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## **Alaska Senate Judiciary Committee**

Senate Joint Resolution No. 9

testimony of

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March 22, 2013

### **I. Blaine Amendment Movement.**

- A. President Ulysses S. Grant and Rep. James Blaine introduce Blaine Amendment.
  - 1. No “sectarian” (read: Catholic) aid to education.
  - 2. Fails in Senate.
- B. Blaine Amendment becomes condition for statehood.
- C. Shameful pedigree, “born of bigotry.”
- D. Likely unconstitutional.
- E. Alaska’s conditions for statehood.
  - 1. Territorial Organic Act of 1912, 37 Stat. 512: **NO AID.**  
“... nor shall any public money be appropriated by the Territory or any municipal corporation therein for the support or benefit of any sectarian, denominational, or private school, or any school not under the exclusive control of the government . . .”
  - 2. Alaska Statehood Act of 1958, § 6(j): **NO SECTARIAN AID.**  
“The schools and colleges provided for in this Act shall forever remain **under** the exclusive control of the State, or its governmental subdivisions, and **no part** of the proceeds arising from the sale or disposal of any lands granted herein for educational purposes **shall be used for the support of any sectarian or denominational school, college, or university.**”

II. Alaskan Legislative Bodies Have Resisted the Blaine Impulse.

- A. Constitutional Convention: **NO DIRECT AID. INDIRECT AID OK.**  
Alaska Constitution, art. VII, § 1:  
“The legislature shall by general law establish and maintain a system of public schools open to all children of the State, and may provide for other public educational institutions. Schools and institutions so established shall be **free from sectarian control. No money shall be paid from public funds for the direct benefit of any religious or other private educational institution.**”
- B. Alaska Legislature: Numerous statutes and authorizations. **DIRECT AND INDIRECT AID OK.**  
  
*See Appendix A, infra.*
- C. Alaska legislative bodies have consistently rejected the Blaine impulse.

III. Alaska Supreme Court Revives Blaine Impulse.

- A. *Matthews v. Quinton*, 362 P.2d 932 (Alaska 1961). **NO DIRECT OR INDIRECT AID.**
1. Holds that the Territorial Legislature’s 1955 Bus Transportation Act that provided school bus rides to students, including private school students, violates the Organic Act, and, because program constitutes “direct aid,” Article VII, § 1 of the Alaska Constitution.
  2. **This is an extraordinarily result-oriented and legally erroneous decision, reversing legislative choices.**
    - a. This is a 2-1 decision with devastating dissent by Justice Dimond.
    - b. The 1979 Alaska Supreme Court decision on a similar subject not only declines to rely upon *Matthews*, its footnote 20 states: “We do not rely on *Matthews* . . . and thus have no occasion to overrule or re-affirm it. A substantial question, however, can be raised as to its continuing vitality in light of the analysis we employ in the present decision.” *Sheldon Jackson College v. State*, 599 P.2d 127, 130 n. 20 (Alaska 1979).
    - c. On December 17, 1979, the Alaska Attorney General issues opinion that *Matthews* has no effect and use of public funds for school bus taking students to private schools does not violate Art. VII, § 1.
  3. *Matthews* is riddled with errors, for example, the opinion:
    - a. Effectively redefines “direct” to include “indirect.”

- b. Ignores or rejects abundant contrary evidence from Constitutional Convention legislative history. *See Matthews*, 362 P.2d at 943 n. 42; 362 P.2d at 953-54, 955-56 (Dimond, J, dissenting).
  - c. Relies upon Organic Act when Organic Act has no continuing effect after Alaska becomes a state.<sup>1</sup>
  - d. Rejects presumption of constitutionality for an act of the territorial legislature even though required to do so otherwise by the “continuation of law” provision in Alaska Const. art. XV, § 1.
  - e. Rejects *Everson v. Bd. of Educ. Of Ewing Township*, 330 U.S. 855 (no constitutional problem with use of public funds to provide bus service to students of private schools).
4. In the conclusion to his dissent, beginning on p. 957 of the opinion, Justice Dimond makes a convincing argument that the move by the *Matthews* majority was the same move giving impetus to the Blaine Amendment.

**B. *Sheldon Jackson College v. State*, 599 P.2d 127 (Alaska 1979). NO DIRECT OR INDIRECT AID TO EDUCATION. INDIRECT AID FOR STUDENTS’ HEALTH AND WELFARE OK.**

- 1. Holds that \$2,500 scholarship for students attending private colleges constitutes direct aid and thereby violates Art. VII, § 1.
- 2. **This is a legally erroneous decision, clipping legislative prerogative.** Its errors include:
  - a. For the core of its analysis, it relies upon now-overturned U.S. Supreme Court precedents, *Wolman v. Walter*, 433 U.S. (1977) and *Meek v. Pittinger*, 421 U.S. 349 (1975), *see Sheldon Jackson College*, 599 P.2d 127 at ns. 14, 21, 22, 24, and 27; *Mitchell v. Helms*, 530 U.S. 793 (2000).
  - b. The opinion dismisses core constitutional concept that has effect of preventing an *establishment* religion—the salutary effect of having parents direct the economic benefit. *See Sheldon Jackson College*, 599 P.2d at 132 (student as intermediary has no “cleansing effect”). Consider, instead, the U.S. Supreme Court’s reasoning in *Mueller v. Allen*, 463 U.S. 388, 399 (1983):

“[B]y channeling whatever assistance it may provide to parochial schools through individual parents, Minnesota has reduced the

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<sup>1</sup> A territorial organic act has no continuing force after the territory has been admitted to the union as a state. “It is well settled that, upon admission of a State, all of the Territorial laws are abrogated except as continued in force by competent authority.” *In re Island Airlines, Inc.*, 44 Haw. 634, 642 (1961). *See also Escanaba & Lake Mich. Transp. Co. v. City of Chicago*, 107 U.S. 678, 688 (1883) (The provisions of the Northwest Ordinance that functioned as the organic act for Ohio “could not control the authority and powers of the state after her admission.).

Establishment Clause objections . . . It is true, of course, that financial assistance provided to parents ultimately has an economic effect comparable to that of aid given directly to the schools attended by their children. It is also true, however, that under Minnesota's arrangement public funds become available only as a result of numerous, private choices of individual parents of school-age children. It is also true, however, that under Minnesota's arrangement public funds become available only as a result of numerous private choice of individual parents of school-age children. . . . **Where, as here, aid to parochial schools is available only as a result of decisions of individual parents no 'imprimatur of state approval' . . . can be deemed to have been conferred on any particular religion, or religion generally.**"

This reasoning in the *Mueller* decision repeats in case after case by the United States Supreme Court. It articulates principles intuited by the Alaska Constitutional Convention and this legislature in instance after instance.

- c. The *Sheldon Jackson College* opinion invents neutrality criteria, *i.e.*, that aid must indirectly benefit public and private entities alike, that bears almost no resemblance of that portion of the *Lemon* test requiring parochial aid legislation to have a primary effect that neither advances nor inhibits religion. Compare *Sheldon Jackson College*, 599 P.2d at 130 with *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971).
- d. While purportedly permitting "indirect aid" like the bus services struck down in *Matthews*, it transmogrifies "direct" to mean "substantial" and "indirect" to mean "insubstantial." There is no basis for doing this.
- C. The Alaska Supreme Court has consistently overridden legislative choices and tried to revive the effect of Blaine. While doing so, it has created an inconsistent, anomalous jurisprudence, especially with regard to whether benefit is "direct" or "indirect."

#### IV. The Real Issues.

- A. Is the legislative branch independent of the judicial branch?
- B. Shall the legislature preserve the choices it made with regard to students' educational needs?
- C. Shall the legislature preserve its prerogatives with regard to students' educational needs?

- V. Senate Joint Resolution No. 9 Is a Reasonable Option.
  - A. Alaska legislative bodies—the territorial legislature, the Constitutional Convention, the Alaska Legislature, and various school boards—have consistently tried to reduce the effect of Blaine. *See* Appendix A.
  - B. The Alaska Supreme Court has overridden these bodies with every opportunity brought before it and has done so beyond any reasonable reading of the law.
  - C. SJR No. 9 should make it clear, as a matter of state constitutional law, that the Alaska Legislature can make choices with regard to the education of children in Alaska in accordance with what *it* recognizes as sound public policy, as bounded by the First Amendment to the United States Constitution.
- VI. The First Amendment Establishment Clause Polices the Boundaries Between Church and State.

Appendix A  
ALASKA'S DANCE WITH THE BLAINE AMENDMENT

<i>Congress</i> <b>BLAINE</b>	<i>Alaska Legislative Bodies</i> <b>BLAINE-LESS</b>	<i>Alaska Supreme Court</i> <b>BLAINE-INFECTED</b>
Territorial Organic Act of 1912: <b>NO AID.</b>	Territorial Legislature - Bus Transportation Act of 1955: <b>INDIRECT AID OK.</b>	<i>Matthews v. Quinton</i> (Alaska 1961): <b>NO DIRECT OR INDIRECT AID.</b>
Alaska Statehood Act of 1958: <b>NO SECTARIAN AID</b> (pure Blaine)	Constitutional Convention - Alaska Constitution of 1956: <b>NO DIRECT AID; INDIRECT AID OK.</b>	
	Legislature – 1968 Tuition Grant Act, AS 14.40.751-806: <b>INDIRECT AID OK.</b>	<i>Sheldon Jackson College v. State</i> (Alaska 1979): <b>NO DIRECT OR INDIRECT AID TO EDUCATION.</b>
	Legislature – 2004 AlaskAdvantage Education Grant: <b>INDIRECT AID OK.</b>	
	Legislature – 100+ grants, 2009- 2013, to private organizations for programs and facilities: <b>DIRECT AID OK.</b>	
	Legislature – 2011 Alaska Performance Scholarship: <b>INDIRECT AID OK.</b>	
	DEED School Districts – 122 contracts with supplemental education service providers 2012- 2013. <b>DIRECT AID OK.</b>	
	Legislature – 41 grants in 2013 to private organizations for workforce development. <b>DIRECT AND INDIRECT AID OK.</b>	