The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

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

Prepared By: The Professional Staff of the Judiciary Committee

BILL:	SJR 2550
INTRODUCER:	Senator Altman
SUBJECT:	Religious Freedom
DATE:	April 12, 2010
REVISED:	

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Brown	Matthews	ED	**Favorable**
2.	Treadwell	Maclure	JU	**Favorable**
3.			RC	
4.				
5.				
6.				

I. Summary:

Senate Joint Resolution 2550 proposes an amendment to the Florida Constitution to provide that a person may not be prohibited from participating in a public program because of the person's free choice in using program benefits at a religious provider.

Language is stricken that prohibits public revenue from directly or indirectly supporting sectarian institutions. This provision is commonly known as a Blaine Amendment.

This joint resolution amends article 1, section 3, of the Florida Constitution.

II. Present Situation:

Establishment Clauses

The First Amendment to the U.S. Constitution states:

> 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.[1]

Similarly, article 1, section 3 of the Florida Constitution states:

[1] (Emphasis added).

> 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.***[2]

The U.S. Constitution and the Florida Constitution both contain an Establishment Clause. The Establishment Clauses are based on the clause including the words "establishment of religion." The last sentence of section 3 of article I of the Florida Constitution is known as the "Blaine Amendment" or "no-aid" provision.[3] The U.S. Constitution does not contain a similar provision.

Free Exercise Clauses

Both the U.S. Constitution and the Florida Constitution contain Free Exercise Clauses. The Free Exercise Clauses are based on the clause including the words "free exercise." "Florida courts have generally interpreted Florida's Free Exercise Clause as coequal to the federal clause."[4] "At a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons."[5]

Under the Free Exercise Clauses:

> a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice. Neutrality and general applicability are interrelated, and . . . failure to satisfy one requirement is a likely indication that the other has not been satisfied. A law failing to satisfy these requirements must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest.[6]

A law is *not* neutral if it discriminates against religious practice on its face or "if the object of a law is to infringe upon or restrict practices because of their religious motivation."[7]

The following are examples of Free Exercise Clause violations:

- An ordinance that prohibited the ritual slaughter of animals as part of the Santaria religion;[8]
- Laws that disqualify members of the clergy from holding a public office;[9]

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[2] (Emphasis added).
[3] *Bush v. Holmes*, 886 So. 2d 340, 344, 348-49 (Fla. 1st DCA 2004) ("*Holmes II*").
[4] *Id.* at 365 (citing *Toca v. State*, 834 So. 2d 204, 208 (Fla. 2d DCA 2002)).
[5] *Church of the Lukimi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993).
[6] *Id.* at 531-32 (citation omitted).
[7] *Id.* at 533.
[8] *Lukimi*, 508 U.S. 520.
[9] *McDaniel v. Paty*, 435 U.S. 618 (1978).

- An ordinance that prohibited preaching in a public park by Jehovah's witnesses while allowing preaching during a Catholic mass or a protestant service;[10] and
- A state statute that treated some religious denominations more favorably than others.[11]

However, under the Free Exercise Clause of the First Amendment, a state *may* exclude individuals and entities from a generally available government benefit on the basis of religion.[12]

Blaine Amendments

"Florida's no-aid provision was adopted into the 1868 Florida Constitution during the historical period in which so-called 'Blaine Amendments' were commonly enacted into state constitutions."[13]

Blaine Amendments are provisions in many state constitutions that prohibit the use of state funds at "sectarian" schools. The provisions are named for Congressman James G. Blaine, who proposed such an amendment to the U.S. Constitution while he was Speaker of the U.S. House of Representatives in 1875.

The amendment passed overwhelmingly (180-7) in the House, but failed narrowly (by 4 votes) in the U.S. Senate. Supporters of the amendment then turned their attention to the individual states, where they had much more success. In some states, Blaine Amendments were adopted by the usual constitutional amendment process. In the case of states just entering the Union, they were forced to adopt similar language as a requirement for gaining statehood.[14]

According to the Florida First District Court of Appeal:

> [w]hether the Blaine-era amendments are based on religious bigotry is a disputed and controversial issue among historians and legal scholars. Certain commentators contend that the original Blaine-era no-aid provisions were based in part on anti-Catholic religious bigotry. Other commentators argue, however, that anti-Catholic bigotry did not play a significant role in the development of Blaine-era no-aid provisions in state constitutions.[15]

In contrast, a plurality opinion of the U.S. Supreme Court, authored by Justice Thomas, asserts that Blaine Amendments were motivated by an anti-Catholic bias.[16]

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[10] *Fowler v. Rhode Island*, 345 U.S. 67 (1953).
[11] *Larson v. Valente*, 456 U.S. 228 (1982).
[12] *Locke v. Davey*, 540 U.S. 712, 722 (2004).
[13] *Holmes II*, 886 So. 2d at 348-49.
[14] J. Scott Slater, *Florida's "Blaine Amendment" and Its Effect on Educational Opportunities*, 33 STETSON L. REV. 581, 591 (Winter 2004).
[15] *Holmes II*, 886 So. 2d at note 9 (citations omitted).
[16] *Mitchell v. Helms* 530 U.S. 793, 828-829 (2000). Justice Thomas wrote:

> In short, nothing in the Establishment Clause requires the exclusion of pervasively sectarian schools from otherwise permissible aid programs, and other doctrines of this Court bar it. This doctrine, born of bigotry, should be buried now.

Florida's Blaine Amendment or no-aid provision imposes "further restrictions on the state's involvement with religious institutions than the Establishment Clause" of the U.S. Constitution.[17] The constitutional prohibition in the no-aid provision involves three elements:

- The prohibited state action must involve the use of state tax revenues;
- The prohibited use of state revenues is broadly defined, in that state revenues cannot be used "directly or indirectly in aid of" the prohibited beneficiaries; and
- The prohibited beneficiaries of the use of state revenues are "any church, sect or religious denomination" or "any sectarian institution."[18]

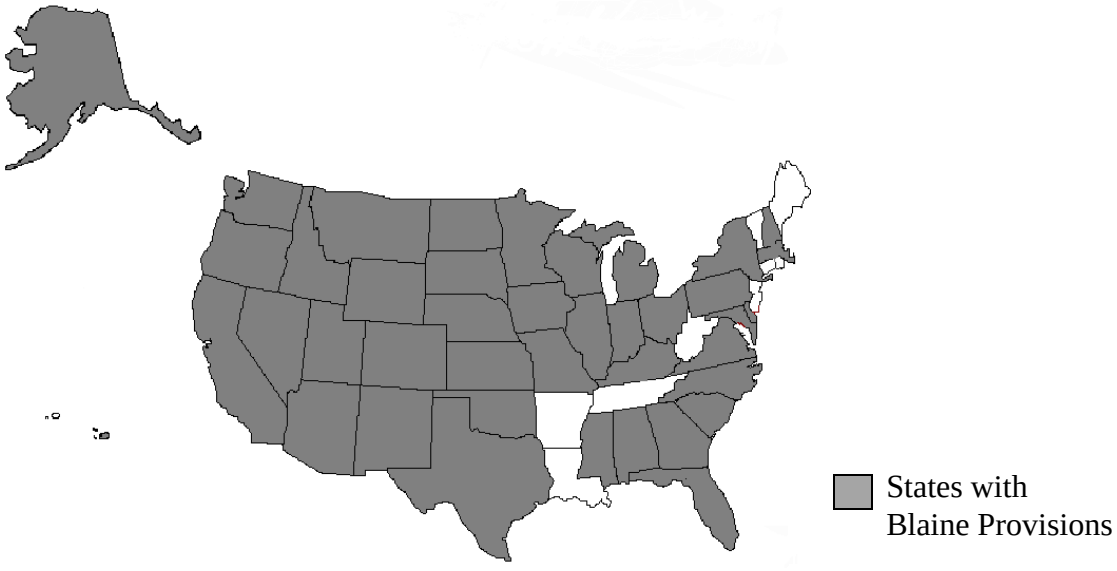
Florida's Blaine Amendment became widely known after the First District Court of Appeal's decision in *Bush v. Holmes*, to invalidate the Opportunity Scholarship Program (OSP).[19]

In a recent application of the Blaine Amendment, a watchdog organization filed suit against the secretary of the Department of Corrections (DOC) to prevent the secretary from expending funds to support faith-based substance abuse transitional housing programs provided by institutions to inmates pursuant to the institutions' contracts with DOC.[20] The trial court entered a judgment on the pleadings in favor of the secretary. On appeal, the First District Court of Appeal recognized that a state constitutional provision, like Florida's no-aid provision, can bar state financial aid to religious institutions without violating either the Establishment Clause or Free Exercise Clause, and reversed the trial court decision and remanded for further factual findings.[21]

Blaine Amendments in Other Jurisdictions

Not all states adopted Blaine Amendments, and today, approximately 39 states have some version of the provision in their state constitutions.[22] Commentators differ regarding the existence of the true number of Blaine Amendments, or the number of provisions that are actually enforced. The following figure illustrates those states with a Blaine Amendment in the state constitution or some other form of Blaine provision:[23]

Id. (citations omitted).
[17] *Holmes II*, at 344.
[18] *Id.* at 352.
[19] *Id.* at 340. The Florida Supreme Court also invalidated the Opportunity Scholarship Program but for violating the uniformity requirement of section 1 of article IX of the Florida Constitution. *Bush v. Holmes*, 919 So. 2d 392 (Fla. 2006).
[20] *Council for Secular Humanism, Inc. v. McNeil*, 2009 WL 4782384 (Fla. 1st DCA 2009).
[21] *Id.* at *5.
[22] Blaine Amendments, *available at* www.blaineamendments.org (last visited Apr. 4, 2010).
[23] The Becket Fund for Religious Liberty, *Blaine Amendments: States*, *available at* http://www.blaineamendments.org/states/states.html (last visited Apr. 8, 2010).



This year, Georgia legislators filed a resolution to remove the Blaine Amendment from its state constitution, but the legislation died in committee.[24]

Constitutional Amendment Process

Article XI of the Florida Constitution sets forth various methods for proposing amendments to the constitution, along with the methods for approval or rejection of proposals. One method by which constitutional amendments may be proposed is by joint resolution agreed to by three-fifths of the membership of each house of the Legislature.[25]Any such proposal must be submitted to the electors, either at the next general election held more than 90 days after the joint resolution is filed with the Secretary of State, or, if pursuant to law enacted by the affirmative vote of three-fourths of the membership of each house of the Legislature and limited to a single amendment or revision, at an earlier special election held more than 90 days after such filing.[26] If the proposed amendment is approved by a vote of at least 60 percent of the electors voting on the measure, it becomes effective as an amendment to the Florida Constitution 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.[27]

III. Effect of Proposed Changes:

Senate Joint Resolution 2550 proposes an amendment to section 3, article I, of the State Constitution to provide that a person cannot be prohibited from participating in a public program because of the person's free choice in using program benefits at a religious provider. In effect,

[24] *See* Georgia House Resolution 567 (2010).
[25] FLA. CONST., art. XI, s. 1.
[26] FLA. CONST., art. XI, s. 5(a).
[27] FLA. CONST., art. XI, s. 5(e).

the state is precluded from excluding individuals and entities from a generally available public benefit or a contract to provide government services on the basis of religion.

The resolution, if adopted by the voters would remove the Blaine Amendment provision from the state constitution. This removes the limitation on the power of the state to spend funds "directly or indirectly in aid of any church, sect, or religious denomination or in aid of any sectarian institution."

The joint resolution is silent regarding an effective date for the constitutional amendment. Therefore, in accordance with section 5, article XI, of the Florida Constitution, it would take effect on the first Tuesday after the first Monday in January following the election at which it was approved by the electorate.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

Establishment Clause and Blaine Amendment

The Establishment Clause "prevents a State from enacting laws that have the 'purpose' or 'effect' of advancing or inhibiting religion."[28] The test to determine whether government aid violates the Establishment Clause of the U.S. Constitution is whether the aid:

- Results in governmental indoctrination;
- Defines its recipients by reference to religion or is neutral with respect to religion; or
- Creates an excessive entanglement.[29]

The conditions under which government may aid a religious institution under the Establishment Clause of the U.S. Constitution were identified by the U.S. Supreme Court in *Zelman v. Simmons-Harris*.[30] The *Zelman* Court stated:

[28] *Zelman v. Simmons-Harris*, 536 U.S. 639, 648-649 (2002).
[29] *Agostini v. Felton*, 521 U.S. 203, 234 (1997).
[30] *Zelman*, 536 U.S. at 652.

> that where a government aid program is neutral with respect to religion, and provides assistance directly to a broad class of citizens who, in turn, direct government aid to [a] religious [institution] wholly as a result of their own genuine and independent private choice, the program is not readily subject to challenge under the Establishment Clause. A program that shares these features permits government aid to reach religious institutions only by way of the deliberate choices of numerous individual recipients. The incidental advancement of a religious mission, or the perceived endorsement of a religious message, is reasonably attributable to the individual recipient, not to the government, whose role ends with the disbursement of benefits.[31]

Accordingly, neutrality must be a key feature of government aid programs that benefit a religion. Aid is neutral if the aid has been directed to a religion by a private choice, rather than a government choice. Aid is neutral if "aid is allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and is made available to both religious and secular beneficiaries on a nondiscriminatory basis."[32]

Courts have found that the following types of aid did not violate the Establishment Clause of the U.S. Constitution:

- Annual subsidies directly to qualifying colleges and universities in Maryland, including religiously affiliated institutions;[33]
- Bussing services for both public and private school children;[34]
- The provision of secular textbooks for both public and private school students;[35]
- Construction grants to colleges and universities regardless of affiliation with or sponsorship by a religious body;[36]
- The provision of grants to religious and other institutions to provide counseling on teenage sexuality;[37] and
- Payment of tuition to private religious schools for children in Cleveland, Ohio, who attended poor quality public schools.[38]

Without knowing exactly how the joint resolution may potentially be challenged if adopted, it is instructional to generally assess how the establishment clause applies to education cases. Initially, a provision must comply with facial constitutionality. In analyzing whether a statute is constitutional on its face, the court will not consider a

[31] *Id.*
[32] *Zelman*, 536 U.S. at 653-54 (quoting *Agostini*, 521 U.S. at 231).
[33] *Roemer v. Maryland Bd. of Pub. Works*, 426 U.S. 736 (1976).
[34] *Everson v. Board of Education*, 330 U.S. 1 (1947).
[35] *Board of Education v. Allen*, 392 U.S. 236 (1968).
[36] *Tilton v. Richardson*, 403 U.S. 672 (1971).
[37] *Bowen v. Kendrick*, 487 U.S. 589 (1988).
[38] *Zelman*, 536 U.S. at 639.

statute's application in practice or through factual findings.[39] The Florida Supreme Court reviewed the First District Court of Appeal's holding that the state's Opportunity Scholarship Program, which provided education vouchers for children to leave failing public schools and attend private schools, violated the "no aid" provision of the state constitution. The Florida Supreme Court, in invalidating the program on other grounds, ruled that it would:

> . . . neither approve nor disapprove the First District's determination that the OSP violates the "no aid" provision in article I, section 3 of the Florida Constitution, an issue we decline to reach."[40]

Because the court decided the case on uniformity grounds, it also did not reach the question of whether the program violated the federal establishment clause.

In upholding an Ohio school voucher program, the U.S. Supreme Court ruled that Ohio did not violate the federal Establishment Clause, as the program took a neutral approach toward religion and individuals had the option to exercise their own free choice regarding private providers.[41] Rather than focusing on the volume of available religious providers, which in this case represented a full 82 percent of participating schools, the Court deemed critical the extent to which the program had the effect of advancing or inhibiting religion.[42] In the absence of demonstrated governmental preference for religious support, the mere incidental advancement of religion, the Court opined, is not constitutionally deficient.[43]

The United States Court of Appeals for the District of Columbia circuit reiterated this principle in *American Jewish Congress v. Corporation for National and Community Service.*[44] Here, the court upheld the AmeriCorps Education Awards Program, a nationwide community service program that provided placement of participants in schools and granted an award to those who completed qualifying service hours. The program did not exclude providers on the basis of religious affiliation or instruction. Some participants were placed in sectarian schools, and some taught religious instruction as part of their coursework. While the program did not expressly restrict instruction to non-secular subjects, instructors received no incentive for teaching religious courses, and these hours did not count toward qualifying service hours.[45] As program challengers

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[39] *Bowen*, 487 U.S. at 600-01 (1988). *See also Reno v. Flores*, 507 U.S. 292, 301 (1993), which provides that a facial challenge is assessed without reference to factual findings or evidence of particular applications. To prevail on a facial challenge, a petitioner must establish that no set of circumstances exists under which the challenged act would be valid.

[40] *Bush v. Holmes*, 919 So. 2d 392, 413 (Fla. 2006). Here, the court struck down the program on the basis that it violated s. 1(a), art. IX, of the Florida Constitution, as it jeopardized the requirement that the state provide for a uniform system of free public schools: "The OSP contravenes this . . . provision because it allows some children to receive a publicly funded education through an alternative system of private schools . . . not subject to the uniformity requirements of the public school system. The diversion of money not only reduces public funds for a public education but also uses public funds to provide an alternative education in private schools…not subject to the 'uniformity' requirement for public schools." *Id.* at 412.

[41] *Zelman*, 536 U.S. at 639.

[42] *Id.* at 640.

[43] *Id.*

[44] *American Jewish Congress v. Corporation for National and Community Service*, 399 F.3d 351 (D.C. Cir. 2005).

[45] *Id.*

failed to demonstrate favoritism toward religious institutions or teachings, the court held, there was no imprimatur of government endorsement.[46]

The Ninth Circuit Court of Appeals did find such an imprimatur, however, in a challenge to a state program establishing a privately funded student tuition organization (STO), where those contributing to the program received a dollar-for-dollar credit on taxes.[47] Although the statute at issue did not directly specify that funding would be provided to religious institutions, in practice, the overwhelming presence of sectarian STOs in the program, and the unrestricted grant of money to these STOs (which then distributed the money solely to religious schools), combined to leave parents with little choice in the selection of providers. Therefore, although the stated purpose of the program was individual choice in education, an on-its-face neutral purpose, its impact was to further religion through education. In support of its invalidation of the STO program, the court cited the U.S. Supreme Court in *McCreary County, Kentucky v. ACLU of Kentucky* and recognized that, ". . .although a legislature's stated reasons will generally get deference, the secular purpose required has to be genuine, not a sham, and not merely secondary to a religious objective."[48]

This joint resolution provides both for the removal of the Blaine Amendment from the state constitution and the introduction of new language upholding independent choice. Not all state constitutions contain a Blaine Amendment now, so its deletion here is, in all likelihood, permissible. Without the benefit of having a program in place to review, it is difficult to analyze the new language in this joint resolution for constitutional impact. However, this provision would likely survive a challenge on its face.

The state spending will continue to be limited to within the parameters of the Establishment clauses, and the constitutionality of the spending will be likely turn on whether it:

- Results in governmental indoctrination;
- Defines its recipients by reference to religion; or
- Creates an excessive entanglement.[49]

Joint Resolutions

In order for the Legislature to submit SJR 2550 to the voters for approval, the joint resolution must be agreed to by three-fifths of the membership of each house.[50] If SJR 2550 is agreed to by the Legislature, it will be submitted to the voters at the next general election held more than 90 days after the amendment is filed with the Department of State.[51] As such, SJR 2550 would be submitted to the voters at the 2010 General Election.

[46] *Id.* at 357.
[47] *Winn v. Arizona Christian School Tuition Organization*, 562 F.3d 1002 (9th Cir. 2009).
[48] *McCreary County, Kentucky v. ACLU of Kentucky*, 545 U.S. 844, 864 (2005).
[49] *Agostini v. Felton*, 521 U.S. 203, 234 (1997).
[50] FLA. CONST. art. XI, s. 1.
[51] FLA. CONST. art. XI, s. 5(a).

In order for SJR 2550 to take effect, it must be approved by at least 60 percent of the voters voting on the measure.[52]

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Private religious institutions could benefit from receiving public funds.

C. Government Sector Impact:

The measure may insulate government programs providing funds to sectarian institutions from lawsuits alleging that the programs violate the Blaine Amendment. The measure may also result in the use of more sectarian institutions to provide government services.

Each constitutional amendment is required to be published in a newspaper of general circulation in each county, once in the sixth week and once in the tenth week preceding the general election.[53] Costs for advertising vary depending upon the length of the amendment. According to the Department of State, the average cost of publishing a constitutional amendment with the ballot summary is $102,053. The cost varies depending on the length of the full text. The average cost per word is $94.68.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.

This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.

[52] FLA. CONST. art. XI, s. 5(e).
[53] FLA. CONST., art. XI, s. 5(d).