GOVERNMENT-FUNDED VOUCHERS ENDANGER BIBLICALLY FAITHFUL CHRISTIAN EDUCATION

Executive Summary

The lesson is as old as the Roman emperor Constantine, who merged the Church with the State, thereby doing great harm to Christianity. Christians continue to need to relearn that lesson.

Most Christians would agree that direct funding of Christian schools would run afoul of the Constitution's Establishment Clause. But more importantly, such controls could undermine Christian education. All the problems now suffered in public schools would be visited upon Christian schools and homeschools, as all schools would become government schools.

Many believe, however, there can be a way around this problem. They promise that with "educational vouchers," refundable tax credits, and other similar programs that government funds will be directed not to the Christian schools – but to the students and their parents, who can spend those funds wherever they like including at Christian schools. Although having money flow from government first to parents and only indirectly to Christian schools sounds theoretically possible, history demonstrates that this too presents problems. Today's intensively secular governments might not object to having these funds wind up in the hands of a Christian school which bows to Caesar on matters such as LGBTQ rights and same-sex marriage, but they will do almost anything to stop government money from assisting biblically faithful education.

Even if not restricted at first, eventually receipt of government funds always winds up being conditioned on accepting restrictions and conditions. Once the first money is received by a Christian school, the hook is set, as the school begins to rely on that government funding, making long-term commitments involving buildings, teachers, and students based on the assumption that funding will continue.

Then, when ungodly conditions are imposed, such as requirements to hire LGBTQ staff, to oppose biblical marriage, and to teach Critical Race Theory, a temptation arises to compromise doctrine to continue to receive those funds, and any such compromise undermines the very purpose of Christian schools. Although the desire to expand Christian schools by whatever means possible is understandable, that way may not be God's way. It may violate a biblical truth that has been summarized: "God's work done in God's way will never lack God's supply."

State funding of Christian schools has long been blocked by "Blaine Amendments" to state constitutions that have existed in about 36 states for more than a century. Efforts have begun in many states to repeal those amendments to obtain taxpayer funding that will go to Christian schools. Christians need to be careful what they ask for. In God's providence, these amendments, originally designed to eliminate competition for government schools dominated by Protestants, may turn out to be the greatest defense against government controls being imposed not only on Protestant schools, but on Catholic and other religious schools as well.

I. State Constitution Blaine Amendments

In 1875, Rep. James G. Blaine (R-ME), the Speaker of the U.S. House of Representatives, introduced an amendment to the U.S. Constitution. The proposed Blaine Amendment easily passed the House but was narrowly defeated in the Senate. It would have modified the First Amendment to read:

> No state shall make any law respecting an establishment of religion or prohibiting the free exercise thereof; **and no money raised by taxation in any state for the support of public schools**, or derived from any public fund therefor, nor any public lands devoted thereto, shall ever be under the control of any religious sect, nor shall any money so raised or lands so devoted be divided between religious sects or denominations." [Emphasis added.]

Although the Blaine Amendment to the U.S. Constitution failed, 36 states subsequently passed their own versions of the Blaine Amendment, mostly in the mid-to-late 1800s, and most are still on the books. When enacted, public schools were still at least nominally Protestant in character, with Bible reading and prayers to open the school day. As Roman Catholic immigration to the United States began to increase, legislators began to fear that government funds might be diverted from public schools to Catholic sectarian schools.

The Blaine Amendments may not have had pure motives, but paradoxically, they may have served to protect both Christian and Catholic schools from government controls. This circumstance calls to mind the words of Joseph in Genesis 50:20 (NASB), "[a]s for you, you meant evil against me, but God meant it for good in order to bring about this present result, to keep many people alive." Our nation itself is the product of human actions with bad intentions, used providentially for good. The actions of King George III of taxation without representation, quartering soldiers in private homes, impressing sailors to fight their own countrymen, hiring Hessian mercenaries to attack his own people, and otherwise restricting the liberty of Americans, resulted in the Declaration of Independence, backed up by the War for Independence, and eventually our Constitution. King George's attempt to restrict liberty inadvertently created a country that exports Christian missionaries, Bibles, and the Gospel to the world.

In a similar fashion, despite the intentions of their framers a century ago, the Blaine Amendments are well-positioned to preserve liberty for adherents of all religious faiths today and into the future.

II. The Experience of Christian Schools in Maryland Demonstrates That Efforts to Repeal the Blaine Amendments Need to Be Rethought.

Recently, numerous well-meaning Republican legislators have sought to assist Christian schools by removing the barriers to public funding. These proposals can take different forms. One method is educational vouchers, by which a certificate, a "voucher," worth a certain amount of money, would be given to the parents of each student which could be used to fund, either partially or in full, Christian education. Several states have some form of voucher programs, but these are exceedingly limited. Another method being considered

is providing a tax credit to parents who are paying tuition to private schools, often "refundable," resulting in state payments to low-income families. However, no foolproof method has been devised to evade efforts by states to require Christian schools to follow certain rules, including anti-discrimination requirements. Once limited to racial discrimination, now such laws often include deference to LGBTQ rights and same-sex marriage. We have seen these laws be used against Christian schools in recent days.

Bethel Christian Academy. Bethel Christian Academy, a Christian school located in Savage, Maryland, is run by a Pentecostal church. In 2016, Maryland enacted a program known as BOOST, which provided scholarships for disadvantaged students to attend nonpublic schools in Maryland. Participating schools were required to sign a document that they "will not discriminate in student admissions on the basis of race, color, national origin, or sexual orientation." Bethel signed the document, but Maryland later found that the school's written policy did not include a statement prohibiting discrimination based on sexual orientation. Despite the fact that Bethel did not discriminate in admissions based on sexual orientation, Maryland nonetheless revoked Bethel's participation, demanding a refund of more than $100,000 paid to Bethel through these scholarships. Bethel defended itself in court, and in *Bethel Ministries v. Salmon*, a federal district court ruled that Bethel did not engage in such discrimination and thus was not required to return the funds.

However, just last year, a Maryland lesbian couple challenged the ability of another Christian school, Grace Academy, to receive funds, because it denied admission to their son, although the reason for that denial was disputed.

The lesson here is that there is every reason to believe that accepting government funds is an open invitation for LGBTQ activists and their lawyers to seek the assistance of Obama- and Biden-appointed judges to undermine Christian education, exposing the school not just to injunctions, but also **awards for damages and attorneys' fees that could bankrupt those schools and perhaps their affiliated churches**, and the states funding the vouchers will not be defending those Christian schools or reimbursing their losses.

III. U.S. Supreme Court Decisions.

Today, when the government is funding government schools and even private schools which teach the anti-Christian religion of secular humanism, it is understandable that Christians are offended when they are excluded from programs handing out government benefits. Two such cases were recently decided by the U.S. Supreme Court.

Trinity Lutheran Church of Columbia, Inc. v. Comer. Most religious conservatives celebrated the U.S. Supreme Court's decision in *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017). There, the Supreme Court struck down a Missouri law that allowed government grants to pay for resurfacing of school playgrounds, but excluded religious schools. The Court held that "when the State conditions a benefit in this way … the State has punished the free exercise of religion." The Court held that "[t]he Free Exercise Clause protects against laws that impose[] special disabilities on the basis of…religious status," and that government

may not "disqualify [religious persons or institutions] from a public benefit solely because of their religious character." *Id*. at 2021. On the other hand, other religious conservatives found it unseemly for Christian schools to be requesting aid from any government.

Espinoza v. Mont. Dep't of Revenue. Three years later, the Supreme Court decided a case which some erroneously now claim struck down Blaine amendments as applied to vouchers. Actually, the law that was challenged was a non-refundable tax-credit scholarship and educational savings account that was enacted in Montana in 2015. The Montana Department of Revenue was required to implement the legislation, and adopted a rule that such a tax credit could not benefit any "religious" schools based on its understanding of the Montana Blaine Amendment.

The Montana trial court ruled that tax credits were an appropriation of public funds, and thus were not prohibited, but the Montana Supreme Court disagreed, ruling that a tax credit was an "indirect payment" which constituted "aid" under the state Constitution's Blaine Amendment.

The U.S. Supreme Court took the case, and by a 5-to-4 margin, ruled that the ban on aid to religious schools violated the Free Exercise Clause. The Court stated: "A State need not subsidize private education. But once a State decides to do so, it cannot disqualify some private schools solely because they are religious." The Court ruled that the Constitution, as the "'supreme law of the land' condemns discrimination against religious schools and the families whose children attend them…. They are 'member[s] of the community too,' and their exclusion from the scholarship program here is 'odious to our Constitution and cannot stand.'" *Espinoza v. Mont. Dep't of Revenue*, 140 S. Ct. 2246, 2262-63 (2020). Chief Justice Roberts wrote the opinion for the court, joined by Justices Thomas, Alito, Gorsuch, and Kavanaugh. Justices Breyer, Ginsburg, Kagan, and Sotomayor dissented.

Zelman v. Simmons-Harris. Although neither *Trinity Lutheran* nor *Espinosa* addressed the issue of vouchers, an earlier case did. *Zelman v. Simmons-Harris,* 536 U.S. 639 (2002) was another 5-to-4 decision which approved an Ohio voucher program as not violating the Establishment Clause even though the vouchers could be used to benefit private religious schools so long as the purpose of the law is secular, not religious. The court's opinion was by Chief Justice Rehnquist, joined by Justices O'Connor, Scalia, Kennedy, and Thomas, with Justices Stevens, Souter, Breyer, and Ginsburg dissenting.

Summary. Even if there was a clear ruling on vouchers, in this and all areas, Christians should not automatically accept the opinions of five justices on the U.S. Supreme Court as being equal in authority to the text of the Constitution. Judicial opinions are just that, opinions, and the Court can be wrong. To this day, many Supreme Court decisions which were and are flat wrong have never been overturned, including: *Buck v. Bell* (forced sterilization); *Lawrence v. Texas (*homosexual sodomy*); Obergefell v. Hodges* (same-sex marriage); and *Bostock v. Clayton County* (employment discrimination based on homosexuality or transgender status). Only recently was *Roe v. Wade* overturned, after a half-century.

No matter what the Supreme Court rules, the question remains, "is it dangerous for the Christian schools to receive those funds?" Thus, in a strange turn of history, the Blaine

Amendments may be an important line of defense for religious schools in an increasingly hostile secular culture.

IV. State Courts Have Upheld the Blaine Amendment.

Colorado. Colorado's Supreme Court recently struck down a voucher program as a violation of the state's Blaine Amendment. The Colorado Constitution, "article IX, section 7 [reads,] 'Neither the general assembly, nor any county, city, town, township, school district or other public corporation, shall ever make any appropriation, or pay from any public fund or moneys whatever, anything in aid of any church or sectarian society, or for any sectarian purpose, or to help support or sustain any school, academy, seminary, college, university or other literary or scientific institution, controlled by any church or sectarian denomination whatsoever.'" *Taxpayers for Pub. Educ. v. Douglas County Sch. Dist.,* 2015 CO 50, at P27 (Colo. 2015). "[T]he [voucher program] awards public money to students who may then use that money to pay for a religious education. In so doing, [it] aids religious institutions," the court held, finding that aid violative of the Blaine Amendment. *Id*. at P29.

South Carolina. In 2020, the state's Supreme Court struck down the state's voucher program as a violation of the state's Blaine Amendment, which states "No money shall be paid from public funds nor shall the credit of the State or any of its political subdivisions be used for the direct benefit of any religious or other private educational institution." *Adams v. McMaster*, 432 S.C. 225, 237 (S.C. 2020) (quoting S.C. Const. art. XI, § 4). Now the state's Republican legislature is seeking a constitutional amendment to overturn the Blaine Amendment to permit a state-funded voucher program.

V. Government Funding Is Always a Clear and Present Danger to Christianity.

The Supreme Court is not wrong to conclude that the Blaine Amendments bars payment of government funds to religious schools "solely because of their religious character." On the other hand, supporters of religious liberty are not wrong in seeing a fundamental unfairness when religious parents have to pay for secular government schools through their taxes and pay again for private school tuition if they wish to have their children educated according to their beliefs.

The current debate is not dissimilar from the effort by Patrick Henry to enact a law in Virginia entitled "A Bill establishing a provision for Teachers of the Christian Religion." That bill would have imposed a tax on Virginians to pay a salary to Christian teachers. On that issue, Henry was successfully challenged by James Madison for reasons set out in his brilliant and timeless "Memorial and Remonstrance Against Religious Assessments" (1785) counseling against any state support of Christian education:

> Because we hold it for a fundamental and undeniable truth, "that Religion or the duty which we owe to our Creator and the manner of discharging it, can be directed only by reason and conviction, not by force or violence."

> Because the establishment proposed by the Bill is not requisite for the support of the Christian Religion. To say that it is, is a contradiction to the Christian Religion itself, for every page of it disavows a dependence on the powers of this world: it is a contradiction to fact; for it is known that this Religion both existed and flourished, not only without the support of human laws, but in spite of every opposition from them.…

Madison's victory in that contentious debate led to Thomas Jefferson's Virginia Statute of Religious Freedom (1786), on which was based the Constitution's First Amendment. The lesson is profound. Supporters of government funding for religious schools forget the Political Golden Rule: "He who has the gold makes the rules."
Christians and adherents of other religions hungry for government largesse are allowing the Trojan horse into their schools, often without realizing it. In the end, the well-placed desire to end the government monopoly on education, combined with a desire for a "fair share" of government dollars threatens instead to transform every private school in America into a government school, under government control.

Government Can Attach Strings to Government Funding. In a long trail of cases, the Supreme Court has indicated that even where the government cannot regulate private organizations directly, it can do so through "strings attached" to government funding. The result has created a "chain of entanglement" where the government purse strings soon become regulatory chains.

South Dakota v. Dole. The Supreme Court has been clear that the federal government can "regulate" by means of imposing conditions in federal funding. Thus, if a school wishes to accept federal funding, it is subject to the "strings attached." The Supreme Court has stated: "[t]he Federal Government may establish and impose reasonable conditions relevant to federal interest in the project and to the over-all objectives thereof." *South Dakota v. Dole*, 483 U.S. 203, 208 (1987).

Employment Division v. Smith. Further, where a generally applicable federal law controls, the Supreme Court has at least tacitly allowed infringement on religious exercise. In 1990, the Supreme Court declared that "if prohibiting the exercise of religion [is] merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended." *Employment Div. v. Smith*, 494 U.S. 872, 878 (1990).

Grove City College v. Bell. In 1984, the Court issued its holding in *Grove City College v. Bell*, 465 U.S. 555 (1984). Grove City College prided itself on refusing to accept direct federal funding, allowing it to maintain a greater degree of independence from federal regulation. In July 1976, the executive department that would later be elevated to Cabinet-level status as the Department of Education ("DOE") ordered Grove City to file an "assurance of compliance" that it was not discriminating on the basis of gender. *Id*. Although the school was in fact not discriminating, it argued that it need not file with the government because it received no federal funds. *Id*. The DOE argued that because some 140 of the college's 2200 students received grants through the government's Basic Educational Opportunity Grant (BEOG) program, the government could

require compliance with Title IX sex discrimination requirements. *Id*.

The Court rejected the college's argument that "the dollars follow the student" and that the college should not be subject to Title IX requirements because the college did not receive **direct** government funding. "[T]he language of § 901(a) contains no hint that Congress perceived a substantive difference between direct institutional assistance and aid received by a school through its students…. There is no basis in the statute for the view that only institutions that themselves apply for federal aid or receive checks directly from the Federal Government are subject to regulation." *Id*. at 564. "The Department's sex discrimination regulations made clear that '[scholarships], loans, [and] grants … extended directly to … students for payment to' an institution **constitute federal financial assistance to that entity**." *Id*. at 568 (emphasis added).

The Court struck what it believed to be a compromise, holding that federal regulation of a private college could only extend to the specific "education program or activity" for which the federal grant applied, and not to regulation of the entire college. *Id*. at 573. That "compromise" lasted only three years. "In response to the Court's interpretation of Title IX … Congress passed the **Civil Rights Restoration Act of 1987**…. The amendment to Title IX provides in relevant part: For the purposes of this chapter, **the term 'program or activity' and 'program' mean all of the operations of … a college**, university [or] postsecondary institution…." *O'Connor v. Davis*, 126 F.3d 112, 117 (2d Cir. 1997) (emphasis added). **From that point, Title IX "sex discrimination" prohibitions applied to any private college even if only its students received federal money.**

Paycheck Protection Act. Few schools considered the consequences of accepting government loans under the Paycheck Protection Program (PPP) made available through the Small Business Administration under March 2020 CARES Act. Nevertheless, last year, a federal district court in North Carolina ruled that a school which accepted such a loan had received "federal financial assistance." Thus, under this decision, Title IX, which prohibits discrimination on the basis of sex in government-funded education programs, applies to a private school which accepted the PPP loans during the period the loan is outstanding. *Karanik v. Cape Fear Academy, Inc.,* No. 7:21-CV-1691 (E.D.N.C. June 17, 2022).

States too can have laws that impose responsibilities and burdens on all recipients of government funds. The lesson to be learned from the *Cape Fear* case is that when government offers money, it may not advertise all the conditions which apply.

Conclusion

President Reagan said it succinctly in 1986: "The nine most terrifying words in the English language are 'I'm from the government and I'm here to help.'" Gold chains may be gold, but they are still chains. America's Christian colleges and schools must retain the freedom to "preach in the name of Jesus," by rejecting the temptation presented by the golden calf of government funding and control. The great missionary to China, J. Hudson Taylor put it, "Depend on it. God's work done in God's way will never lack God's supply. He is too wise a God to frustrate His purposes for lack of funds, and He can just as easily supply them ahead of time as afterwards, and He much prefers doing so." Christians should avoid

the "chain of entanglement." Christ instructed: "You cannot serve God and mammon." His words are as true today as ever.

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APPENDIX: HOW GOVERNMENT UNDERMINES CHRISTIAN MORALITY

***Obergefell v. Hodges*.** The day may come that even a Christian school's tax exemption may be revoked for "discrimination." In 2015, the Supreme Court handed down its infamous "gay marriage" decision, *Obergefell v. Hodges*, 576 U.S. 644 (2015). Justice Kennedy, the decision's author, blithely promised that "religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned. The First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths…." *Id*. at 679-680.

But during oral argument, a discussion between Justice Alito and Donald Verilli, the Obama administration's Solicitor General who argued the case for the federal government as *amicus curiae*, demonstrated the reality of the threat government aid poses to Christian and other religious institutions that benefit in any way from tax dollars. In response to Justice Alito's asking if states should be required to recognize same-sex marriages and if religious universities opposed to same-sex marriage would **lose their tax-exempt status**, Solicitor General Verrilli replied, "**it's certainly going to be an issue**. I don't deny that. I don't deny that, Justice Alito — it is going to be an issue." As Chief Justice Roberts acknowledged regretfully in his dissent, "the Solicitor General candidly acknowledged that the **tax exemptions** of some religious institutions would be in question if they opposed same-sex marriage…. There is little doubt that these and similar questions will soon be before this

Court. Unfortunately, people of faith can take no comfort in the treatment they receive from the majority today." *Id*. at 711-712.

***Bostock v. Clayton County*.** On June 15, 2020, in another infamous opinion, the Court decided *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020). The case dealt with Title VII under the 1964 Civil Rights Act and employment "discrimination," and not directly with Title IX and "discrimination" in education. But Justice Gorsuch wrote for the Court that discrimination on the basis of "sexual orientation" or "gender identity" constituted discrimination on the basis of sex. Gorsuch reached this conclusion despite admitting that "[t]hose who adopted the Civil Rights Act [in 1964] might not have anticipated their work would lead to this particular result…." *Id*. at 1753. In other words, the law as written had nothing to do with "sexual orientation" or "gender identity," and only to do with prohibitions on treating men and women differently in the workplace.

Gorsuch's opinion seems to dismiss the concerns of religious Americans, as he writes, "What are these consequences anyway? The employers worry that our decision will sweep beyond Title VII to other federal or state laws that prohibit sex discrimination. And, under Title VII itself, they say sex-segregated bathrooms, locker rooms, and dress codes will prove unsustainable after our decision today. But none of these other laws are before us…. [W]e do not purport to address bathrooms, locker rooms, or anything else of the kind." *Id*. at 1753.

Billard v. Charlotte Catholic High School. Under *Bostock*, there is apparently no "religious exemption" in the employment context, and religious schools have been forced to retain employees who "came out" as homosexual. In 2021, a North Carolina federal court ruled in favor of a homosexual teacher fired by a Catholic high school after he announced his homosexual "marriage" in a celebratory social media post. "This is a classic example of sex discrimination under the but-for causation standard of *Bostock*," the court ruled. *Billard v. Charlotte Catholic High School*, 2021 U.S. Dist. LEXIS 167418, at *24 (W.D. N.C. 2021).

President Biden's Rule Putting Boys in Girls' Showers. It took exactly one year for *Bostock* to "sweep beyond Title VII" to Title IX's education provisions. On June 22, 2021, the DOE promulgated its new ruling, "Enforcement of Title IX of the Education Amendments of 1972 With Respect to Discrimination Based on Sexual Orientation and Gender Identity in Light of *Bostock v. Clayton County*." The DOE rule states, "Consistent with the Supreme Court's ruling and analysis in Bostock, the Department interprets Title IX's prohibition on discrimination 'on the basis of sex' to encompass discrimination on the basis of sexual orientation and gender identity." *Id*. The DOE's new rule promises retaliation if a "transgender" student is "excluded from, denied equal access to, or subjected to sex stereotyping in academic or extracurricular opportunities and other education programs or activities, denied the benefits of such programs or activities, or otherwise treated differently because of their sexual orientation or gender identity." *Id*. This rule is now being challenged in the Sixth Circuit, where we filed an amicus brief in opposition.

As of today, federal law still allows an exemption to Title IX's "sex discrimination" prohibitions. 34 C.F.R. § 146.12 states that "[t]his part does not apply to **an educational institution which is controlled by a religious organization** to the extent application of this

part would not be consistent with the religious tenets of such organization" (emphasis added). The protection extends only to institutions "controlled by a religious organization," and might well not apply to Christian schools not connected to a church or denomination, or to a homeschool family. Even the limited protections of the religious exemption have come under swift attack, however, in the executive, legislative, and judicial arenas. The ability of Christian educational institutions to uphold the biblical sexual ethic already hangs by a thread.

College of the Ozarks. The College of the Ozarks, a small coeducational Christian college which segregates dormitories between biological males and females, lost its court battle for a preliminary injunction against a Memorandum issued by the Department of Housing and Urban Development ("HUD") which prohibited "discrimination" in housing on the basis of "sexual orientation or gender identify." The Eighth Circuit Court of Appeals ruled that because "HUD has never filed charges of housing discrimination against a college that is exempt from prohibitions on sex discrimination in housing under Title IX," the college had no standing to challenge the Memorandum. *School of the Ozarks, Inc. v. Biden*, 41 F.4th 992, 1001 (8th Cir. 2022).

The Equality Act. In 2021, the badly misnamed "Equality Act" passed the House of Representatives. It failed in the Senate only because two Democrat Senators refused to amend the filibuster rule which requires 60 votes to end debate on legislation. Among other devastating effects on people of faith, the bill would amend Title IX to include protection for "sexual orientation" and "gender identity," expand the definition of "public accommodations" to include schools and colleges; and override any protection granted to religious organizations by the Religious Freedom Restoration Act (RFRA). President Biden promised to sign the bill if it reached his desk.

Hunter v. United States Dep't of Education. A suit was filed by 40 LGBTQ+ individuals targeting the religious exemption provided in Title IX. Although an Oregon judge dismissed the complaint in January 2023, holding that a religious exemption is "substantially related to the government's objective of accommodating religious exercise," this decision could be appealed and additional legal challenges in other courts are sure to follow. *Hunter v. United States Dep't of Education*, 2023 U.S. Dist. LEXIS 5745, at *31 (D. Or. 2023),

Police Powers. Even without funding, the state has controlled Christian ministries through the police power. In 1905, the Court held that Massachusetts' smallpox vaccine mandate trumped the religious objections of a Lutheran pastor. Laws passed under a state's police powers "to protect the public health, the public morals or the public safety" can trump an individual's religious objection. *Jacobson v. Massachusetts*, 197 U.S. 11, 31 (1905). The Court reasoned that "each citizen [covenants] with the whole people, that all shall be governed by certain laws for 'the common good….'" *Id*. at 27.