ALASKA LEGISLATURE COMMITTEE FILES 1999-2000 8672

9875 HOUSE JUDICIARY

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Item 1

History of the

Blaine Amendment

AKA

The Enabling Act of 1889

BLAINE CONCEPT DEVELOPED

1530's	Protestant Reformation ended the Church of England's control over religious liturgy.
1600's	Protestant churches were being established in the United States.
1875	In order to squelch the growth of the Roman Catholic Church in the United States Representative Blaine introduced an amendment. This amendment prevented any public monies from being given to the Catholic Church for education. The amendment failed.
1888	Although the amendment failed to be incorporated in the U.S. Constitution, the Blaine Amendment became known as an the Enabling Act. A requirement for the admission for Montana, Washington, North and South Dakota.
NOTE	Since the late 1800"s some 36 states adopted the Blaine wording and intent into that states constitution.
1971	Traverse City School District v. Attorney General Supreme Court ruled the Michigan's Constitution, Article VIII, Section 2 (prohibiting public funds for private education) was "*Unconstitutional, void, and unenforceable, because it contravened free exercise of religion guaranteed by the United States Constitution and was Violative of equal protection of laws provisions of the United States Constitution.*
1972	Warren v. Nusbaum U.S. Supreme Court decision interpret state constitutions to parallel the First Amendment. Therefore, the recent First Amendment cases should control state constitutional interpretation.
1994	Campbell v. Manchester Board of School Directors The Court unanimously overturned its prior ruling remarking "*Jurisprudence has evolved greatly since 1961 and in directions unpredictable at the time, thus we must examine the constitutional issues anew in light of more recent teachings.*"

1999 Kotterman v. Killian

The Court ruled that "*primary beneficiaries of the credit are taxpayers who contribute to the school tuition organizations, parents who might otherwise be deprived of an opportunity to make meaningful decisions about their children's education's, and the children themselves. Private schools are at best only incidental beneficiaries.*" By creating the program, the legislature "*hoped to encourage the development of educational settings that would invigorate learning inprove academic achievement, and provide additional choices to parents and children.*"

"*The Blaine Amendment was a clear manifestation of religious bigotry, part of a crusade manufactured by the contemporary Protestant establishment to counter what was perceived as a growing Catholic Menace. We would be hard pressed to divorce the amendment's language from the insidious discriminatory intent that prompted it.*"

The Blaine Amendment
State Constitutional School Provision

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A movement away from sectarian schools toward the common or public elementary schools had been developing at the local and state government levels in many parts of the country since the early part of the 19th century. The original common school movement, while opposing sectarian religious instruction, openly supported teaching basic community values which were obviously Christian and implicitly Protestant. Many Roman Catholic immigrants desirous of protecting their own religious and ethnic traditions found the common schools totally unacceptable and sought a share of the public education funds to support their own schools. As a result many advocates of the common schools opposed these Catholic efforts by adopting legal and constitutional restrictions against the use of any public funds for sectarian schools and sectarian control of public schools.

The federal government joined the campaign for a free non-sectarian school system in 1875 when President Ulysses S. Grant called for a constitutional amendment requiring all states to establish such public schools. His proposal was stricter than the common school movement by prohibiting all religious instruction in such schools. Soon Republican Congressman James G. Blaine, himself a longtime advocate of extending federal Establishment restrictions to the states, introduced during the same year a constitutional amendment into the House of Representatives. However, unlike President Grant's call, the Blaine amendment, while prohibiting state support for sectarian religion, specifically protected Christian instruction: "This article shall not be construed to prohibit the reading of the Bible in any school or institution." The Blaine Amendment passed the House in 1876 by a vote of 180 to 7 and fell only two votes short of the required Senate two-thirds majority. For the next decade Blaine continued to support a constitutional amendment without success. In 1889 Senator William W. Blair introduced a similar amendment and expressed his support for a restrictive public shool provision in the Enabling Act for the admission of new states. For Blair also the prohibition of sectarian instruction in public schools was conditioned by a requirement that such schools educate their students in "virtue, morality, and the principles of the Christian religion." Beginning in the previous year of 1888 the intent of the unsuccessful constitutional amendment effort had shifted to the insertion of the public school provision into Enabling Acts for the admission of new states. The bill began in the house as H.R. 8566 and was passed in the Senate as S. 185 in 1889 to enable the admission of the states of North and South Dakota, Montana and Washington.

The Washington Constitutional Convention of 1889 was composed of a comfortable majority of Republican delegates who were undoubtedly Blaine Republicans. The Republican delegates from the earlier Washington Territory to the National Republican Convention had solidly backed Blaine for President three times as did the state delegation in 1892. These delegates also supported Blaine's well-known views on religious establishment and common schools. The Constitutional Convention discussion was remarkably parallel to congressional debate on the Blaine Amendment and Blair's comments on the Enabling Act's public school provision.

It should be no surprise therefore to discover that Washington State's establishment clauses are remarkably similar to those found in the Blaine amendment.

Application of the school provision sections of our state constitution should consider the framers distinction between religion and sectarianism which mirrored the national common school movement: they saw religion as a positive moral force for society and a positive influence for students. The repeated failure of the federal constitutional amendment and the inclusion of the public school provision in only the last third of the states admitted, explains why only some states prohibit financial support for students in sectarian schools, and why federal policy requires an equitable distribution of federal funds to sectarian, and independent private as well as common school students.

Note: This summation is based on the excellent article co-authored by Robert F. Utter and Edward J. Larson in the Spring, 1988 edition of the Hastings Constitutional Law Quarterly, "Church and State on the Frontier: The History of the Establishment Clauses in the Washington State Constitution."

Item 2

History of

Article VII

Constitutional Convention

Education Section Minutes

Pages 1508 to 1535

Dec. 1955 to 1956

PRESIDENT EGAN: If there is no objection, then the Convention will stand at recess until 1:30 p.m.

RECESS

PRESIDENT EGAN: The Convention will come to order. We have before us the article on health, education and welfare. Miss Awes.

AWES: I placed an amendment on the desk which has been submitted by the Bill of Rights Committee.

PRESIDENT EGAN: Mrs. Sweeney.

SWEENEY: Mr. President, I just wanted to get this thing off my desk before we got started on this other thing. Mr. President, your Committee on Engrossment and Enrollment to whom was referred Committee Proposal No. 3, has compared same with the original and finds the same correctly engrossed, and the first enrolled copy will be on the delegates' desks this afternoon. I move the adoption and ask unanimous consent.

PRESIDENT EGAN: Mrs. Sweeney asks unanimous consent that the report be adopted. If there is no objection, Committee Proposal No. 3 is referred to Style and Drafting. Does the special Committee to read the journal have a report to make at this time? Mr. White.

WHITE: I made a report this morning and there is no additional report.

KNIGHT: On rechecking we find that page 9 of the journal for the 43rd day, roll call, under "nays", strike "Barr" and insert "Awes".

PRESIDENT EGAN: Page 9 of the journal of the 43rd day, the first name should be "Awes" instead of "Barr" under the "nays". You ask unanimous consent?

KNIGHT: I do, Mr. President.

PRESIDENT EGAN: Is there objection to adopting the journal of the 43rd day with the suggested correction as offered by the special Committee to read the journal? Hearing no objection, it is so ordered and the journal for that day is ordered approved. At this time we have before us the article on health, education and welfare, and we have the proposed amendment, as proposed by the Committee on Preamble and Bill of Rights. The Chief Clerk will read that proposal. Mr. Sundborg.

SUNDBORG: I would like to report for the Style and Drafting Committee, if I may at this time, that the Committee is hard at

work utilizing the subcommittee method on the articles which had been referred to us. The subcommittees consist of three members each, and they are going over the proposals word by word. We have adopted within our Committee a procedure whereby after the subcommittee has agreed upon its recommendations to the full Committee, but before the full Committee has acted, the subcommittee will contact the substantive committee involved with the view to having one member who would be a spokesman for that committee sit with our subcommittee to go over in detail the suggested changes so that we may be certain that we are following the intent of the committee which originally drafted the article or the intent of the body as expressed here on the floor in amendments. Then after our subcommittees have so conferred with the representative of the substantive committee, the full Style and Drafting Committee will consider their report and report something back here to the Convention floor. My purpose in announcing this to the Convention at this time is to alert each of the major committees to the fact that we will want to have you designate a spokesman or representative of your committee to meet with our subcommittees as we work on your proposals.

PRESIDENT EGAN: That is a matter you will undoubtedly take up with each committee as you come to that.

SUNDBORG: We will notify the committee when we would desire a meeting but we would like to have them be ready to nominate someone to represent them so we will not be delayed.

PRESIDENT EGAN: The Chief Clerk will please read the proposed amendment to Section 1.

CHIEF CLERK: "Section 1, article health, education and welfare, add the word 'educational' before the word 'institution' on the last line."

PRESIDENT EGAN: What is the pleasure of the Committee?

AWES: The Committee met and unanimously adopted this proposed amendment. The word is put in purely for clarification purposes, and I ask the adoption and ask unanimous consent.

PRESIDENT EGAN: Miss Awes asks unanimous consent for the adoption of the proposed amendment. Is there objection? Mr. Taylor.

TAYLOR: Point of information. Is that the only amendment, to put the word "educational" in front of the word "institution"? I am not objecting.

PRESIDENT EGAN: If there is no objection -- Mr. Victor Rivers.

V. RIVERS: I will have to object a little further because that does not in my opinion cover the context of certain communications that we had read here. I will object for this time.

BUCKALEW: I second it.

PRESIDENT EGAN: The subject is open for discussion. Mr. Hellenthal.

HELLENTHAL: I rise to a point of order. I don't think that it is necessary to vote on the proposed amendment. The Committee met and unanimously decided that the word should be included, and rather than have their report remimeographed they merely want to present it with the word in it, and then in the proper course of time the matter will be considered.

PRESIDENT EGAN: No, Mr. Hellenthal, it will have to be amended. Your report is before us and the only manner it can be amended in now is by the action of the body. I understand what your feeling was here, but that is out of that jurisdiction at this time. Miss Awes.

AWES: I will give a little explanation of this. This word, as I said before, was merely for clarification purposes. It was the opinion of the Committee that is what this meant originally, but it was implied by virtue of the fact it was in the education section, but there have been so many comments and so many questions, both from the members of the body and from the communications which have come into the Committee and the Convention, we thought it would be better if this were amended to conform with the intent, at least so it is clear what the intent of the Committee is, and that is the only purpose in submitting this at this time.

HERMANN: Point of information, if we adopt this amendment now and insert the word "educational" before "institution", it will not be possible to remove it later, will it, by amendment from the floor?

PRESIDENT EGAN: It would not be possible to remove the word "educational", Mrs. Hermann, that is true. The Chair just wondered, Mrs. Hermann, if the word "educational" being there, if there are any other institutions in the Territory other than educational institutions that would be affected by this.

COGHILL: I rise to a point of information on that. It is in the educational article, Section 1 of the health, welfare, and education, and it should be germane to that section, and that is just clarifying the intent of the Committee.

PRESIDENT EGAN: Is there further discussion of the proposed amendment?

ROBERTSON: Point of inquiry, does the word "private" mean parochial?

PRESIDENT EGAN: Do you mean is it all-inclusive? Is that right, Mr. Robertson?

ROBERTSON: Yes, that's right. I don't understand the word "private".

AWES: Well, I think undoubtedly it does. You will notice before the word "private" comes the word "religious". "Religious or other private educational institutions", so I think that would undoubtedly be any educational institution that is not supported and run by the state.

V. RIVERS: The basis to my objection to that is this, we had some statements here for matching funds for hospitals under the Hill-Burton Act under legislative acts and of the Territorial legislature. Now it seems to me if we are going to put in other educational institutions, it might refer back to religious institutions or other private institutions, but I think that under this section they also want to include perhaps that no public funds shall be paid for the direct benefit of any religious institution, so if "education" qualifies "religious", then also you have not taken care of the fact that they will be authorized or allowed to prescribe for religious institutions. Also, I believe if that does not apply, then we have eliminated certain groups that operate hospitals from benefiting under Hill-Burton funds and similar appropriations. It seems to me the word "education" is not adequate to cover it unless we all feel it is adequately covered in some other part of the constitution.

PRESIDENT EGAN: Mr. Armstrong.

ARMSTRONG: Mr. President, I would suggest that before we have a discussion at this point, that if this could be accepted as Miss Awes has suggested, we could go ahead with the suggestions of the article and the intent. We are starting at the end of the article instead of the beginning, and I think we are warping Miss Awes' intent out of shape by getting into a lengthy discussion of what was asked as an addition for clarification and I believe we would find that we would have a much more intelligent approach to this thing if we could start at the beginning of the article and read it through, think it through, discuss it and then make any of these amendments. I would say, too, that if we are going to have a lengthy discussion at this point it might be well to just withdraw the motion, because I think we would be defeating our intent.

PRESIDENT EGAN: The article has been read for the second time in its entirety. Mr. White.

WHITE: I don't wish to complicate the situation, but we may run into this again. If I understand the article that is before us

on the floor, the Committee did not ask to withdraw it, but I think Mrs. Hermann raised a very valid point. If this word is inserted now, we can't move later during the course of the debate to strike it. I would move that the rules be suspended and that the Committee be allowed to substitute its unanimous amendment with the thought in mind that we can then later remove it if during the course of the debate it appears to be the wish of the body to do so.

PRESIDENT EGAN: The Chair stated it could not be removed and the Chair would stand corrected to a certain point on that statement, that is by a suspension of the rules or rescinding of the action of course you could do it.

WHITE: I so move, Mr. President, and ask unanimous consent.

PRESIDENT EGAN: Mr. White, please state the motion.

WHITE: That the rules be suspended and that the Committee be allowed to submit its proposed amendment as though a part of the Committee report.

KILCHER: Point of information. Could it possibly be handled in such a manner as to have the report reconsidered and recommitted and come out again a second time?

PRESIDENT EGAN: The effect of Mr. White's motion under suspension of the rules would accomplish that. Mr. Riley

RILEY: Mr. President. I think this is in line with Mr. White's suggestion that this article of this proposal now before us be considered under a suspension of the rules, simply as a committee substitute for the same article. I think that would put the thing in motion.

PRESIDENT EGAN: Right, and have the word "educational" placed before the word "institution".

RILEY: That would enable us to work either way from that word afterwards.

V. RIVERS: That would cover my objection. I have no objection to that.

PRESIDENT EGAN: If there is no objection then, then it is so ordered, and the word "educational" has been inserted before the word "institution" as if this were a substitute committee report. Now, Section 1 is open for amendment. Mr. Hurley.

HURLEY: Mr. President, I would like to ask a question of the Chairman of the Bill of Rights Committee. Would your Committee consider in using the terminology "direct benefit" whether or not that would be a directive or a license to the legislature to appropriate money for the indirect benefits? If so, what was their conclusion?

AWES: I don't think it is a direct order to the legislature to do anything. I think we prohibited what we wanted to prohibit. I don't think that tells the legislature they are supposed to do anything else.

METCALF: I have an amendment.

COGHILL: I rise to a point of order. I submitted an amendment to this section before the noon recess, and it has never been recognized, and I was recognized by the Chair.

PRESIDENT EGAN: Were you recognized for that purpose before the noon recess? If you were, then the Chief Clerk may read the proposed amendment as offered by Mr. Coghill. The Chair feels sorry about that, Mr. Coghill.

CHIEF CLERK: "Section 1, line 7, after the word 'direct' insert the words 'or indirect'."

COGHILL: I move and ask unanimous consent.

R. RIVERS: I object.

METCALF: I second the motion.

PRESIDENT EGAN: It has been moved and seconded that the words "or indirect" be inserted after the word "direct" in line 7, Section 1.

WHITE: Point of order. I believe there was a letter presented to the Convention the other day that the Convention agreed to defer the reading of until we reached this section. It seems to me proper we hear it before we consider any business.

PRESIDENT EGAN: Is there such a communication? The Chief Clerk might read the communication that was referred to before we act upon this amendment.

CHIEF CLERK: (A letter from Mr. Don M. Dafoe, Commissioner of Education, enclosing a statement on Section 1 of the article on health, education and welfare to the effect that he believed the statement somewhat oversimplified and setting forth seven points which he believed should be included in the constitution, was read.)

PRESIDENT EGAN: Mr. Armstrong.

ARMSTRONG: Mr. President, the Committee has asked me to speak to this section, and seeing it has been amended I hope you will liberally construe that I am talking to the amendment, but the Enabling Act that we have before us says on page 3, "The provision shall be made for the establishment and maintenance of a

system of public schools which shall be open to all children of said state and free from sectarian control." Mr. President, your Committee on Health, Education and Welfare approached this whole subject of education with great care and consideration. Many methods were sought out to provide and protect for the future of our public schools. We had to recognize that the public schools were our responsibility and that it was our duty to provide for all children of the state in matters of education. The Convention will note that in Section 1 that the Committee has kept a broad concept and has tried to keep our schools unshackled by constitutional road blocks. May I draw to your attention further the fact that we have used the words "to establish and maintain by general law". This is a clear directive to the legislature to set the machinery in motion in keeping with the constitution and whatever future needs may arise. Your Committee has also spelled out the fact that all children shall have the opportunity of schools, and that if the need arises for vocational schools, rehabilitation centers, schools for the retarded and other forms of education, that it is completely possible under this proposal. It is not only wise but mandatory under the Enabling Act to spell out that schools are operated in the public interest by the state and kept from sectarian control. In the third sentence of this section it deals with the public funds. This term was used because we felt that state funds may at times go through many hands before reaching the point of their work for the public, and so the term "public funds" was then used as a guide to every portion of our state financing, borough, city or other entity for the disbursement of these monies. In this third sentence we have used the word "direct". It was spelled out that the maintenance and operation or other features of direct help would be prohibited. This was not intended and does not prohibit the contracting or giving of services to the individual child, for that child benefits as his part of society. This section gives the education department, or other departments, the right to seek out the child, independent of his religious affiliation, to help him to become a strong and useful part of society wherein it touches health and matters of welfare. We would also point out in the light of letters that have come to this floor relevant to the disbursement of funds to denominational or other private institutions, that this does not prohibit the use of funds in other educational matters, and I am sure that no one on the Committee would object to the inclusion of this word as we have given the amendment here to clarify this one statement. Now it reads as it has been amended by the Committee, "No money shall be paid from public funds for the direct benefit of any religious or other private educational institution." We did this to take any doubt away on the part of this Convention of our motives, and we state that where there are welfare cases for children in homes and when there are indigents in hospitals that we do not wish to interfere with that practice of helping to serve people

through those institutions. It is the feeling of the Committee, after long work and thorough study, that these basic recommendations that we have given here on this section on education should be accepted by the Convention.

V. FISCHER: May I ask the delegate a question?

PRESIDENT EGAN: You may, Mr. Fischer, if there is no objection.

V. FISCHER: The article on finance, the proposal on finance, has the following Section 7: "No tax shall be levied or appropriation of public money made or public property transferred, nor shall the public credit be used, except for a public purpose." Now, that is the article and proposal on finance which would govern not only education but all expenditures of the state, and unless there is a very special reason for having separate and different language here, we probably should treat financial matters only in the finance article, so my question to you is, is there a special reason why we should have the third sentence of Section 1 in the health, education and welfare article?

ARMSTRONG: Your Committee on Health, Education, and Welfare discussed this prior to coming to the floor this afternoon. I believe it was our unanimous feeling that this should be taken as a part of education so that it could always be clarified in relationship to this subject. We realize there are two other matters in proposals that deal directly with finance, but we felt that when we came to those things they would have to be correlated with our action at this point. I feel that this matter needs to be clarified here and that was the action of the Committee and their reason for retaining it here instead of postponing it to the finance section.

R. RIVERS: I speak directly to the proposed amendment to the section. As I understand it, or remember it after all this general discussion --

PRESIDENT EGAN: Before you proceed, it seems that some of the delegates don't realize what the proposed amendment is. After the word "direct" insert the words "or indirect". You may proceed.

R. RIVERS: The standard approach is that no public funds shall be disbursed for the direct benefit of any religious institution or parochial schools. The word "direct" is the standard treatment of that subject. Now when you get into the wording "or indirect", then you are getting into an argument as to whether you can even contract with a private institution for the rendering of certain public services because they might say they might make a profit. Now I agree that it might not be interpreted that way, but you are only stirring up an argument when

you talk about prohibiting the disbursement of money for an indirect benefit to a parochial or private institution. You are reaching clear out to ad infinitum in the realms of logic and association. You don't treat it that way, you don't stir up that kind of an argument. If there is a public purpose for which money is to be expended it does not matter if some of it does result in an indirect benefit to some private concern, which may be a contractor, so I definitely don't want to see the words "or indirect" inserted in this section.

COGHILL: Speaking in defense of my proposed amendment, I would first like to say I am very prone to the problem of putting any religious persecution into the Constitutional Convention or among the delegates. It would be the same thing as me trying to convince Mr. Ralph Rivers of the principles of the Republican party, and he in turn of the party he belongs to. I don't believe that is the problem at all. I think that they certainly have a right, a private right or a religious right, or a parochial right under our constitution to have schools. However, I believe that the way our government was set up 175 years ago, that the founders felt that public education was necessary to bring about a form of educating the whole child for civic benefit through a division of point of the home taking a certain part of the child, the church taking a certain part of this education, and the government or state through public schools taking the other part. I adhere to that principle, and I might say that I am the president of the Association of Alaska School Boards and one of the formers of that twelve-point program we developed in Anchorage last October. I think that the problem could probably be well misconstrued here as to the motive and intent. However, I feel that the intent of public education is primarily a state function and does not belong to any private or any one particular group, whether they are in the minority or the majority. I believe we should take direct steps to maintain a free public education not encroached upon by any quarter. I think it might be well to bring out in the argument for the direct or indirect benefit of public funds for education is the matter that is now being faced in Europe and in particular in the Netherlands where they have what is called the form of educational pacification, where the government is splitting the tax dollar among some 500 different church groups providing for a parochial school benefit on an indirect basis, and in a community where there is maybe 500 school children there will be as high as seven or eight small schools scattered out throughout the community, not providing for the fullest benefit in the educational field as far as having a good complete centralized program. I think that sectarianism segregation in our educational system is bad for the children. I do not deny the right of people to have their own schools. However, I think that we should always look to the interest of the founders of our nation when they brought about the separation of church and state. The

problem was brought, and it was brought about by Thomas Jefferson quite well when he said, "If a nation expects to be ignorant and free in the state of civilization, it expects something that never shall be". Therefore out of his deliberations with John Madison they brought about a form of free public education starting in Virginia, and it has come forward ever since under the intent of having the tax dollar only brought to the public educational system. I know there have been many law cases on it, Supreme Court rulings and what not, and I think that the matter still is divided as far as the general public is concerned, as between the sects of religion and not on the principle of preserving the free public education as an instrument of the state.

RILEY: Mr. President, I should like to address a question, if I may, to the Committee Chairman, but meanwhile I wish to commend Mr. Coghill on quoting with favor, Thomas Jefferson. Miss Awes, it runs in mind and I have not the delegate proposal before me, that there was a delegate proposal submitted in language substantially the same as this would read if Mr. Coghill's amendment were adopted. Could you tell me what your experience was in Committee, what the Committee thinking was in rejecting that language?

AWES: That I believe, if I recall rightly, was Proposal No. 2 and submitted by Mr. Johnson. It was carefully considered by the Committee, and Mr. Johnson was requested to come in and speak with us on it. We considered both the words "direct" and "indirect" and we felt that the words "or indirect" would, as Mr. Rivers said, reach out into infinity practically, and probably it is not even known what the results of that might be. We did feel it would shut out certain things that should not be prohibited. For instance, the welfare department was giving certain free care to the children of the community, and it might be administered through the schools. Well, we feared that "indirect" would make it impossible to give any of these welfare benefits, for instance, to children who were in private schools, and we did not feel that any prohibition should go that far, and so the Committee did carefully consider that word and unanimously agreed we should not use it.

RILEY: It has been said the Committee gave it correct attention and rejected it permanently?

AWES: That is right.

RILEY: Thank you.

METCALF: Mr. Chairman and delegates, I very much favor the inclusion in this section of the words "or indirect". As I read the section, it refers to our school system, and in this book, "Constitutions of the States", there are 16 states that have sections in their constitutions preventing public tax dollars

from being spent for private schools in any way, shape or form. Here is the section from the State of Missouri. The constitution was drawn in 1945, which some of you may have read. It says 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 or any discrimination be made against any church, or any form of religious faith or worship." I am a firm believer in freedom of religion, and we have been aware in the progress of history, medieval times down to colonial times, that at times there have been persecutions practiced. Those are unpleasant things and they have gone past into history. I am for the free public school system, being a licensed teacher and having taught in public school systems in the Territory. I am also a firm believer in the complete separation of church and state, especially with the use of state money and state property. As I said again, I don't believe that the state property or taxes should be used and transferred to a religious group to be used directly or indirectly to the economic or political religious detriment of some other group or individual, and all activity should be on a free and competitive basis, and if I may just have a few minutes, I have a situation in Seward where a religious group have been given the use of the building and land by the Territory, and they are in competition, economic competition to my economic detriment. It is an actual fact, and I not only speak for myself but I speak for four or five people who happen to be affected similarly, and that is why I am trying to point out that I do not like to see state property or money transferred over to religious groups because persecution often times can come about. In this instance here, they have a Territory land, building valued around 60,000 dollars, and they are in active competition with private enterprise, and they have other advantages -- free snow removal, cheap help, no taxes, and I just point out these little things here that make me very much opposed to the use of state money or property in any way, shape or form by religious groups. I therefore favor the inclusion of this phrase "or indirect".

PRESIDENT EGAN: Mr. Smith.

SMITH: Mr. President, I had the opportunity to talk rather at great length with the superintendent of schools in Ketchikan during the Christmas recess on this very subject. He had suggested that the word "indirect" be inserted here, but during the course of the conversation he also said that the public school people were desirous of providing that the standards in the parochial schools be in some manner made equal to those in the public schools. Of course, the only way that could be provided would be through supervision by the State Board of Education. I pointed out to him that the insertion of the word "indirect" here would defeat that purpose and he immediately

said that he agreed and he did not want the word "indirect" inserted.

McCUTCHEON:. Mr. President, will the Chair permit a question through the Chair to Mr. Coghill?

PRESIDENT EGAN: The Chair will permit a question through the Chair to Mr. Coghill.

McCUTCHEON: Mr. Coghill, could you cite me at least a few instances how indirect benefit might accrue. Are there specific types of instances within your knowledge of how this would apply? Because of your delivery here a few moments ago I assumed that there must be various types of specific indirect benefits which you would wish to prohibit. I would like to know what they are.

COGHILL: Through the Chair to Mr. McCutcheon, I believe by putting the indirect benefit clause in there that any social welfare, health arrangements that might be made with the state with any private or parochial institution would be on a contractual basis and would be providing a service to the public and not to the institution, and that is the purpose of the indirect clause in there. It would allow them to have a contract to produce or to show full value for the value of money received from the tax coffer, from the funds. In other words, to provide a hot lunch program with Territorial money or to provide a health program in a school, I do not deny that to the private schools because I feel that that is an instrument of public benefit because the child is benefiting from it from a public standpoint, and a contractual agreement between the organization and our organized state would therefore be in effect. Does that answer your question?

McCUTCHEON: In part. Your intent would be then that if some private institution of one nature or another were to supply this particular service under contract to the state that there could be no profit in that as it extended to that institution? That is, they would have to supply that service at the actual cost? That there could be no profit derived from that particular transaction. Is that the point you are making, that it would not prohibit supplying these various types of welfare programs, hot lunches, etc., but there could not be a profit factor involved?

COGHILL: That is correct, because we in the public school system, we are not allowed to make profit on such things.

KILCHER: I think that the position is not clear at all. What Mr. McCutcheon brought up is not clear at all, a benefit is not the same as a profit, so if they don't want any profit, why don't they mention it. I can see where a private school is benefited by getting nonprofit assistance. If, for instance, it is possible

for a private school to get lunch money assistance on nonprofit basis for its children, it may make the difference for them to be able to operate or not. If they are not getting lunch money or such things, they might not be able to operate, so by getting these nonprofit assistances for the children, they are getting benefited greatly. As a matter of fact, the benefit is so great it means survival or not, so I think the issue is not clear. On the principle I think I should be against the amendment because it does not clear the issue at all in that respect.

COGHILL: Maybe to clarify a point for Mr. Kilcher, one thing we want to keep in mind is the fact that the state has set up a public educational system for all children. The people that are sending their children to private, parochial, or any other type of institution are segregating themselves fromthe public and therefore they should not derive the benefit from the tax dollar. We are providing it. We have spent thousands, hundreds of thousands to provide a good educational system, and if we go to the pacification plan, we are destroying that principle and that in turn answers your interpretation of profit or benefit.

PRESIDENT EGAN: Mr. Gray.

GRAY: If I may ask Mr. Coghill, in reference to your remarks, does your state guarantee to offer a complete educational system?

COGHILL: It certainly will, Mr. Gray, after we write the articles on the legislation.

GRAY: You feel you have a complete educational system today?

COGHILL: I certainly think so.

GRAY: I think there are a lot of areas where a lot of children have no opportunity for public education.

COGHILL: I feel that it is quite a privilege to be a part of a public educational system and be able to criticize it, to be able to criticize our methods and our procedures and to work on those. I will agree with you wholeheartedly, Mr. Gray, that there are lots of things we have to do. However, in my recent trip to Washington, D. C., and being a conferee on the White House Conference on Education, we found with the exception of one disgruntled person, we found that our educational system in Alaska was far above the educational systems of the states. We have a progressive educational system in the sense that we are moving forward. I think one of our biggest thorns is the Alaska Native Service, if that's what you are referring to.

TAYLOR: There has been a lot of sparring around here on this subject. Everybody seems to duck the issue, and I am going to

ask Mr. Coghill a question if I may, through the Chair.

PRESIDENT EGAN: You may, Mr. Taylor.

TAYLOR: Mr. Coghill, what in the event that the word "indirect" was inserted into this measure, what effect would that have on the school bus law that is now in effect?

COGHILL: What effect would that have on the school bus law? I know I am up against a pretty good attorney, but I think that will in turn not affect too much of the school bus system in Alaska because it can be on a public work contractual basis, take it completely out of the educational picture, put it on the welfare picture.

AWES: I would like to make one statement. Mr. Coghill suggested that we insert the words "or indirect". The Committee very carefully considered that word "indirect". We were not sure of the far-reaching effects it would have. Mr. Coghill now proposes that he explains what it means. I can't agree with his interpretation in any respect, and he would have us believe from the explanation he has given so far that it means precisely nothing. I don't believe that any court would so interpret it, and I think he should either give us some reason for having it in there or else if it doesn't mean anything, then I think we should take it out, but I am not satisfied with any explanation he's given yet.

PRESIDENT EGAN: Mr. McCutcheon.

McCUTCHEON: Since the Committee considered this at considerable length about this matter of "direct" or "indirect" wording in this particular section, you must have in mind several specific instances where "indirect" might apply in some fashion in a derogatory manner. If you do have such an idea or some particular questions how this word "indirect" might affect adversely to thinking upon your particular section here, I would like to hear some of them. If your Committee has gone into this so thoroughly, there must have been one or two problems that have arisen where there would be some question about including the word "indirect".

AWES: I have already given one very good example, and that is this question of welfare services which are often administered to children through the schools. Mr. Coghill says that the word "indirect" would not prevent these. I very definitely think that the word "indirect" would prevent them. I think that is one very good example.

POULSEN: May I ask Mr. Coghill a question?

PRESIDENT EGAN: You may, Mr. Poulsen.

POULSEN: If the word "indirect" is put in, would that mean there is such a thing as subsidy to hospitals would be eliminated?

COGHILL: Mr. Poulsen, this is an educational article with the educational institution.

POULSEN: It still comes under public welfare, matching funds for instance.

COGHILL: Mr. Poulsen, if you will note that the Committee amended their proposal to have "educational" inserted before institutions, and so this is strictly an educational article, sir.

WHITE: May I direct a question to Mr. Coghill?

PRESIDENT EGAN: You may, Mr. White.

WHITE: Mr. Coghill, are there children's homes, foster homes in the Territory which provide any education at all to the children who are entitled to admission to those homes?

COGHILL: The children's homes that have schools with them, is that what you mean?

WHITE: Are there any such institutions in the Territory of Alaska that provide any education at all to the children admitted to them?

COGHILL: Yes, there is.

WHITE: What would happen to them under your proposed amendment?

COGHILL: What would happen to these institutions now operating?

WHITE: Do any of these receive any public funds either from the Federal government or the Territorial government?

COGHILL: I don't believe they do because the contract schools went out before 1900. They had a form of contract for schools and that went out. I think that all your foster homes would be deriving an indirect benefit or some sort or another, and there are plenty of them.

WHITE: I think your statement could be corrected, but I'm not the one to do it. I'll defer to someone else, but in the event it is corrected, I would like to hear your answer to the question as to what would happen to them under your amendment.

PRESIDENT EGAN: Mr. Sundborg.

SUNDBORG: I have here a copy of a memorandum from Henry A. Harmon, Director of the Department of Public Welfare of the Territory to the Attorney General on this very subject, listing

a number of schools operated by private and religious organizations to which the Territory now pays funds through the Department of Public Welfare. They show that such institutions not only include a few Catholic institutions, but also Seventh Day Adventists, Moravian, and Presbyterian. It is very brief. I wonder if I might ask to have it read.

PRESIDENT EGAN: If there is no objection the communication can be read. Mr. Fischer.

V. FISCHER: I think it should be read only if it covers educational institutions.

SUNDBORG: It does only that.

PRESIDENT EGAN: The Chief Clerk may read the communication.

(This letter giving information as to payments made by the Territory to various children's institutions in the Territory was read by the Chief Clerk.)

ARMSTRONG: Mr. President, there are several sources of income in the private institution. First of all, an institution can apply for a surplus of food, and upon the signature of the administrator, that food is made available in a limited quantity. I might give an example of butter, beans, and staples of that type. I think that is given on the basis that no Territorial agency is able to give a large enough sum to a private institution to support that child. I might give you an example of one institution that probably is receiving 900 dollars a year from the Territory, but the actual cost breakdown without new buildings and capital expenditures run in excess of 1300 dollars a year to adequately take care of that child. In that institution there was no educational facilities, that is just housing. Another source of income would be then this Territorial grant of 50 dollars which is in lieu of home care. The child as a ward of the Territory and as such must be put into a foster home or into a private institution. They choose, wherever possible, to put the child in a foster home and let that child go to the private school. If a family situation is so complicated, they want to keep that family structure together and hold that family, the child is placed in a private home. There are a few, very few of the schools that have boarding facilities and educational facilities, but there are some that exist, Mr. White, in the Territory, and most of the grants by the Territorial Department of Welfare are given for the boarding home facilities and not for the education, and I think that could be borne out by the fact that they are looking for a holding situation for the child. The educational facilities are incidental at that particular point, but there are a number of places that are together. I hope that will help.

BUCKALEW: Mr. President, I don't think the question has been answered yet by any of the persons who have spoken on this subject.

If the word "indirect" is in there, it is going to eliminate almost any kind of aid. It will, for example, eliminate the free lunch, eliminate bus transportation, eliminate, for example, if we had a school or an institution where they had a school, it would eliminate the state giving any support to the child because that would be indirect support to the institution. I think when the members vote on it, I think they ought to understand the word "indirect" cuts out everything, just eliminates all kinds of support, and I don't think there is any question about it.

PRESIDENT EGAN: Mr. Rosswog.

ROSSWOG: Mr. Chairman, I would like to say that I cannot agree with Mr. Coghill that contracts would not be indirect help. I believe you could construe them to be indirect help. I believe that we should leave these words out of the section, and I believe the Committee has done a very good job. They have considered all angles of it, and I would like to say that I support the Committee resolution.

COGHILL: In closing the argument, I might just leave the thought with the delegates that on this particular subject of the direct or indirect benefit to the private or religious educational institution, would guarantee every citizen of the new State of Alaska that any money diverted from the public funds to any such organization in complete competition with your public institutions, if you will, that there will be a sound contractual agreement between your government and this private institution to provide public service and not to the benefit of the individual institution.

UNIDENTIFIED DELEGATE: Question.

PRESIDENT EGAN: The Chief Clerk will please read the proposed amendment.

CHIEF CLERK: "Section 1, line 7, after the word 'direct' insert the words 'or indirect'."

JOHNSON: I request a roll call.

KILCHER: I am sorry to take another minute. There is one problem that has not come up in this discussion. I am a father of seven children, five of which have had the Calvert course for several years with good results. I understand that the Calvert course could possibly be construed not to be available anymore either if indirect help were not available to a private school. The Territory pays it. My children go to a private school, or most of them. The biggest ones though hike over the road, and the Territory pays an indirect system. It could possibly be construed to include the Calvert course, which is a great problem in Alaska.

COGHILL: I might answer that, being familiar with the Calvert course, that the Territorial Department of Education, that is one of their recognized correspondence courses for the outlying areas, and if any family on a CAA remote station or someone on a remote part of the Yukon River, etc., would want to further the education of their children, write to the Commissioner of Education and they are referred to the Calvert course, and in higher institutions it would be the correspondence courses from the University of Nebraska.

PRESIDENT EGAN: The question is, "Shall the proposed amendment as offered by Mr. Coghill be adopted by the Convention?" The Chief Clerk will call the roll.

(The Chief Clerk called the roll with the following result:

Yeas: 19 - Barr, Boswell, Coghill, Collins, Cooper, Cross, Harris, Hilscher, Hinckel, Johnson, King, Knight, Laws, McCutcheon, Metcalf, Nerland, Poulsen, Robertson, Sweeney.

Nays: 34 - Armstrong, Awes, Buckalew, Davis, Doogan, Emberg, H. Fischer, V. Fischer, Gray, Hellenthal, Hermann, Hurley, Kilcher, Lee, Londborg, McLaughlin, McNealy, McNees, Marston, Nordale, Peratrovich, Reader, Riley, R. Rivers, V. Rivers, Rosswog, Smith, Stewart, Sundborg, Taylor, Walsh, White, Wien, Mr. President.

Absent: 2 - Nolan, VanderLeest.)

CHIEF CLERK: 19 yeas, 34 nays, and 2 absent.

PRESIDENT EGAN: So the "nays" have it and the proposed amendment has failed of adoption.

WHITE: I have an amendment to Section 1.

PRESIDENT EGAN: The Chief Clerk will please read the proposed amendment as offered by Mr. White and Mr. Fischer.

CHIEF CLERK: "Section 1, strike the last sentence."

WHITE: I move the adoption of the amendment.

V. FISCHER: I second it.

ARMSTRONG: I object. Mr. President, I feel that we will complicate our finance situation by trying to write this into a later report for clarification. I think here in one sentence you pinpoint it; you clarify it once and for all, but when you start to define this thing again in a larger amendment, you

have a hopeless task. I don't think it can be done, and I believe you want it here where they read it, they understand it and they know the precepts we are following. I think we would be wasting time to now delete this after we have had this vote of confidence for the Committee's report and then try to take it up again later. So I shall vote to kill the amendment and would ask the delegates to do likewise.

WHITE: I feel again that we are getting into a legislative matter here, and I feel that the broad policies that have been laid down in the Federal Constitution are good enough for our purposes here. Those policies that are contained in our Section 5 of our bill of rights which says, "No law shall be made respecting an establishment of religion or prohibiting the free exercise thereof". In a section, I forget the number of it, in a finance article saying that no funds shall be spent for other than a public purpose. I think those two sections are good enough to spell out the broad outline. In addition, I feel that while I am not a lawyer that almost every argument that has been applied against the use of the word "indirect" could just as logically be applied against the use of the word "direct", and I think it will lead us into trouble.

PRESIDENT EGAN: The question is, "Shall the proposed amendment as offered by Mr. White and Mr. Fischer be adopted"? Mr. Fischer.

V. FISCHER: I would just like to add, Mr. President, that while this Commissioner Dafoe points out education is an important field, I do not feel that when it comes to an appropriation of public funds it should receive any special, either more restrictive or more favored treatment. As Mr. White pointed out, the general stipulation is that funds be appropriated only for public purpose. Now it seems to me that the definition of public purpose must be made during every age in view of the conditions prevailing at that time. I think that has been one of the strong points of the Federal Constitution. The fact that it has left itself open to that kind of interpretation and, therefore, it seems that if we give favored treatment or discriminatory treatment to this education section, what are we going to do when it comes to health, welfare and just anything else that may come out. I think the public purpose provision should be the only guidance when it comes to appropriating public funds.

PRESIDENT EGAN: Mr. Gray.

GRAY: I would like to ask the Chairman of Style and Drafting if they would have the authority to move this section, if it directly belonged to taxation, would Style and Drafting have that authority?

PRESIDENT EGAN: Would the Rules Committee have the answer to that question?

SUNDBORG: Our rules, I believe, outline the authority of the Style and Drafting Committee and they do provide that after the various proposals have been adopted in third reading that the Style and Drafting Committee has an opportunity to arrange any material, section, subsections and I believe even sentences where it properly belongs in the constitution. It might be that Style and Drafting would have that authority, but, of course, that authority would be subject to approval here on the floor because we can't do anything in our Committee, of course, unless it is approved in a subsequent report that we make to the plenary session.

PRESIDENT EGAN: Mr. Smith.

SMITH: Mr. President, I merely wanted to point out that this problem has arisen in a good many of the States. It has arisen in connection with the education, and therefore I feel that this provision should remain in the section under education.

COGHILL: Mr. White brought up the thought that the Federal Constitution was all-inclusive. However, it might be well to remember that during the years that they were writing the Federal Constitution they left all educational matters to the individual states, and the purpose of leaving these educational matters to them was because of the trouble they were having at that time between different groups and different communities and different states being quite well controlled by different churches of one sort and another, such as the Quakers in Penn State and down in Virginia and over in Rhode Island and through that area. I feel that this should stay in the article, although my amendment did not ride, I am going to vote for it because I feel at least we have a certain provision for the direct benefit of tax dollars. I might, if I may, Mr. President, read the Supreme Court's decision of 1947 of the Emerson case, and I will not read the whole section but just in one part. It says, "No tax in any amount, large or small, can be levied to support any religious activities or institution whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither state nor federal government can openly or secretly participate in the affairs of any religious organizations or groups and vice versa."

WHITE: If I may close briefly. I am not for or against bus transportation to certain institutions. I am not for or against hot lunches to certain institutions. I again think we would be much better advised to stick to the broad outlines. In partial reply to Mr. Coghill, I might mention that 100 years from now the state might wish to get involved in some sort of G.I. Bill of its own, following another war. I would not be in favor of it now, but 100 years from now I might. Why not leave ourselves open?

BARR: Point of information. I seem to remember when we first started out there was a sheet of paper on our desk to outline certain things that was mandatory to place in our constitution to conform with the Federal Constitution and with our accepted principles of American government. I will ask Mr. Armstrong, I believe, wasn't this practically the same wording in one of those paragraphs and did it not specifically mention schools? Mr. White has put in his amendment because he said the other phrasing in the Finance Committee report would take care of it. That mentioned public funds should be used for public purposes, but aren't we required to state in our constitution that public funds should not be used for private schools?

ARMSTRONG: No sir, not according to the House Enabling Act that we have used as a guide. On page 3, line 14, it just makes the general provision that for the establishment and the maintenance of a system of public schools which shall be open to all children of the state and free from sectarian control. That is the only thing, but I might add that I believe that there are 39 states that have added some type of safeguard in their constitutions directly in connection with education, and I believe every new constitution that has come out has held to some provision of this type, practically in every case they have been written in at this point, so I don't know why we should be afraid to follow that pattern. I don't think it is unusual to keep it here. I think it is healthy to keep it here, and I believe this is where it belongs.

McNEES: I call for the question.

PRESIDENT EGAN: The question is, "Shall the proposed amendment as offered by Mr. White and Mr. Fischer be adopted by the Convention?"

JOHNSON: I request a roll call.

PRESIDENT EGAN: The Chief Clerk will call the roll.

(The Chief Clerk called the roll with the following result:

Yeas: 13 - V. Fischer, Hurley, Kilcher, Laws, Lee, McCutcheon, Nolan, Poulsen, Reader, Riley, Sundborg, Walsh, White.

Nays: 41 - Armstrong, Awes, Barr, Boswell, Buckalew, Coghill, Collins, Cooper, Cross, Davis, Doogan, Emberg, H. Fischer, Gray, Harris, Hellenthal, Hermann, Hilscher, Hinckel, Johnson, King, Knight, Londborg, McLaughlin, McNealy, McNees, Marston, Metcalf, Nerland, Nordale, Peratrovich, R. Rivers, V. Rivers, Robertson, Rosswog, Smith, Stewart, Sweeney, Taylor, Wien, Mr. President.

Absent: 1 - VanderLeest.)

CHIEF CLERK: 13 yeas, 41 nays and 1 absent.

PRESIDENT EGAN: The "nays" have it and the proposed amendment has failed of adoption. Are there other amendments to Section 1? Mr. Victor Rivers.

V. RIVERS: May I ask a question? I notice that the Committee has come in with the words "direct benefit". I notice that some of the other states' constitutions, including that of Hawaii, say "support or benefit". What was the intent of limiting them to the word "direct"? I would like to know a little about the intent of the Committee rather than in dealing with both "support" or "benefit".

PRESIDENT EGAN: Miss Awes.

AWES: I don't recall that the Committee considered the words "support" or "benefit". I think the purpose we wanted to achieve was brought out in the arguments on an earlier amendment and we felt these words did it, and I don't recall the words "support" or "benefit" came before the Committee.

V. RIVERS: In other words, the Committee did not consider the words "support" or "benefit"?

AWES: That is right.

PRESIDENT EGAN: That seems to be the understanding of the Chair. Mr. Armstrong.

ARMSTRONG: As I recall, Mr. President, we probably discussed the question of the support of private schools, but we did not feel it needed to be in this particular section, and I don't recall, Mr. Rivers, that we considered that as a part of the text. I certainly would agree with what Miss Awes has said, although we discussed in Committee such things as direct legislation for the building of a school or the maintenance of a private school, which would be support, but it was our understanding that that would be covered under this word "direct benefit". This would prohibit the direct appropriation for building or maintenance of private institutions.

V. RIVERS: Mr. President, I am going to make a motion. I think that the word "direct" limits the interpretation of this. I am going to make a motion that the word "direct" be stricken and insert in lieu thereof the words "support of", line 7.

BARR: I second it.

PRESIDENT EGAN: The matter is open for discussion. Mr. Rosswog.

ROSSWOG: I would just question the striking of the words "direct benefit". The "support" I can see that, but "direct benefit", it might leave the question wide open again as far as I'm concerned.

PRESIDENT EGAN: Is there further discussion of the proposed amendment? Mr. Coghill.

COGHILL: I move and ask unanimous consent for a five-minute recess.

PRESIDENT EGAN: If there is no objection the Convention will stand at recess for five minutes.

RECESS

PRESIDENT EGAN: The Convention will come to order. Mr. Robertson.

ROBERTSON: May I ask Mr. Rivers, what in your opinion would be the implication or result of the proposed change?

PRESIDENT EGAN: Mr. Victor Rivers.

V. RIVERS: There is some question in my mind as to what interpretation the words "direct benefit" would receive from the courts and just how narrow they would consider a "direct benefit" to be. I notice in other state constitutions, I don't have all the constitutions available, but the wording I provided was identical with the State of Hawaii. In Nevada they say, "No money shall be expended, either city, county or state, for benefit of sectarian purposes.". In the case of Puerto Rico they also have the same broad general language. I hesitate to use the Puerto Rican constitution as a model for I don't care too much for it, but in that highly religious little Commonwealth they have adopted the same principle, but there again I feel that the word "direct" may be interpreted very narrowly by the courts and may lead to a great many funds that would go for support that I personally do not feel should be going to support of sectarian institutions.

TAYLOR: Mr. Rivers, do you not believe that if you leave that word out it will create more confusion than it will, leaving it in?

V. RIVERS: I don't think so. It will leave a little broader field for interpretation. However, Mr. Chairman, I believe that after considering the matter I will withdraw my amendment and ask unanimous consent to do so for the moment.

PRESIDENT EGAN: Mr. Victor Rivers asks unanimous consent that his proposed amendment be withdrawn. Hearing no objection, it is so ordered. Mr. Barr.

BARR: I ask that we now revert to the introduction of proposals.

PRESIDENT EGAN: If there is no objection, the Convention will now revert to the order of business of introduction of proposals. The Chief Clerk may read the proposals as introduced by Mr. Barr.

COOPER: Is this a delegate proposal or committee proposal? Was not the date set January 8?

CHIEF CLERK: That is today.

PRESIDENT EGAN: The Chief Clerk may read the proposal.

CHIEF CLERK: "Delegate Proposal No. 44, introduced by Mr. Barr, DEPARTMENT OF LABOR."

PRESIDENT EGAN: What committee would you like that to be referred to, Mr. Barr? I believe it should go to the Executive, both of those should. Would the Committee on the Executive be the proper committee? If there is no objection the Committee Proposal will be referred to the Committee on the Executive. The Chief Clerk will please read the second proposal.

CHIEF CLERK: "Delegate Proposal No. 45 introduced by Mr. Barr, OFFICE OF THE ATTORNEY GENERAL."

PRESIDENT EGAN: Committee on the Executive.

BARR: Would it be possible afterwards to have that referred also to the Judiciary?

PRESIDENT EGAN: If there is no objection, it will be referred from the Committee on the Executive to the Committee on the Judiciary. If there is no objection it is so ordered. Are there other amendments to Section 1? Mr. Johnson?

JOHNSON: I have no amendment. I would like to direct a question to the Chairman of the Bill of Rights Committee concerning this section.

PRESIDENT EGAN: If there is no objection, Mr. Johnson, you may direct a question.

JOHNSON: Miss Awes, in the second line, the wording "system of public schools" appears. Now in a number of state constitutions I have noticed that they use the word "system of free public schools". It is assumed I imagine that you intended that we should have a system of free public schools here, but you did not specifically use the word, and I wondered if the Committee had considered that matter and if so, why it was left out?

AWES: We did consider the matter. The first two sentences in this section are taken almost word for word from the Enabling

Act. The word "free" was mentioned. We did not feel it was necessary since we say that a "system of public schools shall be open to all children" and since there is already a well set up system of schools which are free, we were afraid that the word, while not necessary, might cause some confusion if it were used. For instance, this section is intended to refer not only to grade schools and high schools, but also other educational institutions. For instance, a state university, and there may be vocational schools, etc., established, which is customary throughout the country to charge tuition for, sometimes less to residents of the state than to other persons. Also, a city running its own school system, I think, customarily charges a small tuition fee to children who come in from other places, and we were afraid if we used the word "free" that it might raise questions whether or not certain practices like this should be continued or considered. We did not think that was a matter for the constitution.

JOHNSON: Thank you.

HURLEY: I would like to speak on the matter of personal privilege and ask unanimous consent.

PRESIDENT EGAN: You may, Mr. Hurley.

(Mr. Hurley spoke under a question of personal privilege regarding the article on health, education and welfare.)

PRESIDENT EGAN: Are there other amendments to Section 1, article on health, education and welfare? Mrs. Hermann.

HERMANN: Mr. President, I have an amendment to follow Section 1. I want to change Section 2. I have this amendment, it is neither an amendment to Section 2 nor Section 1. I just want to get a new Section 2 and renumber it.

PRESIDENT EGAN: You are asking that Section 2 be deleted?

HERMANN: No, not deleted, just moved down. This actually belongs under the education section, that is the reason I put it in. It has nothing to do with what is already written, however.

PRESIDENT EGAN: Would the Chief Clerk please read the amendment as offered. Mr. Ralph Rivers.

R. RIVERS: Mrs. Hermann wants to inject some new material between the sections. What she has so happens to come in logical order between Sections 1 and 2. We are taking these up section by section, but are we not at liberty to interject new sections in between sections?

PRESIDENT EGAN: She wants to inject a new Section 2 and renumber 2, 3, 4, and 5. The Chair is just hard at getting it through his head. The Chief Clerk may read the proposed amendment.

CHIEF CLERK: "Add a new Section 2 and renumber succeeding sections: 'The state shall provide for a Unified Library Service.'"

HERMANN: I move the adoption of the amendment.

PRESIDENT EGAN: Mrs. Hermann moves the adoption of the proposed amendment.

HERMANN: I ask unanimous consent.

BUCKALEW: Objection.

TAYLOR: I second the motion.

PRESIDENT EGAN: The motion is open for discussion. Mrs. Hermann.

HERMANN: I very probably should have submitted this suggestion to the Committee on Preamble and Bill of Rights, but it was not made to me until after they had turned in their report, and it is submitted at the request of the present Territorial Library Board that we open the way for the establishment of a unified library service for the State of Alaska, which is in keeping with the unified library service that we have recently established for the Territory of Alaska, and it properly comes under the educational article of the constitution, so I have submitted it for that reason. I shall be glad to answer any questions anyone wishes to ask.

DOOGAN: I would like to ask Delegate Hermann a question. Don't you suppose this could very easily be handled by the legislature rather than making it a constitutional provision?

HERMANN: It provides that the legislature shall do it, that is draw up all the regulations concerning it. It was just simply giving them the authority to do it.

SUNDBORG: May I address a question to Mrs. Hermann? Would there be anything in the constitution, if adopted without your proposed amendment, which would prevent the legislature from doing that at any time it pleased to do so?

HERMANN: Frankly, Mr. Sundborg, I don't know, but I submitted the amendment at the request of the Library Board. They think they need the authority.

McNEALY: If I could address a question to Mrs. Hermann. I am probable a little thickheaded today of all days, but what is the meaning of the word "unified"?

HERMANN: The last legislature established for the Territory of Alaska what is designated as a "unified library service". It means a Territorial library service under the direction of a

Territorial librarian that seeks to get uniformity in the operations of libraries throughout the Territory. It also has as one of its major objectives the collection of documents and materials to include in all of these libraries. I think if the assembly will remember, we had a letter some time back from Miss Phelps who is the Territorial Librarian, suggesting that some place be made the repository of everything that is of any historical importance that came out of this Convention, and that is what she is attempting to do for all the libraries, so that in every community we will have libraries having material available that deals with the Territorial development in all of its forms, as well as the customary library material. It also seeks to set up uniformity in operations and proceedings. As most of you likely know, we have a Territorial Library Aid bill whereby we contribute matching funds to certain libraries for the purpose of acquiring books and other periodicals, and all of that is supposed to be reduced to a uniformity of procedure that will do away with much of the confusion that has resulted from every little library and every little place setting up its own rules of procedure and probably not adhering very closely to them after it sets them up.

RILEY: Mrs. Hermann, would you have any objection to the journal showing that the amendment offered by Mrs. Hermann is by request?

HERMANN: I think it was Mr. Barr the other day who said he never introduced anything by request and I am trying to emulate Mr. Barr's noble example. I have no real objection.

MARSTON: May I ask, Delegate Hermann, did you say that the Territory could do all this without us going through the operation here?

HERMANN: Frankly, I said that I did not know. I have not given the question a great deal of thought. I just received this request in the last day, and the Library Board feels that the authority is necessary before the state can pass a law creating it.

TAYLOR: Mrs. Hermann, do you not believe that due to the fact we now have in effect a law providing for a unified library system, it would naturally carry over into the state, be a state law?

HERMANN: If it is re-enacted by the first Territorial or State legislature.

TAYLOR: If the legislature re-enacted the present laws, it would not need this?

HERMANN: I might say there is a provision in the Hawaiian Constitution providing for this very thing and that is probably what induced the sponsors of this request to ask it.

BARR: I am greatly in favor of establishing public libraries. However, there is great doubt in my mind as to whether this is constitutional material. We do have a law establishing library boards which will carry over to the new state, of course, and if we put such a proposal into the constitution, it will be permanent. If at some future time we decide that conditions are so bad we can't afford libraries or want to abolish them, we can't very well do it if it is in the constitution. I would like to point out, the library board is one of the minor departments at the present time, and in the report submitted by the Committee on the Executive Branch which deals with the establishment of the various departments of the government, no mention was made of many departments much more important than a library board for the simple reason that it was supposed the legislature would make laws relating to it.

PRESIDENT EGAN: Shall the proposed amendment as offered by Mrs. Hermann be adopted by the Convention? Mrs. Hermann.

HERMANN: I claim the prerogative of making the final remarks about this brainchild of mine, and I want to say in answer to Mr. Barr's statement, except for the public school system of Alaska, I don't think that anything is more important than library service. Maybe he does not read as much as I do, maybe he reads more but buys his own, but I feel very strongly that the entire cultural pattern of a state or any unit of government is set by the library facilities it offers to the people of that country, and I hope that you will pass this amendment because just for the very reason that he says that we might sometime feel too poor to afford a library service. I don't think we can ever be too poor to afford a library service, and I don't think there is anything in our government, aside from our public school system, that is so valuable to the citizens as a whole as a library service.

McNEES: Roll call, please.

PRESIDENT EGAN: The question is, "Shall the proposed amendment as offered by Mrs. Hermann be adopted by the Convention?" The Chief Clerk will call the roll.

STEWART: May we have it read?

PRESIDENT EGAN: Could the Chief Clerk please read the amendment at this time.

CHIEF CLERK: "Add a new Section 2 and renumber succeeding sections: 'The state shall provide for a Unified Library Service'."

(The Chief Clerk called the roll with the following result:

Item 3

Relevant Court Cases

From around the Nation

Note

The section is a listing of the major US and State Supreme Court Cases that directly affect our review of the Alaska State Constitution. The actual cases have been forward to the committee aide and is available for your review. Due to the fact that this packet is over 250 pages, members of the committee were not issued this section of the packet. Copies will be made on request.

Relevant Court Cases

Traverse City School District v. Attorney General, 384 Mich. 390, IN RE Proposal C, 185 N.W. 2d 9, January 1971

Lemon v. Kurtzman, 403 US 602, 29 L Ed 745, June 1971

Warren v. Nusbaum, 198 N.W. 2d 650, July 1972

Warren v. Nusbaum, 219 N.W. 2d 577, June 1974

Runyon v. McCrary, 427 US 160, 49 L Ed 2d 415, June 1976

Sheldon Jackson College v. State of Alaska, 599 P.2d, 127 Aug. 1979

Mueller v. Allen, 463 US 388, 77 L Ed 2d 721, June 1983

Aguilar v. Felton, 473 US 402, 87 L Ed 2d 290, July 1985

Grand Rapids Sch Dist. v. Ball, 473 US 373, 87 L Ed 2d 267, July 85

Witters v. Wash. Dept. of Serv., 474 US 481 L Ed 2d 846, Jan 1986

Bishop v. Amos, 483 US 327, 97 L Ed 2d 273, June 1987

Davis v. Grover, 480 N.W. 2d 460, March 1992

Florence Co. Sch. Dist. v. Carter, 510 US 7, 126 L Ed 2d 284, 1993

Zobrest v. Catalina Foothills Sch. Dist. 125 L Ed 2d 793, 1994

Campbell v. Manchester Bd. of Sch. Dir., 641 a.2d 352, Jan. 1994

Agostini v. Felton, 138 L Ed 391, June 1997

Jackson v. Benson, 578 N.W. 2d 602, June 1998

Kotterman v. Killian, Supreme Court CV-97-0412-SA, January 1999

Item 4

Overview of

Court Cases

and the Analysis of

Arizona's School Chioce

Ruling, January 27, 1999

(A) Lemon v. Kurtzman, 403 U.S. 602, 702 (1971) 8-1 vote

Recent decisions by the U.S. Supreme Court make clear that unlike direct subsidies to religious schools, educational benefits that include religious schools among the range of options do not violate the First Amendment.

The U.S. Supreme Court applies a three-part test to determine whether state action violates the First Amendment's prohibition against establishment of religion "*establishment clause.*"

(1) Whether the action has a "*secular purpose.*"
(2) Whether its "*primary effect*" is to advance religion
(3) Whether it creates "*excessive entanglement*"

Litigation in the school choice area revolves around the second and third questions.

(B) Corporation of the presiding Bishop v. Amos, 483 U.S. (1987)

Alleged religious discrimination in violation of Title VII of the Civil Rights Act of 1964. The Supreme Court Ruled: Applying the test set out in Lemon v. Kurtzman, 403 U.S. 602. 702's exemption to religious organizations' secular activities does not violate the Establishment Clause. There is ample room under the Clause for benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference.

Section 702's first requirement of the three-part Lemon test that challenged law serve a "secular legislative purpose." This requirement is aimed at preventing the relevant governmental decision-maker from abandoning neutrality and acting with the intent of promoting a particular point of view in religious matters. It is a permissible legislative purpose to alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions.

Section 702, Lemon's second requirement that the challenged law have a principal or primary effect that neither advances more inhibits religion. A law is not unconstitutional simply because it allows churches to advance religion, which is their very purpose. Far a law to have forbidden "effect," the Government itself must have advanced religion through its own activities and influences. 702 is rationally related to the legitimate purpose of alleviation significant governmental interference

with the ability of religious organizations to define and carry out their religious missions.

Section 702, Lemon's third requirement is satisfied sine 702 does not impermissibly entangle church and state. Rather, is effects a more complete separation of the two.

(C) Mueller v. Allen, 463 U.S. 388 (1983) 5-4 vote

The Court upheld Minnesota's income tax deduction for educational expenses, including private school tuition. The Court resolved the question left open in Committee for Public Education and Religious liberty v. Nyquist 413 U.S. 756 (1973), upholding tax deductions for public and private school expenses even though the vast majority were claimed by religious school parents.

(D) Witters v, Dep't of Services for the Blind, 474 U.S. 481 (1986)

The Court unanimously upheld the use of public funds by a blind student pursuing a divinity degree in a religious caooege.

(E) Zobrest v. Catalina Foothills School Dist., 113 S. Ct. 2462 (1993)

The Court ruled that the First Amendment does not forbid the use of public funds to provide an interpreter for a deaf child attending a Catholic high school.

(F) Campbell v. Manchester Bd. Of School Directors, A.2d, 1994 Westlaw 162645 (Vt. Jan 28, 1994), at 3

The Court ruled that the First Amendment forbade funding for children to attend religious schools, Swart v. South Burlington School Dist., 167 A.2d 514 (Vt. 1961).

But in 1994, the Court unanimously overturned its prior ruling, remarking that *"jurisprudence has evolved greatly since 1961 and in directions unpredictable at that time, thus "we must examine the constitutional issues anew in light of more recent teachings."*

(G) Warren v. Nusbaum, 219 N.E.2d 737 (III. 1973)

Court decisions interpret state constitutions to parallel the First Amendment. Therefore, the recent First Amendment cases should control state constitutional interpretation.

(H) Davis v. Grover, 480 N.W.2d 460 (Wis. 1991)

The plaintiffs challenged the Milwaukee Parental Choice Program on the grounds that it was a "local" bill enacted as part of the budget, that it failed to provide a constitutionally mandated "uniform" education, and that it captained inadequate regulations to ensure the program's public purpose would be fulfilled. The Wisconsin Supreme Court rejected the challenge on all grounds.

(I) Runyon v. McCrary, 427 U.S. 160 (1976)

Private schools are already subject to the federal statute prohibiting discrimination on the basis of race in making contracts, which was held applicable to private schools in the above mentioned case. In addition, private schools must avoid racial discrimination in order to maintain tax-exempt status under the Internal Revenue Code (Bob Jones University v. United States, 461 U.S. 574 (1983)). Receipt of public funds in a school choice program would likely have no additional effects on a private school's obligations with respect to race discrimination.

(J) Florence County School Dist. Four v. Carter, 114 S.CT. 361 (1993)

Under the Individuals with Disabilities in Education Act, federal and state courts consistently have ruled that where public schools fail to provide disabled youngsters "appropriate" education, they must provide such opportunities in private schools.

(K) Jackson v. Benson 4-2 vote

The Wisconsin Supreme Court upheld a 1995 state law that expanded the Milwaukee voucher program to include religious schools.

(L) Kotterman v. Killian, C-B-970412-SA 3-2 vote

Suite brought challenging tax credit law on Establishment Clause grounds. Oral arguments presented to Arizona Supreme Court in October 1997. Decision expected in August 1998.

NOTE: See attached fax Analysis of the Arizona School Choice Victory January 27, 1999

INSTITUTE FOR JUSTICE

MEMORANDUM

TO: School Choice Allies

FROM: Chip Mellor
Clint Bolick

DATE: January 27, 1999

RE: Analysis of the Arizona School Choice Victory

The decision late yesterday by the Arizona Supreme Court upholding the state income tax credit for contributions to private scholarship programs provides strong jurisprudential support for school choice and could give a boost to scholarship programs across the nation.

The tax credit plan allows taxpayers to reduce their tax liability by up to $500 for private scholarship contributions and up to $200 for contributions to public schools for extracurricular activities. It was challenged by the Arizona Education Association, the ACLU, and others on First Amendment and state constitutional grounds. IJ represented Superintendent of Public Instruction Lisa Graham-Keegan, Jeff Flake of the Goldwater Institute, Trent Franks, and several families who hope to receive scholarships for their children.

The 3-2 ruling is in excess of 80 pages, with the Court sharply divided on both First Amendment and state constitutional grounds. The First Amendment ruling makes the case a candidate for review by the U.S. Supreme Court.

The majority opinion by Chief Justice Thomas A. Zlaket is scholarly and tightly reasoned. Among other cases, the decision cites the Wisconsin Supreme Court's ruling on the Milwaukee school choice program (Jackson v. Benson), as well as the U.S. Supreme Court's decision in Mueller v. Allen upholding tax deductions for school expenses.

Under the First Amendment, the Court ruled that the *"primary beneficiaries of this credit are taxpayers who contribute to the [school tuition organizations], parents who might otherwise be deprived of an opportunity to make meaningful decisions about their children's educations, and the children themselves."* Private schools are *"at best only incidental beneficiaries."*

By creating the program, the legislature "*hoped to encourage the development of educational settings that would invigorate learning, improve academic achievement, and provide additional choices to parents and children,*" the majority reasoned.

1717 Pennsylvania Avenue, NW Suite 200 Washington, DC 20006 (202) 955-1300 (202) 955-1329 Fax
e-mail: General@ij.org Homepage: www.ij.org

Decisions from the Ohio, Vermont and Maine Supreme Court's still pending. Institute for Justice is closely monitoring the legal aspects of school choice in Texas, Florida, New York City, Pennsylvania, Arizona and Virginia.

The following organization have requested a basic package on Sponsor Substitute House Bill 5. These organizations will be reviewing Alaska's Education Voucher Program and providing comments in regard to Alaska's School Choice Program as compared to the rest of the nation.

Center for Education Reform
Heritage Foundation
Fordham Foundation
Association of Christian Schools International
Institute for Justice
Pacific Legal Foundation

Item 5

Michigan's Constitution

Article VIII, Section 2

Nonpublic Schools, Prohibited Aid.

And

Traverse City School District v.

Attorney General, the State Board

Of Education; IN RE Proposal C,

185 N.W. 2d 9, excerpts

Michigan

CONSTITUTIONS
of the
UNITED STATES

National
and
State

Michigan

(Revised and Updated)

Release 95-2
Issued June 1995

Published for
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COLUMBIA UNIVERSITY

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Dobbs Ferry, New York

tures and revenues shall adopt such budgets only after a public hearing in a manner prescribed by law.

History: Const. 1963, Art. VII, Section 32, Eff. Jan. 1, 1964.

Section 33. Removal of elected officers.

Sec. 33. Any elected officer of a political subdivision may be removed from office in the manner and for the causes provided by law.

History: Const. 1963, Art. VII, Section 33, Eff. Jan. 1, 1964.
Former Constitution: See Const. 1908, Art. IX, Section 8.

Section 34. Construction of constitution and law concerning counties, townships, cities, villages.

Sec. 34. The provisions of this constitution and law concerning counties, townships, cities and villages shall be liberally construed in their favor. Powers granted to counties and townships by this constitution and by law shall include those fairly implied and not prohibited by this constitution.

History: Const. 1963, Art. VII, Section 34, Eff. Jan. 1, 1964.

ARTICLE VIII
Education

Section 1. Encouragement of education.

Sec. 1. Religion, morality and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged.

History: Const. 1963, Art. VIII, Section 1, Eff. Jan. 1, 1964.
Former Constitution: See Const. 1908, Art. XI, Section 1.

Section 2. Free public elementary and secondary schools; discrimination.

Sec. 2. The legislature shall maintain and support a system of free public elementary and secondary schools as defined by law. Every school district shall provide for the education of its pupils without discrimination as to religion, creed, race, color or national origin.

Nonpublic schools, prohibited aid.

No public monies or property shall be appropriated or paid or any public credit utilized, by the legislature or any other political subdivision or agency of the state directly or indirectly to aid or maintain any private, denominational or other nonpublic, pre-elementary, elementary, or secondary school. No payment, credit, tax benefit, exemption or deductions, tuition voucher, subsidy, grant or loan of public monies or property shall be provided, directly or indirectly, to support the

attendance of any student or the employment of any person at any such nonpublic school or at any location or institution where instruction is offered in whole or in part to such nonpublic school students. The legislature may provide for the transportation of students to and from any school.

History: Const. 1963, Art. VIII, Section 2, Eff. Jan. 1, 1964;--Am. Init., approved Nov. 3, 1970, Eff. Dec. 19, 1970.
Constitutionality: Portion of second sentence of second paragraph of this section, prohibiting use of public money to support attendance of any student or employment of any person at any location or institution where instruction is offered in whole or in part to nonpublic students, was held unconstitutional, void, and unenforceable because it contravened free exercise of religion guaranteed by the United States Constitution and was violative of equal protection of laws provisions of United States Constitution. Traverse City School District v. Attorney General, 384 Mich. 390, 185 N.W.2d 9 (1971).

Section 3. State board of education; duties.

Sec. 3. Leadership and general supervision over all public education, including adult education and instructional programs in state institutions, except as to institutions of higher education granting baccalaureate degrees, is vested in a state board of education. It shall serve as the general planning and coordinating body for all public education, including higher education, and shall advise the legislature as to the financial requirements in connection therewith.

Superintendent of public instruction; appointment, powers, duties.

The state board of education shall appoint a superintendent of public instruction whose term of office shall be determined by the board. He shall be the chairman of the board without the right to vote, and shall be responsible for the execution of its policies. He shall be the principal executive officer of a state department of education which shall have powers and duties provided by law.

State board of education; members, nomination, election, term.

The state board of education shall consist of eight members who shall be nominated by party conventions and elected at large for terms of eight years as prescribed by law. The governor shall fill any vacancy by appointment for the unexpired term. The governor shall be ex-officio a member of the state board of education without the right to vote.

Boards of institutions of higher education, limitation.

The power of the boards of institutions of higher education provided in this constitution to supervise their respective institutions and control and direct the expenditure of the institutions' funds shall not be limited by this section.

History: Const. 1963, Art. VIII, Section 3, Eff. Jan. 1, 1964.
Former Constitution: See Const. 1908, Art. XI, Subsection 2, 6.

I.

RULES OF CONSTRUCTION

[1] This case requires the construction of a constitution, where the technical rules of statutory construction do not apply. McCulloch v. Maryland, 17 U.S. (4 Wheat) 316, 407, 4 L.Ed. 579 (1819).

B)

[2] The primary rule is the rule of "common understanding" described by Justice Cooley:

"A constitution is made for the people and by the people. *The interpretation that should be given it is that which reasonable minds, the great mass of the people themselves, would give it.* 'For as the Constitution does not derive its force from the convention which framed, but from the people who ratified it, *the intent to be arrived at is that of the people,* and it is not to be supposed that they have looked for any dark or abstruse meaning in the words employed, *but rather that they have accepted them in the sense most obvious to the common understanding,* and ratified the instrument in the belief that that was the sense designed to be conveyed.' (Cooley's Const. Lim. 81)." (Emphasis added.)

(See also quotations on "common understanding" in the *per curiam* opinion of the companion *Carman* case, *supra.*)

[3] A second rule is that to clarify meaning, the circumstances surrounding the adoption of a constitutional provision and the purpose sought to be accomplished may be considered. On this point this Court said the following:

"In construing constitutional provisions where the meaning may be questioned, the court should have regard to the circumstances leading to their adoption and the purpose sought to be accomplished." Kearney v. Board of State Auditors, 189 Mich. 666, 673, 155 N.W. 510, 512.

[4] A third rule is that wherever possible an interpretation that does not create constitutional invalidity is preferred to one that does. Chief Justice Marshall pursued this thought fully in Marbury v. Madison, 5 U.S. (1 Cranch) 137, 2 L.Ed. 60, which we quote in part:

"If any other construction would render the clause inoperative, that is an additional reason for rejecting such other construction, * * *"

II.

THE EFFECT OF AMENDED ARTICLE 8, SECTION 2, CONSTITUTION OF 1963 ON CHAPTER 2, ACT 100 OF 1970

In Advisory Opinion re Constitutionality of P.A.1970, No. 100, 384 Mich. 82, 180 N.W.2d 265 (1970), we held that the Constitution of Michigan did not prohibit the purchase with public funds of secular educational services from a nonpublic school.[1]

[5, 6] Article 8, Sec. 2, as amended by Proposal C, now prohibits the use of public funds "directly or indirectly to aid

1. The concept of the state purchasing secular educational services from nonpublic schools has been implemented in various ways. Michigan implemented it by paying public monies to eligible nonpublic schools to pay a portion of the salaries of lay teachers who taught secular subjects in the nonpublic school. 1970 P.A. 100 Secs. 55–60a; M.S.A. 15.1919 (105–116a). This is similar to the Rhode Island statute which provides salary supplements to lay teachers in nonpublic school systems in order to attain salaries competitive with those of the public school system. The Pennsylvania statute provides public reimbursements to elementary parochial schools for the actual expenditures they incurred in purchasing services for secular education without regard to the fact whether the teacher was a layman or a member of a religious order.

dents are prohibited by any of the five prohibitions mentioned above. This question will be considered under three headings:

1. *Shared time—at the public school.*

[8] Attorney General's Opinion 4715 construes Proposal C to prohibit shared time services at the public school as follows:

"Under the amendment, public funds could not be used to support the attendance of nonpublic school students at 'any location or institution where instruction is offered in whole or *in part* to nonpublic school students.' (Emphasis supplied.)"

This is a shocking result. It violates both the free exercise of religion and the equal protection provisions of the United States Constitution. (See Part VIII)

These reasons evoke the necessity of applying the rules of construction (Part I). As a consequence, the question before this Court is whether there is an alternative constitutional construction to that adopted in the aforesaid Attorney General's Opinion, which also preserves the purpose of Proposal C of proscribing parochiaid and, of course, is consonant with a common understanding of the language used in Proposal C. This Court has already considered a similar problem in Advisory Opinion re Constitutionality of P.A.1970, No. 100, 384 Mich. 82, 180 N.W.2d 265 (1970). This Court there refused to adopt "a strict 'no benefits, primary or incidental' rule" and found "no evidence * * * that the people intended such a rule when they adopted this (Article I, Sec. 4) provision of the Constitution." The same reasoning is applicable to the terms "support" in the second, third, fourth and fifth

as it shall deem necessary or desirable for the maintenance and improvement of the schools; determine the courses of study to be pursued and cause the pupils attending school in such district to be taught in such schools or departments as it may deem expedient:" (M.C.L.A. 340.583; M.S.A. 15.3583.)

As good a description as any of shared time is found in the United States Senate Education Subcommittee Report on that subject, which reads:

"As generally used in current literature in the field of education, the term 'shared time' means an arrangement for pupils enrolled in nonpublic elementary or secondary schools to attend public schools for instruction in certain subjects . . . The shared time provision is or would be for public school instruction for parochial school pupils in subjects widely (but not universally) regarded as being mainly or entirely secular, such as laboratory science and home economics." (Staff of Senate Comm. on Labor and Public Welfare, 88th Congress, 1st Session, Proposed Federal Promotion of "Shared Time" Education (Comm. Print 1963) p. 1.)

As this quotation indicates, shared time is an operation whereby the public school district makes available courses in its general curriculum to both public and nonpublic school students normally on the premises of the public school.

Shared time has been an accepted fact of American life for more than forty years. (Shared Time: Indirect Aid to Parochial Schools, 65 Mich.L.Rev. 1224 [1967]; Watkins, Experiment in Educational Sharing, 60 Religious Education 43 [1965]; Staff of Senate Comm. on Labor and Public Welfare, 88th Congress, 1st Session, Proposed Federal Promotion of "Shared Time" Education 1 [Comm. Print 1963] p. 2; U. S. Dept. of Health, Education & Welfare, Dual Enrollment in Public & Non-Public Schools 5 [1965].)

On the basis of historical analysis, therefore, it would require a strong showing that Proposal C really did intend to outlaw shared time in the public schools because that had become a long accepted practice over a number of years. (New York Trust v. Eisner, 256 U.S. 345, 349, 41 S.Ct. 506, 65 L.Ed. 963 [1921]; Walz v. Tax Commission of the City of New York, 397 U.S. 664, 678, 90 S.Ct. 1409, 25 L.Ed.2d 697 [1970].)

The Stipulation of Facts in this case indicate that over 15,000 Michigan nonpublic school students participate in shared time programs at public schools, about 2,500 at premises leased by public schools from nonpublic schools, and about 800 at nonpublic schools. (Stipulation of Facts paragraphs 21, 27 and 28.)

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prohibitions and "aid or maintain" in the first prohibition.

A comparison of the parochiaid act, which this first prohibition proscribes, and shared time which this prohibition does not proscribe, is illuminating as to the construction of the prohibition.

Parochiaid as authorized by Chapter 2 of P.A.1970, No. 100 provided $22,000,000 of public monies for participating nonpublic school units to pay a portion of the salaries of private lay teachers of secular nonpublic school courses in the nonpublic school for nonpublic school students. In contrast shared time provides public monies for local public school districts to use to hire public school teachers to teach public school courses in public or nonpublic schools to public or public and nonpublic school students.

Shared time differs from parochiaid in three significant respects. First, under parochiaid the public funds are paid to a private agency whereas under shared time they are paid to a public agency. Second, parochiaid permitted the private school to choose and to control a lay teacher whereas under shared time the public school district chooses and controls the teacher. Thirdly, parochiaid permitted the private school to choose the subjects to be taught, so long as they are secular, whereas shared time means the public school system prescribes the public school subjects. These differences in control are legally significant.

Obviously, a shared time program offered on the premises of the public school is under the complete control of the public school district and is not invalidated by the first prohibition against aiding a nonpublic school since such shared time instruction provides only incidental aid, if any. The second prohibition of Proposal C precludes public monies to "support the attendance of any student . . . at any such nonpublic school." Any support to a nonpublic school student from a shared time program at a public school in which he participates would be only remotely incidental to his attendance at the nonpublic school and thus not prohibited. The third prohibition, no public money to employ anyone at a nonpublic school, is not here in question.

[9] Prohibitions four and five are based particularly on the last portion of the second sentence of the second paragraph of Article 8, Sec. 2—no public money "to support the attendance of any student or the employment of any person at any such nonpublic school *or at any location or institution where instruction is offered in whole or in part to such nonpublic school students.*" (Emphasis added.) The plain meaning of this language is that when nonpublic school students go to a public school, the public school becomes an "institution where instruction is offered * * to such nonpublic school students" and hence ineligible for public monies. This quoted language contravenes the free exercise of religion guaranteed by the United States Constitution and is violative of the equal protection of the laws provisions of the United States Constitution. (Part VIII)

We hold that portion of the second sentence of Article 8 Sec. 2 hereinafter quoted unconstitutional, void and unenforceable: "or at any location or institution where instruction is offered in whole or in part to such nonpublic school students."

[10] We hold, however, that the quoted portion is severable and capable of being removed from Article 8 Sec. 2 without altering the purpose and effect of the balance of the sentence and section.

2. Shared Time—upon leased or other premises.

[11] Premises occupied by lease or otherwise for public school purposes under the authority, control and operation of the public school system by public school personnel as a public school open to all eligible to attend a public school are public

Elementary and Secondary Education Act of 1965 (hereinafter cited as ESEA) to fund programs of special educational benefits in the form of services or equipment, which are designed to aid educationally deprived children.[6] The grants to a public school district in conformity to a plan submitted by the school district to obtain federal funds are subject to the requirement that:

"* * * to the extent consistent with the number of educationally deprived children in the school district of the local educational agency who are enrolled in private elementary and secondary schools, such agency has made provision for including special educational services and arrangements (such as dual enrollment, educational radio and television, and mobile educational services and equipment) in which such children can participate;" ESEA, Sec. 205(a) (2), 79 Stat. 30 (1965), 20 U.S.C. 241e(a) (2) (Supp. 1965).

[20] The question is, does the language of Proposal C which prohibits "public monies" to "aid" a private school, "support the attendance" of a student at a nonpublic school or support the "employment" of any person at a nonpublic school encompass the situation where public school districts make available special educational services to both public and private school students under the required conditions of a federal grant. We hold it does not. The adoption of Proposal C does not disallow a public school district from participation in any federal program under Title I of ESEA for aiding elementary and secondary school children.

Two reasons lead to this conclusion. First, the nature of the special educational services are similar to auxiliary services. The character of the educational programs made available under Title I was described as follows:

"Although available statistics are far from complete, it appears that the bulk of Title I projects involve some type of non-instructional service, such as remedial reading or speech therapy. The similarity of the projects actually implemented . . . seems to indicate a belief on the part of educators that the solution to the problems of educational deprivation lies in 'compensatory' educational services, which services offer the student special instruction in a skill or subject, thereby enabling him to proceed at the same rate as his peers." (Comment, The Elementary and Secondary Education Act—The Implications of the Trust Fund Theory for Church-State Questions Raised by Title I, 65 Mich.L. Rev. 1184, 1187 [1967]) (Footnotes not shown.)

As this appraisal indicates, these educational services are general health and safety measures similar in nature to auxiliary services which we have found to be permissible under Proposal C.

[21] Second, the federal funds do not become "public monies" when they are transmitted from the Office of Education in the Department of Health, Education and Welfare through the State Board of Education to the public school district. Instead the federal funds are impressed with a trust and must be used by state agencies in accordance with federal guidelines and for the purposes for which the funds were granted. Other courts when confronted with the question of the status of federal grants in aid of education to the states have determined that a trust arose with the federal funds serving as the res and the state agency, which administers the program, serving as trustee. Montana State Federation of Labor v. School Dist., 7 F.Supp. 82 (D.Mont.1934), Ross v. Trus-

6. Elementary & Secondary Education Act, Title I, 79 Stat. 27 (1965), as amended, 20 U.S.C. 241a-244.

tees of Univ. of Wyoming, 31 Wyo. 464, 228 P. 642 (1924).

The "public monies" phrase of Proposal C, used in the five prohibitions of the proposal, has reference only to state resources and does not include federal funds. Since the federal grants under Title I do not become public monies of the state when they come under the administrative control of public school boards, Proposal C has no effect on them.

VI.

PRIVATE FOSTERHOMES

The fourth certified question asks:

Does Proposal C preclude direct or indirect assistance to private institutions providing educational services to children who are placed there pursuant to court order?

Answer: No.

[22] Under the probate code a probate judge is clothed with the authority to place a minor, that is any child who has not attained his seventeenth birthday, in a private fosterhome. The relevant statutory authority states:

"(The probate court) may enter an order of disposition which shall be appropriate for the welfare of said child and society * * * as follows:

(d) Place the child in or commit the child to a private institution or agency incorporated under the laws of this state and approved or licensed by the state department of social welfare for the care of children of similar age, sex and characteristics;" (M.C.L.A. 712A.18 [d]; M.S.A. 27.3178 [598.18].)

The private fosterhome receives county funds to pay all expenses incurred in caring for a minor placed in the home by court order.[7] Some private fosterhomes provide educational facilities and instruction for the minors who reside in the home. Payments may be made from two funds, either out of the county's general fund or out of the county's child care fund established under the social services act. These arrangements raise the question whether public funds are paid to "aid or maintain" a private school in violation of Proposal C's first prohibition.

The key language of Proposal C is "any private, denominational or other nonpublic pre-elementary, elementary or secondary school." Is a private fosterhome which serves primarily as a home but also as a school for court appointed juveniles a "nonpublic school" for purposes of the amendment?

Both in function and operation, a private fosterhome which, in addition to providing food, shelter and personal care to its residents offers incidental educational services is a special kind of private institution. The minors placed in its care are committed to the fosterhome by order of the Probate Court.[8]

The minors who are committed are lawbreakers, victims of intemperate habits or products of an unsuitable home environment.[9] At the time of their commitment to a private fosterhome, they are either in the custody of the Probate Court or the Department of Social Welfare.[10] The fosterhome must file semi-annual progress reports to the Probate Court.[11] The Department of Social Welfare is responsible

7. M.C.L.A. 712A.25; M.S.A. 27.3178 (598.25).

8. M.C.L.A. Sec. 712A.18; M.S.A. 27.3178 (598.18).

9. M.C.L.A. Sec. 712A.2; M.S.A. 27.3178 (598.2).

10. M.C.L.A. Sec. 712A.20; M.S.A. 27.3178 (598.20).

11. M.C.L.A. Sec. 712A.24; M.S.A. 27.3178 (598.24).

vices in the nonpublic school where the hiring and control is in the hands of the nonpublic school, otherwise known as "parochiaid." (Part II)

2. Proposal C has no prohibitory impact upon shared time instruction wherever offered provided that the ultimate and immediate control of the subject matter, the personnel and the premises are under the public school system authorities and the courses are open to all eligible to attend the public school, or absent such public school standards, when the shared time instruction is merely "incidental" or "casual" or noninstructional in character, subject, of course, to the issue of religious entanglement. (Question 1; Part III)

3. Proposal C does not prohibit auxiliary services and drivers training, which are general health and safety services, wherever these services are offered except in those unlikely circumstances of religious entanglement. (Question 2; Part IV)

4. Proposal C does not attempt to interfere with the distribution of federal funds. (ESEA) (Question 3; Part V)

5. Proposal C does not, in an educational proposal, intervene to prohibit the operation of a social welfare institution such as a fosterhome. (Question 4; Part VI)

6. Proposal C does not change Michigan's long-standing policy of tax exemption for religious, charitable, and educational institutions. (Question 5; Part VII)

7. Regarding the constitutionality of Proposal C (Questions 6 and 7; Part VIII):

   a. The language "or at any location or institution where instruction is offered in whole or in part to such nonpublic school students" at the end of the second sentence in Proposal C is unconstitutional, void and unenforceable and is severable and capable of being removed from Article 8 Sec. 2 without altering the purpose and effect of the balance of the sentence and section. (Part III, Sec. 1)

   b. The remainder of Proposal C's language by this Court's construction of Proposal C raises no questions of unconstitutionality under the Michigan or the United States Constitutions.

   c. An interpretation of Proposal C that nonpublic school children are barred from shared time in the public schools and from auxiliary services and drivers training at public and nonpublic schools is unconstitutional under the United States Constitution.

The foregoing answers to certified questions one through seven will be certified to the 13th Circuit for disposition of the cause in accord with this opinion. No costs.

BLACK, SWAINSON, BRENNAN and T. G. KAVANAGH, JJ., concurred with WILLIAMS, J.

T. M. KAVANAGH, Chief Justice.

For the reasons stated in my separate opinion in Carman v. Secretary of State (1971), Mich., 185 N.W.2d 1, we believe this case should be dismissed with prejudice. However, the majority opinion in *Carman, supra,* is for the present at least, the law in Michigan.

We agree that if Proposal C was properly submitted to the People and properly adopted, the opinion of Justice Williams correctly interprets our Constitution as amended and correctly applies the due process and equal protection clauses of the Federal Constitution.

T. G. KAVANAGH, J., concurs.

ADAMS, Justice.

In Carman v. Hare (1971), Mich., 18 N.W.2d 1, this Court decided that t

Legal Forum

By Allen B. Dyal,
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Court Allows Use Of Public Funds In Private Schools For Title I Services

The debate over public funds being used in religious K-12 schools has persisted for many years. However, in most instances, the establishment clause of the First Amendment to the Constitution has been interpreted to prohibit financial support for religious schools.

In 1965, the U.S. Congress passed legislation intended to provide full educational opportunities to economically-disadvantaged children. Title I of the Elementary and Secondary Education Act of 1965 provided funds to local schools for the specific purpose of providing remedial education, guidance services and job counseling.

The city of New York, as well as many other cities, developed programs that not only met the needs of public school students, but also provided services to students enrolled in private schools. In 1971, the court developed a three-pronged test to evaluate whether practices of schools and individual laws violated the First Amendment. The standard requires that the law has a secular purpose, neither promotes nor inhibits religion and avoids excessive governmental entanglement. I have often looked at this standard in previous Legal Forum articles.

Title I programs provided by many urban school systems to children in parochial schools were finally challenged in Aguilar v. Felton. The question the court considered was whether it was permissible for a school system, in this case the city of New York, to place public school teachers in private parochial schools to provide Title I remedial services to students. The Supreme Court found the program created an excessive entanglement of church and state. The court indicated that remedial services could be provided to a religious school, but the services must be provided at a neutral site. Strict guidelines have since been created which relate to these programs.

Allen B. Dyal

Many school systems provided mobile classrooms off campus to satisfy the ruling. You may ask, "Why would a public school system want to provide such services to religious schools?" Clearly, the programs helped economically-disadvantaged children. For large urban districts, the program provided a significant amount of funding to the district.

Since 1985, school systems have carefully provided appropriate remedial services at neutral sites. The common sense question that has surfaced in the educational community concerns how a neutral site could really make a difference. The petitioners in Agostini v. Felton sought relief from the courts earlier decision based on the excessive cost of complying with the neutral site provision of the Aguilar decision.

Can the Supreme Court change its mind? Yes, and it did just that in Agostini v. Felton. This past June, the court asserted that with appropriate safeguards, providing Title I programs on parochial school grounds was not a violation of the establishment clause. There was no evidence that public school teachers attempted to religiously indoctrinate students or that the programs promoted or enhanced religion. The court also determined the program did not excessively entangle government, or that public funds for religious schools were not automatically inappropriate or invalid.

This case is significant to educational leaders for several reasons. It shows how important it is to stay up-to-date on legal matters that are dynamic and ever changing. It also shows us that the Supreme Court can change its mind. On the broader question of the separation of church and state, it would seem that the pendulum, constantly moving on such matters, is swinging toward a more flexible view concerning public funds being spent in parochial schools.

I spoke with Barry Blackwell, federal programs coordinator for the State Department of Education, concerning this case. It is Blackwell's opinion that, "The Agostini case will have a major impact on students in Alabama's private schools. In the past, a number of school systems provided services to private school students using mobile units. This finding will allow school systems to provide better and more Title I services at a lower cost. School systems as diverse as Mobile and Wilcox Counties are likely to take advantage of this decision."

It is my view that while Alabama has yet to take advantage of Title I funds for students in religious schools, we are likely to see a move in that direction. The Supreme Court, in this case, affirmed its trend of moving toward greater acceptance of allowing the use of public funds for students in private schools. ■

References

Aguilar v. Felton, 473 U.S. 402 (1985).

Agostini v. Felton (In Press) (1997).

Lemon v. Kurtzman, 403 U.S. 602 (1971).

Barry Blackwell, telephone interview, Oct. 31, 1997.

Additional Information

much effect as these more mundane predictors of school success.

The picture of Vietnamese "boat people" struggling to give their children an education and of the children scoring high on tests as a consequence is one that has been painted often in articles critical of native-born American students. Overall, though, those who have immigrated from Southeast Asia don't reach the national average on standardized tests. In fact, says Kim, "the high school dropout rates for schools with high concentrations of Southeast Asians hover around 50%." Southeast Asians also have lower expectations of what their own educational attainments will be. Some 65% of them think they'll earn at least a bachelor's degree, while for the other Asian groups the figures are in the range of 80%-95%. Fully 75% of the South Asian seniors expect to wind up with an advanced degree, 39% saying they'll get a master's degree and 37% anticipating a Ph.D. or its equivalent.

Kim observes that "the stereotype of Asian Americans is that of a highly successful minority who have made it in American society. Asian American students are portrayed as 'whiz kids,' the 'best and the brightest,' math and science majors, students who pass through our toughest universities with ease. . . . Contrary to the stereotype, there are significant differences among Asian American seniors in terms of socioeconomic characteristics, parental expectations and involvement, educational values, academic achievement, and college aspirations." (Another stereotype that Kim doesn't discuss envisions Asians living in various urban "Chinatowns" when, in fact, a majority live in the suburbs.)

If we put all of the Asian kids into one school district, we would characterize it as an affluent (median income of $41,251 in 1990, compared to $32,142 overall), highly educated, suburban system. No wonder they score well on tests.

Kim goes on to make a different point. Although the stereotype of Asian students is a "good" stereotype, it is still a stereotype and so prevents us from seeing the reality. Recall that Denis Doyle earned his Rotten Apple Award in the Seventh Bracey Report for claiming that it was "Asian" kids who were pushing the SAT math scores up. (Kim's report can be obtained for $9.50, prepaid, from the Policy Information Center, Mail Stop 04-R, Educational Testing Service, Rosedale Rd., Princeton, NJ 08541-0001. ☒

COURTSIDE

A Rare Religious Reversal

BY PERRY A. ZIRKEL

CONGRESS enacted Title I of the Elementary and Secondary Education Act of 1965 "to provide full educational opportunity to every child regardless of economic background." Under Title I school districts receive and spend federal funds for remedial education, guidance, and job counseling for eligible students. Eligibility is based on residence in low-income areas and failing — or being at risk of failing — the state's student performance standards.

Title I funds are not limited to eligible children in public schools; services to eligible students in private schools must be "equitable in comparison to services and other benefits for public school children." However, special restrictions do apply, such as 1) the school district must retain complete control over the funds, 2) the district must provide the services through public employees or other persons independent of the private school and any religious institution, and 3) the services must supplement, not supplant, the level of services provided by the private school and must be "secular, neutral, and nonideological."

The New York City Board of Education first applied for Title I funds in 1966 and has grappled ever since with how to provide Title I services to the private school students, especially those in parochial schools, within its jurisdiction. Its initial arrangement, which was to transport the children to public schools for after-school Title I instruction, was largely unsuccessful; attendance was poor, teachers and children were tired, and parents were concerned with safety. The board next tried after-school instruction on the private school campuses, which also yielded mixed results. Then the board offered Title I services on private school premises during school hours. Under this arrangement, the Title I teachers, who were district employees, received a detailed set of rules spelling out the secular purpose of the program, and a board field supervisor made unannounced monthly visits to monitor compliance.

In 1978, six taxpayers from New York City filed suit in federal court, claiming that the board's third arrangement violated the establishment clause of the First Amendment. In 1985, after appeals to and beyond the Second Circuit, the Supreme Court issued a 5-4 decision in *Aguilar* v. *Felton* finding the board's program to be unconstitutional because of an "excessive entanglement of church and state in the administration of [Title I] benefits."[1] On remand, the federal district court permanently enjoined the board from offering Title I instruction and counseling services provided by public school personnel "on the premises of sectarian schools."

The board then arranged for Title I services to be offered at public school sites, at leased neutral sites, in mobile units parked near sectarian schools, or by means of computer-assisted instruction (CAI) on the premises of sectarian schools. The costs of compliance were significant. Since the 1986-87 school year, the board has spent over $100 million providing CAI, leasing sites and mobile units, and transporting students.

In October and December 1995, the board and a group of parents of eligible parochial school students filed motions in the district court seeking relief from the

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permanent injunction under *Aguilar*. The district court recognized that the plaintiffs were seeking a procedurally sound vehicle to get the issue back before the Supreme Court, and it denied the motions. On appeal, the Second Circuit affirmed.

On 23 June 1997, the Supreme Court voted 5-4 in *Agostini* v. *Felton* to reverse *Aguilar*.[2] While rejecting two of the three grounds argued by the plaintiffs — the costs of compliance and the dicta of five of the justices in favor of reconsidering or overruling *Aguilar*[3] — the majority decision relied on the significant change in the legal landscape represented by the Court's establishment clause decisions since *Aguilar*. More specifically, the majority concluded that more recent rulings have so undermined *Aguilar* and its companion case, *School District of Grand Rapids* v. *Ball*,[4] that they are no longer good law.

First, in *Zobrest* v. *Catalina Foothills School District*,[5] in which the Court held that providing an interpreter for a deaf student on the premises of a sectarian school did not violate the establishment clause, the Court refused to accept the assumption that the placement of public employees on parochial school grounds inevitably results in state-sponsored religious indoctrination or constitutes a symbolic union between government and religion.

Second, in *Witters* v. *Washington Department of Services for the Blind*,[6] in which the Court held that the establishment clause did not bar a state from issuing a vocational tuition grant to a blind person for religious education, the Court invalidated the assumption that any and all public aid that directly aids the educational function of religious schools impermissibly finances religious indoctrination.

Finally, *Zobrest* also undid the "excessive entanglement" argument, which was an essential assumption underlying the *Aguilar* finding. The Court's logic in *Agostini* was as follows: "Since we have abandoned the assumption that properly instructed public employees will fail to discharge their duties faithfully, we must also discard the assumption that pervasive monitoring of Title I teachers is required."

In thus overruling both *Aguilar* and *Ball* as inconsistent with "our current understanding of the Establishment Clause," the majority of the Court expressly held that "a federally funded program providing supplemental, remedial instruction to disadvantaged children on a neutral basis is not [unconstitutional] . . . when such instruction is given on the premises of sectarian schools by government employees pursuant to a program containing safeguards such as those present here."

The four dissenters took issue on both substantive and procedural grounds. Substantively, they criticized the majority for exaggerating the meaning of *Aguilar* and *Ball* while ignoring the limited scope of *Zobrest* and *Witters*, thus repudiating the long-standing principles against direct and substantial subsidization. Procedurally, they interpreted the applicable federal rules as requiring deferral of reconsidering *Aguilar* until a future case.

THE FINDING in *Agostini* represents one of the Supreme Court's rare reversals.[7] It was all the more unusual because it happened within the confines of the same case. It reveals the importance of the membership of the Court, which reflects the interaction of individual and societal values and which is particularly crucial for church/state issues.[8] As illustrated by the change in votes from 5-4 against to 5-4 for, it was a close call, but the current bent on the Court is toward lowering the metaphorical wall of separation in establishment clause cases. Factual variations can be significant, however. Thus the U.S. Department of Education has already issued guidelines to spread the "safeguards" referenced in *Agostini*.[9] The most proximate legal issue in the schools, which concerns the provision of services to special education students in parochial schools, is now somewhat clearer; *Agostini* seems to suggest that doing so on the premises of parochial schools is constitutionally permissible. But the new amendments to the Individuals with Disabilities Education Act appear to effectively eliminate the individual statutory entitlement.[10]

Moreover, *Agostini* does not necessarily change the legal landscape in states, such as Washington, that have a higher church/state barrier in their state constitutions than that of the First Amendment establishment clause.[11]

In any event, one can safely predict more church/state litigation, with results that defy safe predictions. School officials, without the aid of state-sponsored prayers, can only continue trying to discharge their First Amendment duties "in good faith."

1. *Aguilar* v. *Felton*, 473 U.S. 402, 414 (1985).
2. 117 S. Ct. 1997 (1997).
3. Although their individual expressions were merely dicta in *Board of Education of Kiryas Joel School District* v. *Grumet*, 512 U.S. 687 (1994), because the issue was distinctly different in that case, the same five justices — O'Connor, Kennedy, Rehnquist, Scalia, and Thomas — constituted the majority in *Agostini*.
4. 473 U.S. 373 (1985). The Court's decision in *Ball*, which similarly concerned an on-premises remedial program, rested on the second prong (primary religious effect) of the tripartite test. Both *Aguilar* and *Ball* passed the first prong (secular purpose), while *Aguilar* fell on the third prong (excessive entanglement).
5. 509 U.S. 1 (1993). See, for example, Perry A. Zirkel, "Is the 'Wall of Separation' Like the Walls of Jericho?," *Phi Delta Kappan*, September 1993, pp. 88-90.
6. 474 U.S. 481 (1986).
7. There are only two other examples in the elementary/secondary school context: *West Virginia State Board of Education* v. *Barnette* (1943), which reversed *Minersville School District* v. *Gobitis* (1940); and *Brown* v. *Board of Education*, 373 U.S. 483 (1954), which reversed *Gong Lum* v. *Rice* (1927). For a summary of these decisions, see Perry A. Zirkel, Sharon Nalbone Richardson, and Steven S. Goldberg, *A Digest of Supreme Court Decisions Affecting Education*, 3rd ed. (Bloomington, Ind.: Phi Delta Kappa Educational Foundation, 1995).
8. For analyses of the Supreme Court's establishment clause jurisprudence in terms of the members of the Court, see Julie Underwood and Julie Mead, "Establishment of Religion Analysis," *Journal of Law and Education*, Winter 1996, pp. 55-82; and Perry A. Zirkel and Faith MacMurrie, "A Scalogram Analysis of Supreme Court Establishment Clause Cases in Education," *West's Education Law Reporter*, 16 October 1986, pp. 1-10.
9. Mark Walsh, "ED Gives Advice on Title I Aid to Church Schools," *Education Week*, 6 August 1997, p. 26.
10. See, for example, *Cefalu* v. *East Baton Rouge Sch. Dist.*, 117 F.3d 166 (5th Cir. 1997).
11. See, for example, *Witters* v. *Washington Dep't of Serv. for the Blind*, 771 P.2d 1119, *cert. denied*, 493 U.S. 850 (1989). BK

This case pertains to Chapter 2, The Church-State Distinction.

AGOSTINI v. FELTON
65 U.S.L.W. 3605 (1997).

NATURE OF CASE: Appeal of decision affirming the denial of a motion seeking relief from a permanent injunction (barring a school board from sending public school teachers into parochial schools to provide remedial education to disadvantaged children).

GENERAL RULE OF LAW: Under certain circumstances, public school teachers may provide remedial education to parochial students on parochial school grounds without violating the Establishment Clause of the First Amendment.

PROCEDURE SUMMARY:
Plaintiffs: The New York City Board of Education (headed by its Chancellor, Betty-Louise Felton), and parents (P) of disadvantaged parochial school students.
Defendants: Rachel Agostini (D) and five other federal taxpayers.
U.S. District Court Decision: Denied plaintiffs' request for relief from injunction issued in *Aguilar v. Felton*.
Second Circuit Court of Appeals Decision: Affirmed denial of relief.

FACTS: The Board of Education of the City of New York (P), a local educational agency (LEA) under Title I of the federal Elementary and Secondary Education Act of 1965 (the Act), 20 U.S.C., §§ 6301 et seq., has been required to provide "full educational opportunity" to every school-age child, regardless of his or her economic background, under the terms of the Act. Title I channeled federal funds, through the states, to LEAs, which in turn used the funds to provide remedial education, guidance, and job counseling to eligible children. The intended goal was that of assisting these children in meeting state student performance standards.

LEAs were not prohibited from providing services to children enrolled in private schools within its jurisdiction; however, the provision of services under such circumstances was subject to several restrictions. Services were required to be provided on a per-pupil, rather than schoolwide, basis. Additionally, the services were required to be "secular, neutral and nonideological in nature," and to be provided through public employees or others who were independent of private schools/religious institutions. Finally, each LEA was required to retain complete control over funds as well as title to all educational materials.

Within the jurisdiction of the NYC Board of Education (the Board), 10% of the total number of students eligible for services under the Act went to private schools; 90% of those private schools were secular in nature. Originally, the Board arranged to bus Title I-eligible students to public schools for after-school remedial education. When that program failed for logistical reasons, the Board then moved the after-school instruction directly onto private school campuses. The remedial instructors were all public employees, as contemplated by the Act, and were specifically admonished not to introduce any religious matter into their teaching or become involved in any way with the religious activities of the private schools.

In 1978, six federal taxpayers (P) sued the Board in federal district court, asserting that the Board's Title I program violated the Establishment Clause of the First Amendment to the U.S. Constitution. They sought an injunction prohibiting the Board from pursuing its remedial education plan (placing public employees in private religious schools).

The district court permitted the parents of several Title I–eligible parochial students to join the Board as defendants in the lawsuit and thereafter denied the plaintiffs' request for an injunction. The federal Second Circuit Court of Appeals overturned the district court's decision.

The U.S. Supreme Court, in *Aguilar v. Felton*, 473 U.S. 402, 413, affirmed the federal appellate (circuit) court, holding that the Board's Title I program necessitated an "excessive entanglement of church and state in the administration of [Title I] benefits." 473 U.S., at 414. The Court then remanded the case to the district court, which promptly enjoined the Board from using public funds for any program that authorized public

school teachers and counselors to provide services on the premises of sectarian schools.

In response to the injunction, the Board modified its program so that it could continue to serve Title I–eligible private school students. It once again provided instruction at public schools (as it had originally but unsuccessfully) as well as at leased sites and in vans it converted into classrooms in the vicinity of the sectarian schools. Computer-aided instruction was offered on private school premises since this program did not require public employees to be physically present at the sites.

Between the 1986-87 and 1993-94 school years, the Board spent approximately $93 million complying with the Act, as modified under the injunction issued in *Aguilar v. Felton.* These funds were deducted from the entire grant of money available under Title I of the Act, before any of it was passed on to Title I–eligible students throughout the United States. The *Aguilar* costs thus reduced the amount of funds provided to all LEAs for remedial education. In plain terms, 20,000 disadvantaged children from New York City, and 183,000 such children nationwide, experienced a decline in Title I services.

In late 1995, the Board and a new group of parents of disadvantaged parochial school students (P) filed a motion in federal district court seeking relief from the Supreme Court's *Aguilar* decision, claiming that the Court's decisional law had changed to the point that what once had been determined to be illegal was now legal. Both the district court and the Second Circuit Court of Appeals, while recognizing that Establishment Clause decisional law had indeed changed over the years, nevertheless upheld the denial of the motion for relief.

ISSUE: Is the *Aguilar* decision, which held that permitting public school teachers to provide remedial education to disadvantaged parochial school children on the grounds of their private schools has the improper effect of advancing a religion with public funds, still valid law?

HOLDING AND DECISION: No. The *Aguilar* decision in no longer valid law. Permitting public school teachers to provide remedial education to disadvantaged parochial school children in the case's context is no longer seen to have the improper effect of advancing a religion.

Implicit in the decision to overturn *Aguilar* are the following points:

1. The general principles used to evaluate whether government aid violates the Establishment Clause have *not* changed since *Aguilar* was decided. The Court continues to ask whether the government acted with the purpose of advancing or inhibiting religion, just as it continues to explore whether government aid has the "effect" of advancing or inhibiting religion.

2. However, what *has* changed is the Court's understanding of the criteria used in assessing whether government aid to religion has an impermissible effect of advancing religion. Cases decided by the Court after *Aguilar* have modified its approach to assessing establishment cases in two significant respects:

a. First, the presumption (developed in *Ball* and *Meek*) that placement of public employees on parochial school grounds "inevitably results in the impermissible effect of state-sponsored indoctrination [of a religion]" is abandoned. Put another way, no longer will it be presumed that any public employee who works on the premises of a religious school inculcates religion in his or her work. Here, the Court cites the *Zobrest v. Catalina Foothills School District* case for its holding "expressly disavowing the notion that 'the Establishment Clause [laid] down [an] absolute bar to the placing of a public employee in a sectarian school.' " *Agostini*, 1997 ___ U.S. ___, 117 S.Ct. 1997, 2010 (1997), citing *Zobrest*, 509 U.S. 1, 13. In *Zobrest*, the Court refused to presume that a publicly employed interpreter for the deaf would be pressured by pervasively parochial surroundings to inculcate religion by adding to or subtracting from the lectures being translated. Instead, it decided that in the absence of evidence to the contrary, the interpreter would dutifully discharge his or her duties as a full-time public employee by accurately translating what was said.

b. Second, no longer will it be presumed (as it was in *Ball*) that all government aid that directly aids the educational function of religious schools is invalid. Specifically relying on its 1986 holding in *Witters v. Washington Dept. of Servs. for Blind*, 474 U.S. 481, in which the Establishment Clause was found not to bar a state from is-

suing a vocational tuition grant to a blind person who wished to use her grant to attend a Christian college, where the tuition grants in question were "made available generally without regard to the sectarian-nonsectarian or public-nonpublic nature of the institution benefited" (*Witters*, 474 U.S. 481, 487 (1986)), the Supreme Court reasoned that the Title I funding that "benefited" the parochial schools in *Agostini* must be viewed in the same light — i.e., that the funding was an incidental benefit to parochial schools that came about only because disadvantaged students happened to attend parochial schools within the Board's jurisdiction, just as funding indirectly benefiting the Christian college at issue in *Witters* came about merely because a recipient of the funding wished to attend that particular college. In each case, the indirect funding benefit to parochial institutions came about through the "genuinely independent" and private choices of individuals. (Remember, none of the Title I funds at issue in *Agostini* were disbursed directly to parochial schools.)

c. Aside from looking at the criteria by which an aid program identifies its beneficiaries for purposes of determining whether the state is responsible for subsidizing religion, it is also necessary to look at whether the criteria by which a program identifies its beneficiaries creates a financial incentive to undertake religious indoctrination. ___ U.S. ___, 117 S.Ct. 1997, 2014 (1997). Such an incentive cannot be present if aid is allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and is made available to religious and secular beneficiaries on a nondiscriminatory basis. *Id.* Applying such reasoning to the NYC Board's Title I program, it is apparent that remedial services to disadvantaged students are allocated on the basis of criteria that neither favor nor disfavor religion. All children who meet the program's eligibility requirements may avail themselves of services, no matter where they go to school or what their religious beliefs may be.

3. Finally, *Aguilar*'s conclusion that the NYC Title I program resulted in an excessive entanglement between church and state is no longer valid law. The *Aguilar* court had specifically noted that the NYC program (1) required pervasive monitoring by public employees to insure no governmental inculcation of religion, (2) required administrative cooperation between the Board and parochial schools, and (3) potentially increased the risk of political divisiveness. Under the current understanding of the Establishment Clause, the last two considerations do not, by themselves, create an "excessive" entanglement anymore, given that they are present wherever Title I services may be offered, in both parochial and non-parochial school settings. The assumption underlying the first consideration has been undermined; after *Zobrest*, the Court will no longer presume that public employees will inculcate religion simply because they happen to be in a sectarian environment.

COMMENT: The Court summarized its majority decision with the following: "We therefore hold that a federally funded program providing supplemental, remedial instruction to disadvantaged children on a neutral basis is not invalid under the Establishment Clause when such instruction is given on the premises of sectarian schools by government employees pursuant to a program containing safeguards such as those present here." ___ U.S.___, 117 S.Ct. 1997, 2016 (1997). This decision has already been applauded by those commentators who decried the fact that the *Aguilar* injunction had essentially forced the Board to spend upwards of $100 million to rent vans for use as classrooms — merely to avoid the appearance of public teachers setting foot in religious schools. Others who believe in the strict separation of church and state have yet to weigh in, but it is likely that a few, at least, will see this decision as eroding the principle underlying the Establishment Clause (prohibiting the government from establishing a religion) while giving only a minor nod to those favoring the Free Exercise Clause (guaranteeing the free exercise of religion to all). Query whether the two clauses are necessarily at odds with one another.

School administrators will see the decision as beneficial, but it remains to be seen -- and given the somewhat confusing nature of this opinion, certainly cannot be predicted — whether this decision signals a continuing relaxation of strict Establishment Clause criteria.

1.25 million children apply for alternative education scholarships

In the largest private scholarship program ever, the Children's Scholarship Fund (CFS) awarded 40,000 four-year, partial scholarships to help low-income children in grades K-8. There were in total: 1.25 million applicants, 30 for every one scholarship awarded. Families had to be low-income to apply (average income was less than $22,000). Applications were received form all fifty states and over 22,000 communities reflecting 90% of all counties nationwide.

"The old debate is over," Said Forstmann. " These families have ended it. In anybody's book this is a thunderous demonstration of dissatisfaction with the present system and of the demand for alternatives."

Forstmann further appealed to "the moral middle of America," asking "all those of open minds to see through the eyes of our applicants. Once you do, you will clearly see that the distinction that really matters to them is between a good education and a bad education. It's time to help parents seek a good education wherever it can be found."

"More options for parents will mean more competition in education. Competition will be good for parents, for teachers, and for any school that can deliver quality," Said Frostmann, further stressing the CSF favors competition.

Andrew Young who is a member of the National Board of Advisors and helped host the event added, "Every movement I've been a part of has started out as controversial and unpopular and this will be no exception. But the parents of 1.25 million children have taken their stand, and I take mine with them. It's time to give low-income families to freedom to try things that are different," he said.

The framers of Alaska's constitution provided the vehicle to develop alternative programs to educate Alaska's youth. In 1979, the Alaska Supreme Court perverted the intent of the framing fathers. I can help but remember John Cyr's, NEA president, comment when testifying against HJR-6 "It's just bad policy," to afford parents the ability to get the best education possible for their children.

The quotes by Forstmann and Young were provided by Joe Mctighe, Executive Director, Council for American Private Education (CAPE).

Randall C. Lorenz

HJR

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LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

(907) 465-3867 or 465-2450
FAX (907) 465-2029
Mail Stop 3101

130 Seward Street, Suite 409
Juneau, Alaska 99801-2105

MEMORANDUM March 19, 1999

SUBJECT: Amendment of the power of initiative in regard to fish and game (Work Order No. 21-LS0717)

TO: Representative Pete Kott
Attn: Cory Winchell

FROM: George Utermohle
Legislative Counsel

This memorandum is in response to your query regarding whether the legislature may propose an amendment to the Alaska Constitution that reduces the power of the people to enact laws relating to fish and game by initiative.

The power of initiative is conferred on the people by art. XI, sec. 1 of the Alaska Constitution.

> The people may propose and enact laws by the initiative, and approve or reject acts of the legislature by the referendum.

Article XI, secs. 2 - 4 and 6 control how the right of initiative is exercised. Article XI, sec. 7 sets out those subject areas that cannot be addressed by initiative: "[t]he initiative shall not be used to dedicate revenues, make or repeal appropriations, create courts, define the jurisdiction of courts or prescribe their rules, or enact local or special legislation."

The power to propose an amendment to the Alaska Constitution lies with the Alaska Legislature under art. XIII, sec. 1[1/] and with a constitutional convention under art. XIII, sec. 4[2/]. The Alaska Constitution does not place a subject matter restriction on the matter that the legislature may consider in a proposed constitutional amendment. There is no constitutional restriction on the ability of the Alaska Legislature to propose an amendment to the Alaska

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[1/] Article XIII, sec. 1, Constitution of the State of Alaska states, in relevant part: "Amendments to this constitution may be proposed by a two-thirds vote of each house of the legislature."

[2/] Article XIII, sec. 4, Constitution of the State of Alaska states, in relevant part: "Constitutional conventions shall have plenary power to amend or revise the constitution, subject only to ratification by the people."

Constitution that would alter, restrict, or even prohibit the use of the initiative by the people to enact laws relating to fish and game.

However, the Alaska Constitution does place a restriction on the scope of a constitutional amendment that may be proposed by the legislature. The legislature's power to propose amendments is not as broad as that of a constitutional convention. A constitutional convention may not only propose amendments to the Alaska Constitution but may also propose revisions to the Alaska Constitution. The recent Bess v. Ulmer case (Preliminary Opinion and Order, Alaska Supreme Court No. S-08811, S-08812, S-08821, dated September 22, 1998) addressed the distinction between an amendment and a revision. In the view of the court, "changes that are 'few and simple and independent' can be considered amendments, whereas 'sweeping change' requires the revision process." Id. at 2 (citations omitted).

In considering whether the proposed constitutional amendment relating to prisoners' rights[3/] was an amendment or a revision, the court took note of the fact that the proposed amendment "actually or potentially affected" numerous provisions of the Alaska Constitution. Id. at 4. In the court's view, the proposed amendment affected 12 sections within article I of the Alaska Constitution. However, the mere number of sections affected was not wholly determinative of whether the proposed constitutional change constituted a revision. Instead, the court looked not only at the number of sections affected but also the scope of the changes. The court concluded that the proposed change was actually a revision because the proposed change "would eliminate the independent force and effect of so many provisions of the Alaska Constitution with respect to the rights of prisoners that it is beyond the limits of the amendatory process of article XIII, section 1 [of the Alaska Constitution]." Id. at 5.

In reviewing the proposed constitutional amendment relating to marriage, the Supreme Court found that the first sentence of the proposed change constituted an amendment that was validly within the amendatory power of the legislature.[4/] The change was not so expansive as to exceed the permissible scope of an amendment. Id. at 6. Also, the proposed change was "simple to express and understand," related "to only one subject," and did not

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[3/] Legislative Resolve 59, Twentieth Alaska State Legislature, proposed to amend Article I of the Alaska Constitution by adding a new section to read:

Section 25. Rights of Prisoners. Notwithstanding any other provision of this constitution, the rights and protections, and the extent of those rights and protections, afforded by this constitution to prisoners convicted of crimes shall be limited to those rights and protections, and the extent of those rights and protections, afforded under the Constitution of the United States to prisoners convicted of crimes.

[4/] Legislative Resolve 71, Twentieth Alaska State Legislature, proposed an amendment to article I of the Alaska Constitution by adding a new section to read:

Section 25. Marriage. To be valid or recognized in this State, a marriage may exist only between one man and one woman. No provision of this constitution may be interpreted to require the State to recognize or permit marriage between individuals of the same sex.

"substantially affect numerous other sections of the constitution." Id. The Supreme Court struck the second sentence of the marriage amendment on grounds that the sentence was surplusage. Id. at 6-7. It is not clear from the court's opinion whether the second sentence was deleted for any reason related to the issue of amendments and revisions.

The Supreme Court also reviewed a proposed constitutional amendment that changed the procedure for redistricting of the Alaska Legislature. Even though the proposed amendment expressly made substantive changes to nine sections of article VI, the court found that the proposal was indeed an amendment for purposes of the Alaska Constitution and thus was within the amendatory power of the legislature. Though the change proposed by the amendment "is an important one, it is simple to express and understand. It is complete within itself, relates to only one subject, and does not substantially affect numerous other sections of the constitution." Id. at 7.

Based on the Preliminary Opinion and Order issued by the Supreme Court in the Bess case, there is no substantial basis to believe that a proposed amendment that alters the power of the people to enact a law relating to fish or game by initiative exceeds the scope of an amendment that can be proposed by the legislature.

In conclusion, based on the legal precedent available in this state, the legislature does have the power to propose a constitutional amendment that would, if approved by the people, reduce the power of the people to enact laws relating to fish and game by initiative.

If I may be of further assistance, please advise.

GU:lmb
99-048.lmb

INITIATIVES APPEARING ON THE BALLOT IN ALASKA

		FOR	AGAINST
August 9, 1960	Relocate the State Capital	18, 865	23, 972
November 6, 1962	Relocate the State Capital	26, 542	32, 325
August 27, 1974	Relocate and Construct Capital	46, 659	35, 683
August 27, 1974	Conflicts of Interest	57,094	23,151
November 2, 1976	Repeal of Limited entry	44,304	75,125
November 7, 1978	Full Bondable Costs of Relocating the Capital	69, 414	55,253
November 7, 1978	Disposal of State Lands	70,409	55,511
November 7, 1978	Refundable Deposits on Certain Beverage Containers	49,882	75,397
November 4, 1980	Establish Alaska General Stock Ownership Corporation	72,072	78,404
November 2, 1982	Claiming State Ownership of Federal Land	136, 633	50,791
November 2, 1982	Limiting State Funding of Abortions	77, 829	113,005
November 2, 1982	Personal Consumption of Fish and Game	76,679	111,770
November 6, 1984	Reducing Government Regulation of Transportation	116,891	78,663
August 26, 1986	Nuclear Weapons Freeze	80,326	57,125
November 8, 1988	Civil Liability	138,511	54,206
November 8, 1988	A State Community College Separate from University of Alaska	83,472	104,719
August 28, 1990	Amendments to the Alaska Railroad	31,612	107,269

Initiatives Appearing on the Ballot in Alaska

		FOR	AGAINST
August 28, 1990	Relating to the Regulation of Gambling and Establishing an Alaska Gambling Board	50,446	90,827
November 6, 1994	Relating to the Recriminalization of Marijuana	105,263	88,644
November 8, 1994	Relating to Changing the Capital to Wasilla	96,398	116, 277
November 8, 1994	Relating to Banning Ballot Listing Certain Congressional Candidates	126,960	74,658
November 8, 1994	Relating to Voters Right to Know the Cost of Moving the Capital	119,089	66,157
November 5, 1996	Relating to Same Day Airborne Hunting of Certain Animals (95Hunt)	137,635	97,690
November 5, 1996	Relating to Ballot Information and Term Limits (95BITL) (overturned by court)	123,167	102,533
November 3, 1998	Relating to Prohibiting Billboards (97BILL)	160,922	61,401
November 3, 1998	Relating to Requiring Government to Use English (97ENGL)	153,107	70,085
November 3, 1998	Relating to Requiring a Term Limits Pledge for Candidates (97TERM)	109, 613	108,731
November 3, 1998	Relating to Allowing Medical Use of Marijuana (97PSDM)	131,586	92,701
November 3, 1998	Relating to Trapping Wolves With Snares (97TRAP)	83,224	140,049

= 29

The Initiative and Referendum States

Updated January 20, 1999

	Statutes			Constitution	
State	Initiative	Citizen Petition Referendum	Legislative Referendum	Initiative	Legislative Referendum
Alaska	I*	Yes	No	None	Yes
Arizona	D	Yes	Yes	D	Yes
Arkansas	D	Yes	Yes	D	Yes
California	D	Yes	Yes	D	Yes
Colorado	D	No	No	D	Yes
Florida	None	No	No	D	Yes
Idaho	D	Yes	Yes	None	Yes
Illinois	None	No	Yes	D	Yes
Kentucky	None	Yes	Yes	None	Yes
Maine	I	Yes	Yes	None	Yes
Maryland	None	Yes	Yes	None	Yes
Massachusetts	I	Yes	Yes	I	Yes
Michigan	I	Yes	Yes	D	Yes
Mississippi	None	No	No	I	Yes
Missouri	D	Yes	Yes	D	Yes
Montana	D	Yes	Yes	D	Yes
Nebraska	D	Yes	Yes	D	Yes
Nevada	D & I	Yes	Yes	D	Yes
New Mexico	None	Yes	Yes	None	Yes
North Dakota	D	Yes	Yes	D	Yes

Ohio	I	Yes	Yes	D	Yes
Oklahoma	D	Yes	Yes	D	Yes
Oregon	D	Yes	Yes	D	Yes
South Dakota	D	Yes	Yes	D	Yes
Utah	D & I	Yes	Yes	None	Yes
Washington	D & I	Yes	Yes	None	Yes
Wyoming	I*	Yes	No	None	Yes
US Virgin Is.	I	Yes	Yes	I	Yes

Initiative – a law and/or constitutional amendment introduced by the citizens either to the legislature or directly to the voters.

D – Direct Initiative: proposals that qualify go directly on the ballot

I – Indirect Initiative; proposals are submitted to the legislature, which has an opportunity to act on the proposed legislation. Depending on the state, the initiative question may go on the ballot if the legislature rejects it, submits a different proposal or takes no action.

I -- Alaska and Wyoming's initiative processes are usually considered indirect. However, instead of requiring that an initiative be submitted to the legislature for action, they only require that an initiative cannot be placed on the ballot until after a legislative session has convened and adjourned.*

Referendum – a process by which voters may express their judgment on statutes and/or constitutional amendments enacted by the legislature.

Restrictions on the Use of the Initiative

Alaska: No revenue measures, no appropriations, no acts affecting the judiciary, no local or special legislation. Limited to one subject.

California: Limited to one subject.

Colorado: Limited to one subject.

Florida: Limited to one subject.

Illinois: Allowed only for amendment of constitutional Article IV, relating to structural and procedural subjects concerning the legislative branch.

Maine: Any measure providing for an expenditure of funds in excess of those appropriated becomes inoperative 45 days after the legislature convenes.

Massachusetts: No measures relating to religion, the judiciary, specific appropriations and local or special legislation.

Michigan: The initiative power extends only to laws which the legislature may enact.

Mississippi: The initiative cannot be used to repeal or modify the state's Bill of Rights; to amend or repeal provisions relating to the state's public employees' retirement system; to amend or repeal Mississippi's constitutional right-to-work provision, or to modify the initiative process.

Missouri: Limited to one subject. Not used for appropriations of money other than new revenues created and provided for by the initiative. Cannot be used for any purpose prohibited by the state's constitution.

Montana: Cannot be used for appropriations or for local and special laws.

Nebraska: Limited to matters which can be enacted by legislation. The same measure cannot be initiated more often than once in three years.

Nevada: Initiative measures may not make an appropriation or require an expenditure of money unless a sufficient tax is provided as part of the initiative proposal.

North Dakota: Not for emergency measures. Not for appropriation measures for the support and maintenance of state departments and institutions.

Oklahoma: Initiatives rejected by the voters cannot be proposed again for three years by less than 25 percent of the state's legal voters.

Wyoming: Cannot be used to dedicate revenues; to make or repeal appropriations; to create courts; to define the jurisdiction of courts; to prescribe court rules; to enact local or special legislation or to enact legislation prohibited by the Wyoming constitution. The

same measure cannot be initiated more often than once in five years.

HJR

9

HOUSE JOINT RESOLUTION NO. 9

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-FIRST LEGISLATURE - FIRST SESSION

BY REPRESENTATIVES CROFT, James, Dyson, Green, Brice, Therriault, Berkowitz, Foster, Harris, Coghill, Hudson, Morgan, Halcro, Austerman, Ogan, Kott, Cowdery, Phillips, Smalley

Introduced: 1/27/99
Referred: State Affairs, Judiciary

A RESOLUTION

Urging the President of the United States and the Congress to act to ensure that federal agencies do not retain records relating to lawful purchase or ownership of firearms gathered through the Brady Handgun Bill instant check system.

BE IT RESOLVED BY THE LEGISLATURE OF THE STATE OF ALASKA:

WHEREAS the Second Amendment to the Constitution of the United States protects the right of all citizens to keep and bear arms; and

WHEREAS Art I, sec. 19, Constitution of the State of Alaska, clarifies that the right to keep and bear arms is an individual right in Alaska; and

WHEREAS the intent of H.R. 1025, known as the Brady Handgun Bill, when passed by the Congress was to create an instant criminal background check system that kept records only on individuals who are prohibited from lawfully owning firearms; and

WHEREAS the Brady Handgun Bill specifically states that, when a call to the instant check system reveals that a person may lawfully own firearms, "the system shall . . . destroy all records of the system with respect to the call (other than the identifying number and the date the number was assigned) and all records of the system relating to the person or the transfer." (18 U.S.C. 922(t)(2)(C)); and

H

COMMITTEE COPY

WHEREAS the Federal Bureau of Investigation (FBI) has indicated an intent to keep records gathered through the Brady Handgun Bill instant check system regarding lawful owners of firearms in its data banks for "audit purposes"; and

WHEREAS the actions of the FBI are contrary to both the letter and the spirit of the P dy Handgun Bill and further erode the constitutional right of Alaskans to keep and bear arms;

BE IT RESOLVED that the Alaska State Legislature respectfully urges the President of the United States to prevent federal agencies from maintaining information regarding lawful owners of firearms in violation of the Brady Handgun Bill; and be it

FURTHER RESOLVED that the Alaska State Legislature respectfully urges the Congress to make any necessary statutory changes to prevent federal agencies from maintaining information re arding the lawful possession of firearms.

COPIES of this resolution shall be sent to the Honorable Bill Clinton, President of the United States; the Honorable Al Gore, Jr., Vice-President of the United States and President of the U.S. Senate; the Honorable Trent Lott, Majority Leader of the U.S. Senate; the Honorable Dennis Hastert, Speaker of the U.S. House of Representatives; and to the Honorable Ted Stevens and the Honorable Frank Murkowski, U.S. Senators, and the Honorable Don Young, U.S. Representative, members of the Alaska delegation in Congress.

HJR 9

NATIONAL RIFLE ASSOCIATION OF AMERICA
INSTITUTE FOR LEGISLATIVE ACTION
555 CAPITOL MALL, SUITE 455
SACRAMENTO, CA 95814
(916) 446-2455

NRA STATEMENT IN SUPPORT OF HOUSE JOINT RESOLUTION 9

Submitted by:
Brian Judy, Alaska State Liaison
February 18,1999

On behalf of the more than 18,000 NRA members who live in Alaska, I urge strong support for House Joint Resolution 9.

In 1993, the National Rifle Association worked closely with Congress in drafting the law which created the National Instant Check System (NICS) in an effort to ensure the privacy of firearm owners. One of the provisions which was of paramount importance to NRA was the destruction of records required under 18 USC §922(t)(2). This law requires that the instant check "system shall...destroy all records of the system with respect to the call and all records of the system relating to the person or the transfer." The ONLY exception to this requirement is specific authorization to retain a unique transaction identification number and transaction date.

Legislative intent clearly requires the immediate destruction of all personal information pertaining to law-abiding firearm purchasers who are not found to be prohibited from possessing a firearm under federal law.

This is further evidenced by another section of the NICS bill which went on to specify that: "No department, agency, officer, or employee of the United States may (1) require that any record or portion thereof generated by the system established under this section be recorded at or transferred to a facility owned, managed, or controlled by the United States...; or (2) use the system established under this section to establish any system for the registration of firearms, firearm owners, or firearm transactions or dispositions, except with respect to persons prohibited...from receiving a firearm." (§103(I) Public Law 103-159, 107 Stat 1542 (11/30/93))

Clearly, only information on the bad guys, those who are prohibited from possessing firearms, is allowed to be maintained under the provisions of the law.

History has shown, over and over again, how firearm registration systems have led to firearm confiscation mandates. Law-abiding firearm owners clearly understand that the creation of a gun registration system is a major step toward the destruction of the Second Amendment.

The National Rifle Association urges support for House Joint Resolution 9. Passage of this resolution will send a strong message to Washington D.C. that federal bureaucrats are not, and should not act, above the law and that the integrity of the Second Amendment must be preserved.

of this section; and

(C) the transferor has verified the identity of the transferee by examining a valid identification document (as defined in section 1028(d)(1) of this title) of the transferee containing a photograph of the transferee.

(2) If receipt of a firearm would not violate subsection (g) or (n) or State law, the system shall -

(A) assign a unique identification number to the transfer;

(B) provide the licensee with the number; and

(C) destroy all records of the system with respect to the call (other than the identifying number and the date the number was assigned) and all records of the system relating to the person or the transfer.

(3) Paragraph (1) shall not apply to a firearm transfer between a licensee and another person if -

(A)(i) such other person has presented to the licensee a permit that -

(I) allows such other person to possess or acquire a firearm; and

(II) was issued not more than 5 years earlier by the State in which the transfer is to take place; and

(ii) the law of the State provides that such a permit is to be issued only after an authorized government official has verified that the information available to such official does not indicate that possession of a firearm by such other person would be in violation of law;

(B) the Secretary has approved the transfer under section 5812 of the Internal Revenue Code of 1986; or

(C) on application of the transferor, the Secretary has certified that compliance with paragraph (1)(A) is impracticable because -

(i) the ratio of the number of law enforcement officers of the State in which the transfer is to occur to the number of

Testimony of the Alaska Outdoor Council on HJR 9,
By Dick Bishop, vice president
Feb. 18, 1999 before the House State Affairs Committee

Madam Chair, I'm Dick Bishop of Fairbanks, vice president of, and part-time lobbyist for the Alaska Outdoor Council, on whose behalf I am testifying.

The AOC is vitally interested in the safe and ethical exercise of the individual right to keep and bear arms.

The Outdoor Council strongly supports HJR 9. We thank Representative Croft for introducing the measure, and his cosponsors for their strong bipartisan support. This is an issue that knows no party lines.

Regulations mandating retention of data on lawful firearms purchases under the so-called Brady Bill's instant check provisions are a cynical subversion of the clear meaning of that law. The law's provision mandating destruction of those records does not mean some Tuesday next week, or 6 months later.

The purpose of the instant check is to determine if a firearms purchase is legal. Once that determination is made, there is no rationale under the law for retaining that record. The purpose of the law has been fulfilled when attempted illegal purchases are forestalled.

As anyone who has worked in or with government knows, it is all too easy for bureaucracies to overlook or ignore statutory requirements and regulations. The 6-month destruction deadline easily becomes no deadline, through neglect, or for an ulterior motive. Or it might be revised in a future regulation, to one year, or 5 years, -- or permanent retention.

There's not much good to be said about the Brady bill, but at least it was agreed that it was not to be the first step in an all out gun registration system. We applaud the National Rifle Association's legal challenge to this foot in the door regulation.

I wonder who decided there should be 6-month data retention? It appears to fit right in with President Clinton's patronizing political campaign to demonize all gunowners.

The Alaska Outdoor Council urges the Legislature to promptly pass HJR 9. We also recommend that you transmit the resolution to every state legislature and every governor, in addition to the distribution outlined in the resolution.

Thank you for your efforts, and for this opportunity to testify.

28 CFR s 25.9
28 C.F.R. § 25.9

CODE OF FEDERAL REGULATIONS
TITLE 28--JUDICIAL ADMINISTRATION
CHAPTER I--DEPARTMENT OF JUSTICE
PART 25--DEPARTMENT OF JUSTICE INFORMATION SYSTEMS
SUBPART A--THE NATIONAL INSTANT CRIMINAL BACKGROUND CHECK SYSTEM

Current through January 1, 1999; 63 FR 72352

§ 25.9 Retention and destruction of records in the system.

(a) The NICS will retain NICS Index records that indicate that receipt of a firearm by the individuals to whom the records pertain would violate Federal or state law. The NICS will retain such records indefinitely, unless they are canceled by the originating agency. In cases where a firearms disability is not permanent, e.g., a disqualifying restraining order, the NICS will automatically purge the pertinent record when it is no longer disqualifying. Unless otherwise removed, records contained in the NCIC and III files that are accessed during a background check will remain in those files in accordance with established policy.

(b) The FBI will maintain an automated NICS Audit Log of all incoming and outgoing transactions that pass through the system.

(1) The Audit Log will record the following information: type of transaction (inquiry or response), line number, time, date of inquiry, header, message key, ORI, and inquiry/response data (including the name and other identifying information about the prospective transferee and the NTN). In cases of allowed transfers, all information in the Audit Log related to the person or the transfer, other than the NTN assigned to the transfer and the date the number was assigned, will be destroyed after not more than six months after the transfer is allowed. Audit Log records relating to denials will be retained for 10 years, after which time they will be transferred to a Federal Records Center for storage. The NICS will not be used to establish any system for the registration of firearms, firearm owners, or firearm transactions or dispositions, except with respect to persons prohibited from receiving a firearm by 18 U.S.C. 922(g) or (n) or by state law.

(2) The Audit Log will be used to analyze system performance, assist users in resolving operational problems, support the appeals process, or support audits of the use of the system. Searches may be conducted on the Audit Log by time frame, i.e., by day or month, or by a particular state or agency. Information in the Audit Log pertaining to allowed transfers may only be used by the FBI for the purpose of conducting audits of the use and performance of the NICS. Such information, however, may be retained and used as long as needed to pursue cases of identified misuse of the system. The NICS, including the NICS Audit Log, may not be used by any department, agency, officer, or employee of the United States to establish any system for the registration of firearms, firearm owners, or firearm transactions or dispositions. The Audit Log will be monitored and reviewed on a regular basis to detect any possible misuse of the NICS data.

(c) The following records in the FBI-operated terminals of the NICS will be subject to the Brady Act's requirements for destruction:

(1) All inquiry and response messages

(regardless of media) relating to a background check that results in an allowed transfer; and

(2) All information (regardless of media) contained in the NICS Audit Log relating to a background check that results in an allowed transfer.

(d) The following records of state and local law enforcement units serving as POCs will be subject to the Brady Act's requirements for destruction:

(1) All inquiry and response messages (regardless of media) relating to the initiation and result of a check of the NICS that allows a transfer that are not part of a record system created and maintained pursuant to independent state law regarding firearms transactions; and

(2) All other records relating to the person or the transfer created as a result of a NICS check that are not part of a record system created and maintained pursuant to independent state law regarding firearms transactions.

<General Materials (GM) - References, Annotations, or Tables>

28 C. F. R. § 25.9

28 CFR § 25.9

END OF DOCUMENT

REPRESENTATIVE ERIC CROFT

MEMO

To: Representative Pete Kott, Chairman
House Judiciary Committee

From: Representative Eric Croft

Date: 22 February '99

Re.: HJR 9

On February 18th, HJR 9. a resolution addressing the unlawful retention of gun records, was heard and passed unanimously from the House State Affairs Committee. Among those testifying was Brian Judy. Liaison for the National Rifle Association. Mr. Judy was very direct in his presentation. stating that he urged "strong support for House Joint Resolution 9."

Given the importance of having our voice join other state government voices in sending a strong message to the nation's capitol, I request the opportunity for a hearing at the earliest possible date.

Enclosed is a copy of the bill, sponsor statement, and other background information. Please let me know if I can provide anything further.

January-May: State Capitol • Juneau, Alaska 99801-1182 • (907) 465-4998 • (800) 689-4998 • Fax (907) 465-4419
June-December: 716 W. 4th Avenue • Anchorage, Alaska 99501 • (907) 258-8162
Representative_Eric_Croft@legis.state.ak.us

REPRESENTATIVE ERIC CROFT

Sponsor Statement

HJR 9

Preventing the Unlawful Retention of Gun Owner Records

When the United State Congress passed the Brady Bill in 1993 to establish a system to keep firearms out of the hands of criminals, it was clear that this system was not to be used by government as a way to monitor legitimate firearm ownership by law-abiding Americans.

The Brady Bill established the "national instant criminal background check system" to check criminal backgrounds during firearm purchases. In order to ensure that non-criminal records were not retained, language was included that directly addressed this fundamental issue. Under the section referring to lawful firearm purchases, the code clearly states the intent to "destroy all records of the system with respect to the call (other than the identifying number and the date the number was assigned) and all records of the system relating to the person or the transfer."[1]

The problem arose when the Administration gave this clear statutory language a novel interpretation. Final regulations purporting to implement the Brady Bill state that all information regarding legitimate firearm purchases would be retained for "audit" purposes and "will be destroyed after not more than six months after the transfer is allowed."[2]

By extending the holding of non-criminal records for up to one hundred and eighty days, the Administration has violated both the spirit and letter of the original Brady Bill.

HJR 9 urges the President of the United States and the Congress to prevent federal agencies from using the Brady Bill Act as a vehicle to unlawfully collect data about legitimate firearm owners. HJR 9 also requests that necessary statutory changes be implemented to ensure this does not occur again in the future.

The sponsor and co-sponsors of HJR 9 respectfully ask you to join us in seeing that this message is clearly heard at our nation's capitol.

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[1] 18 USC Sec. 922 (t)(2)(c)
[2] 28 CFR Sec. 25.9 (a) (1)

January-May: State Capitol • Juneau, Alaska 99801-1182 • (907) 465-4998 • (800) 689-4998 • Fax (907) 465-4419
June-December: 716 W. 4th Avenue • Anchorage, Alaska 99501 • (907) 258-8162
Representative_Eric_Croft@legis.state.ak.us