COMMENTARY

RELIGION IN PUBLIC SCHOOLS: AN AMERICAN AND SOUTH AFRICAN PERSPECTIVE*

by
RALPH D. MAWDSLEY, J.D., PH.D. AND JOHAN BECKMANN, PH.D.**

INTRODUCTION

The Constitutions of both the United States and South Africa have provisions pertaining to religion. The United States Constitution is by far the briefer of the two, providing only that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."[1] The South African Constitution grants to everyone "the right to freedom of conscience, religion, thought, belief and opinion"[2] while also providing that "religious observances may be conducted at state or state-aided institutions," as long as "those observances follow rules made by the appropriate public authorities, they are conducted on an equitable basis, and attendance at them is free and voluntary."[3] Thus, while it is readily apparent under the U.S. Constitution that a conflict can arise as to whether government action constitutes an establishment of religion or whether government action prohibiting an establishment of religion has intruded upon a person's free exercise of religion, it is not clear the extent to which that conflict exists under South Africa's Constitution. What does appear to be facially clear from the Constitutions of the United States and South Africa is that both purport to protect individuals from government intrusion into a person's free exercise of religion.[4]

* The views expressed are those of the authors and do not necessarily reflect the views of the publisher. Cite as 204 Ed.Law Rep. [445] (Feb. 9, 2006).

** Ralph D. Mawdsley is Professor of Educational Administration, Cleveland State University and Visiting Fulbright Professor of Law and Education, University of Pretoria, South Africa. Johan Beckmann is Head, Department of Education Management and Policy Studies, University of Pretoria, South Africa.

1. U.S.Const., Amend. 1.

2. South Africa Const., § 15 (1).

3. South Africa Const., § 15 (2).

4. For U.S. cases, *cf. Bowen v. Roy*, 476 U.S. 693, 106 S.Ct. 2147, 90 L.Ed.2d 735 (1986) (rejecting free exercise claim of Native American opposing issuance of social security number in a child's name in order to be eligible for federal food stamp and AFDC programs because free exercise does not require government to conduct its internal affairs in ways that comport with the religious beliefs of particular citizens, even if a tenet of religion was that use of the number might harm the child's spirit and prevent her from attaining greater spiritual power) *with Wisconsin v. Yoder*, 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972) (finding free exercise violation where state's effort to require Amish children to attend public schools would have led to children leaving the Amish religious community and the end of a three hundred year old religious tradition; in addition, the Court found that eight years of schooling in an Amish school achieved the state's interest in literacy and citizenship).

The language in the First Amendment Religion Clauses is an express limitation on the federal government[5] and, through the Fourteenth Amendment, a limitation on state government as well.[6] However, determining the appropriate balance between the two separate religion clauses has presented for federal and state courts a difficult judicial puzzle. The agonizing and arduous judicial process of assessing the place of religion in American life over the past sixty years has required a consideration of the public policies to be served by prohibiting, permitting, or mandating religious activity in public schools. As will be evident in this article, American courts have developed multiple tests for assessing the appropriateness of government action regarding religion and for balancing competing claims between establishment and free exercise.

Although conflicts involving the Religion Clauses have arisen in a variety of venues,[7] the cases involving education are by far the most numerous and the most controversial. Religion cases concerning education generally fit into one of two broad patterns, those where the issues between government and religion occur within public schools and those where the issues occur outside public schools. The cases involving religion within public schools have been the most contentious because they not only deal with minor students who are part of a captive audience under state compulsory attendance laws, but, more fundamentally, address important policy questions regarding the purpose and content of public education. The cases concerning religion issues outside public schools generally deal with government aid to religious schools and, although equally contentious, focus on quite a different policy question, namely the appropriate role of government in assisting the education of students in religious schools.[8]

5. *See Reynolds v. U.S.*, 98 U.S. 145, 166, 167, 25 L.Ed. 244 (1878) (recognizing that the free exercise clause was a restriction on Congress but upholding federal statute, and criminal conviction under it for bigamy, prohibiting polygamy in the territory of Utah because "it is within the legitimate scope of the power of every civil government to determine whether polygamy of monogamy shall be the law of social life under its dominion ... [and] [t]o permit [polygamy] would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself.")

6. *See Cantwell v. Connecticut*, 310 U.S. 296, 305, 60 S.Ct. 900, 84 L.Ed. 1213 (1940) (first Supreme Court decision applying Religion Clauses through liberty clause of Fourteenth Amendment to states, in this case invalidating a state criminal statute p where denial of a permit to solicit was based on the secretary's determination of whether the cause was religious and where such denial was held to amount to "censorship of religion").

7. *See e.g., McCreary County v. American Civil Liberties Union*, 125 S.Ct. 2722 (2005) (display of plaque with Ten Commandments in county courthouses violated Establishment Clause); *Van Orden v. Perry*, 125 S.Ct. 2854 (2005) (upholding monument with Ten Commandments on state capitol grounds as not violating Establishment Clause); *Lynch v. Donnelly*, 465 U.S. 668, 675, 104 S.Ct. 1355, 79 L.Ed.2d 604 (1984) (holding display of crèche in city park along with other secular items not violation of the Establishment Clause) *McDaniel v. Paty*, 435 U.S. 618, 98 S.Ct. 1322, 55 L.Ed.2d 593 (1978) (Tennessee constitutional provision disqualifying ministers from serving in the state legislature violated the Free Exercise Clause).

8. The role of government has changed as the Supreme Court has altered the test used to determine a violation of the Establishment Clause. *Cf. Meek v. Pittenger*, 421 U.S. 349, 95 S.Ct. 1753, 44 L.Ed.2d 217 (1975) (finding an establishment clause violation under the second (effects) part of *Lemon v. Kurtzman*, 403 U.S. 602, 91 S.Ct. 205, 29 L.Ed.2d 745 (1971) tripartite test where a state wanted to loan instructional materials and equipment to religious schools) *with*

Sixty years of Establishment Clause litigation in the United States has failed to create a bright-line test for determining acceptable government interaction with religion in the United States, in large part because of philosophical differences among members of the Supreme Court and because of the formation of multiple tests for assessing the meaning of the Establishment Clause. As a result, the definition of what is meant by establishing a religion has become remarkably fluid with some government action prohibited, some permitted although not required, and some required so as to prevent hostility toward religion.

Without an establishment clause, the South African approach to religion and education has been quite different. Religion in public schools is treated not as a suspect element but rather a method to embrace and enhance nation building in a post-apartheid South Africa. The article will examine how South Africa has chosen to address religion and public education. The South Africa Constitution is barely ten years old and without an establishment clause in its constitution, South Africa has not developed the litigation history that has characterized the United States experience. Rather, South Africa has treated religion and public education as part of its process of democratization and, thus, while the basic outline of rights and responsibilities regarding religion are explicated in the constitution and the South African Schools Act of 1996 (Schools Act), the detailed directives for public schools are found in the Ministry of Education's National Policy on Religion and Education of 2003 (National Policy) (corresponding to regulations in the United States). The purpose of this article will be to examine the basic elements of his National Policy, their similarities and differences to the U.S. public school experience under the establishment clause, and problems created for South African public schools by implementation of the South Africa National Policy.

For ease of consideration, the United States approach to religion and education will be examined first followed by South Africa's approach. At the end of the article, the authors will make some comparative comments regarding similarities and differences in the two approaches.

Federalism and the Interaction of Government and Religion

The federal system of government in the United States has created an interesting dynamic regarding the interaction of government and religion. The right to education, unlike South Africa, is a reserved power for the states and is not implied or expressly delegated in the U.S. Constitution to the federal government. However, the reserved power of states and local school boards to make decisions regarding religion and public schools does not immunize those actions from scrutiny under the establishment and free exercise clauses.[9] To further complicate the matter, even though Congress

Mitchell v. Helms, 530 U.S. 793, 120 S.Ct. 2530, 147 L.Ed.2d 660 [145 Ed.Law Rep. [44]] (2000) (finding no violation of the loan of instructional materials and equipment to religious schools pursuant to federal law using neutrality and parent choice tests whereby the materials and equipment were provided to public schools as well and the presence of students in religious was a factor of parent, not government, choice; the Court in *Mitchell* overruled *Meek*).

9. *See, e.g., Epperson v. State of Ark.*, 393 U.S. 97, 89 S.Ct. 266, 21 L.Ed.2d 228 (1968) (invalidating state statute prohibiting the teaching of theory of evolution in public schools or in higher educational institutions

has no implied or express authority regarding education, it can choose to enact legislation affecting education under one or more of its delegated powers, the most important being the spending power.[10]

When Congress chooses to enact such legislation, it, like the actions of states and local school districts, is subject to the establishment and free exercise clauses, but federal legislation has the added dimension of being included with the supremacy clause[11] and, thus, unless declared unconstitutional, federal laws take precedence over state constitutions, state legislation and school district rules.[12] In addition, when Congress enacts statutes pursuant to its spending power, states and school districts that accept funds made available under these statutes are subject to the conditions imposed. Thus, when Congress provides funds for education, these provisions come with conditions and when these conditions affect private (including religious) schools, states and local school districts upon acceptance of the funds are bound by those conditions. Unless the federal legislation is declared unconstitutional, the only way for states and school districts to avoid compliance with the statutory provisions is to refuse federal funding, which none have been willing to do. For example, under "child find,"[13] a process under the Individuals with Disabilities Education Act (IDEA)[14] and its most recent iteration, the Individuals with Disabilities Education Improvement Act (IDEIA),[15] for identifying, locating and evaluating children with disabilities,[16] states and local school districts are required to identify, locate and evaluate children even if enrolled in a religious school.[17] Although the IDEA permits but does not require that states or school districts provide disability services on-site at religious schools, the Supreme Court has found that such provision

supported by state funds as an attempt to advance the religious view of biblical creationism); *Lee v. Weisman*, 505 U.S. 577, 112 S.Ct. 2649, 120 L.Ed.2d 467 [75 Ed.Law Rep. [43]] (1992) (invalidating, under the Establishment Clause, school board use of prayer at graduation where the effect would be to coerce those opposed to religion to stand for the prayers and thus become a participant in that with which they disagree).

10. *See* U.S. Const., art. I, sec. 8 (Congress' implied power to spend money is implied from the delegated power "to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States,")

11. U.S. Const., art. VI ("This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land.")

12. *See, e.g., Gonzales v. Raich*, 125 S.Ct. 2195 (2005) (holding that the federal COntrolled Substances Act criminalizing manufacture, distribution, or possession of marijuana took precedence under the Supremacy Clause over California's Compassionate Use Act permitting the growing and use of marijuana for intrastate medical use; the application of the federal criminal statute to growers and users in California did not violate Congress' power to make laws pertaining to interstate commerce).

13. 20 U.S.C. § 1412 (a)(3), (10) (A)(II)(ii); 34 C.F.R. § 300.125.

14. 20 U.S.C. §§ 1400 *et seq*.

15. *See* IDEIA, 20 U.S.C. § 1412 (a)(3) that extended the right of child find to "children with disabilities who are homeless children or are wards of the State."

16. 20 U.S.C. § 1412 (a)(3), (a)(10)(A)(ii); 34 C.F.R. § 300.451.

17. *Id*. State and public school districts within the state have the responsibility to identify, locate and evaluate children with disabilities applies "with respect to children with disabilities in the State who are enrolled in private, including parochial, elementary and secondary schools."

would not violate the establishment clause.[18] In addition, the Supreme Court has upheld congressional mandates that federal funds involving the providing of remedial services at, and the purchase and loaning of instructional supplies and equipment to, religious schools be dispensed proportionately by states to students in public and private (including religious) schools.[19] In terms of religious activity within public schools, the Supreme Court upheld the Equal Access Act (EAA)[20] that prohibited public schools from preventing student-initiated and student-led non-curriculum-related religious clubs from meeting on school premises where similar nonreligious clubs are permitted to meet.[21]

The federal statutes discussed above are examples of permissive legislation under the establishment clause, namely laws that are not required by either the establishment or free exercise clauses, but which reflect a congressional purpose to assist children wherever they are educated. This article will explore the role of the American establishment clause in shaping the exercise of religion in both public and religious schools. Despite the somewhat dubious label, "separation of church and state," that has been attached to the establishment clause, the purpose of this article will be to demonstrate how federal courts in the United States have distilled three functions from the establishment clause in fulfilling public policy regarding the appropriate interaction between government and religion in addressing matters of education: prohibiting government actions considered to be in support of religion; permitting but not requiring government actions that support religion;

18. *Zobrest v. Catalina Foothills School District*, 509 U.S. 1, 113 S.Ct. 2462, 125 L.Ed.2d 1 [83 Ed.Law Rep. [930]] (1993) (holding that a public school district providing a sign language interpreter to a student in a religious was not a violation of the Establishment Clause).

19. For the IDEA see, 20 U.S.C. § 1412(a)(10)(A)(i)(I); 34 C.F.R. § 300.453 (Local education agencies [LEAs, *i.e.*, public school districts] are required to expend funds for students with disabilities in private schools "equal to a proportionate amount of Federal funds made available under [IDEA]"). *See also, Mitchell v. Helms*, 530 U.S. 793, 120 S.Ct. 2530, 147 L.Ed.2d 660 [145 Ed.Law Rep. [44]] (2000) where the Court upholding the congressional requirement that allocation of funds for school equipment and materials had to be provided on a proportionate basis. However, the reauthorization of the Elementary and Secondary Education Act, now Chapter 70 of No Child Left Behind (NCLB), 20 U.S.C. § 7372, abolished the requirement in an earlier version of the Act, 20 U.S.C. 6321, that local public school districts provide "on an equitable basis, special educational services or other benefits under this part (such as dual enrollment, educational radio and television, computer equipment and materials, other technology, and mobile educational services and equipment)." The current language in NCLB, 20 U.S.C. § 7372, is that "[n]othing in this subchapter shall be construed to mandate equalized spending per pupil for a State, local educational agency, or school."

20. 20 U.S.C. § 4071 (prohibiting public schools with a "limited open forum" from preventing students "on the basis of the religious, political, philosophical, or other content of the speech" from conducting meetings as long as the meetings are conducted during noninstructional time). Federal circuit courts have had an expansive interpretation as to what is noninstructional time. *See Donovan v. Punxsutawney Area School Board*, 336 F.3d 211 [179 Ed.Law Rep. [48]] (3d Cir. 2003) (half-hour activity period at the beginning of the school day) and *Prince v. Jacoby*, 303 F.3d 1074 [169 Ed.Law Rep. [85]] (9th Cir. 2002) (student-staff time during the school day).

21. *Westside Community School District v. Mergens*, 496 U.S. 226, 110 S.Ct. 2356, 110 L.Ed.2d 191 [60 Ed.Law Rep. [320]] (1990) (upholding constitutionality of the EAA against an Establishment Clause challenge).

and mandating government actions that support religious activities in order to prohibit hostility toward religion.

The Accommodationist/Separationist Controversy

Expounding the meaning of the relationship between government and religion under a Constitution that is over two centuries old has not been an easy task and persistent divisions within the Supreme Court have contributed to the difficulty in determining the method of construction to use. On one side has been the accommodationists represented by Chief Justice Rehnquist[22] and Justices Scalia and Thomas reflected in the most recent and conflicting establishment clause cases regarding the display of the Ten Commandments on public property, *McCreary County v. American Civil Liberties Union (McCreary)*[23] (invalidating the display) and *Van Orden v. Perry (Van Orden)*[24] (upholding the display). The accommodationist justices in support of their position searched for the Constitution's meaning in the original intent of the authors of the Constitution.[25] In his scathing dissent in *McCreary*, Justice Scalia chronicled the references to God and support of religion by the first President (George Washington),[26] the first Congress,[27] and the Marshall Court,[28] views that not only "reflected the beliefs of the period" but also the belief "that morality was essential to the well-being of society and that encouragement of religion was the best way to foster morality."[29] Similarly, Chief Rehnquist in his majority opinion in *Van Orden* referenced historical and judicial precedents chronicling "the role of God in our Nation's heritage"[30] and observed that "[s]imply having religious content or promoting a message consistent with a religious doctrine does not run

22. With the death of Chief Justice Rehnquist and the appointment of the new Chief Justice Roberts, one cannot be certain how the balance between accommodationists and separationists will be affected.

23. 125 S.Ct. 2722 (2005) (invalidating in a 5–4 decision the posting of the Ten Commandments in two county courthouses, even though other historical documents were also included in the display).

24. 125 S.Ct. 2854 (2005) (upholding in a 5–4 decision the Ten Commandments engraved on a monument located on the Texas state capitol grounds).

25. For a discussion of the accommodationist-separationist controversy, *see* Ralph Mawdsley *Access by Religious Community Organizations to Public Schools: A Degrees of Separation Analysis*, 193 Ed.Law Rep. [633] (2005).

26. *See id*. at 2748 (George Washington added to the form of Presidential oath prescribed by Art. II, § 1, cl. 8, of the Constitution, the concluding words "so help me God" and offered the first Thanksgiving Proclamation...devoting November 26, 1789 on behalf of the American people "to the service of that great and glorious Being who is the beneficent author of all the good that is, that was, or that will be.")

27. *See id*. (In addition to the first Congress instituting a practice of opening each session with prayer, the same week that Congress submitted the Establishment Clause as part of the Bill of Rights for ratification by the States, it enacted legislation providing for paid chaplains in the House and Senate and the day after the First Amendment was proposed, the same Congress that had proposed it requested the President to proclaim "a day of public thanksgiving and prayer, to be observed, by acknowledging, with grateful hearts, the many and signal favours of Almighty God").

28. *See id*. (The Supreme Court under John Marshall opened its sessions with the prayer, "God save the United States and this Honorable Court").

29. *Id*. at 2749. For other references by other early Presidents and Congresses to public expressions of belief in, and dependence upon, God, *see id.*

30. *Id.* at 2861.

afoul of the Establishment Clause."[31] Indeed, as Justice Scalia noted in his *Van Orden* concurring opinion, the Supreme Court over 50 years earlier, in *Zorach v. Clauson*,[32] had declared that "We are a religious people whose institutions presuppose a Supreme Being," a view that was repeated with approval in three separate Supreme Court decisions over the next three decades.[33] On the other hand, the separationists represented by Justices Stevens, Souter and Ginsberg have "expounded the meaning of constitutional provisions with one eye towards our Nation's history and the other fixed on its democratic aspirations,"[34] otherwise known as the "living Constitution" perspective.[35] In his dissenting opinion in *Van Orden*, Justice Stevens observed that even if the majority opinion represented the views of the Founding Fathers, it is "plainly not worthy of a society whose enviable hallmark over the course of two centuries has been the continuing expansion of religious pluralism and tolerance."[36] Justice Stevens asserted his reliance on the "principle [of neutrality] firmly rooted in our Nation's history and our Constitution's text," a "principle that government must remain neutral between valid systems of belief" with the awareness that, "[a]s religious pluralism has expanded, so has our acceptance of what constitutes valid belief systems."[37] Thus, according to the separationists, the establishment clause forbids the display of the Ten Commandments monument because it represents "a direct descendent of the evil of discriminating among Christian sects."[38] The remaining three Justices, O'Connor,[39] Kennedy, and Breyer have represented swing votes depending on the issue before the Court.[40]

31. *Id*. at 2863.

32. 343 U.S. 306, 72 S.Ct. 679, 96 L.Ed. 954 (1952) (upholding constitutionality of public school release time program that permitted students to leave the public school during the last hour of the school day one day per week and attend religious meetings at religious institutions of their choice while students not participating in the released time program stayed in the school until the end of the school day; in effect, the Court rejected the argument that the success of released time depended on state compulsory attendance requirements in that students had to either attend a religious institution or stay in the school, the Court relying instead on the support of parent choice).

33. *See Lynch v. Donnelly*, 465 U.S. 668, 675, 104 S.Ct. 1355, 79 L.Ed.2d 604 (1984) (holding display of crèche in city park along with other secular items); *Marsh v. Chambers*, 463 U.S. 783, 787, 103 S.Ct. 3330, 77 L.Ed.2d 1019 (1983) (upholding State of Nebraska's opening of each legislative session by chaplain paid with public funds, even though clergyman of only one denomination had been selected for 16 years and prayers were in the Judeo-Christian tradition); *School Dist. Of Abington Township v. Schempp*, 374 U.S. 203, 213, 83 S.Ct. 1560, 10 L.Ed.2d 844 (1963) (invalidating Pennsylvania statute requiring Bible reading at beginning of each school day in public schools).

34. *Van Orden*, 125 S.Ct. at 2889 (Stevens, J., dissenting).

35. See *McCreary*, 125 S.Ct. at 2756 (Scalia, J., dissenting).

36. *Van Orden*, 125 S.Ct. at 2887 (Stevens, J., dissenting).

37. *Id*. at 2890.

38. *Id*.

39. Since the *McCreary* and *Van Orden* decisions, Justice O'Connor has announced her retirement from the Supreme Court which will undoubtedly present during the approval process of appointment by the President with the advice and consent of the Senate the issue of what the nominee's views are regarding the role of government and religion.

40. In *McCreary*, Justices O'Connor and Breyer joined with the majority invalidating the posting of the Ten Commandments while Justice Kennedy voted with the dissent. However, in *Van Orden* upholding a monument with the Ten Commandments, Justices Breyer and Kennedy both joined the majority and Justice O'Connor voted

The accommodationist view fits within what is sometimes referred to as strict construction which takes the position that "the legislature [rather than the Supreme Court is] a much more appropriate expositor of social values"[41] and, thus, the purpose of the Supreme Court is to interpret generously the Constitution "because the powers conferred upon Congress under it had to be broad enough to serve not only the needs of the federal government originally discerned but also the needs that might arise in the future."[42] In large part, the strict constructionist view to judicial construction of the Constitution recognizes the limitation of judicial authority because the judicial power to review federal statutes, while reasonably implicit in the Constitution, is nonetheless not explicitly granted.[43] As a result, the Constitution should be viewed as "an enactment that has a fixed meaning ascertainable through the usual devices familiar to those learned in the law" as opposed to "a novel invitation to apply current societal values."[44] On the other hand, the separationist view reflects what is referred to as a liberal (or, nonoriginalist) constructionist approach energizing the Supreme Court in particular, and all federal courts in general, to engage in "a collaborative inquiry, involving both the Court and the country, into the contemporary content of freedom, fairness, and fraternity."[45] Relying on theories of "public morality,"[46] "moral theory,"[47] and "relative equality, mobilization of citizenry, and civic virtue,"[48] the liberal construction interpretation of the Constitution directs an adjustment to changing circumstances. Thus, Justice Stevens, dissenting in *Van Orden*, captured the essence of this approach when he remarked that "[i]t is our duty, therefore, to interpret the First Amendment's command that 'Congress shall make no law respecting an establishment of religion' not by merely asking what those words meant to observers at the time of the founding, but instead by deriving from the Clause's text and history the broad principles that remain valid today."[49]

with the dissent. However, one needs to compare Justice O'Connor's vote with the separationists in *McCreary* and *Van Orden* to her strict constructionist approach in *Kelo*: "Nothing is to prevent the State from replacing any Motel 6 with a Ritz-Carlton, any home with a shopping mall, or any farm with a factory....[T]he government now has license to transfer property from those with fewer resources to those with more. The Founders cannot have intended this perverse result." *Kelo*, 125 S.Ct. at 2676, 2677 (O'Connor, J., dissenting).

41. Antonin Scalia, *Originalism: The Lesser Evil*, 57 U.CIN.L.REV. 849, 854 (1989)

42. *Id*. at 853. The watchword is reflected by Justice Marshall, the second Chief Justice of the Supreme Court, in *McCulloch v. Maryland* where he declared that "we must never forget it is a constitution we are expounding." 17 U.S. 316, 407, 4 L.Ed. 579 (1819).

43. *See Marbury v. Madison*, 5 U.S. 137, 177, 2 L.Ed. 60 (1803) (determining for the first time that the Supreme Court had the authority to review laws of Congress, in this case finding that a statute ordering the Secretary of State to deliver judicial appointments signed by the President violated the Constitution's separation of powers with the observations that: (1) "[i]t is emphatically the province and duty of the judicial department to say what the law is," (2) "[i]f two law conflict with each other, the courts must decide on the operation of each," and (3) "the constitution is to be considered, in court, as a paramount of law.").

44. Scalia, 57 U.CIN.L.REV. at 854.

45. Lawrence Tribe, AMERICAN CONSTITUTIONAL LAW 771 (2d ed. 1988).

46. Owen Fiss, *The Supreme Court 1978 Term-Forward: The Forms of Justice*, 93 HARV.L.REV. 1, 9, 11 (1979).

47. Ronald Dworkin, TAKING RIGHTS SERIOUSLY 149 (1977).

48. Richard Parker, *The Post Constitutional Theory—And Its Future*, 42 OHIO ST. L.J. 223, 258 n. 146 (1981).

The difficulty with the liberal constructionist approach is that while it invites judges to "expand on fundamental values" and "freedoms that are uniquely our heritage,"[50] it also leaves unanswered the question whether, once the original import of the Constitution is cast aside to be replaced by the "fundamental values" of the current society, to what extent must courts only "expand on" freedoms, and not contract them as well?[51] One can argue that the Supreme Court's 5-4 decision in *Kelo v. City of New London*[52] in its most recent term is just such an example of a restricted freedom, in this case private ownership of property. In this case, the majority (Justices Stevens, Kennedy, Souter, Ginsburg, and Breyer) interpreted a "public taking" under the Fifth Amendment so that a city could condemn private property (well-maintained homes in a poor urban area) and turn it over to another private entity (a manufacturer in this case who proposed building a new plant) "so long as [the property] might be upgraded" or as long as the condemnation might "generate some secondary benefit for the public—such as increased tax revenue, more jobs, maybe even aesthetic pleasure."[53] In this heavily contested, much publicized, and long awaited decision regarding the extension of the eminent domain power of government, Justice Stevens, writing for the majority, rationalized his diminution of private property ownership rights on the grounds that the "needs of society have varied between different parts of the Nation, just as they have evolved over time in response to changed circumstances."[54] With this departure from the historical protection of private property against public taking and the invocation of a "changed circumstances" standard, Justice Stevens has, in effect, invited more litigation to determine whether future takings will satisfy this judicially-created guideline.[55] However, Justice Thomas, in his dissenting opinion in *Kelo* succinctly captured the concerns of the strict constructionist's concern about the erosion of constitutional rights, in this case the protection of private property ownership, when he pointedly observed, "I do not believe that this Court can eliminate liberties expressly enumerated in the Constitution."[56] Indeed, one can argue that departure by the *Kelo* majority from prior Supreme Court precedents that had restricted severely the taking of private property through eminent domain will result in future, protracted discussion as to how the

49. *Van Orden*, 125 S.Ct. at 2888 (Stevens, dissenting).

50. Lawrence Tribe, GOD SAVE THIS HONORABLE COURT 45 (1985).

51. *See* Scalia, U.CIN.L.REV. at 855.

52. 125 S.Ct. 2655 (2005) . This case arose under the Fifth Amendment's provision that "private property [shall not] be taken for public use, without just compensation."

53. *Id*. at 2675 (O'Connor, J., dissenting). As Justice O'Connor noted, "Nothing is to prevent the State from replacing any Motel 6 with a Ritz-Carlton, any home with a shopping mall, or any farm with a factory....[T]he government now has license to transfer property from those with fewer resources to those with more. The Founders cannot have intended this perverse result." *Id.* at 2676, 2677.

54. *Id*. at 2664.

55. *See id*. at 2667.

56. *Id*. at 2678 (Thomas, J., dissenting). *See also, id*. at 2786–2787 where Justice Thomas injected another concern, "Allowing the government to take property solely for public purpose is bad enough, but extending the concept of public purpose to encompass any economically beneficial goal guarantees that these losses will fall disproportionately on poor communities."

Constitution can further be used as an instrument of judicial social engineering.[57]

Multiple Interpretive Tests for the Establishment Clause

The conflict among factions of the Supreme Court in interpreting protection of private property rights in *Kelo* mirrors the interpretive dilemma regarding the establishment clause and education. The disagreement among members of the Court in religion cases, as in *McCreary* and *Van Orden*, demonstrates differences in opinion regarding the appropriate test to be used in assessing whether a violation of the Establishment Clause has occurred. Over the years, members of the Court in addressing Establishment Clause issues have invoked at least five different tests in assessing whether government involvement in religion violates the Establishment Clause: *Lemon v. Kurtzman* (*Lemon*)[58] tripartite test, endorsement,[59] divisiveness,[60] coercion,[61]

57. The two leading Supreme Court cases upholding public taking of private property are *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 104 S.Ct. 2321, 81 L.Ed.2d 186 (1984) and *Berman v. Parker*, 348 U.S. 26, 75 S.Ct. 98, 99 L.Ed. 27 (1954). In *Berman*, the Court upheld condemnation of a blighted neighborhood of Washington D.C. where 64.3% of the buildings were beyond repair and the Court deferred to Congress' judgment to treat the entire neighborhood as a unit, even though Berman's store was not in need of repair. *Midkiff* involved a Hawaii statutory condemnation scheme to condemn and resell property where only 22 landowners owned fee simple title to 72.5% of 47% of land in the state resulting in inflated real estate markets. However, the cases hewed to a bedrock principle that formed, up to *Kelo*, the basis for jurisprudence: "A purely private taking could not withstand the scrutiny of the public use requirement; it would serve no legitimate purpose of government and would thus be void." *Midkiff*, 467 U.S. at 245, 104 S.Ct. 2321.

58. 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971) (invalidating a state statute providing reimbursement for teacher salaries, textbooks, and instructional materials used in nonpublic, including religious, schools under a newly crafted tripartite test: state action involving religion must have a secular purpose, must neither advance nor inhibit religion, and not involve the state in excessive entanglement). *Id.* at 613, 91 S.Ct. 2105.

59. The two-part endorsement test, first articulated by Justice O'Connor in *Lynch v. Donnelly*, 465 U.S. 668, 690, 104 S.Ct. 1355, 79 L.Ed.2d 604 (1984) (O'Connor, J., concurring) requires that courts determine whether government action has a secular purpose and whether, using an objective-observer test comparable to the reasonable person standard in tort law, a reasonably knowledgeable person would objectively perceive the government action as an endorsement of religion. The district court judge in *McCreary*, although relying on the *Lemon* test to analyze the Ten Commandment displays, used the endorsement test to determine whether the postings constituted an advancement of religion under the second of the *Lemon* tests, much as Justice O'Connor had developed the endorsement test. *See Lynch v. Donnelly,* 465 U.S. at 690, 104 S.Ct. 1355 ("The purpose prong of the *Lemon* test asks whether government's actual purpose is to endorse or disapprove of religion. The effect prong asks whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval"). *See American Civil Liberties Union v. McCreary County*, 96 F.Supp.2d 679, 687 (E.D. Ky 2000).

60. Divisiveness has been used to refer both to divisions among religious adherents and to competition in the political process for resources. *See* Justice Souter's majority opinion in *McCreary*, "We are centuries away from the St. Bartholomew's Day massacre and the treatment of heretics in early Massachusetts, but the divisiveness of religion in current public life is inescapable." *McCreary*, 125 S.Ct. at 2745. *See also, Meek v. Pittenger*, 421 U.S. 349, 95 S.Ct. 1753, 44 L.Ed.2d 217 (1975). Justice Brennan's decision concurring with the majority's declaring unconstitutional the loaning of instructional materials and auxiliary programs but dissenting from the decision to find constitu-

neutrality,[62] and the historical intent[63] tests. Indeed, one can argue that the interpretive lens through which a member of the Court chooses to view the establishment clause will influence that member's decision.

Clearly, the oldest, most frequently used and most contentious of the religion tests is the *Lemon* test. Despite efforts by accommodationists on the Supreme Court to eliminate the Lemon test,[64] it has demonstrated remarkable resilience. The three parts of the test—that government action must have a secular purpose, must not have the effect of either advancing or inhibiting religion, and must not result in government entanglement with religion–have been particularly daunting for accommodationists seeking to allow for greater government-religion interaction between government and religion in education because failure of any one of the three tests constitutes a violation of the Establishment Clause. While framed in the context of government financial support for religious schools, the *Lemon* test has been invoked in a wide range of religion cases to both prohibit and permit efforts to accommodate religious beliefs in public schools and permit government support for religious schools.

However, the line between prohibited and permitted government conduct quickly became blurred and, thus, while state legislatures could not supplement the salaries of religious school teachers who taught secular subjects[65] or pay for maintenance repairs at religious schools,[66] states were

tional the loaning of textbooks noted that, "The potential for political divisiveness related to religious belief and practice is aggravated...by the need for continuing annual appropriations and the likelihood of larger and larger demands as costs and populations grow."*Id*. at 375, 95 S.Ct. 1753, quoting from *Lemon*, 403 U.S. at 622-623, 91 S.Ct. 2105 (Brennan, J., concurring in part and dissenting in part).

61. In *Lee v. Weisman*, 505 U.S. 577, 588, 112 S.Ct. 2649, 120 L.Ed.2d 467 [75 Ed.Law Rep. [43]] (1992), (the majority of the Court in striking down graduation prayer on behalf of participants who felt pressured to stand for an invocation and benediction delivered by a rabbi created a psychological coercion test, observing that "subtle coercive pressures exist...where the student had no real alternative which would have allowed her to avoid the fact or appearance of participation").

62. *See Mueller v. Allen*, 463 U.S. 388, 103 S.Ct. 3062, 77 L.Ed.2d 721 [11 Ed.Law Rep. [763]] (1983) (upholding Minnesota state tax deduction for tuition, books, and transportation expenses at both public and nonpublic, including religious, schools, and finding no Establishment Clause violation because statute was neutral in terms of those benefiting, even though only those in nonpublic schools were likely to be eligible for the deductions).

63. *See McCreary*, 125 S.Ct. at 2748–2749 (Scalia, J., dissenting). *See also, Van Orden*, 124 S.Ct. at 2861–2863.

64. *See Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 113 S.Ct. 2141, 124 L.Ed.2d 352 [83 Ed.Law Rep. [30]] (1993) where Justice Scalia, while concurring in Justice White's majority opinion, takes issue with his reference to *Lemon v. Kurtzman*:

> Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence once again, frightening the little children and school attorneys of Center Moriches Union Free School District. Its most recent burial, only last Term, was, to be sure, not fully six feet under. Our decision in Lee v. Weisman, 505 U.S. 577, 586-587, 112 S.Ct. 2649, 120 L.Ed.2d 467 [75 Ed.Law Rep. [43]] (1992), conspicuously avoided using the supposed "test" but also declined the invitation to repudiate it.

Id. at 398, 113 S.Ct. 2141 (Scalia, J., concurring in the judgment).

65. *Lemon v. Kurtzman*, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971).

permitted to transport children to religious schools on publicly owned buses,[67] to loan textbooks to religious schools,[68] to reimburse religious schools for performing various testing and reporting services mandated by state law,[69] and to furnish standardized tests identical to those used in the public schools.[70] To add to the confusion, while states could loan textbooks they could not loan other kinds of supplementary materials or teaching aids[71] and, while states could provide public funds for diagnostic testing on-site in religious schools, those funds could be used to provide therapeutic services only if offered at a public site.[72] In these early cases, the Court agonized and disputed at length regarding the meaning of original intent. Discerning a bright line as to what government activities should be prohibited and which should be permitted under the establishment clause became extremely difficult. For those Justices arguing for a strict line of separation between government and religion, a backward look to the religious persecutions in Fifteenth Century and Sixteenth Century England became their reference point, while those Justices arguing for a less rigid separation between government and religion argued that the colonial experience augured for government prohibition of religious contact only where government chose to support a specific religion (a preferential as opposed to a nonpreferential view),[73] a dispute that has never been resolved and was revisited in *McCreary* and *Van Orden.*[74]

66. *Committee for Pub. Educ. and Religious Liberty v. Nyquist*, 413 U.S. 756, 93 S.Ct. 2955, 37 L.Ed.2d 948 (1973).

67. *Everson v. Bd. of Educ.*, 330 U.S. 1, 67 S.Ct. 504, 91 L.Ed. 711 (1947).

68. *Bd. of Cent. Sch. Dist. v. Allen*, 392 U.S. 236, 88 S.Ct. 1923, 20 L.Ed.2d 1060 (1968); *Meek v. Pittenger*, 421 U.S. 349, 95 S.Ct. 1753, 44 L.Ed.2d 217 (1975); *Wolman v. Walter*, 433 U.S. 229, 247–248, 97 S.Ct. 2593, 53 L.Ed.2d 714 (1977).

69. *Committee for Pub. Educ. v. Regan*, 444 U.S. 646, 100 S.Ct. 840, 63 L.Ed.2d 94 (1980). *But see, Levitt v. Comm. For Pub. Educ.*, 413 U.S. 472, 93 S.Ct. 2814, 37 L.Ed.2d 736 (1973) (invalidating New York statute authorizing state to reimburse nonpublic schools for expenses of services for examination and inspection in connection with administration, grading and compiling and reporting the results of tests and examinations and the maintenance of certain records where they were prepared by religious schools and were an integral part of the teaching process.)

70. *Wolman v. Walter*, 433 U.S. 229, 237–238, 97 S.Ct. 2593, 53 L.Ed.2d 714 (1977).

71. *Meek v. Pittenger*, 421 U.S. 349, 95 S.Ct. 1753, 44 L.Ed.2d 217 (1975) (invalidating Pennsylvania statute as to loan of instructional materials that could be diverted to religious uses but upholding loan of textbooks); *Wolman v. Walter*, 433 U.S. 247–248, 97 S.Ct. 2593 (1977) (upholding Ohio statute loaning textbooks to religious schools but invalidating portion of statute loaning instructional materials).

72. *Wolman v. Walter*, 433 U.S. 229, 246–248, 97 S.Ct. 2593, 53 L.Ed.2d 714 (1977).

73. *Cf. Wallace v. Jaffree*, 472 U.S. 38, 106, 105 S.Ct. 2479, 86 L.Ed.2d 29 [25 Ed.Law Rep. [39]] (1985) (Rehnquist, J., dissenting) (supporting nonpreferential view, "[t]he Establishment Clause did not require government neutrality between religion and irreligion nor did it prohibit the Federal Government from providing nondiscriminatory aid to religion") *with Lee v. Weisman*, 505 U.S. 577, 612, 615, 112 S.Ct. 2649, 120 L.Ed.2d 467 [75 Ed.Law Rep. [43]] (1992) (Souter, J., concurring) (rejecting nonpreferential approach, "The Framers repeatedly considered and deliberately rejected such narrow language and instead extended their prohibition to state support for 'religion' in general.")

74. For examples of judicial interpretations of the views of the Founding Fathers, *see Engel v. Vitale*, 370 U.S. 421, 425–429, 82 S.Ct. 1261, 8 L.Ed.2d 601 (1962) (striking down school board rule requiring recitation of the following prayer, "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our

Establishment Clause Litigation and Values

The early government aid to religious school cases, while demonstrating conflict regarding the meaning of establishing a religion, did not really strike at the core of the issue, namely the place of religious values in American culture. After all, the aid cases had only concerned what government could do with relationship to religious activities outside government venues, not what government could do in its own venues.[75] The prayer and Bible reading cases, *Engel v. Vitale (Engel)* and *Abingdon School District v. Schempp (Schempp)*,[76] were the first school cases to address the role of religion in public schools. Ten years prior to *Engel*, in 1952, the Supreme Court in upholding early dismissal of students from public schools to attend off-campus religious classes, had observed, "We are a religious people whose institutions presuppose a Supreme Being,"[77] but the Supreme Court, in striking down prayer and Bible reading as part of public school daily homeroom opening activities in *Engel* and *Schempp*, found religious tradition to be largely irrelevant.[78] Justice Black writing for the Court in *Engel* observed that the "first and most immediate purpose [of the establishment clause] rested on the belief that a union of government and religion tends to destroy government and to degrade religion."[79] Invoking a "wholesome neutrality," Justice Clark, writing for the majority in *Schempp*, referenced "the teachings of history that powerful sects or groups might bring about a fusion of governmental and religious functions or a concert or dependency of one upon the other to the end that official support of the State or Federal Government would be placed behind the tenets of one or of all orthodoxies."[80] In the only dissent in both *Engel* and *Schempp*, Justice Stewart, similar to Justice Thomas in *McCreary*, opined that "[i]n the absence of coercion . . .

parents, our teachers and our Country."); *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 232–240, 83 S.Ct. 1560, 10 L.Ed.2d 844 (1963) (finding that the purpose of the Establishment Clause "was designed comprehensively to prevent those official involvements of religion which would tend to foster or discourage religious worship or belief.") *Id*. at 234, 83 S.Ct. 1560 (Douglas, J., concurring).

75. *See generally*, Ralph Mawdsley and Charles Russo, "Religious Schools and Government Assistance: What is Acceptable after *Helms*?" 151 Ed.Law Rep. [373] (2001).

76. 374 U.S. 203, 83 S.Ct. 1560, 10 L.Ed.2d 844 (1963) (state statute required the reading of ten verses from the Bible over the school public address system and the recitation of the Lord's Prayer by students in their home rooms. Students who objected could absent themselves from the home room or simply not participate in the exercises. The parents challenging the statute in this case chose not to absent their children because they did not want them considered to be "odd balls"). *Id*. at 207, 83 S.Ct. 1560, note 3.

77. *Zorach v. Clauson*, 343 U.S. 306, 313, 72 S.Ct. 679, 96 L.Ed. 954 (1952).

78. *See Schempp*, 374 U.S. at 213, 83 S.Ct. 1560, where the Court, although striking down the school practice of Bible reading and recitation of the Lord's Prayer over the school address system, nonetheless observed that "the fact that the Founding Fathers believed devotedly that there was a God and that the unalienable rights of man were rooted in Him is clearly evidenced in their writings." In addition, the Court cited to Bureau of Census figures that only 3% of Americans in 1962 professed no religion whatsoever. In effect, these observations made no difference because the majority was persuaded that recitation of words with religious meanings participated in by a captive audience amounted to government indoctrination.

79. *Engel*, 370 U.S. at 431, 82 S.Ct. 1261.

80. *Id*. at 221, 83 S.Ct. 1560.

such [prayer and Bible reading] cannot . . . be held to represent the type of support of religion barred by the Establishment Clause.''[81]

In many ways, *Engel* and *Schempp* became the exemplars for prohibiting government integration of religious values into public schools. While the Supreme Court went on in post-*Engel* and *Schempp* cases to uphold state and federal statutes permitting tax deductions for expenses at both public and nonpublic (including religious) schools,[82] the provision of on-site special education services at a religious school,[83] the provision of on-site Title I services in religious schools,[84] public vouchers for use by students in nonpublic (including religious) schools,[85] and loaning of equipment and instructional materials to religious schools,[86] a majority of the Court resisted the incursion of religious influence into the public schools themselves. In the wake of *Engel* and *Schempp*, the Court invalidated state statutes or school board rules that permitted cleric prayer at public school graduation,[87] that required the teaching of creation-science as an alternative to evolution,[88] that provided for

81. *Id.* at 316, 72 S.Ct. 679 (Stewart, J. dissenting). *See also, Engel*, 370 U.S. at 445, 82 S.Ct. 1261 for a similar declaration (Stewart, J., dissenting).

82. *See Mueller v. Allen*, 463 U.S. 388, 103 S.Ct. 3062, 77 L.Ed.2d 721 [11 Ed.Law Rep. [763]] (1983) (upholding Minnesota state tax deduction for tuition, books, and transportation expenses at both public and nonpublic, including religious, schools, and finding no Establishment Clause violation because statute was neutral in terms of those benefiting, even though only those in nonpublic schools were likely to be eligible for the deductions).

83. *See Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 113 S.Ct. 2462, 125 L.Ed.2d 1 [83 Ed.Law Rep. [930]] (1993) (upholding against an Establishment Clause challenge a public school district providing a sign language interpreter to a student in a religious school). Under IDEA services can be provided on-site at private, including religious, schools "to the extent consistent with law." 34 C.F.R. § 300.456(a). IDEA has a proportionality requirement that funds must be provided on a proportionate basis between public and nonpublic schools. 20 U.S.C. § 1412(a)(10)(A)(i)(I); 34 C.F.R. § 300.453. However, while providing IDEA services does not violate the Establishment Clause, no private school child with a disability "has an individual right to receive some or all of the special education and related services the child would receive if enrolled in a public school." 34 C.F.R. § 300.454(a).

84. *See Agostini v. Felton*, 521 U.S. 203, 117 S.Ct. 1997, 138 L.Ed.2d 391 [119 Ed.Law Rep. [29]] (1997), overruling *Aguilar v. Felton*, 473 U.S. 402, 105 S.Ct. 3232, 87 L.Ed.2d 290 [25 Ed.Law Rep. [1022]] (1985). Title I has a proportionality requirement that federal funds must be allocated on a proportionate basis to students in nonpublic schools. 20 U.S.C.A. §§ 6301 et seq.

85. *Zelman v. Simmons–Harris*, 536 U.S. 639, 122 S.Ct. 2460, 153 L.Ed.2d 604 [166 Ed. Law Rep. [30]] (2002) (upholding against Establishment Clause challenge the Cleveland, Ohio voucher program that provided up to 4000 vouchers with a maximum value of $2,250 to parents to place their children in nonpublic schools in Cleveland, or to purchase tutor services, or enroll in a neighboring public school district).

86. *See Mitchell v. Helms*, 530 U.S. 793, 120 S.Ct. 2530, 147 L.Ed.2d 660 [145 Ed.Law Rep. [44]] (2000) (holding that loaning instructional materials, including books, and electronic and AV equipment, to religious schools did not violate the Establishment Clause), overruling *Meek v. Pittenger*, 421 U.S. 349, 95 S.Ct. 1753, 44 L.Ed.2d 217 (1975) and *Wolman v. Walters*, 433 U.S. 229, 97 S.Ct. 2593, 53 l.Ed.2d 714 (1977).

87. *Lee v. Weisman*, 505 U.S. 577, 112 S.Ct. 2649, 120 L.Ed.2d 467 [75 Ed.Law Rep. [43]] (1992).

88. *See Epperson v. State of Ark.*, 393 U.S. 97, 89 S.Ct. 266, 21 L.Ed.2d 228 (1968) (invalidating state statute prohibiting the teaching of theory of evolution in public schools or in higher educational institutions supported by state funds); *Edwards v. Aguillard*, 482 U.S. 578, 107 S.Ct. 2573, 96 L.Ed.2d 510 [39 Ed.Law Rep. [958]] (1987) (invalidating

a moment of silence that included prayer,[89] and that permitted student-initiated and student-led prayer at football games.[90]

Although, in all of these cases the Supreme Court overturned state legislative or local school board decisions reflecting support for a public school culture inclusive of religious values, the prime embodiment of this judicial approach occurred in *Lee v. Wiesman*[91] where Justice Kennedy, writing for a majority of the Court (Justices Kennedy, Blackmun, Stevens, O'Connor, and Souter), invalidated the use of prayer at public school graduation, ending in many public schools what had become a 150 year-old tradition. By creating a hitherto unknown test of "psychological coercion," the majority terminated this tradition of religious inclusion in favor of what it termed "our own tradition [of not] subject[ing] [citizens] to state-sponsored religious exercises."[92] Thus, in one sweep of the pen, five Justices brushed aside what had become a part of education culture in most United States' schools.

While the two prayers at graduation in *Lee* were short and were not theological lessons,[93] one could argue that they were more than token

Louisiana Balanced-Treatment statute requiring that creation science be taught if evolution was taught in public schools).

89. *See Wallace v. Jaffree*, 472 U.S. 38, 105 S.Ct. 2479, 86 L.Ed.2d 29 [25 Ed.Law Rep. [39]] (1985) (invalidating an Alabama statute authorizing that public schools could provide a moment of silence at the beginning of the school for mediation or voluntary prayer, finding that the addition of the word, "prayer," constituted state support for a particular practice to use during the silence).

90. *Santa Fe. Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 120 S.Ct. 2266, 147 L.Ed.2d 295 [145 Ed.Law Rep. [21]] (2000) (holding that prayer before football games violated Establishment Clause, even though student-initiated and student-led, because: the school's public address system was used; cheerleaders, band members and athletes were present and did not have the option to leave; and, the decision to have a prayer represented a majority of students voting which meant that there was no provision for addressing the views of students who dissented).

91. 505 U.S. 577, 112 S.Ct. 2649, 120 L.Ed.2d 467 (1992).

92. *Lee*, 505 U.S. at 592, 112 S.Ct. 2649.

93. *See id.* at 582, 112 S.Ct. 2649, for the two prayers by Rabbi Gutterman:

INVOCATION

"God of the Free, Hope of the Brave:

"For the legacy of America where diversity is celebrated and the rights of minorities are protected, we thank You. May these young men and women grow up to enrich it.

"For the liberty of America, we thank You. May these new graduates grow up to guard it.

"For the political process of America in which all its citizens may participate, for its court system where all may seek justice we thank You. May those we honor this morning always turn to it in trust.

For the destiny of America we thank You. May the graduates of Nathan Bishop Middle School so live that they might help to share it.

"May our aspirations for our country and for these young people, who are our hope for the future, be richly fulfilled.

AMEN

BENEDICTION

"O God, we are grateful to You for having endowed us with the capacity for learning which we have celebrated on this joyous commencement.

"Happy families give thanks for seeing their children achieve an important milestone. Send Your blessings upon the teachers and administrators who helped prepare them.

"The graduates now need strength and guidance for the future, help them to understand that we are not complete with

religious exercises. To many the inclusion of such religious incursions into public school activities underscores the importance of religion as a basis for community values. The notion of community values is reflected in the recent Supreme Court decision, *Santa Fe Independent School District v. Doe (Santa Fe)*,[94] where a majority of the Court[95] invalidated a school district policy that would have permitted a majority of students to determine whether a student should be permitted to deliver a short message (that could be a prayer) before each home football game. The observation of Justice Stevens, writing for the majority, that the "majoritarian process implemented by the [School] District guarantees, by definition, that minority candidates will never prevail and that their views will be effectively silenced"[96] raises the tantalizing question of the relationship between the religious values of the democratic majority and the religious values of a dissenting minority. At stake is the difficult determination of how public school boards should be able to construct a value system for operating their schools. Although the elimination of a religious activity does not necessarily suggest that public schools have now established a religion of secularism, it does suggest that public schools will have to develop a secularized value system removed from its religious underpinnings. While the Court majorities in *Engel, Schempp, Lee*, and *Santa Fe* found determinative the perspective of the dissent, one should also consider the challenge facing a school board where, to paraphrase and apply the outcome in *McCreary* to schools, students are expected to understand the difference between acceptable and unacceptable conduct (e.g., Thou shalt not kill) without benefit of the religious context in which these values have been framed (accountability to a higher power than man).[97] Religion is more than just history and literature[98] and much can be learned from the values in a community's religions. As Justice Scalia observed in his *Lee v. Weisman* dissent, eloquently excoriating the majority's fabrication of a psychological harm to disaffected persons who felt psychologically coerced into standing for a religious invocation and benediction,

> maintaining respect for the religious observances of others is a fundamental civic virtue that government (including the public schools) can and should cultivate. . . . The Baptist or Catholic who heard and joined in the simple and inspiring prayers of Rabbi Gutterman on this official

academic knowledge alone. We must each strive to fulfill what You require of us all: To do justly, to love mercy, to walk humbly.

"We give thanks to You, Lord, for keeping us alive, sustaining us and allowing us to reach this special, happy occasion.

AMEN

94. 530 U.S. 290, 120 S.Ct. 2266, 147 L.Ed.2d 295 [145 Ed.Law Rep. [21]] (2000).

95. The three accommodationist Justices dissented, Chief Justice Rehnquist and Justices Scalia and Thomas.

96. *Id*. at 304, 120 S.Ct. 2266.

97. *See McCreary*, 125 S.Ct. at 2749 (Scalia, J., dissenting) ("[The] actions of our First President and Congress and the Marshall Court were not idiosyncratic; they reflected the beliefs of the period. Those who wrote the Constitution believed that morality was essential to the well-being of society and that encouragement of religion was the best way to foster morality.")

98. The Supreme Court has repeatedly declared that the Bible can be taught as history and literature and many public schools have included elective courses for that purpose. However, a controversy has arisen as to whether materials published for such courses are a subterfuge for teaching religious values. See NSBA Legal Clips, Aug. 4, 2005 discussing the curriculum prepared by the National Council on Bible Curriculum in Public Schools.

> and patriotic occasion was inoculated from religious bigotry and prejudice in a manner that cannot be replicated. To deprive our society of that important unifying mechanism, in order to spare the nonbeliever what seems to me the minimal inconvenience of standing or even sitting in respectful nonparticipation, is as senseless in policy as it is unsupported in law.[99]

It is little wonder, then, that all of these cases challenging government prohibition of, or permissive support for, religious activities and religious traditions have involved a Court deeply divided on the appropriate role of government involvement in religion.

The Supreme Court's separationist approach to religion in education has been strengthened by a quite unrelated decision in *Hazelwood School District v. Kuhlmeier (Hazelwood)*[100] protecting the right of public school boards and administrators to control the content of curriculum as long as school officials have a reasonable pedagogical basis for their decision. Thus, school districts desirous of excluding religious content from their schools can plead their control over curriculum. For example, in *Brown v. Hot, Sexy, and Safer Productions (Brown)*,[101] the First Circuit was called upon to adjudicate a conflict between a conflict between a school board's use of an outside speaker to present a program promoting AIDS Awareness week and parent religious objections to the program. For 1 ½ hours, students were required to attend an assembly with sexually explicit monologues and sexually explicit skits without the school having sent home parent consent forms required by school board policy. When students and parents sued various school officials, including the principal, on a variety of legal theories (including the right to direct the education of children and free exercise of religion), the First Circuit upheld dismissal of the claims because, while "the state cannot prevent parents from choosing ... religious instruction at a private school..." the Constitution does not impose a burden on state educational systems "to cater a curriculum for each student whose parents have genuine moral disagreements with the school's choice of subject matter."[102] Generally, *Brown* is consistent with rulings by other courts in the United States holding that public schools cannot be compelled to accommodate religious objections or requests for changes to curriculum.[103]

The Establishment Clause and Hostility Toward Religion

However, the accommodationist view has also had a modicum of success in that the Court has recognized that the establishment clause includes more

99. *See Lee v. Weisman*, 505 U.S. 577, 638, 112 S.Ct. 2649, 120 L.Ed.2d 467 [75 Ed.Law Rep. [43]] (1992) (Scalia, J., dissenting).

100. 484 U.S. 260, 108 S.Ct. 562, 98 L.Ed.2d 592 [43 Ed.Law Rep. [515]] (1988).

101. 68 F.3d 525 [104 Ed.Law Rep. [106]] (1st Cir. 1995).

102. *Id*. at 533, 534.

103. *See, e.g., Mozert v. Hawkins County Bd. of Educ.*, 827 F.2d 1058 [41 Ed.Law Rep. [473]] (6th Cir. 1987) (rejecting religious claim by mother for a separate reading series for her daughter because the one adopted by the school district contained material offensive to her religion). *See also, Bannon v. School District of Palm Beach County*, 387 F.3d 1208 [193 Ed.Law Rep. [78]] (11th Cir. 2004) (upholding school's refusal to permit religious symbols painted by a student on partitions in the school hallway because the partitions were considered "government speech" and school could choose to refuse to permit such expression).

than just the functions of prohibiting and permitting religious activity; in certain cases, government action can be viewed as hostile to religion, at which point the establishment clause, frequently in conjunction with the free speech clause, requires government action favorable to religion. Although this mandatory function of the establishment clause has been overshadowed by the enormous litigation legacy involving prohibited or permitted religious activities under the establishment clause, it is important because the free exercise clause has proven ineffective in protecting religious actions involving public settings.[104] In *Locke v. Davey (Locke)*,[105] the Supreme Court upheld a state rule prohibiting the use of state scholarship funds to pursue a theological degree as not in violation of the free exercise clause, even though providing such assistance was permissible under the establishment clause.[106] Thus, the *Locke* majority expounding upon what if referred to as "the play between the joints"[107] of the free exercise and establishment clauses, left a student disenfranchised from receiving a state scholarship because the free exercise clause created no right of entitlement. In a sense, *Locke* is the successor to earlier free exercise principles that the free exercise clause confers no constitutional protection where government action is considered neutral and generally applicable,[108] and confers protection only where a particular religion has been singled out for adverse treatment.[109] Thus, with the diminution of the protective value of the free exercise clause, the establishment clause requirement that government cannot demonstrate hostility toward religion has taken on new importance.

104. The seminal case in the diminution of the importance of the Free Exercise Clause was *Employment Div., Dep't of Human Resources of Ore. v. Smith*, 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990) (in a majority opinion by Justice Scalia, the Court reasoned that free exercise was no longer a defense to neutral, generally applicable government actions; in this case, the state had denied unemployment compensation benefits to two discharged state employees for using peyote as part of Native American religious ceremony and such denial was not a violation of the Free Exercise Clause where state prohibition of the use of peyote was neutral, in the sense that it had been enacted without the purpose of penalizing the religion). *See generally*, Ralph Mawdsley, "*Employment Division v. Smith* Revisited: The Constriction of Free Exercise Rights Under the United States Constitution," 76 Ed.Law Rep. [1] (1992)

105. *See Locke v. Davey*, 540 U.S. 712, 124 S.Ct. 1307, 158 L.Ed.2d 1 [185 Ed.Law Rep. [30]] (2004) (holding that state could restrict allocation of its funds without violating the Free Exercise Clause, even though its constitutional prohibition on use of funds was more restrictive than the Establishment Clause. See Wash, Const., Art. I, § 11 "No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment.")

106. *Cf. Witters v. Washington Dep't of Servs. For the Blind*, 474 U.S. 481, 106 S.Ct. 748, 88 L.Ed.2d 846 [29 Ed.Law Rep. [496]] (1986) (holding that a student using a state grant for ministerial training did not violate the Establishment Clause) *with Witters v. State Comm'n for the Blind,* 112 Wash.2d 363, 369–370, 771 P.2d 1119, 1122 [53 Ed. Law Rep. [278]] (1989) (on remand, state supreme court upheld denial of grant under state constitution as not being a free exercise violation).

107. *Locke*, 540 U.S. at 718, 124 S.Ct. 1307.

108. *See Employment Div., Dep't of Human Resources of Ore. v. Smith*, 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990).

109. *See Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993) (invalidating four city ordinances enacted to prohibit the religious practice of animal sacrifice of the Santeria religion, even though the ordinances claiming to be neutral allowed for a wide range of other kinds of animal killings).

The notion that the establishment clause prohibited government from displaying hostility toward religion has been part of constitutional dogma since the earliest cases decided by the Court under the First Amendment religion clauses.[110] The seminal case for public schools has become *Lamb's Chapel v. Center Moriches Union Free School District (Lamb's Chapel)*[111] where the Court, in a rare unanimous decision, found that a school district had violated the free speech clause by opening its premises to a wide range of community groups but refused to permit a church to show a religious film series in the evenings. Since the Court found a free speech violation, it saw no reason to address "the church's argument that categorical refusal to permit District property to be used for religious purposes demonstrate[d] hostility to religion,"[112] but the refusal of the Court to dismiss the claim out-of-hand was at least tacit recognition that such a claim was possible. Two years later, in *Rosenberger v. Rector and Visitors of University of Virginia (Rosenberger)*,[113] the Court, in finding that the university's refusal to fund a campus organization publication written from a Christian viewpoint when other publications from other viewpoints were funded violated the free speech clause, added that, "[the university's] course of action was a denial of the right of free speech and would risk fostering a pervasive bias or hostility to religion, which could undermine the very neutrality the Establishment Clause requires."[114] Four years after *Rosenberger*, the Court, in *Good News Club v. Milford Central School (Good News)*,[115] held that a public school that

110. *See, e.g., McCollum v. Bd. of Educ. of Sch. Dist. No. 71*, 333 U.S. 203, 211–212, 68 S.Ct. 461, 92 L.Ed. 649 (1948) (in invalidating religious classes taught by clerics in school buildings during school time, the Court observed that "hostility [toward religion] would be at war with our national tradition as embodied in the First Amendment's guaranty of the free exercise of religion"); *Zorach v. Clauson*, 343 U.S. 306, 315, 72 S.Ct. 679, 96 L.Ed. 954 (1952) (in refusing to apply *McCollum* to an off-campus released time program, the Court observed that "separation of Church and State [does not] mean that public institutions can make no adjustments of their schedules to accommodate the religious needs of the people. We cannot read into the Bill of Rights such a philosophy of hostility to religion"); *Lynch v. Donnelly*, 465 U.S. 668, 673, 104 S.Ct. 1355, 79 L.Ed.2d 604 (1984) (in upholding a créche in a town display, the Court observed that "the constitution [dose not] require complete separation of church and state; it affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any"); *Wallace v. Jaffrey*, 472 U.S. 38, 85 105 S.Ct. 2479, 86 L.Ed.2d 29 [25 Ed.Law Rep. [39]] (1985) (O'Connor, J., concurring in judgment) ("In invalidating statute providing for meditation of prayer, Justice O'Connell observed, For decades our opinions have stated that hostility toward any religion or toward all religions is as much forbidden by the Constitution as is an official establishment of religion"); *Edwards v. Aguillard*, 482 U.S. 578, 616, 107 S.Ct. 2573, 96 L.Ed.2d 510 [39 Ed.Law Rep. [958]] (1987) (in striking down a Balanced Treatment statute, the Court observed that "we have consistently described the Establishment Clause as forbidding not only state action motivated by the desire to *advance* religion, but also that intended to 'disapprove,' 'inhibit,' or evince 'hostility' toward religion"); *Board of Educ. of Westside Community Schs. v. Mergens*, 496 U.S. 226, 248, 110 S.Ct. 2356, 110 L.Ed.2d 191 [60 Ed.Law Rep. [320]] (1990) (in upholding constitutionality of Equal Access Act, the Court noted that "if a State refused to let religious groups use facilities open to others, then it would demonstrate not neutrality but hostility toward religion").

111. 508 U.S. 384, 113 S.Ct. 2141, 124 L.Ed.2d 352 [83 Ed.Law Rep. [30]] (1993).

112. *Id.* at 390, note 4, 113 S.Ct. 2141.

113. 515 U.S. 819, 115 S.Ct. 2510, 132 L.Ed.2d 700 [101 Ed.Law Rep. [552]] (1995).

114. *Id*. at 845–846, 115 S.Ct. 2510.

115. 533 U.S. 98, 121 S.Ct. 2093, 150 L.Ed.2d 151 [154 Ed.Law Rep. [45]] (2001).

provided after-school access to certain youth-oriented groups (e.g., Boy Scouts) but denied access to a Christian youth group (Good News Club) violated the free speech clause. Most telling though was how the Court handled the claim that admitting a religious group immediately after school would violate the establishment clause by creating the appearance of sponsorship of religion; "even if we were to inquire into the minds of schoolchildren in this case, we cannot say the danger that children would misperceive the endorsement of religion is any greater than the danger that they would perceive a hostility toward the religious viewpoint if the Club were excluded from the public forum."[116]

Federal courts have picked up on this theme that refusing to provide the same rights to those expressing their religious views could constitute hostility toward religion. For example, in *Rusk v. Crestview School District*,[117] the Sixth Circuit upheld a school district rule that fliers from community religious groups be distributed to students on the same basis as fliers from other community groups, the court noting that, "if Crestview were to refuse to distribute flyers advertising religious activities while continuing to distribute flyers advertising other kinds of activities, students might conclude that the schoon disapproves of religion."[118]

While no case to date has held that the establishment clause by itself will support a hostility claim, the prohibition of free speech viewpoint discrimination in *Lamb's Chapel* and subsequent cases clearly has mirrored the establishment clause's prohibition on hostility. In effect, public schools and other government entities that have discriminated against religious expression have demonstrated hostility toward religion which, while not actionable under the establishment clause, nonetheless is reflected in the finding of a free speech violation. Whether a separate establishment clause claim will develop remains to be seen, but a finding of no viewpoint discrimination under free speech will probably be tantamount to a determination of neutrality for purposes of the establishment clause.[119] However, the determination as to whether an establishment clause hostility claim is possible seems to be a matter of proof, not a matter that the claim is not justiciable.[120]

South Africa's Approach to Religion in Public Schools

South Africa's ten-year-old Constitution lacks an establishment clause and, thus, it will be interesting to see whether South Africa can avoid the highly fractious debate that has characterized Supreme Court interpretation of the United States Constitution's establishment clause. More specifically, if South Africa's schools are not limited by an establishment clause, to what

116. *Id*. at 118, 121 S.Ct. 2093.

117. 379 F.3d 418 [191 Ed.Law Rep. [84]] (6th Cir. 2004).

118. *Id*. at 423.

119. *See e.g., Seidman v. Paradise Valley Unified Sch. Dist. No. 69*, 327 F.Supp.2d 1098, 1119 [191 Ed.Law Rep. [175]] (D. Ariz. 2004) (upholding school district prohibition of use of "God" on tile to be displayed in interior of school as being school-sponsored speech and rejecting Establishment Clause hostility claim where prohibition was considered neutral in the absence of "evidence that the Defendants affirmatively opposed religion, were hostile to religion, or showed preference for those who do not believe in religion.")

120. *See id.* where the failure of a hostility claim was due to lack of evidence, not to the lack of such a claim.

extent are they able to include religion that might otherwise be prohibited in the United States? As is evident by the discussion below, South Africa views its use of religion in schools as part of its policy of reconciliation to invest its school children with tolerance for diversity. South Africa's approach to religion and education is reflected in its Constitution, its Schools Act of 1996 (Schools Act), and the Ministry of Education's National Policy on Religion and Education (National Policy).

For a comprehensive statement of South Africa's approach to religion in schools, one must look in the country's National Policy on Religion and Education. The National Policy, reflective of "the rich and diverse religious heritage of [the] country," identifies "the distinctive contribution that religion can make to education" and declares that "the public school has an educational responsibility for teaching and learning about religion and religions."[121] While the National Policy is not prescriptive, it does provide "a framework for schools to determine policies, and for parents and communities to be better informed of their rights and responsibilities in regard to religion and education."[122] In a broader sense, the National Policy recognizes a connection between religion and values with its observation that, "religions are key resources for clarifying morals, ethics, and building regard for others. Religions embody values of justice and mercy, love and care, commitment, compassion, and co-operation. They chart profound ways of being human, and of relating to others and the world."[123] Against the backdrop of the Constitution's protection of "freedom of conscience, religion, thought, belief, and opinion" and the Schools Act's prohibition of discrimination on the basis of "religion, belief and conscience," the National Policy asserts that "public schools have a calling to promote the core values of a democratic society"[124] and that religious education in public schools is a method of promoting those values.[125] In fact, the National Policy notes that while

121. *Id.* at ¶ 1.

122. *Id*. at ¶ 2.

123. *Id*. at ¶ 31.

124. *Id*. at ¶ 14. These core values are defined as follows:

> *Equity*: The education process in general, and this policy, must aim at the development of a national democratic culture with respect for the value of all of our people's diverse cultural, religious and linguistic traditions.
>
> *Tolerance*: Religion in education must contribute to the advancement of interreligious toleration and interpersonal respect among adherents of different religious or secular worldviews in a shared civil society.
>
> *Diversity*: In the interest of advancing informed respect for diversity, educational institutions have a responsibility for promoting multi-religious knowledge, understanding, and appreciation of religions in South Africa and the world.
>
> *Openness*: Schools, together with the broader society, play a role in cultural formation and transmission, and educational institutions must promote a spirit of openness in which there shall be no overt or covert attempt to indoctrinate pupils [Sections 15(1) and (2) of the Constitution of the Republic of South Africa] into any particular belief or religion.
>
> *Accountability*: As systems of human accountability, religions cultivate moral values and ethical commitments that can be recognized as resources for learning and as vital contributions to nation building.
>
> *Social Honor*: While honoring the linguistic, cultural, religious or secular backgrounds of all pupils, educational institutions cannot allow the overt or covert denigration of any religion or secular world-view.

125. *Id*.

> we could reject any place for religion in education, by arguing that the mutual acceptance of our common humanity is the only solution for societal harmony, [w]e believe that we will do much better as a country if our pupils are exposed to a variety of religious and secular belief systems, in a well-informed manner, which gives rise to a genuine respect for the adherents and practices of all of these, without diminishing in any way the preferred choice of the pupil.[126]

South Africa characterizes its approach to religion and education as a "co-operative model" that recognizes the "[s]eparate spheres for religion and the state" under the Constitution, but also "[the] scope for interaction between the two."[127] It declares its "co-operative model" to be a reaction both against the "theocratic model" under apartheid "that tried to impose religion in public institutions"[128] and against "a separationist model . . . [that] completely divorce[s] the religious and secular spheres of a society, such as in France or the United States."[129]

The National Policy establishes guidelines in three areas of religion-public education interaction: a Religion Education K–9 curricular program, religious instruction, and religious observances. Of these three, the most interesting is the curricular program which is obligatory for all students in grades K–9. The National Policy acknowledges the South Africa Constitution's "guarantee of freedom of religion" and asserts that, in the curricular program, "the state, neither advancing nor inhibiting religion, must assume a position of fairness, informed by a parity of esteem for all religions and worldviews."[130] Critical then to "teaching about religion, religions, and religious diversity" is facilitation "by trained professionals" and the development of teaching and learning materials that are "appropriate and credible" and assessment that is "objective."[131]

The focus of the Religion Education curricular program is "teaching and learning about the religions of the world."[132] This program is a component, albeit a small one,[133] of one of the eight General Education Learning Areas[134] that has its outcome, within the country's National Qualifications Network, mastery of "cultural literacy, ethical literacy, and religious literacy."[135] The assessment standards for the Religion and Education program contain specific grade level outcomes expected of all students.[136]

126. *Id*. at ¶ 29.

127. *Id*. at ¶ 3.

128. *Id*.

129. *Id.*

130. *Id*. at ¶ 5.

131. *Id*. at ¶ 8.

132. *Id*. at ¶ 19.

133. *See id*. The National Policy suggests that "if offered as a discrete module, [the religion and education program] would constitute no more than a few lessons in each year."

134. *Id*. at ¶ 48. The Eight Learning Areas are: Languages, Mathematics, Natural Sciences, Social Sciences, Arts and Culture, Life Orientation (includes Religion Education), Economic Management Sciences, and Technology. National Curriculum Statement–Grades K–9, p. 1 (2002). The religion curriculum is part of the "Life Orientation Learning Area."

135. *Id*. at ¶ 44.

136. *See id.*, Appendix to the Policy on Religion and Education.

> The ***Assessment Standards*** for this part of the Learning Area are as follows:
>
> Grade We know this when the learner:
>
> Grade R Identifies and names symbols linked to own religion.

> Grade [K] Identifies and names symbols linked to own religion.
> Grade 1 Matches symbols associated with a range of religions in South Africa.
> Grade 2 Describes important days from diverse religions.
> Grade 3 Discusses diet, clothing and decorations in a variety of religions.
> Grade 4 Discusses significant places and buildings in a variety of religions.
> Grade 5 Discusses festivals and customs from a variety of religions.[137]
> Grade 7 Explains the role of oral traditions and scriptures in a range of the world's religions.
> Grade 6 Discusses the dignity of the person in a variety of religions.
> Grade 8 Discusses the contributions of organizations from various religions to social development.
> Grade 9 Reflects on and discusses the contributions of various religions in promoting peace.[138]

This curricular requirement must be evaluated against South Africa's Constitution which provides that "[e]veryone has the right to freedom of conscience, religion, thought, belief and opinion."[139] Whether this mandatory approach to teaching about religion can be reconciled with the constitutional guarantee is discussed later in this section.

The National Policy distinguishes the religious education curricular program from "religious instruction" and "religious observances." "Religious instruction" defined as "instruction in a particular faith or belief . . . [is the] responsibility of the home, the family, and religious community . . . [and] cannot be part of the formal school program."[140] However, the Policy "encourages the provision of religious instruction by religious bodies and other accredited groups outside the formal school curriculum on school premises" with the provisos that the opportunities "be afforded in an equitable manner to all religious bodies represented in a school," that "no denigration or caricaturing of any other religion take place," and that "attendance be voluntary."[141] In essence, South Africa's approach to religious instruction is not significantly different from the religious speech approach toward community religious organization access adopted by the Supreme Court in *Lamb's Chapel* and *Good News Club* in the United States.

> Grade 1 Matches symbols associated with a range of religions in South Africa.
>
> Grade 2 Describes important days from diverse religions.
>
> Grade 3 Discusses diet, clothing and decorations in a variety of religions.
>
> Grade 4 Discusses significant places and buildings in a variety of religions.
>
> Grade 5 Discusses festivals and customs from a variety of religions.
>
> Grade 6 Discusses the dignity of the person in a variety of religions.
>
> Grade 7 Explains the role of oral traditions and scriptures in a range of the world's religions.
>
> Grade 8 Discusses the contributions of organizations from various religions to social development.
>
> Grade 9 Reflects on and discusses the contributions of various religions in promoting peace.

137. *Id*., Appendix to the Policy on Religion and Education.

138. *Id*.

139. South Africa Const., ch. 2, § 15(1).

140. *Id.* at ¶ 54, 55.

141. *Id*. at ¶ 57.

The directive of the National Policy on Education and Religion regarding religious observances is rather more complex (and confusing). The National Policy allows for religious observances on public school premises during the school day that can include "school assembl[ies] . . ., selected readings from various texts emanating from different religions, rotation of opportunities for observance in proportion to the representation of different religions in the school, . . . universal prayer . . ., or a period of silence."[142]

South Africa's Constitution and its Schools Act make religious observances discretionary in public schools but do require that when these observances occur, they must satisfy specific requirements.[143] Religious observances may be conducted at public schools, provided that, those observances follow rules made by the appropriate public authorities, they are conducted on an equitable basis, and attendance at them is free and voluntary.[144] Neither the Constitution nor the Schools Act defines "religious observances" but the National Policy broadly places observances into four categories:

> voluntary public occasions, which make use of school facilities, for a religious service on a day of worship or rest;
>
> voluntary occasions when the school community (teachers and pupils) gather for a religious observance;
>
> observances held in a voluntary gathering of pupils and/or teachers during a school break; and
>
> an observance which may be ongoing, and entail other dimensions such as dress, prayer times and diets, which must be respected and accommodated in a manner agreed upon by the school and the relevant faith authorities.[145]

Not all of these observances will occur during the school day, but to the extent that they "are organized as an official part of the school day, [they] must accommodate and reflect the multi-religious nature of the country in an appropriate manner."[146] These emphases on diversity and equity among religions represent a significant limitation on the Local Governing Bodies' (LGBs'–roughly equivalent to local school boards in the U.S.) role in "determin[ing] the nature and content of religious observances for teachers and pupils."[147] LGB policies and practices regarding observances "[can] not violate the religious freedom of pupils and teachers by imposing religious uniformity on a religiously diverse school population in school assemblies . . . [and] must maintain parity of esteem with respect to religion, religious bodies or secular beliefs in all of its public institutions, including public schools."[148] Despite these guidelines though, the Policy does not require that a LGB permit religious observances[149] nor "does [it] prescribe specific ways in which religious observances at public schools must be organized"[150]

142. *Id*. at ¶ 62. The policy though also provides that a LGB "may determine that a policy of no religious observances be followed." *Id*. at ¶ 61.

143. S.A. Const.§ 15(2); Schools Act, ch. 2, § 7.

144. *Id*.

145. *National Policy*, ¶ 59.

146. *Id*. at ¶ 61.

147. *Id*.

148. *Id.* at ¶ 63.

149. *Id*. at ¶ 61.

150. *Id*. at ¶ 65.

Analyzing the Similarities and Differences Between the United States' and South Africa's Approaches to Religion and Public Education

South Africa's National Policy and its constitutional and statutory underpinnings provide broad direction for the country but differ in several areas from the United States. However, the important consideration is not just determining the differences between how South Africa and the United States address religion and education but determining what the implications for these differences are for the two countries.

First, and perhaps most obvious, is the National Policy's characterization (or, mischaracterization) of the United States approach to religion and education as one of complete separation. As reflected in an earlier part of this article, the establishment clause is not now viewed as, nor has it ever been viewed as, a complete divorcement of religion and the secular. Even if South Africa's "co-operative model" permits it to engage in certain kinds of activities (mandatory classroom religion curriculum and optional religious observances) that would be impermissible under the establishment clause, the U.S. Supreme Court's interpretation of the establishment clause can hardly be understood as one of complete separation. The measure of the strength of South Africa's National Policy should be whether it can honor its commitment to using religion as a form of nation building within its constitutional and statutory religious guarantees, not whether its approach to religion and education is different from (or better than) that of the United States. In other words, the focus of South Africa should not be outward to what other countries are doing but inwardly to whether its approach can achieve its purpose of nation building without violating the constitutional guarantee of freedom of religion. Indeed, it is difficult to even speculate how mischaracterizing the United States approach to religion and education would have any practical effect on South Africa's implementation of its National Policy in its own public schools. The "co-operative model" is a perfectly legitimate approach to addressing religion and education but its legitimacy should not depend on how other countries choose to address that topic. Ultimately, if South Africa's "co-operative model" is to succeed, it must do so because it is the fulfillment of its own country's history and culture,[151] not because it is different from the experience in another country. Unfortunately, as reflected in the discussion to follow, the effort to elevate the "co-operative model" based on its difference may have the effect of distracting the national

151. The National Policy reflects the uniqueness of the South African culture in choosing its approach to religion and education. *See id*. at ¶ 9, 10.

> South Africa is a multi-religious country. Over 60 per cent of our people claim allegiance to Christianity, but South Africa is home to a wide variety of religious traditions. With a deep and enduring indigenous religious heritage, South Africa is a country that also embraces the major religions of the world. Each of these religions is itself a diverse category, encompassing many different understandings and practices. At the same time, many South Africans draw their understanding of the world, ethical principles, and human values from sources independent of religious institutions. In the most profound matters of life orientation, therefore, diversity is a fact of our national life.
>
> Our diversity of language, culture and religion is a wonderful national asset. We therefore celebrate diversity as a unifying national resource, as captured in our Coat of Arms: *!Ke E:/Xarra //ke* (Unity in Diversity). This policy for the role of religion in education is driven by the dual mandate of celebrating diversity and building national unity.

government and the public schools from protecting the religious integrity of public school students.

Second, South Africa's introduction of a required religion curriculum in public schools is an accomplishment that would not be possible in the United States. While the U.S. Supreme Court has repeatedly declared that the Bible can be taught as literature or history, finding an acceptable curriculum has been difficult.[152] At best, any course in the United States would have to be an elective and then only at the high school level. South Africa has recognized the important connection between religion and values, asserting that "[r]eligion can play a significant role in preserving our heritage, respecting our diversity, and building a future based on progressive values."[153] In essence, South Africa has asserted the important role of religion in schools in "promot[ing] the core values of [its] democratic society . . . [namely] equity, tolerance, multilingualism, openness, accountability, and social honor."[154] While one can fashion an argument in the United States that an elective Bible course should fit within school board discretion under *Hazelwood* in determining the appropriateness of curriculum, the long shadow of *Engel*, *Schempp*, *Lee* and *Santa Fe* suggests that any religious content within the public schools will be suspect, especially where the nature of the course depends on the views and values of the teacher.[155] Presumably, South Africa

152. *See* NSBA Legal Clips, January 2005, "School Board in rural Michigan embroiled in dispute about whether to add a Bible course to class offerings;" NSBA Legal Clips, Aug. 4, 2005 (discussing conflict between National Council on Bible Curriculum in Public Schools (NCBCPS) and the Texas Freedom Network (TFN) regarding use of NCBCPS Bible course curriculum in Texas public schools). See also, Katie Humphrey, "Bible course accused of preaching to students," Austin American–Statesman, Aug. 2, 2005; Ralph Blumenthal and Barbara Novovitch, "Bible Course Becomes a Test for Public Schools in Texas," New York Times, Aug. 1, 2005.

153. *Id.* at ¶ 6. However, the National Policy is careful to state that "Religions are an important, although not an exclusive source of moral values." *Id*. at ¶ 31.

154. *Id*. at ¶ 14. These core values are defined as follows:

> *Equity*: The education process in general, and this policy, must aim at the development of a national democratic culture with respect for the value of all of our people's diverse cultural, religious and linguistic traditions.
>
> *Tolerance*: Religion in education must contribute to the advancement of interreligious toleration and interpersonal respect among adherents of different religious or secular worldviews in a shared civil society.
>
> *Diversity*: In the interest of advancing informed respect for diversity, educational institutions have a responsibility for promoting multi-religious knowledge, understanding, and appreciation of religions in South Africa and the world.
>
> *Openness*: Schools, together with the broader society, play a role in cultural formation and transmission, and educational institutions must promote a spirit of openness in which there shall be no overt or covert attempt to indoctrinate pupils [Sections 15(1) and (2) of the Constitution of the Republic of South Africa] into any particular belief or religion.
>
> *Accountability*: As systems of human accountability, religions cultivate moral values and ethical commitments that can be recognized as resources for learning and as vital contributions to nation building.
>
> *Social Honor*: While honoring the linguistic, cultural, religious or secular backgrounds of all pupils, educational institutions cannot allow the overt or covert denigration of any religion or secular world-view.

155. *See Myers v. Loudoun County Public Schools*, 418 F.3d 395 [200 Ed.Law Rep. [581]] (4th Cir. 2005) (Aug. 10, 2005) (upholding "under God" in the Pledge of Allegiance as a "patriotic exercise" but distin-

will have the same challenges in assuring that the teachers of religion respect the students' "constitutional guarantees of human and civil rights to freedom or religion, thought, and conscience."[156] While the National Policy provides for a training and accreditation process for teachers of religion,[157] there are in place no student remedies should a teacher violate those "constitutional guarantees." Contrary to the United States under the establishment clause in *Engel* and *Schemmp*, where the broad equity power of the federal courts was invoked to invalidate facially the use of prayer and Bible reading in public schools, any remedy in South Africa would seem to be limited only on an applied basis to specific teacher infractions. In the end, the religion and education curriculum will continue in place, the student will still be required to attend the course, but with a possible warning to the teacher not to engage in "religious instruction" while presenting the course content.

Third, South Africa's National Policy on Religion and Education permits, although does not require, religious assemblies in public schools, something again that would not be possible in the United States. South Africa's approach to religious assemblies suggests the permissive model under the U.S. establishment clause, but with the important difference that while public schools are empowered to have religious assemblies during the school day, "pupils must be excused on grounds of conscience from attending a religious observance component, and equitable arrangements must be made for these pupils."[158] Such voluntariness of participation distinguishes religious assemblies from the religion and education curriculum. However, the National Policy is somewhat ambiguous as to what is meant by its declaration that "[w]here a religious observance is organized as an official part of the school, it must accommodate and reflect the multi-religious nature of the country in an appropriate manner."[159] Thus, if the teacher and student public school constituency represented overwhelmingly only one religion (as is frequently the case in many South African schools), would separate assemblies representing other religions be necessary if the few dissenting students were excused to their own separate assemblies encompassing only their own religion? The answer depends on how one reads the National Policy as a statement on nation building.[160] Although individual public schools do not

guishing it from the "religious exercise" in *Engel*, *Schempp*, and *Lee*.) A California federal district court in the most recent version of *Newdow* with Newdow again serving as plaintiff held that Newdow lacked standing and dismissed his constitutional challenge to the pledge of allegiance. *Newdow v. The Congress of the U.S.*, 383 F.Supp.2d 1229 [201 Ed.Law Rep. [915]] (E.D.Cal. 2005). However, the district court upheld the standing of another custodial parent and held that California's pledge statute violated the establishment clause as being coercive in nature. *Id*. at 1241–42, citing for support to *Newdow v. U.S. Congress* (*Newdow III*), 328 F.3d 466 [176 Ed.Law Rep. [44]] (9th Cir. 2003).

156. *National Policy* at ¶ 28.

157. *See id*. at ¶ 34. ("The teaching of Religion Education in schools is to be done by appropriately trained professional educators registered with the South African Council of Educators (SACE)." However, the teachers are encouraged to use "guest facilitators" from the community who are not required to be registered but who must be selected "on an equitable basis.")

158. *Id.* at ¶ 63.

159. *Id*. at ¶ 61.

160. *See id*. at ¶ 64. ("Since the state is not a religious organization, theological body, or inter-faith forum, the state cannot allow unfair access to the use its resources to propagate any particular religion or religions. The state must maintain parity of esteem with

have to permit religious assemblies, once they are permitted, the schools must utilize these assemblies as part of the national program for "finding new ways to celebrate our different linguistic, cultural, and religious resources [and for] moving decisively beyond the barriers erected by apartheid, beyond the shields provided by ignorance of the other, which invariably breeds suspicion, hatred and even violence."[161] In what appears to be a national purpose to use religion to create unity in diversity this purpose has gone beyond the permissible limits of the establishment clause in the United States. A diversity approach to selection of speakers was not sufficient to save school-controlled graduation prayer in *Lee* and such an approach would most assuredly not work for school assemblies. While public schools in the United States can be required under the free speech clause (and indirectly under the establishment clause's prohibition against hostility) to provide access to religious views, this has been done to protect equal access on an individual basis, never a mandate that public schools must engage in religious diversity.

Fourth, the indication that religion is part of South Africa's approach to nation building raises the question whether its National Policy is one of celebrating diversity and tolerance or one of manipulating religion for national purposes. The Assessment Standards in the Religion and Education curriculum have an interesting range of goals. The standards for grades kindergarten through grade 5 and grade 7 seem to be fairly descriptive in nature.

> Grade [K] Identifies and names symbols linked to own religion.
> Grade 1 Matches symbols associated with a range of religions in South Africa.
> Grade 2 Describes important days from diverse religions.
> Grade 3 Discusses diet, clothing and decorations in a variety of religions.
> Grade 4 Discusses significant places and buildings in a variety of religions.
> Grade 5 Discusses festivals and customs from a variety of religions.[162]
> Grade 7 Explains the role of oral traditions and scriptures in a range of the world's religions.

However, the standards for Grades 6, 8 and 9 read differently.

> Grade 6 Discusses the dignity of the person in a variety of religions.
> Grade 8 Discusses the contributions of organizations from various religions to social development.
> Grade 9 Reflects on and discusses the contributions of various religions in promoting peace.[163]

One wonders how religions will be assessed in terms of "the dignity of the person," "contributions . . . to social development," and "contributions . . . in promoting peace." All three of these standards reflect constitutional rights protected in South Africa's Bill of Rights[164] but the National Policy

respect to religion, religious or secular beliefs in all of its public institutions, including its public schools.")

161. *Id*. at ¶ 69.

162. *Id*., Appendix to the Policy on Religion and Education.

163. *Id*.

164. *See* South Africa Constitution, Ch. 2, §§ 10.("Everyone has inherent dignity and the right to have their dignity respected and protected"), 24 ("Everyone has the right . . . [to] ecologically sustainable develop-

contains no insight as to how this assessment should occur. Will contributions be measured according to doctrinal theology, past historical practices, believers' personal beliefs, or current social activism? More importantly though, what happens to a student's constitutional "right to freedom of conscience, religion, thought, belief and opinion"[165] if the result of the class discussion is that the student's religion has made insufficient contributions to one or more of the standards? While the Policy declares that "Religion Education is education about diversity for a diverse society . . . that engenders a sense of acceptance, security, and respect for pupils with differing values, cultural backgrounds, and religious traditions," it also declares that "not all religious values are consistent with our Constitution."[166] Will the National Policy engender respect for values that a class decides are unconstitutional?

Most troublesome though is the breadth of the National Policy's definition of "religion" to include "beliefs and practices in relation to the transcendent, the sacred, the spiritual, or the ultimate dimensions of human life," in addition to the more narrow references to "religious traditions, communities, and institutions in society."[167] For purposes of satisfying this curricular requirement, will teachers be expected to choose some religions and ignore others where class time most assuredly would not permit a comprehensive discussion of all religions? If only religions represented in the classroom, the school or the community are selected, how does that necessarily further the purpose of multiculturalism? In addition, although some religions tend to be monolithic in nature, many have multiple sects that may bear a common religious name but have wide differences in doctrine and practices. In such a case, will some religions be ignored altogether or will differences among sects in religions be ignored even if those differences influence how students might view a religion's (or sect's) contributions to human dignity, social achievement, and peace?

Unfortunately, the National Policy avoids the difficult questions and, with only broad guidelines, leaves implementation of the Policy up to LGBs and classroom teachers. After two years of the National Policy on Religion and Education, no one has investigated how the Policy has been implemented, or, indeed, whether it has been implemented at all. Thus, one does not know the extent to which all public schools have been bought into the "cooperative model" or whether some have continued with the "theocratic model" that is part of the legacy of apartheid.

CONCLUSION

South Africa's effort in its National Policy to use religion as part of its process for democratization by mandating a study about religion in its schools is, in one way, consistent with its history and culture. However, without

ment and use of natural resources while promoting justifiable economic and social development"), and 9, 16, 17 ("the full and equal enjoyment of all rights and freedoms;" "the right to freedom of expression . . ." [which does not include] "propaganda for war," "incitement of imminent violence," or "advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm;" and "[e]veryone has the right, peacefully and unarmed, to assemble, to demonstrate, to picket and to present petitions.")

165. *Id*. at § 15 (1).

166. *National Policy* at ¶ 30.

167. *Id*. at ¶ 27.

clearer direction regarding the excising of possible abuse under the National Policy, one has to wonder whether the approach in the United States has some merit here. To force the study of religion for all students may open the door for manipulation of religion for political purposes, especially in a country such as South Africa where the nature of constitutional rights for religious beliefs are ill-defined and where remedies for violations of those beliefs are unclear. On its face, the notion that religions will be assessed based on their contributions to the country seems so potentially rife with dissention that one wonders why the discussion needs to take place at all. The irony of South Africa's National Policy is that no such discussion regarding contributions based on race, ethnicity, or national origin would be tolerated and, indeed, should be tolerated. Why then is religion chosen to be treated differently? In the end, South Africa may find that the three approaches to religion and education taken by the United under its establishment clause might provide some useful benchmarks in determining whether the National Policy has created both respect for individual differences in beliefs and recognition of institutionalized religious values.

Regarding religious observances (assemblies) in public schools, part of the ambiguity of South Africa's National Policy is determining how the public schools are handling these assemblies. The National Policy gives South Africa's LGBs and school administrators broad latitude in determining whether religious assemblies will occur and then what the content of those assemblies will be. In many schools, presumably, these assemblies will serve multiple purposes—religious and patriotic exercises, as well as school announcements. To the extent that the religious component of these assemblies reflect the dominant culture of the students in a school, these events are less expressions of the rejected "theocratic model" than manifestations of important student and community values grounded in religious expression. To this end, the United States may have an important lesson to learn from South Africa about the role of religious content and community values.

The United States approach of protection against government hostility under the free speech clause has served the interests of individual students or community organizations in gaining access to public school venues or resources but has not addressed the larger question in *Engel*, *Schempp*, *Lee*, and *Santa Fe* as to why the rejection of religious actions reflective of community values should not also be characterized as hostility toward religion. South Africa's approach to religion and public education is a hybrid of these four cases. In balancing respect for individual beliefs and public school instruction regarding religious values, South Africa has attempted to build a bridge between the two concepts of individual rights and collective nation building. Although the impact of the National Policy in South African schools has not been assessed, students in most of the country's public schools may have the benefit of religious expression in school assemblies that both recognizes and encourages religious values that guide and direct the lives of the students.

The United States effort of using the free speech clause as a vehicle to prevent hostility toward religion and prohibit students from being treated differently because of their religious views of practices has missed the broader perspective of religion as a measure of community or institutional

values. For many students in United States public schools, as for their counterparts in South Africa's schools, religion is an important and necessary part of their lives. What is important for such students is not a historical or comparative perspective of religion but a public acknowledgement that religion affords a transcendent sense of worth to each student's life and achievements. While we properly celebrate the differences among students based on race, ethnicity, and gender, public schools in the United States are deprived from honoring the one unifying factor that gives meaning to these differences, namely that life is about purpose, responsibility, and accountability. Justice Thomas in his insightful dissent in *McCreary* may well be correct that "coercion [should be] the touchstone for our Establishment Clause inquiry."[168] Thus, what is important is not that a school board or administrator may choose a particular religious perspective to challenge students regarding these lifelong goals of purpose, responsibility and accountability, but that students disagreeing with that perspective will have the right to absent themselves without fear of reprisals or harassment. If lifelong values are to be taught, these values for most students will have a religious framework and public school officials should not be faulted for choosing the religious framework familiar to most of the students.

168. *McCreary*, 125 S.Ct. at 2866 (Thomas, J., dissenting).