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**STATE BLAINE AMENDMENTS AND FUNDING RELIGIOUSLY AFFILIATED SCHOOLS:
STATE CONSTITUTIONAL CLAUSES IN CONTEXT**

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On February 25, 2004 the United States Supreme Court presented its decision in *Locke v. Davey*.¹ Among the many issues present before the Court in *Locke* were the state constitutional clauses known generally as “Blaine Amendments.” These Amendments, adopted during the Nineteenth Century, typically condition that state funds may not be delivered to “sectarian” schools. However, it is now being argued by the opponents of these state constitutional clauses that “sectarian” was a “code word” for anti-Catholic, and thus, these clauses are unconstitutional. On the other hand, this paper argues that these clauses are not unconstitutional; that whatever the origins, the modern clauses no longer bear any anti-Catholic stigma and that these clauses are legitimate exercises of state efforts to avoid the excessive entanglement of church and state. In *Locke* the Court ruled that the constitution of Washington was not suspect simply because it denied public funds a scholarship in pursuit of a theology degree.

Presently, these state constitutional clauses have the potential to inhibit the flow of tax dollars to religious institutions providing various social services as well as to parochial schools. These amendments referred collectively to as “Blaine Amendments” are the result of an informal movement initiated by Nineteenth Century speaker of the House of Representatives and later U.S. Senator, James G. Blaine. Congressman Blaine represented the state of Maine in the House of Representatives from 1863–1876 and in the Senate from 1876–1881. He also ran for President three times. In 1875 Blaine introduced before the House of Representatives a Constitutional Amendment barring tax support for sectarian institutions.² The amendment was edited in the House and passed, but it failed in the Senate.³ Blaine’s proposal failed as a Constitutional Amendment. However, for roughly three decades following this attempt, Congress required each new state incorporate similar language in its constitution as a condition for joining the Union.⁴

It should be noted there is no universally agreed-upon definition of exactly what constitutes a Blaine Amendment. As a result, it is unclear how many state constitutions contain these clauses. For example, Gedicks identifies thirty-seven states with Blaine Amendments,⁵ Komer

1 540 U.S. 712 (2004).

2 4 *Cong. Rec.* 5172, 5191 (1876)

3 4 *Cong. Rec.* 5558, 5596 (1876)

4 See, e.g., Act of Feb. 22, 1889, ch. 180, Sec. 4, 25 Stat. 676, 677 (1889) (enabling act for North Dakota, Montana, South Dakota, and Washington); Act of 3 July, 1890, ch. 656, Sec. 8, 26 Stat. 215, 216 (1890) (enabling act for Idaho); Act of June 20, 1919, ch. 310, sec. 2, 36 Stat. 557, 559 (1910) (enabling act for Arizona and New Mexico); See also 20 *Cong. Rec.* 2080, 2100 (1889) (statement of Sen. Blair arguing in favor of enabling act requirement that state constitutions). Cited in Nathan Adams, “Pedigree of an Unusual Blaine Amendment: Article I, Section 3 Interpreted and Implemented in Florida Education.” 30 *Nova L. Rev.* 1 (2005).

5 Frederick Gedicks, “Reconstructing the Blaine Amendments.” 2 *First Amend. L. Rev.* 85 (2003).

identifies thirty-six states,⁶ Rogers asserts there are thirty states with such clauses,⁷ Kinzer cites twenty-four states,⁸ while Kirkpatrick lists only twenty.⁹ This paper focuses on the most suspect word, i.e., “sectarian,” and identifies thirty states with Blaine Amendments [See Appendix A].¹⁰

Regardless of the number, and even without unequivocal definition, Blaine Amendments are now challenged because, it is asserted, the denial of state funds to religious institutions as a result of past anti-Catholic animus fails the test of religious neutrality. However, this blanket condemnation of Blaine Amendments is problematic given the lack of clarity surrounding what exactly constitutes a Blaine Amendment. Similarly, there are legitimate questions regarding which, if any of these clauses are truly rooted primarily in anti-Catholic bigotry or whether other, valid legislative motives could be behind adoption of these clauses. Additionally, these amendments have been examined, evaluated, and re-adopted in many present-day state constitutions and it may no longer be valid to invest the modern clauses with putative Nineteenth Century attitudes. Finally, the principle of neutrality articulated by the Court does not eliminate all barriers in the relationship between Church and State.

The Supreme Court decision in *Locke* upholding the Washington Promise Scholarship Program complicates the aspirations by Blaine Amendment opponents. At the same time, it does not simplify the picture for Blaine Amendment supporters because the Supreme Court’s decision paradoxically agreed with Blaine opponents that Blaine Amendments were expressions of anti-Catholic animus but then observed that because there was no such animus documented in Washington, the Washington amendment in question was not a “Blaine Amendment.” This decision has significant policy implications for state legislatures and educational policy makers because the future will now require state-by-state examination of Blaine clauses, with attendant court challenges, to determine whether a state demonstrates specific anti-Catholic hostility in its adoption of its constitutional language and whether any intervening history ameliorates that anti-Catholic past. Regardless of which way this issue is concluded, state legislatures and educational policy makers will then be required to analyze the implications for various school funding programs.

The authors argue that the word “sectarian” as used in both Nineteenth Century as well as extant state constitutions is surrounded by additional descriptive terms and modifiers that clearly articulate the goal that tax dollars should not flow to any religious institution, Catholic or otherwise. This leads to the conclusion that the Nineteenth Century state Blaine Amendments reflect contemporary efforts to diminish social controversy by disentangling Protestant religious practice from public schools as well as to prevent the flow of tax dollars into Catholic parochial schools. As a result, the Blaine clauses should be seen as legitimate constitutional efforts to

6 *Id.*

7 Remarks of Melissa Rogers, “Separation of Church and States: An Examination of State Constitutional Limits on Government Funding for Religious Institutions, Session 1.” The Pew Forum on Religion and Public Life, <http://pewforum.org/events/index.php?EventID=45>

8 Donald L. Kinzer, *An Episode in Anti-Catholicism: The American Protective Association*, (University of Washington Press, 1964) p. 11-12.

9 David Kirkpatrick, “The Pain of Blaine (Amendments) is on the Wane,” U.S. Freedom Foundation, 2003, http://www.freedomfoundation.us/blaine_amendments__part_3

10 Many state constitutions contain other clauses that may affect the flow of tax dollars into religious institutions. For example, the Kentucky State Constitution, Sec. 184 reads, “The interest and dividends of said fund, together with any sum which may be produced by taxation or otherwise for purposes of common school education, shall be appropriated to the common schools, and to no other purpose.” While this phrase can influence whether or not state funds can flow to religious schools, it is not counted in this research as a “Blaine Amendment.” Other similar clauses are briefly discussed below.

“ensure domestic tranquility” rather than unconstitutional expressions of anti-Catholic, or even anti-religious, animus.

Between 1776 and 1920, 169 state constitutions existed at one time or another. Of particular interest for this study were clauses containing the word “sectarian;” a putatively anti-Catholic code word deemed by both opponents and supporters alike to be characteristic of a Blaine Amendment.¹¹

The language of the United States Constitution and of state constitutions was profoundly affected by Eighteenth and early Nineteenth Century tension regarding the critical role played by religion in the formation of the nation. This balance was critical, in particular, American constitutional language sought to clearly repudiate the practices of established churches common in Sixteenth and Seventeenth Century Europe.¹²

Of particular importance in the early United States was the principle of no compulsory support for religion—language critical in the development of many state Blaine Amendments. An established church is a church officially sanctioned and supported by the government of a country; a situation that makes “membership of the political community coincident with submission to the locally dominant creed.”¹³ Perhaps the key characteristic of an established church is compulsory support through the collection of tax revenues by the government, which are then given to a church, to many churches, or to different religious organizations.

Against this model of an established church was the model of church-state separation and the toleration or other religious traditions. Pleas for religious toleration and the right of individual conscience emerge very early in American colonial history;¹⁴ and the seriousness of the struggle for tolerance plays an important role throughout the Eighteenth and Nineteenth Centuries and influences much state constitutional language.

Across the early United States, many different opinions regarding the right of establishment versus non-establishment were argued; over time, the non-establishment position became the dominant paradigm.¹⁵ Representing this view is best perhaps illustrated in the acceptance of

11 *Mitchell v. Helms*, 530 U.S. 793, 828 (2000) (plurality opinion). See e.g. Green, *supra* at 41-43 (1992); *Zelman v. Simmons-Harris*, 536 U.S. 639, 721 (2002) (Breyer, J., dissenting) (noting the purpose of federal and state Blaine amendment movements was “to make certain that government would not help pay for ‘sectarian’ (i.e. Catholic) schooling for children”); Douglas Laycock, “The Underlying Unity of Separation and Neutrality,” 46 *Emory L. J.* 43, 50 (1997) (“[N]ineteenth century opposition to funding religious schools drew heavily on anti-Catholicism”); Ira C. Lupu, “The Increasingly Anachronistic Case Against School Vouchers,” 13 *Notre Dame J. L. Ethics & Pub. Policy* 375, 386 (1999) (“From the advent of publicly supported, compulsory education until very recently, aid to sectarian schools primarily meant aid to Catholic schools.”)

12 U.S. Constitution, Amend. 1: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.”

13 John T. S. Madeley, “A Framework for the Comparative Analysis of Church-State Relations in Europe.” *West European Politics*, vol. 26. #1 (2003). p. 27.

14 See, for example, the 1657 Flushing Remonstrance, <http://www.nym.org/flushing/remons.html>

15 For example, Virginia experienced a ten-year struggle, which included the publication in 1785 of *Memorial and Remonstrance Against Religious Assessments*. The *Memorial* was promulgated in opposition to a movement in the Virginia Legislature to pass *A Bill establishing a Provision for Teachers of the Christian Religion*. Among its principles the *Memorial* declared:

The Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate, [T]he same authority which can establish Christianity, in exclusion of all other Religions, may establish with the same ease any particular sect of Christians, in exclusion of all other Sects. [T]hat the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all

the Virginia legislature of Thomas Jefferson's *Statute of Religious Liberty*, which declared, "No man shall be compelled to frequent or support any religious worship, place or ministry whatsoever."¹⁶ Several other states had similar provisions.¹⁷

This struggle over church-state relations in the early United States had at its core the issue of compulsory support for religion; and by the end of the second decade of the Nineteenth Century, clauses asserting that there would be no compulsory support for religious institutions were triumphant. Prior to 1800, ten of sixteen states included no compulsory support clauses in the state constitutions; and five of those states had reiterated this statement in multiple constitutions.¹⁸ By 1825 seven additional states (seventeen of twenty-four states) had adopted this principle.¹⁹ By 1850 more states had also accepted this principle.²⁰ Thus, by 1850, well before any waves of anti-Catholic hysteria, much less Blaine's influence, twenty-three of thirty states had made this principle within the state's constitutions.

Taking a different approach, the Ohio Constitution of 1851 required that "no religious or other sect, or sects, shall ever have any exclusive right to, or control of, any part of the school funds of this state."²¹ In 1855, Massachusetts added to its constitution a statement that funds

cases whatsoever; and,

Above all are they to be considered as retaining an "equal title to the free exercise of Religion according to the dictates of Conscience." Whilst we assert for ourselves a freedom to embrace, to profess and to observe the Religion, which we believe to be of divine origin, we cannot deny an equal freedom to those whose minds have not yet yielded to the evidence, which has convinced us.

16 Virginia Statute for Religious Freedom of 1786.

17 These include, Georgia, Art. IV, §5 (1789), "All persons shall have the free exercise of religion, without being obliged to contribute to the support of any religious profession but their own." Pennsylvania, Art. II, (1776, "[N]o 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." New Jersey, Art. XVIII, (1776), "That no person shall ever, within this Colony, be deprived of the inestimable privilege of worshipping Almighty God in a manner agreeable to the dictates of his own conscience; nor, tunder any pretence whatever, be compelled to attend any place of worship, contrary to his own faith and judgment; nor shall any person, within this Colony, ever be obliged to pay tithes, taxes, or any other rates, for the purpose of building or repairing any other church or churches, place or places of worship, or for the maintenance of any minister or ministry, contrary to what he believes to be right, or has deliberated or voluntarily engaged himself to perform." Delaware, Art. I §1 (1792) ". . . yet no man shall or ought to be compelled to attend any religious worship, to contribute to the erection or support of any place of worship or to the maintenance of any ministry, against his own free will and consent;" Kentucky, Art. XII § 3 (1792) "that no man of right can be compelled to attend, erect, or support any place of worship, or to maintain any ministry against his consent; that no human authority can in any case whatever control or interfere with the rights of conscience." Vermont, Ch.1. Art. 3 (1793) "that no man ought to, or of right can be compelled to attend any religious worship, or erect or support any place of worship, or maintain any minister, contrary to the dictates of his conscience, nor can any man be justly deprived or abridged of any civil right as a citizen, on account of his religious sentiments, or peculiar mode of religious worship; and that no authority can, or ought to be vested in, or assumed by, any power whatever, that shall in any case interfere with, or in any manner controul the rights of conscience, in the free exercise of religious worship." Tennessee, Art XI, § 3 (1796) "that no man can of right be compelled to attend, erect, or support any place of worship, or to maintain any ministry against his consent; that no human authority can in any case whatever control or interfere with the rights of conscience;" Ohio, Art. VIII, § 3 (1802) "that no human authority can, in any case whatever, control or interfere with the rights of conscience; that no man shall be compelled to attend, erect, or support any place of worship, or to maintain any ministry, against his consent;"

18 Maryland 1776; North Carolina 1776; Pennsylvania 1776 reiterated 1790; South Carolina 1776 reiterated 1788, 1790; Vermont 1777, reiterated 1786 1793; New Hampshire 1784, reiterated 1792; Vermont 1777, reiterated 1786, 1793; Delaware 1792; Kentucky 1792 reiterated 1799; Tennessee 1796; and Georgia 1798.

19 Ohio 1802; Indiana 1816; Connecticut 1818; Illinois 1818; Alabama 1819; Maine 1820; and Missouri 1820.

20 Virginia 1830; Michigan 1835; Arkansas 1836; Rhode Island 1842; Texas 1845; and Wisconsin 1848.

21 Ohio Const. Art. VI, 2 (added 1851).

raised for “common” schools “shall never be appropriated to any religious sect for the maintenance exclusively of its own schools.”²² In 1859 Kansas added its own similar language providing that “no religious sect or sects shall ever control any part of the common-school or University funds of the State.”²³ Oregon did the same later the same year asserting that “no money shall be drawn from the Treasury for the benefit of any religious [sic], or theological institution” and forbidding that “any money be appropriated for the payment of any religious [sic] services in either house of the Legislative Assembly.”²⁴

The next fifteen years saw similar clauses adopted by South Carolina,²⁵ Illinois,²⁶ Pennsylvania,²⁷ Missouri,²⁸ Alabama²⁹ and Nebraska.³⁰ The Pennsylvania and Nebraska Constitutions were further amended in 1963 and 1976, respectively, to impose more specific restrictions against the use of public funds for religious purposes.³¹ Illinois also adopted an unusually detailed provision barring any payments “in aid of any church or 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 whatever” and also forbidding any grant of “land, money, or other personal property...to any church or for any sectarian purpose.”³² Thus, roughly half the state constitutions containing what are now labeled “Blaine Amendments” had those clauses in place prior to Blaine’s failed federal amendment. Similarly, in each of these examples, the language is clearly speaking toward all religions and denominations and not solely denying state funds to Catholic institutions.

In the latter half of the 1870s, the period most closely associated with the failed federal Blaine Amendment, seven more states, Colorado,³³ Texas,³⁴ Georgia,³⁵ New Hampshire,³⁶ Min-

22 Mass. Const. Art. XVIII (1855).

23 Kansas Const. Art. VI, § 8 (1859). This language was preserved and moved to Art. VI, § 6 in 1966

24 Ore. Const. Art. I, § 5.

25 S.C. Const. Art. X, § 5 (1868) (providing that “no religious sect or sects shall have exclusive right to or control of any part of the school-funds of the State”), renumbered and amended by S.C. Const. Art. XI, 4 (1973).

26 Ill. Const. Art. VIII, § 3 (1870) (forbidding, *inter alia*, appropriation of public funds for “anything in aid of any church or sectarian purpose”) (renumbered art. X, 3 (1970)).

27 Pa. Const. Art. III, § 18 (1874) (forbidding appropriations “for charitable, educational or benevolent purposes... to any denominational or sectarian institution, corporation or association”); *id.* art. III, 29 (1967).

28 Mo. Const. Art. XI, § 11 (1875) (forbidding any payment of public funds “in aid of any religious creed, church or sectarian purpose” and to any school “controlled by any religious creed, church or sectarian denomination whatever”) (renumbered art. IX, 8).

29 Ala. Const. Art. XIII, § 8 (1875) (forbidding educational funds being “appropriated to, or used for, the support of any sectarian or denominational school”); *id.* art. XIV, 263 (amended 1901).

30 Neb. Const. Art. VIII, § 11 (1875) (forbidding “sectarian instruction . . . in any school or institution supported in whole or in part by [public school funds]” and state acceptance of any grant of property “to be used for sectarian purposes”); *id.* art. VII, 11 (amended 1976).

31 Neb. Const. Art. VII, sec.11 (amended 1976); Pa. Const. art. III, 29 (added 1963)

32 Ill. Const. Art. VIII, § 3 (1870) (renumbered art. X, 3 (1970)).

33 Colo. Const. Art. IX, § 7 (adopting an anti-funding provision identical to article VIII, 3 of the 1870 Illinois Constitution, article 8, § 33 (1874)); *id.* art. V, 34 (1876) (prohibiting “charitable, industrial, educational or benevolent” appropriations to any “denominational or sectarian institution or association,” much like article III, § 18 of the 1874 Pennsylvania Constitution (1874)).

34 Tex. Const. Art. I, § 7 (providing that “no money shall be appropriated, or drawn from the Treasury for the benefit of any sect, or religious society, theological or religious seminary”); *id.* art. VII, 5(a) (barring school funds from “ever being appropriated to or used for the support of any sectarian school”).

35 Ga. Const. Art. I, § 1, para. XIV (1877) (including a similar prohibition).

36 N.H. Const. Pt. 2, Art. LXXXIII (1877) (enacting the same type of provision).

nesota,³⁷ California,³⁸ and Louisiana³⁹ also adopted anti-funding provisions. The provisions in the Georgia and Minnesota Constitutions were unusually detailed about the range and character of excluded institutions. The Georgia Constitution stated, “no money shall ever be taken from the public Treasury, directly or indirectly, in aid of any church, sect, cult, or denomination of religionists, or of any sectarian institution.”⁴⁰ Likewise, the Minnesota Constitution states, “In no case shall any public money or property be appropriated or used for the support of schools wherein the distinctive doctrines, creeds or tenets or any particular Christian or other religious sect are promulgated or taught.”⁴¹

From 1880 to the end of the century another thirteen states adopted religiously sensitive anti-funding provisions. For instance, in 1880 Nevada added to its constitution, providing that “no public funds of any kind or character whatever, State, County or Municipal, shall be used for sectarian purpose.”⁴² In 1885, Florida asserted in its Declaration of Rights that no public revenue “shall ever be taken from the public treasury directly or indirectly in aid of any church, sect or religious denomination or in aid of any sectarian institution.”⁴³

Therefore, as Justice Rehnquist noted in the majority opinion in *Locke*, “[m]ost States that sought to avoid an establishment of religion around the time of the founding placed in their constitutions formal prohibitions against using tax funds to support the ministry.”⁴⁴ The plain text of these constitutional provisions prohibited any tax dollars from supporting the clergy.⁴⁵ This trend continued throughout the Nineteenth Century. Thus, the precursors of the so-called “Blaine Amendments” predate the development of, and are therefore not driven by, anti-Catholic hostility in the last half of the Nineteenth Century.

A key pattern emerges when examining state constitutional clauses declaring that there can be no public support for religious institutions. On the surface, no public support clauses appear closely related to the no compulsory support clauses. However, with one exception, such public support clauses appear only in the Nineteenth Century and were not as widely adopted as statements explicitly rejecting “compulsory” support. For example, Article 18 of the New Jer-

37 Minn. Const. Art. XIII, § 2 (enacting the same provision).

38 Cal. Const. Art. IV, 3§ 0 (1879) (providing that no governmental body “shall ever . . . grant anything to or in aid of any religious sect, church, creed, or sectarian purpose”); Cal. Const. art. XVI, 5, art. IX, 8 (amended 1966).

39 La. Const. Art. LI (1879) (providing that “no money shall ever be taken from the public treasury, directly or indirectly in aid of any church, sect or denomination of religion, or in aid of any priest, preacher, minister or teacher thereof”); *id.* Art. CCXXVIII (providing that no school funds “shall be appropriated to or used for the support of any sectarian schools”); cf. La. Const. Art. CXL (1868) (prohibiting appropriation to “any private school or any private institution of learning whatever” but lacking any reference to “sectarian” schools). Louisiana’s anti-funding provisions were deleted from its constitution in the 1974 revision. See La. Const. art. I, 8 (paralleling federal religion clauses).

40 Ga. Const. Art. I, § 1, para. 14 (1877).

41 Minn. Const. Art. XIII, § 2.

42 Nev. Const. Art. XI, § 10 (added 1877).

43 Fla. Declaration of Rights 6 (1885), amended by Fla. Const. Art. I, § 3.

44 e.g., Ga. Const., Art. IV, §5 (1789), reprinted in 2 *Federal and State Constitutions, Colonial Charters and Other Organic Laws* 789 (F. Thorpe ed. 1909) (reprinted 1993) (.All persons shall have the free exercise of religion, without being obliged to contribute to the support of any religious profession but their own.); Pa. Const., Art. II (1776) in 5 *id.*, at 3082 ([N]o 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.); N. J. Const., Art. XVIII (1776), in *id.*, at 2597 (similar); Del. Const., Art. I, §1 (1792), in 1 *id.*, at 568 (similar); Ky. Const., Art. XII, §3 (1792), in 3 *id.*, at 1274 (similar); Vt. Const., Ch. I, Art. 3 (1793), in 6 *id.*, at 3762 (similar); Tenn. Const., Art. XI, §3 (1796), in *id.*, at 3422 (similar); Ohio Const., Art. VIII, §3 (1802), in 5 *id.*, at 2910 (similar).

45 *Locke* at 9.

sey Constitution of 1776 states, "...nor shall any person, within this Colony, ever be obliged to pay tithes, taxes, or any other rates, for the purpose of building or repairing any other church or churches, place or places of worship, or for the maintenance of any minister or ministry." After New Jersey, from 1830 to 1875 a series of states, beginning with Virginia and later Michigan, Wisconsin, Indiana, Minnesota, and Missouri, adopt "no public support" language, with Oregon doing so somewhat later.⁴⁶

Closely related to the more general "no compulsory support" phrasing is the specific statement that government shall make no appropriation for church schools.⁴⁷ For example, the Pennsylvania Constitution of 1874 states, "No appropriation shall be made to any charitable or educational institution not under the absolute control of the Commonwealth..."⁴⁸ Similar clauses appears only seven times beginning first in 1873 in Pennsylvania and being infrequently adopted but moving slowly. While in isolation, these clauses could be seen as targeting Catholic schools, when seen in context with other No Compulsory Support Clauses the overall impact of these clauses is clearly tied to the ongoing efforts to effectively delineate church and state relations and is therefore, decidedly more neutral.

A similar, though less definitive pattern is seen with the clauses stating that there shall be no grant of land or aid to religious institutions. For example, the Illinois Constitution of 1870 states, "nor shall any grant or donation of land, money or other personal property ever be made by the State or any such public corporation to any church or for any sectarian purpose."⁴⁹ This language was adopted by only six states.⁵⁰

The 1851 Ohio constitution stated, "The general Assembly shall make such provisions by taxation, or otherwise, as with the income arising from the school trust fund, will secure a thorough and efficient system of common schools throughout the State, but no religious or other sect or sects shall ever have any exclusive right to, or control of, any part of the school funds of this State."⁵¹ This "exclusive right" phrasing was used only in five state constitutions,⁵² but all originate in the Nineteenth Century.

Another infrequently used constitutional provision uses a variety of different phrasings to state that public schools are to be kept free of sectarian influences. This type of clause is evidenced from the Nevada constitution of 1864, which reads:

The Legislature shall provide for a uniform system of common schools, by which a school shall be established and maintained in each school district at least six months in every year, and any school district neglecting to establish and maintain such a school, or which shall allow instructions of a sectarian character therein, may be deprived of its proportion of the interest of the public school fund during such neglect or infraction.⁵³

Five other state constitutions reflect this type of provision.⁵⁴

46 New Jersey 1776; Virginia 1830; Michigan 1835; Wisconsin 1848; Indiana 1851; Minnesota 1857; Oregon 1857; Missouri 1875; Idaho 1889; South Dakota 1889; Washington 1889; and Wyoming 1889.

47 Pennsylvania 1873; Nebraska 1875; Colorado 1876; Montana 1889; south Dakota 1889; Wyoming 1889; and Utah 1895.

48 Art. 3, § 17.

49 Art. VIII, § 3.

50 Illinois 1870; Colorado 1876; Texas 1876; Idaho 1889; South Dakota 1889; and Utah 1895.

51 Art. VI, § 2.

52 Ohio 1851; Kansas 1855; Nebraska 1866; Arkansas 1868; and Mississippi 1868.

53 Art. XI, § 2.

54 Nebraska 1864; Montana 1889; North Dakota 1889; South Dakota 1889; and Washington 1889.

Interestingly enough, these last two clauses, taken in isolation, leave open the possibility of some distribution of state funds to a variety of religious institutions, and thus no “exclusive right.” However, six of the ten⁵⁵ of the states using these clauses also have no compulsory support clauses in the state constitutions complicating that possibility.

The pattern of these constitutional words and phrases demonstrates conclusively that state legislatures throughout the country and throughout the Nineteenth Century struggled with the issue of church state relations as manifested in the question of whether tax dollars should be allowed to flow to religious institutions. The controversy over the 1876 Blaine Amendment and its purported “progeny” must be seen in this context and cannot be localized either in time to periods of anti-Catholic activity or in spirit to anti-Catholic intent.

Given the preoccupation of the advocacy literature in opposition to the “Blaine Amendments” along with the assertion that “sectarian” was code for “Catholic”⁵⁶ the term should play the dominant or defining role in this claim. Instead, “sectarian” is most commonly used in concert with other words and phrases, the net result of which is decidedly neutral and not surreptitiously anti-Catholic in either the Nineteenth or the Twentieth Centuries.

The word “sectarian” also has its own history in American constitutional language. The term first appears in state constitutional language in Nevada in 1864. It is used again in 1868 in Georgia and South Carolina and becomes common afterwards, being utilized eighty-five times in fifty-one constitutions adopted by twenty-seven states.

The word sectarian, however, replaces the word “sect” used in earlier constitutions and it plays the identical role. “Sect” is first used in 1776 in Maryland, New Hampshire, and New Jersey and by Vermont in 1777. The word largely fades out by 1890 but remains in the constitutions in Connecticut to 1955, Kansas to 1966 and Maine to 1988. In clauses where both terms occur the overlapping meaning is apparent. For example, Article X, Sec. 5 of the South Carolina Constitution of 1868 reads, “No religious sect or sects shall have exclusive right to, or control of any part of the school funds of the State, nor shall sectarian principles be taught in the public school.” “Sectarian” is simply an adjective drawing on the previous use of the term “sect.”

This transition from “sect” to “sectarian” is important because the word “sect,” as used in the Eighteenth and Nineteenth Century state constitutions very clearly refers to the variety of Protestant denominations found in the American colonies. For example, the Maryland Constitution of 1776 repeatedly refers to, “any minister, public teacher, or preacher of the gospel, as such, or to any religious sect, order or denomination.”⁵⁷ Likewise, the Vermont Constitution of 1777 stated:

That all men have a natural and unalienable right to worship ALMIGHTY GOD, according to the dictates of their own consciences and understanding, regulated by the word of GOD; and that 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 minister, contrary to the dictates of his conscience; . . . nevertheless, every sect or denomination of people ought to observe the Sabbath, or the Lord’s day, and keep up, and support, some sort of religious worship, which to them shall seem most agreeable to the revealed will of GOD.⁵⁸

55 Arkansas, Kansas, Montana, Nebraska, Ohio, and South Dakota.

56 See The Beckett Fund discussion of the South Dakota case *Puckett v. Rounds* as but one of many examples of this assertion being made: <http://www.becketfund.org/index.php/case/13.html>.

57 Md. Const. of 1776, § 34.

58 Vermont Constitution of 1777, Chap. I, §3.

In fact, the New Hampshire Constitution of 1776 authorizes the collection of taxes to support churches stating,

The people of this state have a right to impower, and do hereby fully impower the legislature to authorize from time to time, the several towns, parishes, bodies-corporate, or religious societies within this state, to make adequate provision at their own expence, for the support and maintenance of public protestant teachers of piety, religion and morality: Provided notwithstanding, That the several towns, parishes, bodies-corporate, or religious societies, shall at all times have the exclusive right of electing their own public teachers, and of contracting with them for their support and maintenance. And no portion of any one particular religious sect or denomination, shall ever be compelled to pay towards the support of the teacher or teachers of another persuasion, sect or denomination. And every denomination of christians demeaning themselves quietly, and as good subjects of the state, shall be equally under the protection of the law: and no subordination of any one sect or denomination to another, shall ever be established by law.⁵⁹

Use of the term “sect” is similar through American history and the last use is nearly identical to the first: the Maine Constitution or 1988 states;

All men have a natural and unalienable right to worship Almighty God according to the dictates of their own consciences, and no one shall be hurt, molested, or restrained in his person, liberty, or estate for worshipping God in the manner and season most agreeable to the dictates of his own conscience, nor for his religious professions or sentiments, provided he does not disturb the public peace, nor obstruct others in their religious worship; and all persons demeaning themselves peaceably, as good members of the State, shall be equally under the protection of the laws, and no subordination nor preference of any one sect or denomination to another shall ever be established by law, nor shall any religious test be required as a qualification for any office or trust under this State; and all religious societies in this State, whether incorporate or unincorporate, shall at all times have the exclusive right of electing their public teachers, and contracting with them for their support and maintenance.⁶⁰

The Word “sectarian” then appears for the first time in the 1864 Nevada Constitution, once again prior to the failed Blaine Amendment:

The Legislature shall provide for a uniform system of common schools, by which a school shall be established and maintained in each school district at least six months in every year, and any school district neglecting to establish and maintain such a school, or which shall allow instructions of a sectarian character therein, may be deprived of its proportion of the interest of the public school fund during such neglect or infraction; and the Legislature may pass such laws as will tend to secure a general attendance of the children in each school district upon said public school.⁶¹

The Nevada Constitution also states, “No sectarian instruction shall be imparted or tolerated in any school or university that may be established under this Constitution.”⁶²

59 N. H. Const. of 1776, Art. I, § VI.

60 Me. Const. of 1988, Art. I, § 3.

61 Nev. Const. of 1864, Art. XI, §2.

62 Nev. Const. of 1864, Art. XI, §9.

Four years later, in 1868, the Georgia Constitution adopted the following language, “[n]o vote, resolution, law, or order, shall pass, granting a donation, or gratuity, in favor of any person, except by the concurrence of two-thirds of each branch of the General Assembly, nor, by any vote, to a sectarian corporation or association.”⁶³

These uses of the term “sectarian” might appear to support the theory of anti-Catholic intent if taken in isolation; but the South Carolina Constitution, also of 1868, states, “No religious sect or sects shall have exclusive right to, or control of any part of the school funds of the State, nor shall sectarian principles be taught in the public school.”⁶⁴ Thus, the juxtaposition of “sect” and “sectarian” carries forward the neutral stance of earlier constitutions. The term “Sects” is clearly plural, referring to the variety of Christian denominational groups and “sectarian” must be read in that light as referring back to those “sects” not suddenly interjecting anti-Catholic animus.

It is this trend that continues through the remainder of the Nineteenth Century. The Alabama Constitution of 1875 stated, “No money raised for the support of the public schools of the state shall be appropriated to, or used for, the support of any sectarian or denominational school.”⁶⁵ The Colorado Constitution of 1876 similarly stated, “No appropriation shall be made for charitable, industrial, educational, or benevolent purposes to any person, corporation, or community not under the absolute control of the State, nor to any denominational or sectarian institution or association.”⁶⁶ The Idaho Constitution of 1890 rejects, “aid of any church or sectarian, or religious society, or for any sectarian or religious purpose ... controlled by any church or sectarian or religious denomination whatsoever;”⁶⁷ and similar language is used in the Florida Constitution of 1885 which stated: “No preference shall be given by law to any church, sect or mode of worship, and no money shall ever be taken from the public treasury directly or indirectly in aid of any church, sect or religious denomination, or in aid of any sectarian institution.”⁶⁸ In fact, this neutral doctrine of “no preference” to any religious group was employed by twenty-three states between 1776 and 1889.⁶⁹

States constitutions potentially exhibit non-neutral language in one section while exhibiting language, which is “neutralized” in another. For example, the Oklahoma Constitution of 1907 in Article I, Section 5 states, “Provisions shall be made for the establishment and maintenance of a system of public schools, which shall be open to all the children of the State and free from sectarian control;” a clause refined by the following:

No public money or property shall ever be appropriated, applied, donated, or used, directly or indirectly, for the use, benefit, or support of any sect, church, denomination, or system of religion, or for the use, benefit or support of any priest, preacher, minister, or other religious teacher or dignitary, or sectarian institution as such.⁷⁰

Similarly, the Arizona Constitution of 1912 reads:

63 Ga. Const of 1864, Article III, § 6.2.

64 S. C. Const. of 1868, Art X, § 5.

65 Ala. Const. of 1875, Art. XIII, § 8 (note the insertion of the additional descriptor, “denominational”).

66 Col. Const. of 1876, Art. IX, § 7.

67 Idaho Const. of 1890, Art. 9, § 5.

68 Fl. Const. of 1885, Art. I, § 6.

69 North Carolina 1776; Pennsylvania 1776 reiterated 1790, 1873; Delaware 1792, reiterated 1831; Tennessee 1796, reiterated 1834, 1879; Ohio 1802; Indiana 1818, reiterated 1851; Kentucky 1792, reiterated 1799, 1850; Mississippi 1818, reiterated 1832, 1868; Illinois 1818, reiterated 1848, 1879; and Maine 1820.

70 Oklahoma Const. Art. II, Sec. 5.

No sectarian instruction shall be imparted in any school or state educational institution that may be established under this Constitution, and no religious or political test or qualification shall ever be required as a condition of admission into any public educational institution of the state, as teacher, student, or pupil; but the liberty of conscience hereby secured shall not be so construed as to justify practices or conduct inconsistent with the good order, peace, morality, or safety of the state, or with the rights of others.⁷¹

However, the Arizona Constitution specifically rejects aid to, “any church, or private or sectarian school, or any public service corporation.”⁷² Likewise, the North Dakota Constitution of 1981 states in that the government shall “make provision for the establishment and maintenance of a system of public schools which shall be open to all children of the state of North Dakota and free from sectarian control.”⁷³ However, the North Dakota Constitution also states:

All colleges, universities, and other educational institutions, for the support of which lands have been granted to this state, or which are supported by a public tax, shall remain under the absolute and exclusive control of the state. No money raised for the support of the public schools of the state shall be appropriated to or used for the support of any sectarian school.⁷⁴

In a similar vein, any perception of anti-Catholic “code words” in the South Dakota Constitution of 1889,⁷⁵ in which the word “sectarian” unmodified must be qualified by Article VI, Section 3 that precedes them:

The right to worship God according to the dictates of conscience shall never be infringed. No person shall be denied any civil or political right, privilege or position on account of his religious opinions; but the liberty of conscience hereby secured shall not be so construed as to excuse licentiousness, the invasion of the rights of others, or justify practices inconsistent with the peace or safety of the State. No person shall be compelled to attend or support any ministry or place of worship against his consent, nor shall any preference be given by law to any religious establishment or mode of worship. No money or property of the state shall be given or appropriated for the benefit of any sectarian or religious society or institution.⁷⁶

The elegant defense of the rights of conscience and the assertion of no compulsory support as well as the clear repudiation of preference to one religious group over another would seem to make clear that the “sectarian or religious” institutions of the final phrase encompass all religions and Christian denominations; and in this light must the rest of the state Constitution be understood. Thus, in each of these examples, apparently biased clauses must be read in the light of the rest of the document; which then make clear the neutral intent of each Constitution taken as a whole.

Overall, of the twenty-seven states in which the constitutions use the term “sectarian” from Nevada in 1864 to Texas in 2003, spanning eighty-five clauses and fifty-one constitutions, the term “sectarian” is refined by such neutral language in forty-five of the eighty-five specific

71 Ariz. Const. Art. XI, Sec. 7.

72 Ariz. Const. Art IX, Sec. 10.

73 North Dakota Const. Art. VIII, Sec. 1.

74 North Dakota Const. Art. VIII, Sec. 5. See also, Art. VIII, Sec. 16, Art. XXII, Sec. 1, and Art. XXVI, Sec. 18.

76 South Dakota Const. Art. VI, Sec. 3.

clauses and neutral formulations characterize twenty-four of the twenty-nine states. Thus, it must be concluded that the term “sectarian,” at least as it is used in state constitutions, is not some code word for “Catholic;” and that the vast majority of so-called Blaine Amendments reflect neutral religious intent.

In 1908, *Quick Bear v. Leupp*,⁷⁷ upheld payment to Catholic schools on a South Dakota Sioux reservation. In *Quick Bear*, the Court ultimately determined that monies paid under treaty provision were not “appropriations” of tax funds but “[i]t is the Indians’ money, or, at least, is dealt with by the government as if it belonged to them, as morally it does;”⁷⁸ thus use in “sectarian” schools does not violate Constitutional limits. However, the Court clearly again employed the term “sectarian” referring to the variety of denominations and not simply Catholic schools. The Court cited the 1896 Appropriation Act statement, “it is hereby declared to be the settled policy of the government to hereafter make no appropriation whatever for education in any sectarian school,”⁷⁹ but pointed out that, “it is contended that the spirit of the Constitution requires that the declaration of policy that the government ‘shall make no appropriation whatever for education in any sectarian schools’ should be treated as applicable, on the ground that the actions of the United States were to always be undenominational, and that, therefore, the government can never act in a sectarian capacity.”⁸⁰

The Court observed that, “Some time before 1895 opposition developed to these contracts with denominational schools, on the ground that the public moneys of the United States, raised by taxation, should not be used for education in sectarian institutions.”⁸¹ Thus, the Court uses the terms “sectarian,” and “denominational” as equivalents and prefers “undenominational” to “non-sectarian.”⁸² This is important because the Court also refers to “different denominational schools” and “different denominations”⁸³ observing that Lutheran as well as Catholic schools were involved in Indian education on the Rosebud reservation. Thus, “sectarian,” in this instance, clearly refers to denominational schools of any kind and not simply Catholic schools.

In still another example, Justice Frankfurter, in his concurring opinion in *McCullum v. Board of Education* opined:

Horace Mann was a devout Christian, and the deep religious feeling of James Madison is stamped upon the Remonstrance. The secular public school did not imply indifference to the basic role of religion in the life of the people, nor rejection of religious education as a means of fostering it. The claims of religion were not minimized by refusing to make the public schools agencies for their assertion. The non-sectarian or secular public school was the means of reconciling freedom in general with religious freedom.⁸⁴

Frankfurter continued,

The non-sectarian or secular public school was the means of reconciling freedom in general with religious freedom. The sharp confinement of the public schools to secular education was recognition of the need of a democratic society to educate its children, insofar

77 210 U.S. 50 (1908).

78 *Id.* at 80.

79 *Id.* at 79.

80 *Id.* at un-numbered fn. Available online at <http://caselaw.lp.findlaw.com/scripts/getcase.pl?navby=case&court=US&vol=210&page=50>

81 *Id.*

82 *Id.* at 81.

83 *Id.* at un-numbered fn. *supra*.

84 *McCullum v. Board of Educ.*, 333 U.S. 203 at 216 (1948).

as the State undertook to do so, in an atmosphere free from pressures in a realm in which pressures are most resisted and where conflicts are most easily and most bitterly engendered. Designed to serve as perhaps the most powerful agency for promoting cohesion among a heterogeneous democratic people, the public school must keep scrupulously free from entanglement in the strife of sects. The preservation of the community from divisive conflicts, of Government from irreconcilable pressures by religious groups, of religion from censorship and coercion however subtly exercised, requires strict confinement of the State to instruction other than religious, leaving to the individual's church and home, indoctrination in the faith of his choice.⁸⁵

Thus, it is possible to suggest that the entire concept of the "Blaine Amendment," as currently used, is fundamentally flawed. While Blaine's failed federal amendment establishes a particular point in time and an historical context for a specific expression of Constitutional thinking related to the flow of tax dollars into religious institutions, an examination of state constitutions makes clear that there is little legitimacy to localizing the "Blaine" issues to the latter quarter of the Nineteenth Century. As a part of the long-standing Constitutional tradition concerning the separation of Church and State, the "Blaine Amendments" are nothing more, and nothing less, than a legitimate continuance of that tradition.

This analysis of state constitutional clauses identified as potential Blaine Amendments suggests that proving anti-Catholic motive for any given clause would be difficult at best. First, it is clear that the use of the term "sectarian" emerges from earlier use of "sect" and that both terms are clearly presented as indicating the multiplicity of Christian denominations and not the singling out of any one group.

The failed federal Blaine Amendment emerged from religiously neutral impulses responding to religious controversy in schools and supported by the emergence of atheist and secularist, not to mention Liberal Christian, movements. It is clear that many Blaine clauses were included in state constitutions not out of anti-Catholic animus but out of Federal requirements that such language be included in new state constitutions.

Furthermore, the Blaine clauses at both Federal and state levels emerged from many reasons not single causes. Thus, even where anti-Catholic animus may have played a role in state adoption of a "Blaine Amendment" other, legitimate, motives also undoubtedly played a role. As a result, it is difficult to argue that an unconstitutional motive embedded with numerous other constitutionally acceptable motives should invalidate a state constitutional clause unless it can be shown that the unconstitutional motive was the primary intent of adoption. It must be recognized that state constitutional adoption and revision in the Twentieth Century, a period arguably less dominated by anti-Catholicism than the latter half of the Nineteenth Century has great potential to eliminate anti-religious bias as grounds for invalidation.

If it were viewed by the Supreme Court that these state constitutional prohibition clauses were "Blaine Amendments" as characterized by anti-Catholic intent the Court must also acknowledge that other state constitutional prohibition clauses are paradoxically constitutional as they are devoid of such animus and, thus, be definition not a "Blaine Amendment."

Thus, the wording of a state constitutional clause, specifically the use of "sectarian," is no longer the defining factor for determining lack of constitutional validity. Therefore, as a result of the difficulty of proving anti-Catholic intent as a primary legislative priority, as suggested by the argument presented herein, many, if not most, state clauses impacting the flow of tax dollars

85 *McCullum*, 333 U.S. 203 at 216-7 (1948) (concurring).

into religious institutions are Constitutionally permissible. Thus, it will devolve to state courts to decide whether a state constitutional clause should be considered a “Blaine Amendment.”

As a result of this, and where state clauses are challenged, state supreme courts will be required to engage in analysis to determine whether anti-Catholic motives were primary drivers for the adoption of the state Blaine clauses; and it seems likely that many, if not most, state Blaine Amendments would survive constitutional challenge. Thus, each state, which has such prohibitory constitutional language, will have to make its own determination of what role a state clause will play in educational and other funding decisions. Potentially, each clause will be litigated before each state supreme court based upon a totally different factual situation.

In this context, it is important to note that both the Wisconsin and Ohio State Constitutions contain Blaine language, but in *Jackson v Benson*⁸⁶ the Wisconsin Supreme Court upheld the Milwaukee Parental Choice Program declaring the program acceptable under both the Wisconsin and United States Constitutions despite the program’s provisions allowing tax dollars to go to religious institution. In 1998, the U.S. Supreme Court chose not to hear the appeal of the Wisconsin ruling. Conversely, in Ohio, the State Court of Appeals found the Pilot Project Scholarship Program⁸⁷ unconstitutional, declaring that the program had the primary effect of advancing religion in violation of the Establishment Clause.⁸⁸ It was this ruling the United States Supreme Court overruled in *Zelman v. Simmons-Harris*.⁸⁹

A state supreme court may be called upon to interpret the presence of Blaine language in the state constitution and thus determine whether state tax dollars will be allowed to flow to religious institutions. But even then, it is clear that the United States Supreme Court finds limited impediments to religious institutions receiving tax funds; and any attempt by state legislatures to create such limits must be carefully crafted to fulfill the rather imprecise requirements of “neutrality.”

The state of Florida illustrates the complexity of these potential challenges along with the state specific constitutional language. In the state of Florida, private education supporters had sought for the increased financial support of religiously affiliated schools. In 2006 the Florida Supreme Court declared the state’s Opportunity Scholarship Program unconstitutional because it included private secular and religious schools.⁹⁰ In *Bush v. Holmes*, the Florida court asserted in a five to two decision that the voucher program violated the state constitution’s provision requiring a “uniform” system of public schools for all students. Chief Justice Pariente wrote in the majority opinion that the voucher program “diverts public dollars into separate, private systems...parallel to and in competition with the free public schools.”⁹¹ It is instructive to note that this ruling was not based on Florida’s “Blaine Amendment,”⁹² but instead on the clause requiring a “uniform, efficient, safe, secure, and high quality system of free public schools.”⁹³ This illustrates the argument previously presented that “Blaine Amendments” and “No Compulsory Support” clauses are not the only state constitutional clauses having the potential to affect the flow of tax dollars into private and religious institutions.

86 218 Wis. 2d 835 (1998).

87 Ohio Rev. Code Ann. §§3313.974—3313.979.

88 528 U.S. 983 (1999).

89 234 F.3d 945 (2002).

90 *John Ellis “Jeb” Bush v. Ruth D. Holmes*, 919 So. 2d 392, 412-13 (Fla. 2006).

91 Erik W. Robelen, “Florida Voucher Ruling Roils School Choice Waters,” *Education Week*, 17 January 2006. Available online at <http://www.edweek.org/ew/articles/2006/01/18/19vouchers.h25.html>

92 Fla Const., Art. I, Sec. 3.

93 Fla. Const., Art. IX, Sec. 1(a).

Summary

The funding of public elementary and secondary education is a state and local undertaking that reflects a highly complex operation that is interwoven with state constitutional requirements and limitations. State constitutions control the extent to which state legislatures may fund religiously sponsored elementary and secondary education. These “Blaine Amendments” adopted during the Nineteenth Century, typically condition that state funds may not be delivered to “sectarian” schools. However, it is now being argued by Blaine opponents that “sectarian” is a “code word” for anti-Catholic; therefore these clauses are unconstitutional. This paper argues these clauses are not unconstitutional; that whatever the origins, the modern clauses no longer bear any anti-Catholic stigma and that these clauses are legitimate exercises of state efforts to avoid the excessive entanglement of church and state.

The state constitution Blaine clauses have significant policy implications for state legislatures and educational policy-makers because the future will now require a state-by-state examination of each Blaine clause, with attendant court challenges, to determine whether a state demonstrates specific anti-Catholic hostility in its adoption of its state constitutional language and whether any intervening history ameliorates that anti-Catholic past. Regardless of these determinations, state legislatures will then be required to analyze the implications for various education funding programs that may fund private religiously affiliated schools. Thus, the involvement of religious institutions in state funded programs opens a veritable “Pandora’s Box” regarding a variety of legal dilemmas that will undoubtedly be explored in the future regarding the financing of elementary and secondary education.

APPENDIX A

Blaine Clauses In Current State Constitutions As Defined By Sectarian

State	Clause	Text
Alabama	Art. XIV, Sec. 263	No money raised for the support of the public schools, shall be appropriated to or used for the support of any sectarian or denominational school.
Alaska	Article VII, Sec. 1	Public Education. 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.
Arizona	Art. IX, Sec. 10	No tax shall be laid or appropriation of public money made in aid of any church, or private or sectarian school, or any public service corporation.
	Art. XI, Sec. 7	No sectarian instruction shall be imparted in any school or state educational institution that may be established under this Constitution, and no religious or political test or qualification shall ever be required as a condition of admission into any public educational institution of the state, as teacher, student, or pupil; but the liberty of conscience hereby secured shall not be so construed as to justify practices or conduct inconsistent with the good order, peace, morality, or safety of the state, or with the rights of others.
	Art. XX, Sec. 7	Provisions shall be made by law for the establishment and maintenance of a system of public schools which shall be open to all the children of the state and be free from sectarian control, and said schools shall always be conducted in English. The state shall never enact any law restricting or abridging the right of suffrage on account of race, color, or previous condition of servitude.
Arkansas		<i>No use of "sectarian"</i>
California	Art. IX, Sec. 8	No public money shall ever be appropriated for the support of any sectarian or denominational school, or any school not under the exclusive control of the officers of the public schools; nor shall any sectarian or denominational doctrine be taught, or instruction thereon be permitted, directly or indirectly, in any of the common schools of this State.

	Art. XVI, Sec. 5	Neither the Legislature, nor any county, city and county, township, school district, or other municipal corporation, shall ever make an appropriation, or pay from any public fund whatever, or grant anything to or in aid of any religious sect, church, creed, or sectarian purpose, or help to support or sustain any school, college, university, hospital, or other institution controlled by any religious creed, church, or sectarian denomination whatever; nor shall any grant or donation of personal property or real estate ever be made by the State, or any city, city and county, town, or other municipal corporation for any religious creed, church, or sectarian purpose whatever; provided, that nothing in this section shall prevent the Legislature granting aid pursuant to Section 3 of Article XVI.
Colorado	Art. V, Sec. 34	No appropriation shall be made for charitable, industrial, educational, or benevolent purposes to any person, corporation, or community not under the absolute control of the State, nor to any denominational or sectarian institution or association.
	Art. IX, Sec. 7	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; nor shall any grant or donation of land, money, or other personal property ever be made by the State, or any such public corporation, to any church or for any sectarian purposes.
	Art. VIII, Sec. 8, Amend. 187	Religious test and race discrimination forbidden sectarian tenets. No religious test or qualification shall ever be required of any person as a condition of admission into any public educational institution of the state, either as a teacher or student; and no teacher or student of any such institution shall ever be required to attend or participate in any religious service whatsoever. No sectarian tenets or doctrines shall ever be taught in the public school, nor shall any distinction or classification of pupils be made on account of race or color, nor shall any pupil be assigned or transported to any public educational institution for the purpose of achieving racial balance. [As amended, December 20, 1974.]
Connecticut		<i>No use of "sectarian"</i>

Delaware	Art. 10, Sec. 3	No portion of any fund now existing, or which may hereafter be appropriated, or raised by tax, for educational purposes, shall be appropriated to, or used by, or in aid of any sectarian, church or denominational school; provided, that all real or personal property used for school purposes, where the tuition is free, shall be exempt from taxation and assessment for public purposes.
Florida	Art. I, Sec. 3	Religious freedom. There shall be no law respecting the establishment of religion or prohibiting or penalizing the free exercise thereof. Religious freedom shall not justify practices inconsistent with public morals, peace or safety. No revenue of the state or any political subdivision or agency thereof shall ever be taken from the public treasury directly or indirectly in aid of any church, sect, or religious denomination or in aid of any sectarian institution.
Georgia	Art. I, Sec. 2, Para. Vii	Separation of church and state. No money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect, cult, or religious denomination or of any sectarian institution.
Hawaii	Art. 10, Sec. 1, Amend. 21	The State shall provide for the establishment, support and control of a statewide system of public schools free from sectarian control, a state university, public libraries and such other educational institutions as may be deemed desirable, including physical facilities therefore. There shall be no discrimination in public educational institutions because of race, religion, sex or ancestry; nor shall public funds be appropriated for the support or benefit of any sectarian or private educational institution, except that proceeds of special purpose revenue bonds authorized or issued under section 12 of Article VII may be appropriated to finance or assist not-for-profit corporations that provide early childhood education and care facilities serving the general public.
Idaho	Art. IX, Sec. 5, Amend. 96	Neither the legislature 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 or religious society, or for any sectarian or religious purpose, or to help support or sustain any school, academy, seminary, college, university or other literary or scientific institution, controlled by any church, sectarian or religious denomination whatsoever; nor shall any grant or donation of land, money or other personal property ever be made by the state, or any such public corporation, to any church or for any sectarian or religious purpose; provided, however, that a health facilities authority, as specifically authorized and empowered by law, may finance or refinance any private, not for profit, health facilities owned or operated by any church or sectarian religious society, through loans, leases, or other transactions. [Ratified November 4, 1980]

	Art. IX, Sec. 6,	No religious test or qualification shall ever be required of any person as a condition of admission into any public educational institution of the State, either as teacher or student; and no teacher or student of any such institution shall ever be required to attend or participate in any religious service whatever. No sectarian or religious tenets or doctrines shall ever be taught in the public schools, nor shall any distinction or classification of pupils be made on account of race or color. No books, papers, tracts or documents of a political, sectarian or denominational character shall be used or introduced in any schools established under the provisions of this article, nor shall any teacher or any district receive any of the public school moneys in which the schools have not been taught in accordance with the provisions of this article.
Illinois	Art. X, Sec. 3	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 whatever, anything in aid of any church or 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 whatever; nor shall any grant or donation of land, money, or other personal property ever be made by the State, or any such public corporation, to any church, or for any sectarian purpose.
Indiana		<i>No use of "sectarian"</i>
Iowa		<i>No use of "sectarian"</i>
Kansas		<i>No use of "sectarian"</i>
Kentucky	Part. 2, Sec. 189	No portion of an fund or tax now existing, or that may hereafter be raised or levied for educational purposes, shall be appropriated to, or used by, or in aid of, any church, sectarian or denominational school.
Louisiana		<i>No use of "sectarian"</i>
Maine		<i>No use of "sectarian"</i>
Maryland		<i>No use of "sectarian"</i>
Massachusetts		<i>No use of "sectarian"</i>
Michigan		<i>No use of "sectarian"</i>
Minnesota		<i>No use of "sectarian"</i>
Mississippi	Art. IV, Sec. 66, Amend 3	No law granting a donation or gratuity in favor of any person or object shall be enacted except by the concurrence of two-thirds of the members elect of each branch of the legislature, nor by any vote for a sectarian purpose or use.
	Art. VIII, Sec. 208	No religious or other sect, or sects, shall ever control any part of the school or other educational funds of this State; nor shall any funds be appropriated towards the support of any sectarian school; or to any school that at the time of receiving such appropriation is not conducted as a free school.

Missouri	Art. IX, Sec. 8	Neither the general assembly, nor any county, city, town, township, school district or other municipal corporation, shall ever make an appropriation or pay from any public fund whatever, anything in aid of any religious creed, church or sectarian purpose, or to help to support or sustain any private or public school, academy, seminary, college, university, or other institution of learning controlled by any religious creed, church or sectarian denomination whatever; nor shall any grant or donation of personal property or real estate ever be made by the state, or any county, city, town, or other municipal corporation, for any religious creed, church, or sectarian purpose whatever.
	Art. I, Sec. 7	That no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect or denomination of religion, or in aid of any priest, preacher, minister or teacher thereof, as such; and that no preference shall be given to nor any discrimination made against any church, sect or creed of religion, or any form of religious faith or worship.
Montana	Art. X, Sec. 6.1	The legislature, counties, cities, towns, school districts, and public corporations shall not make any direct or indirect appropriation or payment from any public fund or monies, or any grant of lands or other property for any sectarian purpose or to aid any church, school, academy, seminary, college, university, or other literary or scientific institution, controlled in whole or in part by any church, sect, or denomination.
Nebraska	VII-11	Notwithstanding any other provision in the Constitution, appropriation of public funds shall not be made to any school or institution of learning not owned or exclusively controlled by the state or a political subdivision thereof; PROVIDED, that the Legislature may provide that the state or any political subdivision thereof may contract with institutions not wholly owned or controlled by the state or any political subdivision to provide for educational or other services for the benefit of children under the age of twenty-one years who are handicapped, as that term is from time to time defined by the Legislature, if such services are nonsectarian in nature. All public schools shall be free of sectarian instruction. The state shall not accept money or property to be used for sectarian purposes; PROVIDED, that the Legislature may provide that the state may receive money from the federal government and distribute it in accordance with the terms of any such federal grants, but no public funds of the state, any political subdivision, or any public corporation may be added thereto. A religious test or qualification shall not be required of any teacher or student for admission or continuance in any school or institution supported in whole or in part by public funds or taxation.

Nevada	Art. II, Sec. 2	The legislature shall provide for a uniform system of common schools, by which a school shall be established and maintained in each school district at least six months in every year, and any school district which shall allow instruction of a sectarian character therein may be deprived of its proportion of the interest of the public school fund during such neglect or infraction, and the legislature may pass such laws as will tend to secure a general attendance of the children in each school district upon said public schools.
	Art. II, Sec. 10	No public funds of any kind or character whatever, State, County or Municipal, shall be used for sectarian purpose.
New Hampshire		<i>No use of "sectarian"</i>
New Jersey		<i>No use of "sectarian"</i>
New Mexico	Art. XII, Sec. 3	The schools, colleges, universities, and other educational institutions provided for by this constitution shall forever remain under the exclusive control of the State, and no part of the proceeds arising from the sale or disposal of any lands granted to the State by Congress, or any other funds appropriated, levied; or collected for educational purposes, shall be used for the support of any sectarian, denominational, or private school, college, or university.
	Art. XXI, Sec. 4	Provision shall be made for the establishment and maintenance of a system of public schools which shall be open to all the children of the State and free from sectarian control, and said schools shall always be conducted in English.
New York		<i>No use of "sectarian"</i>
North Carolina		<i>No use of "sectarian"</i>
North Dakota	Art. VIII, Sec. 1	A high degree of intelligence, patriotism, integrity and morality on the part of every voter in a government by the people being necessary in order to insure the continuance of that government and the prosperity and happiness of the people, the legislative assembly shall make provision for the establishment and maintenance of a system of public schools which shall be open to all children of the state of North Dakota and free from sectarian control. This legislative requirement shall be irrevocable without the consent of the United States and the people of North Dakota.
	Art. VIII, Sec. 5	All colleges, universities, and other educational institutions, for the support of which lands have been granted to this state, or which are supported by a public tax, shall remain under the absolute and exclusive control of the state. No money raised for the support of the public schools of the state shall be appropriated to or used for the support of any sectarian school.
Ohio		<i>No use of "sectarian"</i>

Oklahoma	Art. I, Sec. 5	Provisions shall be made for the establishment and maintenance of a system of public schools, which shall be open to all the children of the state and free from sectarian control; and said schools shall always be conducted in English: Provided, that nothing herein shall preclude the teaching of other languages in said public schools. [As Amended, November 7, 1978]
	Art. II, Sec. 5	No public money or property shall ever be appropriated, applied, donated, or used, directly or indirectly, for the use, benefit, or support of any sect, church, denomination, or system of religion, or for the use, benefit or support of any priest, preacher, minister, or other religious teacher or dignitary, or sectarian institution as such.
	Art. XI, Sec. 5	. . . Such educational institutions shall remain under the exclusive control of the State and no part of the proceeds arising from the sale or disposal of any lands granted for educational purposes, or the income or rentals thereof, shall be used for the support of any religious or sectarian school, college, or university, and no portion of the funds arising from the sale of sections thirteen or any indemnity lands selected in lieu thereof, either principal or interest, shall ever be diverted, either temporarily or permanently, from the purpose for which said lands were granted to the State.
Oregon	Art. I, Sec. 5	No money shall be drawn from the Treasury for the benefit of any religious [sic], or theological institution, nor shall any money be appropriated for the payment of any religious [sic] services in either house of the Legislative Assembly
Pennsylvania	Art. III, Sec. 15	No money raised for the support of the public schools of the Commonwealth shall be appropriated to or used for the support of any sectarian school.
	Art. III, Sec. 29	No appropriation shall be made for charitable, educational or benevolent purposes to any person or community nor to any denomination and sectarian institution, corporation or association: Provided, That appropriations may be made for pensions or gratuities for military service and to blind persons twenty-one years of age and upwards and for assistance to mothers having dependent children and to aged persons without adequate means of support and in the form of scholarship grants or loans for higher educational purposes to residents of the Commonwealth enrolled in institutions of higher learning except that no scholarship, grants or loans for higher educational purposes shall be given to persons enrolled in a theological seminary or school of theology.

	Art. 8, Sec. 17, Amend. 10	Notwithstanding any provisions of this Constitution to the contrary, the General Assembly shall have the authority to enact laws providing for tax rebates, credits exemptions, grants-in-aid, State supplementations, or otherwise provide special provisions for individuals, corporations, associations or nonprofit institutions, including nonpublic schools (whether sectarian or nonsectarian) in order to alleviate the danger, damage, suffering or hardship faced by such individuals, corporations, associations, institutions or nonpublic schools as a result of Great Storms or Floods of September 1971, of June 1972, or of 1974, or of 1975. [Source: 1975 Pa. Laws 622]
	Art. 8, Sec. 17, Amend. 12	Notwithstanding any provisions of this Constitution to the contrary, the General Assembly shall have the authority to enact laws providing for tax rebates, credits exemptions, grants-in-aid, State supplementations, or otherwise provide special provisions for individuals, corporations, associations or nonprofit institutions, including nonpublic schools (whether sectarian or nonsectarian) in order to alleviate the danger, damage, suffering or hardship faced by such individuals, corporations, associations, institutions or nonpublic schools as a result of Great Storms or Floods of September 1971, of June 1972, or of 1974, or of 1975 or of 1976.
Rhode Island		<i>No use of "sectarian"</i>
South Carolina	Art. XI, Sec. 4	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.
South Dakota	Art. VI, Sec. 3	The right to worship God according to the dictates of conscience shall never be infringed. No person shall be denied any civil or political right, privilege or position on account of his religious opinions; but the liberty of conscience hereby secured shall not be so construed as to excuse licentiousness, the invasion of the rights of others, or justify practices inconsistent with the peace or safety of the State. No person shall be compelled to attend or support any ministry or place of worship against his consent, nor shall any preference be given by law to any religious establishment or mode of worship. No money or property of the state shall be given or appropriated for the benefit of any sectarian or religious society or institution.
	Art. VIII, Sec. 16	No appropriation of lands, money or other property or credits to aid any sectarian school shall ever be made by the state, or any county or municipality within the state, nor shall the state or any county or municipality within the state accept any grant, conveyance, gift or bequest of lands, money or other property to be used for sectarian purposes, and no sectarian instruction shall be allowed in any school or institution aided or supported by the state.

	Art. XXII, Sec. 1	...Fourth, That provision shall be made for the establishment and maintenance of systems of public schools, which shall be opened to all the children of this state, and free from sectarian control.
	Art. XXVI, Sec. 18	...Fourth - That provision shall be made for the establishment and maintenance of systems of public schools which shall be opened to all the children of this state and free from sectarian control.
Tennessee		<i>No use of "sectarian"</i>
Texas	Art. I, Sec. 7	Appropriations for Sectarian Purposes. No money shall be appropriated, or drawn from the Treasury for the benefit of any sect, or religious society, theological or religious seminary; nor shall property belonging to the State be appropriated for any such purposes.
	Art. VII, Sec. 5	The available school fund shall be applied annually to the support of the public free schools. Except as provided by this section, the legislature may not enact a law appropriating any part of the permanent school fund or available school fund to any other purpose. The permanent school fund and the available school fund may not be appropriated to or used for the support of any sectarian school. The available school fund shall be distributed to the several counties according to their scholastic population and applied in the manner provided by law.
Utah	Art. III, Sec. 4, Amend. 33	Fourth: The Legislature shall make laws for the establishment and maintenance of a system of public schools, which shall be open to all the children of the state and be free from sectarian control. (Amended 1/1/1947)
	Art. X, Sec. 1, Amend. 184	The Legislature shall provide for the establishment and maintenance of the state's education systems including: (a) a public education system, which shall be open to all children of the state; and (b) a higher education system. Both systems shall be free from sectarian control. (Amended 7/1/1987)
Vermont		<i>No use of "sectarian"</i>
Virginia	Art. IV, Sec. 16	The General Assembly shall not make any appropriation of public funds, personal property, or real estate to any church or sectarian society, or any association or institution of any kind whatever which is entirely or partly, directly or indirectly, controlled by any church or sectarian society. Nor shall the General Assembly make any like appropriation to any charitable institution which is not owned or controlled by the Commonwealth; the General Assembly may, however, make appropriations to nonsectarian institutions for the reform of youthful criminals and may also authorize counties, cities, or towns to make such appropriations to any charitable institution or association.

	Art. VIII, Sec. 11	The General Assembly may provide for loans to, and grants to or on behalf of, students attending nonprofit institutions of higher education in the Commonwealth whose primary purpose is to provide collegiate or graduate education and not to provide religious training or theological education. The General Assembly may also provide for a State agency or authority to assist in borrowing money for construction of educational facilities at such institutions, provided that the Commonwealth shall not be liable for any debt created by such borrowing. The General Assembly may also provide for the Commonwealth or any political subdivision thereof to contract with such institutions for the provision of educational or other related services. [As Amended January 1, 1975]
Washington	Art. IX, Sec. 4	All schools maintained or supported wholly or in part by the public funds shall be forever free from sectarian control or influence.
	Art. XXVI	...Provision shall be made for the establishment and maintenance of systems of public schools free from sectarian control, which shall be open to all the children of said state.
West Virginia		<i>No use of "sectarian"</i>
Wisconsin	Art. X, Sec. 3	The legislature shall provide by law for the establishment of district schools, which shall be as nearly uniform as practicable; and such schools shall be free and without charge for tuition to all children between the ages of 4 and 20 years; and no sectarian instruction shall be allowed therein; but the legislature by law may, for the purpose of religious instruction outside the district schools, authorize the release of students during regular school hours. [As amended April 1972]
Wyoming	Art. I, Sec. 19	No money of the State shall ever be given or appropriated to any sectarian or religious society or institution.
	Art. III, Sec. 36	No appropriation shall be made for charitable, industrial, educational or benevolent purposes to any person, corporation or community not under the absolute control of the State, nor to any denominational or sectarian institution or association.
	Art. VII, Sec. 8, Amend. 48	Provision shall be made by general law for the equitable allocation of such income among all school districts in the state. But no appropriation shall be made from said fund to any district for the year in which a school has not been maintained for at least three (3) months; nor shall any portion of any public school fund ever be used to support or assist any private school, or any school, academy, seminary, college or other institution of learning controlled by any church or sectarian organization or religious denomination whatsoever.

Art. VII, Sec. 12	Sectarianism prohibited. No sectarian instruction, qualifications or tests shall be imparted, exacted, applied or in any manner tolerated in the schools of any grade or character controlled by the State, nor shall attendance be required at any religious service therein, nor shall any sectarian tenets or doctrines be taught or favored in any public school or institution that may be established under this constitution.
Art. XXI, Sec. 28	The legislature shall make laws for the establishment and maintenance of systems of public schools which shall be open to all the children of the State and free from sectarian control.

SCHOOL GOVERNANCE

***S.J. v Lafayette Parish School Board*, No. 2009-C-2195, 2010 WL 2723689 (La. July, 6, 2010):** A question that is often asked is, “Am I responsible for students once they leave school grounds.” At least a partial response was provided by the Supreme Court of Louisiana in the case of *S.J. v Lafayette Parish*. The student in the instant case was a 12 year old sixth grader who had stayed after school to participate in a school disciplinary program. Participants in this program were aware that there would be no transportation provided by the school and that they were required to arrange a ride home. On previous occasions, the student had arranged with her mother to come and pick her up. This time, however, she didn’t tell her mother choosing instead to go out for something to eat with a friend and then walk home through a neighborhood known to be unsafe where she was raped and killed. The mother filed suit against the school district claiming that it failed to provide reasonable supervision over her daughter while she was at a school activity. The trial court, after reviewing the facts, concluded that the student had ample opportunity to arrange a safe ride home from the disciplinary program but chose not to and dismissed the claim. On appeal the court found the school 20% at fault, the student 5% at fault, and the murderer 75% at fault. Upon reaching the Louisiana Supreme Court a duty-risk analysis and found that the school district did have a duty of “reasonable supervision” for students at school programs. It also found, however, that the state law requiring school districts to provide transportation was an “access” statute rather than a “safety” statute so that, even though the court opined that the district’s decision to run a late bus only for tutoring students and not disciplinary students was in error, it held that the district had not breached its duty of care by making the policy decision to not provide transportation.

EMPLOYEES’ RIGHTS

***City Sch. Dist. of the City of New York v McGraham*, No. 10-06065 (N.Y. Sup. Ct., App. Div. July 13, 2010):** A high school English teacher developed a crush on one of her honor students, eventually sending him an e-mail professing her romantic interest in him. He reported the e-mail to the principal. An investigation was done, and NYSD officials recommended termination. Given the circumstances of the case, however, the administrative hearing officer declined to terminate imposing instead a 90-day suspension without pay on the teacher. The lower court found the hearing officer’s punishment against public policy. On appeal, the appellate court reinstated the hearing officer’s decision because due process was provided; the decision was based on ample evidence, was rational, and was not arbitrary and capricious, therefore the lower court had no grounds for reversal. “[T]he award in this case recognizes the seriousness of the allegations and imposes a penalty which we do not think is disproportionate to the charges...[and] we find the penalty imposed here not to be so lenient as to have been arbitrary or capricious.”

***Policastro v Tenafly Bd. of Educ.* No. 09-1794 (D. N.J. May 7, 2010):** The Tenafly Board of Education had a policy which stated, “Mailboxes are the property of the Tenafly Board of Education and should be used for school business. Any staff member wishing to distribute flyers/announcements etc. (via the mailboxes) must have prior approval from the principal or vice-princi-

pal.” Policastro, as teacher, deliberately violated the policy so that he could file suit challenging its constitutionality. He alleged that the policy was overbroad on its face an unconstitutional prior restraint on his freedom of speech as applied to him. In making its decision, the court did not apply the *Pickering/Garcetti* line of precedent, stating that the policy in question was content neutral therefore the *Pickering/Garcetti* precedent did not apply. Instead, the court used a content neutral time/place/manner rationale, following the ruling in *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288 (1984) stating that such restrictions “are valid provided that they are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.” Moreover, the Third Circuit had already decided that teacher mailboxes were a non-public forum. Therefore, holding for the school district, the court found that the district policy as regarding teacher mailboxes was an appropriate time/place/manner and content neutral restriction.

***Kramer v New York City Bd. of Educ.*, No. 09-1167 (E.D. N.Y. May 20, 2010):** Academic freedom does not protect everything a teacher does in his or her classroom. In a lesson on HIV/AIDS, Kramer asked students for alternative terms for words being used in the lesson. Some of the slang suggested by students was vulgar but Kramer went ahead and repeated the terms and placed them on the blackboard. Parents complained and the principal investigated. During the investigation Kramer was assigned to non-classroom duties and not allowed for “per-session” activities such as coaching and proctoring exams. The outcome of the investigation was that Kramer was guilty of verbal abuse of students, however, no formal disciplinary actions were taken against Kramer and she was reinstated. Kramer sued for a violation of her First Amendment rights. Ultimately the court decided that Kramer’s speech was not constitutionally protected. Because of a disagreement among federal circuit’s Kramer’s speech was judged both by both employee speech and student speech standards. As regarding public employee speech, the court found *Garcetti v Ceballos*, 547 U.S. 410 (2006) to be controlling. Since Kramer’s speech was public employee speech, made pursuant to her official duties but not relating to a matter of public concern, the court found no constitutional protection. As regarding the student speech standard, the court found that under *Hazelwood School District v Kuhlmeier*, 484 U.S. 260 (1988) that the district had the authority to restrict Kramer’s speech because it was school sponsored speech.

***Fox v Traverse City Area Pub. Sch.*, No. 09-1688 (6th Cir. May 27, 2010):** Fox was a probationary special education teacher. During her second year she was informed that she would not be extended another contract because of performance deficiencies. Fox claimed that the real reason for her non-renewal was because she had complained to administrators that her teaching caseload exceed the number allowed by law. The 6th Circuit found *Garcetti v Ceballos*, 547 U.S. 410 (2006) to be controlling. Since Fox had only complained to her supervisor, did not make comments to the general public, and never filed a public grievance, it was speech made in the course of performing her job and therefore was not constitutionally protected. The termination was upheld.

RELIGION AND EDUCATION

***Does 1, 7, 8, and 9 v Elmbrook Joint Common Sch. Dist.*, No 09-0409 (E.D. Wis. July 19, 2010):** Wisconsin continues with its blurred line between Church and State with the Elmbrook

decision. This is the state with the Milwaukee Parental Choice Program which has effectively resulted in the State of Wisconsin monetarily supporting the Catholic school system in Milwaukee through a system of state education vouchers. Now the Wisconsin federal district court has ruled that it is acceptable for a school district to hold graduation ceremonies for two of its high schools and senior honors night at a local Christian church. Parents, students, and taxpayers had filed suit seeking a permanent injunction on the grounds that holding graduation ceremonies in a religious venue was a violation of the Coercion Doctrine established in the United States Supreme Court case of *Lee v Weisman*, 505 U.S. 577 (1992), that it was state endorsement of religion, that it resulted in excessive entanglement in violation of the Lemon Test, and was using public money to promote religion. In dealing with the allegations, the court distinguished *Weisman* because there was no prayer at the graduation, the ceremony was simply being held in a church. Therefore, the court did not see “obligatory participation in a secular graduation ceremony, albeit in a church” was not “sufficiently similar to obligatory participation, even through silence, in religious prayer.” Therefore, the court found no coercion. The court also found no violation of the Lemon Test saying that given the lack of any other suitable facilities, either school owned or secular, that “a reasonable observer would fairly understand that [EJCS D’s] use of the Church for these events is based on real and practical concerns, and not an impermissible endorsement of religion.” Moreover, the basic rental agreement being used did not arise to the level of excessive entanglement and ensured that public monies were not being improperly used.

***A.A. v Needville Indep. Sch. Dist.* (No. 09-20091 (5th Cir. July 9, 2010):** A Native American student, A.A. ran afoul of district dress code policy which requires that “Boys’ hair shall not cover any part of the ear or touch the top of the standard collar in back.” A.A. claimed that his long hair was an expression of his religious belief. In an attempt at compromise, the district said he could wear his hair long if he kept it in a bun or in a single braid tucked inside his shirt. A.A. refused to comply with those restrictions because he said his religion required that he wear his hair “visibly long.” As a result, A.A. ended up in in-school suspension. His parents sued under the Texas Religious Freedom Restoration Act (TRFRA), the First Amendment, and the Fourteenth Amendment. The Fifth Circuit declined to decide the case on Constitutional grounds, choosing instead to focus on the TRFRA which required plaintiffs to prove that a regulation placed a substantial burden on their free exercise of religion. Even if that is proved, the state can still prevail if it can prove a compelling state interest and that the regulation was the least restrictive measure of achieving that interest. The court found that A.A. had proved that the regulation did cause a substantial burden to his free exercise of religion because it directly regulated a part of his body rather than a piece of personal property such as a knife or rosary. The court did not agree that the interests given by the district, to teach hygiene, instill discipline, prevent disruption, avoid safety hazards, and assert authority rose to the level of a compelling state interest. *Editor’s Note: This case is not applicable outside of the state of Texas because the court relied solely on a state statute rather than reaching a constitutional interpretation of “substantial burden” on the free exercise of A.A.’s religious beliefs.*

***Morgan v Swanson*, No. 09-40373 (5th Cir. June 30, 2010):** This case reinforces the fact that viewpoint discrimination by the state is always unconstitutional, even at the elementary level. This suit arose out of children being forbidden from handing out “goodie bags” during holidays and birthday celebrations which contained a religious message. When the parents of the children filed suit against the principals in Plano Independent School District, the principals moved for

dismissal claiming qualified immunity. The alleged that the parents hadn't alleged any conduct on the part of the principals which violated the students' constitutional rights because the First Amendment doesn't prohibit viewpoint discrimination against religious speech in elementary school. In finding no qualified immunity, the 5th circuit rather incredulously stated that "it has been clear for over half a century that the First Amendment protects elementary school students from religious viewpoint discrimination."

Comer v Scott, No. 09-50401 (5th Cir. July 2, 2010): The Texas Education Agency's policy prohibiting staff members for taking a position on the teaching of Creationism is not a violation of the Establishment Clause because it neither advances nor inhibits religion. Comer, who was the Director of Science for the Curriculum Division of the Texas Education Agency forwarded an announcement of a presentation by an opponent of creationism to two science educator organizations and seven science-educators. She was told to resign or face termination because she had violated the TEA's neutrality policy. Comer resigned and then sued alleging a violation of the Establishment Clause. Using the three prong Lemon Test, the court found non-religious reasons for having a neutrality policy, that there was no evidence that the neutrality policy's principal or primary effect either advanced or inhibited religion as it is a general mandate covering many subjects intended to protect the consulting and advisory role of the TEA.

Christian Legal Society v Martinez, No. 08-1371 (U.S. June 28, 2010): Until this summer, although the law on viewpoint discrimination and educational institutions making decisions based on the speech of students groups was settled, to what extent the educational institution could regulate the internal "discriminatory" behavior of that speech was unclear. That has now been cleared up. The United States Supreme Court has upheld a educational institutions decision to deny a student religious group official recognition because the organization refused to abide by the school's non-discrimination policy as regarding members to its group. The Christian Legal Society (CLS) was denied recognition as a student group by Hastings College of Law because its bylaws required members and officers to sign a "Statement of Faith" affirming a belief in Christian tenets and agreeing to conduct their lives according to prescribed principles, including the belief that sexual activity should not occur outside of marriage; marriage being defined as between a man and a woman thereby excluding homosexuals. This requirement was contrary to Hastings non-discrimination policy. The CLS requested an exemption. It was not granted to the CLS filed suit alleging that Hastings policy violated its Freedom of speech, expressive association, and free exercise of religion. In a 5 to 4 decision, the United States Supreme Court found that Hastings policy requiring that all recognized student groups accept all comers as voting members, even if those individuals disagree with the mission of the group, is viewpoint neutral and constitutionally reasonable. The Court concluded: "[W]e are persuaded that our limited-public-forum precedents adequately respect both CLS's speech and expressive-association rights, and fairly balance those rights against Hastings' interests as property owner and educational institution."

SPECIAL EDUCATION

T.W. v Sch. Bd. of Seminole County, No. 09-12623 (11th Cir. June 29, 2010): T.W. was a student with autism/pervasive developmental disorder. He was a student in Garrett's classroom. Garrett was alleged to have used abusive behavior, including physical force on T.W. on five different occasions. Garrett was eventually dismissed and found criminally guilty of child abuse.

T.W.'s mother sued the district for a violation of T.W.'s substantive due process to be free of excessive corporal punishment and under Section 504 of the Rehabilitation Act. On the claim of excessive corporal punishment the court concluded: "Although Garrett may have resorted to physical force too soon or when alternative disciplinary methods would have sufficed, we cannot say that Garrett's use of force was 'wholly unjustified by a government interest,' and that the amount of force used "was not totally unrelated to the need for the use of force." The court went on to state that "After considering the totality of the circumstances, including T.W.'s psychological injuries we conclude that Garrett's conduct was not so arbitrary and egregious as to support a complaint of a violation of substantive due process." As for discrimination because of disability under Section 504, the court found that the evidence bore out that Garrett did not single T.W. out because of his disability.

Lathrop R-II Sch. Dist. v Gray, No. 09-3428 (8th Cir. July 2, 2010): Parents who were unsatisfied with the services being provided their autistic child, requested a due process hearing. The parents alleged a violation of FAPE. The Missouri Department of Education administrative hearing officer found that FAPE had been denied because the IEP contained no "baseline data." Upon final appeal to the 8th Circuit, the court found that the IDEA "does not explicitly mandate such specific data" as baseline data. Therefore the court refused to compel the school district to include more in an IEP than what was required by law. The IEP in question was sufficient because it "set out D.G.'s present levels of education and measurable goals for the year, enunciated special services and accommodations for D.G., and adequately considered positive behavioral interventions and strategies."

Waivers to Maintenance of State Special Education Funding (Education Week, June 15, 2010 by Christina A. Samuels) The U.S. Department of Education has granted waivers to Iowa and Kansas from the requirement that states maintain state funding of special education at previous year levels. The IDEA allows such waivers in "exceptional or uncontrollable circumstances such as a natural disaster or a precipitous and unforeseen decline in the financial resources of a state." (20 USC Sec. 1412(a)(18)(C)(i). No one can remember such waivers having been granted since the passage of the IDEA.

STUDENT RIGHTS

Student Doe I v Lower Merion Sch. Dist, No. 09-2095 (E.D. Pa. June 24, 2010): African-American students who lived in the primarily African-American section of Lower Merion, PA filed suit against the district alleging that its new redistricting plan violated their rights under section 1981, Title VI of the Civil Rights Act of 1964. Students living in the affected area no longer would have the choice of which high school to attend. Instead they were all assigned to Harriton High School. The goals of the redistricting plan was to better integrate the high schools while also reducing travel time and transportation costs, facilitate school continuity, and increase the number of students who could reasonably walk to school. The court applied strict scrutiny to the plan because it affected a suspect class. It concluded that the state had articulated a compelling state interest for which this particular plan was the most narrowly tailored plan to meet all of the stated goals. As regarding the use of racial demographics in developing the plan, the court stated, "The Supreme Court has never prohibited a school district from taking into account the demographics of a neighborhood as one of many factors in assigning students to schools."

R.S. v Bd. of Educ. of the Hasting-on-Hudson Union Free Sch. Dist., No. 09-2680, (2d Cir. April 9, 2010): The school district was accused of not responding in an appropriate manner to three e-mails sent to S.S. from a classmate which were profane, critical of the girl's appearance, and sexually suggestive. The district had approached the suspected sender, but found that his password had been compromised and others had had access to his account. Once a new account and password were provided the suspect student the e-mails stopped. Regardless, S.S. remained anxious because the identity of the sender had never been found. The parents of S.S. filed suit. The 2nd Circuit found that the harassment was not so severe and pervasive that it denied S.S. access to educational resources and opportunities—something which must be proven to sustain a suit of hostile environment harassment. The case was dismissed.

Brown v Cabell County Bd. of Educ., No. 09-0279 (S.D. W.Va. May 26, 2010): The high school had been having problems with the Black East Thugs street gang threatening and assaulting students. One student, AJ, was arrested under suspicion of shooting a police officer. Shortly after his arrest some students started wearing shirts saying "Free A-Train." One student was suspended when he wore such a shirt to school. The school was divided. Some saw the shirts as endorsing the gangs since AJ was a member of the gang. Others saw the shirts as a freedom of expression issue. Upon reaching the courts, the rulings in *Tinker v Des Moines Independent Community School District*, 393 U.S. 503 (1969) regarding student speech which materially and substantially disrupts the school environment, and *Harwick v Hayward*, 674 F. Supp. 2d 725 (D. S.C. 2009) which allowed the banning of display of the confederate flag to be controlling. In the instant case, the court found that the school could place a restraint on AB's speech because of the disruption to the school environment as well as the probability that it could incite further violence. The court stated that "Outside the school context Plaintiff's message of support would undoubtedly be speech worthy of stringent protection under the First Amendment," the court explained...[i]t is only because of the potential disturbance and disruption in that setting that he could be punished for expressing his views."

Walters v Dobbins, No. 09-1004 (Ark. May 27, 2010): Walters, a senior, played an audio clip from a cell phone during Class Day during which a female student says, "Oh my gosh, I'm horny!" Walters was suspended for three days which meant that he missed graduation. Walters filed suit alleging a violation of his First Right to Free Speech and his 14th Amendment right to due process. The court looked to the United States rulings in *Goss v Lopez*, 419 U.S. 565 (1975) and *Bethel Sch. Dist. No. 403 v Fraser*, 478 U.S. 675 (1988) in ruling for the district. The court found that due process had been afforded. Moreover, since the suspension occurred after the educational term was over causing Walter to only miss the graduation ceremony, and since there is no legal right in Arkansas to attend a graduation ceremony no deprivation to an education, thus no property, and been deprived. As for the vulgar speech itself, the court stated that under *Bethel*, the school district had the right to "disassociate itself from a student's speech to demonstrate that vulgarity is inconsistent with the fundamental values of public school education." The decision was affirmed by the Arkansas Supreme Court.