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A Comparative Analysis of the Legal Rights of Students in the United States and Great Britain

Dorian Belfiore
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INTRODUCTION

This paper compares the legal and constitutional rights of students in the United States and Great Britain. Students will receive more exemptions for religious reasons in the United States as compared to Great Britain because it is generally easier for an individual to assert his or her fundamental freedoms under the United States Constitution.1 Although the British system recognizes equality and freedom, it discriminates against minority religions because their needs are not inherently accommodated.2 Furthermore, as long as there are practicable alternatives, British courts will not grant exemptions to students.3 However, most of the time, the alternatives do not entirely satisfy the student's needs.4

[T]he predominant absence of religion from American public schools, which is the result of the First Amendment's prohibition of establishment, tends to promote more religious freedom than the British system. In contrast to British education, which has legislatively and in practice endorsed Christianity as the core faith, American education, which

2 Id.
3 Id.
4 Id.
supports no religious beliefs, effectively treats all religions equally from the beginning. As religious exceptions or accommodations are necessary, courts have the ability to grant them to protect the individual's right to free exercise.⁵

Although Great Britain still has an established church, the United States and Great Britain both encourage religious freedom. "The Bill of Rights automatically grants American citizens the right to free exercise of religion, and the courts then decide at what point that right should be curtailed for the sake of maintaining a civilized society. Conversely, British courts, which are not bound by a Bill of Rights, have the liberty to grant additional rights as they are requested. As in the United States, however, rights can be denied for the sake of maintaining order." ⁶

The United States tends to be slightly more tolerant in the classroom because American culture focuses on the rights of the individual, whereas England's focus is the availability (or lack) of alternatives to the circumstances creating the problem.⁷ There are some similarities between the two countries' approaches to church-state issues. Both allow some governmental religious expression that has become part of the cultural fabric. In Great Britain, the long history of establishment and close relationship between the Church of England and the British State means that some of the most noticeable religious expressions are not generally perceived as implying a particular state stance towards religion or any coercion. In the United States, some government acknowledgments of religion are constitutionally acceptable.⁸

⁵ Id. at 1521
⁶ Id.
⁷ Id. at 1521-22.
Both countries allow churches a great deal of autonomy from state interference. In Great Britain, state authorities retain some jurisdiction over the established Church, but it is rarely exercised. Still, that jurisdiction has symbolic value because it clarifies that British establishment is not the same as clerical rule or the imposition of particular beliefs or behaviors. Establishment is seen as placing an obligation on the Church of England to operate in a way that reflects the multi-faith nature of British society. Thus, one could say that Great Britain has an established church but not an established religion. Meanwhile, in the United States, the reluctance of the courts to interfere with church matters is based on the Free Exercise Clause of the Fourth Amendment, which also forbids the imposition of particular beliefs. ⁹

Although the United States and Britain diverge regarding religion’s place in government and in education, the two countries are aligned in their desire to protect an individual’s right to freedom of religion. This issue is frequently raised in a school setting because some students require special religious accommodations.

Separation between Church and State:

Great Britain’s Background

Unlike the situation in the United States, where the concept of establishment has been the subject of a significant body of jurisprudence and academic interpretation, in Great Britain (and more generally within Europe), “establishment” is not a legal term of art but a general description of a state of affairs. The historical core of British establishment is the fact that the Head of State (the reigning monarch) is also the head of the established Church. The significance

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⁹ Id.
of this has diminished as the role of the monarch within the British constitution has diminished.\textsuperscript{10}

In the seventeenth century, establishment meant that the nation and the Church of England were unified. Consequently, dissent was punished as disloyalty and sedition. While Protestant dissent came to be tolerated, Roman Catholic dissent was much more severely treated. Precisely because, it involved not only a lack of loyalty towards the English nation, but potentially sympathy and unity with other, Roman Catholic nations. In Elizabeth times, religious conformity was a way of maintaining national cohesion around the twin pillars of the Monarch and the Church. She was a subscriber to the view of the unity of Church and Monarch and therefore viewed nonconformity as sedition however, what she was interested in was a unity of practice and allegiance, rather than a unity of theology or personal belief.\textsuperscript{11}

However, this understanding developed considerably since 1829, the date of Roman Catholic emancipation. The contemporary Church of England is not understood as constituting or united to the nation, but as a Church of baptized Christians with a particular duty of service to the nation. A central feature of establishment in Great Britain is that the Church of England is given by the state the symbolic function of making religion present within public life. This is partly visible in the context of civic religion: significant events in the life of the nation are often marked by church services organized by the Church of England, in the Anglican mold, but with the participation of other denominations and faiths.\textsuperscript{12} Therefore, a further principle of


\textsuperscript{11}See Kenneth Hylson-Smith, \textit{The Churches in England from Elizabeth I to Elizabeth II} 32 (1996).

establishment can be understood as an acknowledgement of the public role of religion and a resistance to its being seen only as part of the private life of an individual.

While British establishment appears to require the state publicly to acknowledge the existence and value of religion, it claims it does not require the state to impose religious belief, or any particular religious belief, on its citizens.\(^\text{13}\) Notably, the existence of civic events of a religious, even Christian, nature should not be interpreted as an attempt to force people into a particular religious belief. There is something of a tradition within the Church of England of distinguishing acts and beliefs, and of leaving the matter of the conscience up to the individual. Historically, much of the spirit of the contemporary Church of England and contemporary establishment can be traced back to the time of Queen Elizabeth I.\(^\text{14}\) However the claim that Great Britain’s establishment does not distinguish or impose a particular religion is problematic in the realm of individual religious rights, as it pertains to educational accommodations.

### Education in Great Britain

The 1559 Act of Uniformity established the Church of England as the national religion.\(^\text{15}\) Despite the Anglican establishment, Great Britain has worked vigorously to protect religious freedom for all religions. While the Church of England may appear to be the preferred religion, today Great Britain tolerates all minority faiths and guarantees them freedom of worship and the freedom to practice their religion in public.\(^\text{16}\) Additionally, the functions of the Church do not

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\(^\text{13}\) Fischer, *supra* note 8, at 491.

\(^\text{14}\) *Id.*

\(^\text{15}\) Act of Uniformity, 1559, (Eng.).

coincide with the functions of public government. The House of Lords recently held that, under the Human Rights Act of 1998, the Church of England is not a “public authority.”  

Great Britain does not have a written constitution or a bill of rights like the United States, but the common law and statutes tend to protect civil liberties. (In Britain long-standing traditions become the law, hence no Constitutional Bill of Rights.) Additionally, Britain adheres to the European Convention on Human Rights of 1950 (“Convention”). The European Council, which was formed after the conclusion of World War II, enacted the Convention to protect various fundamental freedoms and rights. Article 9 of the Convention states:

(1) Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

(2) Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or the protection of the rights and freedoms of others.

Another relevant provision of the Convention is Article 2 of Protocol 1, which states: “No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religions and philosophical

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18 Council of Europe, European Convention on Human Rights § 1, art. 9, Nov. 4, 1950.
20 European Convention, supra note 18.
convictions.” Religious schools in Great Britain are found in both the private sector and a predominant part of the public sector. Great Britain funds both types of schools, in contrast to American schools, which are governed by state and local rules. Educational standards in Great Britain are governed by Parliamentary legislation.

Modern education law in Great Britain was developed through various legislative acts beginning with the Education Act 1944. The 1944 Act created a new system of education in post-war England. An often litigated provision of the 1944 Act requires a local education authority (LEA) to provide students with transportation to and from school. This provision raised many issue because the 1944 Act also allowed parents the right to choose which school their children would attend, and sometimes a desired school was located far away.

Under the 1944 Act, an LEA “was obliged to have regard to parental preference,” but the Education Act 1980 made it a mandatory requirement for an LEA to comply with a parent's request. The Education Reform Act 1988 further advanced parental rights and preferences by giving them greater choices regarding where their children would attend school, influence over the governing bodies, and control of certain types of schools. A parent would usually choose one school over another for religious reasons. The Education Act 1996 repealed the earlier Acts

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22 Education Act, 1944, (Eng.).
24 Id. at 5.
25 Id.
to consolidate all of the modern law, and the Education Act 1998 established the current structure of schools.\textsuperscript{26}

There are five main types of schools in England, voluntary, maintained, community, foundation, and independent schools. The LEA’s own community and maintained schools, voluntary schools, which are only assisted rather than owned by LEAs, receive various amounts of government funding and usually serve a particular religious persuasion.\textsuperscript{27} Voluntary schools are often started by parties who believe that the government’s educational provisions are inconsistent with their own religious beliefs but who cannot afford to finance a private school independently.\textsuperscript{28} It has been argued that the system inherently discriminates, as Muslim applications have consistently been turned down on procedural or technical grounds.\textsuperscript{29}

Independent schools are the equivalent of American private schools. Independent schools maintain private contracts with students and are therefore not subject to judicial review.\textsuperscript{30} A significant number of independent schools serve religious traditions that have only recently arrived in England, such as Judaism (1650’s) and Islam (19\textsuperscript{th} and 20\textsuperscript{th} century). Criticism of the teachers and curricula at independent schools has made it difficult for religious groups to set up such schools in their communities.\textsuperscript{31}

\begin{itemize}
\item[\textsuperscript{26}] Id. at 67.
\item[\textsuperscript{27}] Id. at 19.
\item[\textsuperscript{28}] A. BRADNEY, RELIGIONS, RIGHTS AND LAWS 67 (1993).
\item[\textsuperscript{29}] Id. at 68.
\item[\textsuperscript{30}] See MCEWAN, supra note 23, at 20.
\item[\textsuperscript{31}] BRADNEY, supra note 28, at 69,70.
\end{itemize}
The British government purposely wove Christianity into education law. Since the enactment of the 1944 Act, people have slowly drifted away from religion. When the British government enacted the 1988 Act, Parliament consciously placed Christian education at the center of all religious education.\textsuperscript{32} In fact, the 1988 Act was the first time Parliament explicitly mentioned "Christianity" in a provision of education legislation.\textsuperscript{33} However, British law does not specifically limit religious schools to Christianity. Currently there are a small number of Jewish and Muslim schools as well.\textsuperscript{34} Although the educational trend in Great Britain is toward freedom of religion and individual independence, modern legislation, particularly the 1988 Act, indoctrinates children with Christian beliefs because such legislation teaches children that Christianity represents community values and maintains British identity. This is the opposite of the American goal, to prevent religious indoctrination in public schools.\textsuperscript{35}

Therefore to reiterate, British education has legislatively and in practice endorsed Christianity as the core faith. Because religious exceptions or accommodations are necessary, United States courts have the ability to grant them to protect the individual's right to free exercise. Therefore, the principal absence of religion from American public schools, which results from the First Amendment's prohibition of establishment, is more likely to promote increased religious freedom than the British system.\textsuperscript{36}

\textsuperscript{32} Id at. 65,69,70.
\textsuperscript{33} Id.
\textsuperscript{34} Id. at 67.
\textsuperscript{35} Id.
\textsuperscript{36} Kass, supra note 1, at 1521.
United States Background

In adopting the Constitution, the founders of the United States insisted on adding provisions to safeguard certain individual rights even when they were unpopular with the majority. 37 The First Amendment safeguards religious freedom through two companion clauses. The Establishment Clause provides that “Congress shall pass no law respecting the establishment of religion,” 38 while the Free Exercise Clause balances this by adding, “nor prohibiting the free exercise thereof.” 39 As with most of the provisions of the Bill of Rights, these protections were later held to apply to the individual states and their political subdivisions by virtue of the Fourteenth Amendment.

Unlike Great Britain, which openly endorses and funds religious education for different religions, the Supreme Court of the United States has struggled over the years to interpret the First Amendment's requirement that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof,” 40 This amendment was intended to promote religious freedom while also creating a religiously neutral government that neither preferred any religious sect nor supported religion over irreligion. 41 The Supreme Court has determined that the Establishment Clause prohibits federal and state governments from setting up churches, forcing people to participate in religious practices, punishing people based on their religious

37 JOSEPH STORY, II COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, 601 (Little Brown & Co. 1873).
38 U.S. Const. amend. I.
39 Id.
40 Id.
beliefs, using taxes to fund religious programs or institutions, and participating in religious organizations.\textsuperscript{42}

The Establishment Clause prevents public schools from providing students with religious instruction. Both the state and federal governments fund and operate public schools, school programs and policies cannot represent religious establishment. The United States's approach to religion in schools further departs from Great Britain’s approach because the Establishment Clause typically restricts states from providing any type of funding to church-related schools. Public school programs that allow students to receive religious instruction at their parents' option once a week during the regular school day are unconstitutional if the program is held on school property and takes time away from secular studies.\textsuperscript{43} Such programs are not religiously neutral because they are initiated tax-supported public school systems and utilize tax-supported public property. (School systems funded and operated by use of government-initiated tax programs) However, a program that releases students early so that they may pursue religious instruction elsewhere is constitutional because such a policy makes no use of public resources and merely accommodates individuals' religious needs by rearranging their school schedules.\textsuperscript{44}

Also the Supreme Court held statutes from Maryland and Pennsylvania unconstitutional because they required that students recite portions of the Bible at the beginning of each school day.\textsuperscript{45} Although such statutes allowed students to withdraw from engaging in the exercise, the use and validation of any type of prayer in a public school system nevertheless violated the

\textsuperscript{42} Everson v. Bd. of Educ., 330 U.S. 1, 1516 (1947).
\textsuperscript{44} Zorach v. Clauson, 343 U.S. 306, 31415 (1952).
separation of church and state required by the Establishment Clause.\textsuperscript{46} Similarly in \textit{Engel v. Vitale}, the Supreme Court struck down a New York statute that directed all public school students to recite daily a nondenominational prayer written by the State Board of Regents.\textsuperscript{47} By prohibiting the school-sponsored recitation of prayers during the school day, the Establishment Clause furthers the constitutional objective of protecting religious freedom by barring the preference of one religious belief over another.\textsuperscript{48}

In an effort to further separate public school education from religion, in \textit{Lee v. Weisman}, the United States Supreme Court has held that religious prayers are also prohibited at school sponsored events outside of the classroom.\textsuperscript{49} The Court gave three reasons for holding the school’s involvement violated the Establishment Clause. First, a school official decided that an opening invocation and closing benediction should be given; second the school chose a clergyman to lead the prayer; finally and, most importantly: the school directed the content of the prayer that would be recited at a mandatory school ceremony.\textsuperscript{50} This is another instance where, the Supreme Court was concerned that the state-sponsored ceremony violated students’ right to free exercise by pressuring nonbelievers to participate in a religious activity contrary to their own beliefs.\textsuperscript{51}

The Court ultimately decided on the external boundaries of the Establishment Clause when it upheld the Equal Access Act of 1984, a law which created an exception to the neutrality

\textsuperscript{46} \textit{Id.} at 224-25.
\textsuperscript{48} \textit{Id.} at 431-432.
\textsuperscript{50} \textit{Id} at. 587-589.
\textsuperscript{51} \textit{Id} at. 593.
requirement in public schools.\textsuperscript{52} This Act prohibits federally funded, public secondary schools from discriminating against students who wish to conduct a political, philosophical, or religious meeting on school property during non-instructional hours.\textsuperscript{53} Although faculty may not participate in such meetings, their attendance is required.\textsuperscript{54} The Supreme Court of the United States held that the Equal Access Act did not violate the Establishment Clause because it was more consistent with an equal access policy than a state system of sponsored religion.\textsuperscript{55} Furthermore, since the Equal Access Act requires that meetings occur during non-instructional time and that faculty be present merely to supervise, the Court held that it did not create an excessive entanglement of government and religion.\textsuperscript{56}

Education in America

The United States’s approach to religion in schools further deviates from Great Britain’s approach because the Establishment Clause usually forbids states from providing any type of funding to church-related schools. In Great Britain, by contrast, religiously affiliated schools receive government funding. However, case law has gradually evolved such that states currently are permitted to disburse funds to religious schools under certain circumstances.\textsuperscript{57}

The Supreme Court addressed the constitutionality of a New Jersey local school board policy of reimbursing parents for using public transportation buses to send their children to

\textsuperscript{53} Id. § 4071(a), (b).
\textsuperscript{54} Id. § 4071(c), (3).
\textsuperscript{56} Id. at 253
\textsuperscript{57} Zelman v. Simmons-Harris, 536 U.S. 639 (2002).
school. Pursuant to this policy, parents received funds irrespective of whether their children attended public or Catholic parochial schools. While acknowledging the wall of separation between church and state, the Supreme Court upheld the policy because it applied to all people generally, regardless of their religious beliefs. Therefore it was, "neutral in its relations with groups of religious believers and non-believers." As Justice Rehnquist has summarized the reigning view, "laws that have the 'purpose' or 'effect' of advancing or inhibiting religion" run afoul of the Establishment Clause. Federal and state laws must be "neutral with respect to religion," completely separating the political sphere from the religious.

The Supreme Court developed a three-pronged test to determine whether statutes granting funding for education in religiously affiliated schools violate the Establishment Clause. This case involved two state statutes, one providing salary supplements for teachers in nonpublic schools and one authorizing reimbursement of teachers' salaries, textbooks, and instructions materials.

This criterion for constitutional assessment has come to be commonly referred to as the Lemon Test. First, to survive constitutional scrutiny; a statute must have a secular legislative purpose. Second, its principle or primary effect must be one that neither advances nor inhibits religion, and finally it must not foster an excessive government entanglement with religion.

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58 Everson 330 U.S. 1.
59 Id at. 3.
60 Id.
63 Id.
The Court acknowledged that "some involvement and entanglement between church and state are inevitable," but stated that "lines must be drawn." It held both statutes unconstitutional because they promoted excessive entanglement. 64 The United States Supreme Court has continued to use this test erratically, at times revising and at others despising it, Justice Scalia compared the Lemon test to a "ghoul in a late-night horror movie."65 Nevertheless, the test remains the leading method to determine whether a government entity has violated the Establishment Clause.66

Congress enacted Title I of the Elementary and Secondary Education Act of 1965 (Title I); to assist low-achieving children meet state performance requirements. This Act provides additional funding to local educational agencies (LEA's).67 Student eligibility does not depend on whether the child goes to a private or a public school, but instead on the character of the benefits provided by the funding: to qualify, the benefits must be secular, neutral, and non-ideological.

Establishment Clause issues were raised due to use of this particular aid. A group of parents, along with the Board of Education of the City of New York, sought relief from an injunction preventing Title I teachers from providing aid to students in religious private schools.68 After concluding that Title I teachers could work in religious private schools because

64 Id. at 624-25.
their presence neither promoted nor inhibited religion, the Supreme Court also held that the excessive entanglement analysis and the impermissible effect analysis were essentially the same.\textsuperscript{69}

American Voucher System

Claims regarding violations of the Establishment Clause based on the distribution of aid often occur in impoverished areas where a large number of students attend religiously affiliated private schools which offer a better education than local public schools.\textsuperscript{70} To enjoy fully the freedoms guaranteed by the United States Constitution, children from these underprivileged areas need the best education possible.\textsuperscript{71} Without education, children would never be able to effectively participate in a democratic society such as the United States of America.

Voucher programs are formed when the state allows individual students and their parents to determine which school the student will attend. The program allocates a specific sum of money that can be used for part or full payment for the student to attend that school. This system is the mirror attempt of the LEA structure of educational funding in England and Wales, with the dual goals of maintaining the current governments’ position on its status of establishment, while promoting individual freedom of choice regarding education. A voucher program in the United States however, may provide that the voucher will go directly to the student or parent who then designates the ultimate recipient or that payment is to be given directly to the school. Voucher

\textsuperscript{69} Id. at 232.

\textsuperscript{70} Zelman at. 681-682; (Thomas, J., concurring).

\textsuperscript{71} Id.
programs may be designed to include secular private schools or all private schools, including sectarian ones, that otherwise meet certain academic or other qualifications. Some voucher programs may be structured such that they restrict participation in the program to public schools.

Challenges to the voucher system have occurred when the program allowed public school students to attend any school. In *Zelman v. Simmons-Harris*, the Supreme Court upheld an Ohio voucher program that provided parents with monetary grants to send their children to any school, public or private, even religious within the Cleveland City School District. Because the program was one of true private choice, the Supreme Court held that it was entirely neutral toward religion.

In an opinion written by Chief Justice Rehnquist, the Court held that the program did not violate the Establishment Clause because the state money that ultimately flowed to participating private sectarian schools was the result of the parent's true private choice of which school their child would attend and, therefore, would receive the voucher money for tuition. Justice O'Connor, who joined the Court's opinion, also wrote a separate concurrence emphasizing "that parents of voucher students in religious schools have exercised 'true private choice.'" Justice Thomas, joined the Court's opinion also wrote a separate concurrence. He concentrated on the importance of providing disadvantaged residents of school districts and minorities an alternative to inadequate public schools. He also argued that religious liberty under the Fourteenth Amendment may have a different meaning than under the First Amendment, thus dictating a

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72 *Zelman*, 536 U.S. at 645-46, 653.

73 *Id.* at. 653.

74 *Id.* at. 639.

75 *Id.* at. 663.
different scope of separation between religion and government than that required by the First Amendment's Establishment Clause. "These programs address the root of the problem with failing urban public schools that disproportionately affect minority students."\textsuperscript{76} The Supreme Court's decision in \textit{Zelman v. Simmons-Harris} virtually foreclosed the possibility that opponents of school voucher programs could raise a successful facial challenge based on federal constitutional grounds to a state voucher program.\textsuperscript{77}

The \textit{Zelman} case also did not address any state constitutional or statutory questions involving school vouchers. The \textit{Zelman} case itself originally involved a challenge under the Ohio state constitution. The next, most viable challenge available to voucher opponents appears to be reliance upon state constitutional amendments that, more explicitly than the Establishment Clause, prohibit states from funding private, religious educational institutions.\textsuperscript{78} The Ohio Supreme Court held that the Ohio voucher program, known as the Pilot Project Scholarship Program, violated a state constitutional single-subject provision but indicating in dicta that the program did not violate the Establishment Clause.\textsuperscript{79} Several other courts have examined state constitutional challenges to voucher programs. State constitutions have provisions that include federal counterparts and may likewise raise questions regarding the validity of voucher...
programs. Courts are not required to construe these state constitutional provisions in the same way that the United States Constitutional provisions are construed.\textsuperscript{80}

The Supremacy Clause of the United States Constitution requires that state constitutions cannot provide less protection than the United States Constitution. However, state constitutions may provide more protection than the United States Constitution. States may construe their own Establishment Clause in a manner that is different than that which has been given to the United States Establishment Clause. States are within their rights to hold that the state constitution requires increased separation between government and the religion than is required by the United States Establishment Clause. Therefore, state voucher programs may still violate state constitutional provisions even after the United States Supreme Court upheld that the Cleveland voucher program did not violate the United States Constitution.

The Supreme Court recently examined the impact of such a state constitutional provision that took a stricter position on separating religion and the state than does the United States Establishment Clause.\textsuperscript{81} In \textit{Locke v. Davey}, the Supreme Court held that neither the United States Free Exercise Clause nor the Equal Protection Clause was violated when a state refused to award a state scholarship to a student who was pursuing a degree in devotional theology, even though it provided such scholarships for secular instruction.\textsuperscript{82} The Supreme Court, however, did expressly acknowledge that the United States Establishment Clause would have permitted the state to provide students with devotional theological scholarships to those who are in that field of study.

\textsuperscript{80} Id.


\textsuperscript{82} Id.
The *Locke* case involved a constitutional challenge to a Washington state statute and the implementing policy of the state's Higher Education coordinating Board (HECB) prohibiting state aid to any post-secondary student who pursues a degree in theology. The provision in the state constitution at the heart of the issue provided that "[n]o public money or property shall be appropriated for or applied to any religion worship, exercise or instruction or the support of any religious establishment."83 The persistence of American Establishment Clause concerns is indicated by *Locke v. Davey.*84 Several state constitutions consistently remain overly concerned with avoiding establishment instead of protecting freedom of individuals, conscience, or the human right of parental choice in schooling.85 However, vouchers permit parents to take one step on the road to achieving the potential of the Free Exercise Clause by financing parental choice of a school for poor families without violating the Establishment Clause.86 It therefore would appear that *Locke* tends to lend continuing support to the kind of voucher program at issue in Ohio.

State constitutions may also have specific provisions, in addition, to the general state constitutional provisions that have federal counterparts, which expressly prohibit the expenditure of public funds at private religious schools or sectarian institutions for religious institutions. Some but not all of these provisions are known as Blaine Amendments. They inherited their name after an unsuccessful attempt to amend the United States Constitution in the nineteenth century by a proposal that was introduced into the House of Representatives by the


85 *Id.* at. 404-405.

86 *Id.* at. 404.
Representative from Maine, James G. Blaine. The amendments originate from anti-Catholic animus, as the Catholic minority increasingly sought public support for Catholic learning institutions. The constitutionality of these provisions which were, motivated by discriminatory temperament remains an open question.

In *Bush v. Holmes* a Florida state appellate court stated in a footnote that, "there is no evidence of religious bigotry relating to Florida's no-aid provision" and its retention in the 1968 general revision of the Florida Constitution. The court further mentioned that the issue pertaining to bigotry was highly debated by legal scholars and historians. The state appellate court then held that the inclusion of sectarian schools in the state's voucher system violated the state constitution's no-aid provision that prohibited the expenditure of any public funds either indirectly or directly to aid sectarian institutions. The court also held the no-aid provision did not violate the state Free Exercise Clause nor did it violate the federal Free Exercise Clause, citing the Supreme Court's decision in *Locke v. Davey*. The court noted that most Florida courts have interpreted the state Free Exercise Clause like the federal provision and that the state no-aid provision must be read in conjunction with the state Free Exercise Clause and Establishment Clause as all three are found in the same constitutional provision and therefore, "must be read in pari materia' to form [a] congruous whole so as not to render any language superfluous."

The Supreme Court has made some reference to the Blaine amendment and state counterparts issue. Justice Thomas, in writing the plurality opinion in *Mitchell v. Helms*, noted

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89 *Id.* at. 344.
90 *Id* at. 365.
the anti-Catholic prejudice surrounding the consideration of the federal Blaine Amendment and that the prohibition against aid to pervasively sectarian schools was in essence a reference to Catholic schools. He stated that "nothing in the Establishment Clause requires the exclusion of pervasively sectarian schools from otherwise permissible aid programs, and other doctrines of this Court bar it. This doctrine, born of bigotry, should be buried now." Chief Justice Rehnquist avoided making a decision on the constitutionality of state amendments linked to the Blaine amendment in Locke v. Davey as the state amendment before the Supreme Court in Locke was not such an amendment.

State Blaine Amendments or other amendments or statutes placing limits on the expenditure of state funds at sectarian institutions or for sectarian instruction or purpose may be construed as being essentially co-extensive with the prohibition of the United States's Establishment Clause. In light of Zelman, this result would mean that such state constitutional provisions would not prevent the inclusion of sectarian schools in a voucher program. However, Locke certainly indicates that states may be free to construe their own law to restrict the participation of sectarian schools in voucher programs.

General Applicability in the United States

Laws that apply to the general population, at times, conflict with an individual's religious beliefs, encroaching on his or her right to free exercise, and courts are consequently required to

92 Id.
94 Heytens, supra note 87, at 160.
resolve the dispute, either ruling in favor of the individuals fundamental rights or affirming on
the basis of need to maintain an orderly society. In Wisconsin v. Yoder, the Supreme Court of the
United States upheld the First Amendment rights of Amish children whose religious views were
in conflict with a state statute requiring them to attend private or public school until the age of
sixteen.95 The parents of several children were convicted of violating the statute when they
refused to send their children to school after the children completed the eighth grade.96 The
parents argued that the statute infringed upon their First and Fourteenth Amendment rights
because sending their children to high school directly conflicted with the Amish religion and
lifestyle.97

The Supreme Court agreed that Wisconsin had an indisputable interest in educating
children but said that the state's interest in education was not automatically superior to other
interests because “only those interests of the highest order and those not otherwise served can
overbalance legitimate claims to the free exercise of religion.”98 The Supreme Court held that
Wisconsin could not compel school attendance against a claim of religious interference unless
the requirement on its face did not impede the free exercise of religion or the state's interest was
compelling enough to exceed protection of the individual's First Amendment right.99

When balancing the significance of the varying interests, the Supreme Court considered
the genuineness of the parents' claims and emphasized the difference between mere personal

96 Id.
97 Id. at 208, 209.
98 Id. at 214, 215.
99 Id. at 214.
preference and sincere religious belief, resolving that the parents' claims in Yoder were, in fact, religiously based.\(^{100}\) The Supreme Court found that the Wisconsin statute severely hindered the Amish children's free exercise of religion because their religion has existed for centuries and is modeled upon a simple lifestyle that disregards current societal norms, along with advances in technology, and instead focuses on devotion to family, community and God.\(^{101}\) Forcing Amish children to attend public high school would compromise their religious beliefs by exposing them to values contrary to their own and to excessive pressure from their peers to conform.\(^{102}\)

In its arguments the state took the position it had a strong interest in producing self-sufficient individuals capable of intelligently partaking in society, however the Supreme Court did not agree that this interest was compelling enough to impose upon the Amish beliefs.\(^{103}\) The Supreme Court also noted that particular religiously driven behavior could be subject to regulations of general applicability intended "to promote the health, safety, and general welfare" of the public."\(^{104}\) The Supreme Court further explained that the right of the parents to direct the upbringing of their children, in conjunction with their First Amendment right to exercise religion freely, outweighed the state's compelling interest because the Amish parents did not jeopardize the health or well-being of their children.\(^{105}\) The Supreme Court distinguished its rule regarding laws of general applicability from the balancing test established in \(Yoder\).\(^{106}\)

\(^{100}\) Id. at. 215, 216.

\(^{101}\) Id. at. 210.

\(^{102}\) Id. at. 217, 218.

\(^{103}\) Id. at. 221.

\(^{104}\) Id. at. 220.

\(^{105}\) Id. at. 223, 224.

In Employment Division v. Smith, two individuals were dismissed from their job positions when it was learned they ingested peyote during a Native American religious ceremony. The use of the peyote violated an Oregon law which prohibited the possession of certain controlled substances. The Supreme Court considered whether the prohibition of the religious use of peyote violated the Free Exercise Clause.

States must be permitted to regulate in order to maintain a democratic society and citizens must obey certain laws. The Supreme Court refused to exempt the individuals from the Oregon law because it was a neutral, generally applicable law not intended to promote or oppress any religious beliefs. The Court explained that the holding in Yoder, which allows the Court to use a compelling interest test, applied only because that case involved a combination or a “hybrid” of constitutional rights, the right to direct the upbringing of one’s children and the right to free exercise. This conclusion supports the idea that two claims involving infringements of constitutional rights, which would fail if alleged separately, have the potential to succeed when they are asserted as a combination because the hybrid of constitutional rights triggers the compelling interest test.

107 Id. at 874.
108 Id. at 876.
109 Id. at 879.
110 Id.
111 Id. at 881.
Recent Cases in the United States and Great Britain

In a United States case the great-grandmother of a student sued the local school district, claiming that the district's mandatory uniform policy was unconstitutional, subsequently she argued the policy did not have any provisions allowing students to “opt-out” for religious causes. The complaint was brought forward after the student was suspended from school for noncompliance with the policy. The great-grandmother’s position was that the policy infringed upon her right as her great-grandson’s legal guardian to direct his upbringing and free exercise. The grandmother’s specific belief was that forcing students to wear uniforms eliminates an individual's free will and is “characteristic of the ‘last days' and required by the anti-Christ.” In this circumstance her religious faith required her to oppose the anti-Christ and prevent her children from becoming indoctrinated with his mark and his orders.

The District Court explained that the plaintiff was entitled to strict scrutiny of the uniform policy because the circumstances of this case could fall under the hybrid-rights exemption demonstrated by Yoder. The District Court did not resolve the issue on the merits but only denied the defendant's motion for summary judgment. The court’s rationale focused on the previous established right of parents to direct the upbringing of their children and that the

114 Id. at 657.
115 Id. at 653.
116 Id. at 653, 654.
117 Id. at 663.
118 Id.
Supreme Court of the United States has protected religious beliefs under the First Amendment even when such beliefs are not “acceptable, logical, consistent, or comprehensible to others.”

Applying the balancing test from Yoder, a court would have to compare the government interest with the sincerity of the religious beliefs involved. There is no history after Hicks but a likely prediction is that it would lose on its merits. A court could easily conclude that the Board of Education’s compelling interest in creating a uniform policy outweighed the imposition to the grandmother’s rights, while acknowledging burden imposed. The Board of Education specifically stated that the policy had the following benefits: “1) improved student behavior, 2) increased safety in schools, 3) increased sense of belonging and school pride among students, 4) increased emphasis on individual personality and achievement rather than outward appearance among students, and, 5) elimination of negative distinctions between wealthy and needy children.”

Additionally the School Board spoke to local parents in the community with varying religious associations all of whom stated that a uniform policy would not violate their religious beliefs. The Board knew that the plaintiff was opposed to the policy, but the Board could not understand how its policy offended the plaintiff’s religion. This is an indicating factor, that the burden to the plaintiff’s religious beliefs may not have been substantial enough to permit a religious exemption.

The Eastern District of New York considered the validity of a school policy requiring certain immunizations unless the students were “bona fide members of a recognized religious

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119 Id. at 657, 658.
120 Id. at 652.
121 Id. at 653.
organization."\[^{122}\] Two families were denied an exemption because they did not belong to a recognized religious organization, after they objected to the immunization of their children for religious reasons.\[^{123}\] In recognizing the compelling government interest in mandatory inoculations the District Court held that by limiting the exemption to members of a recognized religion the provision was unconstitutional. This is because it preferred some religions over others and prevented individuals from the free exercise of religion, violating the Establishment Clause and the Free Exercise Clause.\[^{124}\] The District Court then concluded that both plaintiffs offered religious reasons for requesting an exemption.\[^{169}\] The court held that one plaintiff was entitled to an exemption from the vaccination rule because that individuals religious beliefs were sincere, under the court’s determination the other plaintiff did not hold such a belief and therefore should not benefit from and exemption.\[^{125}\]

It should be noted that in Hicks and Sherr the individuals involved held religious beliefs that represent a small minority of the American population. Laws are obviously less likely to conflict with the religious beliefs of individuals who are represented by a majority. If a majority of American people were required to refuse immunization for religious reasons, such a practice would likely be the societal norm and students would not need an exception to the rule. The circumstances are similar in Great Britain, however, exemptions will not be granted in Great Britain unless there is no viable alternative.

\[^{123}\] Id. at 88.
\[^{124}\] Id. at 89, 91.
\[^{125}\] Id. at 96, 97.
In Great Britain there has been a case concerning a schoolgirl who was successfully excluded from school because of her choice to wear a severe Muslim dress. Unlike well reported and comparable cases of other countries in Europe, the basis of the exclusion was not a rule prohibiting Muslim dress in school in order to maintain a secular or Christian philosophy. Like most British schools they imposed a uniform requirement on students. The school uniform was designed with the large Muslim population in the area taken into consideration. In the design phase of the uniform the school consulted with a local mosque to guarantee that variations were available which suited Islamic dress code, thereby encouraging a multicultural attitude within the school.

The issue was that the particular form of Islamic dress (jilbab) which the pupil wished to use was more severe than the one considered normal by the local Muslim leadership, and therefore did not conform to the uniform. The question before the court was not whether or not Islamic dress could be visible within the school, but instead whether the individual convictions of the individual should be allowed to prevail over a solution which had been reached collectively. The judgment of the Court of Appeal was that the individual should prevail, reasoning that religious freedom is a matter of individual conscience rather than membership of a particular community involving compliance with its norms. This represents perhaps the first acknowledgment by the British Courts that religious freedom involves the individual conscience, rather than participation in a particular collectivity. However, the co-existence of an established church and this principle is questionable.

127 Id. ¶ 31-47.
128 Id. ¶ 49
Such a determination depends on the circumstances of the case. Not all religiously motivated acts will be protected by Article 9. In an employment setting, the European Court of Human Rights will not find an interference with one's right to manifest religious beliefs when a person voluntarily accepts employment that does not accommodate a specific religious practice and there are alternative options that do not present undue hardship or inconvenience.\(^\text{129}\) The student in Denbigh chose a school that was outside of her district, she also knew about the uniform policy before she started attending, and there were three other schools in the area which permitted the wearing of the jilbab. It could be argued that there was no interference with the student's right to manifest religious beliefs. Lord Bingham concluded that there was no interference with the right to manifest religious beliefs, to be justified; interference must be prescribed by law and necessary for a specific democratic purpose.\(^\text{130}\) A school uniform policy is not necessarily law but it is prescribed by the school for a specific purpose, therefore, the school was justified in its actions and did not need to change its uniform policy.\(^\text{131}\)

Also in Great Britain nine students brought claims against their local education authority because the LEA would not provide the students with transportation to the school of their choice.\(^\text{132}\) The claims were brought under the Race Relations Act of 1976 and the European Convention for Human Rights of 1950.\(^\text{133}\) The parent of the students wanted them to receive Jewish education. All were members of a Jewish community in Leeds, but were attending schools in Manchester. A provision in the free transportation policy stated that students are

\(^{129}\) Id. ¶ 23.

\(^{130}\) Id. ¶ 34.

\(^{131}\) Id.


\(^{133}\) Id. ¶ 3.
eligible for free transportation if the school is outside of the Leeds area, a diocese designates the
nearest appropriate school, and the school is more than three miles away from the student's
home. The Jewish student wished to attend a school located 45 miles away, when all of the
other students who chose schools outside of Leeds travel between 3.4 and 5.9 miles.

The parties argued that under the Education Act 1996, the local education authority was
required to provide such transportation. The Queen's Bench Division considered the following
factors: the suitability of the chosen school, the suitability of an alternate school, the underlying
reasons for the parental preference, various financial considerations, and other policy
considerations enacted by the LEA. Furthermore, when an LEA's decides not to provide free
transportation to a student will not be reversed unless it is irrational. The Queen’s Bench
Division refused to provide free transportation to the students due to the existence of a high
school in Leeds which offered some Hebrew studies and the cost associated with providing the
students with free transportation to Manchester.

The parents also set forth several claims under different provisions of the European
Convention of Human Rights. A violation of the right to practice one's religion asserted under
Article 9 of the Convention was the most relevant claim. The court also rejected this argument
stating that “Article 9 does not protect every act motivated or inspired by a religion or belief and
does not in all cases guarantee the right to behave in the public sphere in a way which is dictated

134 Id. ¶ 9.
135 Id. ¶ 18.
136 Id. ¶ 19.
137 Id. ¶ 37.
by a belief.”\textsuperscript{138} Further, the court held that there must more than a mere inconvenience on the manifestation of one’s religious beliefs, therefore it must be found to be a material infringement on religious rights.\textsuperscript{139} This decision plainly opposes the more sensitive manner American courts use when analyzing Free Exercise cases.

Conclusion

One should notice that the plaintiffs in this case asserted several claims under both the European Convention for Human Rights and the Education Act. However, in the judge’s opinion neither one of these enactments appeared to hold more weight than the other. This is particularly different from the United States, where plaintiffs usually assert that one piece of legislation violates the Constitution, the supreme law of the land. The lynchpin to the difference between the two countries is in Great Britain judges can simply refuse to accommodate individuals based on prior precedent. Although Great Britain wants to guarantee all of its citizens certain freedoms, fewer exemptions seem to be granted in Great Britain because the plaintiffs have a harder time defining the right and demonstrating that there was a material violation.

\textsuperscript{138} \textit{Id.} ¶ 39.

\textsuperscript{139} \textit{Id.} ¶ 40.