formal constitutional amendment).

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least complex method through which formal constitutional change can take place, because proponents of change can access the ballot without legislative involvement. While legislative proposals for constitutional change still significantly outpace those proposed through initiative, in those states where both are available, the use of legislative proposals over the last thirty years has been cut in half, while the use of the initiative has nearly doubled.¹¹¹ Thus, one would expect a significant number of proposals to amend no-aid clauses to emanate from the fourteen no-aid clause states that allow direct constitutional initiatives.¹¹² In those states where initiative is not available, the easiest road to constitutional change would be states where legislative proposals require a vote in a single legislative session and where approval of the measure is achieved through an electoral majority. There are eleven no-aid states in this category (twelve if Louisiana is included, given that its constitution included a no-aid clause at the beginning of the study period).¹¹³

The most difficult amendment hurdles to overcome would be in those states without an initiative and where proposals must be approved over two legislative sessions or must be approved by a supermajority of the electorate. The remaining thirteen no-aid clause states fall in this category, and as one might expect, ten of these states have relatively low rates of amendment.¹¹⁴ The only states among this group with above average rates of amendment are Hawaii, New York, and South Carolina.¹¹⁵

III. NO-AID CLAUSES ON THE BALLOT

While no-aid clause states permitting formal constitutional change through direct initiative or with less restrictive legislative and electoral requirements might appear to be attractive locales for the repeal or amendment of the state's no-aid clause, constitutional change will occur only if there is a perceived need for it to take place. The mere presence of a no-aid clause in the constitution

¹¹¹ See Krislov & Katz, *supra* note 67, at 309 (“Where available, the Direct Constitutional Initiative is quickly becoming the method of choice for citizen lawmakers.”).

¹¹² See COUNCIL OF STATE GOVERNMENTS 2012, *supra* note 63, at 14 tbl.1.3; see also *Comparison of Statewide Initiative Processes*, *supra* note 69.

¹¹³ Alabama, Alaska, Georgia, Idaho, Kansas, Kentucky, Louisiana, Mississippi, New Mexico, Texas, Utah, Washington. Mississippi is an initiative state, but it is included in this category because its initiative process requires legislative involvement. See *Comparison of Statewide Initiative Processes*, *supra* note 69.

¹¹⁴ See *id.*

¹¹⁵ For rates of amendment for each state, the author relied on Lutz, *supra* note 60, at 367 tbl. A-1.

might not be enough of a need if the clause is not being interpreted restrictively to curtail programs that otherwise would be permitted under the Federal Establishment Clause. For example, if state courts are interpreting the state no-aid clause to be consistent with the Federal Establishment Clause, few in the legislature would see the need for proposing an amendment, and, in initiative states, citizen groups would be less compelled to undertake an expensive initiative proposal and approval campaign. However, if courts in the state are interpreting the no-aid clause restrictively or the expectation is that they will, there will be a different environment for constitutional change, and the formal methods available for change may matter.

My focus here is on no-aid clause repeal or amendment proposals that address or may affect public support of religious elementary and secondary schools. Because the need for constitutional change likely will be driven by more than just the presence a no-aid clause in the constitution, I expect most proposals to be “court-constraining” amendments.¹¹⁶ There are two types of court-constraining amendments. Reactive court-constraining amendments are adopted to overturn a state court decision and authorize the legislature to enact a statute that the court has nullified under the constitution.¹¹⁷ The other type, preemptive court-constraining amendments, are designed to avert future court decisions because of the uncertainty whether a program or practice is authorized under the constitution as written.¹¹⁸ This uncertainty may result from courts in other states using their constitutions to invalidate similar programs or practices being considered.¹¹⁹ While court-constraining amendments might focus on permitting a specific program or policy, they also might involve a complete repeal of the provision or a general rewriting of it to make it less restrictive.¹²⁰

I identified ballot proposals affecting state no-aid clauses and their application to religious elementary and secondary schools using multiple sources. Primary sources I used were data on referenda and initiatives available through the Inter-university Consortium for Political and Social Research,¹²¹ the “Ballot

¹¹⁶ See Dinan, *supra* note 17, at 986 (describing history and types of “court-constraining amendments”).

¹¹⁷ See *id.*

¹¹⁸ See *id.*

¹¹⁹ See *id.*

¹²⁰ See *id.* at 986–89.

¹²¹ *Referenda and Primary Election Materials (ICPSR 6)*, INTER-UNIVERSITY CONSORTIUM POL. & SOC. RES. (1995), <http://www.icpsr.umich.edu/icpsrweb/ICPSR/studies/6> (last visited

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Measures Database” compiled and maintained by the National Conference of State Legislatures,¹²² and data on initiative ballot measures compiled by the Initiative and Referendum Institute at the University of Southern California.¹²³ I also relied on various other sources, including those in individual states.¹²⁴ I focused on proposals between 1965 and 2012 to reflect the more modern efforts to amend these provisions, which may provide more insight into future amendment efforts. A measure was included in the data if it proposed to repeal the state’s no-aid clause, proposed to amend the no-aid clause as it applied to specific programs or practices affecting religious elementary or secondary schools, proposed to rewrite the no-aid clause in a way that could influence its application to programs or practices affecting religious elementary or secondary schools, or proposed to amend the state constitution in some other way that would limit the application of the no-aid clause to programs or practices affecting religious elementary or secondary schools.

For each proposal, I determined whether the proposal was placed on the ballot by the legislature, initiative, convention, or commission and obtained the ballot question/summary provided to the voters and the popular vote result. In the end, I identified thirty proposals from more than half of the no-aid clause states amending or affecting the application of state no-aid clauses between 1965 and 2012, all but one of which were put before the voters for ratification.¹²⁵ Table 1 sets out the results by state,¹²⁶ and

Jun. 4, 2013) (compiling election returns on state referenda from both the county and state levels from the mid-nineteenth century to the late twentieth century).

¹²² *Ballot Measures Database*, NAT’L CONF. OF ST. LEGISLATURES (2013), <http://www.ncsl.org/legislatures-elections/elections/ballot-measures-database.aspx>.

¹²³ See *Initiative & Referendum Institute*, *supra* note 69.

¹²⁴ The state sources I consulted were offices of state secretaries of state or information offices of state legislatures. I consulted other various sources as well. See RICHARD D. KOMER & CLARK NEILY, INST. FOR JUSTICE, SCHOOL CHOICE AND STATE CONSTITUTIONS: A GUIDE TO DESIGNING SCHOOL CHOICE PROGRAMS 1 (2007), available at <http://www.alec.org/docs/IJ-ALEC-school-choice.pdf>; Janice C. May, *Constitutional Amendment and Revision Revisited*, 17 PUBLIUS 153, 153–79 (1987); Albert J. Menendez, *Voters Versus Vouchers: An Analysis of Referendum Data*, 81 PHI DELTA KAPPAN 76, 76–80 (Sept. 1999). Additionally, I referred to several annual editions of THE BOOK OF THE STATES. See sources cited *supra* note 106. For the early years, I resorted to the STATE GOVERNMENT NEWS, which published developments within state governments on a monthly basis. See Council of State Governments, STATE GOV’T NEWS.

¹²⁵ Delaware’s 1967 proposal to amend its no-aid clause did not need to be submitted to the voters for ratification—it was approved by vote in the legislature over two sessions. See 56 Del. Laws 37–38 (1967).

¹²⁶ See *infra* Table 1.

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Table 2 sets out the measures by proposal type and subject.¹²⁷ The subject of the proposals varied significantly. Some involved a repeal or rewrite of the no-aid clause without reference to any specific program (e.g., Florida's 2012 proposal to repeal no-aid clause language), some referenced a single policy or program only (e.g., California's 1982 proposal addressed secular textbook loans only), others referenced multiple programs (e.g., Missouri's 1986 initiative covered handicapped services, secular textbooks and student transportation), while still others addressed support in more general terms (e.g., Massachusetts' 1982 proposal referenced "aid" to pupils attending private elementary and secondary schools). If more than one program was referenced in the proposal, it appears multiple times in Table 2. The ballot language of the proposals is set out in Appendix B.

¹²⁷ See *infra* Table 2.

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Table 1
Approval of Proposed Amendments to No-aid Clauses
Affecting State Support of Religious Schools
1965-2012

State and Year	Proposal Source	Result	Votes for approval	Votes against approval
Alaska (1976)	Legislative	Fail	54,636 (46%)	64,211 (54.0%)
California (1982)	Legislative	Fail	2,810,191 (38.9%)	4,411,672 (61.1%)
California (1993)	Initiative	Fail	1,561,514 (30.4%)	3,567,833 (69.6%)
California (2000)	Initiative	Fail	3,101,193 (29.5%)	7,422,037 (70.5%)
Colorado (1992)	Initiative	Fail	503,162 (33.2%)	1,011,901 (66.8%)
Colorado (1998)	Initiative	Fail	515,942 (39.7%)	782,982 (60.3%)
Delaware (1967)	Legislative	Pass	n/a	n/a
Florida (2012)	Legislative	Fail	3,441,330 (44.5%)	4,286,572 (55.5%)
Idaho (1972)	Legislative	Fail	116,373 (42.6%)	156,855 (57.4%)
Louisiana (1974)	Convention	Pass ¹²⁸	360,980 (57.9%)	262,676 (42.1%)
Massachusetts (1982)	Legislative	Fail	708,034 (39.7%)	1,160,130 (62.1%)
Massachusetts (1986)	Legislative	Fail	502,170 (30.3%)	1,154,069 (69.7%)
Michigan (1970)	Initiative	Pass	1,416,838 (56.8%)	1,078,740 (43.2%)
Michigan (1978)	Initiative	Fail	718,440 (25.7%)	2,075,583 (74.3%)
Michigan (2000)	Initiative	Fail	1,235,533 (30.9%)	2,767,320 (69.1%)
Missouri (1976)	Initiative	Fail	463,198 (40.3%)	684,818 (59.7%)
Nebraska (1966)	Legislative	Fail	191,986 (43.1%)	253,945 (56.9%)
Nebraska (1970)	Legislative	Fail	182,827 (42.2%)	250,529 (57.8%)
Nebraska (1972)	Legislative	Pass	320,909 (71.7%)	126,737 (28.3%)
Nebraska (1976)	Legislative	Pass	289,683 (55.8%)	229,824 (44.2%)
New York (1967)	Convention	Fail	1,327,999 (27.6%)	3,487,513 (72.4%)
Oregon (1972)	Legislative	Fail	336,382 (39.3%)	519,196 (60.7%)

¹²⁸ Louisiana voters were asked to cast two votes. The first vote (listed here) was for the approval of the Constitution and the second was to choose between two versions of the education article that differed with regard to state higher education board structure. Both versions of the education article excluded the no-aid clause. See W. LEE HARGRAVE, *THE LOUISIANA STATE CONSTITUTION: A REFERENCE GUIDE* 18 (1991) (describing issues surrounding approval of the new Constitution).

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Oregon (1990)	Initiative	Fail	351,977 (32.2%)	741,863 (67.8%)
South Carolina (1972)	Legislative	Pass	247,061 (56.8%)	187,757 (43.2%)
South Dakota (1986)	Legislative	Pass	148,813 (53.9%)	127,530 (46.1%)
South Dakota (2004)	Legislative	Fail	173,650 (47.0%)	195,936 (53.0%)
Washington (1975)	Legislative	Fail	369,775 (39.5%)	565,444 (60.5%)
Wisconsin (1967)	Legislative	Pass	494,236 (56.7%)	377,107 (43.3%)
Wisconsin (1972)	Legislative	Pass	871,707 (74.5%)	298,016 (25.5%)
Wisconsin (1972)	Legislative	Pass	595,075 (50.4%)	585,511 (49.6%)

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Table 2
Subjects of Proposed Amendments to No-aid Clauses
Affecting State Support of Religious Schools, 1965-2012¹²⁹

Proposal Source	Subject											Repeal / Replacement
	Aid to Students and Schools ¹³⁰	Vouchers	Textbooks/ Instructional Materials	Transportation	Income Tax Credit	School Buildings	Handicapped Students	Auxiliary Services	Release Time	Revision of Clause	Repeal / Replacement	
Legislative	Nebraska (1970); Washington (1975); Alaska (1976); Massachusetts (1982); Massachusetts (1986)		California (1982); Massachusetts (1982); Massachusetts (1986); South Dakota (1986)	Nebraska (1966); Delaware (1967) ; Wisconsin (1967) ; Idaho (1972); South Dakota (2004)		Wisconsin (1972)	Nebraska (1976)	Massachusetts (1982); Massachusetts (1986); South Dakota (2004)	Wisconsin (1972)	Nebraska (1972) ; South Carolina (1972)	Oregon (1972); Florida (2012)	
Initiative	Michigan (1970); Michigan (2000)	Michigan (1970) ; Michigan (1978); Colorado (1992); California (1993); California (2000); Michigan (2000)	Missouri (1976)	Michigan (1970) ; Missouri (1976); Michigan (1978); Michigan (1998); Michigan (1970) ; Michigan (2000)	Oregon (1990); Colorado (1998); Michigan (1970) ; Michigan (2000)		Missouri (1976)					
Convention											New York (1967); Louisiana (1974)	

Twenty-nine of these proposals were put before the voters for approval and nine were approved.¹³¹ While some of the proposals were put before the voters when the United States Supreme Court's

¹²⁹ Approved proposals appear in bold.

¹³⁰ This category includes proposals with language covering non-specific aid or types of aid not falling within other subject categories.

¹³¹ See *supra* Table 1.

Establishment Clause jurisprudence was evolving with regard to the subject of aid referred to in Table 2, others were proposed after the Court had declared the aid permissible under the Federal Constitution.¹³² For example, all of the proposals authorizing school transportation programs for students in non-public schools were on the ballot after the Supreme Court's 1947 determination that the practice was constitutionally permissible;¹³³ all of the proposals permitting textbook loan programs appeared after the Court's 1968 decision upholding the constitutionality of those programs;¹³⁴ and all of the proposals on tax credits for school expenses appeared after the high court's 1983 approval of them.¹³⁵ As a result, while these measures addressed policy questions, they also presented to the voters the clear question of whether the state's constitution should be more restrictive than the Federal Establishment Clause.

As reflected in Table 2, eighteen of these proposals addressed vouchers or other types of aid, textbooks and instructional materials, or student transportation.¹³⁶ These types of measures, what some might consider the core of religious school aid, received little support from voters. Indeed, only three were approved, even though most appeared on the ballot through legislative proposal.¹³⁷

Louisiana voters' adoption of its 1974 constitution represents the only successful effort to repeal a state no-aid clause. The state's previous constitution included a no-aid clause in the education article¹³⁸ that convention delegates unanimously proposed to remove after relatively little debate.¹³⁹ Delegates were content with the restrictions on aid to religious schools provided under the Federal Establishment Clause, and viewed the repeal of the no-aid clause as allowing the state greater flexibility with regard to religious school support.¹⁴⁰ Other efforts to repeal state no-aid clauses were not successful. One of the more contentious efforts

¹³² See *supra* Table 2.

¹³³ See, e.g., *Everson v. Bd. of Educ.*, 330 U.S. 1, 5–6 (1947) (holding that states which provide transportation to non-public schools does not violate due process).

¹³⁴ See, e.g., *Bd. of Educ. v. Allen*, 392 U.S. 236, 238 (1968) (allowing public authorities to lend textbooks for free to students in grades seven through twelve—including those attending private schools).

¹³⁵ See, e.g., *Mueller v. Allen*, 463 U.S. 388, 390 (1983) (confirming that states are permitted to give a tax credit for educational expenses).

¹³⁶ See *supra* Table 2.

¹³⁷ See *supra* Table 2.

¹³⁸ LA. CONST. of 1921, art. XII, § 13 (“No public funds shall be used for the support of any private or sectarian school.”).

¹³⁹ See Lee Hargrave, *The Declaration of Rights of the Louisiana Constitution of 1974*, 35 LA. L. REV. 1, 29 (1974).

¹⁴⁰ See *id.* at 29–30.

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occurred in New York in its convention leading to the proposal of a new constitution in 1967.¹⁴¹ The proposed repeal of New York's no-aid clause as part of the new constitution has been referred to as "[t]he most emotionally charged issue of the Convention."¹⁴² Proponents of retaining the no-aid clause argued that it was necessary to ensure church-state separation and prevent a diversion of funds from the public schools to religious schools.¹⁴³ The Convention ultimately approved its repeal, though the proposal prompted "three months of religious dissension throughout the state . . . [where] the battle was fierce and unseemly."¹⁴⁴ The proposed constitution, put before the voters as a single submission rather than separate submissions of the major changes with remaining items in an omnibus amendment, failed.¹⁴⁵ Although the repeal of the no-aid clause was a central issue in the debate at the Convention, other issues also contributed to the defeat of the proposed constitution at the polls.¹⁴⁶

The other two unsuccessful efforts to repeal no-aid clauses came in Oregon in 1972 and Florida in 2012. Oregon's legislatively proposed amendment would have repealed the no-aid clause and replaced it with an establishment clause following the Federal Constitutional language.¹⁴⁷ It was handily defeated.¹⁴⁸ The most

¹⁴¹ See LEAGUE OF WOMEN VOTERS OF N.Y. STATE, SEEDS OF FAILURE: A POLITICAL REVIEW OF NEW YORK STATE'S 1967 CONSTITUTIONAL CONVENTION 43 (1973) (discussing various conflicting viewpoints regarding the proposal to repeal the "so-called Blaine amendment").

¹⁴² *Id.* See also *A New Document or Just Revision?*, N.Y. TIMES, Apr. 3, 1967, at 29 ("The intensity of feeling over whether the school-aid limitation should be modified indicates that the question may be the most emotional issue facing the convention delegates.").

¹⁴³ *A New Document or Just Revision?*, *supra* note 142, at 29. It should be noted that the Convention took place shortly after the state enacted the 1965 textbook loan program that the New York Court of Appeals found constitutional before the vote on the new constitution. See *Bd. of Educ. v. Allen*, 392 U.S. 236, 238–41 (1968) (affirming the New York Court of Appeals's decision to uphold the 1965 amendment that allowed for textbooks to be loaned to students attending private schools).

¹⁴⁴ Lewis B. Kaden, *The People: No! Some Observations on the 1967 New York Constitutional Convention*, 5 HARV. J. LEGIS. 343, 359 (1968). Response to the proposal repealing the "Blaine amendment" was divisive among the public. See PETER J. GALIE, ORDERED LIBERTY: A CONSTITUTIONAL HISTORY OF NEW YORK 310–12 (1996).

¹⁴⁵ *Id.* at 325, 327.

¹⁴⁶ See *id.* at 325–27 (citing fiscal concerns, court reform, and overall partisanship as other primary reasons for the failed vote); see also LEAGUE OF WOMEN VOTERS OF N.Y. STATE, *supra* note 141, at 61 (claiming that several other issues likely played a more important role in voters' decisions).

¹⁴⁷ See STATE OF OR., VOTERS' PAMPHLET: GENERAL ELECTION, NOV. 7, 1972, at 20, available at <http://library.state.or.us/repository/2010/201003011350161/ORVPGenMari1972.pdf>. The Oregon proposal read:

Amends Oregon Constitution to provide as follows: "The Legislative Assembly shall make no law respecting an establishment of religion, or prohibiting the free exercise

recent attempt at repeal was in Florida in 2012, where voters were asked to approve an amendment repealing no-aid language and adding a sentence prohibiting discrimination based on religious belief in the administration of government programs.¹⁴⁹ The legislative proposal referenced the connection between the state's Blaine amendment language and anti-Catholic bigotry, noting that the amendment was necessary "to correct the aforementioned disconnect between the true sentiments and principles of Floridians and the discriminatory origins, intentions, and present application of the Blaine Amendment."¹⁵⁰ Opponents initially challenged the measure in court, claiming the title and ballot language proposed by the legislature was misleading.¹⁵¹ The court ruled that the language was confusing and removed it from the ballot, but upheld a law allowing for the language to be rewritten; the attorney general then revised the ballot language and it appeared on the general election ballot with eleven other proposals.¹⁵² The proposed amendment failed.

There were two proposals put to voters to revise state no-aid clauses in a way that made them less restrictive, although that does not appear to have been the original intention with both measures. Voters approved the 1972 South Carolina proposal as part of a series of recommendations to the legislature from a constitutional

thereof." Repeals existing constitution provision which reads: "No money shall be drawn from the Treasury for the benefit of any religious (sic) or theological institution, nor shall any money be appropriated for the payment of any religious (sic) services in either house of the Legislative Assembly."

Id.

¹⁴⁸ Or. Sec'y of State, *Oregon Blue Book: Initiative, Referendum and Recall: 1972-1978*, OR. BLUE BOOK, <http://bluebook.state.or.us/state/elections/elections19.htm> (last visited Jun. 14, 2013).

¹⁴⁹ CS/HJR 1471, 2011 Leg., Reg. Sess. (Fla. 2011), available at <http://www.flsenate.gov/Session/Bill/2011/1471> [hereinafter Fla. CS/HJR 1471]. The legislature proposed deleting the no-aid language (the third sentence) and adding the following language to the state's establishment clause: "Except to the extent required by the First Amendment to the United States Constitution, neither the government nor any agent of the government may deny to any individual or entity the benefits of any program, funding, or other support on the basis of religious identity or belief." PROPOSED AMENDMENTS ON NOV. 6, 2012, *supra* note 1.

¹⁵⁰ Fla. CS/HJR 1471, *supra* note 149. See Nathan A. Adams, IV, *Pedigree of an Unusual Blaine Amendment: Article I, Section 3 Interpreted and Implemented in Florida Education*, 30 NOVA L. REV. 1, 4 (2005), for a discussion of the history of the Florida constitutional language.

¹⁵¹ Aaron Deslatte, *Judge Tosses Religious-Funding Question from 2012 Ballot*, ORLANDO SENTINEL, Dec. 15, 2011, at A3.

¹⁵² See Letter from Pam Bondi, Att'y Gen. of Fla., Office of Att'y Gen., to Hon. Kurt S. Browning, Fla. Sec'y of State, Fla. Dep't of State (Dec. 20, 2011), available at http://election.dos.state.fl.us/initiatives/pdf/2012Amd_ReligiousFreedom_ATGLetter.pdf.

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study commission.¹⁵³ The then-existing no-aid clause in the state constitution prohibited both direct and indirect aid, and the commission proposed removing the restriction on indirect aid, thereby allowing the legislature “to aid students and perhaps contract with religious and private institutions for certain types of training and programs.”¹⁵⁴ While the measure was approved by voters and the legislature subsequently ratified it as required under the constitution, the ballot language did not provide that level of detail, asking only that voters approve language prohibiting direct aid without reference to the deletion of the constitutional restriction against indirect aid.¹⁵⁵

The Nebraska proposal also was not put forth as a significant change to the no-aid clause but eventually was interpreted to be. The rewrite of its clause was proposed after a constitutional revision commission recommended changing the existing no-aid language from prohibiting appropriation of public funds “in aid of any sectarian or denominational school”¹⁵⁶ to prohibiting appropriation of public funds “to any school or institution”¹⁵⁷ not owned or controlled by the state.¹⁵⁸ The ballot summary did not specifically reference this alteration,¹⁵⁹ and the Legislative Council’s report on

¹⁵³ Op. S.C. Att’y Gen., 1974 S.C. AG LEXIS 230 (Jan. 4, 1974) [hereinafter 1974 SC Attorney General Opinion].

¹⁵⁴ *Id.* (quoting COMM. FOR THE GEN. ASSEMBLY OF S.C., FINAL REPORT OF THE COMMITTEE TO MAKE A STUDY OF THE SOUTH CAROLINA CONSTITUTION OF 1895, at 101 (1969)).

¹⁵⁵ S.C. ELECTION COMM’N, REPORT OF THE SOUTH CAROLINA ELECTION COMMISSION FOR THE PERIOD ENDING JUNE 30, 1973, at 414–15 (1973), available at http://uselectionatlas.org/DOC/SC/Election_Report_1969-1973.pdf. The South Carolina ballot proposal read:

Shall Article XI of the Constitution of this State be amended so as to provide for a State Board of Education, State Superintendent of Education, free school system and other public institutions of learning, prohibit direct public financial aid to religious or other private educational institutions, to delete provisions relating to: election of school officers, payment to school officers and county treasurers from school funds, General Assembly defining enrollment, school trustees, poll tax, taxes levied by school districts, separate schools for races, specific higher education and other related references, gifts for education, gifts to State not designated, escheated property, and income from alcoholic beverages?

Id. (internal quotation marks omitted).

¹⁵⁶ See *Lenstrom v. Thone*, 311 N.W.2d 884, 887 (Neb. 1981) (quoting NEB. CONST., art. VII, § 11 (1958)).

¹⁵⁷ See *Lenstrom*, 311 N.W.2d at 887 (quoting NEB. CONST., art. VII, § 11 (1972)).

¹⁵⁸ See *Lenstrom*, 311 N.W.2d at 887 (detailing change to the constitution).

¹⁵⁹ See *Sample Ballot: General Election, November 7, 1972*, SUPERIOR EXPRESS (Neb.), Nov. 2, 1972, at 4B. The question posed on the ballot did not specify this change but only referred to the proposal as one to revise the no-aid clause to make it more clear:

[R]ecodify, revise, and clarify provisions of Article VII of the Constitution of Nebraska.

.....
A vote FOR this proposal will generally rearrange the provisions of the Article on

the ballot measure noted that the proposed revision was not intended to change the meaning of the no-aid clause.¹⁶⁰ However, nine years later, the state supreme court relied on that change to uphold the constitutionality of a program to provide financial assistance to students attending private colleges and universities in the state, finding that, notwithstanding the Legislative Council's interpretation, the deletion of the "in aid of" language made the clause less restrictive than it had been previously.¹⁶¹ The court subsequently used that interpretation to uphold other programs that would have been suspect under the earlier text.¹⁶²

Many of the no-aid clause amendment proposals were specifically directed toward particular programs and intended to be court-constraining, as their adoption would have overturned an existing state court decision striking down a program under a restrictive interpretation of the no-aid clause. Indeed, most of the successful measures were approvals of legislatively-proposed amendments after the state supreme court invalidated legislatively-enacted programs. For example, Delaware's proposal permitting school transportation was adopted by the legislature after the state supreme court advised the governor that the legislature's authorization of the transportation of private school pupils violated the no-aid clause.¹⁶³ Two of the Wisconsin proposals—the 1967 transportation amendment and the 1972 building use amendment—successfully overturned state supreme court decisions finding these programs unconstitutional.¹⁶⁴ The successful 1986 South Dakota amendment overturned a state supreme court decision finding that an existing textbook loan program violated the state's no-aid clause, even referencing the court's decision in the proposal's ballot language.¹⁶⁵ That decision was the second the state supreme court

Education into a more logical sequence and clarify the language thereof, will clarify the authority of the Legislature respecting the education in public institutions of persons other than those between the ages of five and twenty-one years, and will eliminate certain obsolete language.

A vote AGAINST this proposal will retain the present arrangement, language, and provisions of the Article on Education.

Id.

¹⁶⁰ See *Lenstrom*, 311 N.W.2d at 887.

¹⁶¹ *Id.*

¹⁶² Richard E. Shugrue, *Faithful to the Constitution: The Roadblock for Nebraska's Schools*, 79 NEB. L. REV. 884, 897 (2000) ("In a series of cases during the 1980s, the Nebraska Supreme Court turned some of its previous jurisprudence upside down.")

¹⁶³ See Bacon, *supra* note 13, at 8–9.

¹⁶⁴ See JACK STARK, THE WISCONSIN STATE CONSTITUTION: A REFERENCE GUIDE 71–72 (1997); see also Dinan, *supra* note 17, at 1003–04.

¹⁶⁵ The South Dakota Supreme Court found the textbook loan program unconstitutional.

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had rendered on textbook loans.¹⁶⁶ Louisiana's 1974 constitution removing the no-aid clause was approved after a decision striking down the use of tax funds to pay teachers in non-public schools for teaching secular subjects under the previous no-aid clause.¹⁶⁷ Similarly, South Carolina's successful 1972 amendment overruled an earlier decision finding a state college tuition assistance program unconstitutional because it benefitted religious higher education institutions indirectly.¹⁶⁸ Approved constitutional changes in both Louisiana and South Carolina extended beyond the programs struck down in the earlier court decisions, so those proposals also preempted future court decisions reviewing the constitutionality of state programs.

However, numerous efforts to overturn state court decisions by amendment of the no-aid clause were unsuccessful. For example, the 1972 Idaho proposal permitting the use of public funds to transport children to and from sectarian schools was proposed in response to a state high court decision handed down the previous year finding that the school transportation program enacted by the legislature, while constitutional under the First Amendment's Establishment Clause, violated the state constitution's no-aid clause.¹⁶⁹ Voters ultimately rejected it.¹⁷⁰ In addition, the California 1982 textbook loan amendment rejected by voters was proposed after the state court, in an action brought by the state teachers association and others, found the existing loan program violated the constitution's no-aid clause.¹⁷¹ The failed Oregon 1972

Elbe v. Yankton Indep. Sch. Dist., 372 N.W.2d 113, 118 (S.D. 1985). The ballot proposal read:

Allow the Legislature to authorize only the loaning of nonsectarian textbooks to all children in this state. . . . The South Dakota Supreme Court ruled [previously] that the existing constitutional prohibitions prevent the loaning of textbooks to all children not attending public school.

OFFICE OF SEC'Y OF STATE, OFFICIAL ELECTION RETURNS AND REGISTRATION FIGURES FOR SOUTH DAKOTA: GENERAL ELECTION 16 (1986), *available at* <http://sdsos.gov/content/html/elections/electvoterpdfs/72-86/86SDGEN.pdf>.

¹⁶⁶ A 1976 decision voided a similar textbook loan program. *McDonald v. Sch. Bd. of Yankton Indep. Sch. Dist. No. 1*, 246 N.W.2d 93, 99 (S.D. 1976). However, the state legislature reenacted the program with modifications. *Elbe*, 372 N.W.2d at 117. That second program was found unconstitutional. *Id.* at 118.

¹⁶⁷ *See Seegers v. Parker*, 241 So. 2d 213, 216 (La. 1970) (noting that the use of public funds to pay for secular instruction in religious schools violated the state's no-aid clause).

¹⁶⁸ *Hartness v. Patterson*, 179 S.E.2d 907, 909 (S.C. 1971) (expressing that tuition grants to students attending religious colleges and universities violated the state's no-aid clause).

¹⁶⁹ *Epeldi v. Engelking*, 488 P.2d 860, 867-68 (Idaho 1971).

¹⁷⁰ *See IDAHO CONST. art. IX, § 5* (demonstrating that the original no-aid provision considered by the court was never repealed and there remains no transportation exception in the Idaho Constitution).

¹⁷¹ *Cal. Teachers Ass'n v. Riles*, 632 P.2d 953, 964 (Cal. 1981) (holding that textbook loans

proposal to adopt establishment clause language and repeal the no-aid clause likely would have overruled an earlier decision finding a textbook loan program unconstitutional under the state's no-aid clause.¹⁷² The Massachusetts 1982 and 1986 proposals would have overturned previous court decisions applying the state's no-aid clause to textbook loan programs,¹⁷³ but the proposals also extended beyond the scope of previous decisions. The 2000 Michigan,¹⁷⁴ 1975 Washington,¹⁷⁵ and 1976 Missouri¹⁷⁶ proposals also would have overturned previous decisions as well as extended beyond their scope. Although not directed at a state court decision, the Alaska aid amendment rejected by the state's voters was proposed after an attorney general opinion declaring the existing loan program unconstitutional. The challenged program involved higher education loans, but the proposed amendment language was broader.¹⁷⁷

Fewer efforts to amend the state's no-aid clause have been preemptive court constraining amendments—designed to prevent the court from interpreting the state constitution in a certain way given the uncertainty about the constitutionality of a program.¹⁷⁸ For example, the proposals in Colorado (1992) and California (1993, 2000) were designed to require or authorize the legislature to institute voucher programs,¹⁷⁹ thereby seeking to prevent the courts

to non-public school students violated the state constitution's prohibition against the appropriation of money for the support of sectarian schools).

¹⁷² *Dickman v. Sch. Dist. No. 62C*, 366 P.2d 533, 544–45 (Or. 1961) (recognizing that textbook loan programs violate the state constitution, and although the proposal in question was not directed to textbook loan programs, it mirrored Establishment Clause language interpreted by the U.S. Supreme Court to permit such programs).

¹⁷³ *E.g.*, *Bloom v. Sch. Comm. of Springfield*, 379 N.E.2d 578, 585–86 (Mass. 1978) (deciding that programs loaning textbooks to private school students violated the state's constitution).

¹⁷⁴ *See In re Advisory Opinion re Constitutionality of 1974 PA 242*, 228 N.W.2d 772, 775 (Mich. 1975) (acknowledging that textbook and school supply programs to private schools violated the state's no-aid clause).

¹⁷⁵ *See Weiss v. Bruno*, 509 P.2d 973, 986 (Wash. 1973) (en banc), *overruled in part by State ex rel. Gallwey v. Grimm*, 48 P.3d 274, 284, 288 (Wash. 2002) (en banc) (finding that tuition assistance programs for "schools having a substantial religious purpose" violated the state's no-aid clause); *Mitchell v. Consol. Sch. Dist. No. 201*, 135 P.2d 79, 82 (Wash. 1943) (holding that transportation programs violated the state's no-aid clause).

¹⁷⁶ *See Paster v. Tussey*, 512 S.W.2d 97, 104 (Mo. 1974) (en banc) (deciding that textbook loan programs violated the state's no-aid clause); *McVey v. Hawkins*, 258 S.W.2d 927, 933–34 (Mo. 1953) (recognizing that transportation of parochial students violated the education fund clause).

¹⁷⁷ *See Sheldon Jackson Coll. v. State*, 599 P.2d 127, 128 n.2 (Alaska 1979) (discussing the language of the proposed amendment, in addition to the explanation of it that appeared on the ballot).

¹⁷⁸ *See Dinan*, *supra* note 17, at 986.

¹⁷⁹ *See Brad J. Davidson*, Comment, *Balancing Parental Choice, State Interest, and the*

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from interpreting the state's no-aid clause to strike down such a program once enacted.

Florida's 2012 proposal repealing the no-aid clause was designed to preempt decisions by the state supreme court in two areas.¹⁸⁰ In 2004, the Florida District Court of Appeals relied on the no-aid clause to strike down a publicly funded voucher program that allowed students to attend non-public schools,¹⁸¹ but the state supreme court affirmed the decision on other grounds.¹⁸² More recently, the Florida no-aid clause has been used to challenge the use of public money to support faith-based organizations providing social services, but that litigation had not yet been resolved at the time of the proposal.¹⁸³

Looking at the sources of proposals, citizen initiatives limiting state no-aid clauses fared particularly poorly. Only one initiative was approved of the nine put before the voters—the 1970 amendment proposal in Michigan.¹⁸⁴ That proposal also is unique among the thirty in that it was the sole proposal to *strengthen* the state's no-aid clause (all of the other measures proposed since 1965 were designed to repeal or limit the scope of the state's no-aid clause).¹⁸⁵ Voters approved the initiative after the legislature

Establishment Clause: Constitutional Guidelines for States' School-Choice Legislation, 33 TEX. TECH L. REV. 435, 439–40 (2002); Jason T. Vail, Comment, *School Vouchers and the Establishment Clause: Is the First Amendment a Barrier to Improving Education for Low-Income Children?*, 35 GONZ. L. REV. 187, 203 (2000).

¹⁸⁰ *2012 Florida Amendments: Amendment 8*, COLLINS CTR. PUB. POL'Y (2012), <http://collinscenter.org/2012flamendments/files/2012/09/Collins-Center-Amendment-8.pdf>.

¹⁸¹ See *Bush v. Holmes*, 886 So. 2d 340, 366 (Fla. Dist. Ct. App. 2004), *aff'd*, 919 So. 2d 392 (Fla. 2006).

¹⁸² See *Bush v. Holmes*, 919 So. 2d 392, 398 (Fla. 2006), *aff'g* 886 So. 2d 340 (Fla. Dist. Ct. App. 2004).

¹⁸³ See *Council for Secular Humanism, Inc. v. McNeil*, 44 So. 3d 112, 115, 126 (Fla. Dist. Ct. App. 2010).

¹⁸⁴ See MICH. CONST. art. VIII, § 2.

¹⁸⁵ Voters were asked to approve a new section to the education article (Article 8) of the state constitution:

No public monies or property shall be appropriated or paid or any public credit utilized, by the legislature or any other political subdivision or agency of the state directly or indirectly to aid or maintain any private, denominational or other nonpublic, preelementary, elementary, or secondary school. No payment, credit, tax benefit, exemption or deductions, tuition voucher, subsidy, grant or loan of public monies or property shall be provided, directly or indirectly, to support the attendance of any student or the employment of any person at any such nonpublic school or at any location or institution where instruction is offered in whole or in part to such nonpublic school students. The legislature may provide for the transportation of students to and from any school.

Id. It should be noted that including a sentence allowing for the transportation of students was not a loosening of restrictions, as the legislature had provided for the transportation of private and parochial students for many years prior to the approval of this amendment. See

enacted a law permitting public funds to be used to pay a portion of the salary of teachers involved in secular instruction in religious schools, and the state supreme court upheld the program as constitutional under the state's then-existing no-aid clause.¹⁸⁶ The proposal overturned that decision and further defined the types of aid prohibited. Described by a critic as containing "the most restrictive language in the country in terms of public aid to non-public schools,"¹⁸⁷ the 1970 amendment survived two initiative attempts to modify it. The first was in 1978 when a school voucher proposal was included as part of a proposal to prohibit the use of property taxes for school operating expenses,¹⁸⁸ and the second was in 2000 when Michigan voters were asked to approve an initiative permitting indirect support for nonpublic school students through vouchers and a variety of other programs.¹⁸⁹

William J. McKenna, *The Transportation of Private and Parochial School Children at Public Expense*, 35 TEMP. L. Q. 259, 260 n.7 (1962). For a discussion of the legal issues involved in the 1970 proposal process, see Leon S. Cohan, *Constitutional Law*, 18 WAYNE L. REV. 245, 245, 254–56 (1972).

¹⁸⁶ See *In re* Legislature's Request for an Opinion on the Constitutionality of 1970 PA 100, 180 N.W.2d 265, 273–74 (Mich. 1970).

¹⁸⁷ Richard D. McLellan, *The Michigan Voucher Proposal Would Pass a Constitutional Challenge*, 2001 L. REV. MICH. ST. U. DETROIT C.L. 145, 145, 146–47 (providing an argument for repeal and replacement of the 1970 amendment to permit a voucher program).

¹⁸⁸ The 1978 ballot proposal read:

The proposed amendment would:

1. Prohibit the use of property taxes for school operating expenses.
2. Require the legislature to establish a program of general state taxation for support of schools.
3. Require the legislature to provide for the issuance of an educational voucher to be applied toward financing a student's education at a public or nonpublic school of the student's parent's or guardian's choice.

Proposal H: Proposal to Prohibit the Use of Property Taxes for School Operating Expenses and to Establish a Voucher System for Financing Education of Students at Public and Nonpublic Schools, reprinted in Library of Michigan, State Ballot Proposals: 1978 General Election (photo. reprint 1978), available at <http://cdm16110.contentdm.oclc.org/cdm/ref/collection/p16110coll2/id/104524> [hereinafter *Proposal H*].

¹⁸⁹ The 2000 ballot proposal read:

The proposed constitutional amendment would:

- 1.) Eliminate ban on indirect support of students attending nonpublic schools through tuition vouchers, credits, tax benefits, exemptions or deductions, subsidies, grants or loans of public monies or property.
- 2.) Allow students to use tuition vouchers to attend nonpublic schools in districts with a graduation rate under 2/3 in 1998–1999 and districts approving tuition vouchers through school board action or a public vote. Each voucher would be limited to ½ of state average per pupil public school revenue.
- 3.) Require teacher testing on academic subjects in public schools and in nonpublic schools redeeming tuition vouchers.
- 4.) Adjust minimum per-pupil funding from 1994–1995 to 2000–2001 level.

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Even though citizen initiatives fared poorly, attempts to amend no-aid clauses have increasingly become initiative driven. In the past twenty-five years, there have been only two legislatively proposed measures on the ballot but six initiatives. The increased use of initiative here mirrors its increased use overall as a tool of state constitutional change and also likely reflects the difficulty faced by supporters of change to convince legislative bodies to propose amendments in the political environment surrounding aid programs like school vouchers. With legislatures unwilling to put these constitutional measures before voters, the initiative, where available, becomes the primary alternative for formal change. But proponents have had no success using it as a weapon against no-aid clauses.

What may explain these less than impressive results across all proposals? In general, scholars have attributed the high approval rate for legislative proposals for constitutional change to the fact that most deal with problems identified in of governing and are not generated not as a result of public clamoring for change. Thus, they infrequently face organized opposition.¹⁹⁰ Initiatives, like many of those here, often address more controversial issues and increase voter skepticism. This may be caused by active campaigns run against initiative approval or a distrust of groups seeking to gain something through the proposal.¹⁹¹

When voting on a candidate for office in a partisan election, the voter is able to rely on cues to simplify the decision, such as party affiliation and candidate evaluation. Both can serve as informational shortcuts to simplify the decision-making process. However, in ballot measures, that information is lacking, so voters need greater knowledge.¹⁹² The information vacuum may be filled by the media, messages from elites, as well as information from the

to Students Attending Nonpublic Pre-Elementary, Elementary and Secondary Schools; Allow the Use of Tuition Vouchers in Certain School Districts; and Require Enactment of Teacher Testing Laws, reprinted in Library of Michigan, State Ballot Proposals: 2000 General Election (photo. reprint 2000), available at <http://cdm16110.contentdm.oclc.org/cdm/ref/collection/p16110coll2/id/104535> [hereinafter Proposal 00-1].

¹⁹⁰ See TARR, *supra* note 61, at 142 (citation omitted) (“Even in politically competitive states, proposed amendments have often enjoyed bipartisan support.”).

¹⁹¹ See Magleby, *supra* note 75, at 36.

¹⁹² Numerous studies have addressed the lack of voter knowledge in initiative and referendum campaigns. See, e.g., SHAUN BOWLER & TODD DONOVAN, DEMANDING CHOICES: OPINION, VOTING, AND DIRECT DEMOCRACY 41–42 (1998) (rejecting that most voters are well informed of the policies being voted on); MAGLEBY, *supra* note 103, at 127.

campaign waged over the proposition.¹⁹³ Proposals addressing aid to religious schools oftentimes attract significant attention from large and well-funded interests in the state, such as state education associations, that have the resources to wage active “vote no” campaigns.¹⁹⁴ For example, in the campaign to defeat California’s Proposition 174, the 1993 voucher initiative, the state teachers association was the largest contributor to the \$24 million campaign waged against the measure.¹⁹⁵ In the 2000 California initiative, the Teachers Association contributed approximately \$26 million to support the campaign for its defeat.¹⁹⁶ In the 2000 Michigan voucher proposal, the Michigan Education Association supported the All Kids First! campaign opposing the initiative with donations close to \$5 million.¹⁹⁷ In the 2012 campaign in Florida to repeal the no-aid clause, the Public Education Defense Fund—affiliated with the Florida Education Association—contributed approximately \$1 million to the campaign to defeat Proposition 8.¹⁹⁸ The opposition of state education groups extended beyond measures for vouchers or where vouchers were raised as an issue. For example, the South Dakota Education Association, School Administrators of South Dakota, and the South Dakota PTA actively opposed the 2004 South Dakota ballot proposal involving food and transportation services for nonpublic school children.¹⁹⁹

These organized and well-funded opposition campaigns can have an impact. Research has shown that the level of campaign spending against ballot measures affects the outcome.²⁰⁰ Specifically, increased opposition spending generally leads to more negative

¹⁹³ See BOWLER & DONOVAN, *supra* note 192, at 56.

¹⁹⁴ *But see id.* at 156, 160 (discussing the California Teachers’ Association in support of a *yes* vote on a school spending measure—noticeably outweighing the *no* vote).

¹⁹⁵ See *Introduction to California’s Ballot Measures: Proposition 38—School Vouchers*, CAL. VOTER FOUND., <http://calvoter.org/voter/elections/archive/2000/general/propositions/analysis.html#38> (last updated Nov. 1, 2000).

¹⁹⁶ See *Top Ten Contributors to California Propositions: Proposition 38—School Vouchers*, CAL. VOTER FOUND., <http://www.calvoter.org/voter/elections/archive/2000/general/propositions/topten.html> (last updated May 2, 2001).

¹⁹⁷ Mark Hornbeck, *Voucher Campaign is Costliest*, DETROIT NEWS, Nov. 1, 2000, at 1C.

¹⁹⁸ Jon East, *Amendment 8 Scoreboard: Teachers Union \$1 Million, Catholics \$158,000*, REDEFINED (Sep. 21, 2012), <http://www.redefinedonline.org/2012/09/amendment-8-scoreboard-teachers-union-1-million-catholics-158000>.

¹⁹⁹ Advertisement: *Vote No on Amendment B*, S.D. EDUC. ASS’N, *originally published in* WILMOT ENTERPRISE (S.D.), Oct. 14, 2004, at 16, *available at* <http://wil.stparchive.com/Archive/WIL/WIL10142004P16.php>.

²⁰⁰ Thomas Stratmann, *The Effectiveness of Money in Ballot Measure Campaigns*, 78 S. CAL. L. REV. 1041, 1043–44 (2005).

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voting.²⁰¹ Opponents are able to use these resources to define the issues favorable to their position and create doubt and uncertainty about some aspect of the proposal. If they are able to do so, voters will tend to become risk averse and favor the status quo over a new policy.²⁰² The same relationship on spending and outcome is not necessarily true for proponents of a measure; in fact, some scholars have found that an increase in spending on both sides of a measure may increase opposition, because voters will become more aware of the various special interests that are behind the proposal.²⁰³

The ability of opponents to create doubt and uncertainty is easier to do in a ballot measure campaign than one with candidates, because the wording on a ballot proposal is fixed, so it allows the opponent to shoot “at a target that cannot move or take cover.”²⁰⁴ For example, opponents can center a campaign on the impact of vague or ambiguous language in the proposal, design a campaign around some aspect of the proposal that voters may latch onto in a low information race, or develop campaigns around what they believe to be likely impacts of the proposal. In the 2004 South Dakota transportation and food initiative, opponents asserted the measure did not limit the amount of money that might be taken out of the public school system, would reduce local control over schools, increase unfunded mandates and could result in costly litigation against local school districts filed by parents of nonpublic schools seeking these services.²⁰⁵ In the 2000 campaign for the California \$4000 voucher proposal, financed in large part by a Silicon Valley venture capitalist,²⁰⁶ some pro-voucher groups failed to back the measure because it did not target troubled schools or low income children.²⁰⁷ Additionally, opponents claimed the proposal would cost the state billions of dollars and create voucher schools with no standards for students, no credentials for teachers, and no

²⁰¹ MAGLEBY, *supra* note 103 at 147; Magleby, *supra* note 75, at 39–40.

²⁰² See BOWLER & DONOVAN, *supra* note 192, at 68, 153.

²⁰³ See *id.* at 153.

²⁰⁴ Todd Donovan et al., *Contending Players and Strategies: Opposition Advantages in Initiative Elections*, in CITIZENS AS LEGISLATORS: DIRECT DEMOCRACY IN THE UNITED STATES 99 (Shaun Bowler et al. eds. 1998).

²⁰⁵ See Donna DeKraai, S.D. Educ. Ass’n, *2004 Ballot Question Pamphlet*, S.D. SECRETARY OF ST., http://sdsos.gov/content/viewcontent.aspx?cat=elections&pg=elections/pastelections_electioninfo04_prosconsAGexplanations.shtm (last visited Jun. 14, 2013).

²⁰⁶ Bill Whalen, *Prop 23 Gets Draper-ized*, WHALEN: POLITI-CAL (July 29, 2010), <http://whalen.wordpress.com/2010/07/29/prop-23-gets-draper-ized>.

²⁰⁷ Tim Draper’s Voucher Crusade, BUSINESSWEEK (Nov. 5, 2000), <http://www.businessweek.com/stories/2000-11-05/tim-drapers-voucher-crusade>.

accountability to taxpayers.²⁰⁸ With money, opponents could mount an opposition campaign around messages like these to raise doubt and uncertainty among the electorate.

The most recent campaign in Florida involved opponents asserting that repealing no-aid language and including non-discrimination language was not a proposal for “religious freedom” as it was entitled but was the first step toward another state voucher program. Proponents of the measure claimed that it was designed to protect religious freedom and end religious discrimination against religious groups administering social service programs.²⁰⁹ Opponents countered that, regardless what supporters claimed, the amendment was intended to allow the government to provide tax dollars to any group claiming to be a religious organization.²¹⁰ Indeed, one of the opponents’ slogans was, “This November, don’t be fooled.”²¹¹ Many newspapers followed suit, opposing the measure by claiming the proposal, although not mentioning vouchers, was intended to create a voucher system to provide public funds to religious schools.²¹² Like other opposition campaigns, it was designed to tap into voters’ preferences for the status quo over uncertainty. It succeeded in defeating the measure.

IV. CONCLUSION

Ridding state constitutions of no-aid clauses through formal constitutional change mechanisms has not fared well over recent decades. There has been only one successful repeal of a no-aid clause. Most constitutional measures involving state no-aid clauses have focused on amending the state constitution to authorize programs struck down by the state supreme court or that proponents believed might be struck down if enacted. Most of these proposals were not approved by voters, and the ones that were approved usually sought to overturn a court decision invalidating a

²⁰⁸ See Louise Cooper, *School Vouchers Scam Goes Down*, SOLIDARITY, <http://www.solidarity-us.org/site/node/1531> (last visited Jun. 14, 2013).

²⁰⁹ *Yes on 8 for Religious Freedom & Non-Discrimination Fact Sheet*, FLA. CONF. OF CATHOLIC BISHOPS, <http://www.flaccb.org/resources/archives.php> (last visited Mar. 16, 2013).

²¹⁰ *Amendment 8 Our Opinion: Vote No on this Blatant Attempt to Fund Religious Schools*, MIAMI HERALD (Oct. 4, 2012) [hereinafter *Amendment 8 Our Opinion*], <http://www.miamiherald.com/2012/10/04/3034879/amendment-8-our-opinion-vote-no.html>.

²¹¹ *Vote No On Amendment 8*, STOP TALLAHASSEE POLITICIANS (2012), <http://stoptallypoliticians.com/amd8>.

²¹² *E.g., Amendment 8 Our Opinion*, *supra* note 210 (“The proposal is not about religious freedom at all, but rather a blatant attempt to use public money to finance private religious institutions.”).

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legislative program. Overall, the success rate of legislative proposals amending no-aid clauses—just over one-third were approved by voters—is significantly lower than that of legislatively proposed constitutional amendments across all subjects.

The success rate of amendments to no-aid clauses put on the ballot through the initiative process was even lower. Voters faced eight initiatives since 1965 lessening the restrictions of no-aid clauses as applied to religious schools, and none were approved.²¹³ The only approved initiative, in Michigan, strengthened the state's no-aid clause. While most constitutional initiatives generally face an uphill battle for approval, it is even more difficult when going up against a well-funded and well-organized opposition, as was the case in most of the proposals to make the no-aid clause less restrictive.

Indeed, whether the amendment of no-aid clauses is proposed through initiative or by the legislature, the ability of these opposition groups to use their resources to raise doubt and uncertainty among the electorate will create difficult hurdles for opponents of no-aid clauses to overcome in future campaigns for formal constitutional change. Voters overwhelmingly rejected proposals involving the fundamental types of public support of religious schools that are likely to generate the most opposition—vouchers or other aid, textbooks and instructional materials, and student transportation. Until opposition campaigns become less well-funded or less organized, something that does not appear likely in the near future, the critics of no-aid clauses may be better served focusing their efforts on less formal methods of state constitutional change.

²¹³ See *supra* Table 1.



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APPENDIX A
Religion Clauses in State Constitutions²¹⁴

State	Federal Model	No Preference Clause	Compelled Support Clause	No-Aid Clause(s)
AL	Art. I, sec. 3	Art. I, sec. 3	Art. I, sec. 3	Art. XIV, sec. 263
AK	Art. I, sec. 4			Art. VII, sec. 1
AZ				Art. II, sec. 12, Art. IX, sec. 10
AR		Art. II, sec. 24	Art. II, sec 24	
CA	Art. I, sec 4	Art. I, sec. 4		Art. IX, sec. 8, Art. XVI, sec. 5
CO		Art. II, sec. 4	Art. II, sec. 4	Art. IX, sec. 7, Art. V, sec. 34
CT		Art. VII	Art. VII	
DE		Art. I, sec. 1	Art. I, sec. 1	Art. X, sec. 3
FL	Art. I, sec. 3			Art. 1, sec. 3
GA				Art. I, sec. 2, par. 7
HI	Art. I, sec. 4			Art. X, sec. 1
ID		Art. 1, sec. 4	Art. I, sec 4	Art. IX, sec. 5
IL		Art. I, sec. 3	Art. I, sec. 3	Art. X, sec. 3
IN		Art. I, sec. 4	Art. I, sec . 4	Art. 1, sec. 6
IA	Art. I, sec. 3		Art. I, sec. 3	
KS		Sec. 7 in Bill of Rts.	Sec. 7 in Dec. of Rts.	Art. 6, sec. 6(c)
KY		Sec. 5 in Bill of Rts.	Sec. 5 in Dec. of Rts.	Art. 189
LA	Art. I, sec. 8			
ME		Art. I, sec. 3		
MD	Art. 36		Art. 36 in Dec. of Rts.	
MA		Amend. Art. XI		Amend. Art. CIII, sec. 2
MI			Art. I, sec. 4	Art. I, sec. 4 Art. VII, sec. 2
MN		Art. I, sec. 16	Art. I, sec. 16	Art. I, sec. 16, Art. XIII, sec. 2
MS		Art. III, sec. 18		Art. VIII, sec. 208
MO		Art. I, sec. 7	Art. I, sec. 6	Art. I, sec. 7, Art. IX, sec. 8
MT	Art. II, sec. 5			Art. X, sec. 6 (1)

²¹⁴ Appendix A was compiled based on a review state constitutions by the author and Jennifer Friesen and a review STATE CONSTITUTIONAL LAW: LITIGATING INDIVIDUAL RIGHTS, CLAIMS AND DEFENSES, App. 4A2-8 (1992)

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State	Federal Model	No Preference Clause	Compelled Support Clause	No-Aid Clause(s)
NE		Art. I, sec. 4	Art. I, sec. 4	Art. VII, sec. 11
NV		Art. I, sec. 4		Art. 11, sec. 10
NH		Art. 6, Part First	Art. 6, Part First	Art. 83, Part Second
NJ		Art. I, sec. 4	Art. I, sec. 3	
NM		Art. II, sec. 11	Art. II, sec. 11	Art. XII, Sec. 3
NY		Art. I, sec. 3		Art. XI, Sec. 3
NC				
ND		Art. I, sec. 3		Art. VIII, Sec. 5
OH		Art. I, sec. 7	Art. I, sec. 7	Art. 6, Sec. 2
OK				Art. II, Sec. 5
OR				Art. I, sec. 5
PA		Art. I, sec. 3	Art. I, sec. 3	Art. 3, Sec. 15
RI			Art. I, sec. 3	
SC	Art. I, sec. 2			Art. XI, sec. 4
SD		Art. VI, sec. 3	Art. VI, sec. 3	Art. VI, sec. 3, Art. VIII, sec. 16
TN		Art. I, sec. 3	Art. I, sec. 3	
TX		Art. I, sec. 6	Art. I, sec. 6	Art. I, sec. 7, Art. VII, sec. 5
UT	Art. I, sec. 4			Art. I, sec. 4, Art. X, sec. 9
VT			Ch. 1, art.3	
VA		Art. I, sec. 16	Art. I, sec. 16	Art. IV, sec. 16
WA				Art. I, sec. 11
WV		Art. III, sec. 15	Art. III, sec. 15	
WI		Art. I, sec. 18	Art. I, sec. 18	Art. I, sec. 18
WY		Art. I, sec. 18		Art. 1, sec. 19, Art. 3, sec. 36

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APPENDIX B
Proposed Amendments to No-Aid Clauses Affecting
State Support of Religious Schools
1965-2012

State	Year	Measure ²¹⁵	Ballot Summary/Question
AK	1976	Proposition No. 4 (L)	This is a proposal to amend Article VII, Section 1 of the Constitution of the State of Alaska to allow public funds to be used to provide direct aid such as scholarships and tuition equalization grants to students attending private educational institutions. The Attorney General of the State of Alaska has interpreted Article VII, Section 1 of the Constitution, as it now reads, to prohibit the State from giving tuition equalization grants to students attending private colleges or universities in the State.
CA	1982	Proposition 9 (L)	Authorizes Legislature to provide that textbooks available to pupils attending public schools may be loaned on library-type basis to pupils entitled to attend public schools but who attend nonpublic schools which do not exclude pupils from enrollment because of race or color. Specifies that authorizing a textbook loan program shall not be construed as authorizing provision of instructional materials other than textbooks; that appropriations for the textbook loan program shall not be made from funds budgeted for support of public schools; and that so providing textbooks is not an appropriation for school support.

²¹⁵ The letter in parenthesis after the measure designates whether it was proposed by the legislature (L), through initiative (I), or by a constitutional convention (C).

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CA	1993	Proposition 174 (I)	Amends California Constitution to enable parents to choose a child's school by requiring State to provide a voucher for every school-age child equal to at least 50 percent of prior fiscal year per pupil spending for K-12 public schools. Requires Legislature to establish procedures whereby public schools may become independent voucher-redeeming schools. Vouchers may be redeemed by such schools and by qualifying private schools. Authorizes required academic testing. Limits new regulation of private and voucher-redeeming schools. Voucher expenditures and specified savings count toward education's existing constitutional minimum funding guarantee.
CA	2000	Proposition 38 (I)	Authorizes annual state payments of at least \$4000 per pupil for private and religious schools phased in over four years. Restricts state and local authority to require private schools to meet standards, including state academic requirements. Limits future health, safety, zoning, building restrictions on private schools. Requires release of composite test scores of voucher pupils. Permits Legislature to replace current voter-enacted constitutional funding priority for public schools (Proposition 98) with minimum formula based on national per-pupil average, as defined by terms of this measure.
CO	1992	Amendment 7 (I)	Shall there be an amendment to the Colorado Constitution requiring that all state moneys appropriated for the general support of kindergarten, elementary, and secondary education be apportioned among Colorado students in the form of vouchers; authorizing the General Assembly to similarly apportion local taxes raised for educational purposes and funds appropriated for existing categorical services; providing that the object of such apportionments is to afford choice of educational resources available in Colorado, including government (public), non-government, and home schools; and providing that, with respect to any share of school cost charged to the local property base, a student for whom a voucher is used for educational services shall be counted for attendance purposes only to the extent that said services are provided by the school district of the child's residence?

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CO	1998	Amendment 17 (I)	An amendment to the constitution of the state of Colorado concerning the establishment of an income tax credit for parents or legal guardians of children enrolled in public, non-public schools and non-public home-based educational programs, and, in connection therewith, requiring the General Assembly to establish an income tax credit for income tax years beginning in 1999; specifying the methods for determining the amount of such credit; establishing priorities for eligibility for such credit; establishing an educational opportunity fund to be used to offset the entire costs of such credit; prohibiting reductions in current per-student public school expenditures as a result of the measure or as a result of the transfer of students to non-public schools; prohibiting the state or any political subdivision thereof from using this section to increase their regulatory role over the education of children in non-public schools beyond that exercised and existent on January 1, 1998; and eliminating eligibility for the income tax credit of parents or legal guardians who send children to certain non-public schools, including those that illegally discriminate on the basis of race, ethnicity, color or national origin or teach hatred.
FL	2012	Amendment 8 (L)	Religious Freedom. Proposing an amendment to the State Constitution providing that no individual or entity may be denied, on the basis of religious identity or belief, governmental benefits, funding or other support, except as required by the First Amendment to the United States Constitution, and deleting the prohibition against using revenues from the public treasury directly or indirectly in aid of any church, sect, or religious denomination or in aid of any sectarian institution.
ID	1972	Amendment 4 (L)	Shall Section 5, Article IX, of the Constitution of the state of Idaho, relating to sectarian appropriations, be amended to provide that appropriations may be made to support school transportation programs?
LA	1974	Proposed 1974 Constitution (C)	Do you FAVOR or OPPOSE the adoption of the proposed 1974 Constitution?

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MA	1982	Question 1 (L)	<p>The proposed constitutional amendment would remove the present constitutional prohibition against the use of public funds to aid or maintain private primary or secondary schools. It would permit the Commonwealth, cities and towns to make public funds available to pupils attending private primary and secondary schools in the form of either aid, materials or services subject, however, to three specific limitations. First, the private school could not be one that discriminates on the basis of race or color in its admission requirements. Second, the grant of aid must be consistent with the First Amendment to the United States Constitution which guarantees the free exercise of religion and prohibits the establishment of religion. Third, individual pupils would have to request the aid, materials or services. In addition to these three specific limitations, the amendment would authorize the legislature to enact other laws imposing conditions or restrictions on the grant of public aid, materials or services. The proposal would also change the state Constitution to allow public money to be spent to aid infirmaries, hospitals, charitable or religious undertakings if they are either publicly owned or under the control of public officials. The state Constitution now prohibits such spending unless these institutions are both publicly owned and under the control of public officials.</p>
MA	1986	Question 2 (L)	<p>The proposed constitutional amendment would allow the expenditure of public funds for private schools and private school students. It would remove primary and secondary schools from the list of non-public institutions barred from receiving public aid and would allow public money, property, or loans of credit to be used for founding, maintaining, or aiding those schools. The proposed amendment would also allow public financial aid, materials or services to be provided to a non-public school student requesting such aid, but only if that school does not discriminate in its entrance requirements on the basis of race, color, national origin, religious belief, sex, or physical handicap. The state legislature would have the power to impose limits on aid, materials, or services provided to students.</p>

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MI	1970	Proposition C (I)	Proposed Amendment. Article 8, Section 2: 'No public monies or property shall be appropriated or paid or any public credit utilized, by the legislature or any other political subdivision or agency of the state directly or indirectly to aid or maintain any private, denominational or other nonpublic, pre-elementary, elementary, or secondary school. No payment, credit, tax benefit, exemption or deductions, tuition voucher, subsidy, grant or loan of public monies or property shall be provided, directly or indirectly, to support the attendance of any student or the employment of any person at any such nonpublic school or at any location or institution where instruction is offered in whole or in part to such nonpublic school students. The legislature may provide for the transportation of students to and from any school.'
MI	1978	Proposal H (I)	The proposed amendment would 1) prohibit the use of property taxes for school operating expenses; 2) require the legislature to establish a program of general state taxation for support of schools; 3) require the legislature to provide for the issuance of an educational voucher to be applied toward financing a student's education at a public or nonpublic school of the student's parent's or guardian's choice.
MI	2000	Proposal 1 (I)	The proposed constitutional amendment would: 1) Eliminate ban on indirect support of students attending nonpublic schools through tuition vouchers, credits, tax benefits, exemptions or deductions, subsidies, grants or loans of public monies or property. 2) Allow students to use tuition vouchers to attend nonpublic schools in districts with a graduation rate under 2/3 in 1998-1999 and districts approving tuition vouchers through school board action or a public vote. Each voucher would be limited to 1/2 of state average per-pupil public school revenue. 3) Require teacher testing on academic subjects in public schools and in nonpublic schools redeeming tuition vouchers. 4) Adjust minimum per-pupil funding from 1994-1995 to 2000-2001 level.
MO	1976	Constitutional Amendment No. 10 (I)	Authorizes enactment of laws providing 1) services for the handicapped; 2) nonreligious textbooks; 3) transportation for all public and nonpublic elementary and secondary school children.

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NE	1966	Amendment No. 6 (L)	Constitutional amendment authorizing transportation services for children attending any elementary or secondary school.
NE	1970	Amendment No. 12 (L)	Constitutional amendment to permit the Legislature to make grants for the benefit of students enrolled in nonpublic schools as reimbursement for the part of their tuition that is allocable to instruction in state-approved courses, which reimbursement shall not exceed one-third of the per student cost in the public school district which the student resides nor shall any plan of reimbursement breach the separation of church and state required by the First Amendment to the Constitution of the United States.
NE	1972	Amendment No. 10 (L)	Recodify, revise and clarify provisions of Article VII of the Constitution of Nebraska. A vote FOR this proposal will generally rearrange the provisions of the Article on Education into a more logical sequence and clarify the language thereof, will clarify the authority of the Legislature respecting the education in public institutions of persons other than those between the ages of five and twenty-one years, and will limit certain obsolete language. A vote AGAINST this proposal will retain the present arrangement, language, and provisions of the Article on Education.
NE	1976	Amendment No. 6a (L)	Constitutional amendment to permit contracting with institutions not wholly owned or controlled by the state or any political subdivision for nonsectarian services for handicapped children.
NY	1967	Question No. 1 (C)	Shall the proposed new Constitution, adopted by the Constitutional Convention, and the Resolution submitting the same, be approved?
OR	1972	Measure No. 4 (L)	Amends the Oregon Constitution to provide as follows: 'The Legislative Assembly shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof.' Repeals existing constitution provision which reads: 'No money shall be drawn from the Treasury for the benefit of any religeous (sic) or theological institution, nor shall any money be appropriated for the payment of any religeous (sic) services in either house of the Legislative Assembly.'
OR	1990	Measure No. 11 (I)	Should the Constitution provide choice of public schools, tax credit for education outside public schools, voter approval of certain education laws?

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SC	1972	Amendment No. 6 (L)	Shall Article XI of the Constitution of this State be amended so as to provide for a State Board of Education, State Superintendent of Education, free school system and other public institutions of learning, prohibit direct public financial aid to religious or other private educational institutions, to delete provisions relating to: election of school officers, payment to officers and county treasurers from school funds, General Assembly defining enrollment, school trustees, poll tax, taxes levied by school districts, separate schools for races, specific higher education and other related references, gifts for education, gifts to State not designated, escheated property, and income from alcoholic beverages?
SD	1986	Constitutional Amendment C (L)	Allow legislature to authorize the loaning of nonsectarian textbooks to all children in state. The South Dakota Supreme Court ruled previously that existing constitutional prohibitions prevent the loaning of textbooks to all children not attending public school.
SD	2004	Constitutional Amendment B (L)	Notwithstanding the provisions of section 3, Article VI and section 16, Article VIII, the Legislature may authorize the loaning of nonsectarian textbooks and may authorize the participation in transportation and food services for children of school age. Attorney General's Explanation: The Constitution generally prohibits the Legislature from giving state money or property to sectarian schools. However, the Constitution allows the Legislature to authorize the loan of nonsectarian textbooks to children of school age, including those attending sectarian schools. Amendment B, if adopted, would change the Constitution to also allow the Legislature to authorize participation in food and transportation services for children of school age, including those attending sectarian schools. A vote "Yes" will change the Constitution. A vote "No" will leave the Constitution as it is.
WA	1975	House Joint Resolution No. 19 (L)	Shall Washington's Constitution be amended to permit governmental assistance for students of all educational institutions limited by the federal constitution?

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WI	1967	Question 7 (L)	Shall Section 23 of article I of the constitution be created so that the legislature may provide for the safety and welfare of children by providing for the transportation of children to and from any parochial or private school or institution of learning?
WI	1972	Question 3 (L)	Shall Section 24 of article I of the constitution be created permitting the legislature by law to authorize the use of public school buildings by civic, religious, or charitable organizations during nonschool hours upon payment of reasonable compensation for the use?
WI	1972	Question 4(L)	Shall Section 3 of article X of the constitution be amended to permit the legislature to authorize the release of public school pupils during regular school hours for the purpose of religious instruction outside the public schools?

