Constitution Revision Commission
Declaration Of Rights Committee
Proposal Analysis

(This document is based on the provisions contained in the proposal as of the latest date listed below.)

Proposal #: P 4

Relating to: DECLARATION OF RIGHTS, Religious freedom

Introducer(s): Commissioners Martinez and Gamez

Article/Section affected: Article I, Section 3 – Religious freedom.

Date: November 28, 2017

	REFERENCE	ACTION
1.	DR	**Pre-meeting**
2.	ED	

I. SUMMARY:

The Proposal amends Article I, Section 3 of the Florida Constitution, relating to religious freedom, to repeal the prohibition on the use of public revenue in aid of a church, sect, religious denomination, or sectarian institution. The prohibition is commonly known as the "No Aid Provision" or "Blaine Amendment."

If approved by the Constitution Revision Commission, the proposal will be placed on the ballot at the November 6, 2018, General Election. Sixty percent voter approval is required for adoption. If approved by the voters, the proposal will take effect on January 8, 2019.

A similar proposal was submitted to voters in the 2012 General Election. The proposal received 44.5% of the vote and was not adopted.

II. SUBSTANTIVE ANALYSIS:

A. PRESENT SITUATION:

Religion and Government

The relationship between Religion and Government in Florida is governed by both the U.S. Constitution and the Florida Constitution. Specifically, the First Amendment to the U.S. Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Similarly, Article I, Section 3 of the Florida Constitution provides:

> 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.

These provisions comprise the elements of the religious freedoms that are a central tenet of the American system of government. The Establishment Clause "prevents a State from enacting laws that have the 'purpose' or 'effect' of advancing or inhibiting religion."[1] The Free Exercise Clause directs that no law may discriminate against some or all religious beliefs, or regulate or prohibit conduct undertaken for religious reasons.[2] Florida courts have generally interpreted Florida's Free Exercise Clause as coequal to the federal clause.[3]

However, while the U.S. Constitution and Florida Constitution both contain a prohibition respecting the establishment of religion, the Florida Constitution imposes an additional restriction on the state not explicitly present under the U.S. Constitution. Commonly referred to as a "Blaine Amendment" or "No-Aid Provision," the last sentence of Article I, Section 3 of the Florida Constitution prohibits the direct or indirect use of public revenue in aid of a church, sect, religious denomination or sectarian institution.

"Blaine Amendments" or "No-Aid Provisions"

Florida is one of thirty-seven states to adopt a "No-Aid provision" within the state constitution.[4] The first iteration of Florida's constitutional "no aid provision" was adopted during the Constitutional Convention of 1885. Enacted as Article I, Section 6 of the 1885 Florida Constitution, the "no aid provision" originally provided that:

> No preference shall be given by law to any church, sect or mode of worship, and no money 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.

---

[1] *Zelman v. Simmons-Harris*, 536 US 639, 648-649 (Fla. 2002).
[2] *Church of the Lukimi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993).
[3] *Warner v. City of Boca Raton*, 887 So. 2d 1023, 1030 (Fla. 2004).
[4] Richard D. Komer and Olivia Grady, *School Choice and State Constitutions: A Guide to Designing School Choice Programs*, THE INSTITUTE FOR JUSTICE AND THE AMERICAN LEGISLATIVE EXCHANGE COUNCIL (2d. ed.), available at http://ij.org/wp-content/uploads/2016/09/50-state-SC-report-2016-web.pdf.

This provision was re-adopted in the 1968 revision of the Florida Constitution as Article I, Section 3 and specifically delineated that the "no aid" prohibition also applied to local governments.

Legal scholars and historians disagree regarding the impetus and intended effect of these "no-aid provisions" which were adopted by many states, including Florida. Some historians trace the origin of "no-aid" provisions to 1875 during the administration of President Ulysses S. Grant, who recommended an amendment to the U.S. Constitution denying all direct or indirect public support to "sectarian" institutions, commonly understood to mean "Catholic" institutions.[5] Then-Speaker of the U.S. House of Representatives James G. Blaine proposed an amendment to effectuate Grant's wishes. The measure passed overwhelmingly in the House (180-7), but failed to satisfy the supermajority needed in the Senate by four votes. When the amendment failed at the federal level, supporters turned their attention to the states. Provisions were voluntarily adopted in several existing states and were required as part of gaining statehood in others.

However, a number of states had adopted no-aid provisions prior to the proposal of such an amendment by Representative Blaine.[6] Some have argued those states were likely motivated by a Madisonian concern about liberty of conscience and a pragmatic desire to ensure the financial success of newly formed school systems rather than anti-catholic sentiment.[7] Others have argued that the purpose of the contemporaneous adoption of the "separate but equal doctrine" and the no-aid provision by the framers of the 1885 Florida Constitution was to prevent freedmen from receiving an equal education.[8]

There exists no record from the constitutional convention that incorporated the no-aid provision into the 1885 Florida Constitution regarding the intent of the framers.[9] The Florida First District Court of Appeal, in acknowledging the dispute over the origins of the Florida "Blaine Amendment" or "no aid provision," found no evidence of religious bigotry specific to Florida, pointing out that:

> Significantly, nothing in the proceedings of the CRC or the Florida Legislature indicates any bigoted purpose in retaining the no-aid provision in the 1968 general Revision of the Florida Constitution.[10]

---

[5] America's public schools, or "common schools" were essentially Protestant. Due to this Protestant influence, Catholics established a parallel school system and sought public funding. *See* Nathan A. Adams, *Florida's Blaine Amendment: Goldilocks and the Separate but Equal Doctrine*, 24 St. Thomas L. Rev. 1, 3 (2011).

[6] In 1792, New Hampshire became the first state in the newly formed Union to prohibit the use of state and local school funds by religious institutions; Connecticut followed suit in 1818. Michigan placed a no-funding provision in its constitution in 1835, which served as the prototype for several other states in the region, including Wisconsin in 1848, Ohio and Indiana in 1851, Oregon in 1857, and Kansas in 1858. *See Exposing the Myth of Anti-Catholic Bias,* AMERICAN CIVIL LIBERTIES UNION (July 2011), available at https://www.aclu.org/files/assets/aclu-exposingthemythofanticatholicbias.pdf.

[7] *Id.*

[8] The schools that freedman attended after the Civil War were chiefly sponsored by religious abolitionist societies, such as the American Missionary Association and National Freedman's Relief Organization, and by the Catholic Church. *See* Nathan A. Adams, *Florida's Blaine Amendment: Goldilocks and the Separate but Equal Doctrine*, 24 St. Thomas L. Rev. 1, 13 (2011).

[9] *Bush v. Holmes*, 886 So. 2d 340, 348 (Fla. 1st DCA 2004).

[10] *Bush v. Holmes*, 866 So.2d 340 FN 9 (Fla. 1st DCA 2004).

Nevertheless, the court held, "even if the no-aid provisions were "born of bigotry," such a history does not render the final sentence of Article I, Section 3 superfluous."[11]

Litigation under Florida "Blaine Amendment" or "No-Aid Provision"

Prior to 2004, there was not a substantial body of case law interpreting the no-aid provision in Article I, Section 3. The earliest cases which interpreted the no-aid provision did not involve the use of state revenue, but rather the grant of tax exemptions and the use of public facilities by religious institutions.[12] In upholding the benefit obtained by religious groups in such cases, the Florida Supreme Court took the position that an incidental benefit to a religious group resulting from an appropriate use of public property, or from state action to promote the general welfare of society, is not violative" of the no-aid provision.[13] The court generally focused on the neutrality of such laws.

However, in a series of cases beginning in 2004 which did involve the use of state revenue, the Florida First District Court of Appeal more clearly defined the contours of Article I, Section 3. The court held that Article I, Section 3 of the Florida Constitution is not "substantively synonymous" with the Establishment Clause of the First Amendment to the United States Constitution.[14] The court explained:[15]

> While the first sentence of Article I, section 3 is consistent with the Federal Establishment Clause by "generally prohibiting laws respecting the establishment of religion," the no-aid provision of Article I, section 3 imposes "further restrictions on the state's involvement with religious institutions than [imposed by] the Establishment Clause.

The court articulated a four-part test to assess compliance with Article I, Section 3. The test combines the elements of the *Lemon*[16] test utilized under the Federal Establishment Clause with the additional restriction on the use of state revenue in Florida's Constitution: [17]

- The statute must have a secular legislative purpose (religion-neutral program);
- Its principal or primary effect must be one that neither advances nor inhibits religion;
- The statute must not foster "an excessive government entanglement with religion; and
- The statute must not authorize the use of public monies, directly or indirectly, in aid of a sectarian institution.

This standard as applied in the areas of education and government contracting, has resulted in the invalidation of the Florida Opportunity Scholarship Program and application of the no-aid

[11] *Id.*
[12] *See e.g.*, *Koerner v. Borck*, 100 So. 2d 398 (Fla. 1958); *Southside Estates Baptist Church v. Board of Trustees*, 115 So. 2d 697 (1959).
[13] *See Southside Estates Baptist Church v. Board of Trustees*, 115 So. 2d 697, 700 (Fla. 1959); *Johnson v. Presbyterian Homes of Synod of Fla., Inc.*, 239 So. 2d 256, 261 (Fla. 1970).
[14] *Council for Secular Humanism v. McNeil*, 44 So. 3d 112, 119 (Fla. 1st DCA 2010).
[15] *Id.*
[16] *Lemon v. Kurtzman*, 403 U.S. 602, 612-613 (1971).
[17] *Bush v. Holmes*, 886 So. 2d 340, 358 (Fla. 1st DCA 2004).

prohibition to service contracts with faith based service providers. Under the Federal Establishment Clause, similar programs and laws have been held to be constitutional.

Education

Beginning in 1999, the Legislature passed several laws to expand educational opportunities. Among the education reforms adopted by the Legislature were two "school choice" programs: The Opportunity Scholarship Program (OSP) and the Florida Tax Credit Scholarship Program (FTCSP). The OSP was designed to provide parents of students in "failing schools" the opportunity to send their children to a satisfactorily performing public school or to an eligible private school, including sectarian private schools, through the use of a scholarship.[18] Of the private schools participating in the OSP, 71.7 percent were sectarian, and 55.3 percent of the OSP students utilizing scholarships were attending those sectarian schools.[19]

The FTCSP was designed to further expand school choice opportunities beyond those available under the OSP. Scholarships offered under the FTCSP are not limited to "failing" schools. Rather students receiving certain government assistance or students whose families have an annual income below 185% of the federal poverty level are eligible to receive scholarships. [20] During the 2016-2017 school year, scholarships in the amount of $536 million were awarded to a total of 98,936 students enrolled in 1,733 participating Florida private schools.[21]

In *Bush v. Holmes*, 886 So. 2d 340 (Fla. 1st DCA 2004), the First District Court of Appeal invalidated the scholarship element of the OSP on the grounds that it violated Article I, Section 3 because it used state revenues to aid sectarian schools.[22] The court distinguished *Zelman v. Simmons-Harris*, 536 U.S. 669, in which the U.S. Supreme Court upheld a similar Ohio school choice program under the Federal Establishment Clause:[23]

> If article I, section 3 of the Florida Constitution was coterminous with the First Amendment to the United States Constitution, our inquiry in this case would be decidedly different, and a reversal would be mandated

[18] A voucher utilized by an opportunity scholar is a warrant made payable to the parents of the student attending a private school. Upon receiving notification of the number of students utilizing vouchers, the DOE transfers funds from the respective districts' appropriated budgets to an account for the OSP. Then, the Chief Financial Officer sends the warrants to the respective private schools, and parents must endorse them for the schools to receive OSP funds. *See Legal Issues and Policy Considerations Raised by the Challenge to the Opportunity Scholarship Program: Interim Project Report 2006-139,*, The Florida Senate Committee on Judiciary (February 2006), available at http://archive.flsenate.gov/data/Publications/2006/Senate/reports/interim_reports/pdf/2006-139ju.pdf.

[19] *Id.*

[20] The law provides for state tax credits for contributions to nonprofit scholarship funding organizations, (SFOs). The SFOs then award scholarships to eligible children of low-income families. Scholarships may be used to pay tuition and fees at an eligible private school or to pay for transportation to a Florida public school that is outside of the student's district or to a lab school. An eligible private school may be religiously affiliated. SFOs pay the scholarship funds directly to the participating private schools. *McCall v. Scott*, 199 So. 3d 359 (Fla. 1st DCA 2016).

[21] *Facts & Figures*, FLORIDA DEPARTMENT OF EDUCATION, available at http://www.fldoe.org/core/fileparse.php/15230/urlt/FTC_Sept_2017_1.pdf. (last visited Nov. 28, 2017).

[22] The court held that because an OSP voucher is used to pay the cost of tuition, any disbursement made under the OSP and paid to a sectarian or religious school is made in aid of a "sectarian institution," the school itself, even if it can be shown that no voucher funds benefit or support a church or religious denomination. *Bush v. Holmes* 886 So. 2d 340, 366 (Fla. 1st DCA 2014).

[23] *Bush v. Holmes*, 886 So. 2d 340 (Fla 1st DCA 2014).

> under *Zelman.* If we were resolving this case purely on Establishment Clause principles, the fact that the OSP program on its face has a religiously neutral purpose — to aid children in failing public schools — and the fact that the OSP gives parents or guardians the freedom of choice in selecting an alternative to a failing public school, would be dispositive factors, without regard to whether a disbursement was made directly to a parent or guardian rather than the school….However, article I, section 3 of Florida's Constitution is plainly not identical to the First Amendment [Citations omitted].

On appeal of the decision in *Bush v. Holmes,* the Supreme Court found the OSP scholarships violated Article IX, Section 1 (a) of the Florida Constitution which requires a "uniform, efficient, safe, secure, and high quality system of free public schools." By diverting public dollars into separate private systems parallel to and in competition with free public schools the OSP violated this provision.[24] Thus, the Court found "it unnecessary to address whether the OSP is a violation of the "no aid" provision in article I, section 3 of the Constitution, as held by the First District."[25]

The FTCSP has also been subject to constitutional challenge based upon the no-aid provision. The most recent constitutional challenge to the FTCSP was dismissed because the court determined the plaintiff's lacked standing.[26] No courts have yet reached the merits of the constitutional arguments against the FTCSP.

Social Services

In *Council for Secular Humanism v. McNeil,* 44 So. 3d 112 (Fla. 1st DCA 2010), the court concluded that Article I, Section 3, does not create a per se bar to state or local government contracts with religious entities for the provision of goods and services.[27] The case involved the constitutionality of a statute which authorized the Department of Corrections to consider faith-based services groups when selecting providers to administer substance abuse treatment programs. The court found that such contracts could violate Article I, Section 3, if in addition to providing social services, the government-funded program also advances religion.[28] The court explained that:

> In determining whether such programs violate the no-aid provision, the inquiry necessarily will be case-by-case and will consider such matters as whether the government-funded program is used to promote the religion of the provider, is significantly sectarian in nature, involves religious indoctrination, requires participation in religious ritual, or encourages the preference of one religion over another.[29]

[24] *Bush v. Holmes*, 919 So. 2d 392, 398 (Fla. 2006).
[25] *Bush v. Holmes*, 919 So. 2d 392 (Fla. 2006).
[26] *McCall v. Scott*, 199 So. 3d 359 (Fla. 1st DCA 2016).
[27] *Council for Secular Humanism v. McNeil*, 44 So. 3d 112, 121 (Fla. 1st DCA 2010).
[28] *Id.* at 120.
[29] *Id.*

B. EFFECT OF PROPOSED CHANGES:

The proposal repeals the "No Aid Provision" or "Blaine Amendment" in Article I, Section 3 of the Florida Constitution. The repeal removes the prohibition on the direct or indirect use of public revenue in aid of a church, sect, religious denomination, or sectarian institution.

The repeal does not affect the limitation on government spending power in aid of religious activities under the Establishment Clause of the U.S. Constitution.

If approved by the voters, the proposal will take effect on January 8, 2019.[30]

C. FISCAL IMPACT:

The fiscal impact on state and local government is indeterminate.

III. Additional Information:

A. Statement of Changes:
(Summarizing differences between the current version and the prior version of the proposal.)

None.

B. Amendments:

None.

C. Technical Deficiencies:

None.

D. Related Issues:

Recently, in *Trinity Lutheran Church v. Comer,* 137 S. Ct. 2012 (2017), the U.S. Supreme Court held that the denial of a grant to a church affiliated daycare center for playground equipment pursuant to the Missouri's Blaine Amendment violated the Free Exercise Clause of the U.S. Constitution.[31]

The Trinity Lutheran Church Child Learning Center applied for a grant under a Missouri state program which offered reimbursement grants to qualifying nonprofit organizations that install playground surfaces made from recycled tires. The department had a strict and express policy of denying grants to any applicant owned or controlled by a church, sect, or other religious entity. Pursuant to that policy, the department denied the Center's application. In a letter rejecting that

[30] *See* Article XI, Sec. 5(e) of the Florida Constitution ("Unless otherwise specifically provided for elsewhere in this constitution, if the proposed amendment or revision is approved by vote of at least sixty percent of the electors voting on the measure, it shall be effective as an amendment to or revision of the constitution of the state on the first Tuesday after the first Monday in January following the election, or on such other date as may be specified in the amendment or revision.)
[31] *Trinity Lutheran Church v. Comer*, 137 S. Ct. 2012, 2015 (2017).

application, the department explained that under Article I, Section 7 of the Missouri Constitution, the State's Blaine Amendment, the department could not provide financial assistance directly to a church.

The court held that denying a generally available benefit solely on account of religious identity imposes a penalty on the free exercise of religion.[32] The court found that the express discrimination against religious exercise at issue in the case was not the denial of a grant, but rather the refusal to allow the Church-solely because it is a church-to compete with secular organizations for a grant.[33] The Court held Missouri's preference for "skating as far as possible from religious establishment concerns," in the face of the clear infringement on free exercise, is not a compelling interest that would justify the department's policy.[34]

[32] *Id*. at 2015.
[33] *Id*. at 2021-2022.
[34] *Id*. at 2024-2025.