

**SCALING THE WALL BETWEEN CHURCH AND STATE:
CONFRONTING ISSUES OF EQUALITY STEMMING FROM
FINANCING RELIGIOUSLY AFFILIATED UNIVERSITIES UNDER
DUAL FEDERALISM**

*“Congress shall make no law respecting an establishment of
religion. . . .”*¹

INTRODUCTION

School children all across the country learn this provision of the First Amendment as the “separation of church and state.” But this provision, commonly referred to as the Establishment Clause, was not part of the original drafting of the Constitution, which instead stood silent on the issue of religion.² This was not an oversight by the framers; rather, the majority believed they had addressed the concern of religious freedom by expressly excluding it from the enumerated powers of the new government.³ But not all were convinced that this exclusion provided an adequate restraint on power.⁴ The Anti-Federalists felt the Constitution gave too much power to the new federal

1. U.S. CONST. amend. I.

2. For an idea of the powers and limits originally placed upon the branches of government, see the following provisions of the United States Constitution. U.S. CONST. art. I, § 8 (providing a list of enumerated powers for the legislative branch); U.S. CONST. art. I, § 9 (providing several limits on the powers of Congress); U.S. CONST. art. II, § 2 (explaining that the President’s executive power includes the role of Commander in Chief over the Army, Navy, and Militia, and that with the approval of Congress, he has the power to make treaties and judicial appointments); U.S. CONST. art. III (describing the powers of jurisdiction over certain types of cases of vested in the Supreme Court).

3. Robert L. Cord & Howard Ball, *The Separation of Church and State: A Debate*, 1987 UTAH L. REV. 895, 895–96 (1987). James Madison originally opposed the addition of a Bill of Rights. RICHARD LABUNSKI, JAMES MADISON AND THE STRUGGLE FOR THE BILL OF RIGHTS 159–60 (2006). He believed that rights not expressly given to the new government were automatically reserved to the people. *Id.* Furthermore, Madison believed that adding an amendment regarding religious freedom or any other civil liberty ran the risk of being either too broad or too narrow. *Id.*

4. Not all delegates present at the Constitutional Convention and the signing of the original Constitution were convinced this was adequate. See LABUNSKI, *supra* note 3, at 10. Even before the document was sent to the states for their review, and ultimately their ratification, there was talk of holding a second convention to address shortcomings of the first document. *Id.*

government and did not adequately protect the individual rights of the people.⁵ This group refused to support the Constitution unless it contained a separate Bill of Rights, expressly setting out individual rights to “serve as a barrier between the central government, the respective states, and their citizens.”⁶ The Anti-Federalists ultimately won the debate, and ten amendments survived congressional debate and state ratification to become the Bill of Rights.⁷

But, those Amendments are still subject to judicial review and interpretation, and over the years, the Court has carved out various exceptions. To see this effect, one need only look at the long history of mixed results from the Court’s application of the Establishment Clause.⁸ The variety of issues considered by the Court over the years includes prayer in school, posting religious symbols and displays on public property, and school voucher programs that indirectly fund parochial schools.⁹ Perhaps one of the hottest issues in today’s recession-weary society is the constitutionality of granting public funds to religiously affiliated colleges and universities (RACs). This is an issue for courts and lawmakers at both the state and federal level.

5. Joyce A. McCray Pearson, *The Federal and State Bills of Rights: A Historical Look at the Relationship Between America’s Documents of Individual Freedom*, 36 HOW. L.J. 43, 57 (1993).

6. *Id.* (quoting GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776–1787*, at 536 (1969)). Three key states, the most populous states of the fledgling union, Massachusetts, New York, and Virginia, initially refused to ratify the new Constitution without the inclusion of a Bill of Rights. *Id.* Virginia’s state constitution already included a Declaration of Rights, which included religious freedom. *See id.* at 51. This document was a major influence on the eventual federal Bill of Rights. *See discussion infra* notes 67–69 and accompanying text.

7. Twelve Amendments were actually submitted to the states for ratification. LABUNSKI, *supra* note 3, at 240. For a discussion of the congressional debate of the proposed amendments, see generally *id.* at 213–40. While most accept that the first ten Amendments comprise the Bill of Rights, others consider it to be only the first eight. Robert N. Wilentz, Chief Justice of the Supreme Court of the United States, *The New Constitution*, Address at Princeton University (Jan. 15, 1985), in 49 RUTGERS L. REV. 887, 890 (1997).

8. *See Lee v. Weisman*, 505 U.S. 577, 597 (1992); *Lynch v. Donnelly*, 465 U.S. 668, 678 (1984).

9. *See, e.g., McCreary Cnty. v. ACLU of Ky.*, 545 U.S. 844, 881 (2005) (concluding that displays of the Ten Commandments in several county courthouses in Kentucky was a violation of the First Amendment); *Van Orden v. Perry*, 545 U.S. 677, 681 (2005) (companion case to *McCreary County*, ruling that a Ten Commandments display at a courthouse in Texas was *not* unconstitutional); *Zelman v. Simmons-Harris*, 536 U.S. 639, 643–46 (2002) (holding that an Ohio voucher program which allowed parents to receive government funds to pay any private school tuition, even parochial school tuition, did not violate the Establishment Clause); *Lee*, 505 U.S. at 599 (finding that clergy-led prayer at an official school graduation ceremony was unconstitutional); *Lynch*, 465 U.S. at 687 (holding that the erection of the annual Christmas nativity display in a public park did not violate the Establishment Clause).

At the state level, the Kentucky Supreme Court recently held in *University of the Cumberlands v. Pennybacker*¹⁰ that the Baptist university's receipt of state funds for construction of a new pharmacy school violated the Kentucky Constitution.¹¹ On the national stage, all eyes have been on the American Recovery and Reinvestment Act of 2009 (ARRA), better known as the "Stimulus Package" or "Bailout Bill," which was passed in February 2009.¹² Among a laundry list of new spending, ARRA allows use of federal funds for certain projects at RACs.¹³ Though it defers to state law in the use of these funds, states can vary widely in their mandate of separation of church and state, creating additional concern that these universities and their students are not receiving equal treatment across the country.¹⁴

Part I of this note discusses Supreme Court opinions that have shaped modern Establishment Clause jurisprudence—from the Court's attempt to recapture the framer's intent, to the troubled state of the current test. This section also discusses how the Supreme Court has applied Establishment Clause principles to federal funding of RACs and some of the issues surrounding ARRA. Part II then discusses differences between federal and state constitutional provisions, and how states have adjudicated RAC funding challenges arising under state law. Part III provides an in-depth case study of two recent state constitutional cases involving the funding of RACs. The two cases featured in this section arose under similar state constitutional provisions, but resulted in dramatically different results by the respective state supreme courts. Finally, Part IV discusses ongoing federal constitutional issues arising out of such unpredictable state adjudication, including failed attempts to strike down these provisions. Part IV also proposes how to better equalize the outcomes of adjudication among the states.

10. *Univ. of Cumberlands v. Pennybacker*, 308 S.W.3d 668, 671 (Ky. 2010), *aff'g* *Pennybacker v. Beshear*, No. 06-CI-00554, 2008 WL 644848, at *1 (Franklin Cir. Ct. Mar. 6, 2008). The original case was named for Rev. Albert M. Pennybacker and the current governor of Kentucky. *Pennybacker*, 2008 WL 644848, at *1. The University of the Cumberlands was an intervening defendant in the original action but was the one to appeal the adverse summary judgment ruling of the district court. *Univ. of Cumberlands*, 308 S.W.3d at 672.

11. *Univ. of Cumberlands*, 308 S.W.3d at 679.

12. American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115 (2009) (codified in scattered sections of 26 U.S.C.).

13. *See, e.g., id.* § 14001, 123 Stat. at 279 (instructing governors to refrain from considering the type or mission of an institution of higher education).

14. *See infra* Part I.C.

I. THE EVOLUTION OF MODERN FEDERAL ESTABLISHMENT CLAUSE JURISPRUDENCE

A. *Attempting to Capture the Founder's Intent*

Though one would hardly dispute that Supreme Court decisions regarding separation of church and state have been anything but consistent, the Court has tried to act with an eye toward history, attempting to channel the intentions of our founding fathers.¹⁵ In *Everson v. Board of Education*,¹⁶ the Court reiterated the meaning of the Establishment Clause:

Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*.¹⁷

In addition, the Court quoted Thomas Jefferson's statement that the Establishment Clause was meant to create "a wall of separation between church and State."¹⁸

This 1947 *Everson* opinion reestablished a clear picture of the goal of the Establishment Clause, but provided no uniform, coherent way to test whether a particular government action violated the First Amendment.¹⁹ Finally, in 1971, the Court put forth a test of constitutionality in *Lemon v. Kurtzman*.²⁰ The *Lemon* test states: 1) A statute must have a secular *purpose*; 2) The primary *effect* of the statute can neither advance nor inhibit religion; and 3) A statute cannot support "excessive government *entanglement* with religion."²¹ The test

15. Cord & Ball, *supra* note 3, at 896.

16. *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947).

17. *Id.* at 15–16.

18. *Id.* at 16 (quoting *Reynolds v. United States*, 98 U.S. 145, 164 (1878)). It is from this phrase that we get the common reference to "separation of church and state." *Id.* The quoted phrase has been traced back to an 1802 reply letter from Jefferson to the Danbury Baptist Association commenting on the First Amendment. *Reynolds*, 98 U.S. at 164. See also Letter from Thomas Jefferson to the Danbury Baptists (Jan. 1, 1802), available at <http://www.loc.gov/loc/lcib/9806/danpre.html>.

19. Marcia S. Alembik, Note, *The Future of the Lemon Test: A Sweeter Alternative for Establishment Clause Analysis*, 40 GA. L. REV. 1171, 1177 (2006).

20. *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971); Alembik, *supra* note 19, at 1177–78.

21. *Lemon*, 403 U.S. at 612–13 (emphasis added).

may seem simple enough, but in the forty years since the *Lemon* test was announced, it has been criticized, modified, and sometimes even ignored by the Court.²²

One notable attempt to modify the *Lemon* test was Justice O'Connor's concurring opinion in *Lynch v. Donnelly*, which proposed a clarification of the purpose prong to make the test more applicable.²³ Justice O'Connor believed the proper question was whether the intent of the questioned government action was to "convey a message of endorsement or disapproval" of any particular religion.²⁴ The following year, in *Wallace v. Jaffree*, Justice O'Connor again expressed concerns over the applicability of the *Lemon* test.²⁵ Offering a further refinement of *Lemon*, Justice O'Connor suggested the analysis should focus on "whether an objective observer, acquainted with the text, legislative history, and implementation" of the state action, would consider it an endorsement of religion.²⁶ Despite these repeated attempts to clarify and refine the *Lemon* test, it continues to have a shaky reputation with the Court.²⁷

But not all believed modification was the answer; some felt that *Lemon* simply did not work in certain circumstances.²⁸ In a mark of departure, the Court in *Marsh v. Chambers* avoided applying *Lemon* to the Nebraska state legislature's practice of opening sessions with a prayer by introducing the alternative historical analysis/practice test.²⁹ In finding that the tradition did not violate the Establishment Clause, the Court stated historical patterns alone could not justify constitutional violations, but found the contested practice had "become part of the fabric of our society," thus making it a "tolerable acknowledgement" of widely held beliefs.³⁰ This was not the only alternative test developed by the Court. In *Lee v. Weisman*, the Court applied the coercion test to invalidate the giving of a prayer at a public school graduation.³¹ The

22. Alembik, *supra* note 19, at 1173–74.

23. *Lynch v. Donnelly*, 465 U.S. 668, 687, 691 (1984) (O'Connor, J., concurring).

24. *Id.* at 691. This clarification by Justice O'Connor came to be known as the "endorsement test" and was widely adopted by the courts. Alembik, *supra* note 19, at 1181–82. Courts continue to apply the endorsement test when analyzing the validity of government action under *Lemon*. *Id.*

25. *Wallace v. Jaffree*, 472 U.S. 38, 68–69 (1985) (O'Connor, J., concurring).

26. *Id.* at 76. Ten years later, Justice O'Connor further elaborated on the "objective observer" principle stating that it was like the "reasonable person" from tort law in that it was not an actual individual but a "personification of a community ideal." *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 779–80 (1995) (O'Connor, J., concurring).

27. See Alembik, *supra* note 19, at 1184–85.

28. See *id.* at 1189 (noting Justice Rehnquist found the *Lemon* test was "not useful" in dealing with the constitutionality of a religious monument erected in Texas).

29. *Marsh v. Chambers*, 463 U.S. 783, 786–88 (1983).

30. *Id.* at 790, 792.

31. *Lee v. Weisman*, 505 U.S. 577, 587 (1992).

Court held that the peer pressure to stand or remain silent during the prayer had the effect of coercing students to participate in religion, thus violating the Establishment Clause.³²

Despite the mixed reviews and departures, the Court has never officially overruled *Lemon*. Perhaps Justice Scalia said it best: “The secret of the *Lemon* test’s survival, I think, is that it is so easy to kill. It is there to scare us (and our audience) when we wish it to do so, but we can command it to return to the tomb at will.”³³ Some scholars suggest that the use of alternative tests and the general acceptance of Justice O’Connor’s “endorsement test” indicate that the Court is becoming more tolerant of overlap between government and religion.³⁴ One place this increasing tolerance appears is in the funding of RACs.

B. *Funding of RACs Under the Establishment Clause and Lemon*

Despite the seemingly strict construction of the language of the 1947 *Everson* opinion,³⁵ some believe Justice Black actually laid the groundwork for a “neutrality” principle which could allow such government funding if done on an equal basis.³⁶ In the years since *Everson*, this neutrality principle has taken one of three forms: 1) the ability to separate secular and sectarian functions of the RAC; 2) individual free choice of which school to attend where the funds pass to an RAC by way of individual tuition dollars; or 3) diversity of those benefitting from the aid.³⁷ The method that comes under the heaviest criticism, of course, is the first, where funds can pass directly to a RAC in what would seem to be an apparent violation of the Establishment Clause.

In the early 1970s, the Supreme Court approved certain direct government funding for RACs, opening a door in the wall of separation between church

32. *Id.* at 598.

33. *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 399 (1993) (Scalia, J., concurring). This statement by Justice Scalia could not have been truer than in June 2005, when the Court handed down two seemingly conflicting opinions on the constitutionality of Ten Commandments monuments on public property on the same day. Compare *Van Orden v. Perry*, 545 U.S. 677, 681, 682, 692 (2005) (plurality opinion) (holding that a display of the Ten Commandments which stood on the capitol grounds unopposed for nearly forty years did not violate the Establishment Clause), with *McCreary Cnty. v. ACLU of Ky.*, 545 U.S. 844, 855–56, 881 (2005) (concluding that a planned Ten Commandments monument on the courthouse grounds as part of a larger “Foundations of American Law and Government Display” did violate the Establishment Clause).

34. Alembik, *supra* note 19, at 1184.

35. See *supra* notes 16–19 and accompanying text.

36. D. Michael Murray, Note, *Rosenberger v. Rector & Board of Visitors of the University of Virginia: A Battle Between Establishment Clause Principles and First Amendment Clauses Further Weakens the Wall of Separation*, 46 DEPAUL L. REV. 569, 571–72 (1997).

37. *Id.* at 577.

and state.³⁸ In *Tilton v. Richardson*, the Court considered government funding of a RAC under the Higher Education Facilities Act of 1963.³⁹ Interestingly, this case was decided the same day as *Lemon* and applied the same principles, but unlike *Lemon*, the Court concluded that such funding was constitutional.⁴⁰ *Lemon* and *Tilton* were similar in issue: *Lemon* concerned government funding of a parochial secondary school, and *Tilton* involved funding for construction at a RAC.⁴¹ The *Tilton* Court felt that funding a college or university posed a much smaller danger because children at that age are far less impressionable.⁴² The Court also based its decision on the fact that the proposed facilities themselves were religiously neutral and that the university was committed to academic freedom.⁴³ Furthermore, the funding would be a one-time government grant rather than recurring financing, thus eliminating the need for continued government intervention or entanglement to ensure compliance.⁴⁴ This is in stark contrast to the major concern over the proposed funding in *Lemon*—funding of teachers' salaries at parochial primary and secondary schools—which the Court believed would require unfeasible government

38. See Marjorie Reiley Maguire, Comment, *Having One's Cake and Eating it Too: Government Funding and Religious Exemptions for Religiously Affiliated Colleges and Universities*, 1989 WIS. L. REV. 1061, 1063 (1989); see also *Roemer v. Bd. of Pub. Works*, 426 U.S. 736, 744, 766–67 (1976) (finding that annual funding to four Catholic colleges was not unconstitutional because the colleges were largely committed to academic freedom like public universities); *Hunt v. McNair*, 413 U.S. 734, 738, 749 (1973) (concluding that issuing revenue bonds to a religious university under South Carolina statute for purposes of construction and repair of certain campus facilities was constitutional); *Tilton v. Richardson*, 403 U.S. 672, 674–77, 689 (1971) (holding that religiously affiliated universities were eligible for federal funding like other institutions of higher learning and that such funding did not violate the Establishment Clause). Having opened this door, in 1975, government funding of RACs reached a half billion dollars. Maguire, *supra*, at 1066 n.21 (citing PAUL J. WEBER & DENNIS A. GILBERT, *PRIVATE CHURCHES AND PUBLIC MONEY: CHURCH-GOVERNMENT FISCAL RELATIONS* 101 (1981)).

39. *Tilton*, 403 U.S. at 674–75.

40. Maguire, *supra* note 38, at 1069; *Tilton*, 403 U.S. at 678, 689.

41. Maguire, *supra* note 38, at 1068–69.

42. See *Tilton*, 403 U.S. at 687–88. In addition to the higher level of maturity of college students, college attendance is also voluntary, which some also consider a basis for the dual constitutional treatment of funding primary and secondary schools versus colleges and universities. F. King Alexander, *The Decline and Fall of the Wall of Separation Between Church and State and Its Consequences for the Funding of Public and Private Institutions of Higher Education*, 10 U. FLA. J.L. & PUB. POL'Y 103, 114 (1998).

43. *Tilton*, 403 U.S. at 681 (finding that the facilities funded at the four institutions in question included two libraries, a language laboratory, a science building, and an arts and theater building and that there was no evidence that any religious indoctrination had “seep[ed]” into these facilities).

44. *Id.* at 687–88.

monitoring to ensure public money was not used to teach non-secular subjects.⁴⁵

Within five years, the Supreme Court upheld state funding of RACs in two additional cases, *Hunt v. McNair*⁴⁶ and *Roemer v. Board of Public Works*.⁴⁷ The issue in *Hunt* was very similar to that in *Tilton*, and the Court essentially affirmed its previous ruling, upholding a state grant of revenue bonds to fund construction of secular facilities at a Baptist university.⁴⁸ By contrast, the issue in *Roemer* involved a general (rather than “for construction”), annual (rather than one-time) grant of state funds.⁴⁹ Under the challenged state statute, funds could not “be utilized by the institutions for sectarian purposes.”⁵⁰ To help ensure compliance with the statute, all institutions receiving public money were required to submit an annual report identifying the subsidized expenditures.⁵¹ In holding the funding constitutional, the Court determined the universities were not “pervasively sectarian,” meaning a secular purpose was distinguishable from their religious affiliation.⁵² This determination was based largely upon evidence of academic freedom and a high degree of autonomy from the Catholic Church, despite the university holding religious exercises on campus and mandating theology courses.⁵³ Addressing the seemingly troublesome reporting requirement, the Court held it was not “excessive entanglement” because audits would be “quick and nonjudgmental,” due to the ease of separation between secular and sectarian activities.⁵⁴

In short, the Court seems permissive of neutral government funding of RACs. So long as funding is designated for a secular facility or project and the

45. See *Lemon v. Kurtzman*, 403 U.S. 602, 621–22 (1971). Thus, the stumbling block for the proposed funding in *Lemon* was the entanglement prong of the three prong test articulated by the Court. Maguire, *supra* note 38, at 1069.

46. *Hunt v. McNair*, 413 U.S. 734 (1973).

47. *Roemer v. Bd. of Pub. Works*, 426 U.S. 736 (1976).

48. Compare *Hunt*, 413 U.S. at 743–46, with *Tilton*, 403 U.S. 672.

49. *Roemer*, 426 U.S. at 736.

50. *Id.*

51. *Id.*

52. *Id.* at 755, 758.

53. *Id.* at 755–56. The Court found that the religious exercises were an optional spiritual development opportunity for students and were viewed as a secondary objective of the institution—secondary to academic achievement. *Id.* At the same time, while theology courses were a required part of the students’ academic curriculum, the Court regarded them as part of a well rounded liberal arts education. *Id.*

54. *Roemer*, 426 U.S. at 763–64. At first glance, the decision in *Roemer* seems to conflict with *Lemon*, where the Court struck down the reimbursement of parochial school teachers’ salaries for fear that the ongoing monitoring would constitute excessive entanglement. The real reason for the different outcomes likely stems from the fact that the Court did not believe that a religious elementary or secondary school could have a dominant purpose that was secular, whereas the idea of academic freedom tends to dominate at an institution of higher learning. See *Tilton v. Richardson*, 403 U.S. 672, 685–86 (1971).

institution has a separate and distinct purpose apart from its religious affiliation, the Court will likely uphold the funding. Congress also seems to embrace some degree of neutral funding of RACs, as evidenced most recently by ARRA—the 2009 stimulus package. The issues and debate surrounding this new legislation are discussed in the next section.

C. *Current Issues Surrounding Government Funding of RACs*

When ARRA was signed into law in February 2009, there was already much controversy over spending tax dollars to try to stimulate the national economy. But adding to that controversy was a new spending provision for “modernization, renovation, or repair” of public schools and institutions of higher learning.⁵⁵ The Act states “A Governor shall not consider the type or mission of an institution of higher education, and shall consider *any* institution for funding”⁵⁶ While the state must consider “religious” and public universities equally, the law makes it clear that funds may not be used to renovate or repair facilities “used for sectarian instruction or religious worship” or where “a substantial portion of the functions . . . are subsumed in a religious mission.”⁵⁷ Neither may funds be used for improvements to athletic or administrative facilities, general maintenance costs, or the purchase of vehicles.⁵⁸ Thus, ARRA once again opens the door for federal funding of RACs, so long as the money goes to secular educational instruction.

Despite the apparent contradiction of separation of church and state, the Act has sparked debates of being too restrictive. Former Arkansas governor Mike Huckabee and Senator Jim DeMint have called the stimulus package “anti-religious.”⁵⁹ Their concern was that the restrictions would prohibit *all* religious activity in a federally-funded building, which could affect student groups’ ability to hold meetings in those facilities.⁶⁰ DeMint proposed an amendment to the stimulus bill that would have removed the limitations on how RACs could utilize the federal funds.⁶¹ Ironically, if DeMint’s amendment had passed, eliminating the covenants restricting the use of the funds, the Act would most certainly have been unconstitutional—amounting to an unequivocal endorsement of religion in violation of the First Amendment.⁶² Rather, as the language of the Act stands, intermittent religious student activity

55. American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, § 14002(b)(1), 123 Stat. 115, 280 (codified in scattered sections of 26 U.S.C.).

56. *Id.* § 14002(b)(2), 123 Stat. at 281 (emphasis added).

57. *Id.* § 14004(c)(3), 123 Stat. at 281–82.

58. *Id.* § 14003(b), 123 Stat. at 281.

59. Tobin Grant, *Is the Stimulus Act Anti-Religious?*, CHRISTIANITY TODAY (Feb. 18, 2009, 1:23 PM), <http://www.christianitytoday.com/ct/2009/februaryweb-only/107-31.0.html>.

60. *Id.*

61. *Id.*

62. *Id.*

at institutions that receive the funding will not be affected so long as the main purpose of the building or facility is secular in nature.⁶³

On the flipside, others believe that the spending provision is too permissive. To quell those fears, the Act provides one final caveat: “Nothing in this section shall allow a local educational agency to engage in school modernization, renovation, or repair that is *inconsistent with State law*.”⁶⁴ This deference to state law can have a huge impact on the ability of a RAC to receive funding, because state constitutions and statutes can be far more restrictive than their federal counterparts. One example of such heightened restrictions is Section 189 of the Kentucky Constitution, the provision under which *University of the Cumberlands* was decided,⁶⁵ which states, “[n]o portion of any fund or tax . . . levied for educational purposes, shall be apportioned to, or used by, or in aid of, any church, sectarian or denominational school.”⁶⁶ The following section further explores these differences between federal and state guarantees of religious freedom.

II. A SURGE IN STATE ESTABLISHMENT CLAUSE JURISPRUDENCE

A. *Origin and Amendment of State Constitutional Guarantees of Religious Freedom*

Some of the guaranteed personal freedoms that Americans know and enjoy today actually predate the federal Bill of Rights, as several colonies drafted similar individual protections into their original charters.⁶⁷ These protections began to take the shape of a more formal “Bill of Rights” around the start of the American Revolution when the colonial governments were strongly encouraged to begin drafting their own “state” constitutions.⁶⁸ The Virginia

63. For a discussion of the circumstances under which federal courts will generally uphold government funding for constructing facilities at RACs, see *supra* Part I.B. Occasional use by student organizations wishing to conduct religious services and other religious activities does not make the primary function of the facility religious. *Widmar v. Vincent*, 454 U.S. 263, 273–75 (1981). Furthermore, the Supreme Court has held that once a building is constructed and made generally available for use by the public and student groups, it is unconstitutional for the university to deny access to religious student organizations. *Id.* at 277. Thus, concerns about student groups being turned away from such federally-funded buildings are without merit.

64. American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, § 14002(c), 123 Stat. 115, 281 (codified in scattered sections of 26 U.S.C.) (emphasis added).

65. For a full discussion of this provision and the Kentucky courts’ interpretation of it, see *infra* Part III.B.

66. KY. CONST. § 189.

67. See Pearson, *supra* note 5, at 48–49. Several colonial charters included guarantees of religious freedom as early as the late-1600s. *Id.* at 48.

68. *Id.* at 49. Some states chose to enumerate individual rights in a separate document, similar to the subsequent federal Bill of Rights, while other states incorporated them directly into the text of the constitution. *Id.* However, not all of the original thirteen states had formally

Declaration of Rights was the first to be drafted and was one of the most instrumental, heavily influencing several sister states as well as the federal Bill of Rights.⁶⁹

Even from the start, however, each state's bill of rights varied in specificity.⁷⁰ For example, the first Virginia Declaration of Rights, speaking on the right of religious freedom, simply stated "all men are equally entitled to the free exercise of religion, according to the dictates of conscience"⁷¹ The Pennsylvania Declaration of Rights was modeled after Virginia's, but included more detail,⁷² declaring "no man ought, or of right can be compelled to attend any religious worship, or erect or support any place of worship, or maintain any ministry, contrary to, or against his own free will and consent"⁷³ Many state constitutions have been amended multiple times since their enactment, and several now include significant detail concerning government entanglement with religion.⁷⁴

An important round of amendments came in the mid-1800s amid debate over taxation of private colleges and universities.⁷⁵ This, coupled with strong anti-immigrant and anti-Catholic sentiment, prompted states to add more restrictive provisions to their constitutions.⁷⁶ These amendments, generally called the Blaine Amendments, prohibit state legislatures from giving any financial aid or support to "sectarian" schools.⁷⁷ Immediately following the adoption of these provisions it was much more difficult for RACs to obtain public funding.⁷⁸ For nearly a century, state courts sent an unwavering message—all funding of RACs was prohibited, whether in the form of direct

adopted a Bill of Rights by the time of the American Revolution, or even by the adoption of the Constitution. *See* Wilentz, *supra* note 7, at 890.

69. Pearson, *supra* note 5, at 49–50.

70. *See id.* at 50–53.

71. VA. CONST. of 1776, chap. I, § 16 (1776).

72. Pearson, *supra* note 5, at 51–52.

73. PA. CONST. of 1776, chap. I, § 2 (1776).

74. *See* Pearson, *supra* note 5, at 62.

75. Alexander, *supra* note 42, at 111.

76. Frederick Mark Gedicks, *Reconstructing the Blaine Amendments*, 2 FIRST AMENDMENT L. REV. 85, 86 (2003).

77. *Id.* at 85. *See also* 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, 554–55 (2003). The Amendments are named for Representative James Blaine who proposed a similar amendment for the federal constitution but was unable to secure enough votes in Congress for its adoption. *Id.* at 556, 573. Today thirty-seven states still have such amendments in place. Gedicks, *supra* note 76, at 85. However, many have questioned the discriminatory nature of these amendments, and in recent years, courts have increasingly questioned their constitutionality. DeForrest, *supra*, at 606–07.

78. Alexander, *supra* note 42, at 111–12.

funding or indirect assistance through scholarships, grants, and vouchers.⁷⁹ When Congress and the Supreme Court began to take a more liberal view of funding RACs in the mid-twentieth century, state courts saw a change as well.⁸⁰

A. *State Adjudication of Challenges to Funding RACs*

In 1963, Congress passed the Higher Education Facilities Act,⁸¹ followed by the Higher Education Act of 1965⁸² which, like ARRA, provided funding for construction of “academic facilities” at institutions of higher education without distinguishing between public, private, and religious universities.⁸³ This led to several federal cases challenging such government funding, followed by the controversial Supreme Court decisions finding the practice constitutional.⁸⁴ The federal courts, however, were not the only ones adjudicating challenges of constitutionality. State courts also saw an increase in the number of cases challenging funding of RACs with litigants asserting a violation of *state* constitutional rights.⁸⁵

Some attribute this rise to the fact people were unhappy with the liberal decisions coming from the federal courts on the granting of government money to RACs.⁸⁶ It was becoming increasingly harder to overcome the mounting federal precedent tending to allow funding when it was allocated to academic facilities with little or no religious intertwining.⁸⁷ But when a state provision was also implicated, the state court could strike down the disfavored spending by finding that it did not violate the federal Establishment Clause, but that it did violate the more prohibitive state constitutional provision.⁸⁸ Furthermore, under *Michigan v. Long*, by adjudicating the issue on “adequate and

79. *Id.* at 112–13.

80. *Id.* at 113–14.

81. Higher Education Facilities Act of 1963, Pub. L. No. 88-204, § 106, 77 Stat. 363, 368 (1963) (codified in 20 U.S.C. § 1011 (1970)).

82. Higher Education Act of 1965, Pub. L. No. 89-329, § 111, 79 Stat. 1219, 1224 (1965) (codified in 20 U.S.C. § 716 (1964)).

83. Alexander, *supra* note 42, at 115.

84. *See supra* Part I.B.

85. This was part of the New Judicial Federalism movement. Jennifer DiGiovanni, *Justice Charles M. Leibson and the Revival of State Constitutional Law: A Microcosm of a Movement*, 86 KY. L.J. 1009, 1014 (1998).

86. *See* Wilentz, *supra* note 7, at 893.

87. *See supra* Part I.B.

88. *See* Wilentz, *supra* note 7, at 892. Under such a practice the state court would adjudicate the issue on an “adequate and independent state ground.” DiGiovanni, *supra* note 85, at 1016. This practice was heavily criticized, however, due to the Supreme Court’s jurisdictional inability to review a state supreme court decision decided on independent grounds. *Id.* Some believe that this practice allowed what was truly a federal question to be wrongly decided. *Id.*

independent state grounds,” the ruling was not subject to review by the Supreme Court.⁸⁹

But bringing the action before a state court also provided an opportunity for a new viewpoint into whether an institution was wholly “religious” in nature. One of the leading cases of the time, *Horace Mann League v. Board of Public Works*,⁹⁰ was influential more for the way the decision was reached rather than for the decision itself. In *Horace Mann League*, the Maryland Court of Appeals considered the constitutionality of a matching grant—a type of direct funding—to four religious colleges under both federal and state law.⁹¹ The court ultimately concluded that funding to three of the schools violated the First Amendment due to the sectarian nature of the institutions.⁹² But in reaching this decision, the court looked at six different criteria: 1) the stated purpose of the college; 2) the religious control of the governing board; 3) the extent of financial assistance from and, affiliation with, religious organizations; 4) the prominence of religion at the school—including in the curriculum, the architecture, and sponsorship of religious activities; 5) the accreditation of the program and activities of alumni; and 6) the work and image of the college within the community.⁹³

The criteria used in *Horace Mann League* continue to play a role in challenges to RAC funding even today. Several states with more restrictive constitutional provisions must determine whether the institution receiving the challenged funding is indeed “religious.”⁹⁴ As seen in the case studies below, some of these state courts look to similar criteria as those used by the Maryland Court to determine the true nature of these schools.⁹⁵ But, as is also evident from the case studies, not every state approaches challenges to RAC funding in the same way, thus raising concerns of Equal Protection.⁹⁶

89. *Michigan v. Long*, 463 U.S. 1032, 1041 (1983). Where the state issues were interwoven with federal law, a state had to make it clear that any federal precedent used in the course of the decision was merely for guidance and did not compel the court to reach the conclusion that it did. Only then would the Supreme Court find the state grounds to be “adequate and independent,” and thus not subject to its appellate review. *Id.* at 1040–41.

90. *Horace Mann League v. Bd. of Pub. Works*, 220 A.2d 51 (Md. 1966).

91. *Id.* at 53.

92. *Id.* at 67–69, 73.

93. *Id.* at 65–66.

94. *See, e.g., id.* at 60.

95. *See infra* notes 126–32 and accompanying text.

96. Equal Protection, of course, refers to the provision “[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws.” U.S. CONST. amend. XIV, § 1.

III. CASE STUDIES: RECENT STATE CONSTITUTIONAL CASES ON FUNDING RACs

A. *Case Study*: Saint Louis University v. Masonic Temple Association of St. Louis

1. Facts, Arguments, and Court Findings

In 2007, the Missouri Supreme Court considered the constitutionality of using public funding for construction of a new arena at Saint Louis University, a Jesuit Catholic university.⁹⁷ The university was granted \$8 million dollars in tax increment financing (TIF)⁹⁸ by the City of St. Louis toward construction of a 13,000-seat arena for sporting events, graduations, and various other secular purposes.⁹⁹ The arena was also part of a larger city-wide redevelopment project for blighted areas.¹⁰⁰ The city had passed an ordinance to establish the necessary TIF assistance for the arena and other redevelopment projects that were secular in nature, including theaters, parking areas, housing, and educational facilities.¹⁰¹

The Masonic Temple Association of St. Louis (Masons) objected to the funding, arguing that it violated the Missouri Establishment Clause because the university was controlled by a religious creed.¹⁰² The Missouri Constitution is more restrictive than others on the guarantee of religious freedom, stating “no preference shall be given to . . . any church, sect or creed of religion, or any form of religious faith or worship,” with “preference” stated to include public funding.¹⁰³ More specifically, with respect to education, the Missouri Constitution mandates that no government municipality “shall ever make an appropriation . . . to help to support or sustain any private or public school, academy, seminary, college, university, or other institution of learning

97. *Saint Louis Univ. v. Masonic Temple Ass’n of St. Louis*, 220 S.W.3d 721, 721 (Mo. 2007).

98. The way such tax increment financing works is that for each year following the planned project, the taxpayer will make payments instead of paying taxes on the increased valuation of the property. *See Tax Increment Fin. Comm’n v. J.E. Dunn Constr. Co.*, 781 S.W.2d 70, 73 (Mo. 1989). The amount of the payment is equal to what would have been collected in tax revenue on the increase in assessed value due to the redevelopment project. *Id.* Payments are then placed in a special fund and used as security for the bonds that were issued by the city to fund the project. *Id.*

99. *Saint Louis Univ.*, 220 S.W.3d at 724.

100. *Id.* at 724–25. The city’s redevelopment plan stated that the redevelopment area was the cultural theater and artistic center for the city, an area which also included SLU. SAINT LOUIS, MO., CITY ORDINANCES, *Introduction* to ORDINANCE 65703 (2002–2003). The plan also stated that SLU continued to “serve as an invaluable educational and cultural entities [sic].” *Id.*

101. SAINT LOUIS, MO., CITY ORDINANCES, at Exhibit IV.

102. *Saint Louis Univ.*, 220 S.W.3d at 726.

103. MO. CONST. art. I, § 7.

controlled by any religious creed.”¹⁰⁴ Therefore, to determine whether there was a constitutional violation, the court needed to look at the history and mission of the university.

Saint Louis University (SLU) evolved from the St. Louis Academy, founded by the Jesuits in 1818.¹⁰⁵ Today, the university is run by a president who has general control over the management and direction of the business and educational affairs of the university.¹⁰⁶ Per the university bylaws, the president serves as a single member of the Board of Trustees, which controls operations of the university by majority vote.¹⁰⁷ The bylaws also require that the Board be composed of 25 to 55 members, where not less than 6 but not more than 12 must be Jesuits.¹⁰⁸ The remaining trustees, SLU faculty, and student body include non-Catholics and persons with no religious affiliation at all.¹⁰⁹ The university tradition, however, admittedly tends to follow Jesuit philosophies and ideals.¹¹⁰

It is this Jesuit tradition which formed the heart of the dispute.¹¹¹ The Masons argued that a governing board could be independent and still be controlled by a religious creed, if required to operate under a set of laws founded on religion, which the Masons believed was the case with SLU.¹¹² According to the Masons, the school’s own mission statement promoted “the pursuit of truth for the greater glory of God” and dedication to a “continuing quest for understanding of God’s creation . . . and integration of the values, knowledge and skills required to transform Society in the spirit of the Gospels.”¹¹³

The American Civil Liberties Union of Eastern Missouri (ACLU) filed an amicus brief which further bolstered the Mason’s argument that SLU was governed by a religious creed, drawing attention to the university’s official website.¹¹⁴ The ACLU noted that the website advertised a “Jesuit Education Since 1818” on each page and, at the time, featured a picture of the current

104. *Id.* § 8.

105. *Saint Louis Univ.*, 220 S.W.3d at 724.

106. *Id.* At the time the case was being decided, the current president of the university was in fact a Jesuit priest, but following recent amendments to the university bylaws, it is no longer required that the president be a member of the Jesuit order. *Id.* at 724 n.3.

107. *Id.* at 724.

108. *Id.* At the time of this suit, 9 out of a total of 42 trustees were Jesuits. *Id.*

109. *Id.* At the time of this suit, fewer than one-half of the student body considered themselves Catholics. *Id.*

110. *Saint Louis Univ.*, 220 S.W.3d at 724.

111. Brief for Defendant-Appellant at 24–25, *Saint Louis Univ.*, 220 S.W.3d 721 (No. SC88075).

112. *Id.* at 29.

113. *Id.*

114. Brief for ACLU of E. Mo. as Amicus Curiae Supporting Appellants at 14, *Saint Louis Univ.*, 220 S.W.3d 721 (No. SC88075).

Jesuit president dressed in clerical clothing.¹¹⁵ It also highlighted a quote from a SLU professor that said, “SLU is a great place to grow personally as well as spiritually”¹¹⁶ In addition, the ACLU argued that the Student Life section listed Sunday mass as the Catholic students’ “primary celebration of our eucharistic community” and also named multiple other programs where students and faculty could further their faith and spirituality.¹¹⁷ The ACLU also argued that students themselves were under the impression that they were attending a Catholic university.¹¹⁸

Responding to the attack on its mission, SLU acknowledged that in honor of tradition it intended to be “*identified*,” “*motivated*,” and “*guided*” by Catholic and spiritual ideals, but that it was not “*controlled by*” these purposes.¹¹⁹ Rather, SLU argued that the purposes of the university, as set forth in the charter, were “the encouragement of learning and the extension of the means of education.”¹²⁰ Furthermore, SLU declared it was committed to serving the community, the nation, and the world through teaching, research, and communication of knowledge, much like many other American universities.¹²¹ This commitment to service and academics, SLU argued, was a clear indicator that the university was not controlled by a religious creed.¹²² SLU further argued that these values were a “philosophy of education and a system of character formation” designed to teach students to take lessons from the classroom and reach out to the community, thus helping students to become responsible, contributing members of society.¹²³

The district court agreed with SLU and granted summary judgment in favor of the university.¹²⁴ The Masons appealed to the Missouri Court of Appeals, but due to the important nature and general public interest of the issue, it was transferred to the Missouri Supreme Court before a ruling was issued.¹²⁵ Following the transfer, the Missouri Supreme Court determined the

115. *Id.*

116. *Id.* at 15.

117. *Id.* at 15, 16.

118. *Id.* at 16. To support this argument, the ACLU cited student debate and opposition over adding a socialist-leaning student organization on the ground that the views and principles of socialism went against the Catholic Church. *Id.* at 16–17.

119. Substitute Brief of Respondent Saint Louis Univ. at 50, *Saint Louis Univ.*, 220 S.W.3d 721 (No. SC88075) (emphasis added).

120. *Id.* at 48.

121. *Id.* at 48–49.

122. *Id.* at 49.

123. *Id.* at 51.

124. *Saint Louis Univ.*, 220 S.W.3d at 725.

125. *Id.* The Missouri Constitution grants jurisdiction for order of transfer to the Supreme Court when a majority of the court of appeals justices believe the question is of general interest or importance. MO. CONST. art. V, § 10. Such order for transfer may be made either before or after the appellate court has issued an opinion in the case. *Id.*

key question was not whether the university has *any* affiliation with religion, but whether that religious component “pervades the atmosphere” to give the effect of religious control.¹²⁶ While operation under a religious creed tends to indicate the religious affiliation is controlling, mere tradition and aspiration to follow the ideals of a given religion or sect are not proof of control by a religious creed—“appreciation for” and “control by” are two different things.¹²⁷

Speaking more specifically on the issue of control, the court found it of great importance that the university operated under an independent and religiously diverse Board of Trustees.¹²⁸ Although the university bylaws stated SLU will be publicly identified as a Catholic and Jesuit university and will be motivated by the moral values of the Judeo-Christian tradition, the court held this was insufficient to show *control* by a religious creed.¹²⁹ Similarly, there was no indication that these aspirations dominated campus life or restricted academic freedom, including research and inquiry into matters contrary to traditional Catholic teachings.¹³⁰ The court further noted that the purpose of the proposed arena was to provide a venue for secular student and *community* events while improving a deteriorated and blighted area of the city.¹³¹ Thus, the court held the ordinance allocating TIF funding for construction of the arena was constitutional.¹³²

126. *Saint Louis Univ.*, 220 S.W.3d at 726.

127. *Id.* at 727.

128. *Id.* The Missouri Supreme Court had previously held that the existence of an independent board of directors is a strong indicator that a university is not “controlled” by religion. *See Ams. United v. Rogers*, 538 S.W.2d 711, 721 (Mo. 1976).

129. *Saint Louis Univ.*, 220 S.W.3d at 727–28.

130. *Id.* at 728.

131. *Id.*

132. *Id.* Interestingly, the Missouri Court of Appeals reached largely the same conclusion based on the arguments presented to it prior to the transfer to the Missouri Supreme Court. In the opinion, the court stated that to interpret “control” to mean any kind of religious affiliation would unduly expand the reach of the prohibition in Article IX, Section 8 of the Missouri Constitution. *Saint Louis Univ. v. Masonic Temple Ass’n of St. Louis*, No. ED 86804, 2006 WL 2805606, at *4 (Mo. Ct. App., Oct. 3, 2006). Instead, the court said the provision must be read to exclude government aid only when the affiliated religion is advanced through operation of the school. *Id.* The court of appeals also looked at the purpose of the proposed building—a sports arena—and noted that such a building was for a secular rather than religious purpose. *Id.* Following the Missouri Supreme Court’s decision, SLU’s Chaifetz Arena was completed in April 2008, providing a midsize multipurpose venue within St. Louis City limits, a venue size previously unavailable in the downtown area. Kevin C. Johnson, *On the Scene*, ST. LOUIS POST-DISPATCH (GET OUT), Jan. 31, 2008, at 15.

2. Analysis of the Court's Decision

The fact the arena was intended to benefit the community as a whole was perhaps underemphasized by the court. Indeed, only about half of the bookings at the arena are directly linked to SLU, with many of these events being men's and women's basketball games.¹³³ Arguably it would have been easy to adjudicate this issue on the fact that the project belonged to the community rather than the university. But instead, the court took on the tougher question of what constitutes a "religious" university.

To answer this question, the court focused almost exclusively on the university's mission and religious control of university governance—two of the same factors considered by the court in *Horace Mann League*.¹³⁴ The Missouri Supreme Court ultimately found that evidence of academic freedom in research and the independence of the governing board provided sufficient separation from the Church.¹³⁵ Such findings are also in line with the Supreme Court's findings in *Tilton* and *Roemer*, where academic freedom and independence from the Church weighed heavily in the decisions that funding RACs was constitutional.¹³⁶

Interestingly, another *Horace Mann League* factor—image—was addressed by the ACLU in their amicus brief, where they claimed SLU's website promoted a Catholic school,¹³⁷ but was not discussed by the Missouri Supreme Court.¹³⁸ The power of a website in modern society to promote an organization's image and influence public opinion is undeniable, as many people today turn to the Internet first when looking for information on a business or organization. However, the ACLU's argument seems to fall short after looking at the current university website. Visitors are greeted by a banner of pictures featuring a variety of current events and by important information pertaining to the university and the community.¹³⁹ Items appearing on the banner in the past have included choosing a major, new programs available at SLU, Billiken (SLU's mascot) sports, study abroad opportunities, best places to hang out in St. Louis, and spiritual growth.¹⁴⁰ Information on "spirituality,"

133. Johnson, *supra* note 132.

134. In fact, these were the first two factors named by the court in *Horace Mann League*. See *supra* note 93 and accompanying text.

135. See *supra* notes 128–30 and accompanying text.

136. See *supra* notes 42, 52–53 and accompanying text.

137. See *supra* notes 114–16 and accompanying text.

138. See *Saint Louis Univ. v. Masonic Temple Ass'n of St. Louis*, 220 S.W.3d 721, 726–28 (Mo. 2007) (analyzing any potential violation of the Missouri Establishment Clause by looking only at the Mason's arguments of control by religious creed through SLU's Jesuit affiliation and governance structure.).

139. SAINT LOUIS UNIV., <http://www.slu.edu/index.xml> (last visited Nov. 14, 2010).

140. *Id.* The website is updated periodically to reflect the news, events, and information most current or pertinent for the time of year or what is happening in current events, so not all items

the “Jesuit tradition,” and “campus ministry” is displayed no more prominently than any other information to be conveyed to prospective students or parents.¹⁴¹ Arguably, the appearance of such information is irrelevant to the question of religious control, since the website of nearly every university in America, including public universities, contains information on different religious organizations and opportunities to attend religious services.¹⁴²

Taking into account all the factors—the mission of the university, the practice of academic freedom in all scholastic fields, the independence of the governing board, and the religious diversity among students and faculty—the court reached the proper decision in this case. But even more importantly, looking at the larger picture, the Missouri Supreme Court based its decision on much the same factual analysis found in other similar state and federal funding cases. The establishment of this precedent helps alleviate concerns of inequality when adjudicating RAC funding challenges under Missouri constitutional law.¹⁴³

B. Case Study: University of the Cumberlands v. Pennybacker

1. Facts, Arguments, and Court Findings

In 2010, the Kentucky Supreme Court decided the constitutionality of using public funding to construct a new pharmacy school at University of the Cumberlands (UC).¹⁴⁴ UC, formerly called Cumberland College, is a small private school that was founded by Baptists in 1887.¹⁴⁵ The college is located in Williamsburg, Kentucky, the heart of Appalachia, and has historically served students from this rural mountain region.¹⁴⁶ The university specializes

appear in the banner at all times. For instance, during the World Cup, the banner included a feature on SLU soccer with a Q&A with SLU’s soccer coach. Those items not featured in the banner are generally still available via other links on the website. *Id.*

141. A link to information on the Jesuit tradition is found under the section for prospective students under “About SLU.” *About SLU*, SAINT LOUIS UNIV., <http://www.slu.edu/x5029.xml> (last visited Nov. 14, 2010). The information on spiritual opportunities appears under “Campus Life.” *Campus Life*, SAINT LOUIS UNIV., <http://www.slu.edu/x24194.xml> (last visited Nov. 14, 2010). There is a section on faith, but the page also contains links for Greek life, the recreation center, residential life, clubs, and Busch Student Center, among others. *Id.*

142. For example, University of Missouri-Columbia, the leading state university in Missouri, also includes information regarding religious opportunities and activities for students on its website. *Chancellor’s Diversity Initiative*, UNIV. OF MO., <http://diversity.missouri.edu/resources/religious.html> (last visited Nov. 14, 2010).

143. *Saint Louis Univ.*, 220 S.W.3d at 726–29.

144. *Univ. of the Cumberlands v. Pennybacker*, 308 S.W.3d 668, 679 (Ky. 2010), *aff’g* *Pennybacker v. Beshear*, No. 06-CI-00554, 2008 WL 644848 (Franklin Cir. Ct. Mar. 6, 2008).

145. *Id.* at 671.

146. *Pennybacker*, 2008 WL 644848, at *3.

in a broad-based “liberal arts education enriched with Christian values.”¹⁴⁷ UC is also associated with the Kentucky Baptist Convention (KBC) and the Southern Baptist Convention.¹⁴⁸ In 2006, the Kentucky General Assembly granted \$10 million dollars for use in construction of a new pharmacy school on the campus.¹⁴⁹ The grant did not include a restriction on the use of the building, but the university submitted a memorandum guaranteeing it would use the building for secular education only or transfer possession to the county if it could not meet this promise.¹⁵⁰

Like *Saint Louis University*, this case was also decided under state constitutional law.¹⁵¹ The Kentucky’s Right of Religious Freedom states “[n]o preference shall ever be given by law to any religious sect, society, or denomination . . . nor shall any person be compelled to attend any place of worship, to contribute to the erection or maintenance of any such place”¹⁵² And like Missouri, the Kentucky Constitution also includes a similar specific provision with regard to government funding of education.¹⁵³ Section 189 of the Kentucky Constitution creates a further restriction against government involvement with religion, providing that “[n]o portion of any fund or tax . . . levied for educational purposes, shall be appropriated to, or used by, or in aid of, any church, sectarian or denominational school.”¹⁵⁴ Despite this similarity to the Missouri provision, here the Franklin Circuit Court ruled against the university, finding that the appropriation violated both Sections 5 and 189 of the Kentucky Constitution.¹⁵⁵ UC appealed the

147. *Univ. of the Cumberlands*, 308 S.W.3d at 671.

148. *Id.*

149. *Id.* The grant was apparently meant to help address the statewide shortage of licensed pharmacists. It was part of a larger three-part funding plan which included 80 million dollars to the University of Kentucky for construction of a Biological/Pharmaceutical complex and the formation of a Pharmacy Scholarship Program, and the 10 million dollars to UC for construction of a pharmacy school. See Brief for Appellant at 3, *Univ. of the Cumberlands*, 308 S.W.3d 668 (No. 2008-SC-00253-TG). The appropriation made to UC was in the form of bond financing, where the Kentucky Infrastructure Authority sold bonds to private investors. *Univ. of the Cumberlands*, 308 S.W.3d at 671. Pursuant to state law, principal was paid using taxes on coal severance, and interest payments came from the General Fund. *Id.*

150. *Id.* at 672. The agreement was between the Commonwealth itself and the university, and could be cancelled by either party at any time for “cause.” *Pennybacker*, 2008 WL 644848, at *2. For a look at how little information the legislative grant included, see 2006 Ky. Acts 201.

151. *Univ. of the Cumberlands*, 308 S.W.3d at 671.

152. KY. CONST. § 5.

153. Compare KY. CONST. § 189, with MO. CONST. art. IX, § 8.

154. KY. CONST. § 189.

155. *Pennybacker*, 2008 WL 644848, at *2. The circuit court based this decision on *Fiscal Court of Jefferson County v. Brady*, a 1994 Kentucky Supreme Court decision, which used the entanglement prong of the *Lemon* test as guidance in determining that direct funding of non-public schools was a violation of the Kentucky constitution. *Id.* at *4–*5. The circuit court believed the funding allocated to UC was exactly the kind of direct funding the Kentucky

judgment to the court of appeals but then successfully moved to transfer the case to the Kentucky Supreme Court.¹⁵⁶

Unlike in *Saint Louis University*, the issue in this case focused not on whether UC was a “religious” university, but whether the funds were raised for educational purposes.¹⁵⁷ To this end, UC argued the appropriation was constitutional because it fulfilled a public need.¹⁵⁸ Indeed, the Kentucky Supreme Court has previously held “a private agency may be utilized as the pipe-line through which a public expenditure is made, the test being not who receives the money, but the character of the use for which it is expended.”¹⁵⁹ UC argued that these permitted “private” institutions must necessarily also include RACs.¹⁶⁰ They argued that the circuit court’s interpretation of Section 189 was overbroad and would exclude religious institutions like UC from *all* funding, not just from restricted educational funding.¹⁶¹ The university further argued that the funds in question were not raised for “educational purposes,” which would be restricted under Section 189, but rather that they were raised for “health and welfare purpose[s],” to address the healthcare problem of a statewide pharmacist shortage.¹⁶²

In attacking UC’s argument on the use of the funds, Rev. Albert M. Pennybacker and those who joined him in opposing the grant argued there was no evidence of any shortage of pharmacists.¹⁶³ They further stated that the memorandum, meant to act as a safeguard against any secular use of the funds, was worthless, stating that it “might as well have been written with

Supreme Court had overruled in *Brady*. *Id.* at *3–*4 (citing Fiscal Court of Jefferson Cnty. v. Brady, 885 S.W.2d 681, 686 (Ky. 1994)).

156. *Univ. of the Cumberlands*, 308 S.W.3d at 671. Kentucky Rules of Civil Procedure provide that within ten days of filing an appeal with the court of appeals, a party may file a motion for transfer to the supreme court. The supreme court retains discretion to grant or deny the motion for transfer but will take into consideration whether the case is one of public importance. KY. R. CIV. P. 74.02.

157. *Univ. of the Cumberlands*, 308 S.W.3d at 673–74.

158. See Brief for Appellant, *supra* note 149, at 16–17.

159. Ky. Bldg. Comm’n v. Efron, 220 S.W.2d 836, 837 (Ky. 1949).

160. Brief for Appellant, *supra* note 149, at 18.

161. *Id.* (emphasis added).

162. *Id.* The funding was appropriated from the Infrastructure for Economic Development Bond Pool, a pool that was frequently used to fund projects to serve the medical and healthcare needs of Kentucky residents. *Id.* at 8. Indeed, additional “pharmacy” and health related projects were part of the same legislative grant giving UC the money for construction. See generally 2006 Ky. Acts 252.

163. Brief of Appellees at 15, *Univ. of the Cumberlands v. Pennybacker*, 308 S.W.3d 668 (Ky. 2010) (No. 2008-SC-00253-TG). Appellees argued that the only piece of evidence was prepared two months after the appropriation and thus could not have been considered by the legislature when making its decision. *Id.* at 5.

disappearing ink.”¹⁶⁴ Interestingly, in addition to the main argument focusing on the purpose of the funds, Pennybacker also outlined that the intent of the KBC in supporting UC was to “advance the Kingdom of God in the area of Christian higher education.”¹⁶⁵ As evidence of these deeply entrenched values, Pennybacker highlighted a recent incident where the university expelled a student purportedly for his sexual orientation.¹⁶⁶

Though UC made a valiant technical argument for the constitutionality of the funding, things did not look promising for the university even before an official ruling was made. Following oral arguments before the Kentucky Supreme Court, *The Courier-Journal* out of Louisville reported that several justices were skeptical of how such funding could be allowed under the clear language of Section 189.¹⁶⁷ Chief Justice John Minton reportedly seemed especially unwilling to accept the argument that “pharmacy education is not education,” a necessary prerequisite to finding the funding constitutional.¹⁶⁸

The Kentucky Supreme Court ultimately ruled against the university, finding the appropriation unconstitutional.¹⁶⁹ In reaching this decision, the court briefly discussed the apparent religious nature of UC, finding it was clearly a “church, sectarian, or denominational school” covered by Section 189.¹⁷⁰ The court further stated that the memorandum UC had signed, guaranteeing the secular use of the funds, could not change the nature of the institution itself.¹⁷¹ Determining UC fell under the restriction of Section 189, the court turned its attention to whether the funds were for the prohibited educational purpose.¹⁷² Responding to UC’s health and welfare argument, the court asked: How does construction of a building on campus address the pharmacist shortage unless students are *educated* so they can pass the state exam?¹⁷³ The court found this case distinguishable from *Kentucky Building Commission v. Effron*¹⁷⁴ because there the funds were appropriated to a religiously-affiliated hospital; thus the issue of whether the funds were for

164. *Id.* at 15. Recall that either party could cancel the agreement for cause. See *supra* note 150 and accompanying text.

165. Brief of Appellees, *supra* note 163, at 2.

166. *Id.* at 10.

167. Deborah Yetter, *Court Hears Case of Funding for Cumberland’s Pharmacy School*, *COURIER-J.*, Sept. 25, 2009, at B5.

168. *Id.*

169. *Univ. of the Cumberlands*, 308 S.W.3d at 679.

170. *Id.* at 673. The court used much of the same language concerning the KBC’s purpose in supporting UC that Pennybacker and the other appellees had included in their brief. Compare *id.*, with source cited *supra* note 165 and accompanying text.

171. *Univ. of the Cumberlands*, 308 S.W.3d at 673.

172. *Id.* at 673–74.

173. *Id.* at 674 (emphasis added).

174. *Ky. Bldg. Comm’n v. Effron*, 220 S.W.2d 836 (Ky. 1949).

educational purposes was not raised.¹⁷⁵ Rather, the court equated the proposed facility to a textbook, finding they were equally for educational purposes,¹⁷⁶ and relied on *Fannin v. Williams*, where the court banned the supply of textbooks to non-public schools,¹⁷⁷ to find the UC funding unconstitutional under Section 189.¹⁷⁸

2. Analysis of the Court's Decision

Supporters of UC argued that Section 189 of the Kentucky Constitution was one of the discriminatory nineteenth century Blaine Amendments which, given the nature and history of these amendments, raised Equal Protection concerns.¹⁷⁹ But as evidenced by *Saint Louis University*, some states with these more restrictive provisions are adjudicating constitutional challenges in a manner that is consistent with other federal and state case law that is permissive toward RAC funding.¹⁸⁰ Unfortunately, the Kentucky Supreme Court largely glossed over the issue of whether UC was a “religious” university, taking its affiliation with the KBC as undeniable proof that it was, forcing the outcome of this case, like so many before, to turn on the use of the funds themselves.¹⁸¹ Thus, we have not been able to see where Kentucky would stand in an examination of factors similar to those used by courts in cases such as *Saint Louis University* and *Horace Mann League*.

Because the Kentucky Supreme Court failed to address the issue, it is useful to independently analyze how this case may have been decided had the doctrines of cases like *Tilton*, *Roemer*, and *Saint Louis University* been applied. First, one must look at the mission statement and purpose of the university itself. Here, UC openly promotes that it strives “to graduate men and women with Christian values derived from spiritual and intellectual experience within the university community as well as from the traditional academic disciplines.”¹⁸² This commitment to Christian values attracted some

175. *Univ. of the Cumberlands*, 308 S.W.3d at 674 (discussing *Ky. Bldg. Comm'n*, 220 S.W.2d at 838).

176. *Id.* at 675.

177. *Fannin v. Williams*, 655 S.W.2d 480, 484 (Ky. 1983).

178. *Univ. of the Cumberlands*, 308 S.W.3d at 675, 679.

179. Brief for the Becket Fund for Religious Liberty as Amicus Curiae Supporting Appellants at 5, 12, *Univ. of the Cumberlands v. Pennybacker*, 308 S.W.3d 668 (No. 2008-SC-000253-TG).

180. *See supra* Part III.A.2.

181. *Univ. of the Cumberlands*, 308 S.W.3d at 673.

182. UNIV. OF THE CUMBERLANDS, 2010–2011 UNDERGRADUATE CATALOG 1, available at http://www.ucumberland.edu/academics/catalog/2010_UG.pdf. As part of its General Education Curriculum, all students are required to take six credit hours in Christian Faith. *Id.* at 30. One of the classes toward this requirement must be either Old Testament Survey or New Testament Survey. *Id.* SLU also requires nine credit hours in Theology as part of its Bachelor of Arts core curriculum. *College of Arts and Sciences Bachelor of Arts Core Curriculum Requirement*, SAINT LOUIS UNIV., <http://www.slu.edu/x12584.xml> (last visited Nov. 14, 2010). SLU students must

unwanted press in 2006, after a student was reportedly expelled for violating a university policy forbidding promotion of homosexuality after he openly discussed his sexual orientation on a MySpace page.¹⁸³ The issue hit the papers again in 2009 when the university rescinded its offer to a Texas youth group to come help build homes for the poor, after the group openly endorsed homosexual behavior.¹⁸⁴ Interestingly, UC also stated that it “encourage[d] students to think critically and creatively . . . [to] prepare themselves for lives of responsible service and leadership.”¹⁸⁵ This is similar to one of the goals stressed by SLU that helped show the court that the university was committed to academic freedom.¹⁸⁶ Academic freedom in areas inconsistent with core religious values can go a long way in determining a school is not pervasively sectarian.¹⁸⁷ Unfortunately, the recurring intolerances at UC seem to indicate there is not a high degree of freedom and that, perhaps, UC is incapable of separating itself from its religious affiliation.

Next, it is helpful to look at the governing structure of the university. Unfortunately, as this topic was not going to be addressed by the court, it was not briefed by the parties, and therefore, there is less information available here than in *Saint Louis University*. It is clear, however, that the university utilizes several committees, the first and foremost being the President’s Cabinet.¹⁸⁸

take THEO 100, a foundational course, followed by a 200 and 300 level course of their choice. *Id.* For a Bachelor of Science at SLU, the requirement is only six hours, dropping the 300 level course requirement. *College of Arts and Sciences Bachelor of Science Core Curriculum Requirement*, SAINT LOUIS UNIV., <http://www.slu.edu/x12585.xml> (last visited Nov. 14, 2010). This course requirement was not addressed by the court in *Saint Louis University*, but was one of the factors listed by the court in *Horace Mann League*. See *supra* note 93 and accompanying text. Given the large number and variety of courses offered at SLU that fulfill this requirement, perhaps the Missouri Supreme Court did not find it problematic. Indeed, a look at the SLU course catalog shows that students can choose from classes like American Christianity, Jerusalem: City of Three Faiths, African American Christian Traditions, and Religion and Science. SAINT LOUIS UNIV., COLLEGE OF ARTS AND SCIENCES UNDERGRADUATE CATALOGUE: THEOLOGY 1, 3, *available at* <http://www.slu.edu/x30851.xml>. The relatively small number of courses available to UC students to fulfill the requirement could have weighed negatively against the university. See UNIV. OF THE CUMBERLANDS, *supra*, at 30.

183. Mark Pitsch, *Student Expelled from University of Cumberland for Being Gay*, COURIER-J., Apr. 11, 2006, at B1.

184. David Hawpe, *A Lesson in Love at University of the Cumberland*, COURIER-J., July 8, 2009, at A6.

185. UNIV. OF THE CUMBERLANDS, *supra* note 182, at 3.

186. See *supra* notes 122–23 and accompanying text.

187. See *supra* note 130 and accompanying text.

188. UNIV. OF THE CUMBERLANDS, STANDING COMMITTEES OF THE UNIVERSITY OF THE CUMBERLANDS, 2009–2010, *available at* <http://www.ucumberland.edu/faculty/downloads/committeelist.pdf> (listing the positions and responsibilities of each committee and the names of its members for the current academic year). In addition to the President’s Cabinet, other committees include Academic Appeals, Athletic, Catalog and Curriculum, Cultural Arts, and

The President's Cabinet is responsible for overseeing day-to-day activities and creating a strategic plan for the future.¹⁸⁹ It is made up of nine officers of the university, including the university president.¹⁹⁰ Sadly, there is no readily-available information on the religious affiliation of the members of the President's Cabinet, nor on whether the Cabinet must report to the KBC. It is hard to determine, therefore, if UC has the kind of independent governance necessary to show it is not religiously controlled.

Finally, it is useful to evaluate the image promoted by the school on its website and how that compares with SLU. Like SLU, visitors to the UC website are greeted by a banner of pictures and information.¹⁹¹ Highlighted information includes university news, an emergency notification system, and a calendar of upcoming events.¹⁹² Also like SLU and other universities, campus ministry is listed under the student life page alongside other secular campus activities and organizations, without overpowering them.¹⁹³ Overall, UC's website is quite similar to SLU's and promotes an image of a well-rounded university rather than a "religious" university.¹⁹⁴

Despite the promising evaluation of the image of the university, there are several factors that weigh negatively on UC. The pattern of intolerance for views and lifestyles contrary to Christian teachings, the clear support of the KBC, and the undetermined level of independence of the President's Cabinet seem to indicate that UC may be inseparably entwined with its religious affiliation. With such apparent intertwining and a lack of clear message from the university on academic freedom, it is likely that even a jurisdiction such as Missouri or Maryland would find UC pervasively religious and the funding unconstitutional. But what if the facts had been slightly different? What if those reports of intolerance had been instances of acceptance? What if there was extensive evidence of academic freedom and governing independence? Under these circumstances, a court like Missouri may have found the funding constitutional. But unfortunately, it is unclear when, if ever, we will get Kentucky's view on the issue.

Faculty Development. *Id.* Faculty members may serve on many of the sub-committees, but only the university officers serve on the President's Cabinet. *Id.*

189. *Id.*

190. *Id.* The cabinet is composed of the President, Vice President (VP) for Academic Affairs, VP for Student Services, VP for Institutional Advancement, VP for Finance, VP for Operations, VP for Business Services, VP for Financial Planning, and the Athletic Director. *Id.*

191. UNIV. OF THE CUMBERLANDS, <http://www.ucumberland.edu> (last visited Nov. 14, 2010).

192. *Id.*

193. *Student Life*, UNIV. OF THE CUMBERLANDS, <http://www.ucumberland.edu/students> (last visited Nov. 14, 2010).

194. *See supra* notes 139–42 and accompanying text.

IV. LOOKING FORWARD: HOW TO EQUALIZE THE OUTCOMES OF RAC FUNDING DISPUTES

The above case studies highlight the disparity in state adjudication of challenges to government funding of RACs. The question now becomes, is there a way to ensure Equal Protection when plaintiffs challenge RAC funding under state constitutional rights? As discussed in Part II.A, a state court decision based on complementary state law is considered “adequate and independent grounds” and, thus, is unreviewable by the Supreme Court.¹⁹⁵ Does this mean there is nothing that can be done to alleviate the inequality currently seen among the states?

The United States Constitution by no means requires states to provide financial assistance to private schools—regardless of whether the school is religiously affiliated or secular in nature.¹⁹⁶ But, it does demand neutrality. According to Professor Stephen Carter, this means “government cannot take steps to treat religious schools better than other schools, . . . [nor] take steps to treat religious schools worse.”¹⁹⁷ Thus, Carter argues, if the state chooses to make public aid available to secular private schools, it would be discriminatory not to offer the same aid to religious schools.¹⁹⁸ This is the general argument against the Blaine Amendments, since such amendments tend to single out religious or denominational institutions for the prohibition of state or public aid.¹⁹⁹ Because of this discriminatory nature, there have been numerous challenges to these amendments.

Opponents have tried challenging the constitutionality of these state provisions under both the Free Exercise²⁰⁰ and Equal Protection²⁰¹ clauses. The court recently rejected a Free Exercise challenge in *Locke v. Davey*²⁰² and instead seemed to show support for state covenants prohibiting funding religious schools and programs, stating, “we can think of few areas in which a State’s antiestablishment interests come more into play.”²⁰³ Others have

195. See text accompanying note 89.

196. DeForrest, *supra* note 77, at 608.

197. *Id.* (quoting STEPHEN L. CARTER, *THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION* 200 (1993)).

198. *Id.* at 608–09.

199. *Id.* at 607–08.

200. U.S. CONST. amend. I. This provision is the second religion clause in the First Amendment immediately following the Establishment Clause. The provision reads, “Congress shall make no law prohibiting the free exercise [of religion].” *Id.*

201. U.S. CONST. amend. XIV, § 1.

202. See generally *Locke v. Davey*, 540 U.S. 712 (2004) (finding that a Washington scholarship program that prohibited giving funds to students pursuing a devotional or theological degree did not violate the Free Exercise Clause).

203. *Id.* at 722. The court, thus, found that the state had a substantial interest in imposing the restriction while the statute placed only a minor burden upon recipients. *Id.* at 725. Indeed,

argued the state provisions violate the Equal Protection Clause. For example, in *University of the Cumberlands*, The Becket Fund, as amicus curie, argued that Section 189 raised serious Equal Protection concerns and urged the Kentucky Supreme Court to interpret the provision narrowly to avoid conflicting with the federal constitution.²⁰⁴ But even if the Supreme Court were to find a violation of the Equal Protection clause, that may not alleviate the problem. The Becket Fund noted that approximately 99% of Kentucky K-12 students attending private school were attending a non-secular school.²⁰⁵ In addition, Kentucky has over thirty private colleges and universities, several of which are religiously-affiliated, even if only maintaining historic ties and no longer adhering to a religious creed.²⁰⁶ By simply denying funding to all private schools, a state like Kentucky can maintain its disproportionate discriminatory ban on funding religious schools and circumvent Equal Protection, as it is not required to fund private schools at all.²⁰⁷

Perhaps fighting to extinguish these state provisions through federal action is not the answer. Cases like Maryland's *Horace Mann League* and Missouri's *Saint Louis University* show that a restrictive state provision on funding "religion" does not necessarily bar finding in favor of the RAC under proper circumstances.²⁰⁸ The key is how the court addresses the question. Where the court analyzes the underlying nature of the recipient of the funding, such as in *Saint Louis University*, the results among states are more equal. But where the focus is on the use of funds—the type and location of a proposed building project, the purchase of textbooks, or the provision of transportation for school children—the results can vary widely. Thus, courts should focus on harmonizing the adjudication of claims, making sure that courts examine the true nature of an institution, so that similar universities receive equal treatment across the country.

recipients were not barred from attending pervasively religious schools, from practicing any given religion, or from taking theological courses. *Id.* at 724–25. The only restriction was they could not use the funds to pursue a theological major or degree. *Id.* at 725 n.9.

204. Brief for The Becket Fund for Religious Liberty, *supra* note 179, at 12, 15.

205. *Id.* at 12.

206. See Paolo Turchioe, *The Best Religiously Affiliated Colleges*, FORBES.COM (May 21, 2010, 5:00 PM), <http://www.forbes.com/2010/05/21/religiously-affiliated-colleges-leadership-education-best.html>. Some of the oldest universities in America were founded by religious orders. *Id.* Many have severed formal ties, maintaining only loose historic ties, and like SLU, no longer govern subject to a religious creed. *Id.* Indeed several RACs have esteemed reputations for strong academics. *Id.* But the highest ranked RAC in the country is Centre College located in Danville, Kentucky. *Id.* Centre College, which maintains only historic ties to its Presbyterian founding, ranked ahead of even big name RACs, like Boston College and Notre Dame. *Id.*

207. See *supra* notes 195–97 and accompanying text.

208. *Saint Louis Univ. v. Masonic Temple Ass'n of St. Louis*, 220 S.W.3d 721, 729 (Mo. 2007); *Horace Mann League v. Bd. of Pub. Works*, 220 A.2d 51, 76 (Md. 1966).

CONCLUSION

The fight over separation of church and state is one of the oldest in America. It is a fight that stems back to the debate between the Federalists and Anti-Federalists on whether to even include a provision on religious freedom in the Constitution.²⁰⁹ It is a question that has plagued the Court equally as long, requiring it to determine what constitutes “establishment” of religion or what action presents undue government “entanglement” in religion. With the passage of the Higher Education Acts in the 1960s, government funding of religious schools—and more specifically RACs—became a hot button issue in the courts.²¹⁰ The Supreme Court has chosen a path of neutrality on the issue, holding that so long as the institution is not “pervasively sectarian” and can show an independent, dominant academic purpose, the funding is constitutional.

But the dual system of government creates new challenges for RACs hoping to receive public funding. In the 1800s, several states amended their constitutions to include more restrictive provisions on government action and aid with respect to religion and religiously affiliated organizations, like universities.²¹¹ Since this time, the ability of a RAC to overcome a state constitutional challenge to public funding has been severely curtailed. In the last fifty years, state courts have made great strides in the way they adjudicate these claims, some even using guidelines similar to the federal courts. But even today, RACs facing a challenge to proposed funding in different states that have similar constitutional provisions may receive unequal treatment. The key to resolving this issue is to standardize the way in which courts approach the issue—to look at the true nature of the recipient rather than accepting a religious affiliation at face value.

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209. *See supra* notes 2–5 and accompanying text.

210. *See supra* text accompanying notes 81–85.

211. *See supra* notes 76–78 and accompanying text.

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