ARTICLES AND SURVEYS

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VOLUME 30
NUMBER 1
FALL 2005
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PEDIGREE OF AN UNUSUAL BLAINE AMENDMENT: ARTICLE I, SECTION 3 INTERPRETED AND IMPLEMENTED IN FLORIDA EDUCATION

NATHAN A. ADAMS, IV*

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In 1875, Representative James G. Blaine introduced into the United States House of Representatives a proposed constitutional amendment that would have barred states from spending public funds on “sectarian” institutions—which were commonly understood as Catholic parochial schools—while preserving Protestant instruction in the public schools. The amend-

1. See Mitchell v. Helms, 530 U.S. 793, 828 (2000) (plurality opinion). “If it was an open secret that ‘sectarian’ was code for ‘Catholic.’” Id. (citing Steven K. Green, The Blaine Amendment Reconsidered, 36 AM. J. LEGAL HIST. 38, 41-43 (1992)); Zelman v. Simmons-Harris, 536 U.S. 639, 721 (2002) (Breyer, J., dissenting) (noting the purpose of federal and state Blaine amendment movements was “to make certain that government would not help pay for ‘sectarian’ (i.e., Catholic) schooling for children”); Douglas Laycock, The Underlying Unity of Separation and Neutrality, 46 EMORY L.J. 43, 50 (1997) (“Although there were legitimate arguments to be made on both sides, the nineteenth century opposition to funding religious schools drew heavily on anti-Catholicism.”); Ira C. Lupu, The Increasingly Anach-
ment passed though the House, 180 to 7, but fell 4 votes shy in the Senate. All the same, the amendment enjoyed enough popular nativist support that Congress required new states to adopt this language in their constitutions as a condition of joining the union. In addition, many existing states, including Florida, voluntarily adopted the language.

Florida first adopted its Blaine Amendment—the last phrase of the declaration of rights, section 6—later than most other states in 1885, and then readopted it with changes in the last sentence in article I, section 3 in 1968.
No convention records illuminate the intent of the framers who adopted the 1885 amendment. Convention records from 1968 are not any more helpful. The amendment shares with other states similar text and a common relationship with bigotry. In fact, the same Florida convention that in 1885 enacted the declaration of rights, section 6, precluding aid to sectarian institutions, adopted the separate but equal racial doctrine.

Nevertheless, this article reveals that even in the area most closely linked to the declaration of rights, section 6—education—it has nearly always coexisted with the equal participation of religious persons in neutral, generally applicable public programs with a secular purpose. The exception pertains to a brief interlude from the 1910s to the world wars when anti-Catholic religious bigotry dominated Florida’s headlines. This article examines the key factors influencing the Supreme Court of Florida’s unique historical interpretation of the state Blaine Amendment, as well as the non-exclusionary implementation of it by the Florida Legislature and lesser legislative bodies. This history is especially important now that article I, section 3 has become the primary tool in lieu of the federal Establishment Clause for challenging Florida school choice.

When called upon to construe the Bill of Rights, the Supreme Court of Florida has instructed state courts to examine “the express language of the constitutional provision, its formative history, both preexisting and develop-

There shall be no law respecting the establishment of religion or prohibiting or penalizing the free exercise thereof. Religious freedom shall not justify practices inconsistent with public morals, peace or safety. No revenue of the state or any political subdivision or agency thereof shall ever be taken from the public treasury directly or indirectly in aid of any church, sect, or religious denomination or in aid of any sectarian institution.

Id. (emphasis added).

8. The rough chronology of the amendment’s adoption is available. See Fla. Const. Convention, J. of the Proceedings, at 118–91, 575–90 (1885). The committee presented a report on then-section 22. Id. at 118. The committee read and passed the provision without amendment. Id. at 183–91. The section was renumbered as section 6 without amendment. Id. at 575–77, 590; see also Proceedings of the Constitutional Convention, Wkly. Floridian, June 25, 1885 (Supp.) (committee reported Bill of Rights with section 22); Wkly. Floridian, July 2, 1885 (indicating “[t]he Preamble and Declaration of Rights was . . . spread upon the Journal”); Wkly. Floridian, July 9, 1885 (indicating committee read and passed Preamble and Declaration of Rights, modifying only section 8 (concerning infamous crime)); Constitution Adopted by the Convention of 1885, Wkly. Floridian, Aug. 6, 1885 (renumbering occurred by August 6, 1885).


10. See Fla. Const. art. I, § 3; see, e.g., Ariz. Const. art. IX, § 10; Nev. Const. art. XI, § 2.

ing state law, evolving customs, traditions and attitudes within the state, the state's own general history, and finally any external influences that may have shaped state law.\textsuperscript{12} Weighing these factors in the field of education, the conclusion of this article is that it is more consistent with the state Blaine amendment's pedigree and precedent and with other constitutional prohibitions to perpetuate existing precedent by limiting Blaine's reach to other than religiously-neutral public programs of general eligibility with a secular purpose. The alternative urged by no-aid-separationists would prohibit an entire class of persons from assisting with Florida's most pressing educational and other social needs and communicate a message that religious persons are unequal participants in the public square.

II. PEDIGREE OF THE FLORIDA BLAINE AMENDMENT

When interpreting the state's Bill of Rights, the Supreme Court of Florida directs courts to "focus primarily on factors that inhere in their own unique state experience."\textsuperscript{13} It is precisely these differences that have led the Court to give an unusual interpretation to Florida's Blaine Amendment and the Legislature to implement it in a less exclusionary fashion. The key variables influencing this history are not exceptional. As elsewhere in the United States, the history of Florida's Blaine Amendment is irrevocably linked to the progress of the common school movement and immigration, urbanization, and industrialization. What is distinctive is the speed and extent of the developments.

The common school movement, in Florida and elsewhere, taught a "common religion" that was essentially Protestant in character, requiring until the 1960s, daily reading from the King James Bible, prayer, and other Protestant religious observances in the public schools.\textsuperscript{14} Nationally, Blaine amendments diffused as a reaction to Roman Catholic opposition to the common religion and the request for equal public funding for parochial schools.\textsuperscript{15} In Florida, the Protestant reaction was muted and postponed by the slow pace of the Florida common school movement,\textsuperscript{16} Florida's tradition of religious

\begin{footnotesize}
\begin{enumerate}
\item[12.] Traylor v. State, 596 So. 2d 957, 962 (Fla. 1992).
\item[13.] Id.
\item[14.] See Chamberlin v. Dade County Bd. of Pub. Instruction, 143 So. 2d 21, 23 (Fla. 1962), rev'd, 377 U.S. 402 (1964) (referencing Fla. Stat. § 231.09 (1961)).
\item[15.] See VITERITTI, supra note 1, at 151–52.
\item[16.] 1 HARRY GARDNER CUTLER, HISTORY OF FLORIDA: PAST AND PRESENT 221 (1923).
\end{enumerate}
\end{footnotesize}
pluralism, and delayed and less substantial foreign Catholic immigration, urbanization, and industrialization.

A. Florida Public Education Before the Civil War

Florida had a nascent *de jure*, but not a *de facto* common school system prior to the Civil War. Consequently, private schools were crucial in Florida's pioneer days. Frequently, religious schools were the only available schools. What little public funding existed for education was shared with religious schools. Religious pluralism and tolerance was a tradition in Florida. In the 1850s, not even the Know-Nothing Party propagated an anti-Catholic message in Florida.

1. Religious Tolerance

Unlike a number of northeastern states, Florida never had an established church. Roman Catholics were obviously St. Augustine's first European settlers, but their numbers in mid-nineteenth century Florida were small. Alongside Catholics in St. Augustine, Jews arrived in the 1780s; Presbyterians arrived in 1824; Episcopalians appeared in St. Augustine in 1821; and Methodists came to Pensacola in 1821. "Baptists [arrived] in Nassau County in 1821 and in Bethlehem in 1825." Florida enjoyed religious diversity in the early 1800s, but Protestants were by far the largest religious group.

19. See id.
20. See id.
21. See id. at 222–23.
26. Id.
27. Id.
In 1850, the largest Protestant denomination in Florida was the Methodists, who had eighty-seven churches with property valued at $55,260, accommodating 20,015 members. The Baptists were the next largest denomination with fifty-six churches and property valued at $25,640, accommodating 11,985 members. Presbyterians had sixteen churches with property valued at $31,500 and accommodating 5900 members. Episcopalians had ten churches with property valued at $37,800 and accommodating 3810 members. Roman Catholics had but five churches with property valued at $13,600 and accommodating 1850 members.

"Scholars report that by the mid-[nineteenth] century religious conflict over matters such as Bible reading 'grew intense,' as Catholics resisted and Protestants fought back to preserve their domination." But in frontier Florida, Protestant-Catholic relations were generally cordial. Before the Civil War, the only recorded anti-Catholic riot occurred in St. Augustine in 1848, in response to an anti-Catholic book published by a non-Floridian about the city's Catholic population. "On the frontier everybody chipped in to help one another." For example, in 1858, one observer recounted: "Catholics and Protestants alike generously contributed to . . . the construction of a Catholic church in Tampa."

2. The Age of Private Religious Education

a. The Territorial Years

Florida's tradition of religious tolerance positively influenced education, which was essentially private and sectarian until the 1840s, then sectarian, but evenly split between public and private schools until the Civil
War. The very first common school law in Florida was federal. In 1822, when Florida became a territory, Congress reserved every sixteenth section of land throughout the territory for the purpose of supporting primary schools. The federal limitation on the land grant was in the nature of a trust condition for the purpose of establishing a public school system.

On January 29, 1827, Congress authorized the Governor and Territorial Legislature to preserve and lease the lands and appropriate the funds for schools. The legislature implemented this in 1828 and appointed trustees of the school lands to preserve the lands, collect rent, and select up to twenty acres in every sixteenth-section for the erection of a school. When this led to the rental of but five sections of land for an annual rent of $101.50, the legislative council conferred power in 1832 on the people of the townships to elect commissioners of the sixteenth-sections, and then in 1834, removed the authority to county judges.

Fueled by these developments, on January 22, 1831, the short-lived Florida Education Society in Tallahassee was founded and thereafter, spun-off auxiliary societies. The Educational Society at St. Augustine recorded the first effort to establish a common school in 1831, albeit with the general apathy of the people with respect to education, racial prejudices, and the obstacles caused by a scattered small population, as discussed in the Society’s annals. Efforts in Tallahassee to found a common school also failed in the early 1830s, when promoters found they could not sell, instead of lease, the sixteenth-section lands. The education societies were abandoned altogether around the same time.

This left education in Florida entirely to private schools. As elsewhere in the United States, the first schools in frontier Florida were Protestant. The typical pattern was for a church or a family of means to commence an

41. See id. at 221.
42. Thomas Everette Cochran, History of Public-School Education in Florida 1 (1921).
43. Id. at 5.
44. Id. (citation omitted).
45. Id. at 6 (citing Act of Nov. 21, 1828, 1828 Fla. Territory Laws 247, 247–248 (to provide for laying out the school lands in this Territory)).
46. Id. at 6–7 (citations omitted).
47. Cochran, supra note 42, at 1–2.
48. Id. at 2–3.
49. Id. at 4.
50. Id. at 4–5.
“academy” or “institute.”

In 1827, Reverend Henry White founded Leon County’s and potentially Florida’s first school, Leon Academy. In 1834–1835, Episcopalian Reverend Alva Bennett opened Key West’s first school after a resolution of the town council. Likewise, in frontier Tampa in 1848–1854, Methodist minister Jasper K. Glover and Presbyterian minister Edmund Lee and his wife founded private schools utilizing books furnished by the churches. Classes produced numerous teachers “who instructed generations of Manatee and Hillsborough County young people,” attending both private and public schools. Through the 1830s, it is fair to say that private religious education was essentially the only choice in Florida.

Nevertheless, the Territorial Legislature continued its efforts to create an authentic common school system. The Act of 1835 directed the register of the land office to select portions of sixteenth-sections “for schools, seminaries, and other purposes;” the Acts of 1836 and 1837 directed the territorial treasurer to demand money due from the rent of sixteenth-sections and to prosecute trespassers; the Act of 1839, termed the first general school law, directed three elected trustees in each town to establish common schools where they did not exist from land revenue and to set aside two percent of the territorial tax and auction duties for the education of poor orphan children; the Acts of 1843 and 1844 removed authority from the trustees to sheriffs to look after the education of poor children; and the Acts of 1845 provided that judges should officiate as superintendents of common schools, elected trustees should report to them, and the Governor could select private lands in place of sixteenth-sections for schools.

52. Id. at 15, 33–34.
55. 1 JAMES W. COVINGTON, THE STORY OF SOUTHWESTERN FLORIDA 308 (1957); BROWN, supra note 51, at 11.
56. BROWN, supra note 51, at 11.
57. COCHRAN, supra note 42, at 1, 5–10.
58. Id. at 7 (citation omitted).
59. Id. (citing Act of Feb. 13, 1836, 1836 Fla. Territory Laws 42–43 (amendatory of the several Acts relating to the School Lands in the Territory of Florida)).
60. Id. at 8 (citing Act of Mar. 2, 1839, 1839 Fla. Territory Laws 15–16 (to raise a fund by taxation for the education of Poor Children)); see also CUTLER, supra note 16, at 220.
61. COCHRAN, supra note 42, at 8 (citing Act of Mar. 15, 1843, 1843 Fla. Territory Laws 34–36 (concerning School Lands); Act of Mar. 15, 1844, 1844 Fla. Territory Laws 61–65 (to Incorporate the Inhabitants of the different Townships of this Territory, for the institution and establishment of common schools)).
62. Id. at 9 (citing Ch. 21–(No. 21), § 1, 1845 Fla. Laws, 40, 40).
By all reports, many of these laws were ignored and public school funds criminally squandered or not collected, so that by 1842, the public school fund had a deficit. Governor R.K. Call reported to the Territorial Legislature in 1843 that "in many of the counties, at least, no attention whatever has been paid" to the Act of 1834, and that the territorial treasurer's duties in Tallahassee prevented him from effectively enforcing the Acts of 1836 and 1837. Governor W.D. Moseley announced in 1846 that the laws were so poorly enforced that trespassers on school lands were common and that rents received were "humiliating, shamefully neglected or criminally squandered." Moreover, the Territorial Legislature made no provision for taxation in support of common schools, erecting or maintaining common schools, school or teacher standards, or school terms. Public education was left to a few willing counties which offered a free education only to a handful of poor children. Monroe and Franklin Counties led the way with Monroe County providing for the education of thirty children in Key West from county taxes in 1843, notwithstanding the absence of any state authority for the tax.

b. Florida Becomes a State

Florida became a state in 1845. In An Act Supplemental to the Act for the Admission of Florida and Iowa into the Union, Congress restated its condition on the grant of sixteen-section lands. Article X, section 1 of Florida's first constitution incorporated the condition:

The proceeds of all lands that have been, or may hereafter be, granted by the United States for the use of schools and a seminary or seminaries of learning, shall be and remain a perpetual fund, the interest of which, together with all moneys derived from any other source . . . shall be inviolably appropriated to

63. CUTLER, supra note 16, at 220.
64. COCHRAN, supra note 42, at 7–8 (citing FLA. H.R. JOUR. 19–20 (Terr. Sess. 1843); FLA. S. JOUR. 23 (Terr. Sess. 1843)).
65. Id. at 11–12 (quoting FLA. H.R. JOUR. 7 (Reg. Sess. 1846); Fla. S. Jour. 6 (Reg. Sess. 1846)).
66. Id. at 11.
67. Id. at 12.
68. BROWNE, supra note 54, at 21; accord COCHRAN, supra note 42, at 12.
69. COCHRAN, supra note 42, at 11.
70. An Act for the Admission of the States of Iowa and Florida into the Union, ch. 48, 5 Stat. 742, 742 (1845).
71. Ch. 75, 5 Stat. 788 (1845).
72. Ch. 75, 5 Stat. at 788.
the use of schools and seminaries of learning, respectively, and to no other purpose.\textsuperscript{73}

In 1846, the Florida Legislature authorized the rental of the sixteenth-section lands,\textsuperscript{74} and their sale in 1848, as the system of renting was unprofitable.\textsuperscript{75} The Florida Legislature directed preservation of the proceeds in a permanent common school fund.\textsuperscript{76} The State School Trust Fund (School Fund) remains part of Florida law,\textsuperscript{77} although its importance for funding education has vastly diminished. Nevertheless, in the 1840s, gains in public education made possible by sixteenth-section lands were impressive enough that according to federal census records, common schools began to educate more students than private schools.\textsuperscript{78} In 1840, eighteen private schools served 732 pupils, compared to fifty-one common schools serving 925 pupils.\textsuperscript{79} In 1850, thirty-four private schools served 1251 pupils, compared to sixty-nine common schools serving roughly 1878 pupils.\textsuperscript{80} Of course, the public schools of the 1850s-1860s were nothing like today's schools; the line between common schools and volunteer civic and religious groups was blurry.

In the early years of the common school movement, the schools looked more like "private-public institution[s]."\textsuperscript{81} Florida counties commonly designated private religious schools as public schools,\textsuperscript{82} as Pasco County did for a number of Catholic schools.\textsuperscript{83} "Tax money was used for [their] upkeep, with no qualms about the First Amendment."\textsuperscript{84} Alternatively, the first public schools commonly met in church buildings.\textsuperscript{85} For example, Hillsborough County did not erect its first school building in Tampa until 1878, but relied instead upon the facilities of religious and civic organizations.\textsuperscript{86}

\textsuperscript{73} FLA. CONST. of 1838, art. X, § 1. A condition of statehood was that the Territory of Florida adopt a state constitution, which became effective in 1845. \textit{See} U.S. CONST. art. IV, § 4.

\textsuperscript{74} Ch. 93-(No. 23), § 3, 1846 Fla. Laws 47, 48.

\textsuperscript{75} COCHRAN, \textit{supra} note 42 at 16 (citation omitted).

\textsuperscript{76} Id. (citation omitted).

\textsuperscript{77} \textit{See} FLA. STAT. § 1010.71(1)(a) (2004).

\textsuperscript{78} \textit{See} COCHRAN, \textit{supra} note 42, at 27 tbl.1.

\textsuperscript{79} Id.

\textsuperscript{80} Id.

\textsuperscript{81} COVINGTON, \textit{supra} note 55, at 308.

\textsuperscript{82} \textit{See} McNALLY I, supra note 22, at 148-49.

\textsuperscript{83} Id.

\textsuperscript{84} Id. at 149.

\textsuperscript{85} \textit{See} BROWN, \textit{supra} note 51, at 19, 34, 54, 57-58.

\textsuperscript{86} Id. at 57.
More private schools than public schools existed in 1860. There were ninety-seven public schools with ninety-eight public school teachers with an annual income of approximately $20,000, compared to 138 private schools with 185 teachers and an annual income of approximately $75,000. By comparison, Massachusetts, where the common school movement began, boasted 4134 public schools with 5308 public school teachers with an annual income of $1,545,454.

3. Florida Know-Nothingism

Commencing in the 1850s, the Know-Nothing, or American Party, came into national prominence as the successor to the failing Whig Party and reached its peak strength in Florida in 1856, then rapidly dissolved here due to its moderate orientation on state’s rights and slavery. Nationally, the Know-Nothing platform required reading of the King James Bible in common schools; favored constitutional amendments limiting or depriving suffrage and public office-holding by Catholics; banned foreign language instruction; limited immigration; and prevented immigrants from holding state jobs. The first Blaine-like constitutional amendment was passed by the Know-Nothing Party in the cradle of the common school movement in Massachusetts.

Know-Nothingism is linked to the wave of Catholic and Jewish immigration to the United States in the mid-nineteenth century. This influx gave voice to opponents of the common religion. In 1840, the Very Reverend

87. Herbert J. Doherty, Jr., Florida in 1856, 35 FLA. HIST. Q. 60, 63 (1956).
90. NINTH CENSUS POPULATION, supra note 88, at 453.
91. Thompson, supra note 33, at 42.
92. Id. at 59.
94. Prior to its amendment, the original Eighteenth Article of Amendment provided that “[a]ll moneys . . . which may be appropriated by the state for the support of common schools . . . shall never be appropriated to any religious sect for the maintenance exclusively of its own schools.” Mass. Const. amend. art. XVIII, historical notes.
96. Id. at 6.
John Power, Vicar-General of the Roman Catholic Diocese of New York, explained Catholic resistance as follows: "The Catholic Church tells her children that they must be taught religion by AUTHORITY -- The Sects say, read the bible [sic], judge for yourselves." \(^{97}\) Beginning that year where Catholic immigrants concentrated, the Catholic Church launched an offensive to forbid devotional Bible reading in the common schools and obtain tax exemptions and public funding for parochial schools "to preserve youth from the deleterious effects of Protestantism or secularism." \(^{98}\)

The wave of Catholic immigrants dissenting from the common religion in the northeast came later, in less substantial numbers, and predominately from different countries to Florida. \(^{99}\) Foreign-born Floridians accounted for just 3% of the state's population in 1850, and even by 1890, just 6% of the population. \(^{100}\) By comparison, foreigners in Massachusetts accounted for 16% of the population in 1850, and by 1890 equaled 30% of the population. \(^{101}\) In 1850, Florida's urban centers included Key West with a population of 1825 persons; Pensacola with 1073 persons; St. Augustine with 1213 persons; Tampa with 631 persons; and Jacksonville with 532 persons. \(^{102}\) Catholic immigrants settled in Duval, Escambia, Monroe, and St. Johns County. \(^{103}\) In 1860, the Irish (25%), Germans (15%), and West Indians (28%) comprised Florida's largest immigrant groups; \(^{104}\) however, the Irish and Germans, who American Party activists most vilified, constituted less than 1% of Florida's total population. \(^{105}\)

With so few Catholic immigrants in Florida, and a still nascent common school movement, Florida Know-Nothingism proved nationally distinct. \(^{106}\) Although Democrats branded them as religiously intolerant and abolition-
ists, the Florida American Party platform disapproved the national platform with respect to religious intolerance, states’ rights, and slavery. The Party did not emphasize anti-Catholicism, although there were certainly party leaders who were unabashedly anti-Catholic and opposed to “foreignism,” and others including Governor R.K. Call, critical of any “higher allegiance’ to the Pope.” Yet the state’s demurer from the national platform favoring anti-Catholicism is significant. Although other states discriminated against Catholics in public law prior to the Civil War, Florida did not.

4. The Common School System Matures

In 1849, the legislature approved the first general law for the State of Florida, authorizing the establishment of common schools for white children with the register of the land office as the state superintendent, probate judges as county superintendents, and local elected boards of trustees who were to be elected by the taxpayers of the various school districts each year. The legislature augmented the school fund by adding to the sale of sixteenth-sections the “net proceeds of five percent of other public lands, and of all escheated property, and of all wreckage, and flotsam found on the coast.”

In January 1851, the legislature approved the first “tax on both real and personal property for the support of the common schools” not to exceed four

107. Id. at 45.
108. Id. at 46. The Florida platform stated with respect to religious intolerance as follows: That the American Party of Florida unqualifiedly condemns and will endeavor to counteract all efforts by any sect or party to bring about a union of Church and State, and utterly disclaim any intention to prescribe a religious test as a qualification for office, and that in advocating the principles of the American Party, we wish it distinctly understood that we maintain the right of every citizen to the full, free and unrestricted exercise of his own religious opinions and worship.

Id. (citation omitted); accord OVERDYKE, supra note 23, at 227.

109. Doherty, supra note 87, at 67; OVERDYKE, supra note 23, at 227–28; Thompson, supra note 33, at 49.

110. Spessard Stone, The Know-Nothings of Hillsborough County, 19 SUNLAND TRIB. 3, 3 (1993); Thompson, supra note 33, at 43.

111. OVERDYKE, supra note 23, at 227. Governor R.K. Call said “that while some of his best friends were Catholics, he was willing to declare ‘resistance to the aggressive policy and corrupting tendencies of the Roman Catholic Church.’ He was alarmed over ‘higher allegiance’ to the Pope.” Id. At the Florida American State Convention, “R.K. Call presided and delivered a typical nativistic speech.” Id. at 76.

112. See id. at 227; accord Thompson, supra note 33, at 46.

113. COCHRAN, supra note 42, at 16–17 (citing Ch. 229–(No. 21), 1849 Fla. Laws 25).

114. CUTLER, supra note 16, at 221; accord COCHRAN, supra note 42, at 18;
dollars annually for each school-aged child;\textsuperscript{115} added to the school fund proceeds from the sale of slaves;\textsuperscript{116} and required the state superintendent to notify the comptroller of counties where the money arising from the interest of the school fund was insufficient to allow two dollars to be given annually for the education of school-aged children, so the comptroller could make up the difference.\textsuperscript{117}

Also, in 1851, the Florida Legislature authorized two seminaries of learning,\textsuperscript{118} both committed to the common religion and led by Protestant clergy.\textsuperscript{119} East Florida Seminary (1853–1905) and West Florida Seminary (1857–1901), the forebears of, respectively, the University of Florida and Florida State University, initially concerned themselves primarily with basic elementary education.\textsuperscript{120} Constructed with public funds,\textsuperscript{121} they subsisted in the 1850s primarily upon income from the school fund,\textsuperscript{122} and an annuity from their city of origin (respectively, Ocala and Tallahassee), together with tuition and donations.\textsuperscript{123} The annuity has been hailed by common school

\textsuperscript{115} COCHRAN, supra note 42, at 19 (citing Ch. 343–(No. 32), 1850 Fla. Laws 104); see CUTLER, supra note 16, at 221; BROWN, supra note 51, at 18–19.

\textsuperscript{116} COCHRAN, supra note 42, at 19 (citing Ch. 341–(No. 30), 1850 Fla. Laws 103).

\textsuperscript{117} Id. (citing Ch. 340–(No. 29), 1850 Fla. Laws 102).

\textsuperscript{118} BROWN, supra note 51, at 10.

\textsuperscript{119} West Florida Seminary initially had a strong Presbyterian influence as two of its original presidents were former Presbyterian ministers: Rev. Duncan McNeill Turner (1857–1860) (former Pastor of the Presbyterian Church of Tallahassee) and Rev. Levi H. Parsons (1864). WILLIAM G. DODD, HISTORY OF WEST FLORIDA SEMINARY 9, 24 (1952). East Florida Seminary was at first the idea of the Florida Conference of the Methodist Church. See Charles L. Crow, East Florida Seminary–Ocala (1852) (citation omitted). Later, East Florida Seminary had as principal Edward W. Meaney, an Episcopal priest, and rector of Holy Trinity Episcopal Church in Gainesville. SAMUEL PROCTOR & WRIGHT LANGLEY, GATOR HISTORY: A PICTORIAL HISTORY OF THE UNIVERSITY OF FLORIDA 19 (1986).

\textsuperscript{120} BROWN, supra note 51, at 10; COCHRAN, supra note 42, at 154–55. Harry Gardner Cutler refers to West Florida Seminary as the first bona fide common school in the state, but other evidence set forth above belies this. CUTLER, supra note 16, at 221.

\textsuperscript{121} See PROCTOR & LANGLEY, supra note 119, at 21. East Florida Seminary “received $28,300 in state appropriations for buildings and another $20,000 ‘for general purposes.’” Id.; STATE SEMINARY WEST OF THE SUWANNEE, CATALOGUE 7 (1897–98) [hereinafter STATE SEMINARY WEST, CATALOGUE] (“The City of Tallahassee gave to the State, as an inducement, the property known as the Florida Institute, embracing about ten acres of land and a new two-story brick building, with the furniture and other appliances, valued at $10,000.”).

\textsuperscript{122} See generally PROCTOR & LANGLEY, supra note 119, at 21 (“Annual income from the Agricultural Land Fund [for East Florida Seminary] was $9,000 in 1890, but only $7,700 in 1903.”).

\textsuperscript{123} DODD, supra note 119, at 3; accord CUTLER, supra note 16, at 221.
advocates as "'among the earliest attempts in the South to support schools by taxation.'"\textsuperscript{124}

In its last education enactment before the Civil War, the legislature in 1853, named the register of public lands to be the state superintendent of schools and gave additional responsibilities to county commissioners and probate judges, including fixing the length of the school year and requiring probate judges to employ and discharge teachers.\textsuperscript{125} Reviewing Florida's public educational accomplishments in 1854, State Superintendent David S. Walker said, "[w]ith the exception of the counties of Monroe and Franklin . . . I have heard of none that have contributed anything from the county treasury for the augmentation of the school money received from the State."\textsuperscript{126}

Apathy was widespread.\textsuperscript{127} Reports suggest that parents who could afford tuition resented the idea that they should pay taxes to send other people's children to school.\textsuperscript{128} Some counties like Hillsborough County reacted to the general laws by differentiating school districts, but without creating "a true or free public school system."\textsuperscript{129} Tuition was subsidized, but not usually free; the school year was but six weeks to three months long;\textsuperscript{130} and school buildings were the exception, so classes continued to meet in church and civic buildings or other borrowed properties.\textsuperscript{131}

Up to the Civil War, private schools and public-private partnerships were obviously far more critical to education in Florida up to the Civil War than in the northeast. Due partly to these reasons and because the executive, legislature, and probate court were in agreement that funding students attending private religious schools and common schools teaching a common religion was constitutional, records indicate that public subsidization of parochial education was commonplace.\textsuperscript{132} According to census records (which were likely understated because of the blurring of public and private schools) pri-

\textsuperscript{124} Rhodes, supra note 53, at 22 (quoting GEORGE GARY BUSH, HISTORY OF EDUCATION IN FLORIDA 16 (Bureau of Education Circular of Information No. 7, 1888) (1889)). Apart from the "one which ran for a short while in St. Augustine in 1832," the school was the "first real public school in the state operated on a substantial basis." \textit{Id}.

\textsuperscript{125} COCHRAN, supra note 42, at 19–21.

\textsuperscript{126} \textit{Id}. at 23; accord CUTLER, supra note 16, at 221.

\textsuperscript{127} COCHRAN, supra note 42, at 26.

\textsuperscript{128} BROWN, supra note 51, at 33; see also WILLIAM F. BLACKMAN, HISTORY OF ORANGE COUNTY FLORIDA 48 (1973) (deeming public schools to be pauper schools).

\textsuperscript{129} BROWN, supra note 51, at 18.

\textsuperscript{130} \textit{Id}.

\textsuperscript{131} \textit{Id}. at 19; see W.L. STRAUB, HISTORY OF PINELLAS COUNTY, FLORIDA 64 (1929).

\textsuperscript{132} See BROWN, supra note 51, at 18; COCHRAN, supra note 42, at 25 ("[D]uring the early fifties the money received from public funds was used in many of the counties to subsidize favorite private schools.").
vate schools received five percent of their budgets from public sources in 1860, and more than double this amount in 1870.133

B. Florida's Reconstruction

During the Civil War, a majority of Florida schools closed and the state spent most of the principal of the common school fund on munitions.134 Yet the state emerged with a constitution and laws the most committed yet to public education.135 By the 1870s, the state began more carefully distinguishing public from private schools while still funding private religious education, alongside the separate but equal racial doctrine even after enactment of the declaration of rights, section 6.136 The delayed start of public education, along with delayed and less substantial immigration from different countries, postponed any nativist reaction until the Twentieth Century.137

1. Florida Enacts a Constitutional Common School System

Some deem the Constitution of 1868 the real beginning of common education in Florida, some forty years after the national commencement of the movement.138 The Constitution of 1868 made provision for certain tax revenue and impliedly prohibited use for other schools by stating that the interest of the School Fund "shall be exclusively applied to the support and maintenance of common schools."139 No such constitutional limitation applied to school funds generated by counties or municipalities.140 The Constitution of 1868 also set penalties in terms of lost educational dollars for counties failing to raise tax revenue for education and enacted an appointed State

133. NINTH CENSUS POPULATION, supra note 88, at 455–56; accord COCHRAN, supra note 42, at 27 tbl.I.
134. BROWN, supra note 51, at 40; COCHRAN, supra note 42, at 28.
135. See COCHRAN, supra note 42, at 34.
136. See BROWN, supra note 51, at 66; COCHRAN, supra note 42, at 52.
137. See infra Part II.E.
138. BROWN, supra note 51, at 66; COCHRAN, supra note 42, at 36–37 (the Constitution of 1868 incorporated "the first common-school law which succeeded in creating a real system of public education"); CUTLER, supra note 16, at 221; DODD, supra note 119, at 31 (citing Ch. 1686–(No.2), 1869 Fla. Laws 7);

The period [prior to 1868] is one in which can be seen only the beginnings of the ideas of public school education for all the people. It remained for the constitution of 1868, and the school law of 1869 to create a public school system even in the mere legal sense of the term.

Rhodes, supra note 53, at 29.
139. FLA. CONST. of 1868, art. VIII, § 4.
140. See id.
Board of Education comprised of the Superintendent of Public Instruction appointed by the Governor and confirmed by the Senate, Secretary of State, and Attorney General.\footnote{See COCHRAN, supra note 42, at 34–36 (citing FLA. CONST. of 1868, art. VIII, §§ 8–9); ERNEST L. ROBINSON, HISTORY OF HILLSBOROUGH COUNTY FLORIDA 128 (1928).}

The School Law of 1869 implemented the Constitution of 1868 by mandating a “uniform system of public instruction,” open without charge “to all the youth residing in the State between the ages of six and twenty-one” without respect to race; establishing a board of education in each county appointed by the State Board of Education; creating a county school superintendent appointed by the Governor and local school trustees appointed by the county boards of education; requiring the state superintendent to establish teacher licensing requirements; setting a minimum three-month school year; imposing a state tax on property; and authorizing a county tax on property.\footnote{COCHRAN, supra note 42, at 36–45 (citations omitted); see also BROWN, supra note 51, at 50–51 (the 1869 school law did not require racial segregation).} The law authorized county boards to establish not only elementary, but also heretofore unknown secondary schools.\footnote{COCHRAN, supra note 42, at 44.} It reserved authority over post-secondary education for the State Board of Education, but entitled county boards of education to send pupils in the ratio that they sent representatives to the legislature.\footnote{Id.}

Florida did not fully implement the School Law of 1869 for over a decade because of the State’s poor fiscal situation, resentment toward carpet-baggers and Reconstruction, racial prejudice, the still scattered and sparse population, and the opposition affluent residents voiced about paying taxes to send other peoples’ children to school.\footnote{Id. at 49, 54, 72; BROWN, supra note 51, at 51; Rhodes, supra note 53, at 45.} Some school board members refused appointments and the school boards dragged their feet.\footnote{BROWN, supra note 51, at 51.} Nevertheless, by 1870, Florida’s public schools once again had the edge in numbers over Florida’s private schools, were near parity in spending, and would never again look back; 226 public schools with 265 public school teachers and an annual income of $76,389, compared to 151 private schools with 217 private school teachers and an annual income of $78,180.\footnote{NINTH CENSUS POPULATION, supra note 88, at 452, 454–55 (private school figures combined).} Inflaming racial prejudice, many of the new schools begun by Republicans were for blacks.\footnote{See BROWN, supra note 51, at 50–51.}
Roughly seventy-seven percent of the state educational budget for the year 1868 was spent on educating African-Americans. 149

The number of children attending Florida common schools skyrocketed between 1870 and 1880 and the number of public schools increased five-fold to 1135 with 1151 public teachers and an annual income of $129,907. 150 In 1860, Florida private schools taught more children than Florida public schools; there were 2032 public school children and 4486 private school children. 151 By 1870, schools designated “public” taught considerably more children; there were 10,132 public school children and 4538 private school children. 152 The number of public school children increased more than four-fold between 1870 and 1880 to 43,304 public school children. 153 As in earlier periods, however, the line between public and private schools remained blurred in the 1870s. 154

2. Public and Private Schools Still Blurred

Some so-called common schools were really private religious schools. 155 For example, in October 1878, St. Johns County agreed to treat a Catholic parochial school as part of the public school system. 156 The county entered the following notation: “PUBLIC SCHOOL NO. 12—Sisters of St. Joseph, St. George Street; 180 pupils, Teachers—Sister Gertrude Capo, Sister Agnes Hernandez, Sister Mary Fitz-Simmons.” 157 The school building was owned by the Sisters of St. Joseph and was the only grade school in St.

149. See id. at 50; see also id. at 28–31. To make up for the exhaustion of the seminary fund for munitions, another twenty-four percent of the state educational budget was spent on direct legislative appropriations to the seminaries equal to what they might otherwise have received from the fund. Id. at 50.

150. Compare Office of the Secretary of the Interior, The Tenth Census of the United States: 1880, Population of the United States 916–17 (1882), [hereinafter Tenth Census Population] with Ninth Census Population, supra note 88, at 452. Some of these public schools may not have been in operation. McNally I, supra note 22, at 50. “As of 1880 Hillsborough County had forty-nine schools, but not all were in operation . . . .” Id.


152. Id. at 452, 454–55.


154. Cochran, supra note 42, at 52.

155. Id.


157. Id. (citation omitted).
Augustine. The same thing happened in 1883 in St. Ambrose, and after the adoption of the state Blaine Amendment in 1892 in Mandarin (which became Loretto) in Duval County. Duval County actually erected the school building for the Sisters in Mandarin on property donated by a Catholic family. The Sisters of Saint Joseph were required to receive training and take an exam, utilize approved texts, restrict religious instruction to after-school hours, and submit to monthly inspections.

Altogether, in the 1870s at least fifteen percent of the budget of private schools came from public funding. With respect to bona fide common schools, public school buildings were scarce through the 1870s, and disagreement persisted over which three months were best for common education in frontier Florida. Taxpayers opposed the erection of school buildings as exceeding school board authority. Public schools continued to meet in church and civic buildings, usually rent-free. Manatee County erected its first school house in 1873, Key West constructed its first public school building in 1874, and Tampa erected its first public school in 1876. The State lacked a common course of study, common textbooks, or textbooks at all until 1883, and had a "small and poorly trained teaching force." In frontier towns especially, parochial education was key. Accordingly, the Sisters of Saint Joseph opened some of the first grade schools: in Orlando in October 1889; in Ybor City for latins in 1891 and for blacks in 1903; and in Miami in March 1905.
In the 1880s, Florida’s fiscal situation improved, permitting faster growth in public education in the next decade so that the number of pupils more than doubled between 1880 and 1890 to 91,188 public school children and 6304 private school children. The assessed value of state educational property also more than doubled between 1870 and 1884. State educational expenditures invested in the School Fund doubled, but Democrats who regained control of Florida in 1877, redirected public funds from black schools, while increasing appropriations to the seminaries in the 1880s, which began adding secondary-level courses. Public sentiment began to favor common schools as reflected most notably by the increasing number of counties approving and increasing local levies for their support: from “eleven counties with an average school tax of but one and one-half mills . . . in 1870 [to] thirty-nine counties with an average school tax of a little over three mills” in 1884. Yet grade schools and high schools were still largely unknown except at the seminaries and a few select cities. Tampa’s first high school was founded in the late 1870s and its first grade school in 1878.

3. First Immigrant Influx

In the 1870s, Florida also experienced its first immigrant influx. Cuban immigrants to Key West due to “[t]he Ten Years War (1868–1878) against Spanish colonialism” and the United States imposed tariffs and expanded the modest Key West cigar industry that began in the 1830s. “By the early 1890s, an estimated 50,000 to 100,000 persons traveled annually between Cuba and the United States.” Immigrants imported the first
labor militancy into the State, a source of nativist discontent elsewhere in the United States. By the mid-1880s, in or about the time the declaration of rights, section 6 was enacted, strikes were commonplace in Key West with the largest of such strikes occurring in 1885, 1889, and 1894. Cigar manufacturers, primarily Spanish, began looking for a new site for their factories. “In 1885, Vicente Martínez Ybor settled on a forty-acre tract of land east of Tampa” which became known as Ybor City, and other manufacturers soon followed.

Florida’s immigrant population increased to around six percent by the 1890s, with particular concentrations in Florida’s few relatively urban and industrialized areas and a few almost strictly Catholic immigrant settlements in San Antonio, Dade City, and St. Joseph. The overall effect on the religious diversity of the State was modest. The largest denominations in Florida held constant through at least 1890, with Methodists reporting 70,458 members, and Baptists reporting 39,575 members. Significantly, Catholics, against whom nativists were most prejudiced, took over as the third largest denomination in 1890 with 16,867 communicants. Presbyterians reported 4574 members and Episcopalians reported 4225 members. New denominations included Disciples of Christ with 1306 members, Congregationalists with 1184 members, and Lutherans with 369 members. The stage was set for a Blaine-like backlash.

Just as immigration to Florida gained momentum and Florida’s common school system was congealing, Representative James G. Blaine, a former Speaker of the House and a favored successor to President Grant, seized upon Grant’s recommendation and introduced the federal Blaine Amendment.
on December 14, 1875.\textsuperscript{199} Discussions of federalism and Congress’ proper legislative power controlled the legislative debate.\textsuperscript{200} The House overwhelmingly approved it with an amendment stating it should not be “construed to prohibit the reading of the Bible in any school or institution.”\textsuperscript{201} The Senate barely disapproved it.\textsuperscript{202} Nevertheless, support for the Amendment was strong enough that it began diffusing rapidly among the states with the number enacting them increasing from fourteen in 1876 to twenty-nine in 1890.\textsuperscript{203} Florida was on the trailing-end of the movement.

C. Home Rule and the 1885 State Blaine Amendment

The Florida Constitutional Convention of 1885 replaced the Republican Reconstruction-era constitution with an indigenous one that became law on January 1, 1887.\textsuperscript{204} The article on education in the Constitution of 1885 elaborated upon its predecessor by, among other things: 1) providing for a definite state tax for education and for the distribution of this tax, together with the interest of the School Fund in proportion to the number of school-aged youth in each county;\textsuperscript{205} 2) requiring counties to support the common schools and setting a minimum and maximum rate for an annual county school tax;\textsuperscript{206} 3) adding the Governor and Treasurer to the State Board of Education;\textsuperscript{207} and 4) requiring the quadrennial election of the Superintendent of Public Instruction.\textsuperscript{208}

\textsuperscript{199} Heytens, \textit{supra} note 1, at 131–32. In December 1875, President Grant recommended a constitutional amendment to deny all direct or indirect public support to sectarian institutions. \textit{Id.} The Blaine Amendment read:

\begin{quote}
No State shall make any law respecting an establishment of religion or prohibiting the free exercise thereof; and no money raised by taxation in any State for the support of public schools, or derived from any public fund therefor, nor any public lands devoted thereto, shall ever be under the control of any religious sect, nor shall any money so raised or lands so devoted be divided between religious sects or denominations.
\end{quote}


\textsuperscript{200} See Green, \textit{supra} note 1, at 57–68.

\textsuperscript{201} \textit{Id.} at 60 (citation omitted).

\textsuperscript{202} Joseph P. Viteritti, \textit{Blaine’s Wake: School Choice, the First Amendment, and State Constitutional Law,} 21 HARV. J.L. & PUB. POL’Y 657, 672 (1998). The Senate fell four votes short of the supermajority necessary to pass the Blaine Amendment. \textit{Id.}

\textsuperscript{203} Green, \textit{supra} note 1, at 43.

\textsuperscript{204} Cochran, \textit{supra} note 42, at 79.

\textsuperscript{205} \textit{Id.} at 80 (citing FLA. CONST. of 1885, art. XII, §§ 6, 7).

\textsuperscript{206} \textit{Id.} (citing FLA. CONST. of 1885, art. XII, § 8).

\textsuperscript{207} \textit{Id.} at 79 (citing FLA. CONST. of 1885, art. XII, § 3).

\textsuperscript{208} \textit{Id.} (citing FLA. CONST. of 1885, art. XII, § 2).
The Constitution was also more religiously and racially discriminatory than its predecessor.209 The article on education implemented the separate but equal doctrine by requiring separate schools for blacks and whites and, in the very next subsection, included a provision distinct from the state Blain Amendment, providing "that no public-school money should go for sectarian schools."210 This was in addition to the provision in the 1868 Constitution, preserved in the 1885 Constitution, providing that the School Fund could "be exclusively applied to the support and maintenance of public free schools."211 The 1885 Constitution also included for the first time the declaration of rights, section 6: "No preference shall be given by law to any church, sect or mode of worship and no money shall ever be taken from the public treasury directly or indirectly in aid of any church, sect or religious denomination or in aid of any sectarian institution."212

On the face of these provisions, if not for the requirement in both the 1885 Constitution and 1868 Constitution that the School Fund be expended exclusively on common schools, we might expect that public funding of private religious schools ceased altogether in Florida; but it did not.213 Undeniably, petitioners in other states were largely successful in litigation at striking so-called "aid" reaching Catholic institutions. For example, in one of the earliest cases, the Supreme Court of Mississippi refused a pro rata share of the school fund to parents of students attending a Catholic parochial school and struck an act entitling them to a proportionate share of the funds.214

Perhaps most egregiously, state courts did not require public payment for services rendered.215 For example, the Supreme Court of Illinois upheld under the state Blaine Amendment the refusal of Cook County to make payment for the tuition, maintenance, and care of infants committed until age eighteen by Cook County courts to the Industrial School for Girls at Chicago,

209. See COCHRAN, supra note 42, at 83.
210. Id.; FLA. CONST. of 1885, art. XII, § 12 ("White and colored children shall not be taught in the same school, but impartial provision shall be made for both."); FLA. CONST. of 1885, art. XII, § 13. This section provides:
    No law shall be enacted authorizing the diversion or the lending of any County or District School Funds, or the appropriation of any part of the permanent or available school Fund to any other than school purposes; Nor shall the same, or any part thereof, be appropriated to or used for the support of any sectarian school.

Id.

211. FLA. CONST. of 1885, art. XII, § 4.
212. FLA. CONST. of 1885, Declaration of Rights, § 6.
213. See FLA. CONST. of 1885, art. XII, § 13; FLA. CONST. of 1868, art. VIII, § 4.
which the court held was a front for the Catholic Archdiocese.\textsuperscript{216} Likewise, the Supreme Court of Nevada excused the state from paying to feed orphans assigned to the Nevada Orphan Asylum, also run by the Sisters of Charity.\textsuperscript{217} In the most straightforward equation of "sectarianism" with Catholicism, the courts disagreed that the schools were teaching merely the common religion because, according to them, Catholicism was "sectarianism."\textsuperscript{218}

Until the present, Florida case law reveals no litigation along similar lines, notwithstanding that public funding for parochial education persisted through at least the mid-1910s.\textsuperscript{219} Duval County erected the school building and authorized the Sisters of Saint Joseph to commence a supposed common school in Mandarin in 1892, seven years after enactment of the 1885 constitution.\textsuperscript{220} Similarly, records indicate that in 1892, Pasco County erected a larger building for Saint Anthony’s, known to teach, among other things, catechism and Bible history.\textsuperscript{221} The Sisters of Saint Joseph "surrendered" their common schools around 1914,\textsuperscript{222} but Pasco County built a second school for another Catholic parish, Sacred Heart, as late as 1916.\textsuperscript{223}

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\textsuperscript{216} Id. at 184, 198. The court referenced then-article 8, section 3 of the Illinois Constitution as follows:

Neither the [G]eneral [A]ssembly, nor any county, city, town, township, school-district, or other public corporation, shall ever make any appropriation, or pay from any public fund whatever, anything in aid of any church or sectarian purpose, or to help support or sustain any school, academy, seminary, college, university, or other literary or scientific institution, controlled by any church or sectarian denomination whatever; nor shall any grant or donation of land, money, or other personal property, ever be made by the state, or any such public corporation, to any church, or for any sectarian purpose.

Id. at 184 (quoting ILL. CONST. art. X, § 3).
\end{flushright}

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\textsuperscript{217} Nevada ex rel. Nev. Orphan Asylum v. Hallock, 16 Nev. 373, 381, 388 (1882). The court referenced then-article XI, section 2 of the Nevada Constitution which states that the legislature must "provide for a uniform system of common schools, by which a school should be established and maintained in each school district ... and that any school district which should allow instruction of a sectarian character therein might be deprived of its portion of the interest of the public school fund during the time of such instruction." Id. at 379. (citing NEV. CONST. art. XI, § 2). The court also referenced then article II, section 9 of the Nevada Constitution, providing that "[n]o sectarian instruction shall be imparted or tolerated in any school or University that may be established under this [c]onstitution." Id. (quoting NEV. CONST. art. XI, § 9).
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\textsuperscript{218} Chi. Indus. Sch. for Girls, 18 N.E. at 187; Nev. Orphan Asylum, 16 Nev. at 386–87.
\textsuperscript{219} See Alberta, supra note 156, at 42.
\textsuperscript{220} See id.
\textsuperscript{221} Cf. id. (noting Catholic educational efforts).
\textsuperscript{222} See id. at 41–42. Records indicate that the land the Catholic family donated for the common school in Mandarin was surrendered to the state. Id. at 42.
\textsuperscript{223} McNALLY I, supra note 22, at 149.
\end{flushright}
Florida did not join the national Blaine prohibition against funding Catholic schools, but did require instruction in the common religion. The same convention that adopted the declaration of rights, section 6 also approved payment to the City of Ocala "for the reimbursement of certain monies expended to secure the location there of the East Florida Seminary in 1852, which seminary was summarily removed in 1865 and neither land [n]or money returned to the town." Both schools adhered to the common religion, as evidenced by daily devotional exercises including: Bible reading; singing hymns, choruses, and anthems; praying; short lectures; and required church attendance as late as 1904. The schools authorized opt-outs for Catholics and Jews, something courts in other states occasionally refused.

The trend was obvious. Although themselves religious, Florida common schools were becoming more jealous about sharing resources with parochial schools and less reliant upon private religious charity. As an example, the total value of public school property, which was first recorded in 1877–78 as $116,934 for 992 schools, reached $250,000 for 1724 schools in 1884–85, then more than doubled by 1889–90 to $573,862 for 2333 schools, and continued to climb. Common graded schools, of which there were almost none prior to 1889, also began to appear. As required by the school law of that year, ten high schools were founded by 1892–93, public teachers vastly improved, and the school term lengthened from ninety-two days in 1884–85 to 100 days by 1889–90. State appropriations for the seminaries

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225. THE WKLY. FLORIDIAN, July 30, 1885.

226. According to the West Seminary Course Catalogue of 1897–98, "[w]hile the school is strictly nonsectarian in every feature, no institution is more careful in the moral and religious training of her students than the Seminary." STATE SEMINARY WEST, CATALOGUE, supra note 121, at 45.

227. Id.; EAST FLORIDA SEMINARY, STATE NORMAL SCHOOL AND MILITARY INSTITUTE, CATALOGUE 24 (1885–86); EAST FLORIDA SEMINARY, STATE NORMAL SCHOOL AND MILITARY INSTITUTE, CATALOGUE 42 (1882–83); EAST FLORIDA SEMINARY AND MILITARY INSTITUTION, CATALOGUE 24 (1903–04).

228. See McCormick v. Burt, 95 Ill. 263, 264–66 (1880) (affirming judgment against Catholic plaintiff who was suspended for not observing Bible reading rule); Spiller v. Inhabitants of Woburn, 94 Mass. (12 Allen) 127, 130 (1866) (upholding student’s exclusion from school for refusing to bow her head during public school prayer); North v. Bd. of Trs. of Univ. of Ill., 27 N.E. 54, 56 (Ill. 1891) (holding that expulsion of plaintiff for failure to attend mandatory chapel exercises did not violate the Illinois Constitution).

229. Compare COCHRAN, supra note 42, at 68 tbl.6, with id. at 93 tbl.10.

230. Id. at 68 tbl.6, 93 tbl.10.

231. Id. at 94–98, 108 tbl.12.

232. Id. at 94–98, 108 tbl.12, 124 tbl.15.
also increased dramatically in the 1890s, and both adopted collegiate programs.

D. Public Education Consolidates in the Early 1900s

In the early 1900s, the last components of a modern common school system emerged with the adoption of a standard curriculum in 1911; the extension of the common education backward to kindergarten beginning in 1905 and forward to a formal university system pursuant to the Buckman Act in the same year; the passage of compulsory education legislation in 1919 that, although initially struck, eventually took permanent hold; the consolidation of school districts enabling bus transportation in the 1920s; and the growth of the Florida Education Association. The continued teaching of the common religion into the early 1960s was all that remained anachronistic in the public school system by today's standards.

233. "State appropriations during the 1890s [to East Florida Seminary] averaged $2,500 a year." PROCTOR & LANGLEY, supra note 119, at 21. In 1887, the same year that the 1885 Constitution became effective, the legislature made the first appropriation to the East Florida Seminary library in the amount of $500. Id.

234. Id. at 19; STATE SEMINARY WEST, CATALOGUE, supra note 121, at 9 ("[I]n the past few years ... [the Legislature] propose to limit the scope of instruction in the Seminary mainly to high school and collegiate courses ... ").

235. Ch. 6178-(No. 59), § 1, 1911 Fla. Laws 109, 109.

236. The first public kindergarten was established in Tallahassee in 1905, paid for by the county. Rhodes, supra note 53, at 61.

237. See Ch. 5384-(No. 13), § 1, 1905 Fla. Laws 37, 41-42. "By the Buckman Act [in 1905], the legislature abolished The Florida Agricultural College at Lake City ... The White Normal School at DeFuniak Springs, The East Florida Seminary at Gainesville, The South Florida College at Bartow, and The Florida Agricultural Institute in Osceola County." City of Gainesville v. Bd. of Control, 81 So. 2d 514, 516 (Fla. 1955). West Florida Seminary, renamed Florida State College in 1901, became Florida Female College in 1905; and East Florida Seminary became the University of the State of Florida in 1905 and University of Florida in 1909. See Id. at 517; COCHRAN, supra note 42, at 162-63; CULVER, supra note 16, at 231; DODD, supra note 119, at 107.

238. Ch. 7808-(No. 26), § 1, 1919 Fla. Laws 59, 59. After increasing school attendance by, for example, twenty-five percent in Leon County, the compulsory school attendance law was declared unconstitutional in 1920. Rhodes, supra note 53, at 56-57.

239. Rhodes, supra note 53, at 55-56, 73-74. Although Leon County considered consolidation and bus transportation as early as 1902, it did not become a reality until 1921-22. Id.


241. See generally Chamberlin v. Dade County Bd. of Pub. Instruction, 143 So. 2d 21, 35 (Fla. 1962), rev'd, 377 U.S. 402 (1964) ("The principles governing the recitation of the Lord's Prayer, the singing of religious hymns and the holding of baccalaureate programs ... are so conducted as not to infringe the constitutional safeguards enjoyed by appellants.").

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E. Nativism Flourishes as Florida Enters the Twentieth Century

Just as the common school movement was consolidating and becoming basically self-reliant, an upturn in urbanization, industrialization, immigration, and unemployment occurred, exposing the precursors elsewhere in America to virulent nativism. The result was predictable: religious and racial prejudice flourished as never before in Florida. Neutral public funding for sectarian schools lapsed precisely as racial and religious bigotry flared.

1. Delayed Urbanization Advances

Florida urbanized and industrialized late by comparison to other states. Florida's population was 20% urban in 1890 and 1900; 29% urban in 1910; 37% urban in 1920; and 52% urban in 1930. The state's largest urban centers in 1910 included Jacksonville, with a population of 28,249; Pensacola with 17,747; Key West with 17,144; and Tampa with 15,839. "By 1914 Tampa was the seventh most popular destination for immigrants coming to the United States," which caused Tampa rapidly to take over as the second largest city by 1920 and caused Miami to emerge as a new urban center. The Tampa area quickly became the focus of nativist sentiment, yet by comparison to large cities elsewhere in America, Tampa was small. In 1920, at a time when the population of New York was 5.6 million, the population of Florida's four largest cities was 91,558 in Jacksonville; 51,608 in Tampa; 31,035 in Pensacola; and 29,571 in Miami.

242. GLENN, supra note 1, at 259–60.
243. Thompson, supra note 33, at 50–52; GANNON, supra note 25, at 86–87.
246. McNALLY I, supra note 22, at 56.
247. Id. at 168.
248. FOURTEENTH CENSUS POPULATION VOL. I, supra note 245, at 82.
249. GANNON, supra note 25, at 85.
250. McNALLY I, supra note 22, at 68.
251. FOURTEENTH CENSUS POPULATION VOL. I, supra note 245, at 82.
2. Delayed Industrialization Makes Gains

Anti-Catholic nativism had its roots in industrial and urban centers in America. Industrialization in Florida, as measured by power used in manufacturing, experienced dramatic gains at the turn of the century from 7147 horsepower in 1880 to 16,058 in 1890, 40,745 in 1900, and 139,456 in 1919. Wage earners increased too. For example, in Jacksonville they increased from 1988 in 1909 to 7168 in 1919; in Tampa from 6786 in 1909 to 13,079 in 1919; and in Pensacola from 940 in 1909 to 4586 in 1919. Florida’s principal industries in 1919 were lumber and timber products ($42,598,000 with 21,058 employees); tobacco, cigars, and cigarettes ($37,926,000 with 12,393 employees); shipbuilding and steel ($24,234,000 with 7838 employees); turpentine and rosin ($21,509,000 with 11,748 employees); and fertilizers ($10,686,000 with 1390 employees).

3. Immigration Redoubles

Industrialization, urbanization, immigration, and nativism were linked in Florida nowhere more closely than to the cigar industry in Tampa. In 1890, fifty percent of Tampa’s population was comprised of immigrants, including Cubans, Spaniards who primarily managed the cigar industry, and Italians. Ybor City, then West Tampa, mushroomed into almost exclusively Latino enclaves. Due to cigar-related immigration by 1919, Tampa had by far the largest number of immigrants (10,666), followed by Jacksonville (3894), Key West (3235), Miami (2563) and Pensacola (1445). Three thousand four hundred and fifty-nine Cubans, 2817 Italians (Sicilians), and 2726 Spaniards settled in Tampa; 1704 Cubans, and 1040 West Indians set-

252. See McNally I, supra note 22, at 73.
256. Id. at 244.
257. Id. at 243. "Florida ranked second in turpentine and rosin [production] and fourth in tobacco, cigars, and cigarettes" production in 1900. Twelfth Census Abstract, supra note 100, at clxxxix.
258. See McNally I, supra note 22, at 68–69.
259. Id.
tled in Key West. By 1920, the largest foreign-born ethnic groups in Florida included relatively few at the heart of the nativist controversy in the north. There were 6613 Cubans, 4745 Italians, 4451 English, 4121 Canadians, 4091 Spaniards, 3534 Germans, and 2087 West Indians. By 1920, the Irish and Germans comprised less than one-half percent of the total population and resided predominately in Jacksonville and Miami. About 100 German families also resided in San Antonio, St. Joseph, and Dade City. Nativists later picked on these settlements, as well as the Latino cigar workers located in the Tampa area.

"[C]igar workers comprised the highest paid and most concentrated work force in Florida." Accordingly, whites "looked upon the Latins with both envy and prejudice, with attraction and repugnance; they saw West Tampa as a wild [w]est town and Ybor City as a notorious place of crime, vice, and Dionysian frenzy." Worst, they considered "the denizens of the Latin enclave as un-American, conspiratorial, and nefarious." Jim Crow signs arose forbidding not just blacks, but also Latinos from entering. Ironically, Ybor’s inhabitants, although viewed as pervasively Catholic, demonstrated little interest in the Catholic Church.

4. Structural Unemployment Develops

The problem of structural unemployment and adjustment eventually accompanied industrialization and urbanization in Florida, increasing the friction between native Floridians and the supposedly Catholic immigrants they believed were taking their jobs, corrupting their culture, and burdening gov-

262. Id.
263. Id. These cities included a relatively large number of Canadians, and Jacksonville included a relatively large number of English and Russians (600 and 469 respectively). Id.
264. McNally I, supra note 22, at 73-75.
266. Id.
267. McNally I, supra note 22, at 166; accord Fourteenth Census Population Vol. III, supra note 245, at 197 (indicating that 363 Germans resided in Hillsborough County and 205 in Pinellas County, compared to 608 in Duval County and 334 in Dade County).
269. Id.
270. Id.
271. Id.
272. Id.
Labor militancy erupted in Tampa’s cigar industry in the late 1800s, as it had in Key West. Cigar manufacturers, which came under the control of American conglomerates, began mechanizing traditional hand-rolling methods, leading to the so-called weight strike of 1899, in which workers protested the supply of only a fixed quantity of tobacco to produce a specified number of cigars.

_La Resistencia_, with links to cigar workers’ organizations in Cuba, was formed in 1899 and called the first general strike in 1901. Vigilantés assaulted strike leaders, but general strikes in Tampa were not deterred in 1910, 1920 and 1931 under the leadership of the Cigar Maker’s International Union, which had decided anarchist and socialist tendencies of concern to Floridians. When cigar demand plummeted during the Great Depression, in order to cut costs, manufacturers automated and, during World War II, turned predominately to women to produce cigars. Structural unemployment became severe, deepening prejudices toward immigrants.

5. Nativism Flourishes in Florida

Nativism came into its own in Florida in the early 1900s, once the national precursors consolidated. In 1901, an arsonist burned St. Mary, Star of the Sea Church to the ground in Key West; and in 1915, an arsonist

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274. _Id._ at 3.
275. _Id._ at 8.
276. _Id._
277. _Id._ at 9. The first general strike failed after four months following various vigilante actions. _INGALLS & PÉREZ, supra_ note 183, at 10.
278. _Id._ at 9–10. During the first general strike lasting four months, vigilantes with impunity, kidnapped and exported thirteen of the union’s most prominent leaders. _Id._ Local authorities arrested union supporters unless they returned to work, evicted them, and froze union funds in local banks. _Id.; accord McNALLY I, supra_ note 22, at 71–73.
280. _INGALLS & PÉREZ, supra_ note 183, at 12.
282. _Id._ at 191–93. The final blow to the industry came in the 1960s, when the United States imposed an embargo against the importation of Cuban products including tobacco. _Id._ at 12, 214–15.
283. _MCNALLY I, supra_ note 22, at 73.
burned a classroom in the parish school. Anti-Catholic literature circulated widely in Florida after 1910, causing the Bishop of St. Augustine, Michael J. Curley, to write, "[w]e Catholics . . . are victims of organized vilification and the government itself through the mails takes a hand by the distribution of lewd and lascivious anti-Catholic filth." Nativism impacted local and statewide elections. In St. Augustine in 1910, a secret society, the Patriotic Sons of America, helped defeat Catholic Congressional candidate Lewis W. Zim. Protestants also opposed Catholic candidates in Jacksonville and St. Augustine due to their faith.

In 1913, nativism even influenced the Florida Legislature to pass "legislation titled 'An Act Prohibiting White Persons from Teaching Negroes in Negro Schools," targeting the Sisters of St. Joseph, the only whites known to teach black children at the time (in schools at St. Augustine, Fernandina, Jacksonville, and Ybor City). For three years the law was not enforced; then at Easter, on April 24, 1916, the state prosecutor charged Sister Mary Thomasine with a violation. In May, the county court discharged her from custody by holding that "the petitioner was upon the date named in the affidavit a teacher of a private school in no manner supported or maintained by the public funds," and that the Act did not apply to private schools.

In 1914, the Florida Legislature nearly passed the so-called Garb Bill, which would have precluded public school teachers, widely understood as the same Sisters of St. Joseph, from wearing religious garb. This bill also revealed a link between religious prejudice and Blaine-styled limitations on public funding.

Garb Bill supporters decried "public funds used for sec-

284. Id.
285. Id. at 74.
286. See id.
287. Id.
289. Id. at 75; Chapter 6490—(No. 70) of the Florida Laws states:
   Section 1. From and after the passage of this Act it shall be unlawful in this State, for white
   teachers to teach negroes in negro schools, and for negro teachers to teach in white schools
   Section 2. Any person, or persons, violating the provisions of this Act, shall be punished by a
   fine not to exceed five hundred ($500.00) dollars or by imprisonment in the County jail not
   exceeding six (6) months.
   Ch. 6490—(No. 70), §§ 1–2, 1913 Fla. Laws 311, 311.
290. McNALLY I, supra note 22, at 75; Alberta, supra note 156, at 44.
291. Alberta, supra note 156, at 45.
292. Id. at 47.
293. Robert B. Rackleff, Anti-Catholicism and the Florida Legislature, 1911–1919, 50
   FLA. HIST. Q. 352, 353 (1972).
294. McNALLY I, supra note 22, at 75.
295. Id.
tarian purposes.296 The Bill proved the immediate precursor to the Sisters’
of St. Joseph’s surrender of their so-called common schools297 and the dis-
charge of Sister Thomasine in 1916.298

In the same year, Governor Catts, formerly a Baptist pastor, fomented
nativist prejudice to win statewide office.299 Secret societies, including the
Patriotic Sons of America, Guardians of Liberty, the True Americans, the
Masons, and the Knights of Pythias supported Catts’ self-proclaimed “cru-
sade against ‘the continuance of the Roman domination’ of America.”300 He
coupled religious and class prejudice by adding to his anti-Catholic mes-
 sage,301 an anti-German war and anti-Black message. Typical stump rhetoric
included the claim that German Catholics in San Antonio were planning an
armed-Negro insurrection for Kaiser Wilhelm II, after which the Pope would
move the Vatican there.302 There could hardly have been a more thoroughly
prejudicial speech.

In Fort Lauderdale and Fort Myers, at the height of Catts’ hysteria, pub-
lic teachers lost their jobs in 1915–16 due to their Catholic faith.303 Parochial
schools, previously attended in roughly equal numbers by Catholics and
Protestants, became religiously segregated.304 Additionally, in 1917, the
Florida Legislature finally passed in the Convent Inspection Bill, which was
killed in committee two years earlier.305 Although Governor Catts appointed
a team to perform the task annually, there is no evidence that the Act was
enforced; however, the legislature did not repeal it until 1935.306

Elsewhere in the United States, nativism was also influential and led to
no-aid separationist court victories.307 For example, in 1918, the Supreme
Court of Iowa struck down public payments for maintenance of a public

296. Alberta, supra note 156, at 43 (no citation provided in original).
297. Id. at 41–42. Perhaps influenced by the Latino population, the Tampa Tribune op-
posed the Garb Bill as discriminatory and a violation of the First Amendment. McNALLY I,
supra note 22, at 75.
298. McNALLY I, supra note 22, at 75.
299. Id. at 75–76.
300. Id. at 76.
301. GANNON, supra note 25, at 74.
302. See McNALLY I, supra note 22, at 78–79.
303. Id. at 74. Also, neutral state and local funding benefiting sectarian schools was
threatened. See id. at 75.
304. See id. at 153–54. Protestant children who made up roughly fifty percent of Catholic
classes in 1905–06 in Tampa and about forty percent in 1910 in Tampa and St. Augustin,
made up just twenty-five percent in Tampa and twenty percent in St. Augustine in 1919. Id. at
154.
305. McNALLY I, supra note 22, at 75.
306. Id. at 75.
school operating on the second floor of a parochial school on the grounds that it, too, was essentially parochial.  

In 1922, a New York court struck down indirect aid to pupils in the form of the provision of textbooks and other supplies to parochial students.

F. The Post-World War II Years

After World War II, public funding of Florida educational programs neutrally benefiting religious and non-religious educational institutions resumed. The reason was first as of necessity, in the form of loans and scholarships for teachers and nurses. Subsequently, the funding expanded to other fields and K-12 education. The first three Florida cases ever to interpret the declaration of rights, section 6 also followed in rapid succession after the wars. Accordingly, until the 1967 Constitutional Revision Commission, both the Florida Legislature and the judiciary behaved as if the dec-

308. Id. The Supreme Court of Iowa also struck it down under the state Establishment Clause, a clause precluding “taxation for ecclesiastical support,” as well as a statute forbidding “the use or appropriation or gift or loan of public funds to any institution or school under ecclesiastical or sectarian management or control.” Id. at 207. Accord Jenkins v. Inhabitants of Andover, 103 Mass. 94, 100, 103 (1869) (holding educational enactment unconstitutional to the extent it permits the town of Andover to support a supposed public school that was run by a private board affiliated with Christ Church).

309. Smith v. Donahue, 195 N.Y.S. 715, 718 (N.Y. App. Div. 1922). The court referenced then-article IX, section 4 of the New York Constitution as follows:

No Aid to Denominational Schools. Neither the state, nor any subdivision thereof, shall use its property or credit or any public money, or authorize or permit either to be used, directly or indirectly, in aid or maintenance, other than for examination or inspection, of any school or institution of learning wholly or in part under the control or direction of any religious denomination, or in which any denominational tenet or doctrine is taught.

Id. (quoting N.Y. Const. of 1894 art. IX, §4).

310. See generally ch. 29726, §§ 1-3, 1955 Fla. Laws 231, 231-34. Chapter 29726 was enacted to provide for scholarships and loans to prospective teachers. Id. Chapter 28919 was enacted to provide for scholarships and loans to prospective nurses. Ch. 28919, §§ 1-2, 1955 Fla. Laws 572, 572-73.


312. See Act effective June 22, 1961, ch. 61-496, pmbl., 1961 Fla. Laws 1091, 1091-92. The purpose of this act was to provide financial assistance to Florida high school graduates seeking to attend college. Id. This program served as a predecessor to the Corporate Income Tax Credit Scholarship Program, which permits students in grades K-12 to attend private religious or non-religious schools of their parents’ choice. See Fla. Stat. § 220.187 (2004); Fla. Stat. § 1002.20(6) (2004).

313. See Southside Estates Baptist Church v. Bd. of Trs., 115 So. 2d 697, 698 (Fla. 1959); Koerner v. Borck, 100 So. 2d 398, 402 (Fla. 1958); Fenske v. Coddington, 57 So. 2d 452, 456 (Fla. 1952).
loration of rights, section 6 was consistent with religiously neutral programs of general eligibility with a secular purpose. 314

1. Neutral Public Funding of Religious Schools Reemerges

Teaching and nursing shortages in the aftermath of the world wars were the first to prompt a neutral public education scholarship program. 315 The legislature responded in 1955 by enacting scholarship loans for residents to attend any institution of higher learning in Florida approved for teacher education, religious or non-religious. 316 Awardees pledged to teach in a Florida public school or junior college for at least as long as the resident received the scholarship. 317 The teacher scholarship loan recipient could “register in any college, school, department, or division of the institution he may desire, and may pursue a course of studies leading toward any type of degree he may desire,” as long as, upon graduation, the recipient would be fully eligible for teacher certification. 318 At the time, Florida residents could attend, for teacher education, a variety of religious institutions including, for example, Stetson University, St. Leo College, Bethune-Cookman College, Edward Waters College, Florida Presbyterian College, and Barry College. 319 Similar loan and scholarship programs survive today. 320

314. 1967 Minutes, supra note 9.
318. Fla. Stat. § 239.41 (1961); accord Fla. Admin. Code Ann. r. 130.5-10, 130.7-20 (1962). Florida’s State Board of Education approved programs for teacher education. Id. at r. 130.5-10.
320. See Fla. Stat. §§ 1009.54, 1009.57–59 (2004) (addressing scholarship, loan forgiveness, and tuition reimbursement programs for teachers); Minority Teacher Education
Also in 1955, due to a nursing shortage, the State of Florida established a professional scholarship for Florida residents pledging to practice nursing in Florida. Eventually, one-half of the residents had to pledge their intent to practice nursing in a public hospital in Florida. Scholarships were available to attend several types of educational institutions: 1) “professional diploma schools of nursing or approved junior college schools of nursing in Florida;” 2) “basic collegiate schools of nursing in Florida;” 3) “practical schools of nursing in Florida;” and 4) baccalaureate-granting institutions in Florida and other states. Eligible institutions had to meet “the entrance requirements of a school of nursing approved by the Florida state board of nurse registration and nursing education.” A similar program has existed ever since, now benefiting sectarian schools and has expanded to include occupational therapists. Religious hospitals have always benefited from the program.

The 1960s marked a significant expansion in public funding for private religious and non-religious schools. In 1961, the Florida Legislature approved the first school choice program, neutrally benefiting religious and non-religious higher educational institutions in the form of a corporate income tax educational scholarship program to assist Florida high school graduates “unable to attend college because of financial inability.” The legislation rendered educational benefits payable from approved plans not to

Scholars Program, § 1009.60; Florida Fund for Minority Teachers, Inc., § 1009.605; Teacher/Quest Scholarship Program, § 1009.61; Grants for Teachers for Special Training in Exceptional Student Education, § 1009.62.

323. § 239.47(1).
324. § 239.47(2).
325. § 239.47(3).
326. § 239.47(4).
327. § 239.49. Rollins College may have participated in the program. E-mail from Wenxian Zhang, Dep’t of Archives & Special Collections, Rollins College (Aug. 20, 2004). Rollins College offered a combined nursing and liberal arts program with Orange General Hospital School of Nursing in Orlando from 1941–59. Id.
328. See Nursing Student Loan Forgiveness Program, FLA. STAT. § 1009.66 (2004); Nursing Scholarship Program, § 1009.67. Bethune-Cookman College and Pensacola Christian College have nursing baccalaureate programs. Florida Center for Nursing, Nursing Education Programs in Florida, http://www.flcenterfomursing.org/links/individual_cat.cfm?cat_id=14 (last visited Oct. 30, 2005). See also Critical Occupational Therapist or Physical Therapist Shortage Student Loan Forgiveness Program, § 1009.632; Critical Occupational Therapist or Physical Therapist Shortage Scholarship Loan Program, § 1009.633; Critical Occupational Therapist or Physical Therapist Shortage Tuition Reimbursement Program, § 1009.634.
be deemed as a distribution of income to a member of a corporation. This was a forebear of the modern Corporate Income Tax Credit (CITC) Scholarship Program, enabling students to attend a private religious or non-religious kindergarten through twelfth grade school of the parents' choice.

In 1963, the legislature expanded scholarship and loan assistance to higher education. The state appropriated a half-million dollars for a special trust fund to award scholarship loans for tuition, registration fees, books, and housing to eligible residents attending any "institution of higher learning in Florida, either private or public, which is a member of the Southern Association of Colleges and Secondary Schools, or whose credits are acceptable for transfer to state universities in Florida." Eligibility depended upon need and ability as demonstrated by "standardized examinations and a certification of acceptability by the university or college of the applicant's choice." The state also established Seminole Indian Scholarships for Indians to attend any accredited community college, college, or university in Florida. These and similar aid programs still exist, with two incorporating an explicit requirement that the post-secondary educational institution have a secular purpose, namely, education itself.

In 1965, the legislature approved the precursor to today's Florida Bright Futures Scholarship Program, the Florida Regents Scholarship. The legislature directed the Florida Board of Regents to award a scholarship to eligible residents to attend any "accredited public or private college, university or

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331. Act effective June 22, 1961, ch. 61-496, § 1(4), 1961 Fla. Laws 1091, 1092 (codified at FLA. STAT. § 617.50 (1967)).
334. Id.
335. § 239.67(5).
336. § 239.66.
337. Neutral post-secondary educational loan assistance programs include: the Florida Public Student Assistance Grant Program, FLA. STAT. § 1009.50 (2004), Florida Private Student Assistance Grant Program, § 1009.51, Florida Postsecondary Student Assistance Grant Program, § 1009.52. Florida post-secondary educational loan assistance programs requiring the institution to have a secular purpose include: the William L. Boyd, IV Florida Resident Access Grants, § 1009.89(3) (discussing private schools), and Access to Better Learning and Education Grant Program, § 1009.891(3) (discussing private schools). See also Mary McLeod Bethune Scholarship Program, § 1009.73, Jose Marti Scholarship Challenge Grant Program, § 1009.72 (discussing scholarship for Hispanic students attending, inter alia, private religious post-secondary institutions).
junior college in Florida." Eligibility among seniors depended upon a "rank in the top five percent in the state as judged by the state-wide twelfth grade examination and high school academic record and recommendation of their high school principals." Renewal depended upon maintaining at least "a 'B' average on at least thirty credit hours of work per academic year." The program has expanded since and assumed new names including the Florida Academic Scholars' Fund, Florida Graduate Scholars' Fund, Florida Undergraduate Scholars' Fund, and Florida Bright Futures Scholarship Program.

2. Equal Treatment and Neutrality Principles Reemerge

Following World War II, the Supreme Court of Florida, in addition to the Florida Legislature, interpreted the declaration of rights, section 6 in a manner consistent with neutral and equal treatment of religious persons. The first three Florida cases ever to interpret the declaration of rights, section 6 followed in rapid succession after the World Wars and held constitutional devises of land and access to public buildings neutrally benefiting religious and non-religious persons. Two federal cases decided before the incorporation of the Establishment Clause against the states in 1947 also favored neutrality and equal treatment of persons on the basis of race and faith.

The United States Supreme Court upheld, against the Establishment Clause, the use of federal funds for construction of buildings on the grounds of two hospitals in the District of Columbia; allegedly directed by members of a Catholic monastic order or sisterhood with title to the property vested in

340. § 239.451(1).
341. § 239.451(2).
342. FLA. STAT. § 240.402 (1980).
344. FLA. STAT. § 240.402 (1986).
345. FLA. STAT. § 240.40202 (1997).
346. See, e.g., Southside Estates Baptist Church v. Bd. of Trs., 115 So. 2d 697, 700–01 (Fla. 1959) (condemning a preference of one sect or denomination over any other); Koerner v. Borck, 100 So. 2d 398, 401–02 (Fla. 1958) (upholding church's right or ingress and egress over county-owned land for baptismal purposes); Fenske v. Coddington, 57 So. 2d 452, 456 (Fla. 1952) (upholding the existence of "a Chapel for religious worship which is located in a portion . . . of a public school.").
347. See supra note 346.
the Sisters of Charity.\(^{349}\) Additionally, the Court upheld, against the Fourteenth Amendment, inter alia, a state law authorizing purchase of secular school books for the use of school children attending public and private religious and non-religious schools.\(^{350}\) The Court found no intent to benefit religious schools and that the actual beneficiaries were not the schools, but the children.\(^{351}\)

In 1947, \textit{Everson v. Board of Education} upheld a law providing reimbursement to parents for the cost of transporting children on public busses to religious and non-religious schools.\(^ {352}\) The Court incorporated the Establishment Clause against the states, yet found the Clause not violated by a program "neutral in its relations with groups of religious believers and non-believers."\(^ {353}\) According to the Court, "[s]tate power is no more to be used so as to handicap religions than it is to favor them."\(^ {354}\) Consequently, the Court stated in dicta that on the one hand, New Jersey could not directly contribute tax-raised funds to a sectarian school, but on the other hand, the state could not exclude persons because of their faith, or lack there of, from receiving the benefits of public welfare legislation.\(^ {355}\)

Shortly after \textit{Everson}, in 1952, the Supreme Court of Florida decided the first case interpreting the declaration of rights, section 6, \textit{Fenske v. Coddington}.\(^ {356}\) In \textit{Fenske}, the court reviewed the desire of trustees of a sectarian "negro school" to transfer its related real estate and tangible personal property to the Board of Public Instruction of Orange County, allegedly to better serve the trust's purpose of providing a quality, albeit segregated, education to blacks.\(^ {357}\) The court held the conveyance reserving Stewart Memorial Chapel to the grantors, who were at the heart of the real property, a right of ingress and egress to the premises did not violate the First Amendment or the declaration of rights, section 6.\(^ {358}\) According to the \textit{Fenske} court,

\[\text{[t]he very fact that sufficient money from the original trust is retained by the trustees under the supervision of the Chancellor to maintain this chapel until the further orders of the Chancellor, and that no public (state) monies}\]
are to be spent in aid of any sectarian institution is sufficient evidence that neither the federal or the state Constitutions are being violated. 359

In 1958, the Supreme Court of Florida likewise approved a devise of a parcel of land with a lake for use as a county park, reserving to a nearby church a perpetual right of ingress and egress over county-owned land to reach the lake for purposes of conducting baptisms and other religious and recreational events. 360 Although the easement resulted in an important benefit to the church, and the court conceded that a public disbursement to improve the park was possible, in Koerner v. Borck, 361 the court held that, "any improvement to the county-owned land will be made for the benefit of the people of the county and not for the church." 362 Referencing Everson, "[t]he Florida Supreme Court recognized that prohibiting baptisms in public waters would violate the United States Constitution because state power cannot be used to handicap religions any more than it can to favor them." 363

In 1959, the Supreme Court of Florida elaborated its nascent declaration of rights, section 6 equal treatment and neutrality framework when it held constitutional the temporary use by "several churches" of various public school buildings on Sunday, 364 pursuant to state law and county board regulations, 365 "pending . . . construction of church buildings." 366 Appellants complained that the use was "an indirect contribution of financial assistance to a church in violation of Section 6 of the Declaration of Rights of the Florida Constitution, F.S.A." 367 They further argued "that regardless of how small the amount of money might be, nevertheless, if anything of value can be traced from the public agency to the religious group, the Constitution has been thereby violated." 368 The Supreme Court of Florida disagreed without remanding the case to clarify whether public funds had been contributed and

359. Id. at 456.
361. Id. at 398.
362. Id. at 402.
365. See Fla. Stat. § 235.02 (1959) ("Subject to law, the trustees of any district may provide for or permit the use of school buildings and grounds within the district, out of school hours during the school term, or during vacation, for any legal assembly . . . .").
366. Southside Estates Baptist Church, 115 So. 2d at 698.
367. Id.
368. Id. at 699.
considered de minimis any indirect benefit to the churches and cost to the public fisc.\textsuperscript{369}

In \textit{Southside Estates Baptist Church v. Board of Trustees}, the court approved the consistency of the declaration of rights, section 6 with the neutrality principle when it noted the lack of any evidence “that one sect or denomination is being given a preference over any other. As a matter of fact, the amended complaint reveals that some four or five religious groups had been accorded the same treatment. None has been denied . . . ”\textsuperscript{370} Citing \textit{Fenske} and \textit{Koerner}, the Supreme Court of Florida said: “We ourselves have heretofore taken the position that an incidental benefit to a religious group resulting from an appropriate use of public property is not violative of Section 6, of the Declaration of Rights of the Florida Constitution.”\textsuperscript{371} Subject to judicial review for abuse of discretion, the court applied a rule of reason for a “basically religious” people,\textsuperscript{372} rather than appellant’s position preventing use or occupancy of public property for Easter Sunrise Service and other “absurd application[s].”\textsuperscript{373}

It would be decades before the United States Supreme Court would reach a holding similar to \textit{Southside Estates Baptist Church}.\textsuperscript{374} On the other hand, with respect to striking the common religion, the United States Supreme Court acted first.\textsuperscript{375} In 1964, the United States Supreme Court reversed in part the Supreme Court of Florida’s holding in \textit{Chamberlin} that a statute requiring daily readings from the Bible, the recitation of the Lord’s Prayer, singing of religious hymns, and holding of baccalaureate programs did not violate the Establishment Clause or the declaration of rights, section 6.\textsuperscript{376} On remand, the Supreme Court of Florida preserved the constitutionality of “religious and sectarian baccalaureate programs . . . the conducting of a religious census among the [school] children to ascertain their own religious

\textsuperscript{369} Id. at 699–701.
\textsuperscript{370} Id. at 700.
\textsuperscript{371} \textit{Southside Estates Baptist Church}, 115 So. 2d at 700 (citations omitted).
\textsuperscript{372} Id. at 701.
\textsuperscript{373} Id. at 700.
\textsuperscript{376} \textit{Chamberlin v. Dade County Bd. of Pub. Instruction (Chamberlin I)}, 143 So. 2d 21, 23, 35 (Fla. 1962), rev’d, 377 U.S. 402 (1964) (referencing FLA. STAT. § 231.09 (1961)). See also \textit{Brown v. Orange County Bd. of Pub. Instruction}, 128 So. 2d 181, 183, 185 (Fla. 2d Dist. Ct. App. 1960) (reinstating a complaint for declaratory and injunctive relief against a school district policy permitting the Gideons to annually distribute the King James Bible at public schools on the grounds that it violated the Florida Blaine Amendment, the First Amendment, and parents’ right to inculcate their children in religion).
affiliations . . . [and] the conducting of religious tests as a qualification for the employment of teachers.”

G. The 1967 Constitutional Revision Session

On the eve of the 1967 Constitutional Revision Session, the Florida Legislature had approved numerous public funding programs neutrally benefiting religious and non-religious schools. The Supreme Court of Florida and the United States Supreme Court also had generally endorsed the principles of neutrality and equal treatment of persons on the basis of faith. The Committee of the Whole House approved a single amendment by a vote of seventy-one to twenty-four to replace the declaration of right, section 6’s “no money shall ever be taken from the public treasury directly or indirectly in aid of any church, sect or religious denomination or in aid of any sectarian institution,” with article I, section 3’s “[n]o revenue of the state or any political subdivision or agency thereof shall ever be taken from the public treasury directly or indirectly in aid of any church, sect, or religious denomination or in aid of any sectarian institution.” The minutes do not reflect the reason, but the change ensured, to the extent there was any question, that local governmental bodies are subject to it.

The Commission rejected numerous other amendments to the declaration of rights, section 6, but few conclusions can be drawn from this. For example, the Commission rejected an amendment permitting “the provision of health and welfare or other non-curricula services . . . for the benefit of all school children” and “the distribution of Federal funds in accordance with the terms of the Federal law.” The former proposed nothing new or controversial as private school students have long benefited from basic health and welfare services (for example, immunization) and there is no evidence the Commission sought to end this. The Commission may very well have rejected the second amendment because it was unnecessary; federal law pri-

378. See 1967 Minutes, supra note 9, at 17.
379. See Southside Estates Baptist Church v. Bd. of Trs., 115 So. 2d 697, 701 (Fla. 1959);
380. 1967 Minutes, supra note 9, at 17.
381. FLA. CONST. of 1885, Declaration of Rights, § 6.
382. FLA. CONST. art. I, § 3; see 1967 Minutes, supra note 9, at 17.
383. 1967 Minutes, supra note 9, at 17.
384. Id. at 15.
385. Id. at 13.
386. See id.
marily governs federal expenditures. The Commission also rejected the following amendment, but presumably without meaning to endorse its object: "The liberty of conscience hereby secured shall not be so construed as to justify licentiousness or practices subversive of, or inconsistent with, public morals, peace or safety."" \[388\]

Other rejected amendments include the addition to the 1885 language of the words "for religious, denominational or sectarian purposes," which would have precluded aid for a religious purpose. \[389\] The declaration of rights, section 6 already prohibited this. \[390\] The Commission also rejected a substitute amendment condensing article 1, sections 3 through 5 and replacing the state Blaine amendment with language similar to the federal Establishment Clause: "There shall be no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." At this early date, there was no obvious difference between state and federal jurisprudence and no reason to believe either would eventually prove more separationist than the other, although in fact, federal jurisprudence would shortly emerge as the more exclusionary. \[391\] Last, the Commission rejected a proposal that recurred in subsequent constitutional conventions to strike the phrases "or indirectly" and "directly or indirectly." It also refused an amendment advancing equal treatment of churches, sects, religious denominations, and sectarian institutions, as prevailing jurisprudence already required this. \[392\]

H. The 1968 Florida Blaine Amendment Interpreted

The declaration of rights, section 6 became article I, section 3 with minor modification in the 1968 Florida Constitution. \[393\] The same year, the legislature did not view it as unconstitutional to enact a K-12 voucher program for disabled students unable to obtain exceptional student services from public schools whose parents petitioned to permit them to attend private

\[387\] See 63C AM. JUR. 2D Public Funds § 54 (1997).
\[388\] 1967 Minutes, supra note 9, at 13.
\[389\] Id.
\[390\] See id.
\[391\] FLA. CONST. of 1885, Declaration of Rights, § 6.
\[392\] 1967 Minutes, supra note 9, at 14.
\[394\] 1967 Minutes, supra note 9, at 15, 17.
\[395\] Id. at 13.
\[396\] See FLA. CONST. of 1885, Declaration of Rights, § 6.
\[397\] FLA. CONST. art. I, § 3.
schools, including religious ones.\textsuperscript{398} The Supreme Court of Florida eventually reviewed whether the state could cap the amount it would pay for the sectarian education under this program consistent with article IX, section 1, without otherwise commenting on the constitutionality of the program.\textsuperscript{399} This was the precursor to the McKay Scholarship Program,\textsuperscript{400} which is functionally equivalent to the Opportunity Scholarship Program.\textsuperscript{401}

Also in 1968, the United States Supreme Court decided that the loan of textbooks to students attending parochial schools did not violate the Establishment Clause, as “[t]he law merely makes available to all children the benefits of a general program . . . .”\textsuperscript{402} The Court held that the “financial benefit [was primarily] to parents and students, not schools.”\textsuperscript{403} The Court was not concerned that this would create incentives for some students to attend religious schools.\textsuperscript{404} According to the Court, “[p]erhaps free books make it more likely that some children choose to attend a sectarian school, but that was true of the state-paid bus fares in \textit{Everson} and does not alone demonstrate an unconstitutional degree of support for a religious institution.”\textsuperscript{405}

The Supreme Court of Florida also continued expanding its neutrality jurisprudence.\textsuperscript{406} In 1970, the Supreme Court of Florida held a statute exempting properties used as licensed homes for the elderly, including religious homes, was consistent with the First Amendment and the Blaine Amendment.\textsuperscript{407} “The atmosphere of the home [was] religious,” as demonstrated by, among other things, daily chapel services, except Sunday, “under the supervision of an ordained minister,” Bible instruction and study, and transport to the churches of the residents’ choice on Sunday.\textsuperscript{408} Out of 158 residents, seventy-six were members of the Presbyterian Church.\textsuperscript{409} “Unquestionably, a Christian atmosphere [was] maintained.”\textsuperscript{410} The Synod of Florida of the Presbyterian Church elected the officers and directors of the home.\textsuperscript{411}

\begin{footnotesize}
\begin{enumerate}
\item[399.] \textit{See} Scavella v. Sch. Bd. of Dade County, 363 So. 2d 1095, 1098 (Fla. 1978).
\item[400.] FLA. STAT. § 1002.39 (2004).
\item[401.] § 1002.38.
\item[403.] \textit{Id.} at 244.
\item[404.] \textit{See id.} at 244-45.
\item[405.] \textit{Id.} at 244.
\item[406.] \textit{See} Johnson v. Presbyterian Homes of the Synod of Fla., Inc., 239 So. 2d 256, 261–62 (Fla. 1970).
\item[407.] \textit{Id.} at 261–63.
\item[408.] \textit{Id.} at 258.
\item[409.] \textit{Id.} at 263.
\item[410.] \textit{Id.} at 258.
\item[411.] \textit{Johnson}, 239 So. 2d at 258.
\end{enumerate}
\end{footnotesize}
In upholding the constitutionality of a tax exemption benefiting the home, the court in *Johnson v. Presbyterian Homes of the Synod of Florida, Inc.* disregarded its sectarian character or, indeed, the fact that it was controlled by a church, and instead focused on the statute's secular purpose of encouraging the establishment of homes for the elderly.\textsuperscript{412} Referencing federal precedent, the court also discussed the neutrality of the exemption:

The exemption goes, not only to homes for the aged owned by religious bodies, but to any bona fide homes for the aged duly licensed, owned and operated in compliance with the terms of the statute by Florida corporations not for profit . . . . There is nothing to prevent organizations which do not believe in a Supreme Being from also complying with the statute.\textsuperscript{413}

The *Johnson* court went one step further and held that excluding the religious home from the tax exemption could itself violate the law: "To exempt all homes complying with the statute, except church-related homes, would indeed be discriminatory and inconsistent with the obvious intent and secular aims of the Legislature."\textsuperscript{414}

A year later, in 1971, federal and state law diverged for the first time with the Supreme Court of Florida still on the neutrality track, while the United States Supreme Court turned toward no-aid separationism.\textsuperscript{415} The Supreme Court of Florida upheld the Educational Facilities Law, which authorized Florida counties to create county authorities to assist institutions of higher education, including sectarian institutions, with obtaining financing to develop and expand educational facilities.\textsuperscript{416} The plaintiff challenged bond financing for the purpose of constructing a dormitory-cafeteria and purchasing necessary equipment and other facilities at the Florida Institute of Technology.\textsuperscript{417} The court ruled against the appellant on the following grounds:

A state cannot pass a law to aid one religion or all religions, but state action to promote the general welfare of society, apart from any religious considerations, is valid, even though religious interests may be indirectly benefited. If the primary purpose of the state action is to promote religion, that action is in violation of the

\textsuperscript{412} *Id.* at 261. "It is apparent that Fla. Stat. (1967), § 192.06(14), F.S.A., was enacted to promote the general welfare through encouraging the establishment of homes for the aged and not to favor religion . . . ." *Id.*

\textsuperscript{413} *Id.* at 261–62.

\textsuperscript{414} *Id.* at 262.

\textsuperscript{415} See *Nohrr v. Brevard County Educ. Facilities Auth.*, 247 So. 2d 304, 307 (Fla. 1971).

\textsuperscript{416} *Id.* at 306–07.

\textsuperscript{417} *Id.* at 306.
First Amendment, but if a statute furthers both secular and religious ends, an examination of the means used is necessary to determine whether the state could reasonably have attained the secular end by means which do not further the promotion of religion.\textsuperscript{418}

In contrast, in 1971, the United States Supreme Court held that laws authorizing reimbursement for parochial teacher salaries, textbooks, and instructional materials used in the teaching of secular subjects were unconstitutional on the grounds that they would cause excessive entanglement with the Catholic Church.\textsuperscript{419} Thus, this ruling began the United States Supreme Court's roughly two-decade swing toward federal no-aid separationism,\textsuperscript{420} which allowed neutral aid to religious organizations in only isolated instances consistent with the Court's previous rulings pertaining to textbook loan programs and bus transportation.\textsuperscript{421} Except in Florida, the trend else-

\begin{itemize}
  \item \textsuperscript{418} \textit{Id.} at 307 (quoting \textit{Johnson}, 239 So. 2d at 261).
  \item \textsuperscript{419} \textit{Lemon v. Kurtzman}, 403 U.S. 602, 606-07, 614 (1971).
  \item \textsuperscript{421} \textit{See Meek v. Pittenger}, 421 U.S. 349, 373 (1975) (upholding statute authorizing textbooks for private schools); Wolman v. Walter, 433 U.S. 229, 255 (1977) (upholding use of public school personnel to provide guidance, remedial and therapeutic speech and hearing
where in the country was similar in Blaine-related litigation that frequently referenced federal precedent.\footnote{422}

In 1972, the Florida Attorney General published an opinion interpreting the Establishment Clause and article I, section 3, stating that the Duval County School Board could make available to private secular or parochial schools "audiovisual materials and other instructional aids" purchased by the school district without charge.\footnote{423} Relying primarily upon \textit{Southside Estates, Johnson, and Nohrr v. Brevard County Education Facilities Authority}, the Attorney General reasoned, "[t]he rendering of certain tax-supported services to a private or parochial school for the benefit of students taught there is not necessarily unconstitutional, if the services furnished are for the benefit of the students and not for the support of a particular religious organization."\footnote{424} According to the Attorney General, "state action to promote the general wel-

services on a neutral site; upholding provision of diagnostic services on neutral site; upholding reimbursing cost of standardized testing and scoring of private school students; Springfield Sch. Dist. v. Dept. of Educ., 397 A.2d 1154, 1171 (Pa. 1979) (upholding state law requiring school districts to provide bus transportation for all children, including children enrolled in religious schools); Comm. for Pub. Educ. & Religious Liberty v. Regan, 444 U.S. 646, 648, 662 (1980) (upholding religious school reimbursement for actual costs of state-mandated tests and reporting).

\footnote{422} Compare Sheldon Jackson Coll. v. State, 599 P.2d 127, 132 (Alaska 1979) (striking a program providing tuition grants exclusively to students attending private schools based in part on then-current federal Establishment Clause jurisprudence), and Spears v. Honda, 449 P.2d 130, 139 (Haw. 1968) (striking a program that would provide students transportation to private schools), and People ex rel. Klinger v. Howlett, 305 N.E.2d 129, 132–36 (Ill. 1973) (striking grants to cover the costs of tuition, textbooks and auxiliary services for students attending private schools, but did not disturb a statute providing transportation for schoolchildren), and State ex. rel. Rogers v. Swanson, 219 N.W.2d 726, 735 (Neb. 1974) (striking a scholarship program offering grants for students attending private colleges), and Dickman v. Sch. Dist. No. 62C, 366 P.2d 533, 534, 537 (Or. 1961) (striking a textbook loan program), and Hartness v. Patterson, 179 S.E.2d 907, 909 (S.C. 1971) (struck a tuition grant program benefiting only private schools), and Weiss v. Bruno, 509 P.2d 973, 976, 991 (Wash. 1973), overruled by State ex rel. Gallwey v. Grimm, 48 P.3d 274, 284 (Wash. 2002) (struck financial assistance for needy and disadvantaged students to attend public and private schools and tuition support for higher education), with Ala. Educ. Ass'n v. James, 373 So. 2d 1076, 1081 (Ala. 1979) (upholding a college scholarship program neutrally benefiting religious schools because the purpose of the act was to benefit the public), and Ams. United v. Rogers, 538 S.W.2d 711, 718–19 (Mo. 1976) (upholding college scholarship because act was to benefit the public), and Cal. Educ. Facilities Auth. v. Priest, 526 P.2d 513, 522 (Cal. 1974) (upholding use of revenue bonds to finance facilities at religious schools), and Bd. of Educ. v. Allen, 228 N.E.2d 791, 793–94 (N.Y. 1967) (upholding a textbook loan program), and Durham v. McLeod, 192 S.E.2d 202, 204 (S.C. 1972) (upholding a student loan program benefiting public and private schools).


\footnote{424} \textit{Id.} at 422.
fare of society, apart from any religious considerations, has been held valid by the courts, even though religious interests may be indirectly benefited.⁴²⁵

In 1977, the Attorney General issued a second opinion interpreting article I, section 3, stating that the maintenance of religious facilities in county jails and of rent-free office space for a chaplain, as well as the payment of public funds to compensate a chaplain serving the religious needs of prisoners, does not violate article I, section 3, provided that the facilities and clergy are made available to all inmates regardless of religious belief and that no one religion is given preference over another.⁴²⁶ The opinion found that county commissioners may fund repairs, construction or other capital improvements to provide religious facilities at a jail and the sheriff may fund the operation and equipping of the facilities.⁴²⁷ The Attorney General noted authority for the view that refusing religious accommodations in these circumstances could be deemed inhibition of religion.⁴²⁸ In dicta, the opinion also approved a statute permitting “instruction of the prisoners in their basic moral and religious duties.”⁴²⁹

I. The 1977 Constitutional Revision Commission

The 1968 Florida Constitution incorporated a continuous revision clause requiring consideration of revisions to the constitution within the first ten years after approval and every twenty years afterwards.⁴³⁰ The 1977 Constitutional Revision Commission (CRC) considered article I, section 3, including draft amendments to strike it and weaken it, but rejected the changes on the ostensible grounds that its purpose was merely to fix glitches in the Declaration of Rights, not change them substantively.⁴³¹ Its decision can hardly be viewed as a mandate for an exclusionary article I, section 3. Debate even at this late date incorporated allusions to anxiety over whether the Pope or

⁴²⁵. Id.
⁴²⁷. Id. at 120–21.
⁴²⁸. See id. at 118–19.
⁴²⁹. Id. at 119 (quoting FLA. STAT. § 944.11 (1977)).
⁴³⁰. FLA. CONST. art. XI, § 2.
⁴³¹. Constitution Revision Comm’n Transcript, Full Comm’n 99 (Dec. 6, 1977) [hereinafter 1977 Constitution Revision Transcript]. A proposal to strike the Blaine amendment was rejected. See id. Another amendment considered regarded a committee philosophy of restraint. See id. at 100–04. The effort to delete “directly or indirectly” was rejected. Id. at 122. In truth, the 1977 CRC approved draft substantive changes to the Declaration of Rights including with respect to privacy, pretrial release, grand jury counsel, and non-discrimination based upon sex. Steven J. Uhlfelder & Robert A. McNeeley, The 1978 Constitution Revision Commission: Florida’s Blueprint for Change, 18 NOVA L. REV. 1489, 1492–94 (1994).
other Catholic Church officials sought to "takeover in this state." Ultimately, the debate was unavailing in 1978; the electorate disapproved all the 1977 CRC's proposed revisions—whether or not they concerned the Declaration of Rights.

Without distinguishing or even discussing prevailing case law, the key proponents of striking article I, section 3 gave as their reason that it allegedly precluded aid as simple as vaccinating pupils at religious schools, busing to parochial school or for field trips, offering curriculum guidance, utilizing public sports facilities and participating in sports contests, renting private religious facilities, and testing for eyeglasses, and indirect aid as sophisticated as tax credits and vouchers for tuition at parochial schools. Opponents disagreed that the 1968 Blaine Amendment forbade the less sophisticated forms of aid, ironically, for the reason that the Opportunity Scholarship Program is constitutional; in other words, they were offered as part of a generally eligible program to all Floridians regardless of religious preference.

Neither side betrayed a thoughtful grasp of prevailing case law or practice. Proponents of striking the amendment overstated what precedent indicated it forbade, and opponents voiced support for the neutrality principle upon which the constitutionality of school choice programs depend as much as less sophisticated welfare programs. An alternative amendment proposed striking "directly or indirectly" from the 1968 Blaine Amendment as unnecessary, but opponents defeated this proposal twenty to fifteen on the ground that if the language was superfluous there was no need to eliminate it. The CRC's final decision not to modify the 1968 Florida Blaine Amendment became a non-event when voters disapproved all of the 1977

432. 1977 Constitution Revision Transcript, supra note 431, at 109, 111.
433. Id. at 101, 120; Kelley H. Armitage, Constitution Revision Commissions Avoid Log-rolling, Don't They?, FLA. B.J., Nov. 1998, at 62, 64 n.36 (citation omitted).
434. 1977 Constitution Revision Transcript, supra note 431, at 101, 120.
435. Id. at 108, 121.
436. Id. at 102.
437. Id. at 107-08.
438. Id. at 110.
439. 1977 Constitution Revision Transcript, supra note 431, at 121.
440. Id. at 106-07, 112, 114.
441. Id. at 101, 103.
442. For example, Southside held that a church's use of public facilities is permitted. Southside Estates Baptist Church v. Bd. of Trs., 115 So. 2d 697, 700-01 (Fla. 1959).
443. 1977 Constitution Revision Transcript, supra note 431, at 102, 105.
444. Id. at 114-15, 122.
CRC’s proposals because, according to pundits, “the casino gambling initiative also on the ballot poisoned the voters to all the initiatives.”

J. The 1997 Constitutional Revision Commission

Pursuant to the 1968 Florida Constitution continuous revision clause, the 1997 CRC met without intervening developments in article I, section 3 precedent. The United States Supreme Court, on the other hand, was in the midst of one of the most radical realignments in the Court’s history dating back to its pre-1971 neutrality jurisprudence. The shift is evident in cases upholding public aid to a blind person attending a sectarian institution for the purpose of becoming a minister; a government-provided sign language interpreter for deaf children in religious schools; and remedial educational services on the campus of private schools. It was likewise evident in cases holding that religious persons should be treated equally in public forums, just as the Supreme Court of Florida held decades earlier that churches should have equal access to public facilities.

The 1997 CRC session opened with the caution that a too ambitious agenda could lead to the same defeat experienced by the 1977 CRC. In 1998, voters nevertheless approved diverse revisions affecting the judiciary, environment and conservation, education, cabinet, privacy, elections, and gun sales. The legislature encouraged this result by establishing a task force on the judiciary, funding, and assisting with bill drafting and other ser-

445. Armitage, supra note 433, at 64 n.36 (citation omitted).
446. FLA. CONST. art. XI, § 2.
451. Compare Southside Estates Baptist Church v. Bd. of Trs., 115 So. 2d 697, 700–01 (Fla. 1959) (holding a Florida public school may use its building for religious club meeting during non-school hours), with Widmar v. Vincent, 454 U.S. 263, 265, 276–77 (1981) (holding a state university’s policy of excluding religious student groups from campus facilities was unconstitutional), and Bd. of Educ. of Westside County Sch. v. Mergens, 496 U.S. 226, 253 (1990) (plurality opinion) (holding that a public secondary school that receives federal funding could not prohibit a student religious club from meeting after school hours on school premises).
453. Id. at 276 n.5, 282 n.22 (citations omitted).
vices as early as 1994. The 1997 CRC did not consider proposals to modify the 1968 Blaine Amendment made by the public in public hearings required by the Constitution. Under the rules of procedure for the Rules and Administration Committee of the 1997 CRC, public proposals for revisions had to be read and were rejected unless moved for consideration by the full committee by at least ten votes.

A commissioner on the Rules and Administration Committee motioned to file with the Secretary for consideration by the 1997 CRC one public proposal to revise the 1968 Blaine Amendment “to ensure that the provision is not interpreted to prevent students in parochial schools from receiving neutral benefits.” This motion did not receive the mandatory ten votes for consideration by the CRC. Additional public proposals to modify the 1968 Blaine Amendment were never moved in the Committee; these included a proposal to remove the language “directly or indirectly in aid of any church, sect, or religious denomination or in aid of any sectarian institution” so that the amendment would have stated: “to directly promote any church, sect, or religious denomination or directly aid any sectarian religious institution or program. The state or any political subdivision or agency thereof shall not deny equal access to a public benefit on account of religion.” Another public proposal was to modify the 1968 Blaine Amendment to read as follows: “There shall be no law respecting the establishment of one religion in preference to any other . . . .” In the end, the Committee prevented any public proposal to modify the 1968 Blaine Amendment from receiving consideration by the full CRC and Florida voters.

K. Last Blaine Amendment Litigation

In the aftermath of the 1997 CRC, two Florida appellate courts have examined religiously-neutral programs of general eligibility with a secular purpose, including the first to strike such a program. Meanwhile, the United States Supreme Court completed its realignment with neutrality principles

454. Id. at 276.
455. FLA. CONST. art. XI, § 2(c).
458. Id.
459. Id.
460. Id.
461. Id.
and forced opponents of school choice to dismiss their federal causes of action and rely with limited success upon state Blaine amendments. First, in 2000, in *Rice v. State*, the Fifth District held constitutional a criminal statute enhancing penalties for controlled substance crimes near a place of worship. *Echoing Southside Estates*’ holding that the expenditure of public revenue on religious institutions is permissible if not for a religious purpose, the Fifth District held, “the expenditure of public money to enforce the statute is too remote to aid any sectarian purpose.”

In 2002, in *Zelman v. Simmons-Harris*, the United States Supreme Court upheld school vouchers permitting parents to send their children to public or private religious or non-religious schools. The Court held, where a government aid program is neutral with respect to religion, and provides assistance directly to a broad class of citizens

463. See *Zelman v. Simmons-Harris*, 536 U.S. 639, 652 (2002). For the results of Blaine litigation elsewhere thus far, see *Jackson v. Benson*, 578 N.W.2d 602, 607, 632 (Wis. 1998) (upholding a school choice program similar to the Opportunity Scholarship Program); *Kotterman v. Killian*, 972 P.2d 606, 625 (Ariz. 1999) (upholding a tax credit-based school choice program); *Toney v. Bower*, 744 N.E.2d 351, 363 (Ill. App. Ct. 2001) (upholding a tax credit-based statute for a taxpayer’s expenses for elementary and secondary school education); *Emby v. O’Bannon*, 798 N.E.2d 157, 167 (Ind. 2003) (upholding a program that allocated state funds to provide secular educational services to parochial school students enrolled in public school); *State ex rel. Gallwey v. Grimm*, 48 P.3d 274, 288 (Wash. 2002) (upholding a program that provided funding for certain students to attend colleges or universities, including those schools affiliated with or operated by a religious group); see also *Doolittle v. Meridian Joint Sch. Dist.*, 919 P.2d 334, 343 (Idaho 1996) (upholding reimbursement under IDEA for education at a parochial school); *Minn. Fed’n of Teachers v. Mammenga*, 485 N.W.2d 305, 310 (Minn. Ct. App. 1992) (upholding statute providing for state payments to colleges and universities, including those religiously-affiliated but found not to be "pervasively sectarian," covering costs incurred by high school students enrolled in college courses for secondary school credit); *Ams. United for Separation of Church & State Fund, Inc. v. State*, 648 P.2d 1072, 1088 (Colo. 1982) (upholding a program permitting students to use scholarships at any approved public, private or religiously-affiliated college or university); *Lenstrom v. Thorne*, 311 N.W.2d 884, 889 (Neb. 1981) (upholding college scholarship program); *Neb. ex rel. Creighton Univ. v. Smith*, 353 N.W.2d 267, 272–73 (Neb. 1984) (upholding research grant to religious school). But see *Chittenden Town Sch. Dist. v. Dep’t of Educ.*, 738 A.2d 539, 563–64 (Vt. 1999) (striking down tuition reimbursement to parochial school program); *Bagley v. Raymond Sch. Dep’t*, 728 A.2d 127, 147 (Me. 1999) (holding an education tuition program statute that excluded religious schools to be constitutional); *Op. of the Justices*, 616 A.2d 478, 480 (N.H. 1992) (finding that it would be unconstitutional for school districts to pay partial tuition for parents who sent students to private schools of their choice).

464. 754 So. 2d 881 (Fla. 5th Dist. Ct. App. 2000).
465. Id. at 882–83.
466. Id.
468. Id. at 662–63.
who, in turn, direct government aid to religious schools wholly as a result of their own genuine and independent private choice, the program is not readily subject to challenge under the Establishment Clause.469

The Court fully embraced principles evident in Florida law, just as Florida law took an about-face.

In 2004, in Bush v. Holmes,470 the First District held the Opportunity Scholarship Program unconstitutional under article I, section 3 in an en banc 8-5-1 decision.471 The Opportunity Scholarship Program entitles parents with children in schools underperforming for two-out-of-four years to scholarships to enroll their children in private nonreligious or religious schools which agree: 1) to “[a]ccept scholarship students on an entirely random and religious-neutral basis,” and 2) “not to compel any student attending . . . on an opportunity scholarship to profess a specific ideological belief, to pray, or to worship.”472

Although insisting its decision “does not reach” other programs,473 the First District adopted a three-part test for infringements of article I, section 3 that could do none other.474

The constitutional prohibition in the no-aid provision involves three elements: 1) the prohibited state action must involve the use of state tax revenues; 2) the prohibited use of state revenues is broadly defined, in that state revenues cannot be used ‘directly or indirectly in aid of’ the prohibited beneficiaries; and 3) the prohibited beneficiaries of the use of state revenues are ‘any church, sect or religious denomination’ or ‘any sectarian institution.’475

The court hinted that, in its view, “sectarian” might really mean “pervasively sectarian,”476 and, remarkably, expressed skepticism that the history or text of Blaine Amendments nationally was associated with religious bigotry or animus.477

469. Id. at 652.
471. Id. at 366.
473. Bush I, 886 So. 2d at 362.
474. Id. at 352.
475. Id. at 352 (quoting FLA. CONST. art. I, § 3).
476. Id. at 353 n.10.
477. Id. at 351 n.9. The court further noted:
III. THE CONTEMPORARY MEANING OF THE 1968 FLORIDA BLAINE AMENDMENT

Florida is one of the few states with a Blaine Amendment where all branches of government and lesser governmental bodies have interpreted the constitution to permit religiously-neutral public educational programs of general eligibility with a secular purpose.478 Beginning with direct funding for parochial education and use of sectarian facilities for public education in the 1840s,479 continuing after the adoption of the declaration of rights, section 6 until the 1910s,480 then resuming after the world wars,481 state and local governments have insisted upon treating persons equally without regard to religious beliefs.482

A. The Three-Prong Test for Complying with Article I, Section 3

During the half-century of jurisprudence and lawmaking leading to 2004, the following three-part test was applied to assess compliance with article I, section 3: (1) religion-neutral programs; (2) having a non-sectarian bona fide public purpose; and (3) of general eligibility and equally available to both sectarian and nonsectarian institutions, do not violate the Florida Constitution.483 For programs complying with this test, public revenue passing to sectarian institutions is not “in aid of” them within the meaning of article I, section 3484 because it does not have the purpose of, or intent to, benefit them.485 The purpose of the Opportunity Scholarship Program, for

Whether the Blaine-era amendments are based on religious bigotry is a disputed and controversial issue among historians and legal scholars. . . . [T]here is no evidence of religious bigotry relating to Florida's no-aid provision. Even if the no-aid provisions were “born of bigotry,” . . . such a history does not render the final sentence of article I, section 3 superfluous. Significantly, nothing in the proceedings of the CRC or the Florida Legislature indicates any bigoted purpose in retaining the no-aid provision in the 1968 general Revision of the Florida Constitution.

Id. (quoting Mitchell v. Helms, 530 U.S. 793, 824 (2000)). “[N]othing in the history or text of the Florida no-aid provision suggests animus towards religion.” Id. at 364.

478. See supra Part II.C.
479. See supra Part II.A.2.b.
480. See supra Part II.F.2.
481. See supra Part II.B–E.
482. See supra Part II.F.2.
484. FLA. CONST. art. 1, § 3.
485. See Johnson, 239 So. 2d at 261.
example, is to improve the overall quality of Florida’s public schools;\textsuperscript{486} it is not a mere pretext to benefit religious schools.\textsuperscript{487}

For public programs complying with the three-part test, the primary beneficiaries are those receiving the service, not the religious institutions.\textsuperscript{488} For example, the Supreme Court of Florida in \textit{Koerner} held county taxpayers were the beneficiaries of any improvements to the park, not the church reserving an easement over it for baptisms.\textsuperscript{489} In \textit{Johnson}, the tax exemption for eldercare primarily benefited the elderly and community, not the nonprofit Presbyterian facility.\textsuperscript{490} Likewise, in \textit{City of Boca Raton v. Gidman},\textsuperscript{491} a case not interpreting article I, section 3, the Supreme Court of Florida held that the beneficiaries of city funds subsidizing a child day care center run by a nonprofit organization were the city’s disadvantaged children, not the nonprofit corporation.\textsuperscript{492} The city charter provided, similar to article I, section 3, that “[n]o city funds shall be expended in any manner whatsoever to accrue either directly or indirectly to the benefit of any religious, charitable, benevolent, civic, or service organization.”\textsuperscript{493} The United States Supreme Court held likewise that children and parents, not private schools, were the beneficiaries of reimbursement for school bus fares in \textit{Everson},\textsuperscript{494} loan of textbooks in \textit{Board of Education v. Allen},\textsuperscript{495} and tuition and tutorial aid in \textit{Zelman v. Simmons-Harris}.\textsuperscript{496}

This is not to deny that, as the Supreme Court of Florida stated in \textit{Johnson}, a benefit “merely incidental to the achievement of a public purpose” passes to the private service provider.\textsuperscript{497} Otherwise, crucial social services


\textsuperscript{487} Plaintiffs may prove a pretextual religious purpose. \textit{See Johnson}, 239 So. 2d at 261 (“[I]f a statute furthers both secular and religious ends, an examination of the means used is necessary to determine whether the state could reasonably have attained the secular end by means which do not further the promotion of religion.”); cf. \textit{Silver Rose Entm’t, Inc. v. Clay County}, 646 So. 2d 246, 252 (Fla. 1st Dist. Ct. App. 1994) (indicating the court may critically examine any putative purpose of a law).

\textsuperscript{488} \textit{See Johnson}, 239 So. 2d at 261.

\textsuperscript{489} Koerner v. Borck, 100 So. 2d 398, 402 (Fla. 1958).

\textsuperscript{490} \textit{Johnson}, 239 So. 2d at 261.

\textsuperscript{491} 440 So. 2d 1277 (Fla. 1983).

\textsuperscript{492} \textit{Id.} at 1282.

\textsuperscript{493} \textit{Id.} at 1278.

\textsuperscript{494} \textit{Everson v. Bd. of Educ.}, 330 U.S. 1, 18 (1947).

\textsuperscript{495} 392 U.S. 236, 243–44 (1968).

\textsuperscript{496} 536 U.S. 639, 645 (2002).

\textsuperscript{497} \textit{Johnson v. Presbyterian Homes of Synod of Fla.}, Inc., 239 So. 2d 256, 261 (Fla. 1970).
might never be delivered. Nor is it to disagree that the private provider may attract persons who otherwise would not attend. It is merely to point out that neither has so far been material to Florida courts in analogous cases. Likely, more elderly Floridians can afford pervasively religious nursing homes due to the property tax exemption held constitutional in Johnson. Possibly, more persons attend places of worship because of enhanced controlled substance penalties held constitutional in Rice v. State. The university in Nohrr could presumably build more facilities attracting more students as a result of tax-advantaged bond financing. Church members in Southside Estates may not have been able to worship at all without equal access to public school facilities.

Modern educational funding programs sever the link between religious organizations and any alleged government benefit derived from the program and satisfy the three-prong test more cleanly than any of the aforementioned cases. A public benefit passed directly to the devoutly religious retirement home in Johnson, religious university in Nohrr, and churches in Southside Estates, and Koerner. In contrast, parents and students must decide where to spend their Opportunity Scholarship, McKay Scholarship, Bright Future Scholarship, Florida Resident Access Grant, and Florida Teacher Scholarship. As long as a school is qualified, Florida is entirely neutral about the school parents and students choose, public or private, religious or non-religious. The effect of the parents’ discretion is to add an intervening step rendering the benefit received by the religious organization even more incidental than was the case in prior precedent. It would be no

498. See id. at 263.
499. See 754 So. 2d 881, 885 (Fla. 5th Dist. Ct. App. 2000).
501. See Southside Estates Baptist Church v. Bd. of Trs., 115 So. 2d 697, 700–01 (Fla. 1959).
502. See Johnson, 239 So. 2d at 264.
503. Nohrr, 247 So. 2d at 307.
504. Southside Estates Baptist Church, 115 So. 2d at 700–01.
507. § 1002.20 (6)(b)(2).
511. See § 1002.20(6)(a)-(b).
different if the religious school received the money from a parent who received a tax deduction or tax credit or if a parent who was a public employee spent part of her paycheck on private school tuition or if a welfare recipient did likewise. The effect of the parents’, public employees’, or welfare recipients’ discretion is analogous to that of a superseding, independent variable as in tort law.

Prevailing precedent and law also does not turn on the extent of an organization’s or publicly financed activity’s religiosity. Johnson dealt with a devoutly religious retirement home engaged in religious instruction, Koerner and Southside Estates with a church, and Nohrr with a religious university. The retirement home and churches were engaged in inherently religious activity including religious instruction and worship. Florida precedent does not single-out these factors because article I, section 3 of the Florida Constitution does not. The plain text of article I, section 3 supports no difference at all between public funding for: 1) religious organizations, but not devoutly religious ones; 2) secular activities or social services performed by sectarian persons, but not religious activities or services; or 3) post-secondary education provided by devoutly religious institutions, but not kindergarten through twelfth grade education.

B. The Fee-for-Services Exception to Article I, Section 3

Public programs may also comply with article I, section 3, because they do not confer “aid” at all, but are purely fee-for-service transactions or value-
for-value agreements. Fee-for-service transactions are quid pro quo arrangements that happen to involve the government as the monopoly provider, whereas classic aid programs do not result in the recipient conferring a direct and proximate benefit on government; \(^{521}\) for example, public textbook loan programs or public educators offering guidance counseling in private schools. \(^{522}\) In these circumstances, the aid is akin to unrequited donations. \(^{523}\) In contrast, the United States Supreme Court has upheld reimbursing a sectarian school for performing administration and grading of testing required by the state. \(^{524}\) This is similar to a fee-for-service transaction, where the government receives something of equal value in exchange for payment. \(^{525}\)

The most common fee-for-service transactions involve mail, transportation (e.g., toll roads; bus, ferry, and train fares; and curb cuts), utilities, airport landing rights, pavilion and camping site rentals, building permits, paid parking spaces, and extra police security or crossing guards. \(^{526}\) Like mandatory and universal government-funded services such as police and fire protection, these optional paid-for services probably attract persons to religious and non-religious organizations alike who would not otherwise attend; however, excluding religious organizations from participating in these neutral and generally eligible programs would, in the words of Johnson, "indeed be discriminatory." \(^{527}\) Public services offered for a fee are religiously neutral, generally available, and have a secular purpose. \(^{528}\)

Fee-for-service transactions also occur when the state pays vendors' market rates to provide mandatory public services such as fee-for-polling stations, fees-for-probation services, fees-for-healthcare, and fees-for-education. \(^{529}\) Modern scholarship and loan assistance require that, in exchange for the scholarship or loan, the state receive an educated teacher,

\(^{521}\) See Initial Brief, supra note 486, at 23.


\(^{523}\) See Initial Brief, supra note 486, at 23.


\(^{525}\) See Initial Brief, supra note 486, at 23.


\(^{527}\) Johnson v. Presbyterian Homes of Synod of Fla., Inc., 239 So. 2d 256, 262 (Fla. 1970).

\(^{528}\) See id. at 259.

nurse, or child. Religious and nonreligious private schools provide this service that taxpayers would otherwise finance through public schools likely at a greater cost, because taxpayers finance entirely public facilities. School districts could actually lose net public revenue without the Opportunity Scholarship and McKay Scholarship Program because public schools benefit from state and federal revenue for students participating in both programs as if they were enrolled in the school districts, but would receive no such revenue stream if parents chose to finance their child’s private education entirely on their own.

1. Unless Neutral, the Blaine Amendment Is Not Self-Executing

The Supreme Court of Florida and Florida Legislature have given a meaning to article I, section 3 in keeping with its plain text by treating “in aid of” as “for the purpose of.” Courts in other states have done likewise. In contrast, the opponents of school choice treat “in aid of” within the meaning of article I, section 3 as “any benefit to,” but without advocating an end to literally all public revenue benefiting religious institutions, only revenue for certain religious activities and for “pervasively sectarian” organizations. The Supreme Court of Florida in Southside Estates Baptist Church and the Fifth District in Rice squarely rejected the notion that any public revenue benefiting a pervasively religious institution is unconstitutional. If, contrary to historic precedent, a religiously-neutral program of general eligibility with a secular purpose is unconstitutional, the finer distinctions

530. Cf. FLA. CONST. art. IX, § 1; Bush v. Holmes (Bush II), 767 So. 2d 668, 675 (Fla. 1st Dist. Ct. App. 2000).
531. See Initial Brief, supra note 486, at 22–23.
532. See id.
533. FLA. CONST. art. I, § 3.
534. See e.g., Jackson v. Benson, 578 N.W.2d 602, 612 (Wis. 1998) (holding school choice statute had primary secular purpose of “provid[ing] low-income parents with an opportunity to have their children educated outside of the embattled [public] [s]chool system”); Ala. Educ. Ass’n v. James, 373 So. 2d 1076, 1081 (Ala. 1979) (noting that the purpose of a scholarship program was to benefit the public, not individual colleges); Ams. United for Separation of Church & State Fund, Inc. v. State, 648 P.2d 1072, 1084–85 (Colo. 1982) (upholding a program that permitted students to use scholarships at religious colleges because it was intended to achieve a secular purpose in educating the student).
535. See Brief of Professor Steven G. Gey as Amicus Curiae Supporting Appellees at 11–16, Bush v. Holmes, Fla. S. Ct., Case Nos. SC04-2323, SC04-2324, SC04-2325 (Fla. Mar. 7, 2005) [hereinafter Amicus Brief].
536. Southside Estates Baptist Church v. Bd. of Trs., 115 So. 2d 697, 700 (Fla. 1959); Rice v. State, 754 So. 2d 881, 883 (Fla. 5th Dist. Ct. App. 2000).
appellees draw, without basis in precedent or the language of the amendment, beg the question whether article I, section 3 is self-executing.  

The basic guide, or test, in determining whether a constitutional provision should be construed to be self-executing, or not self-executing, is whether or not the provision lays down a sufficient rule by means of which the right or purpose which it gives or is intended to accomplish may be determined, enjoyed, or protected without the aid of legislative enactment.  

The meaning of key terms that appellees in *Holmes* debate include "revenue of the state . . . taken from the public treasury," "directly or indirectly," "in aid of," "aid," and "sectarian." As set forth above, for example, Appellees contend that "sectarian" means "pervasively sectarian." However, the Supreme Court of Florida has not treated these terms as ambiguous and the Florida Legislature has attributed to them their plain meaning by not expending public revenue for the purpose of benefiting religious organizations, only for a secular purpose as part of a religiously-neutral program of general eligibility.

If not self-executing, article I, section 4 has impliedly been legislatively implemented repeatedly in a non-exclusionary fashion through scholarship and loan programs benefiting students at all levels. Once, the Legislature even enacted a voucher program for exceptional students contemporaneous with the re-adoption of the state Blaine Amendment. The state's increased religious diversity and new education policy objectives, such as increasing educational competition and improving accountability, support the further expansion of religiously-neutral public programs of general eligibility. For example, it is widely recognized that the state could not meet the educational challenge posed by a universal pre-kindergarten program without including religious providers.

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539. Amicus Brief, supra note 535, at 3–4.
540. Id. at 16–17.
541. See Johnson v. Presbyterian Homes of the Synod of Fla., Inc., 239 So. 2d 256, 261 (Fla. 1970).
544. See FLA. STAT. § 1002.205 (2004); FLA. STAT. § 1008.31 (2004).
2. Adequacy, Uniformity, and the State School Trust Fund

Even if the Blaine Amendment does not preclude publicly funded religiously-neutral programs in which religious and nonreligious schools participate, some argue that article IX, section 1, the adequacy and uniformity requirement, together with article IX, section 6, the School Fund, prohibit it. This argument is erroneous. First, in 2004–05, the School Fund accounted for much less than one percent of all public school funding. Although there is no question that from its enactment in 1828, revenue from the School Fund was limited, pursuant to the federal sixteenth-section trust condition, to then-Protestant public instruction; however, county funds were not so limited and, as set forth above, financed private religious education until the 1910s. In modern terminology, this county educational funding represents “required local effort” within the meaning of the Florida Education Finance Program (FEFP) and is derived from the school district board millage levy. Most of the FEFP comes from general revenue. As not all of the various income streams comprising the FEFP are poured into one pot and intermingled, the Department of Education funds the Opportunity Scholarship Program strictly from general revenue or categorical funds other than School Fund revenue.

The theory that article IX, section 1, together with article IX, section 6, somehow permits funding only public education, challenges long-standing practice and the bedrock constitutional principle that the legislature is free to

546. See Fla. Const. art. IX, §§ 1, 6.
548. See id.
enact any statute, unless the constitution clearly prohibits it.\textsuperscript{552} "The Florida Constitution is a limitation upon, rather than a grant of, power."\textsuperscript{553} Article IX, section 1 unambiguously requires the State to make an adequate provision for a "uniform, efficient, safe, secure and high quality system of free public schools" and to establish, maintain, and operate institutions of higher learning.\textsuperscript{554} However, it does not expressly or impliedly preclude the legislature from also funding private education from sources other than the School Fund, any more than it precludes the legislature from funding highways, or a host of other annual appropriations that in some remote sense reduce the revenue available for public education.\textsuperscript{555} The legislature's contemporary construction of article IX, section 1 in enacting the Opportunity Scholarship Program and its purpose to improve public education is also entitled to deference,\textsuperscript{556} whereas the principle of \textit{expressio unius est exclusio alterius} (the mention of one thing implies the exclusion of the other) has no application where the constitution does not clearly prohibit the legislature from acting.\textsuperscript{557}

C. No-Aid Separationism and Unequal Treatment Implicate Other State and Federal Constitutional Protections

A construction of article I, section 3 radically different from the past, requiring no-aid separationism and unequal treatment of religious persons, would necessarily implicate other state and federal constitutional principles. It would pit article I, section 3 against the state and federal Free Exercise Clause and federal Establishment Clause. Additionally, it would implicate the state and federal Equal Protection Clause. Furthermore, an exclusionary interpretation of article I, section 3 raises troubling separation of powers and preemption questions related to federal aid distributed by the State.

1. Free Exercise of Religion

The Florida Free Exercise Clause is just two sentences removed from the Blaine Amendment and provides, "[t]here shall be no law respecting the

\begin{footnotesize}
\begin{enumerate}
\item See State v. Miller, 313 So. 2d 656, 658 (Fla. 1975).
\item Bush v. Holmes (\textit{Bush II}), 767 So. 2d 668, 673 (Fla. 1st Dist. Ct. App. 2000), rev. denied, 790 So. 2d 1104 (Fla. 2001) (citing Bd. of Pub. Instruction v. Wright, 76 So. 2d 863, 864 (Fla. 1955); Taylor v. Dorsey, 19 So. 2d 876, 881 (Fla. 1944)).
\item FLA. CONST. art. IX, §1(a).
\item Id.
\item See \textit{Bush II}, 767 So. 2d at 673 (citing \textit{Taylor}, 19 So. 2d at 882); Gallant v. Stephens, 358 So. 2d 536, 540 (Fla. 1978); Greater Loretta Improvement Ass'n v. Boone, 234 So. 2d 665, 670 (Fla. 1970).
\item Bush II, 767 So. 2d at 674 (citing \textit{Taylor}, 19 So. 2d at 881).
\end{enumerate}
\end{footnotesize}
establishment of religion or prohibiting or penalizing the free exercise thereof.'  

It is black letter law that the courts must interpret constitutional provisions in pari materia, so that each phrase and clause is given "independent legal import" with like effect.  

"Every . . . section of the Declaration of Rights stands on equal footing with every other section." Additionally, state courts are forbidden from according lesser rights than the federal constitution requires.

a. Florida Free Exercise Clause

The Supreme Court of Florida has only occasionally interpreted the state Free Exercise Clause. In 1943, the Court treated as a free exercise violation a license tax of $50.00 imposed upon Jehovah's Witnesses for distributing religious pamphlets. The relevant ordinance applied to all pamphleeters, but selective, arbitrary, and capricious enforcement of similar statutes against Jehovah's Witnesses was commonplace. Similarly, although not explicitly interpreting the Free Exercise Clause, the Court in Johnson said, "[t]o exempt all homes complying with the [property tax exemption] statute, except church-related homes, would indeed be discriminatory." In effect, the Supreme Court of Florida has treated public discrimination against a religious group as an unconstitutional penalty.

Webster's defines a "penalty" as the "disadvantage, loss, or hardship due to some action" and a "handicap." An interpretation of the third sentence of article I, section 3 requiring the state to exclude religious persons from religiously-neutral programs of general eligibility with a secular purpose, would inevitably penalize them contrary to the Free Exercise Clause.

558. FLA. CONST. art. I, § 3.  
559. Traylor v. State, 596 So. 2d 957, 962 (Fla. 1992); see Burnsed v. Seaboard Coastline R.R. Co., 290 So. 2d 13, 16 (Fla. 1974).  
561. Traylor, 596 So. 2d at 961.  
562. State ex rel. Singleton v. Woodruff, 13 So. 2d 704, 705-06 (Fla. 1943).  
563. See Hord v. City of Fort Myers, 13 So. 2d 809, 810 (Fla. 1943) (striking permit ordinance to distribute literature on freedom of religion and freedom of speech grounds); see also State ex rel. Hough v. Woodruff, 2 So. 2d 577, 577-78 (Fla. 1941); State ex rel. Wilson v. Russell, 1 So. 2d 569, 569-70 (Fla. 1941).  
565. Southside Estates Baptist Church v. Bd. of Trs., 115 So. 2d 697, 698-99 (Fla. 1959) (citing FLA. CONST. of 1885, Declaration of Rights, § 6).  
566. WEBSTER'S NEW COLLEGIATE DICTIONARY 846 (1976); WEBSTER'S NEW WORLD DICTIONARY OF AMERICAN ENGLISH 998 (3d ed. 1994).  
567. See FLA. CONST. art. 1, § 3.
One lodestar of legal historical research is that in 1885, "sect" or "sectarian" within the meaning of state Blaine amendments meant Catholic. As the United States Supreme Court has recognized, the purpose of Blaine amendments nationally was to ensure that the public paid for only Protestant religious observances. Taxpayers in Florida supported teaching the common religion in the public schools even later than in other states.

The framers of the declaration of rights, section 6 likely intended to penalize Catholics or, in effect, to exclude them from the protection of the state free exercise clause, just as they did with blacks. Most deny this was any longer the case after 1968. Yet, rather than adopt the view that all persons are now protected by the state free exercise clause, no-aid separationists would exempt an even broader class of persons from its protections to include all devout religious persons or even all religious persons. The separationists contend this exemption is required or one part of article I, section 3 would now be unconstitutional under another part. To the contrary, if the state free exercise clause now protects all persons, all that is required is for the Supreme Court of Florida to continue to apply its post-World War II three-prong analytical framework, finding constitutional a 1) religiously-neutral program; 2) of general eligibility; 3) with a secular purpose.

b. Federal Free Exercise Clause

"At a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons." As early as Everson, the Court held that New Jersey "cannot exclude indi-
individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, because of their faith, or lack of it, from receiving the benefits of public welfare legislation.\textsuperscript{576} In \textit{Lukumi}, the Court held that "[a] law burdening religious practice that is not neutral . . . must undergo the most rigorous of scrutiny,"\textsuperscript{577} and that "the minimum requirement of neutrality is that a law not discriminate on its face."\textsuperscript{578} \textit{Smith} recognized that strict scrutiny applies in the absence of a "valid and neutral law of general applicability," as when a purported general law: facially excludes a class of persons due to their religion; includes individualized exemptions from a general requirement, but not benefiting a particular religious group; has as its purpose infringing upon practices due to their religious motivations; or incorporates hybrid constitutional violations such as free exercise-free speech violations.\textsuperscript{579} \textit{Lukumi} and \textit{Smith} govern the permissibility of excluding religious persons from programs of general eligibility to the extent the purpose is to burden their religious exercise.\textsuperscript{580} On the one hand, no-aid separationists deny excluding religious persons from school choice programs of general eligibility burdens or has the purpose of burdening their religious exercise.\textsuperscript{581} On the other hand, they characterize parochial instruction as a quintessential form of religious expression different from "secular social services" such as

\textsuperscript{576} Everson v. Bd. of Educ., 330 U.S. 1, 16 (1947).
\textsuperscript{577} \textit{Lukumi}, 508 U.S. at 546.
\textsuperscript{578} \textit{Id.} at 533.
\textsuperscript{579} Employment Div., Dep’t of Human Res. of Or. v. Smith, 494 U.S. 872, 879 (1990) (quoting United States v. Lee, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring)). The exclusionary rule relieves the individual from observing general laws that do not promote or restrict beliefs. \textit{Id.} at 879. The Court bars the application of a hybrid rule involving the Free Exercise Clause and other constitutional protections. \textit{Id.} at 881. The Court had held that the state may not refuse to allow exemptions in religious cases where there is an exemption system in place. \textit{Id.} at 884; accord \textit{Lukumi}, 508 U.S. at 533 (citing \textit{Smith}, 494 U.S. at 878–79). Free Exercise jurisprudence demonstrates that an individual’s beliefs do not excuse him from compliance with otherwise valid law. See \textit{Lukumi}, 508 U.S. at 534–37. Activities exempted by other laws, for example, zoning ordinances, are exempted from these prohibitions. \textit{Id.} at 536. \textit{Lukumi} does not require a manifestation of animus, consistent with other forms of unconstitutional discrimination, such as disparate treatment discrimination. See \textit{id}; Locke v. Davey, 540 U.S. 712, 732 (2004) (Scalia, J., dissenting) (citing, \textit{inter alia}, Brown v. Bd. of Educ., 347 U.S. 483, 493–95 (1954); United States v. Va., 518 U.S. 515, 549–51 (1996); Adkins v. Children’s Hosp. of D.C., 261 U.S. 525, 552–53 (1923), overruled by West Coast Hotel Co. v. Parrish, 300 U.S. 379, 400 (1937)). However, the enactment and enforcement of the Florida Blaine Amendment was certainly accompanied by religious and racial bigotry. See Bush v. Holmes (\textit{Bush I}), 886 So. 2d 340, 351 n.9 (Fla. 1st Dist. Ct. App. 2004).
\textsuperscript{580} See \textit{Lukumi}, 508 U.S. at 546; see also \textit{Smith}, 494 U.S. at 879.
\textsuperscript{581} See Answer Brief, supra note 573, at 47.
the provision of healthcare by religious hospitals.582 They cannot have it both ways. According to the Sixth Circuit, a ban on religious providers and instruction in the army's on-base day care program violated the Lukumi standard by burdening the children's and parents' religious exercise, insofar as the parents believed it critical for their children to be raised in a religious environment.583

Compliance with article I, section 3 is not likely to be deemed a permissible compelling interest adequate to satisfy strict scrutiny.584 The United States Supreme Court has expressed serious reservations about the constitutionality of a state Blaine amendment interpreted to require the very exclusion federal courts have deemed a violation of the Free Exercise Clause and Equal Protection Clause.585 In Mitchell v. Helms, the plurality concluded that "the exclusion of pervasively sectarian schools from otherwise permissible aid programs" is premised upon a "doctrine, born of bigotry, [that] should be buried now."586 "[H]ostility to aid to pervasively sectarian schools has a shameful pedigree that we do not hesitate to disavow."587 Joining this plurality, the dissent in Zelman recognized that Blaine amendments were intended to disadvantage Catholics and other religious groups.588

In 2004, the United States Supreme Court held in Locke v. Davey that with respect to state scholarships available to students pursuing post-secondary studies, except devotional theology, it would not find unconstitutional a state statute that "codifies the State's constitutional prohibition on providing funds to students to pursue degrees that are 'devotional in nature or designed to induce religious faith.'"589 This decision did not backpedal from the Court's expressed reservations about discriminatory enforcement of a state Blaine amendment, but instead emphasized that the Court was not considering the constitutionality of a Blaine amendment.590 The Court underscored the otherwise substantial inclusiveness of the scholarship program, for example, enabling students to spend scholarships at pervasively sectarian schools to major in anything besides ministry.591

582. Id. at 41–42.
586. Id. at 829.
587. Id. at 828.
590. Id. at 723–24 n.7.
591. Id. at 723–25. The court stated:
The expressed reason that the Court in *Locke* found no evidence of animus in the Promise Scholarship Program is the very reason opponents of Florida school choice programs would strike them. The Supreme Court found no religious animus in Washington's implementation of the Promise Scholarship Program precisely because of the ability of Washington Promise Scholars to "use their scholarship[s] to pursue a secular degree" at a pervasively religious institution and take devotional theology classes. This rationale suggests that the United States Supreme Court would not affirm the unconstitutionality of a Florida scholarship program on the very ground of its inclusiveness and religious neutrality. Article I, section 3 was interpreted to require the striking of religiously neutral educational programs of general eligibility with a secular purpose as they would violate the federal Free Exercise Clause.

2. Establishment Clause

To the extent state courts adopted an interpretation of article I, section 3 that public revenue may be expended at some sectarian institutions, but not pervasively sectarian ones, the decision would prove at least as problematic as if it barred expending public revenue at all sectarian institutions. First, "the First Amendment forbids an official purpose to disapprove of a particular religion or of religion in general." Yet, this would be the effect of a rule prohibiting devoutly religious persons from participating in general public programs, but permitting other religious persons to join. "[T]o withstand the strictures of the Establishment Clause there must be a secular legis-

Far from evincing the hostility toward religion which was manifest in *Lukumi*, we believe that the entirety of the Promise Scholarship Program goes a long way toward including religion in its benefits. The program permits students to attend pervasively religious schools, so long as they are accredited. And under the Promise Scholarship Program's current guidelines, students are still eligible to take devotional theology courses. Some students may have additional religious requirements as part of their majors.

*Id.* at 724–25 (citations omitted).

592. *Id.; see Answer Brief, supra* note 573, at 26, 28.


594. *Id.* at 721 n.4.

595. *See id.* at 725.

596. *See id.*


599. *See Lukumi*, 508 U.S. at 532; Rusk, 379 F.3d at 423.
ative purpose and a primary effect that neither advances nor inhibits religion. 600

Second, the states and courts may not "troll[] through a person's or institution's religious beliefs" to decide whether they are too religious to receive public benefits. 601 To enforce a state orthodoxy test of devoutness as a condition of eligibility for public benefits, the state would have to judge religious doctrine and observe religious expression. 602 This would put the state at greater risk of excessively "entangling itself with religion" than observing strict neutrality. 603 The church autonomy doctrine, premised primarily upon the Establishment Clause and, secondarily, upon the Free Exercise Clause, precludes this unwarranted inquiry. 604

The Mitchell plurality explicitly rejected the pervasively sectarian test on these grounds and due to its "shameful pedigree." 605 According to the Court, "the religious nature of a recipient should not matter to the constitutional analysis, so long as the recipient adequately furthers the government's secular purpose." 606 Justices O'Connor and Breyer joined the plurality in finding a federal program distributing money to state and local government agencies to purchase educational material and equipment on behalf of public and private schools constitutional and in overruling two cases expounding the pervasively sectarian test in education. 607 Concluding that the test is defunct, the Fourth Circuit held it unconstitutional to deny a religious college's request for generally available state grant funds. 608 According to the Court, "[i]t the First Amendment requires government neutrality, not hostility, to religious belief." 609

600. Sch. Dist. v. Schempp, 374 U.S. 203, 222 (1963). See also Epperson v. Arkansas, 393 U.S. 97, 104 (1968) (The government "may not be hostile to any religion or to the advocacy of no-religion . . . . The First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion.").
602. See id.
606. Id. at 827; accord Columbia Union Coll. v. Oliver, 254 F.3d 496, 501-02 (4th Cir. 2001) (quoting Mitchell, 530 U.S. at 827).
607. Oliver, 254 F.3d at 503 (citing Mitchell, 530 U.S. at 844-45, 850 (O'Connor, J., concurring)).
608. Id. at 507-08.
609. Id. at 510 (citing Everson v. Bd. of Educ., 330 U.S. 1, 18 (1947) (Jackson, J., dissenting)).
3. Federal and State Equal Protection

State and federal courts have generally deemed a constitutional provision requiring the exclusion of protected persons from programs of general eligibility an equal protection clause violation.610 Contrasting the rational basis standard of review applicable to economic regulatory legislation, the United States Supreme Court held “a classification . . . drawn upon inherently suspect distinctions such as race, religion or alienage” is subject to strict scrutiny.611 The same is true under state law.612 Consequently, an exclusionary interpretation of the Florida Blaine Amendment should violate equal protection in two ways: 1) the Blaine Amendment was apparently “enacted with the constitutionally suspect purpose of discriminating” against a particular religious group, then reenacted, according to some, with an even broader discriminatory purpose; and 2) the Blaine Amendment “facially classifies] on the basis of religion.”613

Section 6 of the declaration of rights was enacted to discriminate against Catholics, a “discrete and insular” minority in the 1880s,614 then reenacted as the last sentence of article I, section 3, allegedly not for the purpose of discriminating against Catholics, but either “pervasively religious”

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612. The Florida Equal Protection Clause is contained in article I, section 2 of the Florida Constitution and states “No person shall be deprived of any right because of race, religion, national origin, or physical disability.” FLA. CONST. art. I, § 2. The Florida and federal Equal Protection Clauses are coterminous. See In re Constitutionality of House Joint Resolution 25E, 863 So. 2d 1176, 1178–79 (2003); see also Fla. High Sch. Activities Ass’n v. Thomas ex rel. Thomas, 434 So. 2d 306, 308 (Fla. 1983) (noting that strict scrutiny applies “to those actions by the state which abridge some fundamental right or affect adversely upon some suspect class of persons”); Henry v. State, 825 So. 2d 431, 433 (Fla. 1st Dist. Ct. App. 2002) (holding that “[d]eliberately basing the decision to prosecute upon race, religion, or other ‘unjustifiable’ classification . . . is prohibited”); State v. A.R.S., 684 So. 2d 1383, 1386–87 (Fla. 1st Dist. Ct. App. 1996) (holding a prosecutor’s motive for prosecuting a case may not be based on an unjustifiable standard).

613. Heytens, supra note 1, at 145–46.

614. Id. The original rationale for heightened scrutiny in equal protection cases was to prevent “prejudice against discrete and insular minorities.” United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).
persons or all religious persons. 615 Appellees in Holmes argue that the reenactment cured the original invidious defect. 616 Reenactment can cure an original invidious purpose in some circumstances, 617 but not here where the alleged new purpose of article I, section 3 has an effect more prejudicial than the original. The impact of the revised interpretation is actually to broaden the class of religious persons ineligible to participate in public programs. 618 By all indications, these devoutly religious persons are as discrete and insular today as Catholics were in the 1800s. 619

615. See Answer Brief, supra note 573, at 25 n.19.
616. See id. at 26.
617. Compare Johnson v. Governor of Fla., 405 F.3d 1214, 1223, 1234 (11th Cir. 2005) (affirming summary judgment against article VI, § 4 of the Florida Constitution concerning felon disenfranchisement, because, although enacted for a racially discriminatory purpose, it was reenacted for a legitimate purpose applicable to a narrower class), with Hunter v. Underwood, 471 U.S. 222, 233 (1985) (striking Alabama constitutional provision that disenfranchised any person convicted of an offense involving moral turpitude, notwithstanding that the provision could conceivably now serve legitimate nondiscriminatory state interests).
618. Cf. Johnson, 405 F.3d at 1223-24 (recognizing that the disenfranchisement provision at issue was enacted with discriminatory intent before it was amended).
619. Case law is unsettled whether discrimination between religious and nonreligious persons, as opposed to among religious persons or sects, is prohibited under the Equal Protection Clause. See Heytens, supra note 1, at 142-43. “[T]he modern Supreme Court has never analyzed a claim of discrimination against a religious group or against religion in general under the Equal Protection Clause.” Id. at 142. Religious persons in general, as opposed to devout religious persons, are not a discrete and insular minority, but the United States Supreme Court has protected other non-insular groups such as Caucasians and males. Id. at 143-45 (citing Adarand Constr., Inc. v. Pena, 515 U.S. 200 (1995); City of Richmond v. J.A. Crosson Co., 488 U.S. 469 (1989); Craig v. Boren, 429 U.S. 190 (1976)). Some conclude that religious persons are presumptively protected. Colleen Carlton Smith, Note, Zelman’s Evolving Legacy: Selective Funding of Secular Private Schools in State School Choice Programs, 89 VA. L. REV. 1953, 1991 (2003). [D]ifferentiation among religious sects would trigger the strictest scrutiny, yet [the Court] has never addressed this question with regard to laws that make a more general distinction between the secular and the religious. The weight of the evidence, however, supports the view that the Equal Protection Clause requires at least some form of heightened review and probably mandates strict scrutiny.

Id. at 1991 (footnote omitted). Eugene Volokh, Equal Treatment Is Not Establishment, 13 NOTRE DAME J.L. ETHICS & PUB. POL’Y 341, 370 (1999) (“[T]he court has often said that religious discrimination violates the Equal Protection Clause; though it has generally said this about discrimination among religious sects, this principle should at least presumptively apply to discrimination between religious and nonreligious people and institutions.”). Case law is also unsettled as to whether religious organizations, as opposed to individuals, may constitute a suspect class. See Louis K. Liggett Co. v. Lee, 288 U.S. 517, 536 (1933) (“Corporations are as much entitled to the equal protection of the laws . . . as are natural persons.”); Christian Sci. Reading Room v. City & County of S.F., 784 F.2d 1010, 1012 (9th Cir. 1986), (“It seems clear that an individual religion meets the requirements for treatment as a suspect class . . . [w]hether all religions together constitute a suspect class for purposes of the Equal Protection Clause is a far more complex question that the courts have not previously addressed.”); Civil
Some United States Supreme Court precedent suggests that the exclusion of religious persons from generally eligible programs is properly subject to free exercise analysis, rather than equal protection analysis, but *Lukumi* applied strict scrutiny when "[i]n determining if the object of a law is a neutral one under the Free Exercise Clause," it looked for "guidance in our equal protection cases." *Locke* held on its distinguishable facts, not involving a Blaine amendment and not challenging a broadly inclusive scholarship program, that rational basis scrutiny applied to Davey's equal protection claim. The Court relied upon an equal protection case dealing with fundamental rights analysis, rather than suspect classification analysis at the heart of Blaine amendment litigation.

A federal court has not yet ruled squarely on an equal protection challenge to Blaine-inspired exclusion; however, in *Peter v. Weddl*, the Eighth Circuit held that a Minnesota rule excluding private religious schools from participating in the Individuals with Disabilities Education Act program "explicitly discriminated against children who attended private religious schools," and violated the Free Exercise Clause, Free Speech Clause, and Equal Protection Clause. Likewise, in *Columbia Union College v. Liberties for Urban Believers v. City of Chi.*, 157 F. Supp. 2d 903, 910, 911 n.5 (N.D. Ill. 2001), ("While individuals of a particular religious faith may constitute a suspect class . . . there is no proof churches as an entity qualify as a suspect class here."). In the context of school choice programs, directors of schools are natural persons who could be members of a suspect class, along with parents prohibited from spending scholarships at religious schools. See *Peter v. Weddl*, 155 F.3d 992, 1001–02 (8th Cir. 1998) (remanding on whether the state could condition a parent's right to participate in a generally available program upon their forbearance to exercise their right to send a child to the school of their choice); *Hartmann v. Stone*, 68 F.3d 973, 979 n.4 (6th Cir. 1995) (parents who wished to enroll their children in religious day care had standing to sue the Army for prohibiting it).

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621. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah (Lukumi)*, 508 U.S. 520, 540 (1993); see also *Police Dep't of Chi. v. Mosley*, 408 U.S. 92, 96 (1972) (rejecting exclusion of a picketer protesting racial discrimination within 150 feet of a school, but not picketers protesting labor policies, the Court held, "[n]ecessarily, then, under the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views").


625. 155 F.3d 992, 996 (8th Cir. 1998).

https://nsuworks.nova.edu/nlr/vol30/iss1/1
Clarke, the Fourth Circuit held that excluding a religious college from a state grant program presumptively violated these clauses.

4. Separation of Powers and a Political Question

It is perhaps fitting that as in times past, the future interpretation of a "doctrine, born of bigotry" must be decided in the field of education. On the other hand, it is unfortunate that a political conflict over a single educational program now colors the public's view of a previously consensual analytical framework for interpreting article I, section 3 of the Florida Constitution with implications reaching far beyond school choice. The ugly truth is that many of those seeking to enforce article I, section 3 against educational reform programs care more about defeating the policy initiative than the proper balance between church and state in Florida. Their agenda raises political and policy questions, which the courts are not competent to rule upon and which are reserved by the separation of powers doctrine to the legislature.

626. 159 F.3d 151 (4th Cir. 1998).
627. Id. at 155 n.1, 155–57 (referencing plaintiff's constitutional claims as "one constitutional inquiry"). Plaintiffs in Hartmann also made an equal protection and "Parental Liberty" claim. Hartmann v. Stone, 68 F.3d 973, 978 (6th Cir. 1995); see also Vineyard Christian Fellowship v. City of Evanston, 250 F: Supp. 2d 961, 978 (N.D. Ill. 2003) (holding a zoning regulation that classified on the basis of religion was a violation of the Equal Protection Clause and subject to strict scrutiny). The district court in Vineyard Christian Fellowship distinguished Civil Liberties for Urban Believers v. City of Chicago, 157 F. Supp. 2d 903, 906 (N.D. Ill. 2001), on the grounds that the zoning ordinance in that case treated religious institutions like similarly-situated counterparts. Id at 977; cf. Cornerstone Bible Church v. City of Hastings, 948 F.2d 464, 472 n.13 (8th Cir. 1991) ("Absent evidence of purposeful discrimination based on religious status, the rational basis standard should apply. The disparate impact of the ordinance on the Church is insufficient to support an inference of discriminatory purpose."); Cornerstone Bible Church v. City of Hastings, 740 F. Supp. 654, 669 (D. Minn. 1990) ("If the zoning ordinance did establish a classification based solely on religion," the "zoning ordinance is subject to strict scrutiny because it establishes a classification which is drawn upon the inherently suspect distinction of religion.").
IV. CONCLUSION

Florida has reached an important crossroad leading either in the direction of neutrality and equal treatment, consistent with Florida and federal jurisprudence, or in the direction of no-aid separationism and unequal treatment, consistent with discredited federal Establishment Clause jurisprudence and traditional national Blaine amendment jurisprudence. It is the choice between a state agnostic toward religious confession or concern about it; between a national doctrine borne of religious and racial bigotry or this state’s Blaine amendment jurisprudence, rooted in American equality and pluralism; between encouraging charity and education, regardless of impetus or only if secular; between widening or narrowing the cultural rift separating nonbelievers and devout believers; between federal or state law; and between providing market-sensitive equal educational opportunities to have-nots, or perpetuating systemic educational inequity.

Each factor that state courts are required to examine in order to construe the Bill of Rights points in the same direction: 1) preexisting and developing state education law includes numerous examples of religion-neutral programs of general eligibility with a secular purpose; 2) the express language of article I, section 3 of the Florida Constitution forbids only programs “in aid of” or for the purpose of benefiting sectarian institutions; 3) the formative history of the declaration of rights, section 6 reveals that it was likely intended to bar public funding of Catholic schools, but was implemented in this manner only during a short interlude of anti-Catholic nativism; 4) but for this bigoted period, the state’s history generally reflects religious pluralism and tolerance; 5) evolving conditions within the state support greater involvement of private schools on a religion-neutral basis to meet Florida’s most pressing educational challenges; and 6) external influences that have shaped state law including state and federal constitutional prohibitions preclude discriminating against persons on the basis of their faith.631

Until now, Florida’s experiment with the Blaine amendment has been unusual, generally vindicating: 1) religiously neutral programs; 2) of general eligibility; and 3) with a secular purpose.632 The constitutionality of a host of educational and social welfare initiatives with deep historical roots turns on the continued application of this three-prong test. We should be proud of and expand upon Florida’s non exclusionary Blaine history, rather than depart from it and risk literally transforming Florida, as religious schools are disqualified from assisting with Florida’s most pressing educational chal-

631. See supra Part III.C.
632. See supra Part III.A.
lenges and indeed, faith-based organizations are precluded from meeting the basic needs of our most vulnerable citizens. Excluding persons from public programs solely on the basis of their faith is not the vision of most Floridians vindicated in the legislature. If it becomes the vision of Florida’s courts, it will erode public confidence and surely inspire a new and unnecessary constitutional reform movement.
TORT LAW: 2003-05 REVIEW OF FLORIDA LAW

WILLIAM E. ADAMS, JR.*

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I. INTRODUCTION

This survey will review major cases decided by the Supreme Court of Florida and the Florida District Courts of Appeal from July 2003 until July 2005. It does not cover every single appellate opinion from that time period, but does address those that dealt with substantive tort issues for the first time or clarified existing doctrines and issues. It does not deal with cases that dealt primarily with evidentiary rule violations or restated, well-established principles.

Part II addresses a variety of situations clarifying when or whether a duty exists on behalf of a number of actors. Part III covers cases that resolved causation disputes. The remaining parts deal with recurring situations or special rules that have resulted in multiple opinions being issued during this time period. For example, a number of cases during the past two years have tried to clarify the extent of coverage of Florida’s nursing home resident rights statutes. In addition, Florida courts continue to develop and explain the contours of the evolving area of emotional distress claims. Finally, the last part includes a number of cases involving a broad range of issues. The number of cases decided indicates that Florida courts are still quite busy in refining and clarifying the contours of various tort doctrines.

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II. Duty

The Supreme Court of Florida addressed the question of duty in relation to streetlight maintenance in *Clay Electric Cooperative, Inc. v. Johnson.* This case involved "fourteen-year-old Dante Johnson . . . [who] was struck and killed by a truck" in the early morning "where a streetlight was inoperative." His grandmother sued the truck driver, truck owner, and streetlight maintenance company, Clay Electric Cooperative, Inc. (Clay Electric). In the trial court, Clay Electric "moved for summary judgment, which was granted."4

The Supreme Court of Florida addressed the issue of whether Clay Electric assumed a legal duty to the plaintiffs to act with reasonable care in maintaining the streetlights.5 The court ruled that it created an increased risk by failing to maintain the light and rejected the argument that an inoperative light was no worse than the risk would have been absent a streetlight.6 The court also stated that the deceased's grandmother relied upon Clay Electric to maintain the lights in foregoing other precautions for the deceased.7 It also rejected the defendant's immunity argument.8 Justice Cantero argued in dissent that the holding "places Florida in the decided minority of states that have considered this issue."9 He also argued that the decision to hold the utility company liable involved a legislative policy decision.10

In *Smith v. Florida Power & Light Co.*, the Second District Court of Appeal also addressed the duty of a public utility.11 Smith appealed the entry of a summary judgment in favor of Florida Power & Light (FPL). Smith was injured while working at a construction site.14 "[P]ower passed from an uninsulated overhead power transmission line through the boom of a crane while Smith was working below ground and touching the cable of the crane."15 Smith's employer had determined that its employees could safely

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1. 873 So. 2d 1182, 1184 (Fla. 2003).
2. Id.
3. Id.
4. Id.
5. Id. at 1185.
7. Id.
8. Id. at 1188.
9. Id. at 1195 (Cantero, J., dissenting).
10. Id. at 1202–05.
12. Id. at 227.
13. Id.
14. Id.
15. Id.
work around the electrical lines. The court held that the power company's general knowledge that a construction project would be conducted in proximity to its power lines was insufficient to establish a foreseeable zone of risk creating a duty.

In Bowling v. Gilman, the Second District Court of Appeal considered another duty issue in a construction site accident. Bowling was a carpenter working for a subcontractor engaged in the construction of an adult congregate living facility. The subcontractor engaged defendant Gilman and his solely owned corporation for the use of cranes. It was alleged that a foreman on the site was negligent in directing a crane. The court noted that Florida law deems a crane to be inherently dangerous and that the owner and operator of such has a non-delegable duty to use due care. The court held that a crane operator could assign its performance to another, but not liability for negligent breach of that duty, and thus remanded the case for a new trial so that the jury could be instructed on Gilman's potential vicarious liability.

The Third District Court of Appeal dealt with the issue of duty in Fisher v. Miami-Dade County. The case involved a claim by the personal representative of Fisher, who died in an automobile accident as a passenger in a car driven by a friend who was speeding and being pursued by a Miami-Dade police vehicle. The trial court granted summary judgment to the defendant based upon the conclusion that a police officer owes no duty to a passenger in a fleeing vehicle unless the officer knows or should know of the passenger's presence.

The court noted that the Supreme Court of Florida has held that "police owe a duty to innocent bystanders or third parties injured as a result of high speed chases." It also noted that courts in other states have split on the issue of whether the police owe a duty of care to passengers in a fleeing vehicle. The court decided that the chilling effect of imposing upon law en-
forcement the duty to determine if there was a passenger in the vehicle and also to determine if the passenger was involved in a crime, was too burdensome to impose, and, therefore, affirmed the decision that no duty was owed in this case.30

In *Royal & Sunalliance v. Lauderdale Marine Center*,31 the Fourth District considered a spoliation of evidence case.32 Royal & Sunalliance (Royal) insured vessels which were burned while being repaired in a space leased by Cay Marine, located at the Lauderdale Marine Center (LMC).33 Royal filed a subrogation action to recover amounts paid to the owner of one of the vessels against Cay Marine.34 In 2002, Royal added LMC as a defendant.35 Royal asserted in its fourth amended complaint that LMC “had a common law duty to preserve debris” that was collected by fire inspectors from the fire and placed in barrels.36 The debris had been discarded in July 1998.37 According to the court, because Royal did not allege a contractual or statutory duty to preserve the evidence, nor did they allege that a discovery request was served, the complaint against LMC was properly dismissed.38 The court refused to accept Royal’s argument that “there was a common law duty to preserve the evidence in anticipation of litigation.”39

In *K.M. v. Publix Super Markets, Inc.*,40 the Fourth District again considered the duty issue.41 K.M., a minor, and her father appealed a granted motion to dismiss an action which claimed that her mother’s employer should have warned her about another employee’s criminal background.42 K.M.’s mother arranged for Robert Woodlard, another Publix employee, to babysit for seven-year-old K.M.43 The store manager was aware that Woodlard was doing the babysitting and “also knew that Woodlard was on parole from a previous conviction for attempted sexual battery on a minor under [twelve].”44 “Woodlard sexually abused K.M. on at least two occasions.”45

30. *Fisher*, 883 So. 2d at 337.
31. 877 So. 2d 843 (Fla. 4th Dist. Ct. App. 2004).
32. *Id.* at 844.
33. *Id.*
34. *Id.*
35. *Id.*
37. *Id.* at 845.
38. *Id.* at 845–46.
39. *Id.* at 846.
40. 895 So. 2d 1114 (Fla. 4th Dist. Ct. App. 2005).
41. *Id.* at 1116.
42. *Id.*
43. *Id.*
44. *Id.*
45. *K.M.*, 895 So. 2d at 1116.
The court refused to find a special relationship that imposed a duty on Publix to warn in this case. The court held that "[a]n employer does not owe a duty to persons who are injured by its employees while the employees are off duty, not then acting for the employer's benefit, not on the employer's premises, and not using the employer's equipment."

The Fourth District Court of Appeal resolved an appeal of a dismissal of a negligence claim in *Marinacci v. 219 South Atlantic Blvd.* The "plaintiff sued the defendant, a night club, for negligently advising her to park at a nearby city-owned parking lot, late at night," where she was assaulted. The plaintiff alleged that the club knew or should have known about similar criminal incidents at that lot. The court ruled that the fact that the club did not own the lot did not absolve it of liability if it was negligent in advising its patrons to park there.

### III. CAUSATION

In *Deese v. McKinnonville Hunting Club, Inc.*, the First District Court of Appeal addressed the classic tort issue of proximate causation. The *Deese* case involved an accident that occurred during a dog hunt organized by the defendant hunt club in which dogs were used to drive deer into open areas to be shot by the hunters. During this hunt, the dogs drove the deer toward a county highway with a speed limit of fifty-five miles per hour. While parked alongside the road, the appellant's twelve-year-old son asked the appellant if he could help catch the dogs. After being given permission, he exited the appellant's truck and was struck by a vehicle traveling down the highway. Three days later, he died. The appellant alleged that the hunt club "breached its duty to promulgate, draft, and enforce rules and regulations to ensure that club activities would be conducted in the safest manner

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46. *Id.* at 1120.
47. *Id.* (footnote omitted).
49. *Id.*
50. *Id.*
51. *Id.* at 1273.
52. 874 So. 2d 1282 (Fla. 1st Dist. Ct. App. 2004).
53. *Id.* at 1284.
54. *Id.*
55. *Id.*
56. *Id.*
57. *Deese,* 874 So. 2d at 1284.
58. *Id.*
The defendant successfully moved for summary judgment, arguing that it was not negligent as a matter of law and that "its actions were not the proximate legal cause of the accident." However, the court of appeal held that it was not appropriate to grant summary judgment on these facts where reasonable persons could conclude that conducting a hunt near a highway in which dogs might enter and where club members were directed to catch when possible could foreseeably lead to some injury as occurred in this case. Furthermore, the court held that to the extent that the appellant’s part in permitting his son to exit the vehicle contributed to the accident, it was a question of comparative negligence as opposed to a superseding intervening cause relieving the appellee from liability.

The Second District Court of Appeal reversed a final judgment on a proximate cause issue in *Murphy v. Sarasota Ostrich Farm/Ranch, Inc.* This case involved a claim by the ostrich farm that dogs owned by one of the defendants and kept on the property of another caused death or injury to some of its ostriches. At issue on appeal was whether the defendants could be held liable for lost bird production caused by the dogs’ harassment of the ostriches. The plaintiff’s expert “testified that a male ostrich can be stressed to the point where he will not breed,” but because he failed to state that the acts of the dogs were “more likely than not . . . a substantial factor in bringing about any loss in production,” the court found the evidence insufficient to support that their acts were a legal cause of the injury.

In *Trembath v. Beach Club, Inc.*, the Fourth District Court of Appeal also decided a case on appeal on the issue of proximate cause. Beach Club, Inc., sued Trembath for crashing his rental car into its building. Amongst the damages awarded, it claimed expenses for the installation of a sprinkler system. The club had managed to avoid being cited for failure to have such a system in an earlier routine inspection, but pursuant to the inspection conducted after the crash, which permitted a more thorough inspection, the club

59. Id.
60. Id. at 1286.
61. Id. at 1290.
62. *Deese, 874 So. 2d at 1290.*
63. *875 So. 2d 767, 769 (Fla. 2d Dist. Ct. App. 2004).*
64. Id. at 768.
65. Id.
66. *Id. at 768–69.*
67. *860 So. 2d 512 (Fla. 4th Dist. Ct. App. 2003).*
68. *Id. at 513.*
69. *Id.*
70. *Id.*
was found to be in violation of relevant safety codes.\textsuperscript{71} Testimony at trial indicated “that the club was not in compliance with the code before the accident,” but had simply managed to avoid being discovered as out-of-compliance until the inspection after the accident.\textsuperscript{72} The court held that the defendant could not be held responsible for the cost of installing the sprinkler system because it was not a cause-in-fact of that requirement, which was a duty existing separate and apart from the accident.\textsuperscript{73}

IV. PREMISES LIABILITY

In the case of \textit{Poe v. IMC Phosphates MP, Inc.},\textsuperscript{74} Scotty Poe drove a vehicle containing his three minor children from a public highway onto a paved driveway through an abandoned entrance to a mine owned by the defendant, IMC Phosphates, and hit a large metal pipe placed about twenty feet inside the entrance by the defendant.\textsuperscript{75} The paved portion at the entrance, which lacked a sign or other warning, appeared to be a continuation of the highway and was not illuminated.\textsuperscript{76} The pipe, which was a rusty brown color that was neither bright nor reflective, was placed at the point where the pavement ended.\textsuperscript{77} In opposition to the defendant’s motion for summary judgment, the plaintiffs submitted the affidavit of an expert who opined that the defendant could have used a different type of fencing and an easily visible lightweight barricade along with a sign to minimize possible collisions.\textsuperscript{78} The Second District Court of Appeal addressed the trial court’s analysis which focused on the issue of the status of the Poes as entrants to the defendant’s property.\textsuperscript{79} The court noted that courts from several jurisdictions have held “that a traveler who enters private land that appears to be a continuation of the public highway becomes an implied invitee.”\textsuperscript{80} For implied invitees, the landowner has a duty to exercise due care.\textsuperscript{81} Noting that legal commentators have criticized the “transparent legal fiction” of the “implied invitee,”

\textsuperscript{71} \textit{Id.}
\textsuperscript{72} \textit{Trembath}, 860 So. 2d at 514.
\textsuperscript{73} \textit{Id.} at 515.
\textsuperscript{74} 885 So. 2d 397 (Fla. 2d Dist. Ct. App. 2004).
\textsuperscript{75} \textit{Id.} at 398–99.
\textsuperscript{76} \textit{Id.} at 399.
\textsuperscript{77} \textit{Id.}
\textsuperscript{78} \textit{Id.} at 399–400.
\textsuperscript{79} \textit{Poe}, 885 So. 2d at 400. The court noted that the accident occurred before the 1999 amendments to section 768.075 of the \textit{Florida Statutes}, which immunized property owners from liability for injuries to trespassers. \textit{Id.} at 400 n.3.
\textsuperscript{80} \textit{Id.} at 401.
\textsuperscript{81} \textit{Id.}
the court instead referenced the modern approach which focuses on the cause of the traveler leaving the public road.\textsuperscript{82} Thus, it held that the classification of the visitor was irrelevant, and, instead, the analysis should depend upon whether the actor's conduct misled the traveler into reasonably believing that the land entered is a highway.\textsuperscript{83} The court noted that the Third and Fourth Districts have also adopted this approach,\textsuperscript{84} which is consistent with section 367 of the \textit{Second Restatement of Torts}.\textsuperscript{85} Therefore, in this particular case, summary judgment was obviously inappropriate because of factual issues concerning the placement and visibility of the pipe in addition to issues under section 368 of the \textit{Second Restatement of Torts} concerning artificial conditions near a highway.\textsuperscript{86}

The Second District also dealt with a premises liability case in \textit{St. Joseph's Hospital v. Cowart},\textsuperscript{87} in which a patient at the defendant St. Joseph's Hospital was bitten by a black widow spider in the emergency room.\textsuperscript{88} The court noted the general rule is:

\begin{quote}
[a] landowner owes two duties to a business invitee: (1) to use reasonable care in maintaining its premises in a reasonably safe condition; and (2) to give the invitee warning of concealed perils that are or should be known to the landowner and that are unknown to the invitee and cannot be discovered through the exercise of due care.\textsuperscript{89}
\end{quote}

Florida law does not impose a general duty to protect invitees from harm caused by wild animals except in special circumstances.\textsuperscript{90} The District Court reversed the jury award because "[t]here was no evidence that the pest control company was not performing its services satisfactorily," nor that it knew that a black widow spider was on its premises.\textsuperscript{91} Further, the plaintiff's ex-

\textsuperscript{82.} \textit{Id.} at 402.
\textsuperscript{83.} \textit{Poe}, 885 So. 2d at 402.
\textsuperscript{84.} \textit{Id.} at 403 (citing Felton v. W. Gables Homes, Inc., 484 So. 2d 639 (Fla. 3d Dist. Ct. App. 1986); Hollywood Corporate Circle Assocs. v. Amato, 604 So. 2d 888 (Fla. 4th Dist. Ct. App. 1992)).
\textsuperscript{85.} Section 367 states:
\begin{quote}
A possessor of land who so maintains a part thereof that he knows or should know that others will reasonably believe it to be a public highway is subject to liability for physical harm caused to them, while using such part as a highway, by his failure to exercise reasonable care to maintain it in a reasonably safe condition for travel.
\end{quote}

\textit{RESTATEMENT (SECOND) OF TORTS} § 367 (1965).
\textsuperscript{86.} \textit{Id.} at 1039 (Fla. 2d Dist. Ct. App. 2004).
\textsuperscript{87.} \textit{Id.} at 1040.
\textsuperscript{88.} \textit{Id.}
\textsuperscript{89.} \textit{Id.}
\textsuperscript{90.} \textit{Id.} at 1041.
\textsuperscript{91.} \textit{Id.} at 1042–43.
pert testified that "he did not think [that] the hospital employees should have suspected [the spider's] presence." Of more interest is a claim by the plaintiff for negligent infliction of emotional distress based upon the plaintiff feeling that the hospital employees were not taking his condition seriously and the emergency room physician joking about the situation with one of his colleagues. Fortunately for the defendant hospital, Florida's reliance upon the impact rule prevented liability because the court correctly held that the impact of the spider's bite was not caused by negligence.

The Third District Court of Appeal decided a premises liability action in *Longmore v. Saga Bay Property Owners Ass'n*, a case in which the plaintiff's sixteen-year-old child drowned in a man-made lake owned by appellee. The parents claimed that the appellee knew that its lake had a precipitous drop-off from less than sixty-nine inches to over forty feet, which created a duty to either "warn or provide life guards to protect children from this 'exceptionally dangerous concealed peril.'" The court refused to find that a sudden drop-off constituted a dangerous condition or trap because such a condition was also characteristic of conditions existing in natural lakes. The court also rejected the parents' argument that, because the defendant had previously been sued, it had a duty to warn because of its superior knowledge of the drop. The court held that such a warning was not required because the drop "did not constitute a concealed dangerous condition."

In *Weissberg v. Albertson's, Inc.*, the Fourth District addressed the breadth of the "dangerous instrumentality doctrine" in a case involving an injury suffered by the plaintiff, who was struck by a "powerized" shopping cart in the defendant's grocery store. The court considered the appropriateness of dismissal of the complaint by the trial court. The appellate court noted that, although Florida's relevant statute prevented defendant from being liable for the negligence of the operator of the shopping cart, it did not prevent Albertson's from being liable for its own negligence in entrusting the

92. *St. Joseph's Hosp.*, 891 So. 2d at 1042.
93. *Id.* at 1042–43.
94. *Id.* at 1043.
95. 868 So. 2d 1268 (Fla. 3d Dist. Ct. App. 2004).
96. *Id.* at 1268.
97. *Id.*
98. *Id.* at 1270.
99. *Id.*
100. *Longmore*, 868 So. 2d at 1270.
101. 886 So. 2d 305 (Fla. 4th Dist. Ct. App. 2004).
102. *Id.* at 306.
103. *Id.* at 307.
Further, the court held that the defendant could be held liable under a premises liability theory, which the plaintiff alleged was violated by a failure to provide safety warning devices.\footnote{104}

The Fourth District Court of Appeal also decided another premises liability case in \textit{Burns International Security Services Inc. of Florida v. Philadelphia Indemnity Insurance Co.},\footnote{105} which dealt with a final judgment in a case dealing with liability for a theft.\footnote{106} Defendant Burns was the security company for Parkway Commerce Center, in which D & H Distributing Corporation (D & H) was a tenant insured by Philadelphia Indemnity for a theft that occurred at D & H's warehouse space.\footnote{107} Burns argued on appeal that it had no duty to secure the premises until there was evidence of similar prior criminal activity.\footnote{108} After noting the various categories of cases involving premises liability, the court noted that the duty of security providers arises from a different basis.\footnote{109} The court correctly noted that the security provider contracts to provide security, and thus should not be able to argue that it is not liable for a criminal act simply because it was the first of its type upon the premises.\footnote{110}

The \textit{Burns} case also dealt with an issue of the proper apportionment of fault between parties pursuant to section 768.81 of the \textit{Florida Statutes}.\footnote{111} The verdict form also included two prior parties who had been voluntarily dismissed from the action, whom the jury also determined to be at fault.\footnote{112} The court noted that it should "first determine the amount of damages for which Burns is liable based upon its own percentage of fault."\footnote{113} Because Burns was found forty-five percent at fault, the court should then add the amount for which it was jointly liable, up to an additional $500,000.\footnote{114}

The Fourth District Court of Appeal also considered a premises liability case that involved the scope of duty of a security company in \textit{Robert-Blier v. Statewide Enterprises, Inc.}\footnote{115} This case involved a lawsuit against a security company hired by a condominium association "to provide one unarmed

\begin{footnotesize}
\begin{enumerate}
\item Id. (citing Fl. Stat. § 768.093(2) (2002)).
\item Id.
\item 899 So. 2d 361 (Fla. 4th Dist. Ct. App. 2005).
\item Id. at 362–63.
\item Id. at 363.
\item Id.
\item Id. at 364.
\item Burns Int’l Sec. Servs. Inc. of Fla., 899 So. 2d at 365.
\item Id.; Fl. Stat. § 768.81 (2004).
\item Burns Int’l Sec. Servs. Inc. of Fla., 899 So. 2d at 365.
\item Id. at 367.
\item Id.
\item 890 So. 2d 522, 523 (Fla. 4th Dist. Ct. App. 2005).
\end{enumerate}
\end{footnotesize}
guard to patrol the community . . . to escort residents to their homes upon request, and to observe and report suspicious incidents.” 117 A visitor to one of the buildings “was forced into her car, driven off the premises, and raped.” 118 The court noted that the association “owed a duty to visitors to protect or warn them of known dangers in the common areas,” but that it had only contracted “for the appearance of security” with this security company. 119 Although it rejected the defendant’s argument that it owed no duty to the plaintiff, the court was unwilling to hold that the company had assumed the association’s broad duty to protect invitees, but instead held the company only had a duty to provide the services contractually agreed upon. 120

The Fourth District Court of Appeal considered the liability of social hosts in Estate of Massad v. Granzow. 121 This case involved a claim by the Estate of Roger P. Massad, who was a guest in Dee Janet Granzow’s home. 122 Massad became drunk, in part on alcoholic beverages served by Granzow, and fell and struck his head in the home “sustaining a concussion with significant bleeding.” 123 “Granzow gave Massad a prescription pill not prescribed for his use, which worsened his intoxication.” 124 She abandoned him next to an unfenced pool, into which he later fell and drowned. 125

Granzow argued that section 768.125 of the Florida Statutes, which provides immunity for serving alcohol to guests, should be available to social hosts, as well as vendors of alcohol. 126 The court agreed that both the common law and the statute shield social hosts from liability for “dispensing or furnishing alcohol.” 127 However, pursuant to the theory found in section 324 of the Second Restatement of Torts, the court noted that the defendant was not entitled to dismissal of the complaint because she could still be held liable based upon her conduct when she “took charge of Massad,” when he was helpless and unable to adequately aid or protect himself. 128

117. *Id.*
118. *Id.*
119. *Id.* at 523.
120. *Id.* at 524.
121. 886 So. 2d 1050, 1051 (Fla. 4th Dist. Ct. App. 2004).
122. *Id.*
123. *Id.*
124. *Id.*
125. *Id.*
126. Massad, 886 So. 2d at 1052 (citing FLA. STAT. § 768.125 (2003)).
127. *Id.*
128. *Id.* at 1052–53. Section 324 states, in part:

One who, being under no duty to do so, takes charge of another who is helpless adequately to aid or protect himself is subject to liability to the other for any bodily harm caused to him by
V. NURSING HOME LIABILITY

The Supreme Court of Florida addressed the interplay between Florida's Wrongful Death Act and Florida's statute covering nursing home Patient's Bill of Rights in Knowles v. Beverly Enterprises–Florida, Inc.129 The case was filed by the personal representative of Gladstone Knowles, who died from severe bedsores and other ailments while residing at the defendant's nursing home.130 The trial court granted summary judgment for the defendant on the claim based upon violation of the Patient's Bill of Rights' statute because none of the statutory violations caused the death.131 The case proceeded to trial upon a common law negligence theory, but after the verdict, the court ruled "that it had erred in granting a summary judgment on the statutory claim."132 The Fourth District Court of Appeal, sitting en banc, held that the trial court was initially correct in dismissing the statutory claim.133 The relevant statutory section stated:

Any resident whose rights . . . are deprived or infringed upon shall have a cause of action against any licensee responsible for the violation. The action may be brought by the resident . . . or by the personal representative of the estate of a deceased resident when the cause of death resulted from the deprivation or infringement of the decedent's rights.134

The import of this decision has been lessened by statutory amendments during the pendency of the legislation that have added language indicating that the representative may file an action for violation of the resident's rights "regardless of the cause of death."135 The Supreme Court of Florida held that the plain meaning of the language prevented the action and rejected arguments that its conclusion wrongfully failed to consider the language in con-

(a) the failure of the actor to exercise reasonable care to secure the safety of the other while within the actor's charge, or
(b) the actor's discontinuing his aid or protection, if by so doing he leaves the other in a worse position than when the actor took charge of him.

RESTATEMENT (SECOND) OF TORTS § 324 (1965).
129. 898 So. 2d 1, 2 (Fla. 2004).
130. Id. at 2–3.
131. Id. at 3.
132. Id.
133. Id. (citing Beverly Enterprises-Fla., Inc. v. Knowles, 766 So. 2d 335, 336 (Fla. 4th Dist. Ct. App. 2000)).
134. FLA. STAT. § 400.023(1) (1997).
135. FLA. STAT. § 400.023(1) (2004).
cert with the Survival Statute and Wrongful Death Acts. The concurring opinion of Justice Cantero137 and the dissenting opinion by Justice Lewis138 provide an interesting debate concerning the role of the court in referring to legislative intent when the language of the statute is arguably ambiguous. As the opinions exemplify, this old canard of statutory construction depends upon the willingness to accept that language as ambiguous.

The First District Court of Appeal considered damages issues in nursing home cases in Estate of Williams v. Tandem Health Care of Florida, Inc.140 This case was brought by the estate of Lucille Williams, who fell while a resident of the defendant nursing home and later died as a result. The estate brought an action alleging infringement of a resident's rights and wrongful death under the appropriate statutes. Pursuant to new rulings issued by the Supreme Court of Florida, the court ordered a new trial because it deemed that those rulings precluded non-economic damages to survivors resulting from medical malpractice. The estate argued that damages available to heirs under the wrongful death statute should be incorporated under the resident’s rights provision. The court disagreed, noting that the statute refers to the rights of the resident and refused to add or imply that survivors’ rights to damages are also available under that statute.

The Fourth District Court of Appeal also decided a case involving nursing home negligence in Carr v. Personacare of Pompano East, Inc., which considered an appeal of a complaint dismissal. The court reversed the trial court decision that chapter 400 remedies preclude a common law negligence action. This decision is consistent with a relatively recent Supreme Court of Florida decision.

The Fifth District Court of Appeal also considered a nursing home resident’s rights case in Extendicare Health Services, Inc. v. Estate of Patter-
in which the decedent was alleged to have died as a result of the deprivation of rights.\textsuperscript{152} Extendicare, the alleged operator of the home, appealed the trial court's denial of a motion to compel arbitration.\textsuperscript{153} The arbitration provision appeared in a contract between the alleged operator and owner of the nursing home and the manager of the home.\textsuperscript{154} Extendicare argued "that their only connection to the nursing home was through this agreement" and the financial support that they provided the manager.\textsuperscript{155} The court ruled that since the deceased was not a party to the contract, nor an intended third party beneficiary, he could not be bound by its arbitration provision even though it arguably provided a basis for Extendicare's responsibility because the suit was brought pursuant to statutory and negligence claims.\textsuperscript{156}

The Fifth District Court of Appeal considered an appeal of a nursing home liability claim in \textit{Jackson v. York Hannover Nursing Centers}.\textsuperscript{157} The claim was filed by the personal representative of a nursing home patient who died three weeks after admission to the nursing home.\textsuperscript{158} The defendants claimed that the death occurred because the medical center from which she was transferred "was negligent in its care and treatment," and they subsequently placed the medical center on the verdict form even though it was not a party.\textsuperscript{159} The plaintiff's expert then testified that the medical center's care fell below the standard of care.\textsuperscript{160} The court held that the trial court properly permitted the jury to apportion damages because there was only a single injury to which both parties contributed, as opposed to two distinguishable injuries.\textsuperscript{161}

\section*{VI. EMOTIONAL DISTRESS CLAIMS}

The Supreme Court of Florida decided a case concerning emotional distress injuries in a claim of the tort of negligent interference with parental rights in \textit{Southern Baptist Hospital of Florida, Inc. v. Welker}.\textsuperscript{162} In this case, the plaintiff filed an action against a psychologist employed by the defendant

\begin{thebibliography}{99}
\bibitem{151} 898 So. 2d 989 (Fla. 5th Dist. Ct. App. 2005).
\bibitem{152} \textit{Id.} at 990.
\bibitem{153} \textit{Id.}
\bibitem{154} \textit{Id.}
\bibitem{155} \textit{Id.}
\bibitem{156} \textit{Extendicare Health Servs., Inc.}, 898 So. 2d at 990.
\bibitem{157} 876 So. 2d 8, 9 (Fla. 5th Dist. Ct. App. 2004).
\bibitem{158} \textit{Id.} at 9–10.
\bibitem{159} \textit{Id.} at 10.
\bibitem{160} \textit{Id.}
\bibitem{161} \textit{Id.} at 13.
\bibitem{162} 908 So. 2d 317, 318 (Fla. 2005).
\end{thebibliography}
hospital, which gave an opinion to a court that the appellant had abused his children while in his custody, which resulted in an injunction removing custody of his minor children from him to his former wife and denied him access to the children.\textsuperscript{163} The court declined to answer the certified question as to whether the impact rule precludes recovery for emotional injuries in an action for negligently interfering with parental rights because the courts below had not addressed whether an action for negligent interference with parental rights exists.\textsuperscript{164} Although the court acknowledged that it had previously determined that Florida recognizes an intentional interference with parental rights cause of action, it still declined to indicate whether it would recognize an action for negligent interference with parental rights.\textsuperscript{165}

The First District Court of Appeal addressed a case dealing with an emotional distress claim in \textit{Hernandez v. Tallahassee Medical Center, Inc.}\textsuperscript{166} Ms. Hernandez, a surgical nurse, appealed the dismissal of her complaint against her employer which stated that the defendant was aware that she suffered from an epileptic-seizure disorder that her neurologist had advised prevented her from driving to work.\textsuperscript{167} The hospital, which informed her that her job was in jeopardy because of missed work, instructed her to take a taxi and obtain reimbursement for travel to and from work while on call.\textsuperscript{168} The plaintiff called work, claiming to be sick, but was told to come “right away”, although they were allegedly aware that she would be forced to drive to work herself.\textsuperscript{169} As she drove to work, she “suffered a seizure, lost control of her car, and suffered serious and permanent injuries” as a result.\textsuperscript{170} The court found that ordering an employee to work right away, despite awareness of her suffering from a serious condition, “did not exceed all bounds of decency” as required for intentional infliction of emotional distress.\textsuperscript{171} Of perhaps even more importance was the finding by the court that the employer did not have a duty to its employee to avert the harm for negligence purposes.\textsuperscript{172} The court noted that driving to work was normally outside the scope of employment and that awareness of the threatened harm did not create a duty.\textsuperscript{173} The court also noted that the demand to come to work, did not

\begin{itemize}
  \item \textsuperscript{163} \textit{Id.} at 318–19.
  \item \textsuperscript{164} \textit{Id.} at 320.
  \item \textsuperscript{165} \textit{Id.}
  \item \textsuperscript{166} \textit{896 So. 2d 839, 840 (Fla. 1st Dist. Ct. App. 2005).}
  \item \textsuperscript{167} \textit{Id.}
  \item \textsuperscript{168} \textit{Id.}
  \item \textsuperscript{169} \textit{Id.} at 840–41.
  \item \textsuperscript{170} \textit{Id.} at 841.
  \item \textsuperscript{171} \textit{Hernandez}, \textit{896 So. 2d at 841.}
  \item \textsuperscript{172} \textit{Id.} at 842.
  \item \textsuperscript{173} \textit{Id.} at 842–43.
\end{itemize}
include an express order to drive to work and that the plaintiff could have chosen to decline to come to work or to seek other means of transportation.174

The First District also decided an emotional distress claim in the area of veterinary malpractice in *Kennedy v. Byas.*175 The plaintiff, Robert Kennedy, filed an action for veterinary malpractice and emotional distress based upon the treatment received for his pet basset hound.176 The defendant won a partial summary judgment motion on the emotional distress claim and moved for transfer of venue to county court from circuit court because the remaining damages for the malpractice claim were under the jurisdictional limit for circuit court.177 The court accepted the plaintiff’s writ of certiorari to quash the order of transfer so that the substantive issue could be reached.178 The court refused to abandon the impact rule for this veterinary malpractice case.179 Acknowledging that the Supreme Court of Florida permitted damages to be recovered in a case involving the malicious destruction of a dog in *La Porte v. Associated Independents, Inc.*180 and that other jurisdictions are split on the issue of permitting recovery of emotional distress claims for negligent provision of veterinary care, the court opted to not permit an exception to the impact rule out of fear of placing an unnecessary burden on courts by expanding this tort.181

The Third District Court of Appeal dealt with an emotional distress claim in *LeGrande v. Emmanuel,*182 in which “a Baptist minister . . . sued two congregational members . . . for slander, slander per se, negligent infliction of emotional distress, intentional infliction of emotional distress, and loss of consortium.”183 The Pastor’s complaint, which was dismissed, alleged that his congregation members had accused him of stealing money from the church to purchase a Mercedes and “referred to [him] as ‘Satan’ and ‘Makout,’” a name typically used for oppressive secret police from Duvalier’s regime.184 The court correctly reversed the dismissal of the slander and slander per se claims because the minister alleged that he was falsely accused of criminal acts, which are actionable per se.185 The court also correctly up-

\[\text{References:}
174. Id. at 844.
175. 867 So. 2d 1195, 1196 (Fla. 1st Dist. Ct. App. 2004).
176. Id.
177. Id. at 1196–97.
178. Id. at 1196.
179. Id. at 1198.
180. 163 So. 2d 267, 269 (Fla. 1964).
181. Kennedy, 867 So. 2d at 1198.
182. 889 So. 2d 991, 993 (Fla. 3d Dist. Ct. App. 2004).
183. Id.
184. Id.
185. Id. at 994.
\]
held the dismissal of the infliction of emotional distress claims because it deemed the comments to not rise to the level of extreme and outrageous conduct as to satisfy the requirements for an intentional infliction claim and because his allegations of memory loss and aggravation of a pre-existing diabetic condition were wholly insufficient for a negligent infliction action.\textsuperscript{186}

The Third District also considered an emotional distress claim in \textit{Williams v. Worldwide Flight Services Inc.},\textsuperscript{187} which involved an appeal of a dismissal of an action for intentional infliction of emotional distress and negligent retention.\textsuperscript{188} The complaint alleged that the plaintiff was exposed to intentionally discriminatory behavior by his general manager on the basis of race.\textsuperscript{189} Amongst other complaints, the plaintiff alleged that he was called a "nigger" and a "monkey" as well as being subjected to false accusations of theft.\textsuperscript{190} The court found that the behavior did not rise to the level of outrageousness to permit recovery.\textsuperscript{191} Whether this is accurate in the abstract is debatable, but the court did correctly note that the federal and state employment discrimination statutes are available to remedy such conduct.\textsuperscript{192}

The Fourth District Court of Appeal also considered a negligent infliction of emotional distress claim in \textit{Thomas v. Ob/Gyn Specialists of the Palm Beaches, Inc.}\textsuperscript{193} which dealt with an appeal of summary judgment against the plaintiff.\textsuperscript{194} The case involved a claim by the husband for the alleged malpractice of a doctor who performed a D & C (dilatation and curettage) procedure upon the plaintiff's pregnant wife.\textsuperscript{195} The existence of the fetus had not been diagnosed and did not survive the procedure.\textsuperscript{196} The court refused to expand the abrogation of the impact rule in this line of cases,\textsuperscript{197} distinguishing it from the wrongful stillbirth exception recognized by the Supreme Court of Florida in \textit{Tanner v. Hartog.}\textsuperscript{198}

The Eleventh Circuit Court of Appeal also considered Florida law in relation to an emotional distress claim in \textit{Gonzalez-Jiminez De Ruiz v. United

\textsuperscript{186.} \textit{Id.} at 994–95.
\textsuperscript{187.} 877 So. 2d 869 (Fla. 3d Dist. Ct. App. 2004).
\textsuperscript{188.} \textit{Id.} at 869–70.
\textsuperscript{189.} \textit{Id.} at 870.
\textsuperscript{190.} \textit{Id.}
\textsuperscript{191.} \textit{Id.}
\textsuperscript{192.} \textit{Williams,} 877 So. 2d at 871.
\textsuperscript{193.} 889 So. 2d 971 (Fla. 4th Dist. Ct. App. 2004).
\textsuperscript{194.} \textit{Id.} at 971.
\textsuperscript{195.} \textit{Id.}
\textsuperscript{196.} \textit{Id.}
\textsuperscript{197.} \textit{Id.} at 972.
\textsuperscript{198.} 696 So. 2d 705, 708 (Fla. 1997).
States, a case brought under the Federal Tort Claims Act by survivors of a prisoner who died from cancer. In dismissing the infliction of emotional distress claims by the children of the prisoner and his alleged common-law wife, the court noted that substandard medical care, failure to provide access to the deceased while he was ill, failure to inform the family of his death, and delay in transporting his remains did not constitute intentional infliction. The court also held that, without physical injury, it could not recognize a negligent infliction of emotional distress claim.

VII. MEDICAL MALPRACTICE

The Fourth District Court of Appeal, in an en banc decision, reversed the dismissal of a medical malpractice complaint in Burke v. Snyder, in which the plaintiff alleged that she was the victim of a sexual battery during a medical examination by the defendant at the Nova Southeastern University Osteopathic Treatment Center. The plaintiff alleged that Nova was vicariously liable for the doctor’s conduct and also negligent in hiring, supervising, and retaining him in its employ, but “the plaintiff did not comply with the notice and pre-suit screening requirements for medical malpractice actions [n]or file suit within the two-year statute of limitations for such [actions].” Noting that it had decided to the contrary in an earlier opinion, O’Shea v. Phillips, it also acknowledged that other district courts had disagreed with its interpretation of the relevant Florida Statutes, including Florida Statutes section 766.110. It receded from its prior decision because it deemed that the sexual misconduct did not arise “out of the rendering of . . . medical care or services.”

The Fourth District also decided an appeal of a medical malpractice claim in Grobman v. Posey, a case involving the right of non-settling de-
fendants to obtain a setoff for amounts paid by a settling defendant. The case involved a malpractice claim against a number of physicians, an anesthesiologist, a hospital, and Prudential Insurance Company, which provided HMO (Health Management Organization) coverage. Two of the physicians and Prudential settled with the plaintiff before trial. Prudential was sued under vicarious liability and negligent credentialing theories, but the settlement did not indicate the causes of action, nor did it allocate between economic and non-economic damages. At trial, the remaining defendants, Dr. Grobman and Mercy Hospital, asked for the jury to apportion fault to the other physicians and anesthesiologist, but not the HMO/health insurer. In order to resolve the dispute, the court was forced to consider the applicability of section 768.81, which “eliminates joint and several liability for non-economic damages and limits joint and several liability for economic damages.” However, vicarious liability would not result in apportionment because the vicariously liable party is liable for all of the harm caused by the primary actor. Furthermore, the court ruled that the negligent credentialing claim was derivative in nature and therefore, like vicarious liability, would not require apportionment of damages. Therefore, the court held that Prudential was not a proper Fabre defendant to be placed on the verdict form, and its payment required a complete set-off against the verdict under sections 46.015 and 768.041 of the Florida Statutes.

VIII. SOVEREIGN IMMUNITY

The Supreme Court of Florida addressed the issue of sovereign immunity in Pollock v. Florida Department of Highway Patrol, an appeal of two actions brought by the survivors of a deceased driver and passenger of a car that “collided into the back of an unlit tractor-trailer which had stalled . . . [on] the Palmetto Expressway.” A driver had earlier called 911 and was transferred to the Florida Highway Patrol (FHP), informing a dispatcher of

210. Id. at 1232.
211. Id. at 1232–33.
212. Id. at 1233.
213. Id.
214. Grobman, 863 So. 2d at 1233.
215. Id. at 1234 (citing D’Angelo v. Fitzmaurice, 863 So. 2d 311, 314 (Fla. 2003)).
216. Id. at 1235.
217. Id. at 1235–36.
218. Id. at 1237.
219. 882 So. 2d 928 (Fla. 2004).
220. Id. at 930.
the existence of the hazard in the highway.\textsuperscript{221} He was informed by the dispatcher that a unit would be dispatched, but apparently the dispatcher failed to enter the call into the computer for assignment.\textsuperscript{222} FHP has internal operational rules requiring the dispatch of a trooper to the scene of a stalled vehicle, and evidence at trial revealed that officers were available.\textsuperscript{223} Its rules also indicate that crash prevention and crash investigation are primary functions of the FHP.\textsuperscript{224} The trial courts in both cases entered judgments for the plaintiffs, but the decisions were reversed by the Third District Court of Appeal, which certified a conflict with decisions by the Second District.\textsuperscript{225}

As noted by the Supreme Court of Florida, Florida has waived sovereign immunity in tort actions "for any act for which a private person under similar circumstances would be held liable."\textsuperscript{226} The issue before the court was whether the FHP owed a common law or statutory duty to the plaintiffs.\textsuperscript{227} Although the court acknowledged the duty of a public or private entity that owns, operates, or controls property to maintain it and to warn of and correct dangerous conditions thereon,\textsuperscript{228} it held that FHP was not bound because it lacked ownership or control over the highways.\textsuperscript{229} The court noted that the operation and maintenance of the roads is the province of the Florida Department of Transportation and the local governments in which the roads are located and that Florida law permits, but does not require, FHP to remove stalled or abandoned vehicles from state highways.\textsuperscript{230} It also opined that the responsibility of enforcing laws for the public good does not create a duty towards a particular individual, absent the officers becoming directly involved in circumstances that place a person within a "zone of risk."\textsuperscript{231} The court examined a number of instances in which a special duty could arise and found that this situation did not fit within any of them.\textsuperscript{232} It also rejected the argument that the internal procedures created an independent duty of care.\textsuperscript{233}

\begin{itemize}
\item \textsuperscript{221} \textit{Id. at} 931.
\item \textsuperscript{222} \textit{Id.}
\item \textsuperscript{223} \textit{Id.}
\item \textsuperscript{224} \textit{Pollock,} 882 So. 2d at 931.
\item \textsuperscript{225} \textit{Id. at} 931–32.
\item \textsuperscript{226} \textit{Id. at} 932 (quoting Henderson v. Bowden, 737 So. 2d 532, 534–35 (Fla. 1999)).
\item \textsuperscript{227} \textit{Id. at} 933–34.
\item \textsuperscript{228} \textit{Id. at} 933 (citing Bailey Drainage Dist. v. Stark, 526 So. 2d 678, 681 (Fla. 1988)).
\item \textsuperscript{229} \textit{Pollock,} 882 So. 2d at 934 (citing Alderman v. Lamar, 493 So. 2d 495, 498 (Fla. 5th Dist. Ct. App. 1986)).
\item \textsuperscript{230} \textit{Id.}
\item \textsuperscript{231} \textit{Id. at} 935–36. (citing Kaisner v. Kolb, 543 So. 2d 732, 735 (Fla. 1989); Everton v. Willard, 468 So. 2d 936, 938 (Fla. 1985)).
\item \textsuperscript{232} \textit{Id.}
\item \textsuperscript{233} \textit{Id. at} 936–37.
\end{itemize}
Justice Pariente dissented, arguing that FHP’s actions were operational in nature and therefore not within the protection of sovereign immunity.\textsuperscript{234} She argued that the general duty/special duty dichotomy had been abandoned after the passage of section 768.28 of the \textit{Florida Statutes}.\textsuperscript{235} Although acknowledging that some decisions seem to have receded from this abandonment, she argues that the court should focus on conventional tort principles, particularly foreseeability.\textsuperscript{236} Justice Pariente argued that because the FHP assured the caller that a unit would be sent, it therefore assumed control over the situation and its failure to so respond created a foreseeable “zone of risk” of harm.\textsuperscript{237}

The First District Court of Appeal also addressed sovereign immunity in \textit{Rudloe v. Karl},\textsuperscript{238} an action in which a Florida State alumnus and the corporation of which he was president and “closely affiliated” sued Florida State University (FSU) and another alumnus for statements made in the FSU Department of Oceanography Newsletter.\textsuperscript{239} The newsletter in question included responses to the Department’s request for students to relate their experiences of departmental history.\textsuperscript{240} One of the experiences was an account by Dr. Karl that Rudloe may have stolen a priceless specimen from the department.\textsuperscript{241} The plaintiffs’ second amended complaint alleged that FSU was negligent in failing to verify the facts contained in Dr. Karl’s submission to the newsletter.\textsuperscript{242} The court held that sovereign immunity was not a bar to the action because it did not involve basic law enforcement or governmental policy making, nor discretionary planning or judgment.\textsuperscript{243}

The Fifth District Court of Appeal decided a sovereign immunity issue in \textit{City of Ocala v. Graham},\textsuperscript{244} a case involving a claim that a woman was shot because of the negligence of one of the city’s police officers.\textsuperscript{245} Appellant called the Ocala police to complain about a death threat from her former husband.\textsuperscript{246} She alleged that the officer agreed that he, or someone else from
the department, would talk to her former husband, which she believed would
deter him from carrying out his threat. Two days later, the appellant en-
gaged in three different conversations with her husband, and she acknowl-
edged that she realized that no one from the police department had contacted
him. The estranged husband appeared at her residence, got into a fist fight
with their adult son and shot at the son, hitting the appellant instead.

The court first noted that "there is no common law duty to prevent the
misconduct of third persons." The court observed that in relation to law
enforcement and public safety, "sovereign immunity may disappear" if a
special relationship exists between the victim and the governmental official. In looking at the required elements for such a relationship, the court
held that the appellant could not establish justifiable reliance upon the offi-
cer's assurance that he would talk to the assailant and that the failure to con-
tact the estranged husband was not the proximate cause of the appellee's
injuries. First, the court noted that the threats occurred in a jurisdiction
outside of the control of the Ocala Police Department and that the officer
informed the appellant of the appropriate law enforcement authority to con-
tact. In addition, it found that it was sheer speculation to posit that the
officer's failure to contact the assailant caused the harm and the physical
attack by the adult son upon the estranged husband was a superseding cause
of the injuries.

IX. TORTIOUS INTERFERENCE

The Second District Court of Appeal resolved a tortious interference
with a business relationship issue in Advantage Digital Systems, Inc. v. Dig-
tal Imaging Services, Inc. The appeal arose from an injunction obtained
by Digital Imaging (Digital) against three of its former employees who were
subsequently employed by Advantage Digital (Advantage), which was in-
corporated by one of the employees and a customer of Digital Imaging. The court ruled that the injunction was too broad against the former employ-

247. Id.
248. Id.
249. Graham, 864 So. 2d at 475–76.
250. Id. at 476 (citing RESTATEMENT (SECOND) OF TORTS § 315 (1965)).
251. Id. at 476–77 (citing Trianon Park Condo. Ass'n v. City of Haileah, 468 So. 2d 912, 921 (Fla. 1985)).
252. Id. at 477.
253. Id. at 478.
254. Graham, 864 So. 2d at 478–79.
255. 870 So. 2d 111, 114 (Fla. 2d Dist. Ct. App. 2003).
256. Id.
ees who had signed a non-competition agreement to not solicit Digital customers because it extended beyond a ban on solicitation, it restrained solicitation of prospective customers, and it extended beyond two years without evidence overcoming the statutory presumption pursuant to Florida Statutes section 542.335(1)(d)(1)\textsuperscript{257} that restraints in excess of that time period are unreasonable.\textsuperscript{258} In relation to the injunction against former employee Michael Knaus, who had not signed a non-competition agreement, the court reversed the injunction restraining him from doing business with Digital customers because of the assumption that he had sabotaged Digital's machines while working as an independent contractor for Digital.\textsuperscript{259} Because Knaus had ended his relationship with Digital and therefore could no longer sabotage the machines, the court found the injunction to be an inappropriate remedy because the alleged harm had already occurred.\textsuperscript{260} The court then reversed the injunction against Advantage because it could permissibly compete for business, unless it was inducing a breach of a contract not terminable at will.\textsuperscript{261} It did note that Advantage could not assist the former employees to breach their non-competition agreements with Digital and that an injunction to that effect would be permissible.\textsuperscript{262}

An appeal of a dismissal of a "tortious interference with a business relationship" claim was decided by the Third District Court of Appeal in Rubin v. Alarcon.\textsuperscript{263} In the case, the plaintiff law firm undertook representation of Benito Santiago against Morena Monge.\textsuperscript{264} Defendant Alarcon, a mutual friend of Santiago and Monge, proceeded to act as Monge's agent in settling the case with Santiago.\textsuperscript{265} In the second amended complaint, the plaintiffs allege that Alarcon urged Santiago not to tell his attorneys about the negotiations, but instead to tell them that he no longer wanted to pursue the lawsuit.\textsuperscript{266} In addition, it was alleged that Santiago was urged to not disclose the payments made to him in settlement of the case.\textsuperscript{267} Although acknowledging that parties may settle cases without attorney intervention, the court held that they may not engage in fraud or collusion in order to interfere with the

\textsuperscript{257}. FLA. STAT. § 542.335(1)(d)(1) (2000).
\textsuperscript{258}. Id.; Advantage Digital Sys., Inc., 870 So. 2d at 114–15.
\textsuperscript{259}. Advantage Digital Sys., Inc., 870 So. 2d at 115–16.
\textsuperscript{260}. Id. at 116.
\textsuperscript{261}. Id. at 116–17.
\textsuperscript{262}. Id. at 116.
\textsuperscript{263}. 892 So. 2d 501, 501 (Fla. 3d Dist. Ct. App. 2004).
\textsuperscript{264}. Id.
\textsuperscript{265}. Id. at 502.
\textsuperscript{266}. Id.
\textsuperscript{267}. Id.
agreement between the attorney and client. The court also noted in dicta, however, that a provision in the contingent fee agreement that the client could not settle the case without prior written approval of the law firm was void.

The Fourth District Court of Appeal also considered a case involving tortious interference of a contract for attorneys’ fees in Ingalsbe v. Stewart Agency, Inc. The trial court dismissed the complaint on the basis of absolute immunity. In the case, the lawyers “were retained by their client to sue appellees [Stewart Agency] under the Lemon Law.” The client won a jury verdict, which was reversed on appeal. After remand, the appellees approached the client and urged settlement without involving the lawyers. The appellees and client then agreed on how much the appellees would pay in attorneys’ fees to the appellants, which met only one of the alternatives available in the fee agreement between the client and the appellants. The appellees argued that the appellant’s claim was barred by the “litigation privilege.” This privilege has been defined as one that applies to “any act occurring during the course of a judicial proceeding.” However, as the court noted, although the appellee was privileged to propose and conclude a settlement, it was not entitled “to interfere with a fee contract between one of the settling parties and his lawyer.” Judge Gross dissented, arguing that the decision “impinge[d] on a client’s right to settle a lawsuit,” noting that the settlement far exceeded the damages awarded at the initial trial. The dissent argued that the settlement did comply with one of the alternatives in the fee contract and did not involve a design or defeat payment of attorney’s fees. Upon a motion for rehearing, the court did certify the following question to the Supreme Court of Florida:

Does the litigation privilege of Levin, Middlebrooks, Mabie, Thomas, Mayes & Mitchell, P.A. v. United State Fire Insurance Co.,
639 So.2d 606 (Fla. 1994), apply to claims alleging direct interference with an attorney’s fee earned by representing a consumer’s claim for unfair or deceptive practices in a sale of a motor vehicle, where the interference arose from a seller-initiated settlement without counsel in which the fee due the lawyer was reduced without the lawyer’s consent. 281

The Fifth District Court of Appeal considered an appeal of an injunction involving a “tortious interference with business relationships” claim in Animal Rights Foundation of Florida, Inc. v. Siegel. 282 Plaintiff Siegel was president of a timeshare development that hired a production company to conduct entertainment for potential buyers that included twice weekly animal shows. 283 The complaint alleged that defendant foundation’s supporters picketed at the plaintiff’s residential community and business offices as well as circulated leaflets that claimed Siegel abused animals. 284 The court ruled that the injunction’s prohibition on picketing that would impede the flow of traffic was improper in light of a lack of record evidence that “the Foundation had impeded or was likely to impede the free flow of traffic.” 285 It also ruled that the noise restrictions were an improper burden on speech “because they enjoin[ed] all shouting and all uses of bull horns or megaphones, rather than tailoring a prohibition against impermissible conduct.” 286 Additionally, the court invalidated restrictions on the number of protestors and location of demonstrations absent evidence showing the need for such regulation. 287 It also struck bans on videotaping passers-by because of a failure to demonstrate irreparable harm. 288 Furthermore, it struck parts of the injunction that banned certain statements from being made. 289 Finally, the court noted that because the speech involved was pure speech and because the foundation was not a competitor of Siegel or the development and it was not promoting an economic interest, the speech “was not properly restrained to prevent the tortious interference alleged.” 2890 In a partial concurrence and dissent, Chief Judge Sawaya argued that the conduct engaged in by the defendant was har-

281. Id. at 38–39.
282. 867 So. 2d 451, 452–53 (Fla. 5th Dist. Ct. App. 2004). The case also involved claims of “invasion of privacy, slander, and libel.” Id. at 453.
283. Id. at 452.
284. Id. at 453.
285. Id. at 455.
286. Siegel, 867 So. 2d at 456.
287. Id.
288. Id.
289. Id. at 457.
290. Id. at 458 (footnote omitted).
assessment as opposed to speech\textsuperscript{291} and that some of the speech was not political, but commercial in nature.\textsuperscript{292}

X. "\textit{Slavin}" DOCTRINE

The Fourth District Court of Appeal considered the application of the \textit{Slavin} doctrine in \textit{Gonsalves v. Sears, Roebuck and Co.}\textsuperscript{293} The plaintiff's mother purchased carpeting for her staircase from Sears, which was installed by its contractor, Flamingo.\textsuperscript{294} The first installation was incorrect and had to be replaced.\textsuperscript{295} A problem became apparent after the second installation, which the mother made several unsuccessful attempts to get rectified.\textsuperscript{296} She was reassured by Sears that it would remedy the problem so she did not seek an independent company to repair the problem.\textsuperscript{297} Before the problem was remedied, she "fell on the staircase sustaining [a] serious injury."\textsuperscript{298} The trial court granted a motion for summary judgment filed by Sears and Flamingo pursuant to the \textit{Slavin} doctrine.\textsuperscript{299} This doctrine refers to the case of \textit{Slavin v. Kay}\textsuperscript{300} and holds that "a contractor is relieved of liability for damages caused by a patent defect after control of the completed premises has been turned over to the owner."\textsuperscript{301} The court noted that this case involved a patent defect, but held that it could not be conclusively established that the work was ever completed.\textsuperscript{302} It also noted that this case did not really fit into the rationale of \textit{Slavin}, as Sears had actually been asked to fix the problem.\textsuperscript{303}

In \textit{Foreline Security Corp. v. Scott},\textsuperscript{304} the Fifth District Court of Appeal also applied the \textit{Slavin} doctrine.\textsuperscript{305} This case involved liability for a 1999 bank robbery.\textsuperscript{306} "Foreline installed a bank security system at the Mount Dora branch of the United Southern Bank (USB) in 1993."\textsuperscript{307} Scott, who was

\begin{itemize}
\item \textsuperscript{291} Siegel, 867 So. 2d at 464 (Sawaya, C.J., concurring in part, dissenting in part).
\item \textsuperscript{292} \textit{Id.} at 468.
\item \textsuperscript{293} 859 So. 2d 1207, 1208 (Fla. 4th Dist. Ct. App. 2003).
\item \textsuperscript{294} \textit{Id.}
\item \textsuperscript{295} \textit{Id.}
\item \textsuperscript{296} \textit{Id.}
\item \textsuperscript{297} \textit{Id.}
\item \textsuperscript{298} \textit{Gonsalves}, 859 So. 2d at 1208.
\item \textsuperscript{299} \textit{Id.}
\item \textsuperscript{300} 108 So. 2d 462 (Fla. 1958).
\item \textsuperscript{301} \textit{Gonsalves}, 859 So. 2d at 1209.
\item \textsuperscript{302} \textit{Id.}
\item \textsuperscript{303} \textit{Id.}
\item \textsuperscript{304} 871 So. 2d 906 (Fla. 5th Dist. Ct. App. 2004).
\item \textsuperscript{305} \textit{Id.} at 909.
\item \textsuperscript{306} \textit{Id.} at 908.
\item \textsuperscript{307} \textit{Id.} (internal quotation marks omitted).
\end{itemize}
a teller at the bank at the time of the robbery, was shot and rendered a quadriplegic as a result.\textsuperscript{308} Scott sued Foreline, alleging several causes of action.\textsuperscript{309} The jury found that Foreline was fifty percent at fault and that USB was fifty percent at fault for the injury, but the trial court entered judgment against Foreline for the full amount of the damages pursuant to section 768.81 of the \textit{Florida Statutes}.\textsuperscript{310} The court first noted that a majority of states have adopted a "completed and accepted rule" for this type of factual situation.\textsuperscript{311} Having completed installation of the security system six years prior to the robbery, Foreline argued that it should have received a jury instruction on the \textit{Slavin} doctrine.\textsuperscript{312} The court agreed.\textsuperscript{313} The court also held that it was error to instruct the jury to allocate fault between USB and Foreline and then ignore the allocation as the jury may have decided differently had it been aware that Foreline would bear responsibility for the entire amount of the verdict.\textsuperscript{314}

\section*{XI. Miscellaneous}

In \textit{Indemnity Insurance Co. of North America v. American Aviation, Inc.},\textsuperscript{315} the Supreme Court of Florida responded to certified questions of law concerning the economic loss rule from the United States Court of Appeals for the Eleventh Circuit.\textsuperscript{316} Indemnity Insurance Company (Indemnity) and Profile Aviation Services, Inc. (Profile) sued American Aviation (American) for negligent maintenance and inspection of an aircraft's landing gear on a Profile aircraft.\textsuperscript{317} The court noted that the economic loss rule, which prohibits tort actions in certain cases where the only damages are economic losses, is applied to those in contractual privity to prevent the circumvention of the allocation of such losses set forth in the contract.\textsuperscript{318} Thus, it would be inappropriate to permit a tort action where the only breach of duty was a breach of the contract.\textsuperscript{319} Similarly, the products liability economic loss rule developed in order to prevent manufacturers from being held liable for economic

\begin{footnotes}
\item 308. \textit{Id.}
\item 309. \textit{Scott}, 871 So. 2d at 908.
\item 310. \textit{Id.} at 908-09.
\item 311. \textit{Id.} at 909 (footnote omitted).
\item 312. \textit{Id.} at 909-10.
\item 313. \textit{Id.} at 910.
\item 314. \textit{Scott}, 871 So. 2d at 911.
\item 315. 891 So. 2d 532 (Fla. 2004).
\item 316. \textit{Id.} at 534.
\item 317. \textit{Id.}
\item 318. \textit{Id.} at 536.
\item 319. \textit{Id.} at 537.
\end{footnotes}
damages beyond that provided for by warranty law. The latter limitation has generally been applied to products which damage themselves as a result of a defect in the product. The court held that the economic loss rule did not apply in this case where the plaintiffs were not in privity and noted that it continued to recognize the “other property” exception to products liability economic loss cases.

In Allstate Insurance Co. v. Ginsberg, the Supreme Court of Florida decided an invasion of privacy claim. The case was responsive to several certified questions of law from the Eleventh Circuit Court of Appeals involving claims by Elaine Scarfo that, while employed by corporations owned by Victor Ginsberg, she was subjected to “unwelcome offensive conduct, including physical touching and comments of a sexual nature.” Amongst the claims brought by Scarfo was a claim of invasion of privacy, and the case required a resolution of whether this conduct fit within that tort as recognized in Florida. The court held that the tort does not include this type of intrusion to the plaintiff’s body as opposed to physical space or holding the person free from public gaze.

The First District Court of Appeal also considered a warning issue in McGraw v. R & R Investments, Ltd. In this case, Patricia McGraw appealed from a final summary judgment finding R & R, an equine activity sponsor, not liable for injuries that she suffered as an equine trainer employed by R & R after she was thrown by a horse owned by R & R. The resolution of the case depended upon analysis of the immunity provided to equine sponsors by section 773.02 of the Florida Statutes. Section 773.04 requires that equine sponsors post notices and give written warnings announcing that the sponsor is not liable for injuries from inherent risks of equine activities, but provides no consequences for failure to provide such warnings. The court reversed the summary judgment, holding that the

320. *Indemnity Ins. Co. of N. Am.*, 891 So. 2d at 538.
321. *Id.* at 542 (citing *Moransais v. Heathman*, 744 So. 2d 973, 984 (Fla. 1999) (Wells, J., concurring)).
322. *Id.* at 543.
323. 863 So. 2d 156 (Fla. 2003).
324. *Id.* at 157.
325. *Id.*
326. *Id.* at 158.
327. *Id.* at 162.
328. 877 So. 2d 886, 888 (Fla. 1st Dist. Ct. App. 2004).
329. *Id.*
330. *Id.*
331. *Id.* at 889 (citing *FLA. STAT.* § 773.04 (2000)).
statutory obligation to provide the notice was mandatory if the sponsor was to be afforded the statutory immunity.\(^{332}\)

In *Hopkins v. Boat Club, Inc.*,\(^{333}\) the First District Court of Appeal considered an appeal of a case involving a release.\(^{334}\) This case, filed by Ruby and Ronald Hopkins, involved injuries suffered by Mrs. Hopkins when she was thrown from a boat operated by Mr. Hopkins under the direction and supervision of one of the boat club’s employees.\(^{335}\) The plaintiffs signed an agreement with the boat club for use of the club’s boats and then signed individual releases which included a clause entitled “Assumption and Acknowledgment of Risks and Release of Liability Agreement.”\(^{336}\) Although controlled by federal maritime law, the court stated that it was consistent with Florida law to look unfavorably upon exculpatory clauses seeking to absolve a party from its own negligence and to find such clauses ineffective absent clear and unequivocal language.\(^{337}\) The court found the language in this release to be sufficient in its specific reference to a number of risks, including “ship’s wakes,” which caused the injury in this case and the reference to release all “principals, directors, officers, agents, [and] employees . . . from any and all liability . . . for any and all injury or damage.”\(^{338}\)

The Third District Court of Appeal decided a case dealing with a claim of interference with testamentary capacity in *In re Hatten*.\(^{339}\) The case, an appeal of a summary judgment in favor of the defendant, dealt with an allegation that the decedent had disinherited three relatives, including her brother, Louis.\(^{340}\) The plaintiffs filed an adversary action against Louis, alleging that he had taken away the will of the deceased and destroyed it.\(^{341}\) The evidence supporting the existence of the will consisted of statements from the three plaintiffs, who were beneficiaries of the alleged will.\(^{342}\) The defendant argued that the evidence should be barred by the hearsay rule and the Dead Man’s Statute.\(^{343}\) After quickly disposing of the hearsay objection by noting the specific exemption for statements relating to wills, the court

\(^{332}\) *Id.* at 893.
\(^{333}\) 866 So. 2d 108 (Fla. 1st Dist. Ct. App. 2004).
\(^{334}\) *Id.* at 109.
\(^{335}\) *Id.* at 110.
\(^{336}\) *Id.* at 109.
\(^{337}\) *Id.* at 111.
\(^{338}\) Hopkins, 866 So. 2d at 112.
\(^{339}\) 880 So. 2d 1271, 1272 (Fla. 3d Dist. Ct. App. 2004).
\(^{340}\) *Id.*
\(^{341}\) *Id.* at 1273.
\(^{342}\) *Id.*
\(^{343}\) *Id.* at 1274.
next addressed the Dead Man's Statute issue. Because the Dead Man's Statute applies to a person interested in an action in a representative capacity, the court held that it did not apply to this action, in which the defendant was being sued for damages in his personal capacity for his tortious act.

In *Haskins v. City of Fort Lauderdale*, the Fourth District Court of Appeal decided an appeal of an invasion of privacy and negligent investigation claim. The plaintiff, Robin Haskins, alleged that while working as a civilian employee for the City of Fort Lauderdale Police Department, her office was illegally searched for illegal diet pills. In the criminal case in which she was charged with possession of a controlled substance with intent to sell and/or deliver, the evidence obtained in the search was suppressed and the state *nolle prossed* the charge. Her labor union filed a grievance in relation to her job termination, which resulted in a finding that there was not just cause for her dismissal. The appellate court upheld the trial court's summary judgment on the basis of the statute of limitations. The appellate court rejected the arguments that the statute was either tolled until the criminal court ruled that the search was illegal or until the arbitration proceedings on the labor grievance were completed.

The Fourth District Court of Appeal considered an appeal of malicious prosecution and false arrest claims in *Daniel v. Village of Royal Palm Beach*. In this case, Felicia Daniel filed a malicious prosecution claim for her arrest for aggravated assault. According to witnesses, Daniel was driving carelessly and harassing an unmarked police car. The court held that "the arresting officer had probable cause to arrest Daniel for reckless driving." She was later tried and acquitted of this charge. Despite the fact that she was arrested for aggravated assault and disputed many facts alleged by the witnesses, the court held that a summary judgment was appropriate because "[t]he validity of an arrest does not turn on the [charge] announced

344. *Hatten*, 880 So. 2d at 1274–75.
345. *Id.* at 1276.
346. 898 So. 2d 1120 (Fla. 4th Dist. Ct. App. 2005).
347. *Id.* at 1122.
348. *Id.*
349. *Id.*
350. *Id.*
351. *Haskins*, 898 So. 2d at 1124.
352. *Id.* at 1123.
353. 889 So. 2d 988, 990 (Fla. 4th Dist. Ct. App. 2004).
354. *Id.*
355. *Id.*
356. *Id.*
357. *Id.*
by the officer at the time” of an arrest and the factual disputes are not material to the existence of probable cause at the time of arrest. 358

The Fourth District also decided a claim concerning a loss of consortium set forth by a child who was a fetus at the time of injury in Larusso v. Garner. 359 The mother was three months pregnant with the child, Braden, when she was in an automobile accident that resulted in her sustaining severe brain injuries. 360 Despite being in a coma, she carried Braden to term. 361 The court evaluated the claim under the Florida Statutes establishing a child’s right to loss of parental consortium—section 768.0415. 362 It was argued that the defendants did not fit within the statutory term “unmarried dependent” so as to qualify for the damages. 363 However, the court held that “[b]ecause Florida follows the ‘born alive’ doctrine,” which permits minors who are “born alive” to seek compensation for injuries occurring to them or their parents, it would deem the statute to provide coverage. 364 It did, however, find that the lower court erred in awarding filial consortium damages beyond Braden’s reaching the age of majority, although it agreed that Braden’s damages could so extend. 365

In Broz v. Rodriguez, 366 the Fourth District Court of Appeal considered the application of a release. 367 The plaintiff, Grace Broz, appealed a final judgment in favor of a number of defendant doctors. 368 Broz fell at the Rocking Horse Ranch and first sued the ranch in a lawsuit that was settled. 369 She then filed suit against the defendants in this action for surgery on her injuries, which she claimed was negligently performed. 370 In the general release signed with the ranch, she did not reserve a claim against the defendants in this action. 371 In interpreting section 768.041, Florida Statutes, the court held that she must have so reserved to hold subsequent tortfeasors liable. 372

358. Daniel, 889 So. 2d at 991.
359. 888 So. 2d 712, 716 (Fla. 4th Dist. Ct. App. 2004).
360. Id. at 715.
361. Id.
362. Id. at 720; see FLA. STAT. § 768.0415 (2004).
363. Larusso, 888 So. 2d at 719.
364. Id.
365. Id. at 721.
366. 891 So. 2d 1205 (Fla. 4th Dist. Ct. App. 2005).
367. Id. at 1206.
368. Id.
369. Id.
370. Id.
371. Broz, 891 So. 2d at 1206.
372. See id. at 1207–08.
The res ipsa loquitur doctrine was applied by the Fourth District Court of Appeal in *Nodurft v. Servico Centre Ass'n*. The plaintiff, Colleen Nodurft, alleged that she was injured in the ladies' restroom of an Omni Hotel when "a wall-mounted trash receptacle fell from the wall and struck her foot." Two witnesses testified that receptacles in the restrooms were loose. The plaintiff requested a jury instruction on res ipsa loquitur, which was denied. The court noted that Florida courts had expanded the doctrine beyond its origins, including the notion that the defendant had exclusive control of the instrumentality causing injury. The court then held that although the receptacle "was in a public place and accessible to the public, the Omni had 'sufficient exclusivity' [of its control] to rule out the chance that [it] fell from the wall as a result of the actions of some other agency." Accordingly, the court reversed and remanded for a new trial.

The Fifth District Court of Appeal decided a malicious prosecution appeal in *Doss v. Bank of America, N.A.* Bank of America sued Doss for payment on bogus checks, endorsed by a forger. Doss opened a savings account at the bank, but did not have a checking account with it. The forger, who forged Doss' name on the checks, presented identification indicating that she was Doss. The bank's fraud investigator concluded that Doss had nothing to do with the check-cashing scheme and recommended that no collection action be taken against Doss. The bank could not explain why the lawsuit had been filed. Doss agreed to a joint stipulation for dismissal of the bank's collection action. In Doss' malicious prosecution action, the bank asserted that Doss had not received "a 'bona fide' termination of the collection suit" because of the joint stipulation of dismissal.

Although the court noted that cases that terminate due to settlements or joint stipulations do not normally qualify as bona fide terminations for mali-
cious prosecution actions, such is not always the case.\textsuperscript{388} It noted that courts must look at "the total circumstances."\textsuperscript{389} Although the bank agreed to restitution of $37.14, which it had set-off when it first discovered the forged checks, the court held that such was actually an admission by the bank that it recognized Doss' innocence.\textsuperscript{390} Further, it deemed her waiver of interest to be de minimus because the interest on the $37.14 would have been miniscule and her waiver of attorney's fees in the action was not significant since there was no basis to claim them.\textsuperscript{391} It held that her failure to seek attorney's fees pursuant to section 57.105 in the collection suit was also not fatal.\textsuperscript{392}

The Fifth District Court of Appeal decided a defamation case in \textit{Fariello v. Gavin}.\textsuperscript{393} Fariello appealed the dismissal of his complaint on the basis of the litigation privilege.\textsuperscript{394} Fariello claimed that Craig Gavin, president of the Crystal Hills Mini Farms Unit 1 and 2 Association, Inc., made slanderous comments about Fariello that "Fariello had committed the crime of perjury in connection with certain of his professional qualifications."\textsuperscript{395} The trial court granted motions for summary judgment on the basis that it felt it permissible for Gavin to question the credibility of "Fariello publicly because the two men were adversaries in the prior lawsuit."\textsuperscript{396} Because immunity is an affirmative defense, the court held that it would normally be inappropriate to dismiss the complaint unless it demonstrated on its face that the defense applied.\textsuperscript{397} The court held that it was not so apparent in this case.\textsuperscript{398}

The United States Court of Appeals for the Eleventh Circuit applied Florida's crashworthiness doctrine in \textit{Bearint v. Dorel Juvenile Group, Inc.}\textsuperscript{399} The plaintiff's parents appealed a verdict that Cosco, manufacturer of an automobile safety seat in which their son, Kagan, was seated at the time of an accident was not liable for the injuries that he sustained.\textsuperscript{400} Saturn automobile company, which was also sued, settled prior to trial.\textsuperscript{401}

\textsuperscript{388} \textit{Id.} at 995.
\textsuperscript{389} \textit{Id.}
\textsuperscript{390} \textit{Doss}, 857 So. 2d at 995.
\textsuperscript{391} \textit{Id.} at 995–96.
\textsuperscript{392} \textit{Id.} at 996.
\textsuperscript{393} 873 So. 2d 1243, 1244 (Fla. 5th Dist. Ct. App. 2004).
\textsuperscript{394} \textit{Id.}
\textsuperscript{395} \textit{Id.}
\textsuperscript{396} \textit{Id.}
\textsuperscript{397} \textit{Id.} at 1245.
\textsuperscript{398} \textit{Fariello}, 873 So. 2d at 1245.
\textsuperscript{399} 389 F.3d 1339, 1348 (11th Cir. 2004).
\textsuperscript{400} \textit{Id.} at 1343.
\textsuperscript{401} \textit{Id.} at 1344.
In considering the applicable Supreme Court of Florida case, *D'Amario v. Ford Motor Co.*, the Eleventh Circuit Court of Appeals discussed the applicability of the crashworthiness doctrine, which precludes consideration of the fault of initial tortfeasor who cause a crash when a device in the car causes enhanced injuries. In this case, in which the design of Saturn’s front seat was considered a cause of the injury, the court ruled that a proper application of the doctrine would permit the jury to consider Saturn’s contribution to the injury of the infant.

402. 806 So. 2d 424 (Fla. 2001).
403. *See Bearint*, 389 F.3d at 1345–47.
404. *See id.* at 1348.
FLORIDA’S NO-FAULT LAW: TO SET-OFF OR NOT TO SET-OFF, THAT IS THE QUESTION

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I. INTRODUCTION

What comes to mind for most people when they think about torts or personal injury lawsuits is sensational newspaper headlines about a doctor found liable for medical malpractice or a business ordered to pay a huge amount of money because of a product defect. Nowadays, these thoughts are usually quickly followed by some thought about “tort reform” or some vision of wealthy lawyers. This perception of torts or personal injury lawsuits is quite far from the reality of the day to day work of your ordinary plaintiff and defense tort lawyers, especially in Florida. Like most everywhere else, the largest amount of personal injury legal work in Florida concerns automobile injuries. This is not surprising given that Florida has an

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4. The overall award median for all plaintiff verdicts collected from the years 1995 to 2001 was $41,380. JURY VERDICT RESEARCH SERIES No. 1.20.8, CURRENT AWARD TRENDS IN PERSONAL INJURY 8 (Catherine Thomas ed., 2002 ed. 2003) (on file with authors). The median compensatory award for Florida from the years 1995-2001 was $67,500 and the percent of cases that awarded punitive damages in Florida for the years 1995-2001 is two percent. Id. at 39, 41.
5. Approximately sixty percent of plaintiff verdicts between 1995 and 2001 were for instances of vehicular negligence. Id. at 51.
estimated 13,715,866 licensed motor vehicles\(^6\) and 15,483,582 licensed drivers.\(^7\) Add to these numbers the tourists and business travelers who come to Florida on a yearly basis and the number of motor vehicles and drivers using Florida roadways are staggering.\(^8\) With all of the these motor vehicles and drivers on the road, it is also not surprising that there were 243,294 motor vehicle accidents in Florida last year.\(^9\) Unfortunately, with car accidents, many times personal injury follows. Simple math reveals that based on the number of motor vehicle accidents per year, potentially trillions of dollars of both insurance coverage and insurable losses occur.

This article will focus on Florida’s Motor Vehicle No-Fault Law and, in particular, the Personal Injury Protection coverage (“PIP”) required by this statute.\(^10\) The first part of this article will describe the legislative purpose and specific provisions of the Florida Motor Vehicle No-Fault Law concerning PIP. The second part of this article will examine the conflicting case law in Florida regarding the application of the PIP provisions to persons who do not have PIP coverage and are injured in a motor vehicle accident. Finally, this article will propose a resolution to the conflicting case law in Florida involving the application of the PIP provisions to uninsured, injured parties.

II. FLORIDA’S PIP PROVISIONS

Florida’s Motor Vehicle No-Fault Law requires anyone owning a motor vehicle to obtain a minimum of $10,000 in medical coverage.\(^11\) This required insurance is called Personal Injury Protection coverage, or PIP.\(^12\) Auto owners can purchase PIP insurance with a variety of deductibles.\(^13\) PIP coverage kicks in when a person is injured arising out of the use or mainte-
nance of a motor vehicle. PIP insurance pays, according to the Florida Statute, regardless of whether the injured party is or is not at-fault for the injuries sustained.

The Florida No-Fault Law PIP provisions also provide limited tort immunity for at-fault car drivers and owners. Under these provisions, the at-fault driver avoids tort liability and is immune from suit, unless the injury caused by the at-fault driver, "consists in whole or in part of:

(a) Significant and permanent loss of an important bodily function.
(b) Permanent injury within a reasonable degree of medical probability, other than scarring or disfigurement.
(c) Significant and permanent scarring or disfigurement.
(d) Death.

This statutory provision is sometimes referred to as the "permanent injury" or "threshold" requirement. Therefore, under the Florida Motor Vehicle No-Fault Law, an injured person may not bring suit against an at-fault party unless the person's injury meets the definition of the type of injury contained in the foregoing statutory section.

Florida's Motor Vehicle No-Fault Law then goes on to state that even if an injured party satisfies the type of injury requirement to bring suit against an at-fault driver, the "injured party . . . shall have no right to recover any damages for which personal injury protection benefits are paid or payable."

The end result, when all of these statutory provisions are read in conjunction with each other, is that if an injured person's medical bills are paid under a PIP policy and the injured person files suit against the at-fault owner or driver and recovers a judgment against that at-fault owner or driver, the amount of PIP benefits paid to the injured person will be subtracted from the judgment as a set-off.

It seems pretty clear that the Florida Motor Vehicle No-Fault Law and its PIP provisions have attempted to strike a balance between providing

14. § 627.736(1).
15. § 627.736(4)(d).
16. § 627.737.
17. § 627.737(2)(a)-(d).
18. See id.
19. Id.
20. § 627.736(3) (emphasis added).
quick payment to the injured person for medical treatment and not subjecting at-fault drivers and owners to double payment for the same injury.  

In 1971, the Florida Legislature decided that the traditional "fault" based tort system, when applied to auto accidents, was too slow and inefficient. The legislature also noted that the traditional tort system had "led to inequalities of recovery, with minor claims being overpaid and major claims being underpaid." Florida's first version of the Florida Motor Vehicle No-Fault Law, entitled the Florida Automobile Reparations Reform Act, took effect on January 1, 1972. One of the key provisions in this original statute and the statute as it exists today is the PIP insurance provision. PIP was designed to provide "medical, surgical, funeral, and disability insurance benefits without regard to fault." The statute mandates the purchase of PIP insurance for motor vehicles required to be registered in Florida.

At the time of the Act, seventeen percent of all lawsuits filed were automobile related lawsuits. The legislature figured that PIP coverage would reduce the number of motor vehicle accident lawsuits and free up valuable court time. The legislature's further design was to enable an injured person to receive money quickly to cover out of pocket medical expenses from the injured person's own insurance company.

22. See §§ 627.736-.737.
23. Lasky, 296 So. 2d at 16.
24. Id.
26. See § 627.731.
27. Id.
28. Id.
29. Lasky, 296 So. 2d at 17 n.15.
30. Id. at 20.
31. The Florida No-Fault law requires that all vehicle owners purchase PIP insurance. See § 627.731. Further, the design of the No-Fault law contemplates that both drivers involved in a car crash will be covered under their own no-fault policies. § 627.736. This is evidenced by the multiple provisions written into the Act, which penalize drivers who fail to obtain no-fault insurance. See § 627.733. Section 627.733(4) of the Florida Statutes provides that anyone "who fails to have [no-fault insurance] in effect at the time of an accident shall have no immunity from tort liability." § 627.733(4). Additionally, section 627.733(6) mandates that anyone failing to maintain no-fault insurance shall have their driver's license suspended until such time that no-fault insurance is obtained. § 627.733(6). Therefore it becomes illegal to drive a car that is not insured under a PIP policy. See id. Through these provisions the legislature expects that all motorists will be covered under a PIP policy and those who are not, will no longer be allowed to drive. See id. Section 627.736(3) of the Florida Statutes provides that "[a]n injured party who is entitled to bring suit under the provisions of ss. 627.730-627.7405 [the Act], or his or her legal representative, shall have no right to recover any damages for which personal injury protection benefits are paid or payable." § 627.736(3) (emphasis added). Unfortunately, the statute provides no guidance in the situation...
What the Florida legislature did not anticipate is how to deal with the injured party in a car accident who does not carry the mandatory PIP coverage. Does this uninsured injured party become self-insured for the first $10,000 in medical bills? If the uninsured injured party receives a judgment against the at-fault party, is the at-fault party’s insurance company entitled to a set-off of $10,000, even though no PIP benefits were paid? The answer to these questions seems to depend on where in Florida the accident occurred.

III. PIP INSURANCE SET-OFF

Four different Florida District Courts of Appeal have wrestled with the question of whether an at-fault driver or owner is entitled to subtract the amount of statutorily required PIP benefits from a judgment received by an injured party who was required to carry PIP coverage but did not.

where there are no PIP benefits that are paid or payable. See § 627.736. Further, the statute gives no definition of “paid or payable.” See id. This leads to several different interpretations and clearly conflicting decisions in the different districts of the Florida District Court of Appeal. Thus, this article is necessary to explain the decisions of the different District Courts of Appeal and to propose a solution to this conflict.

Section 627.736(1) of the Florida Statutes lays out who is covered by a PIP policy. § 627.736(1). The statute states that a PIP policy covers:

the named insured, relatives residing in the same household, persons operating the insured motor vehicle, passengers in such motor vehicle, and other persons struck by such motor vehicle and suffering bodily injury while not an occupant of a self-propelled vehicle . . . for loss sustained by any such person as a result of bodily injury, sickness, disease, or death arising out of the ownership, maintenance, or use of a motor vehicle.

Id. Therefore, according to the statute, PIP will even be extended to pedestrians if the pedestrian either: owns a motor vehicle which is covered by a PIP policy, or is a third party who neither owns a motor vehicle nor has obtained any PIP insurance. Id.

32. See § 627.733. Section 627.733 of Florida Statutes delineates those who are required to obtain PIP insurance, stating:

(1) Every owner or registrant of a motor vehicle, other than a motor vehicle used as a taxicab, school bus as defined in s. 1006.25, or limousine . . . shall maintain security as required by subsection (3) [of this statute] in effect continuously throughout the registration or licensing period.

(2) Every nonresident owner or registrant of a motor vehicle which . . . has been physically present within this state for more than 90 days during the preceding 365 days shall thereafter maintain security as defined by [this statute].

§ 627.733(1)-(2). Therefore, all those who own a car or who have a car registered in their name are required to maintain a PIP insurance policy. See id. Those who do not own a car or have a car registered to them are not required to be covered under a PIP policy. See id.

A. The No Set-off Appellate Court Decisions

The first case to confront the PIP set-off issue was Ward v. Nationwide Mutual Fire Insurance Co.\(^\text{34}\) The Ward case was actually the consolidation of two appeals—Ward v. Nationwide Mutual Fire Insurance Co. and Johnston v. United Services Automobile Ass'n.\(^\text{35}\) The plaintiffs in each case were injured while occupying a vehicle owned by someone else, yet both injured plaintiffs owned their own car but had failed to purchase PIP coverage as required by Florida law.\(^\text{36}\)

The defendants' insurance policy stated that medical payments (other than PIP benefits) will be available “only over and above any personal injury protection benefits that are paid or payable for the bodily injury under this or any [insurance] policy.”\(^\text{37}\) The injured plaintiffs contended that because the plaintiffs did not purchase PIP insurance, no PIP benefits were paid or payable to them.\(^\text{38}\) Therefore, the injured plaintiffs argued that the defendants’ insurance companies should be responsible for paying the injured plaintiffs’ full medical expenses with no set-off for the amount of PIP benefits.\(^\text{39}\)

The defendants’ insurance companies countered that until the plaintiffs’ medical bills exceeded the statutorily required amount of PIP coverage,\(^\text{40}\) the insurance companies were not liable to pay for any of the medical expenses incurred by the injured plaintiffs.\(^\text{41}\) The insurance companies “argued that PIP benefits should be considered as paid or payable, regardless of” whether the plaintiffs purchased coverage or not because section 627.733(4) of the Florida Statues,\(^\text{42}\) which is the same provision in effect today, states that:

An owner of a motor vehicle with respect to which security is required by this section who fails to have such security in effect at the time of an accident . . . shall be personally liable for the payment of benefits under s. 627.736. With respect to such benefits, such an owner shall have all of the rights and obligations of an insurer under ss. 627.730-627.7405.\(^\text{43}\)

The insurance companies urged the court to give full force and effect to this provision by classifying these injured, but PIP uninsured plaintiffs, as

\(^\text{34}\) 364 So. 2d 73 (Fla. 2d Dist. Ct. App. 1978).
\(^\text{35}\) Id.
\(^\text{36}\) Id. at 75–76.
\(^\text{37}\) Id. at 76 (emphasis added).
\(^\text{38}\) Id.
\(^\text{39}\) Ward, 364 So. 2d at 76.
\(^\text{40}\) The amount of required PIP insurance in 1978 was $5,000.00. Id.
\(^\text{41}\) Id.
\(^\text{42}\) Id. (emphasis added).
\(^\text{43}\) FLA. STAT. § 627.733(4) (2004).
self-insurers. 44 By doing so, the insurance companies figured that the statutory amount of PIP coverage required should be subtracted from any amount of medical payments ordered in the judgment in favor of the plaintiffs. 45 By allowing such a set-off, the insurance company’s obligation to pay any money for medical expenses to these plaintiffs would be extinguished. 46 The insurance companies noted further that to permit injured parties to recover without regard to a set-off for PIP benefits would reward these plaintiffs for failing to comply with the Florida Motor Vehicles No-Fault Law. 47

The court concluded that although the plaintiffs have failed to obtain the statutorily mandated PIP coverage, the insurance companies are not entitled to a set-off. 48 The court in Ward determined that even though a motorist who fails to obtain PIP coverage has, by statute, all the rights and obligations of an insurer, this statutory provision does not actually make that motorist an insurer. 49 The court also remarked that because the legislature already set forth in the statute the penalty for motorists who fail to purchase the required PIP coverage, it is not for this court or for a private insurance company to impose another penalty against an injured, but PIP uninsured motorist. 50

This issue surfaced again in Reynolds v. Life Insurance Co. of Virginia. 51 In Reynolds, the plaintiff, who did not carry PIP insurance, was injured while driving his personally owned car. 52 The defendant’s insurance company policy provided that “[b]enefits payable under this policy will be reduced by the amount of benefits payable for the same loss pursuant to a Motor Vehicle No-Fault Law, or similar law.” 53 The injured plaintiff incurred medical bills well in excess of the PIP benefit amount. 54

The plaintiff argued that the Ward case was precedent and the insurance company is not entitled to a set-off equal to the statutorily required amount of PIP coverage. 55 The defendant insurance company claimed that the Ward

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44. Ward, 364 So. 2d at 77.
45. Id.
46. Id.
47. Id. at 78.
48. Id.
49. Ward, 364 So. 2d at 77 (citing Farley v. Gateway Ins. Co., 302 So. 2d 177, 179 (Fla. 2d Dist. Ct. App. 1974)).
50. Id. at 78.
52. Id. at 519.
53. Id.
54. Id. at 519-20. The injured plaintiff incurred $11,000.00 in medical expenses. Id. at 519. The insurance company wanted a $5,000.00 set-off, the amount of statutorily required PIP, and, as such, claimed that the plaintiff was only due $6,000.00 ($11,000-$5,000 = $6,000). Reynolds, 399 So. 2d at 520.
55. See id.
case was distinguishable because of the language contained in the defendant’s insurance policy.\textsuperscript{56} In \textit{Ward}, the policy language in question provided “any personal injury protection benefits that are \textit{paid or payable} . . . under this or any [insurance] policy.”\textsuperscript{57} In \textit{Reynolds}, the policy language stated “benefits payable . . . pursuant to a Motor Vehicle No-Fault Law.”\textsuperscript{58} The defendant insurance company claims that the court’s reasoning in \textit{Ward} was based on the absence of an insurance policy providing PIP benefits while, in \textit{Reynolds}, the reduction was triggered by the existence of the Florida Motor Vehicle No-Fault Law.\textsuperscript{59}

The court, however, was not swayed by the insurance company’s argument.\textsuperscript{60} Instead the court ruled against a set-off of the amount of required PIP coverage because “PIP benefits will be paid under the required insurance, not directly by reason of the operation of the statute.”\textsuperscript{61}

In the case of \textit{Jedlicka v. Proctor}, the Second District Court of Appeal rather summarily ruled that no set-offs will be allowed for at-fault defendants who injure PIP uninsured motorists.\textsuperscript{62} The court’s only comment was “[w]e find merit only on Jedlicka’s claim that the trial court erred in reducing his damage award because of his failure to obtain statutorily required personal injury protection.”\textsuperscript{63} The court went on to say that \textit{Reynolds} and \textit{Ward} are controlling, and it is reversible error to reduce an injured party’s damage award because of his or her failure to obtain PIP insurance.\textsuperscript{64}

The PIP set-off issue then made its way to the Fifth District Court of Appeal, in the case \textit{Erie Insurance Co. v. Bushy}, where the court reached the same conclusion as the Second District Court of Appeal.\textsuperscript{65} The plaintiff in \textit{Erie} was injured while driving his automobile and had failed to obtain PIP insurance.\textsuperscript{66}

The court, in discarding the insurance company’s argument that the plaintiff was a self-insurer, ruled that

\textsuperscript{56} Id.
\textsuperscript{58} Reynolds, 399 So. 2d at 519.
\textsuperscript{59} Id. at 520.
\textsuperscript{60} Id.
\textsuperscript{61} Id.
\textsuperscript{62} 724 So. 2d 668, 668 (Fla. 2d Dist. Ct. App. 1999).
\textsuperscript{63} Id.
\textsuperscript{64} Id.
\textsuperscript{65} 394 So. 2d 228, 230 (Fla. 5th Dist. Ct. App. 1981).
\textsuperscript{66} Id.
[holding an [injured] owner of [a PIP] uninsured motor vehicle li-
able as a self-insurer for damages suffered from an [at-fault] in-
sured driver would avoid the express insuring contract provisions
in Erie's liability policy. It should make no difference to Erie un-
der its liability policy whether the injured person has or does not
have insurance.67

Accordingly, the Erie court disallowed a set-off to the defendant insurance
company.68

In another Fifth District Court of Appeal case involving PIP set-offs,
Stephens v. Renard, the court merely parrots the ruling in Erie by stating
"that it is error to reduce a[n injured] plaintiff's damage award for her failure
to obtain the statutorily required [PIP insurance]."69

B. The Set-off Appellate Court Decisions

The Fourth District Court of Appeal, in Holt v. King,70 was the first ap-
pellate court to rule in favor of a PIP set-off.71 At the time of the car crash,
King's PIP "policy had been cancelled . . . [for] failure to pay her insurance
premium."72 Prior to trial, King moved to strike Holt's affirmative defense
that Holt was entitled to a set-off due to King's failure to obtain PIP insur-
ance.73 The trial court granted King's motion and disallowed the at-fault
defendant a set-off because the court felt bound to follow the Ward,
Stephens, and Erie decisions, which disallowed a set-off equal to the amount
of required PIP coverage.74

The Court of Appeal in Holt disagreed with the trial court's decision
and held that, under the statutory language of section 627.733(4) of the Florida Statutes,
King was self-insured to the extent of the PIP coverage that she
should have purchased so the defendant insurance company was entitled to a
set-off of that amount.75 Further, the court ruled that Holt, who had pur-
chased his own PIP insurance, was also entitled to limited tort immunity pro-

67. Id.
68. Id.
69. 487 So. 2d 1079, 1080 (Fla. 5th Dist. Ct. App. 1986).
70. 707 So. 2d 1141 (Fla. 4th Dist. Ct. App. 1998).
71. Id. at 1144.
72. Id. at 1142.
73. Id.
1978); Stephens, 487 So. 2d 1079; Erie Ins. Co. v. Bushy, 394 So. 2d 228 (Fla. 5th Dist. Ct.
75. Holt, 707 So. 2d at 1143.
vided by the Florida Motor Vehicle No-Fault law.\textsuperscript{76} This later ruling meant that not only was the insurance company due a set-off for PIP coverage, but also the plaintiff, King, would have to meet the statutory threshold for damages for the insurance company to have to pay any money for her medical expenses.\textsuperscript{77}

The \textit{Holt} court was able to distinguish the \textit{Ward} case because the \textit{Holt} case "did not involve a tortfeasor's right to a set-off pursuant to the statutory tort exemption, but, rather, involved the question of whether public policy relieves an insurer of his contractually undertaken duty to a claimant when the claimant has failed to comply with the no-fault laws."\textsuperscript{78}

With regard to \textit{Erie}, the court stated that the Erie Insurance Company had undertaken a contractual obligation to insure the injured party, whereas there was no such obligation in \textit{Holt}.\textsuperscript{79}

The court acknowledged that the instant case was factually similar to the \textit{Stephens} case.\textsuperscript{80} The court stated that the instant ruling in \textit{Holt} was in direct conflict with the Fifth District's holding in \textit{Stephens},\textsuperscript{81} which expressly denied a set-off for an at-fault driver causing injury to an uninsured motorist.\textsuperscript{82} The conflict between \textit{Holt} and \textit{Stephens} was certified to the Supreme Court of Florida.\textsuperscript{83}

After the \textit{Holt} case, the Third District Court of Appeal stepped forward with its decision in \textit{Cases v. Gray}.\textsuperscript{84} On appeal, the court simply ruled that "[o]n the authority of, and for the reasons well expressed in \textit{Holt}, we hold that a PIP set-off is required."\textsuperscript{85} Conflict was again certified to the Supreme Court of Florida between \textit{Cases}, \textit{Stephens}, and \textit{Jedlicka}.\textsuperscript{86}

It appeared as though the Supreme Court of Florida would hear the \textit{Cases} case and resolve the conflict in the decisions between the Second and Fifth District Courts of Appeal and the Third and Fourth District Courts of Appeal.\textsuperscript{87} However, according to the Supreme Court of Florida's docket, a

\textsuperscript{76.} Id.
\textsuperscript{77.} See id. at 1144.
\textsuperscript{78.} Id. at 1143.
\textsuperscript{79.} Id. at 1143–44.
\textsuperscript{80.} \textit{Holt}, 707 So. 2d at 1144.
\textsuperscript{81.} Id.
\textsuperscript{82.} \textit{Stephens} v. \textit{Renard}, 487 So. 2d 1079, 1080 (Fla. 5th Dist. Ct. App. 1986).
\textsuperscript{83.} \textit{Holt}, 707 So. 2d at 1144; see also Cases v. Gray, 894 So. 2d 268, 268 (Fla. 3d Dist. Ct. App. 2004) (certifying conflict to the Supreme Court of Florida); Jedlicka v. Proctor, 724 So. 2d 668, 669 (Fla. 2d Dist. Ct. App. 1999) (certifying conflict to the Supreme Court of Florida).
\textsuperscript{84.} 894 So. 2d 268.
\textsuperscript{85.} Id. at 268.
\textsuperscript{86.} Id.
motion to dismiss the *Cases* case for lack of jurisdiction due to an untimely filing was granted on December 20, 2004. In addition, a motion for reinstatement of the *Cases* case on appeal was denied March 11, 2005. Therefore, the conflict in these decisions remains.

**IV. CONCLUSION**

It is almost pure folly to try and predict the outcome if the PIP set-off conflict between the District Courts of Appeal decisions reaches the Supreme Court of Florida. Yet, perhaps in this instance, the answer rests in a plain reading of the Florida Motor Vehicle No-Fault Law.

Subsections (1) and (2) of section 627.737 of the *Florida Statutes* prescribe that if an injured plaintiff has obtained the required PIP coverage, the injured plaintiff may only sue the at-fault defendant for additional damages, including non-economic damages, if the injured plaintiff’s injuries meet the statutory threshold for a recoverable injury. This is the limited tort immunity provision that insulates at-fault defendants. However, the Florida Motor Vehicle No-Fault law goes on to provide, in subsection (4) of section 627.733 of the *Florida Statutes*:

> An owner of a motor vehicle with respect to which security is required by this section **who fails to have such security in effect at the time of an accident shall have no immunity from tort liability, but shall be personally liable for the payment of benefits under s. 627.736.** With respect to such benefits, such an owner shall have all of the rights and obligations of an insurer under [the No-Fault Law].

This provision of the Florida Motor Vehicle No-Fault Law seems to hold the key to resolving the conflict between the District Courts of Appeal decisions on the PIP set-off issue. The Second District Court of Appeal in *Farley v. Gateway Insurance Co.*, stated that subsection (4) of section 627.733 of the *Florida Statutes* did not render an injured but PIP uninsured plaintiff a self-insurer because an insurer can only be someone who is “in the business of selling insurance.” However, this statutory provision clearly

88. *Id.*
90. *FLA. STAT.* § 627.737(1)-(2) (2004).
91. *Id.* § 627.733(4) (emphasis added).
92. 302 So. 2d 177, 179 (Fla. 2d Dist. Ct. App. 1974).
mandates that the automobile owner who fails to purchase PIP insurance takes on the rights and obligations of an insurer. The trick is to figure out what the Florida legislature meant by this statutory provision.

The primary goal of statutory interpretation is to identify the purpose and intention of the legislature in creating the statute, in order to effectuate that intention. The court in Farley held that the purpose of "the act was . . . to broaden insurance coverage while at the same time reasonably limiting the amount of damages which could be claimed."

Perhaps the answer to the PIP set-off issue resides in a simple reading of the exact language of subsection (4) of section 627.733 of the Florida Statutes. This statutory provision states that it covers the "owner of a motor vehicle." The statute goes on to say that an owner of a motor vehicle can lose the limited tort immunity provided by the PIP law if that vehicle owner fails to carry PIP insurance. Applying this section to the injured plaintiff makes no sense because limited tort immunity does not apply to an injured plaintiff, but rather to an at-fault defendant. Moreover, the remaining part of this statutory provision, which bestows on the PIP uninsured defendant the rights and obligations of an insurer, also seems to logically follow. Under this interpretation of section 627.733(4), if the at-fault defendant fails to purchase PIP insurance coverage, then the limited tort immunity provided for in the statute shall not apply. Consequently, the question is not whether the injured plaintiff carries PIP insurance, but whether the at-fault defendant has purchased PIP insurance that makes a difference. Therefore, when an injured but PIP uninsured plaintiff sustains an injury that does not meet the statutory threshold, the at-fault defendant is not liable to the uninsured injured plaintiff for the amount of damages covered by PIP insurance, if the at-fault defendant has purchased PIP coverage for his own motor vehicle. On the other hand, if the at-fault defendant has not purchased PIP insurance coverage for his own motor vehicle, then the at-fault defendant loses the limited immunity provided for in the statute. In turn, the at-fault

94. Id.
95. See Deason v. Fla. Dep't of Corr., 705 So. 2d 1374, 1375 (Fla. 1998).
96. Id. (citing State v. Nunez, 368 So. 2d 422, 423–24 (Fla. 3d Dist. Ct. App. 1979)).
97. Farley, 302 So. 2d at 179.
98. FLA. STAT. § 627.733(4) (2004).
99. Id.
100. Id.
101. See id.
102. Id.
103. § 627.733(4).
104. § 627.737(1).
105. See id.
defendant will be liable for any and all damages sustained by the injured plaintiff, without regard to whether the injured plaintiff has or has not purchased PIP insurance.106

Approaching the interpretation of the Florida Motor Vehicle No-Fault Law from this angle eliminates the need to address the PIP set-off issue because it is not a question of set-off, but a question of the application of the limited tort immunity to at-fault defendants. The injured but PIP uninsured plaintiff faces other penalties for failing to carry PIP insurance.107 Such failure is not relevant to whether or how much an at-fault defendant has to pay.108 Trying to connect the two issues has led to this conflict of appellate court decisions.109 Perhaps, the Supreme Court of Florida can avoid the PIP set-off issue by separating, rather than connecting, the rights and obligations of the injured plaintiff and the at-fault defendant. At least, it may be a better approach than torturing the language of the Florida Motor Vehicle No-Fault law to sanction or deny the set-off of the amount of PIP benefits against an injured but PIP uninsured plaintiff.

Will the Supreme Court of Florida ever accept the task of resolving the conflict of the appellate decisions in this matter? Probably not! The Florida Motor Vehicle No-Fault Law is scheduled to be sunset on October 1, 2007.110 Consequently, the Florida Motor Vehicle No-Fault Law may end, along with this conflict, before the Supreme Court gets a chance to decide the issue. Until then, Florida car owners, drivers, and insurance companies need to pay particular attention to where an automobile accident occurs.

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106. Id.
107. § 627.733(6).
108. § 627.737(1).

(1) Effective October 1, 2007, sections 627.730, 627.731, 627.732, 627.733, 627.734, 627.736, 627.737, 627.739, 627.740, 627.7401, 627.7403, and 627.7405, Florida Statutes, constituting the Florida Motor Vehicle No-Fault Law, are repealed, unless reenacted by the Legislature during the 2006 Regular Session and such reenactment becomes law to take effect for policies issued or renewed on or after October 1, 2006.

(2) Insurers are authorized to provide, in all policies issued or renewed after October 1, 2006, that such policies may terminate on or after October 1, 2007, as provided in subsection (1).

Id.
2004-05 SURVEY OF FLORIDA EMPLOYMENT LAW

JOHN SANCHEZ*

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I. INTRODUCTION

This survey maps out the key developments in the law governing public employment in Florida during 2004–05. Part II on hiring, privatization, screening, ethics, nepotism, and crime looks at such issues as background checks on applicants for employment and medical screening for HIV and genetic predisposition to certain illnesses. Privatization deals with the controversial process by which governmental functions are assumed by private entities in an effort to save money. Ethical issues may arise, for example, when a public official acquires a personal stake in city contracts. Nepotism is the practice of hiring relatives, which is generally against the law in Florida’s public sector.

Part III on terms of employment explores a wide array of legal issues dealing with hours and wages, public employee pension plans, health insurance, the Family Medical Leave Act, drug testing, employee privacy, defamation, workers’ compensation, unemployment compensation, and smoking in the workplace.

Part IV on employment discrimination is subdivided into constitutional challenges to workplace discrimination under the First and Fourteenth Amendments and statutory claims stemming largely from federal statutes outlawing discrimination on grounds of race, sex, national origin, religion, age, and disability.

Finally, Part V on arbitration, collective bargaining, and just cause takes a quick look at the role played by unions in the life of Florida’s public sector.

II. HIRING, PRIVATIZATION, SCREENING, ETHICS, NEPOTISM, AND CRIME

A. Background Checks: Genetic and HIV Screening

Employers owe a duty to conduct background checks on applicants for employment if they are to avoid liability for the emerging tort of negligent hiring. For example, under this tort, third parties sue an employer for failing to discover an employee’s previous history of violence. Before the employer
faces liability for this tort, "the plaintiff must first establish that the employee committed a wrongful act that caused the [plaintiff’s] injury."1 "[U]nlike vicarious liability, which requires that the negligent act of the employee be committed within the course and scope of the employment, negligent hiring may encompass liability for negligent acts that are outside the scope of the employment."2

Some local police departments have come under fire by whistleblowers for failing to conduct adequate background checks on police applicants. One study "found that [forty] of [sixty-seven] Hollywood, [Florida] police officers hired within the [last] decade had ‘moderate to serious’ problems in their backgrounds, including arrest records, a history of abusing prisoners, suspended driver’s licenses and falsified employment applications."3

One version of negligent hiring involves an injured employee suing the employer for failing to disclose, for instance, the violent tendencies of a co-worker. In Florida, however, an employer may owe no duty to an employee injured by a co-worker while the employees are off-duty.4 In one case, the court held that a Florida supermarket owed no duty to tell its employee that a co-worker she hired outside of work, as a day care provider, was a convicted sex offender.5

In 2005, the National Transportation Safety Board recommended that "the Federal Aviation Administration require commercial and small airlines to find out if a pilot has failed a flight test before hiring him or her."6

In Florida, it is a first degree misdemeanor to disclose the results of an HIV test or the identity of the person tested except under certain circumstances.7 In one case, an employee was allowed to sue her employer for mental anguish and emotional distress after confidential HIV test results were publicly disclosed.8 The case is also noteworthy because damages for emotional distress ordinarily stem from a physical injury, but the court ruled

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2. Id. at 1052 n.1 (citations omitted).
3. Jerry Berrios, Ex-chief Again Wins $201,100, MIAMI HERALD, Jan. 26, 2005, at lB.
5. Id. at 1116.
6. Ina Paiva Cordle, NTSB: Lines Should Know if Pilots Fail Tests, MIAMI HERALD, Jan. 29, 2005, at 1C.
7. FLA. STAT. § 381.004(4)(d) (2004). Compare id. with Melo v. Barnett, 157 S.W.3d 596, 599 (Ky. 2005). In 2005, the Supreme Court of Kentucky ruled that a doctor who treated an employee for a workplace injury did not violate the employee’s state law privacy rights by disclosing his HIV-positive status to his employer because he signed a consent form authorizing the disclosure of relevant medical information. Melo, 157 S.W.3d at 599.
that the harm stemming from the disclosure of confidential information can only be "emotional in nature" in a case like this one.\textsuperscript{9}

Legislative efforts at the federal level, with clock-work precision, have yet again aimed at restricting the use of genetic screening in employment. On February 7, 2005, the United States Senate passed a bill that prohibits employers from relying on an individual’s genetic information when making any employment-related decisions.\textsuperscript{10}

\section*{B. Privatization}

Under the leadership of Florida’s Governor, Jeb Bush, Florida is at the forefront of the movement aimed at converting formerly governmentally performed functions into private hands. In 2005, Florida became "the first state in the nation to fully privatize its child welfare programs."\textsuperscript{11}

Florida’s seemingly unstoppable push to privatize every public function has come under heavy fire. A Supreme Court of Florida Justice has strongly inveighed against the state’s privatization of death-penalty appeals.\textsuperscript{12} Instead of speeding up these appeals, he said that the shoddy quality of legal work by inexperienced private lawyers has slowed the process.\textsuperscript{13}

At times, privatization is driven by cost-saving rather than by attempts at fixing a broken system. For example, in 2004, the Fort Lauderdale City Commission tentatively approved a plan to completely privatize city trash collection, a move aimed at saving nearly $890,000 per year.\textsuperscript{14}

\section*{C. Ethics}

While Florida’s ethics law requires “government officials to publicly disclose gifts they receive” from non-relatives,\textsuperscript{15} state lawmakers may have crossed the line with a bill proposed in 2005 involving disclosures by lobby-

\begin{itemize}
  \item \textsuperscript{9} Id. at 212. A happy post-script: the lab’s testing produced a false positive—Abril was, in fact, HIV-negative. \textit{Id.} at 207.
  \item \textsuperscript{10} See S. 306, 109th Cong. § 202 (2005).
  \item \textsuperscript{11} Carol Marbin Miller, \textit{State Finishes Privatizing of Child Welfare, Miami Herald}, Apr. 16, 2005, at 1B. Given that Florida’s “foster care system [is] often described as one of the worst in the United States,” it’s hard to see how this innovative move will leave the state’s foster children worse off. \textit{Id.}
  \item \textsuperscript{12} Marc Caputo, \textit{Justice Blasts Lawyers over Death Row Appeals, Miami Herald}, Jan. 28, 2005, at 1B.
  \item \textsuperscript{13} \textit{Id.}
  \item \textsuperscript{14} Samuel P. Nitze, \textit{City Leaders Back Big Tax Hike, Miami Herald}, Sept. 14, 2004, at 3B.
  \item \textsuperscript{15} Scott Andron, \textit{Gift Law Confusing, Experts Say, Miami Herald}, Feb. 8, 2004, at 1B.
\end{itemize}
ists. Under a proposed "booty call" amendment, lobbyists with ties to the Florida Legislature would be forced to reveal whether they are "having a romantic or sexual relationship with a lawmaker." 16

D. Nepotism

Anti-nepotism laws make it unlawful for public officials to put relatives on the public payroll. While Florida has an anti-nepotism law, 17 it is less clear whether the law was violated when a Florida town administrator hired his wife than when he hired his daughter as town clerk. 18 Freedom of association has sometimes been enlisted (usually unsuccessfully) to challenge anti-nepotism policies adopted by public employers. 19

E. Workplace Crime

In Florida, workplace crime costs employers $27.4 billion a year. 20 Almost 70% of all crime costs are "business related or nonresidential." 21 "Florida employers are two and a half times more likely to experience crime losses than Florida residents. And white-collar crime accounts for 47% of all business crime costs." 22

III. TERMS OF EMPLOYMENT

A. Hours and Wages

1. Fair Labor Standards Act

New federal overtime rules (amending the Fair Labor Standards Act (FLSA)) took effect August 23, 2004. 23 While some critics charged that the

17. FLA. STAT. § 112.3135(2)(a) (2004).
18. Amy Sherman, Family Hiring Dispute Flares, MIAMI HERALD, Apr. 26, 2005, at 1B.
19. See, e.g., Vaughn v. Lawrenceburg Power Sys., 269 F.3d 703, 712–13 (6th Cir. 2001) (holding that public employer’s anti-nepotism policy was rationally related to that employer’s reasonable fear that spousal loyalty would undermine discipline and, thus, did not violate the First Amendment right of marital association).
21. Id.
22. Id.
new rules would cost six million American workers their overtime, police officers, firefighters, and other public-safety officers remain unaffected.24

The Class Action Fairness Act, signed February 18, 2005, by President George W. Bush, shifting class action lawsuits filed in state courts to federal courts,25 will not affect § 216(b) of the FLSA, which governs collective actions alleging violations of the FLSA, the Equal Pay Act, and the Age Discrimination in Employment Act.26 Under the new law, federal district courts would exercise jurisdiction over any civil action involving more than $5 million and in which the opposing parties are from different states.27

According to a Department of Labor Wage and Hour Opinion Letter, an employer does not jeopardize the exempt status of in-house attorneys under § 13(a)(1) of the FLSA from overtime pay rules by insisting that they submit biweekly timesheets that document time spent working in various “cost centers.”28

2. Public Employee Wages

Under federal law, employees who are called up for active duty in the military are entitled to return to their former jobs without loss of benefits or seniority when their service is completed.29 Despite this law, many soldiers face a gap in pay while on active duty: the difference between their military pay and their former civilian salaries.30 To reduce this gap, a bill was introduced in the 2005 Florida Legislature that will assist state National Guard and Reserve soldiers who lose wages when they are called up for active duty.31 About twenty-eight percent of the Florida Guard or Reserve on active duty formerly worked for the government as civilians.32 Even before this proposed “Citizen Soldier” bill, the state of Florida and many local governments already paid “all or part of their Guard or Reserve workers’ missed salaries.”33 For example, “[c]ompanies and agencies such as the Broward

24. Walker & Danner, supra note 23.
30. Phil Long, State Eyes Cash Relief for Guard, MIAMI HERALD, Feb. 14, 2005, at 1B.
31. Id.
32. Id.
33. Id.
County Sheriff’s Office” go above and beyond federal standards by paying reservists “half of the difference between what the military pays them and what [the employer] ordinarily pays them.”

On March 10, 2005, the Department of Labor (DOL) published its final rule requiring private and government employers to notify workers who might leave their jobs to serve in the military of their right to return to their jobs at the same pay, benefits, and status, under the Uniformed Services Employment and Reemployment Rights Act.

To help state agencies retain young lawyers, Florida lawmakers are weighing a bill aimed at helping attorneys in paying off their student loans. The law “would allow the state to repay up to $44,000 on student loans for assistant public defenders, assistant state attorneys, assistant attorneys general and assistant statewide prosecutors.” Without this law, government lawyers, who make an average of $65,000 a year, feel pressed by looming student loans to find work in private practice where the median income of lawyers is $120,000.

Labor negotiations over public employee pay also made news in the last year. A 2004 employment contract between the Broward Teachers Union and the school district grants the county’s 15,000 teachers an average of a four percent raise at a cost of $35 million. In addition, the contract includes monetary incentives for teachers to earn advanced degrees.

In 2004, the First District Court of Appeal ruled that a city’s legislative imposition of a pay freeze contained in an earlier contract, after impasse over a new contract, did not amount to an unfair labor practice. The court found that the old contract made clear that if no new collective bargaining agreement was reached, then salaries would remain at current levels until a new contract was signed. For this reason, the court concluded that the employees had no expectation of wage increases once the old contract expired.

34. See Dalia Naamani-Goldman, Military Praises Employers, MIAMI HERALD, Apr. 29, 2005, at 5B.


37. Id.

38. Id.

39. See Steve Harrison, Teachers’ Pay Hike Deal Struck, MIAMI HERALD, July 31, 2004, at 3B.

40. Id.

41. Id.


43. Id. at 498.

44. Id.
3. State Minimum Wage

On May 2, 2005, as a result of a statewide voter initiative, Florida’s minimum wage rose to $6.15 hourly, while servers and other workers salaries who receive tips went from $2.13 to $3.13 an hour.45 As part of article X of the state constitution, Florida’s minimum wage “will be indexed to the inflation rate in the future.”46 New rates will go into effect each January 1.47 While thirteen other states have minimum wages set above the national standard, such a rate hike will have more impact in a state like Florida, which is “more dependent on low-paying jobs” than most states.48 Among other features, the Amendment: bars Florida employers from discriminating in any manner or retaliating against any person for exercising rights it protects; allows employees to sue any employer who refuses to pay minimum wage; and permits Florida’s Attorney General to file a civil action to enforce the law.49 Moreover, a full range of remedies are recoverable by prevailing employees, with a four year statute of limitations for non-willful violations and five years for willful violations.50

B. Public Employee Pension Plans

Florida’s state pension plan covers 225,000 retirees and 650,000 current employees in public employment.51 After the stock market bubble burst in 2001 and the public pension fund ended up with worthless Enron stock, the fund filed a landmark lawsuit against its stock investment manager, Alliance Capital Management, claiming “breach of contract, breach of fiduciary duty, fraud and negligence.”52 The fund claimed Alliance invested in Enron, even after the company’s accounting irregularities were publicly called into question.53

In April 2005, a jury did not find found Alliance liable for $281 million in Enron-related investment losses suffered by Florida’s public pension

45. Gregg Fields, Minimum Wage Boosted, MIAMI HERALD, May 2, 2005, at 4G.
46. Id.
47. Id.
48. Id.
50. Id.
51. Sophia Pearson, Pension Fund Loses Legal Battle, MIAMI HERALD, Apr. 19, 2005, at 1C.
52. Id.
53. Harriet Johnson Brackey, Enron Among Various Targets, MIAMI HERALD, Mar. 9, 2005, at 1C [hereinafter Brackey I].
Jurors concluded Alliance "didn’t breach its contract with the Florida State Board of Administration and wasn’t negligent in supervising the fund’s account."55 The fund was also ordered to pay Alliance $1.1 million in unpaid management fees.56 Despite this legal setback, "the state pension system has reaped $40 million in settlement payments during the last two years [as part of] class-action securities lawsuits."57

Merrill Lynch, Florida’s largest pension advisor, acts as consultant for ninety-three public pension funds from Jacksonville to Hallandale Beach.58 North Miami Beach is looking to hold Merrill Lynch accountable as pension consultant for the dismal growth—"only 0.9% on average in each of the last five years"—of its police and general employee pension fund.59 By contrast, nationwide, public pension funds grew 4.1% a year.60 Significantly, the Securities and Exchange Commission has launched an investigation into consultants who advise pension boards and fail to reveal conflicts of interest.61 To prevent abuses, "[t]he SEC is calling for pension consultants to separate their consulting activities from other businesses, to increase disclosure and put policies in place to prevent conflicts of interest."62

In a similar vein, "[t]he city of Coral Gables, [Florida] is suing its former [public] pension fund advisor, UBS Paine Webber, for over $25 million in losses" of fund assets.63

Finally, with regard to public pension developments, proposed changes for the city of Hollywood, Florida’s 220 firefighters include: increasing employee pension contributions from 7% to 8% per year; permitting employees to retire after twenty-three years of service rather than twenty-five years; and changing the formula for calculating pension benefits.64

54. Pearson, supra note 51.
55. Id.
56. Id.
57. Brackey I, supra note 53.
60. Id.
61. Brackey II, supra note 58.
62. Id.
63. Brackey III, supra note 59.
C. Health Insurance

Under the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA), employers who already offer health benefits owe a duty to offer continued coverage to most former employees and their dependents for eighteen to thirty-six months or until coverage under another plan begins.65 Final COBRA notice regulations issued by the DOL went into effect in 2005 and provided an updated sample COBRA notice for use by employers of single-employer group health plans.66 If an employer adopts the model notices, the DOL will consider the employer to be in good faith compliance with its rules.67

As a complement to COBRA, under the Veterans Benefits Improvement Act of 2004, effective December 10, 2004, employees absent from the workplace because of military service are entitled to twenty-four months of continuation coverage in the employer’s health insurance plan.68

As of January 1, 2005, Blue Cross of Florida, the largest health plan in the state with 3.5 million members, will no longer cover weight-loss surgery.69 “Doctors in Florida submitted 2522 requests for weight-loss surgery coverage to Blue Cross in 2004, up from 1500 a year earlier.”70 Critics suspect that Blue Cross of Florida dropped coverage because of the $25,000 surgery cost.71

Locally, Fort Lauderdale’s police union has made major changes in its self-insured health insurance plan in the face of a financial crisis.72 Among the numerous changes, the union fired the plan manager, raised premiums, switched to a larger plan administrator, and borrowed money.73 While illegal conduct was not suspected, the plan has run up about $1.17 million in unpaid

65. Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, § 1001, 100 Stat. 82, 224 (1986). The Eleventh Circuit Court of Appeals has ruled that penalties under COBRA may be recoverable only by plan participants, not by plan beneficiaries. Wright v. Hanna Steel Corp., 270 F.3d 1336, 1344 (11th Cir. 2001).
67. Id. at 30,091.
70. Id.
71. Id.
72. Samuel P. Nitze, Health Plan for Cops Gets Clean Bill, MIAMI HERALD, Nov. 10, 2004, at 7B.
73. Id.
doctors’ bills and quarterly financial reports, required by contract to be filed with the city, were in arrears until August 2004.\footnote{Id.}

Under a 2004 contract between the city of Fort Lauderdale and its police and fire unions, “the city will increase its monthly contributions toward employee health insurance costs.”\footnote{Samuel P. Nitze, Police, Firefighters OK Deals, MIAMI HERALD, Oct. 2, 2004, at 6B.} By contrast, under the city of Hollywood’s three-year contract with its fire union, “[f]irefighters will . . . contribute more money toward their healthcare costs.”\footnote{Berrios I, supra note 64.}

Finally, a state court ruled in 2004 that a Florida labor union’s claim that a school board committed an unfair labor practice by unilaterally changing terms in its health insurance plan was wholly a question for the Public Employees Relations Committee and was not suitable for arbitration under the board’s collective bargaining agreement.\footnote{Commc’ns Workers of Am. v. Indian River County Sch. Bd., 888 So. 2d 96, 100-101 (Fla. 4th Dist. Ct. App. 2004).}

D. Family Medical Leave Act

Under the Family and Medical Leave Act (FMLA), all eligible state and local government employees are entitled to twelve weeks of unpaid leave in a twelve-month period: 1) for birth or adoption of a child or placement of a foster child; 2) to care for a spouse, child, or parent with a serious health condition; or 3) for the employee’s own serious health condition.\footnote{29 U.S.C. § 2612(a)(1) (2000).} To be eligible for FMLA leave, the employee must: 1) have worked 1250 hours in the twelve months leading up to the leave request;\footnote{§ 2611(2)(A)(ii) (2000). It is rare that an employee’s off-duty time counts as working time toward meeting the 1250 hours of service requirement. See Rich v. Delta Air Lines, Inc., 921 F. Supp. 767, 772 (N.D. Ga. 1996).} 2) have worked for the current employer for at least twelve total months;\footnote{§ 2611(2)(A)(i).} and 3) have worked at a worksite that has fifty or more employees within a seventy-five mile radius of the worksite.\footnote{§ 2611(2)(B)(ii).}

In \textit{Walker v. Elmore County Board of Education},\footnote{379 F.3d 1249 (11th Cir. 2004).} the Eleventh Circuit ruled that a first year teacher was not eligible for FMLA leave at the time requested leave was to begin.\footnote{Id. at 1253 n.9.} This was because she had not worked for the
school board for at least twelve months. Nevertheless, even employees who have worked fewer than twelve months may file retaliation claims under the FMLA.

In *Morrison v. Magic Carpet Aviation*, the Eleventh Circuit addressed FMLA's threshold requirement that an employer have fifty employees within a seventy-five mile radius of the worksite. In ruling that the entity was not the pilot's employer, the court applied the following test of an employer-employee relationship: "1) whether or not the employment took place on the premises of the alleged employer; 2) how much control the alleged employer exerted on the employees; and 3) whether or not the alleged employer had the power to fire, hire, or modify the employment condition[s]."

According to a DOL opinion letter, day laborers and "routine temps" sometimes count as employees for purposes of the fifty-employee threshold necessary for FMLA coverage.

Like most federal labor statutes regulating the workplace, FMLA bars employers from discriminating or retaliating against any employee for exercising rights granted under the Act. The circuit courts, however, are in disarray over the proper framework for raising such suits. While the Eleventh Circuit has adopted the burden-shifting *McDonnell Douglas* framework in FMLA retaliation suits, the Ninth Circuit simply insists that the worker prove by a preponderance of the evidence that her exercise of FMLA rights amounted to "a negative factor in the decision to [discharge] her."

Employers are unhappy with FMLA, citing, for example, the Act's vagueness and the cost of compliance. According to the Employment Pol-

84. *Id.* at 1253 & n.9.
86. 383 F.3d 1253 (11th Cir. 2004).
88. *Morrison*, 383 F.3d at 1255.
90. § 2615(b). Even former employees are entitled to bring retaliation suits under FMLA. Smith v. BellSouth Telecomm., Inc., 273 F.3d 1303, 1307 (11th Cir. 2001).
91. Brungart v. BellSouth Telecomm., Inc., 231 F.3d 791, 798 (11th Cir. 2000) (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)). "[T]o establish a prima facie case of retaliatory discharge or retaliation using the *McDonnell Douglas* framework, a plaintiff must show that 1) she engaged in statutorily protected conduct; 2) she suffered an adverse employment action; and 3) there is a causal connection between the protected conduct and the adverse employment action." *Id.* (citing Parris v. Miami Herald Publ’g Co., 216 F.3d 1298, 1301 (11th Cir. 2000)).
icy Foundation, a Washington, D.C. research group, "[c]ompliance with FMLA cost employers $21 billion in 2004." At one end of the spectrum are employers who seek a tightening of the definition of a serious health condition to one requiring at least ten days leave, more specificity over defining illnesses that qualify for FMLA leave, and curbing the use of intermittent leave. At the other extreme are those advocates who propose expanding FMLA to countenance "leave to care for a same-sex spouse, domestic partner, parental in-law, sibling, or grandparent."

E. Drug Testing

Random drug testing, conducted without prior notice or any evidence or suspicion of drug taking, faces strong legal challenge as an unreasonable search and seizure under the Fourth Amendment. An employer's compelling case for random testing is most likely to be sustained when public safety is at stake. The Supreme Court has yet to rule on the constitutionality of random drug testing.

In Wenzel v. Bankhead, the plaintiff, Wenzel, worked in an administrative building in Tallahassee where no juveniles were present and the employer offered no evidence that the employee would be a safety threat even if he were under the influence of drugs or alcohol. Wenzel refused to undergo random drug testing and sued his public employer over the issue. Although Wenzel had access to confidential juvenile information and facilities, the federal district court deemed the random "suspicionless" drug testing unconstitutional under the Fourth Amendment, concluding that the facts did not support a "special need" substantially important enough to outweigh Wenzel’s privacy interest.

94. Id.
95. Id.
96. Id.
97. See, e.g., Kathleen M. Dorr, Annotation, Validity, Under Federal Constitution, of Regulations, Rules, or Statutes Requiring Random or Mass Drug Testing of Public Employees or Persons Whose Employment Is Regulated by State, Local, or Federal Government, 86 A.L.R. Fed. 420, 423 (1988) (stating that some courts have held that “the government must have a reasonable individualized suspicion that a drug test will produce a positive result in order to test [certain governmental] employees”).
98. E.g., Smith v. Fresno Irrigation Dist., 84 Cal. Rptr. 2d 775, 785 (Ct. App. 1999) (concluding that construction and maintenance worker’s expectation of privacy was outweighed by irrigation district’s substantial safety-related grounds for random drug testing).
100. Id. at 1319, 1324.
101. Id. at 1317.
102. See id. at 1323–25.
According to a DOL opinion letter, employers may insist that employees returning from FMLA leave undergo drug testing as long as all similarly situated employees are treated the same and the testing relates to the specific health problem that led to FMLA leave.\textsuperscript{103}

F. Privacy

In 2004, the Homeland Security Department instituted a policy requiring its employees to sign a nondisclosure agreement so restrictive that it raises privacy concerns.\textsuperscript{104} Although the policy affects only new employees, a lawyer for a public employee union warned that it “would discourage employees from talking to the public and Congress about ‘matters of public concern.’”\textsuperscript{105} Since the policy bars “department employees from giving the public ‘sensitive but unclassified’ information,” public unions claim this gives the government “unprecedented leeway to search employee homes and personal belongings in violation of the Fourth Amendment.”\textsuperscript{106}

Although the federal Employee Polygraph Protection Act (EPPA) virtually eliminated polygraph exams in the private workplace, it still comes into play at the intersection of public and private employment such as when private contractors do work for a public employer.\textsuperscript{107} For example, in \textit{Polkey v. Transtecs Corp.}, \textsuperscript{108} the Eleventh Circuit ruled that the EPPA did not allow a private contractor performing work for the Department of Defense to administer lie-detector tests under the Act’s “national defense” exemption.\textsuperscript{109} The court made clear that this exception applies only to the federal government, not to private contractors.\textsuperscript{110} In addition, the “ongoing investigation exemption” did not apply, the court concluded, because Polkey was never suspected of wrongdoing.\textsuperscript{111} Even though Polkey never underwent polygraph testing, he recovered damages because under the EPPA it is unlawful for an employer to request that an employee take a polygraph exam, even if no test is ever administered.\textsuperscript{112}

\begin{footnotes}
\item[105] \textit{Id.}
\item[106] \textit{Id.}
\item[107] See, e.g., Polkey v. Transtecs Corp., 404 F.3d 1264, 1268–69 (11th Cir. 2005).
\item[108] \textit{Id.} at 1264.
\item[109] \textit{Id.} at 1268–69.
\item[110] \textit{Id.} at 1269.
\item[111] \textit{Id.} at 1270.
\item[112] \textit{Polkey}, 404 F.3d at 1267–68.
\end{footnotes}
G. Defamation

An emerging area of defamation law, known as the "invited defamation defense," has been successfully invoked by employers when an employee repeatedly demands that the employer spell out the grounds for discharge. In one Florida case, the court ruled that an employee's insistence that his employer tell him why he was being dismissed constituted a complete defense to defamation.

Employment-related defamation may arise as well when workers send offensive e-mails to colleagues. One Florida employee was dismissed for sending a co-worker e-mails that "included nude videos and pictures, lewd animation, profanity and suggestive remarks."

The Supreme Court of Florida imposed a two-week suspension and a $15,000 fine on a Broward judge for sending an anonymous e-mail to another judge, taking him to task for his unfair treatment of Hispanic defendants. The punishment for the inappropriate e-mail had been recommended by the Judicial Qualifications Commission, an agency charged with probing allegations of judicial misconduct.

H. Workers' Compensation

In the last year, Florida courts and the Eleventh Circuit have rendered decisions in which employees have alleged that they were the targets of retaliation for exercising rights under the state's workers' compensation law. In Borque v. Trugreen, Inc., the Eleventh Circuit ruled in a case from Florida that a workers' compensation settlement agreement that does not specifically release the employer from any retaliatory discharge claim does not bar an employee from subsequently raising such claims. "[M]ere reference to rights and benefits under the Workers' Compensation Law is insufficient to waive a claim for retaliatory discharge."

114. Id. at D398.
116. Sara Olkon, E-mail Costs Judge $15,000+, MIAMI HERALD, July 8, 2005, at 1B.
117. Id.
119. 389 F.3d 1354 (11th Cir. 2004).
120. Id. at 1358.
121. Id. (citing Smith v. Piezo Tech. & Prof'l Adm'rs, 427 So. 2d 182, 184 (Fla. 1983)).
In Bruner v. GC-GW, Inc., a state court broadly read Florida's workers' compensation anti-retaliation provision to include protecting an employee who was dismissed for filing a workers' compensation claim against a former employer. In reaching this result, the court rejected the employer's claim that it did not dismiss the employee for filing a workers' compensation claim, but out of a good faith concern that his earlier claim would increase the employer's workers' compensation insurance rates.

In Flores v. Roof Tile Administration, Inc., a Florida court ruled that there is a right to a jury trial in a suit for retaliatory discharge under Florida's workers' compensation law.

In Miami-Dade County v. Lovett, the court determined that, under federal law, an employer may "offset workers' compensation payments up to the amount of [social security disability] benefits the claimant is receiving," but the law "prohibits the offset from decreasing the claimant's total benefit below 80% of his monthly [average weekly wage] or 80% of his monthly [average current earnings], which ever is greater." The claimant in this case "was injured in the line of duty" and ended up "permanently and totally disabled." "The [c]laimant ... receiv[ed] $265.05 per week in [social security disability] [b]enefits, and $1600.38 per month in Florida Retirement System (FRS) in-line-of-duty disability benefits." The court ruled that the employer correctly calculated the offset by providing the claimant with 100% of his average weekly wage.

In 2003, the Florida Legislature amended the workers' compensation law to require medical proof in occupational disease cases where the employment is the major contributing cause of the disease. In City of Cooper City v. Farthing, a former employee was denied workers' compensation because he offered no medical evidence that the incidence of his disease in his job was higher than in the public at large.

122. 880 So. 2d 1244 (Fla. 1st Dist. Ct. App. 2004).
123. Id. at 1247–48.
124. Id. at 1250.
125. 887 So. 2d 360 (Fla. 3d Dist. Ct. App. 2004).
126. Id. at 360.
128. Id. at 137–38.
129. Id. at 137.
130. Id.
131. Id. at 138.
132. City of Cooper City v. Farthing, 905 So. 2d 925, 927 n.2 (Fla. 1st Dist. Ct. App. 2005) (citing FLA. STAT. § 440.151(1)(a) (2003)).
133. Id. at 925.
134. Id. at 927.
In *Lee v. Volusia County School Board*, workers' compensation benefits were denied because the claimant made false statements, such as claiming to be in pain and unable to do yard work, but surveillance videos showed the claimant engaging in activities inconsistent with his earlier reports to doctors and the employer's insurance carrier.

Under workers' compensation law, an employer who commits an intentional act aimed at causing injury or death to an employee may be sued in tort law. In *Byers v. Ritz*, dependents of a public safety officer brought a wrongful death action against the officer's supervisors after the officer was killed in an accident involving a backhoe taken without permission for use in post-hurricane clean-up effort. In denying the plaintiffs' claim, the court ruled that the theft of the backhoe was not the proximate cause of the officer's death who was killed when he was hit by a tree limb that the backhoe operator was trying to remove. In legal terms, the theft, while an intentional act, was causally superseded by the unintentional act of the backhoe's operator.

In *Deere v. Sarasota County School Board*, the claimant tripped over toys and injured her lower back while at work as a pre-kindergarten aide. Later, she was in a car accident and asked her doctor whether her compensable injury (under workers' compensation) had worsened. The doctor refused to examine her and the employer's claims adjuster told the claimant "there is nothing we can do now." When the claimant later sought workers' compensation benefits, the employer raised a statute of limitations defense. In ruling for the claimant, the Florida court left no doubt that "[w]here an [employer or its insurance carrier] misleads a claimant about his or her rights or availability of workers' compensation, even unintentionally, resulting in the claimant's failure to file a timely claim, the [employer or its carrier] will be estopped from denying benefits."
I. Unemployment Compensation

Four Florida cases in the past year have addressed one of the most common issues to be found in the law of unemployment compensation: what constitutes employee misconduct sufficient to render the worker ineligible for such benefits? In Rosas v. Remington Hospitality, Inc., the court ruled that an employee's refusal to answer questions and cooperate in a theft investigation was "an isolated incident" that did not amount to misconduct sufficient to foreclose unemployment benefits.

In Saunders v. Unemployment Appeals Commission, Saunders, a diabetic, worked in an after-school program for children. Amid a diabetic attack at work, she went two blocks to a relative's house to inject insulin ("she did not keep [it] at the Center because she did not want the children or clients with drug problems to have access to the insulin or the needles"). In her haste, she did not inform anyone she was leaving because she believed she would return before the children arrived at 2:30 p.m. While Saunders returned to the Center at about 2:20 p.m., four children were already there unsupervised. She was terminated for "leaving her work site without permission and leaving young children unattended." Saunders's employer contested her claim for unemployment benefits on the ground that Saunders was let go for misconduct. The court noted that "where company policies are concerned, 'misconduct usually involves repeated violations of explicit policies after several warnings.'" Siding with Saunders, the court concluded that "she did not intentionally refuse to comply with her employer's policies or willfully and wantonly disregard her employer's interests" sufficient to amount to misconduct warranting denial of unemployment benefits.

149. 899 So. 2d 390 (Fla. 3d Dist. Ct. App. 2005).
150. Id. at 391.
151. 888 So. 2d 69 (Fla. 4th Dist. Ct. App. 2004).
152. Id. at 70.
153. Id. at 71.
154. Id.
155. Id.
156. Saunders, 888 So. 2d at 71.
157. See id. at 70.
158. Id. at 72 (quoting Grossman v. J.C. Penny Co. 2071, 689 So. 2d 1206, 1207 (Fla. 3d Dist. Ct. App. 1997)).
159. Id. at 73.
In *City of Largo v. Rodriguez*, an employee was dismissed for giving untruthful testimony during a grievance proceeding conducted to assess discipline imposed on the employee. In deciding whether the former employee was disqualified from receiving unemployment benefits because she was dismissed for misconduct, the court reiterated that an "employee's action must be willful, wanton, or deliberate." In holding for the employer, the court reasoned that dishonesty is willful misconduct sufficient to disqualify a claimant from unemployment benefits.

In *Blodgett v. Florida Unemployment Appeals Commission*, an employee, out on pregnancy leave, was instructed to submit a written request for each thirty-day leave of absence under the employer's personal leave policy. The employee failed to make the December 28, 2002, deadline because she was unable to pick up leave forms from her doctor until January 14, 2003, when she was medically allowed to drive again. She was fired for missing the deadline and she applied for unemployment compensation. While misconduct sufficient to bar such benefits can stem from excessive absenteeism, the court nevertheless granted the former employee unemployment benefits because she attempted to comply with her employer's policy and she was not dishonest or malingering. What many of these cases underscore is that "misconduct" that constitutes sufficient cause for discharge may not amount to "misconduct" sufficient to bar unemployment benefits.

Florida law excludes from unemployment benefits coverage jobs designated as "major nontenured policymaking or advisory position[s], including a position in the Senior Management Service." In *Brenner v. Department of Banking & Finance*, a Senior Management Service employee was deemed ineligible for unemployment benefits because, as part of the executive branch, his job duties and responsibilities were primarily policymaking or managerial in nature.

160. 884 So. 2d 121 (Fla. 2d Dist. Ct. App. 2004).
161. *Id.* at 122.
162. *Id.* at 123 (citing Anderson v. Unemployment Appeals Comm'n, 822 So. 2d 563, 566 (Fla. 5th Dist. Ct. App. 2002)).
163. *Id.*
164. 880 So. 2d 814 (Fla. 1st Dist. Ct. App. 2004).
165. *Id.* at 815.
166. *Id.*
167. *Id.*
168. *Id.* at 815–16.
170. 892 So. 2d 1129 (Fla. 3d Dist. Ct. App. 2004).
171. *Id.* at 1130.
Typically, if an employee resigns her position, she is rendered ineligible for unemployment benefits.\(^{172}\) In *Florida Department of Revenue v. Florida Unemployment Appeals Commission*,\(^{173}\) an employee signed a settlement agreement stipulating that he would resign instead of being terminated.\(^{174}\) While the settlement agreement would have been void if it was intended to waive the employee's rights to unemployment benefits, the court sustained the settlement agreement and disqualified the claimant from unemployment benefits because the primary purpose of the settlement was not to waive the employee's rights to such benefits.\(^{175}\)

**J. Smoking**

While Florida does not have a law protecting employees who smoke, "[t]wenty-eight states and the District of Columbia protect workers who smoke."\(^{176}\) While it is permissible in Florida for public employers to refuse to hire smokers,\(^{177}\) two other southern states have taken another route. Alabama and Kentucky, for example, have passed on to state employees the cost of smokers by raising health insurance premiums for those who smoke.\(^{178}\)

In the first of its kind in the private sector, Weyco, a Michigan insurance benefits administrator, began testing its 200 employees for smoking in 2005.\(^{179}\) Employees face random testing and, if they fail, they will be dismissed.\(^{180}\) Such policies have fueled outrage by opponents who question whether employers should be able to shape how employees live their lives, even at home.\(^{181}\)

\(^{172}\)  Fl. Dep't of Revenue v. Fla. Unemployment Appeals Comm'n, 872 So. 2d 376, 377 (Fla. 1st Dist. Ct. App. 2004).
\(^{173}\)  *Id.* at 376.
\(^{174}\)  *Id.* at 377.
\(^{175}\)  *Id.*
\(^{176}\)  Kathy Barks Hoffman, *To Smoke, or Not to Smoke?*, MIAMI HERALD, Feb. 9, 2005, at 1C.
\(^{177}\)  *E.g.*, City of N. Miami v. Kurtz, 653 So. 2d 1025, 1026, 1029 (Fla. 1995) (holding that there was no privacy violation for the city to require job applicants to sign affidavits avowing they have not used tobacco for a year).
\(^{180}\)  *Id.*
\(^{181}\)  Hoffman, *supra* note 176.
IV. EMPLOYMENT DISCRIMINATION

A. Constitutional Challenges

1. First Amendment

The United States Supreme Court has ruled that public employees have a First Amendment right to speak out on "matters of public concern." 182 By contrast, internal disputes bear no First Amendment weight. 183 In February 2005, the United States Supreme Court agreed to hear the case of a Los Angeles County prosecutor that tests the line between public and private concern. 184 In Ceballos v. Garcetti, 185 Ceballos, a deputy district attorney, learned that a deputy sheriff might have lied about evidence to secure a search warrant. 186 Ceballos complained about this concern in a memo to his supervisors. 187 Ceballos said he was demoted and transferred in retaliation for his actions. 188 He sued, alleging that he was punished for speaking out on a matter of public concern. 189 The Ninth Circuit Court of Appeals ruled for Ceballos, concluding that it was crucial that public employees be able to disclose wrongdoing in public agencies. 190 The United States Supreme Court’s ruling, expected by June 2006, “could affect the rights of millions of public employees, from police, prosecutors and teachers to public hospital workers.” 191

A bill introduced in the Florida Legislature in 2005, aimed at protecting conservatives on public campuses, has some public university professors up in arms, claiming that the law will chill free speech in the classroom and curb their ability to discuss hot-button issues. 192 Although similar bills have been filed in ten other states, Florida House Bill 837 “says students should not ‘be infringed upon by instructors who persistently introduce controversial matter..." 193

185. 361 F.3d 1168 (9th Cir. 2004), cert. granted, 125 S. Ct. 1395 (2005).
186. Id. at 1170–71.
187. Id. at 1171.
188. Id. at 1171–72.
189. Id. at 1172.
190. Ceballos, 361 F.3d at 1180.
191. Savage, supra note 184.
192. Kimberly Miller, Florida Legislature: Classroom Bill Draws Fire, MIAMI HERALD, Mar. 8, 2005, at 7B.
into the classroom that has no relation to the subject of study and serves no teaching purpose." 193 The bill does not define the terms "persistent" or "controversial." 194 "The bill also states that professors could not be hired, fired, promoted or granted tenure based on their political leanings or religious beliefs." 195

Colorado Governor Bill Owens in 2005 pressured the University of Colorado to dismiss a controversial professor "who wrote that some people who worked at the World Trade Center [on 9/11] were 'little Eichmanns,' toiling on behalf of American foreign policy just as Adolf Eichmann did on behalf of the Holocaust." 196

A federal judge in Tampa ruled in 2004 that the federal government must prove that a fired University of South Florida professor actually financed a Palestinian charity group and that the contributions were literally used for violent attacks on Israelis. 197 The defendant alleges that the antiterrorism law he is charged with violating criminalizes his political speech and renders him guilty by association. 198 The government's fifty-count racketeering indictment claims the defendant transmitted money to terrorist groups under the pretext of financing scholarly work and aiding orphans. 199

The circuit courts are split over the proper definition of an "adverse employment action" in retaliatory discharge claims brought by public employees. 200 While all courts agree, for example, that dismissals constitute an adverse employment action, courts disagree over whether a transfer amounts to an adverse employment action. 201 In Stavropoulos v. Firestone, 202 the Eleventh Circuit applied Title VII of the Civil Rights Act of 1964 standards for defining an adverse employment action in a case involving a public university professor's First Amendment retaliation claim. 203

193. Id.
194. Id.; see Fla. HB 837 (2005) (proposed FLA. STAT. §§ 1002.21, 1004.09), available at http://www.myfloridahouse.gov/ (search "Find a Bill By Number, Session 2005" for "837;" then follow "Original Filed Version" hyperlink under "Bill Text").
195. Miller, supra note 192.
197. Jay Weaver, Judge: Prove Terror Intent, MIAMI HERALD, Aug. 6, 2004, at 1B.
198. Id.
199. Id.
203. 361 F.3d 610 (11th Cir. 2004).
204. Id. at 616–17.
2. Equal Protection

In *City of Richmond v. J.A. Croson Co.*, a city put into effect an affirmative action plan under which thirty percent of its contracting work would go to minority-owned businesses. The Supreme Court struck down the plan, holding that the single standard of review for racial classifications should be "strict scrutiny." In *Hershell Gill Consulting Engineers, Inc. v. Miami-Dade County*, white-owned engineering firms doing contracting work for the county sued the county over its affirmative action program, alleging an equal protection violation. While the federal district court found the program unconstitutional, it awarded no compensatory or punitive damages, only nominal damages and attorneys' fees and costs.

B. Statutory Challenges

1. Title VII

a. Generally

Damage awards recoverable under Title VII of the *United States Code* are subject to taxation. Under the civil rights tax relief provision of the 2004 American Jobs Creation Act, however, individuals would be entitled to a tax deduction from their gross income for attorneys' fees and court costs paid to litigate claims of unlawful discrimination.

In 2005, the Supreme Court ruled that sums paid by a taxpayer-client to an attorney under a contingent fee agreement count as gross income to the client under § 61(a) of the *Internal Revenue Code*.

The Eleventh Circuit has ruled that the Equal Employment Opportunity Commission (EEOC) is not precluded from suing nor is bound by an earlier judgment in private employment discrimination litigation between employ-

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206. *Id.* at 477–78.
207. *Id.* at 493, 505.
209. *Id.* at 1310.
210. *Id.* at 1344.
ees and their employer.\(^\text{214}\) Thus, the EEOC was free to bring its own enforcement action against the employer.\(^\text{215}\)

b. **Sexual Harassment**

Three Florida cases involving sexual harassment were decided over the past year. In *Russell v. KSL Hotel Corp.*,\(^\text{216}\) the court ruled that harassing acts, absent sexually explicit content directed at women and driven by animus against women, may constitute actionable sexual harassment.\(^\text{217}\)

In *EEOC v. Six L’s Packing Co.*,\(^\text{218}\) although settled, if the court would have ruled it is likely that the court would have found if employees are not fluent in English, the prudent employer should translate its harassment policy into their language so they are “on notice” of the company’s policies.\(^\text{219}\)

In *Natson v. Eckerd Corp.*,\(^\text{220}\) the court ruled that because the employer had three different published versions of its sexual harassment policy, only two of which were directed at employees, it was “for the jury to determine which version of the policy was the one that Natson should have followed.”\(^\text{221}\) If she can establish that she satisfied either version of the policy, she will have established that her employer knew of the harassment and did not remedy it.\(^\text{222}\)

c. **National Origin**

A public employee at Port Everglades recovered a $305,000 jury verdict in 2004 in a lawsuit claiming that his federal employer created a hostile work environment on account of his Arab ancestry.\(^\text{223}\) The employee convinced jurors that “he was abused, harassed and humiliated by his supervisors in front of his peers because of his Lebanese national origin and his Arab-American race.”\(^\text{224}\) Among other insults, the employee’s supervisors made

\(^{214}\) See EEOC v. Pemco Aeroplex, Inc., 383 F.3d 1280, 1294 (11th Cir. 2004).

\(^{215}\) Id. at 1295.

\(^{216}\) 887 So. 2d 372 (Fla. 3d Dist. Ct. App. 2004).

\(^{217}\) Id. at 378 (citing Hall v. Gus Constr. Co., 842 F.2d 1010, 1014 (8th Cir. 1988); King v. Auto, Truck, Indus. Parts & Supply, Inc., 21 F. Supp. 2d 1370, 1379 (N.D. Fla. 1998)).

\(^{218}\) No. 03-Cv-570-FTM-29DNF (M.D. Fla. filed Jan. 26, 2004).


\(^{220}\) 885 So. 2d 945 (Fla. 4th Dist. Ct. App. 2004).

\(^{221}\) Id. at 948–49.

\(^{222}\) See id. at 949.

\(^{223}\) Kevin Deutsch, Lebanese-American Worker Wins $305,000 in INS Suit, MIAMI HERALD, July 31, 2004, at 1B.

\(^{224}\) Id.
fun of his accent and made rude remarks about his prayer rug, even though the employee was Catholic, not Muslim.\textsuperscript{225}

d. Religion

In March 2005, the U.S. House of Representatives approved a job-training bill that would allow faith-based organizations receiving federal funds to consider a person’s religious beliefs in making employment decisions.\textsuperscript{226} Under current law, religious groups that receive federal money for job-training programs cannot discriminate on religious grounds in hiring or firing.\textsuperscript{227}

2. Age Discrimination in Employment Act

On March 30, 2005, the Supreme Court ruled in \textit{Smith v. City of Jackson}\textsuperscript{228} that disparate impact claims may be brought under the Age Discrimination in Employment Act (ADEA).\textsuperscript{229} A disparate impact claim emerges when an employer takes an action that is neutral on its face but has the accidental effect of discriminating against a protected class.\textsuperscript{230}

Under the City of Jackson, Mississippi’s pay plan, police officers with less than five years of service secured proportionately larger raises than those with over five years of service.\textsuperscript{231} A group of older officers sued the city under the ADEA for disparate impact discrimination.\textsuperscript{232} In response, the city asserted that it enacted the pay plan not to discriminate against older officers but to start making salaries more competitive with other police departments in the area.\textsuperscript{233} In the language of the ADEA, the city was relying on one of the “reasonable factors other than age,” a defense which is not found in Title VII.\textsuperscript{234} This is so because Congress recognized that an employee’s age, unlike his race, sex, religion, etc., sometimes is relevant to his ability to perform certain jobs.\textsuperscript{235} This employer defense was the strongest argument relied upon by courts that had rejected disparate impact claims under the

\textsuperscript{225} See \textit{id}.
\textsuperscript{228} 125 S. Ct. 1536 (2005).
\textsuperscript{229} \textit{Id.} at 1540.
\textsuperscript{230} \textit{Id.} at 1544.
\textsuperscript{231} \textit{Id.} at 1539.
\textsuperscript{232} \textit{Id.}
\textsuperscript{233} \textit{Smith}, 125 S. Ct. at 1546.
\textsuperscript{234} \textit{Id.} at 1540–41.
\textsuperscript{235} \textit{Id.} at 1545.
While the Supreme Court dismissed the officers’ lawsuit based on the “reasonable factors other than age” defense; it ruled that disparate impact claims are also allowable under the ADEA, while Justice Scalia, in his concurrence, reached the same result by deferring to the EEOC’s reading of the Act.

In Conroy v. Abraham Chevrolet-Tampa, Inc., the Eleventh Circuit ruled that district courts are not required to give the jury a pretext instruction in an employment discrimination suit.

3. Americans with Disabilities Act

Under the Americans with Disabilities Act (ADA), employers may “discipline, discharge or deny employment” to anyone whose alcohol consumption “impairs job performance or conduct” if the person is not a “qualified individual with a disability.” For example, in one Florida case, the court found no evidence that the employee’s alcoholism permanently altered his ability to engage in a major life activity. Thus, the employee was not disabled under the ADA and could be dismissed for excessive absenteeism stemming from his drinking.

According to a 2004 EEOC Advisory Letter, the ADA does not require employers to alert employees that a co-worker has a disability such as hepatitis C. Indeed, the ADA bars employers from revealing medical information about applicants and employees.

Under the 2004 guidelines issued by the EEOC, an employer may remove a worker from a food handling position if the worker is disabled by a disease transmissible through food found on the CDC list and the odds of spreading the disease cannot be reduced by reasonable accommodation.

236. See id. at 1543.
237. Id. at 1546.
238. Smith, 125 S. Ct. at 1546–47 (Scalia, J., concurring).
239. 375 F.3d 1228 (11th Cir. 2004).
240. Id. at 1235.
243. Id.
244. ADA Does Not Permit Telling Employees Co-Worker Has Hepatitis C, EEOC Advises, 73 U.S.L.W. 2137, 2137 (2004).
245. Id.
In 2004, the EEOC issued a fact sheet providing tips on dealing with employees with epilepsy. The guide spells out: 1) when epilepsy is a disability under the ADA; 2) when employers may inquire about an employee’s epilepsy; 3) suggested reasonable accommodations; and 4) how to handle safety concerns.

4. Retaliatory Discharge

In general, “[i]n order to establish a prima facie retaliation case, the plaintiff must demonstrate the following elements: 1) a statutorily protected expression; 2) an adverse employment action; and 3) a causal connection between the participation in the protected expression and the adverse action.”

Under an anti-retaliation provision of Florida law known as the “participation clause,” it is unlawful for an employer to discriminate against a person who has “made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing.” In one Florida case, a police chief wrote a memo advising another officer about how to file a harassment claim. The memo did not say whether the officer’s claims were of a sexual nature, it did not name the alleged harasser, and it did not describe the specific acts of harassment. After the police chief was dismissed, he filed a retaliatory discharge claim, invoking the “participation clause” in support of his suit. The court ruled that the city articulated a legitimate, nondiscriminatory reason for dismissing the police chief, suggesting that he lacked interpersonal skills and that the police chief did not show a pretext for retaliation. Finally, the court ruled that the police chief could not avail himself of the “participation clause” simply because he gave another officer the EEOC’s phone number and wrote a memo on his behalf. The court

248. Id.
251. Id. at 845.
252. Id.
253. Id. at 843, 846.
254. Id. at 848.
255. Guess, 889 So. 2d at 846–47.
made clear that the participation clause only protected acts occurring "in conjunction with or after the filing of a formal charge with the EEOC." 256

Title IX of the Education Amendments of 1972 257 provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 258 The Supreme Court has ruled there is an implied right of action under Title IX available to victims of sex-based discrimination. 259 On March 29, 2005, the United States Supreme Court ruled 5-4 in *Jackson v. Birmingham Board of Education* 260 that Title IX also implies a private right of action for whistleblowers' claims of retaliation over complaints. 261

In 2003, the Supreme Court ruled that counties may be subject to suit under the federal False Claims Act. 262 False Claims Act suits amount to whistleblower suits alleging retaliation over exposing governmental corruption. 263

Finally, a Florida court ruled that under "public policy, employers have an obligation of reasonable cooperation where an employee's appearance in the court system is required." 264 In other words, it is wrongful for an employee to lose unemployment benefits over a mandatory court appearance. 265

V. ARBITRATION, COLLECTIVE BARGAINING, AND JUST CAUSE

A. Arbitration

There is an emerging form of mandatory arbitration negotiated between individual employees and their employers outside the setting of a collective bargaining agreement. These kinds of arbitrations, administered under the Federal Arbitration Act (FAA), are binding on the parties and foreclose any recourse to courts other than to appeal the arbitrator's decision. 266 In 2001, the United States Supreme Court ruled that the FAA governs most employ-

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256. *Id.* at 846 (quoting EEOC v. Total Sys. Servs., Inc., 221 F.3d 1171, 1174 (11th Cir. 2000)).
258. § 1681(a).
261. *Id.* at 1507.
263. *See id.*
265. *Id.*
ment contracts except for those involving transportation employees.\footnote{267} In the past year, two Eleventh Circuit cases have addressed the FAA's exception for transportation workers.

In \textit{Bautista v. Star Cruises},\footnote{268} the Eleventh Circuit ruled that the FAA's exception for contracts of employment of seamen does not apply to cruise ship employment contracts with arbitration clauses governed by the United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards.\footnote{269}

Similarly, in \textit{Hill v. Rent-A-Center, Inc.},\footnote{270} the Eleventh Circuit ruled that the FAA's transportation industry exemption does not include workers who incidentally deliver goods across state lines in the course of their job.\footnote{271}

In \textit{Rappa v. Island Club West Development, Inc.},\footnote{272} the Florida court addressed whether a former employee was required by contract to arbitrate his dispute with his employer over unpaid wages.\footnote{273} The court ruled that the trial court was required, as a preliminary matter, to hold an evidentiary hearing to weigh whether the employment contract's arbitration clause was unconscionable before assessing whether to compel arbitration.\footnote{274} Under Florida's Arbitration Code, three elements must be weighed: "1) whether a valid written agreement to arbitrate exists; 2) whether an arbitrable issue exists; and 3) whether the right to arbitration was waived."\footnote{275} In order to invalidate an arbitration clause, a "court must find that the clause is both procedurally and substantively unconscionable."\footnote{276}

In \textit{Corpion v. Jenne},\footnote{277} the court interpreted a collective bargaining agreement as authorizing the arbitrator to decide whether there was "just cause" for a sheriff to demote a police officer, and that part of that authority is the power to decide whether the violation of a department policy was serious enough to warrant demotion or justified a lesser penalty.\footnote{278}
In *DeSocio v. Sonic Automotive*, a salesperson’s claim that the dealership fired him for threatening to expose unlawful sales practices went to arbitration. The employer won and the claims were dismissed. But the arbitrator also ruled that the employer bore the cost of the arbitration because it failed to ask for costs in the case. The Florida court ruled that since the employer never notified the employee of its intent to seek attorney’s fees, it waived them. Under Florida law, unlike American Arbitration Association rules, an employer must give an employee notice of intent to seek fees.

**B. Collective Bargaining**

Florida International University’s “board of trustees declared an impasse in contract negotiations” with the public union representing faculty members who have been “working without a contract since January 2003.” As a public university, “[w]hen an impasse is declared, an outside mediator is brought in.” It is possible for the parties to reach a one-year agreement on salary if nothing else. The mediator “will make recommendations to the university’s board of trustees.” The board is authorized “to impose a one-year settlement without union approval.”

**C. Just Cause**

Under Florida law, the following grounds constitute just cause for dismissing a corrections officer: 1) “refus[ing] to truthfully answer questions specifically relating to the performance” of a guard’s duties; 2) insubordination; 3) neglect; 4) refusing “to follow lawful orders or perform officially designated duties;” 5) “falsify[ing] reports or records;” and/or 6) “knowingly submit[ting] inaccurate or untruthful information for or on any . . . record, report or document.”

279. 894 So. 2d 1064 (Fla. 2d Dist. Ct. App. 2005).
280. Id. at 1065.
281. Id.
282. Id.
283. Id. at 1065, 1067.
284. *DeSocio*, 894 So. 2d at 1065.
286. Id.
287. Id.
288. Id.
289. Id.
290. FLA. ADMIN. CODE ANN. r. 33-208.002 (7), (11), (13), (20) (2003).
In Wright-Simpson v. Department of Corrections, the Florida court ruled that the state agency “proved by a preponderance of the evidence that it had cause to discipline [a guard] for conduct unbecoming a public employee” and the Public Employee Relations Commission did not abuse its discretion in upholding the guard’s dismissal.

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291. 891 So. 2d 1122 (Fla. 4th Dist. Ct. App. 2004).
292. Id. at 1126–27.
UP IN ARMS OVER FLORIDA'S NEW “STAND YOUR GROUND” LAW

MICHELLE JAFFE

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I. INTRODUCTION

The suburban accountant heard scratching noises at his front door.1 In fear, he grabbed his .40-caliber handgun, opened the door, and shot the sixteen-year-old in the back.2 He told police he thought the teenager was armed.3 In actuality, the teenager and his friend were trying to tie fishing

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1. Deana Poole, *Gun Bill Could Mean: Shoot First, Ask Later*, PALM BCH. POST, Mar. 23, 2005, at 1A.
2. *Id.*
3. *Id.*
line to door knockers as a prank. The accountant pled guilty to a charge of manslaughter, "was sentenced to spend [fifty-two] weekends in the Palm Beach County Jail and [ten] years of probation." He "said he thinks about the [teenager's] death every day and regrets his action." This occurred in October of 2003. Had it occurred after October 1, 2005, the case would not have been prosecuted. The reason: a new law that purports to codify Florida's castle doctrine, but which critics say enshrines "shoot first, ask questions later" into Florida law instead.

On October 1, 2005, people in Florida gained the right to stand their ground. On that day, Florida's new law goes into effect, designed to protect persons and property, authorizing the use of force including deadly force against an intruder or attacker in a dwelling, creating a presumption that a reasonable fear of death or great bodily harm exists under certain circumstances, and providing immunity from criminal prosecution or civil liability for using deadly force. No longer do those in Florida have to retreat "to the wall" before meeting "force with force." The prospect of this looming change has ignited gun-control advocates and gun advocates alike. Will Florida become a modern Wild West, replete with ubiquitous gunfights played out by local Wyatt Earps and Wild Bill Hickoks, all in the name of self-defense? Some say yes. Others say it is "no different from what most other states allow."
This paper examines Florida's new law. Part II briefly discusses the theory behind justified homicide and the development of the doctrine of self-defense. Part III follows the origins of the American doctrine of the duty to retreat when faced with life-threatening force, as well as the eventual split between states that require retreat and states that permit a person to stand their ground. Part IV traces Florida law as the state developed exceptions to the general duty to retreat, and then discusses the new law. Finally, Part V analyzes the vastly different reactions to the new law, compares the outcry to Florida's concealed carry law, and then analyzes whether the new law warrants such turmoil.

II. JUSTIFIED HOMICIDE

A. The Theory

"A justified act is one that 'the law does not condemn, or even welcomes.'" While excuse defenses apply to specific defendants because they exculpate these individuals for their criminal conduct due to underlying disabilities and disorders, justification defenses exonerate those "who perform ordinarily criminal conduct in special circumstances that render their behavior socially acceptable." Morally, justifications and excuses are not equal. Being justified is preferable to being excused, since a person who is justified commits an act that, in the eyes of society, was not wrong. Conversely, a person who is merely excused does commit a wrongful act; however, the actor is not blameworthy due to underlying circumstances.

Even if accepted, does the concept of justification mean the action was right? One argument contends that "justified conduct is right rather than merely permissible." If so, then the precepts of the criminal law prescribe actions that are ideal; that is, no alternative is superior. Conversely, others argue that the criminal law provides minimal standards, meaning it is possible to surpass the standards justification defenses set. An example is when one who could act pursuant to the precepts of a justification defense never-

19. Id.
20. Id. at 389-90.
21. SCHOPP, supra note 17, at 16.
22. Id. at 16-17.
23. Id. at 17.
theless refrains from acting. Yet another argument separates the "best conduct" from the "morally obligatory conduct.

Self-defense is a justification defense. It encompasses a complex area of law and of social morality that requires a complex theory of explanation. Any offered theory must also account for four widely accepted limitations on the use of defensive force: 1) "force may be used only against an unlawful aggressor;" 2) "the use of force must be strictly necessary;" 3) "the amount of force must be proportional to the force being threatened;" and 4) "the attack must be imminent." Thus, the theories behind self-defense and, more generally, justification defenses are complicated and unsettled.

B. The Development of the Doctrine of Self-Defense

There is generally no dispute that deadly force may be used in self-defense to protect oneself from death or serious bodily injury, and that the act is justifiable in certain situations. Yet, this was not always the case. Indeed, the doctrine of self-defense did not exist in medieval law, but slowly evolved as a modern doctrine. "From the beginning of the jurisdiction of the king's courts over crime to the reign of Edward I. homicide could be justified only . . . in cases where the homicide was committed in execution of the law." In all other cases, in other words, "homicide by misadventure," the defendant was not justified. Instead, he was convicted, his chattels were forfeited, and he was required to get the king's pardon. Since the chancellor signed the pardon in the king's name, obtaining a pardon became

24. Id.
25. Id.
26. SCHOPP, supra note 17, at 55.
27. Id. at 61.
29. Re'em Segev, Fairness, Responsibility and Self-Defense, 45 SANTA CLARA L. REV. 383, 383-84 (2005). Less universally accepted is the moral justification for the use of defensive force. Kaufman, supra note 28, at 20. "[O]ne’s choice of a foundational principle for self-defense will determine one’s conception of the scope and limits of permissible self-defense, a matter that is continually in controversy." Id. However, it has been argued that legal justification should remain distinct from moral justification. Baron, supra note 18, at 400.
31. Id.
32. Id. at 567-68.
33. Id. at 568.
34. Id. at 569.
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a mere formality, and the chancellor soon dispensed of such formality in the name of equity.\textsuperscript{35} Additionally, the statute 24 Henry VIII. c. 5 was enacted and interpreted “as providing for acquittal without formal pardon.”\textsuperscript{36} This combination of statutory change and common law court decisions transformed the previously equitable defense into a legal one.\textsuperscript{37}

Thus, two incarnations of self-defense exist at common law: justifiable self-defense and excusable self-defense.\textsuperscript{38} The distinction was once clearly recognized, but became blurred as various courts offered different interpretations.\textsuperscript{39} Indeed, “traditional common law excused some of these defendants under the doctrine of se defendendo, [which] has proven difficult to explain and justify.”\textsuperscript{40} An important aspect of justifiable self-defense is that the innocent victim who is attacked must have a “reasonable and honest belief [that there is] imminent danger of death or grave bodily harm.”\textsuperscript{41} Even if some use of force may have been justified under the circumstances, the fact-finder may determine that the use of force was unreasonable.\textsuperscript{42} If so, “the defendant will not prevail.”\textsuperscript{43} What constitutes a reasonable belief remains ambiguous.\textsuperscript{44}

Generally, there are three standards of what constitutes “reasonable.”\textsuperscript{45} The majority view objectively examines “what a ‘reasonable person’ or ‘person of ordinary firmness’ would have done in the defendant’s situation.”\textsuperscript{46} A few jurisdictions use a completely subjective standard of reasonableness, thereby focusing solely on the defendant’s perception and foregoing the reasonable person analysis.\textsuperscript{47} A third approach declines to expressly state

\textsuperscript{35} Beale, supra note 30, at 570.
\textsuperscript{36} Id. at 571 (citations omitted).
\textsuperscript{37} Id.
\textsuperscript{39} See Erwin v. State, 29 Ohio St. 186, 194 (1876) (discussing the evolution of justifiable and excusable self-defense).
\textsuperscript{40} SCHOPP, supra note 17, at 88.
\textsuperscript{41} Gousie, supra note 38, at 455.
\textsuperscript{43} Id.
\textsuperscript{45} Id. at 997.
\textsuperscript{46} Id.
\textsuperscript{47} Id.
whether an objective or subjective approach should be used, and holds "that the determination of the defendant's reasonableness in using physical force is for the jury as within its province as the trier of fact." Thus, the law of self-defense remains far from clear. Further complicating the matter is the so-called duty to retreat.

III. THE ENGLISH RETREAT TO THE WALL WHILE THE AMERICANS STAND THEIR GROUND

A. The American Aversion to Retreating

The duty to retreat derives from traditional English common law, which sought to produce a "society of civility" and retain control of quarrels between individuals. In a threatening situation, one who sought to claim justifiable homicide had to prove both that he had retreated "to the wall" and that the homicide was necessary "in order to prevent his own death or serious [bodily] injury." Indeed, so palpable was the fear that the right to defend oneself would mutate into the right to murder that the one accused of a homicide bore the burden of proving his innocence.

In the United States of America, the traditional English duty to retreat survived in only a minority of states. Americans rejected such English cowardice just as they rejected English rule; thus, a majority of Americans gained the right to stand their ground and defend themselves as their fledging country gained its independence from England.

A product of legal discourse, the no duty to retreat mentality spread westward. In 1876 Ohio, the "true man" ethic emerged when James W. Erwin claimed self-defense after killing his son-in-law during a dispute over who had possession of a shed located between their homes. "[T]he deceased [son-in-law], with an ax on his shoulder, approached [Erwin] in a

48. Id.
50. Id. at 3-4.
51. Id. at 3.
52. Id. at 5.
53. Id.
54. BROWN, supra note 49, at 8. Mr. Brown traces the spread of this mentality particularly through case analysis revealing Ohio's "true man" ethic, Indiana's "American mind" theory, and Minnesota's "wild and unsettled wilderness" analysis. See generally BROWN, supra note 49. This article's analysis similarly follows this historical journey, but includes an extended case analysis, including pertinent facts of the case, as well as relevant language of the courts.
55. Id.
threatening manner." Erwin warned him not to enter and, when the son-in-law ignored the warning and approached, fatally shot him. After he was convicted of murder in the second degree, Erwin appealed his conviction. On appeal, Erwin claimed that the lower court erred in instructing the jury as to the law of self-defense. More specifically, Erwin argued that the court should not have followed the doctrine of "retreating to the wall." The Supreme Court of Ohio held that:

[t]he law, out of tenderness for human life and the frailties of human nature, will not permit the taking of it to repel a mere trespass, or even to save life, where the assault is provoked; but a true man, who is without fault, is not obliged to fly from an assailant, who, by violence or surprise, maliciously seeks to take his life or do him enormous bodily harm.

Thus, the court rejected the concept of a duty to retreat and instead focused on the necessity of the act in question; that is, whether the defendant, a non-aggressor who was attacked, acted "with the necessity of taking life to save his own upon him."

In Runyan v. State, the Supreme Court of Indiana focused on what it called the "American mind." John Runyan was convicted of manslaughter and appealed his conviction, alleging erroneous jury instructions. Apparently, Runyan had traveled to cast his vote in the presidential election. He had an altercation with a man named John Spell, who used threatening lan-
Later that day, Runyan borrowed an acquaintance's pistol so he could defend himself in case he was attacked. At night, Runyan traveled with some friends to get election news. As he leaned against the side of a building, an assistant marshal of the town began to argue with him. The assistant marshal then tried to push Henry Ray, Runyan's brother-in-law, out of the crowd. As he turned away, Charles Pressnal rushed at Runyan and hit him a few times. Runyan then drew a pistol from his coat pocket and shot Pressnal, who was mortally wounded and later died.

The court held that "when a person, being without fault and in a place where he has a right to be, is violently assaulted, he may, without retreating, repel force by force, and if, in the reasonable exercise of his right of self-defense, his assailant is killed, he is justifiable." In so holding, the court noted that "[t]he defendant was already standing practically against a wall." The question of most import to the court was: "[D]id the defendant have reason to believe, and did he in fact believe, that what he did was necessary for the safety of his own life or to protect him from great bodily harm?" Thus, these American courts used the age-old imagery of the defendant retreating to the wall not as a requisite to establish self-defense, but seemingly rather as a justification as to why the defendant needed to use deadly force at all.

In Minnesota, "the wild and unsettled wilderness" of the location in which the defendant lived, along with the introduction of firearms, was used to establish that the trial court's charge upon the subject of escape or retreat was reversible error. In State v. Gardner, the defendant testified that he used his gun only to save his own life. The Supreme Court of Minnesota acknowledged that the case presented some of the peculiarities of "frontier life." Further, the court reasoned that "[t]he doctrine of 'retreat to the wall' had its origin before the general introduction of guns. Justice demands that

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67. Runyan, 57 Ind. at 81.
68. Id.
69. Id.
70. Id.
71. Id.
72. Runyan, 57 Ind. at 80–81.
73. Id.
74. Id. at 84.
75. Id.
76. Id. at 85.
77. State v. Gardner, 104 N.W. 971, 975–76 (Minn. 1905).
78. Id. at 971.
79. Id. at 972.
80. Id. at 973.
its application have due regard to the present general use and to the type of firearms." In doing so, the court continued the mostly western theme of no duty to retreat.

B. Some States Still Demand Retreat

While the majority of the states embraced the no retreat philosophies of the "true man," the "American mind," and the "wild and unsettled wilderness," a minority of states still required a duty to retreat. Those states rejected the "hip-pocket ethics of the Southwest" and chose to uphold the "peaceful though often distasteful method of withdrawing to a place of safety."

This adherence to the duty to retreat philosophy continues today in some states. The Model Penal Code sides with these states and requires the actor using deadly force to believe such force is "necessary to protect himself against death, serious bodily injury, kidnapping or sexual intercourse compelled by force or threat." Additionally, the Model Penal Code includes a duty to retreat; that is, the actor is not justified in using deadly force if

the actor knows that he can avoid the necessity of using such force with complete safety by retreating or by surrendering possession of a thing to a person asserting a claim of right thereto or by comply-

81. Id. at 975. The court went on to discuss instances when requiring retreat would make "good sense." Gardner, 104 N.W. at 975. Drawing a distinction between firearms and a hand-to-hand encounter with fists, clubs, or knives, the court stated that "[w]hat might be a reasonable chance for escape in the one situation might in the other be certain death. Self-defense has not, by statute nor by judicial opinion, been distorted, by an unreasonable requirement of the duty to retreat, into self-destruction." Id.

82. Erwin v. State, 29 Ohio St. 186, 199 (1876). The Erwin decision exemplified the reasoning of the group of states that required no duty to retreat, but claimed they still followed English law. Beale, supra note 30, at 576. Those states utilized the English distinction between excusable and justifiable homicide and reasoned their cases in that manner. Id.

83. Runyan v. State, 57 Ind. 80, 84 (1877). The Runyan decision typified the rationale of the other group of states that required no duty to retreat before using deadly force. Beale, supra note 30, at 576. Those states reasoned that the "conditions of the new country require[d] a different rule" than the English authority. Id.

84. Gardner, 104 N.W. at 975.
85. BROWN, supra note 49, at 5.
86. Beale, supra note 30, at 580.
88. MODEL PENAL CODE & COMMENTARIES § 3.04(2)(b) (Official Draft and Revised Comments 1985).
ing with a demand that he abstain from any action that he has no duty to take.\footnote{\textsection 3.04(2)(b)(ii).}

Thus, the states continue to disagree about what constitutes justifiable use of deadly force in the name of self-defense.

C. \textit{The Position of the United States Supreme Court}

With the states split on the issue of whether a defendant had a duty to retreat before claiming self-defense, the question came before the United States Supreme Court.\footnote{See sources cited \textit{infra} notes 94, 106, 121.} From 1893 to 1896, the Court, which today is most remembered for its \textit{Plessy v. Ferguson}\footnote{163 U.S. 537 (1896).} decision, decided various cases involving self-defense.\footnote{David B. Kopel, \textit{The Self-Defense Cases: How the United States Supreme Court Confronted a Hanging Judge in the Nineteenth Century and Taught Some Lessons for Jurisprudence in the Twenty-First}, 27 AM. J. CRIM. L. 293, 295 (2000). Kopel points out that the Court's \textit{Plessy v. Ferguson} decision, "which claimed that state-imposed racial segregation was not intended to be insulting to blacks," sharply contrasts the self-defense string of cases "in which the Court stood up again and again for the rights of blacks, American Indians, and other outsiders." \textit{Id.}} Although they received little scholarly attention, an examination of these early Supreme Court self-defense cases may foster a better understanding of the hotly contested issues involved.\footnote{Id.}

First, in \textit{Beard v. United States},\footnote{158 U.S. 550 (1895).} the Court heard the case of the three Jones brothers involved in an angry dispute with their uncle, Beard, over a cow.\footnote{Id. at 551.} The cow had been given to Edward, one of the brothers, after his mother's death.\footnote{Id.} However, Beard took possession of the cow as a condition to allowing Edward to live with him.\footnote{Id.} Edward left the Beard home a few years later, but returned with his brothers in an effort to reclaim the cow.\footnote{Id.} The Jones brothers took a shotgun with them, but the brothers were unsuccessful in their endeavor, as Beard prevented them from taking the cow and warned them not to return unless Edward's right to possess the cow was declared through legal proceedings.\footnote{Beard, 158 U.S. at 551–52.} The brothers, ignoring the warning, returned later that same day and again attempted to take the cow, but Mrs. \ldots
Beard prevented them from doing so this time. Mr. Beard then returned from an errand, carrying a shotgun he normally took with him, and joined the group in his field, which was a distance from his dwelling. During this dispute, Will Jones approached Mr. Beard in a threatening manner and, when Jones continued toward him despite Beard’s warning him to stop, Beard hit him over the head with his gun. Jones’s skull was crushed, and he died. The Court, in reviewing the case, decided that the trial court erred in instructing the jury that Beard did not have the right to use self-defense if he could have retreated safely. Indeed, the Court held that “[t]he defendant was where he had a right to be” such that if he:

- did not provoke the assault and had at the time reasonable grounds to believe and in good faith believed, that the deceased intended to take his life or do him great bodily harm, he was not obliged to retreat, nor to consider whether he could safely retreat, but was entitled to stand his ground and meet any attack made upon him with a deadly weapon, in such way and with such force as, under all the circumstances, he, at the moment, honestly believed, and had reasonable grounds to believe, was necessary to save his own life or to protect himself from great bodily injury.

Thus, the United States Supreme Court seemed to endorse a no duty to retreat philosophy, at least when the defendant was on his own premises. However, a year later, the Court confused the issue. In Allen v. United States (Allen I), a fourteen-year-old adolescent killed an eighteen-year-old teenager named Henson. The facts, which were disputed, established either that Henson and his two friends attacked Allen and his friend with sticks, intending to kill them, or that Allen attacked Henson and Henson’s friends with a pistol. Following Allen’s conviction, the Supreme Court eventually heard his case and reversed the conviction on the grounds that the jury had been erroneously instructed that one who claims self-defense “must be regarded as

100. Id. at 552.
101. Id.
102. Id. at 552–53.
103. Id. at 553.
104. Beard, 158 U.S. at 563–64.
105. Id. at 564.
107. Id. at 551.
108. Id. at 552.
exercising the deliberation of a judge,” an instruction the Court believed sub-
stituted “abstract conceptions for the actual facts of the particular case as
they appeared to the defendant at the time.”110

The Supreme Court heard Allen’s case again after he was convicted for
the second time.111 Again, the Court found reversible error,112 this time be-
cause the jury instructions precluded a claim of self-defense if the sticks and
clubs used were not “deadly weapons.”113 The Court reasoned that “when a
fight is actually going on sticks and clubs may become weapons of a very
deadly character.”114 Again, the Court reversed Allen’s conviction.115

Finally, the Court heard Allen’s case for a third time in 1896.116 This
time the Court affirmed the conviction.117 In doing so, the Court upheld a
jury instruction that included language suggesting the defendant must “use
all the means in his power otherwise to save his own life or prevent the in-
tended harm, such as retreating as far as he can.”118 The Court distinguished
prior cases in which it held the defendant had no duty to retreat, reasoning
that those cases did not discuss a general duty to retreat instead of killing
when attacked, because in the previous cases the defendants were upon their
own property.119 Still, the Court “blurred the bright-line ‘no duty to retreat’
rule enunciated in Beard.”120

In 1921, the Supreme Court decided the case of Brown v. United
States.121 Brown was convicted of murder in the second degree and the ap-
pellate court upheld the conviction.122 The Supreme Court re-examined the
evidence, which showed that Hermes, the deceased, had assaulted Brown
twice with a knife and made threatening comments.123 As a result, Brown

111. See Allen II, 157 U.S. at 676.
112. Id. at 679.
113. Id.
114. Id.
115. Id. at 681.
117. Id. at 502.
118. Id. at 497, 502.
119. Id. at 498.
120. Kopel, supra note 92, at 315. This case also provides an interesting historical aside.
At the trial level, the jurors were deadlocked, so the judge told them to “re-examine their
opinions” such that those favoring conviction “should consider whether the pro-acquittal
jurors might be right” and vice versa. Id. at 316. Today, judges give similar instructions to
deadlocked juries, and such an instruction is termed an “Allen charge.” Id.
121. 256 U.S. 335 (1921).
122. Id. at 341.
123. Id. at 342.
carried a pistol in his coat with him for protection.\textsuperscript{124} When Hermes indeed came toward him with a knife, Brown retreated to where his coat was lying, retrieved his pistol, and fired four shots, killing Hermes who had been striking at him.\textsuperscript{125} The essential jury instructions stated that the one assaulted is always under a duty to retreat so long as he can do so safely.\textsuperscript{126}

The Supreme Court declined to trace the ancient origins of retreat, deeming it "useless" to trace the law back that far, since "[c]oncrete cases or illustrations stated in the early law in conditions very different from the present . . . have had a tendency to ossify into specific rules without much regard for reason."\textsuperscript{127} Instead, the Court decided "the failure to retreat is a circumstance to be considered with all the others in order to determine whether the defendant went farther than he was justified in doing; not a categorical proof of guilt."\textsuperscript{128} The decision of the Court had been that "if a man reasonably believes that he is in immediate danger of death or grievous bodily harm . . . he may stand his ground" and lawfully defend himself.\textsuperscript{129} Stating that "[d]etached reflection cannot be demanded in the presence of an uplifted knife," the Court upheld the "no duty to retreat" concept.\textsuperscript{130}

These Supreme Court cases epitomize the difficulty, not only of trying to rationalize the killing of a human being in the purported defense of another human being, but of fairly and justly trying the accused in a court of law. Understanding the decisions themselves may also prove challenging and controversial. The Supreme Court cases remain persuasive authority for state courts that must decide issues of the common law duty to retreat in relation to self-defense.\textsuperscript{131} Some jurisdictions have embraced the concept of not retreating.\textsuperscript{132} Others remain wary, continuing their historical dislike of an ideal that typifies the "ethics of the duelist."\textsuperscript{133}

\textsuperscript{124} Id.
\textsuperscript{125} Id.
\textsuperscript{126} Brown, 256 U.S. at 342.
\textsuperscript{127} Id. at 343.
\textsuperscript{128} Id.
\textsuperscript{129} Id. (citing Beard v. United States, 158 U.S. 550, 559 (1895)).
\textsuperscript{130} Id.
\textsuperscript{131} Kopel, supra note 92, at 325.
\textsuperscript{132} See, e.g., State v. Renner, 912 S.W.2d 701, 703–04 (Tenn. 1995) (discussing the Tennessee judiciary's adoption of the common law "no duty to retreat" rule, followed by the Tennessee legislature's codification of the rule in 1989). Some states long supported the concept of "no duty to retreat." See, e.g., People v. Toler, 9 P.3d 341, 347 (Colo. 2000) (holding that neither historical state common law nor modern statutory law requires a non-aggressor to "retreat to the wall").
\textsuperscript{133} Beale, supra note 30, at 577.
D. The "Castle Doctrine" Exception

Even in jurisdictions that follow the "retreat to the wall" doctrine, exceptions exist "such as the 'castle doctrine,' which allows a person in his own home to use deadly force in self-defense without first retreating even if a reasonably safe means of escape exists." Therefore, regardless of whether a person is in a "duty to retreat" jurisdiction or a "stand your ground" jurisdiction, "the law imposes no duty to retreat upon one who, free from fault in bringing on a difficulty, is attacked at or in his or her own dwelling or home." One explanation for why the "castle doctrine" abrogates the necessity requirement of self-defense while in one's own home is that "a person should not be required to face a possibly greater danger by retreating than he would if he remained inside the home." Judge Cardozo expressed a second rationale when he stated that

[i]t is not now and never has been the law that a man assailed in his own dwelling is bound to retreat. If assailed there, he may stand his ground and resist the attack. He is under no duty to take to the fields and the highways, a fugitive from his own home.

The "castle doctrine," however, sometimes provides more confusion, especially when the relative status of the parties becomes involved. Jurisdictions disagree about whether the doctrine should apply to cohabitants, invited guests, or both. For example, what happens if both the attacker and the innocent victim live in the same home? Following the rationale of the "castle doctrine," both parties would have an equal right to defend themselves against an attack, so the party forced to act in self-defense would not receive the benefit of the "castle doctrine."

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134. Toler, 9 P.3d at 347.
139. Id. In the area of self-defense, the term "cohabitant" refers to one who has possessory rights over the property, a definition that differs from the non-self-defense meaning of "cohabitant," which generally refers to two people, who may or may not be married, living together. Id. at 669 n.57.
140. See Orr, supra note 87, at 129. For one jurisdiction's examination of the inherent problems in trying to determine the relative status of an aggressor and defendant, see State v. Glowacki, 630 N.W.2d 392 (Minn. 2001). That jurisdiction's inquiry led to the bright-line rule that "[t]here is no duty to retreat from one's own home when acting in self-defense in the
Perhaps exacerbating the confusion is the close—and often confused—relationship between the "castle doctrine," an exception to the necessity requirement of self-defense, and the use of deadly force in defense of premises, which may be understood as an exception to the proportionality requirement of self-defense, which requires that deadly force not be excessive in relation to the harm threatened. The defense of premises doctrine provides that where an aggressor is making an unlawful, felonious, or violent entry into a dwelling or other premises, a defender who is lawfully in or around his dwelling or other premises, may use deadly force against that intruder. The use of deadly force is permissible even when the defender has not been threatened with death or serious bodily injury. Examples of laws that purport to allow the defense of premises are variously called "Shoot the Burglar," "Make My Day," and "Shoot the Carjacker" laws.

The Model Penal Code incorporates a castle doctrine exception into its required duty to retreat. It provides that an "actor is not obliged to retreat from his dwelling or place of work, unless he was the initial aggressor or is assailed in his place of work by another person whose place of work the actor knows it to be." The Model Penal Code traces its decision for its admittedly minority stance in adopting a duty to retreat to its decision to place "a high value on the preservation of life," while reasoning that an actor who kills when he knows he can safely avoid such an action has no moral claim to exoneration. As is the case with nearly all jurisdictions that adopted a duty home, regardless of whether the aggressor is a co-resident" and the conclusion that the key inquiry in such cases is into the reasonableness and level of use of force. Id. at 402.

141. Green, supra note 136, at 9. But see Thomas Katheder, Note, Criminal Law—Lovers and Other Strangers: Or, When is a House a Castle?—Privilege of Non-Retreat in the Home Held Inapplicable to Legal Co-Occupants (State v. Bobbitt, Fla. 1982), 11 FLA. ST. U. L. REV. 465, 470 (1983) (discussing that the "castle doctrine" is the resolution of the confusion and is the result of a merge between the duty to retreat and the defense of habitation).

142. Green, supra note 136, at 9. Note that there are cases where both doctrines would apply. Id. at 10. One example is where an "armed intruder enters a defender's home with the intent of committing murder or rape." Id. In such a case, both the "castle doctrine" and defense of premises doctrine apply. Id.

143. Id. at 2.


146. Id.

147. MODEL PENAL CODE & COMMENTARIES § 3.04 cmt. 4(c) (Official Draft and Revised Comments 1985).
to retreat, the Model Penal Code likewise requires an initial aggressor to "retreat regardless of where he is threatened." 148

IV. FLORIDA

A. The Old Law: Retreat

Florida's self-defense law, before the new "Stand Your Ground" law was enacted, was a combination of statutory and common law. 149 A person was justified in the use of deadly force in self-defense "if he or she reasonably believe[d] that such force [was] necessary to prevent imminent death or great bodily harm." 150 While the statute said nothing about a duty to retreat, Florida common law established the duty to "retreat to the wall" when one is attacked in a place outside of one's home. 151 Indeed, it had long been acknowledged that "it is the duty of a party to avoid a difficulty which he has reason to believe is imminent, if he may do so without apparently exposing himself to death or great bodily harm." 152

In Wilson v. State, 153 the Supreme Court of Florida addressed the issue of whether threats of violence by the deceased against the accused are admissible at trial. 154 In deciding that such threats are admissible where the identity of the aggressor is in doubt; that is, where no direct evidence establishes either the deceased or the accused as the assailant, the court stated it was not unmindful that one's home is the castle of defense for himself and his family, and that an assault upon it with an intent to injure him, or any of them, may be met in the same way as an assault upon himself, or any of them, and that he may meet the assailant at

148. Id.
149. Weiand v. State, 732 So. 2d 1044, 1049 (Fla. 1999).
150. FLA. STAT. § 776.012 (2004).
151. Hedges v. State, 172 So. 2d 824, 827 (Fla. 1965), overruled by Weiand, 732 So. 2d 1044.
152. Danford v. State, 43 So. 593, 596 (Fla. 1907). In the case, Mr. Danford argued that the correct law was that a person had no duty to retreat so long as he was where he had a right to be, was not engaged in an "unlawful enterprise," and was not the aggressor in combat. Id. The deceased's brother had previously attempted to use a gun on Danford. Id. The court found that Danford took his gun, stood in his field, which was near the public road, and spoke first to the boys warning them to halt, then immediately advanced toward the fence and fired at them. Id. at 597. The court held that Danford was the aggressor, and therefore, was not able to claim self-defense. See id.
153. 11 So. 556 (Fla. 1892).
154. Id. at 558.
the threshold, and use the necessary force for his and their protection against the threatened invasion and harm.155

Wilson, then, hinted at a potential Florida "castle doctrine." Later, in Pell v. State,156 the Supreme Court of Florida declared that the duty to retreat must be qualified.157 Specifically,

if a person is not the aggressor in a difficulty, and is violently assaulted on his own premises, he is not obliged to retreat in order to avoid the difficulty, but may stand his ground and use such force as may appear to him as a cautious and prudent man to be necessary to save his life or to save himself from grievous bodily harm.158

"While Pell involved a trespasser,"159 thirty-six years later, in Hedges v. State, the Supreme Court of Florida held that Hedges, who had killed her paramour, was entitled to a jury instruction that included the rule of no duty to retreat in one's own home.160 In doing so, the court extended the application of the "castle doctrine" to include not only trespassing attackers, but also invitees.161 Thus, Florida had apparently resolved one of the intricacies of the "castle doctrine;" namely, whether deadly force may be used justifiably against those invited onto the premises, as well as against mere intruders.162 However, eighteen years later, the Supreme Court of Florida was confronted with another one of those intricacies when it heard State v. Bobbitt.163 In that case, the issue was whether the "castle doctrine" extended to legal occupants of the same home.164 In order to decide, the court had to settle a conflict between two district courts of appeal.165 The First District Court of Appeal, the court of origin of the Bobbitt decision, held that the "castle doctrine" applied even where legal co-occupants are involved, while the Fourth District Court of Appeal held in Conner v. State166 that the "castle doctrine" does not apply.

155. Id. at 561 (citations omitted).
156. 122 So. 110 (Fla. 1929).
157. Id. at 116.
158. Id. .
160. Id. at 825, 827.
161. See id. at 827.
162. See id.
163. 415 So. 2d 724 (Fla. 1982), overruled by Weiand, 732 So. 2d 1044.
164. Id. at 724.
165. Id.
166. 361 So. 2d 774 (Fla. 4th Dist. Ct. App. 1978).
“where the assailant and the victim are both legal occupants of the same home.” The court ruled in favor of the Fourth District and distinguished *Hedges*, reasoning that since Hedges’s paramour was merely an invitee, when he commenced his attack upon her he lost his invitee status and became, in effect, a trespasser, thereby making the “castle doctrine” applicable. Conversely, in *Bobbitt*, both aggressor and victim were legal occupants of the same home, giving both equal rights to their “castle.” Thus, the distinction between when the “castle doctrine” applied and when the circumstances demanded an absolute duty to retreat appeared to depend upon whether the intruder was a cotenant or invitee. Justice Overton strongly dissented. Baffled that the majority’s opinion entitled a woman who killed her paramour in her home to claim the benefit of the “castle doctrine” while simultaneously denying the benefit of the “castle doctrine” to a woman who killed her husband under similar circumstances, he proposed that the court adopt a modified “castle doctrine” when the assailant is an invitee, cotenant, or family member. In an effort to acknowledge both the sanctity of human life and the sanctity of the home, the proposed instruction would impose a limited duty to retreat in such situations.

The *Bobbitt* decision proved problematic. As Justice Overton stated, the decision “place[d] the wife in the same position as if the altercation had occurred in a public place.” The language of the majority opinion focused on the fact that both husband and wife had “equal rights to be in the ‘castle’ and neither had the legal right to eject the other.” A troubling hypothetical then arises. What would happen if, for example, a nineteen-year-old daughter, who lives with her father in his home, kills him in response to an unprovoked attack? Based upon the *Bobbitt* decision, the daughter should not be able to claim the privilege of non-retreat, since the father had better rights to the property. Such a result “contravenes the intent of the decision.”

167. *Bobbitt*, 415 So. 2d at 724.
168. *Id.* at 726.
169. *Id.*
170. *Id.* (Overton, J., dissenting).
171. *Id.*
172. *Bobbitt*, 415 So. 2d at 728.
173. *Id.*
174. *Id.* at 727. Another commentator described an abused woman’s justifiable right to defend herself from a physically abusive husband as being “no greater than that of anyone to defend themselves in a bar fight.” *Orr, supra* note 87, at 125.
175. *Bobbitt*, 415 So. 2d at 726.
177. *Id.* at 644–45.
178. *Id.* at 645. The cohabitant exception to the “castle doctrine” has been challenged as being “based on rigid principles of property interests that have been mistakenly coupled with
Case law continued to shape Florida’s “castle doctrine” exception to the duty to retreat. The castle itself was expanded in *Redondo v. State*. In that case, the court revealed less sympathy for the life of the assailant when it held that the protected castle may include business or employment premises. The Second District Court of Appeal tempered this approach when it combined the result of *Redondo* with the reasoning of *Bobbitt*. In *Frazier v. State*, the court agreed that the “castle doctrine” protects persons in their place of employment as they lawfully engage in their occupation. However, the twist in that case was that the attacker was a co-worker. Therefore, the court reasoned, both victim and assailant had an equal and lawful right to be in the place where their altercation occurred. *Frazier* was not entitled to the benefit of the “castle doctrine” instruction.

Florida courts declined to include automobiles under the “castle” umbrella. In *Baker v. State*, the defendant argued that he had no duty to retreat if he was attacked in his own automobile. In refusing to further extend the “castle doctrine” exception to the duty to retreat, the court reasoned that the very mobility of the automobile should have provided the defendant with a means of retreat from a self-defense confrontation and that “to carve out the exception... could seem to virtually eliminate the retreat obli-

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requirements that originated in the common law defense of habitation.” Carpenter, *supra* note 138, at 685. Carpenter identifies three legal assumptions that form the basis of this erroneous application:

1) some type of an intrusion is required in order for an occupant to stand ground at home and use deadly force; 2) the deadly cohabitant does in fact maintain the status of lawful possessor throughout the deadly attack; and 3) the deadly cohabitant’s lawful possession usurps the sanctuary’s importance to the innocent cohabitant.

Id. 179. 380 So. 2d 1107 ( Fla. 3d Dist. Ct. App. 1980).

180. Id. at 1110–11. The court stated:

In our view, business or employment premises should enjoy the same sanctity as a home for self defense purposes as in each instance the person attacked has a proprietary or near proprietary interest in the place where he is assaulted which is cloaked with a certain privacy protection; a person ought not be required, when attacked, to flee from such hallowed ground. Moreover, our normal solicitude for the life of the attacker is somewhat dampened when he chooses such historically protected premises on which to make his murderous assault.


182. Id. at 824.

183. Id. at 825.

184. Id.

185. Id.

186. Frazier, 681 So. 2d at 825.


188. Id. at 1056.

189. Id. at 1059.
Unwilling to eliminate the duty to retreat, Florida continued to wade through its convoluted "castle doctrine" until the Supreme Court of Florida heard the case of Weiand v. State.\textsuperscript{191} Kathleen Weiand shot and killed her husband during a violent argument in their apartment.\textsuperscript{192} At trial, Weiand claimed self-defense and presented evidence of battered spouse syndrome.\textsuperscript{193} A jury found Weiand guilty of second-degree murder.\textsuperscript{194} The Supreme Court of Florida accepted the Second District Court of Appeal's certified question as to whether the court should recede from the Bobbitt decision.\textsuperscript{195} In overruling Bobbitt, the court acknowledged it was joining a majority of jurisdictions that do not impose a duty to retreat from the home when a defendant uses deadly force in self-defense, so long as such force is necessary to prevent death or great bodily harm from a co-occupant.\textsuperscript{196} The court reasoned that it would no longer rely on property law and possessory rights in determining when a duty to retreat exists, and that the decision represented sound public policy based upon known information about the victims of domestic violence.\textsuperscript{197} In an attempt to curtail concerns that eliminating a duty to retreat might result in increased violence, the court chose Justice Overton's "middle ground" approach from Bobbitt.\textsuperscript{198} Thus, there would no longer be a "duty to retreat from the residence before resorting to deadly force against a co-occupant or invitee if necessary to prevent death or great bodily harm, although there is a limited duty to retreat within the residence to the extent reasonably possible."\textsuperscript{199}

And so, it appeared that Weiand had resolved Florida's confused and unsettled law regarding the duty to retreat and the "castle doctrine."\textsuperscript{200} More recently, however, the issue of whether to extend the "castle doctrine" privi-

\textsuperscript{190} ld. In another automobile case, the defendant was in his car, with the motor running and no obstacle preventing him from exiting the parking lot. Reimel v. State, 532 So. 2d 16, 17 (Fla. 5th Dist. Ct. App. 1988). The court held that lethal self-defense was not established as a matter of law, since both a real necessity for taking a life and imminent danger, such that a reasonably prudent person would fear, are both required to establish justified self-defense. ld. at 18. Further, the defendant had a duty to retreat to the wall in order to avoid the necessity of taking another person's life. ld.

\textsuperscript{191} 732 So. 2d 1044 (Fla. 1999).

\textsuperscript{192} ld. at 1048.

\textsuperscript{193} ld.

\textsuperscript{194} ld. at 1049.

\textsuperscript{195} ld. at 1046-47.

\textsuperscript{196} Weiand, 732 So. 2d at 1051.

\textsuperscript{197} ld.

\textsuperscript{198} ld. at 1056 (citing State v. Bobbitt, 415 So. 2d 724, 728 (Fla. 1982) (Overton, J., dissenting)).

\textsuperscript{199} ld. at 1058.

\textsuperscript{200} Orr, supra note 87, at 125.
FLORIDA'S NEW "STAND YOUR GROUND" LAW

legal to include temporary visitors or guests came before the Third District Court of Appeal. The court declined to extend the castle doctrine privilege that far, afraid that granting such an extension would provide visitors with "innumerable castles" wherever the visitors were permitted to visit, which would in turn "encourage the use of deadly force." Such a scenario, the court believed, was not what the Supreme Court of Florida had in mind when it decided Weiand and thereby protected the value of human life.

B. The New Law: Stand Your Ground

Although it appeared the judiciary had finally settled Florida's duty to retreat and "castle doctrine" laws, on October 1, 2005, its decisions became obsolete, because on that day, Florida's new "Stand Your Ground" law went into effect. Premised upon the concept that law-abiding people should be able to "protect themselves, their families, and others from intruders and attackers without fear of prosecution or civil action for acting in defense of themselves and others," the common-law "castle doctrine" that "declares that a person's home is his or her castle," the "State Constitution [that] guarantees the right of the people to bear arms in defense of themselves," the ideal that "persons residing in or visiting this state have a right to expect to remain unmolested within their homes or vehicles," and that "no person or victim of crime should be required to surrender his or her personal safety to a criminal, nor should a person or victim be required to needlessly retreat in the face of intrusion or attack," the new legislative material creates two new sections of the Florida Statutes and amends two other sections.

First, section 776.013 entitled "Home Protection; Use of Deadly Force; Presumption of Fear of Death or Great Bodily Harm" is newly created. It establishes that:

(1) A person is presumed to have held a reasonable fear of imminent peril of death or great bodily harm to himself or herself or another when using defensive force that is intended or likely to cause death or great bodily harm to another if:

202. Id. at 417.
203. Id. (citing Bobbitt, 415 So. 2d at 728 (Overton, J., dissenting)).
(a) The person against whom the defensive force was used was in the process of unlawfully and forcefully entering, or had unlawfully and forcibly entered, a dwelling, residence, or occupied vehicle, or if that person had removed or was attempting to remove another against that person's will from the dwelling, residence, or occupied vehicle; and

(b) The person who uses defensive force knew or had reason to believe that an unlawful and forcible entry or unlawful and forcible act was occurring or had occurred.\(^{207}\)

There are certain situations in which the presumption will not apply. One such situation occurs if “[t]he person against whom the defensive force is used has the right to be in or is a lawful resident of the dwelling, residence, or vehicle” and there is no “injunction for protection from domestic violence or a written pretrial supervision order of no contact against that person.”\(^{208}\)

Another situation where the presumption will not apply is where the “person[] sought to be removed is a child or grandchild, or is otherwise in the lawful custody . . . of the person against whom the defensive force is used.”\(^{209}\) A third situation where the presumption will not apply is where “[t]he person who uses defensive force is engaged in an unlawful activity.”\(^{210}\)

Finally, the presumption does not apply if “[t]he person against whom the defensive force is used is a law enforcement officer . . . who enters a dwelling, residence, or vehicle in the performance of his . . . official duties.”\(^{211}\)

However, the officer must have identified himself in the manner prescribed by law, or the person using force must have known or reasonably should have known that the person entering was a law enforcement officer.\(^{212}\)

Additionally, the new section establishes:

A person who is not engaged in an unlawful activity and who is attacked in any other place where he has a right to be has no duty to retreat and has the right to stand his or her ground and meet force with force, including deadly force if he or she reasonably believes it is necessary to do so to prevent death or great bodily harm to himself or another or to prevent the commission of a forcible felony.\(^{213}\)

\(^{207}\) Id.

\(^{208}\) Id.

\(^{209}\) Id.

\(^{210}\) Id.


\(^{212}\) Id.

\(^{213}\) Id.
In addition, a person attempting to unlawfully enter another “person’s dwelling, residence, or occupied vehicle is presumed to be doing so with the intent to commit an unlawful act involving force or violence.”

Sections 776.012 and 776.031 of the Florida Statutes were amended. The former, which establishes when the use of force is justified when used in defense of a person, now includes the phrase “and does not have a duty to retreat,” while the latter, which establishes when the use of force is justified in defense of others, now includes the sentence: “A person does not have a duty to retreat if the person is in a place where he or she has a right to be.” Additionally, a person may use deadly force in defense of self under the circumstances described in the newly amended section 776.012. Thus, the duty to retreat has been abrogated in Florida.

V. THE EFFECT

A. The Reaction

Even before the Florida House of Representatives passed the Florida Senate-approved bill, opinions on the new legislation emerged. According to the bill’s sponsor, Representative Dennis Baxley, R-Ocala, the bill’s purpose is to give law-abiding citizens more rights, specifically the right to “meet force with force,” since having a duty to retreat is “a good way to get shot in the back.” The bill’s introduction followed an incident in North...
Florida, where a seventy-seven-year-old man and his wife had been living in a mobile home beside their house, which Hurricane Ivan had damaged. 221  

The man fired at a burglar, killing him. 222  Once the bill passed the Senate unanimously, 223 the uproar continued as "conservatives cheer[ed] and liberals recoil[ed]." 224  

Those who oppose the new law point out that Florida's law never required retreat if retreat would increase a person's chance of facing great bodily harm or death. 225  They voice concerns that the law is not age-specific or intent-specific, so many questions arise, such as whether a sixth-grader may justifiably retaliate against a bully or whether society can rely upon the judgment of a person who had been drinking in a bar and says he acted because he felt threatened. 226  They say it is a "virtual license for vigilante justice," and that it would make it difficult to prosecute homicides resulting from gang activity. 227  

Although the law does not mention guns, legislators appeared to believe that the underlying issue was people's feelings on gun control. 228  The fact that Marion Hammer, a National Rifle Association (NRA) lobbyist, pushed the bill through the legislature helps support this assumption. 229  Because the law passed in Florida so emphatically, the NRA plans to ride their "big tailwind" and get similar laws passed across the nation. 230  

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221. Rosica, supra note 11.  
222. Id. Prosecutors did not file criminal charges against the North Florida man. Id.  
223. Id.  
224. Hinkle, supra note 11.  
225. Stephen Majors, Opinions Mixed on Gun Law, BRADENTON HERALD, June 5, 2005, at 1C.  
226. Shannon Colavecchio-Van Sickler, Will Deadly Force Law Open Door to Abuses?, ST. PETE. TIMES, Apr. 8, 2005, at 1A.  
229. Alan Gomez, House Passes NRA-Backed Gun Proposal; Bush to Sign, PALM BCH. POST, Apr. 6, 2005, at 1A; Manuel Roig-Franzia, Fla. Gun Law to Expand Leeway for Self-Defense; NRA to Promote Idea in Other States, WASH. POST, Apr. 26, 2005, at A01 (noting that Marion Hammer is a former NRA president).  
230. Roig-Franzia, supra note 229.
B. Concealed Carry Redux?

In 1987, Florida became the first state to streamline the process of obtaining a permit to carry a concealed weapon. The same arguments arose then that have arisen now; namely, that the state will become a modern Wild West. Interestingly, in the subsequent years, the state’s violent crime rate decreased even as the number of weapons permits increased. The reason for the decline remains unclear, although some experts claim the explanation lies in tougher laws like the 10-20-life and three strikes laws, as well as tougher sentencing guidelines for violent felons. Others credit the country’s economic upswing and demographics for the nationwide decline in violent crime, which paralleled Florida’s decreased rate. Gun advocates say that the increased number of guns in private hands is the reason for the national decline in violent crime. However, gun control advocates disagree. They point out that Massachusetts has one of the lowest rates of violent crime in the nation and also has strict gun control laws. Also, even though Florida’s violent crime rate is decreasing, Florida remains one of the most violent states in the nation. Thus, with this new law, the same lines appear to be drawn. The question then becomes whether these positions are realistic.

While the question of whether statutes can deprive criminals of firearms has long been debated, “the relationship between the number of guns and the number of armed crimes” has received much recent attention. One argument proclaims an inverse relationship between the number of people armed and the violent crime rate; that is, as the former increases, the latter decreases. This argument relies on criminals being inherently logical.

231. Mark Schwed, Who’s Packing Heat in Florida?, PALM BCH. POST, June 4, 2005, at 6D.
233. Schwed, supra note 231.
234. Id.
235. Id.
236. Id.
237. Id.
238. Schwed, supra note 231.
239. Id. In 2000, Florida was second only to Arizona in the rankings for the most violent state in the country. Id. In 2003, Florida remained second, this time behind only South Carolina. Roig-Franzia, supra note 229.
240. Goddard, supra note 232.
242. Id.
243. Id.
Presumably, criminals “weigh the cost of committing a crime” and will hesitate before attempting to victimize an armed individual. Following this theory, thirty-three states are now “permitting law-abiding citizens to carry concealed weapons.” Supporters of Florida’s new law propound the same argument.

One study supported responsible ownership of guns after examining Canadian self-defense and comparing it to American self-defense. Another study refuted the commonly invoked image of people nobly defending their families at home when it found that defensive gun use more typically occurred outside of the home. That study’s results also suggested that hostile gun displays designed to frighten others inside the home may be more common than gun use in self-defense, with most hostile gun displays characterized as domestic violence directed against women. Responding to fears that allowing defensive gun use may lead to vigilantism, another study determined that defensive gun use is more often used for self-protection rather than to punish criminals. While homeowners may purchase guns for self-protection, the greater threat to those living in the home may come from other family members inside.

Thus, the studies do not clearly link gun ownership and increased violent crime, and, similarly, they cannot definitively advocate for or against the concept of defensive gun use.

VI. CONCLUSION

Florida’s new law specifically abrogates a duty to retreat. Additionally, it provides immunity from civil and criminal prosecution, and creates a

244. *Id.*
245. *Id.*
247. Gary A. Mauser, *Armed Self-Defense: The Canadian Case*, 24 J. CRIM. JUST. 393, 404 (1996) (examining the frequency with which Canadians and Americans used firearms to protect against criminal violence and concluding that private ownership of firearms, coupled with moderate firearms regulations, is beneficial to society and may contribute significantly to public safety).
249. *Id.* at 290.
presumption of fear of death or great bodily injury.\(^{253}\) Advocates of the new law laud it as a measure that provides the public with a means to better protect itself, as well as sends a message to criminals that the public will, with the full backing of this law, support anyone who chooses to stand his or her ground.\(^{254}\) Opponents declare the new law "will return Florida to the days of the Wild West—all but giving [six] million registered gun owners a license to kill in what is already one of the most violent states in America."\(^{255}\)

The battle over this new law resurrects past arguments regarding concealed carry laws,\(^{256}\) and the continuing conflict over whether that law benefited or harmed Florida may foreshadow another chronic debate. The two laws appear irrevocably linked, since some claim the "Stand Your Ground" law will encourage more people to get concealed-carry permits, while others declare it will lead to a reduction in violent crime.\(^{257}\) While it may be too soon to tell what effect the new law will have on the legal system,\(^{258}\) it seems it is not too early for controversy and debate.

\(^{254}\) Colavecchio-Van Sickler, supra note 226.
\(^{255}\) Suzanne Goldenberg, Florida Backs Right to Shoot, GUARDIAN, Apr. 8, 2005, at 16.
\(^{256}\) See Goddard, supra note 232, at 3.
\(^{257}\) Majors, supra note 225.
\(^{258}\) Id.
SOLICITATION AND CONSPIRACY: A FLORIDA PRACTITIONER’S GUIDE TO DOUBLE JEOPARDY DEFENSE AND ANALYSIS

ERIC ROSEN*

I. INTRODUCTION

Under Florida law, an individual may be convicted of solicitation if he “commands, encourages, hires, or requests another person” to commit a

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criminal act. An individual may also be convicted of conspiracy if that person "agrees, conspires, combines, or confederates with another person . . . to commit any offense." The issue that will be examined in this article is whether, according to Florida law, the solicitor can be convicted of both solicitation and conspiracy to commit a single criminal offense, or whether double jeopardy prohibits conviction for these two crimes.

For purposes of this article, a simple hypothetical fact pattern will help illustrate the issue. Zack hires Hunt to murder Ken. On that same day at that same time, Hunt agrees to commit the murder. This article will address the specific question of whether Zack can be convicted of both solicitation and conspiracy. Moreover, if Hunt commits the murder of Ken, can Zack be convicted of solicitation, conspiracy, and the murder? Under previous Florida cases, individuals have been convicted of both solicitation and conspiracy to commit one substantive offense such as murder or theft. The Fifth Amendment of the United States Constitution provides that "[n]o person shall... be subject for the same offence to be twice put in jeopardy of life or limb." The Florida Constitution also contains a double jeopardy clause stating, "[n]o person shall... be twice put in jeopardy for the same offense." The double jeopardy clause provides "protect[ion] against a second prosecution for the same offense after acquittal, and against a second prosecution for the same offense after conviction," and "protection against 'multiple punishments for the same offense' imposed in a single proceeding." Accordingly, both the United States Constitution and the Florida Constitution prohibit multiple convictions for the same act committed during a single episode when those offenses contain identical elements. The Florida Statutes regarding double jeopardy also contain exceptions which expand double jeop-

1. FLA. STAT. § 777.04(2) (2004).
2. § 777.04(3).
3. This fact pattern is loosely based upon the case of Zacke v. State, 418 So. 2d 1118, 1120 (Fla. 5th Dist. Ct. App. 1982).
4. Id.
6. U.S. CONST. amend. V.
10. See Blockburger v. United States, 284 U.S. 299, 304 (1932); State v. Florida, 894 So. 2d 941, 945–46 (Fla. 2005).
ardy prohibitions to grant further protections not provided by the United States Constitution.\(^1\)

Part II of this article will take a look at the Florida Statutes and case law regarding the crimes of solicitation and conspiracy. Part III of this article will examine the Florida Statute that codifies the "same-elements test" and the exceptions used to determine whether double jeopardy is an issue so as to prevent multiple convictions for the same offense.\(^2\) Part IV will examine Florida’s double jeopardy analysis and its effect on solicitation and conspiracy. Moreover, since this is a prima facie case under Florida jurisprudence, Part V of this article will explore how other jurisdictions have dealt with the question of whether a charge of solicitation and conspiracy should merge for purposes of protecting individuals from multiple convictions against double jeopardy. Part VI will then discuss how the Model Penal Code deals with convictions and sentencing in regards to the inchoate crimes of solicitation and conspiracy. Lastly, Part VII will conclude with a proposal for the Florida legislature to adopt the Model Penal Code’s approach to criminal convictions of solicitation and conspiracy.

II. SOLICITATION AND CONSPIRACY

A. Solicitation

The basic premise of a solicitation is the "enticement" of another person to commit a criminal offense.\(^3\) Even if the individual who is solicited to commit the crime never agrees to the request, the solicitor has still committed the crime of solicitation.\(^4\) Section 777.04(2) of the Florida Statutes provides:

A person who solicits another to commit an offense prohibited by law and in the course of such solicitation commands, encourages, hires, or requests another person to engage in specific conduct which would constitute such offense or an attempt to commit such offense commits the offense of criminal solicitation, ranked for purposes of sentencing as provided in subsection (4).\(^5\)

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12. See generally Blockburger, 284 U.S. at 304.
14. Id. (citing State v. Waskin, 481 So. 2d 492, 493–94 n.2 (Fla. 3d Dist. Ct. App. 1985)).
15. FLA. STAT. § 777.04(2) (2004).
Florida courts have stated that "[t]he crime of solicitation is completed when the actor with intent to do so has enticed or encouraged another to commit a crime; the crime need not be completed." 16 Furthermore, the crime of solicitation itself need not be violent or even involve a violent crime. 17 Since the solicitation is completed by one party simply asking another to commit a crime, no agreement is necessary by the person solicited. 18 The question that Florida courts have seemed to evade is what happens to the solicitation when the solicitee agrees with the solicitor and a conspiracy has been formed?

B. Conspiracy

Florida courts explain that "'[t]he crime of conspiracy is comprised of the mere express or implied agreement of two or more persons to commit a criminal offense; both the agreement and an intention to commit an offense are essential elements.' " 19 Florida statutes codifying the crime of conspiracy state that "'[a] person who agrees, conspires, combines, or confederates with another person or persons to commit any offense commits the offense of criminal conspiracy, ranked for purposes of sentencing as provided in subsection (4).' " 20 An individual who combines with a police officer to commit a crime cannot be convicted of conspiracy because the officer lacks the required intent to ultimately commit the substantive offense. 21 However, an individual who requests a police officer to commit a crime may be convicted of solicitation. 22 Furthermore, the object of the conspiracy for purposes of sentencing is already factored into the guidelines providing the appropriate punishment. 23

Interestingly, a defendant in Florida has argued that a conviction for solicitation should merge with a conviction for conspiracy. 24 The Florida court

16. State v. Johnson, 561 So. 2d 1321, 1322 (Fla. 4th Dist. Ct. App. 1990) (finding that an individual can be convicted of solicitation even when the person he solicits is a police officer); see also Waskin, 481 So. 2d at 498.
17. Lopez, 864 So. 2d at 1153.
18. Johnson, 561 So. 2d at 1323.
20. § 777.04(3).
22. Id. (rejecting defendant's argument that an individual cannot be convicted of solicitation when the person he solicits is a police officer).
dismissed this argument under circumstances where merger would not apply because the conspiracy by the defendant was between himself and his co-defendant, and the solicitation occurred with another individual. However, by the court's acknowledgment of the appellant's merger theory, it is logical to infer that they have recognized the possibility of merger under other circumstances. The inchoate crimes of solicitation and conspiracy, although appearing simple at first glance, can raise complex issues.

III. DOUBLE JEOPARDY

The Fifth Amendment of the United States Constitution provides that "[n]o person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb." The Florida Constitution also contains a double jeopardy clause stating, "[n]o person shall . . . be twice put in jeopardy for the same offense." The Double Jeopardy Clause provides three separate types of protection for criminal defendants. These safeguards include "protection against a second prosecution for the same offense after acquittal, and against a second prosecution for the same offense after conviction." The third "protection against 'multiple punishments for the same offense' imposed in a single proceeding" is the most important protection for purposes of this analysis. Both the United States Supreme Court and the Supreme Court of Florida prohibit multiple convictions for the same act committed during a single episode when those offenses contain identical elements.

25. Id. In Tarawneh, the Fourth District Court of Appeal rejected the argument that conviction for solicitation should merge with the conviction for conspiracy. Id. However, in Tarawneh the husband's conviction for conspiracy was based on an agreement between the husband and his wife to have a third party murdered. Id. The solicitation charge was based upon the husband's attempted procurement of one Petrillo to commit the murder of the third party. Id. The court's rejection of the merger theory was premised on the fact that the crimes were committed at a different time with different actors. Tarawneh, 562 So. 2d at 772. Therefore, there was no issue as to double jeopardy. Id.

26. See id.

27. U.S. CONST. amend. V.


30. Id. at 381.


32. See Blockburger v. United States, 284 U.S. 299, 304 (1932); State v. Florida, 894 So. 2d 941, 945 (Fla. 2005).
A. Blockburger and the "Same-Elements" Test

The United States Supreme Court in Blockburger v. United States explored the issue of double jeopardy and whether an individual may be punished more than once for the same offense. In Blockburger the defendant was convicted of Count II for sale of morphine, Count III for sale of morphine not in the original stamped package, and Count V for selling morphine without a written order. Counts III and V occurred on the same day with the same person purchasing the morphine. The defendant appealed and argued that his conviction violated his protection against double jeopardy because the morphine was only sold to one person and this constituted a single offense. The Court rejected the petitioner's first argument because his charges for the second and third counts "although made to the same person, were distinct and separate sales made at different times." The Court also reasoned that the legislature had intended to punish "[e]ach of several successive sales [as] a distinct offense."

The Court went on to discuss Counts III and V which included sale of narcotics not in the original stamped package and selling any of such drugs not pursuant to a written order. The question was then raised whether, during the one sale of narcotics, the individual had "committed two offenses or only one." The Court stated that the test to determine whether two offenses had been committed "is whether each provision requires proof of a fact which the other does not." The Court held that a single act may be a violation of two statutes, and the petitioner's consecutive sentences were upheld. The test created by Blockburger has been commonly referred to in Florida as the "same-elements" test and has been codified under section 775.021(4) of the Florida Statutes.

33. Blockburger, 284 U.S. at 301–02.
34. Id. at 301.
35. Id.
36. Id.
37. Id.
38. Blockburger, 284 U.S. at 302.
39. Id. at 303–04.
40. Id. at 304.
41. Id. (citing Gavieres v. United States, 220 U.S. 338, 342 (1911)).
42. Id. (citing Gavieres, 220 U.S. at 342).
B. Section 775.021(4) of the Florida Statutes

Under Florida law, the courts will examine the legislative intent to determine whether multiple convictions for different crimes occurring during a single criminal transaction can be upheld. When the legislative intent is not clear, the courts will apply the "same-elements" test as set forth in Blockburger. Florida has codified the Blockburger test in section 775.021(4) of the Florida Statutes. This statute also provides several exceptions to the "same-elements" test that enhance double jeopardy protections for individuals facing criminal conviction. Section 775.021(4)(a) of the Florida Statutes provides:

Whoever, in the course of one criminal transaction or episode, commits an act or acts which constitute one or more separate criminal offenses, upon conviction and adjudication of guilt, shall be sentenced separately for each criminal offense; and the sentencing judge may order the sentences to be served concurrently or consecutively. For the purposes of this subsection, offenses are separate if each offense requires proof of an element that the other does not, without regard to the accusatory pleading or the proof adduced at trial.

Florida cases apparently have yet to apply this test to the inchoate offenses of solicitation and conspiracy when both occur during one criminal episode. However, section 775.021(4) is consistently applied in cases dealing with double jeopardy issues.

1. Overview of Section 775.021(4) and Exceptions: State v. Florida

In a recent case, the Supreme Court of Florida provided a helpful overview of how to apply the provisions of section 775.021(4) of the Florida Statutes.

45. State v. Florida, 894 So. 2d 941, 945 (Fla. 2005).
46. Id.
47. See § 775.021(4).
48. See § 775.021(4)(b)(1)-(3).
49. § 775.021(4)(a) (emphasis added).
51. See State v. Florida, 894 So. 2d 941, 944 (Fla. 2005) (finding that the conviction of both aggravated battery on a law enforcement officer and attempted second degree murder arising from one bullet shot by the defendant into the officer's head did not violate double jeopardy).
The Supreme Court of Florida in \textit{State v. Florida} was faced with the question of whether an individual can be convicted of aggravated battery on a police officer and attempted second-degree murder with a firearm arising from a single criminal act by the defendant of firing a bullet and hitting a police officer.\footnote{Id. at 944-49.} On its face, the case appeared to be a clear cut violation of the defendant’s constitutional rights protected under the double jeopardy clause.\footnote{Id. at 944.} However, the court held that the defendant’s conviction of attempted second-degree murder and aggravated battery on a law enforcement officer did not violate double jeopardy, and consecutive sentences under section 775.021(4) were proper.\footnote{See Lovell v. State, 882 So. 2d 1107, 1108 (Fla. 5th Dist. Ct. App. 2004) (stating that dual convictions satisfying the “same-elements” test may still violate double jeopardy protections when the offenses are “degree variants of the same core offense”).}

The facts of the case are relatively straightforward. The defendant, during a single criminal episode, shot a police officer in the head with a handgun.\footnote{Florida, 894 So. 2d at 949.} The jury came back with a verdict under Count VI as guilty of aggravated battery on a law enforcement officer and guilty on Count VII for attempted second-degree murder with a firearm.\footnote{Id. at 944.} During sentencing, “defense counsel moved to vacate the conviction on” double jeopardy grounds alleging that the convictions were for “the same exact conduct.”\footnote{Id.} The trial court then withheld sentencing on Count VI but sentenced the defendant to life imprisonment on Count VII.\footnote{Id. at 944.} The Fourth District Court of Appeal affirmed per curiam and without an opinion.\footnote{Id. at 949.} However, when the defendant asserted post-conviction relief on double jeopardy grounds, the Fourth District reversed and vacated the conviction on Count VI.\footnote{Id. (citing Florida v. State, 855 So. 2d 109, 111 (Fla. 4th Dist. Ct. App. 2003)).} The Supreme Court of Florida granted de novo review of the case on a motion for post-conviction relief.\footnote{Id. at 944-45.}

The Supreme Court of Florida agreed with the State’s contention that attempted second-degree murder and aggravated battery on a law enforcement officer contained elements distinct from one another.\footnote{Id. at 946.} The court narrowly applied the “same-elements” test and found that “[v]ictim contact is
unnecessary for attempted second-degree murder but essential to aggravated battery, and unlike attempted second-degree murder, an act need not have had the potential to cause death to constitute aggravated battery." The court then examined the exceptions under section 775.021(4)(b) which provides:

The intent of the Legislature is to convict and sentence for each criminal offense committed in the course of one criminal episode or transaction and not to allow the principle of lenity as set forth in subsection (1) to determine legislative intent. Exceptions to this rule of construction are:

1. Offenses which require identical elements of proof.
2. Offenses which are degrees of the same offense as provided by statute.
3. Offenses which are lesser offenses the statutory elements of which are subsumed by the greater offense.  

Applying the exceptions provided under this statute is a complex task. The Supreme Court of Florida quickly dismissed the "identical elements" exception under section 775.021(4)(b)(1), explaining that proof of attempted second-degree murder requires the state to prove the defendant's act could have caused death where as aggravated battery does not require this proof.

The court also went on to analyze the application of section 775.021(4)(b)(2) which bars a dual conviction for "[o]ffenses which are degrees of the same offense as provided by statute." The test under this exception looks to see whether the crimes committed during the single criminal episode are done toward the same "core offense." In determining if both crimes have the same "core offense," the court will look to see what the primary evil is of the crime that has been committed. If the two offenses con-

64. Id.
65. FLA. STAT. § 775.021(4)(b) (2004).
68. § 775.021(4)(b)(2).
69. Florida, 894 So. 2d at 948. In Johnson v. State, the defendant had stolen a purse that contained a firearm and a certain amount of cash. 597 So. 2d 798, 799 (Fla. 1992). He was separately convicted of grand theft of cash and grand theft of a firearm. Id. The court of appeals reversed on double jeopardy grounds because both takings occurred during one criminal taking. Id.
70. See Carawan v. State, 515 So. 2d 161, 173 (Fla. 1987) (Shaw, J. dissenting) ("The primary evil of aggravated battery is that it inflicts physical injury on the victim; [and that] the primary evil of attempted homicide is that it may inflict death . . . ."); Lovell v. State, 882 So. 2d 1107, 1109 (Fla. 5th Dist. Ct. App. 2004) (holding that a conviction for first degree felony
tain the same "primary evil," no dual conviction will withstand double jeopardy protection. 71 Because the "primary evil" of aggravated battery is the infliction of bodily harm, and the "primary evil" of attempted murder is the possibility of killing the victim, both crimes are not derived from the same "core offense." 72 In Florida, the court followed precedent 73 and held that aggravated battery and attempted murder were "not merely degree variants of the same core offense, and therefore [did] not come within the [statutory] exception." 74

Next, the court analyzed the last exception to the Blockburger test as codified under the Florida Statutes. Section 775.021(4)(b)(3) of the Florida Statutes bars dual convictions for two separate crimes when one of the offenses is the lesser offense, "the statutory elements of which are subsumed by the greater offense." 75 However, the court in Florida made clear that this subsection only applies "to necessarily lesser included offenses listed in Category 1 of the Schedule of Lesser Included Offenses." 76 In other words, "necessarily lesser included offenses are those in which the elements of the lesser offense are always subsumed within the greater, without regard to the charging document or evidence at trial." 77 The court also discussed the difference between necessarily lesser included offenses and permissive included offenses. 78 The permissive lesser included offense is fact specific where both crimes appear different on the face of the statute; but in this particular case, one crime cannot be committed unless the other has been perpetrated. 79 The court, in applying the necessarily lesser included offense exception, found that dual convictions for aggravated battery on a police officer and attempted second-degree murder did not violate double jeopardy protections since aggravated battery is not a necessarily lesser included offense under Category 1 of the Schedule of Lesser Included Offenses. 80 Judging from the court's opinion in this case, the double jeopardy protections under Florida law are

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71. See Johnson, 597 So. 2d at 799.
73. Florida, 894 So. 2d at 949 (Fla. 2005) (citing Gordon, 780 So. 2d at 23).
74. Id.
76. Florida, 894 So. 2d at 947.
77. Id.
78. Id.
79. Id. (citing State v. Weller, 590 So. 2d 923, 925 n.2 (Fla. 1991)).
80. Id.
narrow, and the application of section 775.021(4) of the Florida Statutes can be cumbersome. 81

2. The Single Criminal Episode

Another issue important to double jeopardy analysis under Florida law is the length of one criminal episode. When does a single criminal transaction end and another begin? The court appears to have taken a very narrow view of timing for a single criminal episode, almost insuring multiple punishments. 82 The Supreme Court of Florida in Hayes v. State 83 settled conflicting law among the First, Third, and Fifth District Courts of Appeal. 84 The question presented in Hayes was “whether a defendant may be separately convicted of both armed robbery and grand theft of a motor vehicle where the defendant steals various items from inside a victim’s residence, including the victim’s car keys, and then proceeds outside the victim’s residence to steal the victim’s motor vehicle utilizing those keys.” 85 After being “convicted of armed robbery, armed burglary of a structure, and grand theft of a motor vehicle,” 86 Hayes appealed, arguing that because the acts stemmed from one criminal episode, “double jeopardy prohibited [multiple] convictions for both of these offenses because they are degree variants of the core offense of theft.” 87

The court in Hayes then discussed the conflict between the First District and the Fifth District. 88 In Henderson v. State, 89 the First District upheld multiple convictions for robbery and grand theft of an automobile on substantially similar facts to that of Hayes, which states that the “the robbery . . . was sufficiently separated . . . by both time and geography.” 90 The Fifth District Court of Appeal, in another case with facts indistinguishable from Hayes, concluded that because the robbery and theft of the automobile occurred during one continuous sequence of events and was the “product of the same force and fear,” dual convictions had to be reversed. 91 The Supreme Court of Florida rejected the Fifth District’s analysis and went on to rule that

81. See generally Florida, 894 So. 2d at 941 (Fla. 2005).
82. See Hayes v. State, 803 So. 2d 695 (Fla. 2001).
83. Id. at 695.
84. Id. at 705.
85. Id. at 697.
86. Id.
87. Hayes, 803 So.2d at 698.
88. Id.
89. 778 So. 2d 1046 (Fla. 1st Dist. Ct. App. 2001).
90. Id. at 1047.
the defendant may be convicted and consecutively sentenced to robbery and
grand theft of an automobile. The court established that in determining
double jeopardy issues resulting from stealing one victim’s personal belong-
ings,
courts should look to whether there was a separation of time, 
place, or circumstances between the initial armed robbery and the 
subsequent grand theft, as those factors are objective criteria utilized to determine whether there are distinct and independent 
criminal acts or whether there is one continuous criminal act with a 
single criminal intent.

The court reasoned that the defendant, Hayes, first entered the home of 
the victim and robbed him of many personal items. This ended the robb-
ery. Second, the defendant then went on to separately steal the victim’s 
automobile. The court in Hayes recognized the criminal acts of the defen-
dant as “sufficiently separated as to time and place so as to constitute distinct and independent criminal acts.” Applying the reasoning of the Supreme Court of Florida in both Florida and Hayes, a valid argument can be made that a conviction for solicitation and conspiracy occurring at the same time, 
with the same criminal object should be barred under double jeopardy analy-
sis.

IV. APPLYING FLORIDA’S DOUBLE JEOPARDY ANALYSIS TO SOLICITATION AND CONSPIRACY

A. “Same-Elements” Test

To determine whether multiple convictions for solicitation and conspir-
acy arising out of one criminal episode violate a defendant’s protection against double jeopardy, the courts will first explore whether the legislature intended separate punishments. Absent clear legislative intent to allow for multiple punishments for two separate crimes, courts will apply the Block-
burger test, which the Florida Legislature later codified in section 775.021(4)(a). According to the Florida Statutes codification of the Blockburger "same-elements" test, an individual may be convicted of multiple crimes when "in the course of one criminal transaction or episode, [he or she] commits an act or acts which constitute one or more separate criminal offenses." To determine whether an offense is separate for double jeopardy purposes, each offense must contain "an element that the other does not." It is relatively clear that the crimes of solicitation and conspiracy will not pass the "same-elements test" under section 775.021(4)(a) of the Florida Statutes. The crime of solicitation under the Florida Statutes punishes the individual who "commands, encourages, hires, or requests another person" to commit a crime. The crime of conspiracy punishes "[a] person who agrees, conspires, combines, or confederates with another person . . . to commit [an] offense" prohibited by law. Clearly, the crime of solicitation does not require the element of an "agreement" to commit the crime. Furthermore, the crime of conspiracy does not require the element of one individual encouraging or requesting the other to commit the offense. Since solicitation and conspiracy are two separate crimes under the "same-elements" test, which therefore does not prohibit separate convictions of each, it is necessary to review the exceptions listed under section 775.021(4)(b) of the Florida Statutes. Multiple convictions are barred "if the offenses meet the criteria in [any] one of the exceptions."
B. Identical Elements of Proof

The next issue under the analysis requires a review of the illustration provided in the introduction of this article. Zack hires Hunt to kill Ken and at that same time and location, Hunt agrees to commit the murder. The first exception under section 775.021(4)(b)(1) of the Florida Statutes bars multiple convictions for offenses occurring during one criminal episode that “require identical elements of proof.”\textsuperscript{110} Here, the only proof needed to sustain the charge against Zack for conspiracy would be the fact that Hunt agreed.\textsuperscript{111} Moreover, the proof needed to find Zack guilty of solicitation would be the fact that he requested or hired Hunt to commit the murder.\textsuperscript{112} The identical elements of proof exception is not easy to overcome and is very similar to the “same-elements” test; however, even if the two crimes fail to meet this test, the other exceptions must still be analyzed.\textsuperscript{113}

C. Primary Evil and Degree Variant

The second provision under section 775.021(4)(b)(2) of the Florida Statutes provides an exception for “[o]ffenses which are degrees of the same offense as provided by statute.”\textsuperscript{114} To fulfill this exception, the defendant must prove that the crimes committed were “aggravated forms of the same underlying offense distinguished only by degree factors.”\textsuperscript{115} The Supreme Court of Florida in Gordon v. State used a two-step analysis to see whether two criminal acts committed during a single criminal episode would fall within exception two of section 775.021(4)(a) of Florida Statutes.\textsuperscript{116} The first question is whether the two crimes constitute separate offenses under the Blockburger “same-elements” test.\textsuperscript{117} The next inquiry is “whether the crimes are ‘degree variants’ or aggravated forms of the same core of-
As previously discussed, there is no doubt that solicitation to commit murder and conspiracy to commit murder, are two separate crimes under the "same-elements" test. For purposes of double jeopardy, the argument must now be made that solicitation to commit murder and conspiracy to commit murder occurred during one criminal episode, and "are merely degree variants of the [same] core offense."

According to Hayes, and referring to the illustration of Zack’s hiring Hunt to kill Ken, it is clear that the offenses of solicitation and conspiracy committed by Zack both occurred during one criminal episode. As previously mentioned, Hayes examined "whether there was a separation of time, place, or circumstances" between the two crimes to determine "whether there are distinct and independent criminal acts or whether there is one continuous criminal act with a single criminal intent." In the case of Zack’s hiring Hunt to commit murder, there is no separation of "time, place, or circumstances" between the request by Zack and the subsequent agreement by Hunt to commit the offense. Furthermore, both of these acts occurred during "one continuous criminal act with a single criminal intent." Zack needs only to command, encourage, hire, or request Hunt to commit a crime to have committed solicitation. At that same time, and without any further act or intent on behalf of Zack, Hunt simply needs to agree to the scheme for Zack to have committed not only solicitation, but conspiracy as well. Having established in this illustration that the crimes were committed during one

118. *Id.*
119. *See id.* at 20; *see also* FLA. STAT § 777.04(2)–(3) (2004) (stating solicitation includes a request, or encouragement, where criminal conspiracy only requires an agreement to commit an offense proscribed by the law).
120. *Sirmons*, 634 So. 2d at 154 (reversing conviction of grand theft of an automobile and armed robbery with a weapon because both crimes are merely degree variants of the core offense of theft and both occurred during one criminal transaction; *see also* State v. Florida, 894 So. 2d 941, 948–49 (Fla. 2005) (rejecting argument that aggravated battery is a degree variant of attempted murder); Hayes v. State, 803 So. 2d 695, 700 (Fla. 2001); Mixson v. State, 857 So. 2d 362, 365 (Fla. 1st Dist. Ct. App. 2003) (holding that two counts of grand theft must be struck down because they are part of the same core offense of theft and occurred during one criminal episode).
121. *See Hayes*, 803 So. 2d at 704 (finding that criminal episodes are separated by time, place, and circumstance).
122. *Id.*
123. *Id.*
124. *Id.*
126. *See § 777.04(2)–(3).*
criminal episode, the issue remaining to be resolved is whether solicitation and conspiracy are "degree variants" of part of the same core offense.127

Florida courts have used the "primary evil test" to determine whether separate crimes are "degree variants" of the same "core offense."128 According to State v. Florida, the court looks at the potential harm that the criminal act will or may cause as a result.129 Under this test, the "primary evil" of a solicitation is that an individual will request, encourage, or hire another to commit an offense with the potential that the other individual will agree, although it is not necessary for there to be an agreement.130 Furthermore, the "primary evil" of conspiracy is the agreement between two or more people to commit a criminal offense.131 Under this analysis, it would appear that the solicitation would be a lesser "degree variant" of the "core offense" of conspiracy to commit murder because both are punishing the potential for an agreement or actual agreement that may result in the solicitation becoming a conspiracy.132 The argument for double jeopardy protection of an individual convicted of solicitation and conspiracy to commit a crime, arising during one criminal episode, may find its chances under the "degree variant" exception in section 775.021(4)(b)(2) of the Florida Statutes.133

D. Lesser Offense Subsumed by the Greater Offense

The most persuasive double jeopardy argument which would ultimately bar dual convictions for a solicitation to commit murder and conspiracy to commit murder, arising during one criminal transaction, will likely be found in the exception listed under section 775.021(4)(b)(3) of the Florida Statutes.134 The third provision under section 775.021(4)(b) of the Florida Statutes grants exception to "[o]ffenses which are lesser offenses the statutory elements of which are subsumed by the greater offense."135 The court in

128. See, e.g., Florida, 894 So. 2d at 948–49.
129. Id. at 948–49 (finding that the primary evil of battery is intentional, nonconsensual touching, and the primary evil of attempted second-degree murder is the potential of the defendant’s act to cause death).
130. See § 777.04(2); State v. Johnson, 561 So. 2d 1321, 1322–23 (Fla. 4th Dist. Ct. App. 1990) (stating that "solicitation is completed by one party asking another" with no agreement or action required by the second party).
131. See § 777.04(3).
132. See § 777.04(2)–(3); Sirmons v. State, 634 So. 2d 153, 154 (Fla. 1994).
134. § 775.021(4)(b)(3).
135. Id.
Florida explained that this exception only applies “to necessarily lesser included offenses listed in Category 1 of the Schedule of Lesser Included Offenses.” Accordingly, a review of the Florida Standard Jury Instructions in Criminal Cases provides that neither solicitation nor conspiracy have any necessarily lesser included offenses listed within their jury instruction.

Moreover, Category 1 of the Schedule of Lesser Included Offenses located in the appendix of the jury instructions also fails to mention either solicitation or conspiracy. An argument to include solicitation as a necessarily lesser included offense of conspiracy is not an easy obstacle to overcome. The Supreme Court of Florida in Ray v. State has confirmed that the Category 1 “schedule is presumptively correct and complete, and the Court expects that using the schedule will lessen the confusion surrounding lesser included offenses.” To succeed under this exception, the defendant must overcome the presumption that Category One of the Schedule of Lesser Included Offenses is complete and argue that solicitation is a necessarily lesser included offense to conspiracy.

An argument to include solicitation as a lesser included offense to conspiracy is not without merit. Arguments have been made that a solicitation can also be referred to as an attempted conspiracy. In Hutchinson v. State, the appellant requested a man by the name of Pledger to kill one Dutch Thomas. Pledger then “reported the incident to the State Attorney’s office.” The appellant was convicted of attempted conspiracy, and on appeal the question was raised whether attempted conspiracy was recognized as a crime under Florida law. The Second District Court of Appeal reversed the conviction, holding that attempted conspiracy was not a crime and a

136. State v. Florida, 894 So. 2d 941, 947 (Fla. 2005) (finding that aggravated battery is not a necessarily lesser included offense of attempted murder recorded under Category One of the Schedule of Lesser Included Offenses).


138. Id. at 609.

139. 403 So. 2d 956 (Fla. 1981).

140. Id. at 961 n.7.

141. Hutchinson v. State, 315 So. 2d 546, 547–49 (Fla. 2d Dist. Ct. App. 1975); see also Model Penal Code & Commentaries § 5.02 cmt. 1 (Official Draft & Revised Comments 1985) (explaining that “[s]olicitation may . . . be thought of as an attempt to conspire”).

142. Hutchinson, 315 So. 2d at 547.

143. Id.

144. Id. It should be noted that at the time the appellant was convicted, the crime of solicitation was not codified but would have to be charged under the crime of common law solicitation under section 775.01 of the 1973 Florida Statutes. Id. This statute made “common law [crimes] of England in relation to crimes applicable in Florida.” Id.
charge of solicitation would be proper. However, the court did concede to the proposition that, theoretically, a solicitation is the equivalent to attempted conspiracy. The law is well-established that an individual who succeeds in the commission of a crime may not be convicted of both the criminal attempt and the substantive offense. Theoretically, because a solicitation is tantamount to the non-existent crime of attempted conspiracy, an argument could be made that once the solicitee agrees with the solicitor's proposition then the object of the solicitation has been completed and would therefore merge into the conspiracy. In this case, if a jury were to convict the solicitor of conspiracy, then the lesser offense of solicitation, or theoretically an attempted conspiracy, would be "absorbed by the greater offense."

Furthermore, one Florida court has recognized that punishment for solicitation is already factored into the sentencing for a conviction of conspiracy. In Crofton v. State, the Second District Court of Appeal held that the trial court departed from the recommended sentencing guidelines and the case was reversed and remanded. Geraldine Crofton, the defendant, arranged for her husband to be murdered by seeking out the help of one Vance Ellison. Crofton actively provided information to plan the murder while Ellison subsequently hired two other individuals to commit the murder. Crofton was later convicted of conspiracy to commit the murder of her husband and sentenced to twenty-five years in prison. On appeal, Crofton argued that her conviction had exceeded the recommended sentencing provided in Florida guidelines. The court reversed the sentence because "the trial judge improperly considered factors inherent in the underlying crime to justify departure." The Second District Court of Appeal further noted that "[t]he [lower] court also saw aggravation in the fact that Geraldine solicited Ellison to commit the murder." The court then explained that solicitation

145. Hutchinson, 315 So. 2d at 549.
146. Id.
147. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 375 (3d ed. 2001).
148. See id.
149. Id.
151. Id. at 317.
152. Id. at 320.
153. Id. at 318.
154. Id.
155. Crofton, 491 So. 2d at 318.
156. Id.
157. Id. at 319. The trial judge improperly considered the fact that the object of the conspiracy was murder and that this was already factored into the sentencing guidelines. Id. at 320.
158. Id. (emphasis added).
to commit murder "is in the very nature of the charge of conspiracy to commit murder and is already factored into the sentencing guidelines."\(^{159}\) The case was sent back to the lower court for resentencing.\(^{160}\) According to Crofton, it would appear that punishment for solicitation to commit murder is already factored into the punishment for conspiracy.\(^{161}\) Accordingly, solicitation should be a necessarily lesser included offense to conspiracy, thus barring multiple convictions.\(^{162}\) Other jurisdictions have dealt with the complex case of double jeopardy analysis for solicitation and conspiracy and may be helpful insight as to whether an argument to bar multiple convictions will be successful.\(^{163}\)

V. JURISDICTION ANALYSIS

A. Michigan Rejects Double Jeopardy Argument

In Michigan, the issue of whether double jeopardy prohibits multiple convictions for the crimes of solicitation and conspiracy arising during one criminal transaction has been raised.\(^{164}\) The case of People v. Jones was decided in an unpublished opinion on March 22, 2005.\(^{165}\) In Jones, the defendant was convicted and sentenced to nineteen to thirty years imprisonment for solicitation and second-degree murder, and he also received life imprisonment on a conspiracy count.\(^{166}\) On appeal, the defendant argued that his convictions violated both federal and state protections against double jeopardy.\(^{167}\) Similar to the Florida double jeopardy analysis, the Court of Appeals first determined the legislative intent in permitting multiple punishments.\(^{168}\) However, unlike Florida, the Michigan courts believe "[s]tatutes prohibiting conduct violative of distinct social norms are generally viewed as separate and amenable to permitting multiple punishments."\(^{169}\) The Court of Appeals then explained that "the purpose of the conspiracy statute is to pro-

159. Corfton, 491 So. 2d at 320.
160. Id.
161. See id.
162. See id. at 319–20.
164. See Jones, 2005 WL 657578, at *4–5; Burgess, 396 N.W.2d at 825.
166. Id.
167. Id. at *4.
168. Id. at *5.
169. Id. (citing People v. Pena, 569 N.W.2d 871, 875 (Mich. Ct. App. 1997)).
tect society from the increased danger presented by group activity as opposed
to individual activity.”170 The court then found that the purpose of the solicita-
tion statute was to punish those people who try to induce others into com-
mittting a criminal act.171 The court held that since the statutes were aimed at
two separate and distinct social norms, conviction for each crime “[d]id not
offend double jeopardy principles.”172 Lastly, the court rejected the defen-
dant’s argument that convictions of both solicitation and conspiracy should
be barred because each required proof of the same evidence.173 This test is
similar to Florida’s double jeopardy statute, which exempts those crimes
which require identical elements of proof, thus barring multiple convic-
tions.174 However, the Supreme Court of Michigan has rejected the adoption
of this test, so the Court of Appeals would not apply an analysis.175

In Jones, the Michigan Court of Appeals, in coming to their conclusion,
cited the case of People v. Burgess.176 It should be noted that the court in
Burgess recognized that under double jeopardy there is “a close question . . .
where . . . [a] defendant is convicted of inciting, inducing or exhorting an-
other to commit murder in addition to conspiracy and first-degree murder.”177
This analysis appears misplaced. The Burgess court came to the conclusion
that the intent of the legislature was to punish the solicitation and conspiracy
separately.178 However, the statute which proscribes solicitation was earlier
found to be “a special kind of accomplice statute,” 179 which stated “[a]ny
person who incites, induces or exhorts any other person to unlawfully . . .
murder . . . shall be punished in the same manner as if he had committed the
offense.”180 Nonetheless, the court found that the statute was meant to codify
common law crime of solicitation and ultimately upheld the defendant’s mul-
tiple convictions.181 The conclusion in this analysis relied on the legislature’s
intent in establishing statutes that were meant to punish individuals for sepa-
rate crimes.182 Another jurisdiction analyzed a similar “inciting” statute to

170. Jones, 2005 WL 657578, at *4 (citing People v. Sammons, 478 N.W.2d 901, 913
171. Id.
172. Id. (citing Pena, 569 N.W.2d at 875).
173. Id.
176. Id. (citing People v. Burgess, 396 N.W.2d 814, 823 (Mich. Ct. App. 1986)).
177. Burgess, 396 N.W.2d at 823.
178. Id. at 824.
179. Id. at 823 (citing People v. Rehkopf, 370 N.W.2d 296, 298 (Mich. 1985)).
180. Id. (citation omitted).
181. Id. at 824.
182. Burgess, 396 N.W.2d at 824.

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the one analyzed in Burgess and came to a different conclusion as to whether an individual can be convicted of solicitation, conspiracy, and the substantive offense of murder.\(^{183}\)

**B. New Mexico: One Last Defense**

In the case of *State v. Vallejos*, the New Mexico Court of Appeals reversed the defendant's convictions for solicitation and conspiracy.\(^{184}\) In *Vallejos*, the defendant appealed his convictions for conspiracy to commit first-degree murder and solicitation to commit murder, arguing that the multiple punishments violated his protection against double jeopardy.\(^{185}\) The state secured a conviction on the fact that the defendant had solicited and conspired with his nephew, Chris Sedillo, to shoot and kill Sybil Saiz.\(^{186}\) The criminal plan was executed; however, the victim, Ms. Saiz, survived.\(^{187}\) The defendant was formally adjudicated as guilty of both solicitation and conspiracy, but the court imposed concurrent sentences for the dual convictions.\(^{188}\) The defendant then argued that the merger of the two offenses for sentencing purposes was in contradiction to his right against double jeopardy.\(^{189}\) As a result, the Court of Appeals analyzed whether the legislature intended multiple convictions for crimes relating to a solicitation.\(^{190}\)

The court first explained that in a prior case, it determined that the crimes of solicitation and conspiracy merge for purposes of sentencing and the defendant may only receive a concurrent sentence for the two crimes.\(^{191}\) The court of appeals then stated that "imposition of concurrent sentences did not render multiple convictions for the same offense harmless," and that "besides habitual liability, other potential adverse collateral consequences flow from allowing a separate conviction to stand, including delay in the defendant's eligibility for parole, the use of the second conviction for impeachment purposes, and general social stigma."\(^{192}\) The court then concluded that the crimes of solicitation and conspiracy to commit murder may be prosecuted and submitted to a jury which can render a verdict on both counts.\(^{193}\)


\(^{184}\) *Id.* at 670.

\(^{185}\) *Id.*

\(^{186}\) See *id.*

\(^{187}\) *Id.*

\(^{188}\) *Vallejos*, 9 P.3d at 674.

\(^{189}\) *Id.*

\(^{190}\) *Id.* (citing Swafford v. State, 810 P.2d 1223, 1234 (N.M. 1991)).

\(^{191}\) *Id.* at 675 (citing State v. Shade, 726 P.2d 864, 878 (N.M. Ct. App. 1986)).

\(^{192}\) *Id.* (citing *State v. Pierce*, 792 P.2d 408, 419 (N.M. 1990)).

\(^{193}\) *Vallejos*, 9 P.3d at 675–76.
However, the court held that the "[d]efendant will not be held 'liable' or 'guilty' of criminal solicitation upon formal adjudication or entry of judgment and sentence by the trial court."194 Thus, the court vacated the conviction for criminal solicitation.195 Analyzing the Florida Statutes codifying solicitation and conspiracy in light of Florida’s accomplice liability statute may prove to be one last defense in barring multiple convictions for the two inchoate offenses.196

C. Applying the New Mexico Approach

The New Mexico statute construed in Vallejos was substantially different from the Florida statute that punishes criminal solicitation.197 The problems that arose in Vallejos were the statutes "incongruous provisions" coupled with the fact that the statute also combined accomplice liability with the inchoate crime of solicitation.198 The New Mexico Court of Appeals was forced to interpret these provisions strictly and with the principle of lenity due to the nature of the crimes.199 The principle of lenity "requires [the court] to interpret the statute in favor of the defendant."200 According to section 775.021(4)(b) of the Florida Statutes, "[t]he intent of the Legislature is to convict and sentence for each criminal offense" and "not to allow the principle of lenity."201 Furthermore, it appears that the legislature intended punishment for accomplice liability and solicitation separately. Section 777.011 of the Florida Statutes which describes the "[p]rincipal in first degree," or aider and abettor, is only related to the solicitation statute in that they both are contained under chapter 777 of the Florida Statutes.202 However, an argument can be made regarding the construction of the solicitation statute and accomplice statute which may require prohibition of multiple punishments.

A "[p]rincipal in the first degree" can be convicted and punished for a substantive offense if he or she "aids, abets, counsels, hires, or otherwise procures such offense to be committed."203 The use of the word "hires" in both the accomplice liability statute and the solicitation statute may provide

194. Id. at 676 (citing State v. Mondragon, 759 P.2d 1003, 1006 (N.M. Ct. App. 1988)).
195. Id.
198. Vallejos, 9 P.3d at 675.
199. Id.
200. Id. (citing State v. Odgen, 880 P.2d 845, 853 (N.M. 1994)).
201. FLA. STAT § 775.021(4)(b) (2004).
203. § 777.011 (emphasis added).
double jeopardy protection when the substantive crime is committed. An argument can be made that Zack can only be convicted of murder in this instance because Zack’s guilt of solicitation and the substantive offense of murder would rely on the same proof of him “hiring” Hunt, and, therefore, would fall within the statutory exception barring dual convictions.

It is clear that some bright-line rule regarding these offenses and the convictions thereof should be established and adopted by Florida. Professors and legal scholars of the American Law Institute may have created a solution to double jeopardy issues arising out of multiple convictions for solicitation and conspiracy.

VI. THE MODEL PENAL CODE: SOLICITATION, CONSPIRACY, AND COMPLICITY

The Model Penal Code (MPC) and states that have adopted similar penal statutes have taken a different approach to the inchoate offenses of solicitation and conspiracy. According to section 5.02 of the MPC:

A person is guilty of solicitation to commit a crime if with the purpose of promoting or facilitating its commission he commands, encourages or requests another person to engage in specific conduct that would constitute such crime or an attempt to commit such crime or would establish his complicity in its commission or attempted commission.

The basic language of this statute is very similar to that of section 777.04(2) of the Florida Statutes. The MPC also provides that a defendant is still guilty of criminal solicitation even if the actor failed to communicate the solicitation to another person, so long as his behavior was indicative of a command, encouragement or request.

204. See State v. Florida, 894 So. 2d 941, 945 (Fla. 2005) (stating that legislative intent is determinative in double jeopardy cases); § 775.021(4)(b)(1) (barring dual convictions for crimes requiring the same elements of proof).

205. See § 775.021(4)(b)(1).

206. See MODEL PENAL CODE & COMMENTARIES §§ 5.02(2)–(3), 5.05(3) cmt. 1 (Official Draft & Revised Comments 1985).

207. MODEL PENAL CODE & COMMENTARIES §§ 5.02(1), 5.03(1); see also Commonwealth v. Graves, 508 A.2d 1198, 1198 (Pa. 1986) (finding that an individual may not be convicted of solicitation and conspiracy if both inchoate offenses are designed towards the commission of one substantive offense).

208. MODEL PENAL CODE & COMMENTARIES § 5.02(1).

209. See FLA. STAT. § 777.04(2) (2004).

210. MODEL PENAL CODE & COMMENTARIES § 5.02(1).
The MPC's statute regarding conspiracy is also very similar to Florida's statute. According to section 5.03(1) of the MPC:

A person is guilty of conspiracy with another person or persons to commit a crime if with the purpose of promoting or facilitating its commission he:

(a) agrees with such other person or persons that they or one or more of them will engage in conduct that constitutes such crime or an attempt or solicitation to commit such crime; or

(b) agrees to aid such other person or persons in the planning or commission of such crime or of an attempt or solicitation to commit such crime. 211

Under both the MPC and Florida law, an agreement to commit some criminal act is a necessary element of conspiracy. 212 In addition, unlike Florida law, the MPC requires that at least one of the co-conspirators commit some overt act to prove the alleged conspiracy exists. 213

However, a difference between Florida law and the MPC that is important for purposes of this article regards multiple convictions. Accordingly, in defining the law of solicitation and conspiracy, the MPC provides that "[a] person may not be convicted of more than one offense defined by this Article for conduct designed to commit or to culminate in the commission of the same crime." 214 Indeed, the MPC reasons that the danger of inchoate crimes is that they may result in the crime being committed, and, therefore, "there is no warrant for cumulating convictions of . . . solicitation and conspiracy to commit the same offense." 215 Applying the provisions of the MPC to the illustration of Zack hiring Hunt to kill Ken, Zack will only be guilty of one inchoate crime, either conspiracy or solicitation, since the inchoate offense is of "conduct designed to commit or to culminate in the commission of the same crime." 216 Furthermore, the MPC provides that a person may not be convicted of both an inchoate crime and the substantive offense which was its object. 217 Thus, under the MPC, if Hunt murders Ken, Zack will be guilty

211. MODEL PENAL CODE & COMMENTARIES § 5.03(1).
212. See id.; § 777.04(3).
213. MODEL PENAL CODE & COMMENTARIES § 5.03(5).
214. MODEL PENAL CODE & COMMENTARIES § 5.05(3).
215. MODEL PENAL CODE & COMMENTARIES § 5.05 cmt. 4.
216. MODEL PENAL CODE & COMMENTARIES § 5.05(3).
of murder and punished accordingly, but will not be guilty of either solicitation or conspiracy.

VII. CONCLUSION AND PROPOSAL

Florida criminal law providing punishment for the crimes of solicitation and conspiracy not only raises double jeopardy issues, but also poses a danger to the efficiency of the Florida criminal justice system. Currently, a jury can convict an individual of both solicitation and conspiracy that is designed to culminate into one substantive criminal offense.\textsuperscript{218} An argument that solicitation is a lesser included offense or a “degree variant” of conspiracy may ultimately bar dual convictions under Florida law. However, it appears that the MPC takes the appropriate view that punishment “should certainly suffice to meet whatever danger is presented by the actor,” and the “heaviest and most afflictive sanctions” should be reserved for the substantive crimes.\textsuperscript{219}

It is questionable whether imposing numerous punishments on an individual for inchoate crimes which were meant to culminate in the commission of one substantive offense will act as a deterrent.\textsuperscript{220} Furthermore, the Florida Legislature must enact law that will efficiently “determine under what circumstances consecutive punishment is to be authorized for the various combinations of offenses that arise from unitary conduct.”\textsuperscript{221} To clear up any confusion raising double jeopardy issues, over-sentencing problems, and overall efficiency of the Florida criminal law system regarding punishment for inchoate crimes such as solicitation and conspiracy, the Florida Legislature should adopt similar provisions to those provided under the Model Penal Code. However, without such legislation the double jeopardy argument to bar dual convictions for solicitation and conspiracy designed to achieve one criminal offense will await its day in court.

\textsuperscript{218} See \textit{FLA. STANDARD JURY INSTRUCTIONS IN CRIMINAL CASES} §§ 5.2, 5.3 (2002).
\textsuperscript{219} MODEL PENAL CODE & COMMENTARIES § 5.05 cmt. 2 (Official Draft & Revised Comments 1985).
\textsuperscript{220} See id.