RELIGION IN PUBLIC SCHOOL CURRICULA IN THE UNITED STATES AND IRELAND: THE LEGAL BALANCE BETWEEN EDUCATIONAL AUTHORITY AND INDIVIDUAL RIGHTS

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INTRODUCTION

A large urban public school district is sued when a high school choir sings a spiritual, *I'm Gonna Sing 'Til the Spirit Moves in My Heart*, at the school's graduation ceremony. The school board settles the case out of court when it agrees to a new policy that limits the teaching of religious music.[1] A federal appellate court supports a teacher's removal of a child's Thanksgiving poster from the classroom's wall because the poster expressed the child's thanks for Jesus Christ.[2] Another federal appellate court in the United States upholds a state statute that requires public school districts to adopt a policy establishing a daily moment of silence so that "each pupil may, in the exercise of his or her individual choice, meditate, pray, or engage in any other silent activity which does not interfere with, distract, or impede other pupils in the like exercise of individual choice."[3] After a contentious year of debate in the state of Ohio, the state board of education votes 18-0 to adopt new science standards. Included for the first time in any state's science academic standards is a reference to Intelligent Design, the theory that some intelligence, whether God or not, had a hand in creating life.[4] And most recently, the United States Supreme Court delivered heated and controversial decisions on the legality of posting the Ten Commandments on public property.[5]

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[1] Doe v. Columbus Pub. Sch., No. C2-01-439 (complaint filed in the United States District Court for the Southern District of Ohio, May 10, 2001).

[2] C.H. v, Oliva, 990 F. Supp. 341 (D. N. J. 1997), aff'd in part and vacated in part on procedural grounds, 226 F.3d 198 (3d Cir. 2000).

[3] Virginia Code § 22.1-203. See Gilmore v. Brown, 258 F.3d 265 (4th Cir. 2001).

[4] See Ohio Department of Education, http://www.ode.state.oh.us (Retrieved July 19, 2003).

[5] McCreary County v. American Civil Liberties Union, No. 03-1693, 2005 U.S. LEXIS 5211 (June 27, 2005), and Van Orden v. Perry, No. 03-1500, 2005 U.S. LEXIS 5215 (June 27, 2005).

Each of these recent legal developments illustrates the continuing educational dialogue associated with the presence of religion in public schools in the United States. They illustrate the tension between educational and legal policymaking authority and the rights of objecting individuals to challenge and nullify such policies. The first case represents a successful challenge to the inclusion of religion in public schools. The second case represents a failed challenge to allow an elementary school student's religion-themed art project The next two, arguably, represent efforts to return religion to the curriculum and to accommodate the religious rights of students and staff. The final cases are both 5-4 decisions from late June 2005 – one upholds the placement of a Ten Commandments monument on the grounds of the Texas State Capitol among other historical monuments and the other strikes down the placement of a similar monument on its own inside a courthouse building. All five, highlighted by the divided decisions over the posting of the Ten Commandments on government property, raise significant questions about public school curriculum and appropriate constitutional balances. When cases of religion in state-supported schools reach courts, how are they resolved? With respect to cases involving religion-based challenges to public school curricula, do the courts favor the rights of the individual dissenters or do they favor the more widely supported district-wide standards and practices? Can the required and full curriculum accommodate each individual's right to freedom of religion and, at the same time, respect the rights of others to be free from government sponsorship of religion? Within the bounds of the law, ethics, and politics, school leaders must guide their public organizations toward the proper balance between these competing interests. But just how should that balance play out?

This paper presents and analyzes court cases involving religion in public school curriculum. For sake of international comparison and a discussion of the guidance, suggestions, and inspiration respective legal systems can offer, the law of the United States and the Republic of Ireland will be explored. What lessons can each system learn from the other? Admittedly, American courts are much more active in the area of religion in schools than Irish courts are. And while both countries share respective revolutionary histories in the fight for religious freedom, they have each taken their own paths to the twenty-first century. And the presence of religion in government-supported educational settings has contributed to the journey.

The issues discussed by the courts and the precedents established in the decisions will be examined to shed some light on the balance that the courts strike between two primary, but competing, principles. On one hand, there is the institutional authority and obligation to set curriculum that will meet state and national standards, and prepare students for participation in and contribution to a modern, democratic, diverse, and technological society. On the other hand, institutional authority has its legal limits, including individual

legal rights to be free from alleged government-sponsored religious activity in public school. These limits on institutional authority must also be tempered by individual legal rights to free exercise of religion.

THE RELIGION CLAUSES OF THE UNITED STATES FIRST AMENDMENT AND THEIR IMPACT ON THE WORK OF SCHOOLS

The Three Establishment Clause Standards

The religion clauses of the First Amendment of the United States Constitution attempt to strike a necessary balance between Free Exercise and Establishment: "Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof." Pertinent to the discussion here, two Supreme Court cases from the 1960s set the scene for later Establishment Clause challenges to religion in the curriculum. First, in *School District of Abington Township v. Schempp*,[6] the Court invalidated two public school district policies requiring daily Bible and/or prayer reading. The Court held that the policies unlawfully favored believers over non-believers. As such, the policies lacked a secular purpose and the requisite neutrality with respect to the presentation of religion in public schools. Six years later, in *Epperson v. Arkansas*,[7] the Court struck down a state statute that made it a crime to teach evolution in public schools. According to the Court, the schools' right to prescribe curriculum is bounded by the requirements of the United States Constitution. The criminal statute at issue in *Epperson* prohibited the teaching of a scientific theory and did so for reasons that violated the First Amendment.

Both *Schempp* and *Epperson* raise questions not merely of constitutional law, but also of curricular authority and the roles played by school leaders. How should a school administrator respond to such challenges? Does he or she have successful curricular defenses to counter the legal challenges? Despite striking down the respective policies, the Courts in both *Schempp* and *Epperson* made profound and lasting statements in favor of the inclusion of religion in public schools, seemingly in favor of school that wish to keep some vestige of religion in their curricula.

> By and large, public education in our Nation is committed to the control of state and local authorities. Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basis constitutional values.[8]

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[6] 374 U.S. 203 (1963).

[7] 393 U.S. 97 (1969).

[8] Id. at 104.

Similarly, and perhaps even more directly on the issue of religion in the curriculum, the Court in *Schempp* frowned on hostility to religion in public settings and favored neutrality instead:

> [I]t might well be said that one's education is not complete without a study of comparative religion or the history of religion and its relationship to the advancement of civilization. It certainly may be said that the Bible is worthy of study for its literary and historic qualities. Nothing we have said here indicates that such study of the Bible or of religion, when presented objectively as part of a secular program of education, may not be effected consistently with the First Amendment.[9]

Since the days of *Schempp* and *Epperson*, courts have struggled to find the one Establishment Clause standard by which to judge the actions of teachers, school administrators, and boards of education. As a result, school leaders must combat challenges leveled under at least one of three theories. Arguably, the most popular standard is the "*Lemon* Test", adopted by the Supreme Court in *Lemon v. Kurtzman*.[10] Under the test, in order for a government action to withstand an Establishment Clause challenge, each of the following questions must be answered in the affirmative: (1) Is the purpose of the government action a secular one? (2) Is the primary effect of the action neither to advance nor inhibit religion? (3) Does the action avoid excessive entanglement with religion?

The *Lemon* test has not been overturned. However, after thirty years, several courts and commentators have modified it and argued in favor of two newer standards that may reflect a changing balance. The "endorsement test," articulated in Justice O'Connor's concurring opinion in *Lynch v. Donnelly*,[11] rewrites the first two questions of *Lemon* to address the intention of the government's activity or policy and the actual message that the activity or policy conveys. The questions become: (1) Is the intent of the government action or policy to endorse religion? (2) Regardless of the intent, does the action or policy actually convey a message of endorsement? Justice O'Connor argued that "[e]ndorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community. Disapproval sends the opposite message."[12] Operative in the

[9] 374 U.S. at 225.

[10] 403 U.S. 602 (1971). In *Lemon*, the Court struck down two state statutes that granted aid (direct and indirect) to private schools. Among the benefits struck down were public subsidies and reimbursements for teacher salaries and textbooks and other instructional materials.

[11] 465 U.S. 668 (1984) (O'Connor, J., concurring).

[12] Id. at 689.

application of the endorsement test is whether a "reasonable observer" would perceive the government action or policy to endorse religion.

The "coercion test", adopted by the Supreme Court in the landmark graduation prayer decision in *Lee v. Weisman*,[13] holds that a government action is unconstitutional if it has a coercive effect with respect to religious practices. In *Lee*, a student graduating from a public middle school complained that the school's policy of inviting local religious leaders to deliver the commencement ceremony's invocation and benediction violated the Establishment Clause. The Supreme Court agreed and struck down the policy. In the majority opinion, Justice Kennedy articulated a "coercion" test, under which governmental entities may not coerce anyone to support or participate in a religious exercise. In furtherance of this directive and in application to a public school's use of a religious leader to deliver a graduation prayer, Justice Kennedy stated the following:

> Of course, in our culture standing or remaining silent can signify adherence to a view or simple respect for the views of others. And no doubt some persons who have no desire to join in a prayer have little objection to standing as a sign of respect for those who do. But for the dissenter of high school age, who has a reasonable perception that she is being forced by the State to pray in a manner he conscience will not allow, the injury is no less real.[14]

Each of the three Establishment Clause tests has been applied regularly in cases involving legal challenges and defenses to the inclusion of religion in public schools. And along with the litigation-heavy Establishment Clause also come claims of free speech and free exercise infringement. The following sections and subsections of the paper review the relevant case law of the Establishment, Free Exercise, and Free Speech Clauses of the First Amendment, and offer guidance to practitioners with an outline of the balance between curricular authority and individual rights. The states of affairs in the balance are constantly changing, but many solid lessons are offered along the way.

THE LEGAL STANDARDS APPLIED TO PUBLIC SCHOOL CURRICULUM: THE USA BALANCE

The individual right to be free from government establishment of religion: You may not teach IN religion.

[13] 505 U.S. 577 (1992).

[14] Id at 593.

The primary curricular lesson learned by public schools in Establishment Clause cases is that courses and other school-sponsored activities that endorse religion, coerce participation in religious practices, or present religious material in a non-neutral manner are unconstitutional. While the line may be blurred in some recent cases, the significant historical cases that first taught this lesson involved direct school sponsorship of prayer and Bible reading and, today, seem rather cut and dried. It is true that the Court in *School District of Abington Township v. Schempp* noted that the mere presence of religion in public schools would not be impermissible. However, according to the Court, state laws and school policies that require daily public school Bible and/or prayer reading are unconstitutional, even if teachers and administrators permit students to excuse themselves from participation.[15] The same judicial result came thirty years later when the Court struck down school-sponsored prayer at school graduations. Basically, with such an exercise, the school is directing the performance of a formal religious function. While attendance at graduation is not technically required, it is in a fair and real sense obligatory. "In the hands of the government what might begin as tolerant expression of religious views may end in a policy to indoctrinate and coerce."[16]

Despite many attempts to write themselves around these results – and often times because of those attempts – schools continue to lose the public school prayer arguments, even when the prayer is non-denominational, student-initiated, and student-led. In *Santa Fe Independent School District v. Doe*,[17] a public school policy permitting student-led, student-initiated prayer at football games violates the Establishment Clause. First, the Court held that the football game speeches are school-authorized and delivered on school premises during a school event. This is not private speech by students. Furthermore, the student elections to decide the speaker subject constitutional rights to a majority vote, where the minority voices are silenced. Second, the Court found perceived and actual endorsement of religion. By perception, the policy bears the stamp of the school. In actuality, the stated goals of "solemnity" and "invocation" inherently indicate the desire and call for "divine assistance." The history of the school and its tradition of prayer at school events indicated that the true

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[15] 374 U.S. 203 (1963). See also Engel v. Vitale, 370 U.S. 421 (1962) (New York's program of daily classroom invocation of God's blessings was held unconstitutional). Against the "legislative prayer exception" handed down in *Marsh v. Chambers*, 463 U.S. 783 (1983) (permitting religious inductions and prayers to open sessions of legislatures), courts have struck down similar practices at public school board meetings. See Coles v. Cleveland Bd. of Educ., 171 F.3d 369 (6th Cir. 1999), and more recently, Doe v. Tangipahoa Parish Sch. Bd., No. 03-2870, 2005 U.S. Dist. LEXIS 3329 (E.D. La. Feb. 24, 2005). "In a very real sense, the Board runs the schools, and serves as the spokesperson of the public school system." Id. at *20.

[16] Lee v. Weisman, 505 U.S. 577, 591-592.

[17] 530 U.S. 290 (2000).

purpose of the policy was to preserve the practice of prayer at football games. The Court also found coercion to participate in religious activities. For most people, attendance at the football games is, in essence, not voluntary. Players, coaches, cheerleaders, band members, staff, parents, and students (via peer pressure) attend the games. Even it were truly voluntary, the act of student-led prayer at graduation would still be coercive.

Student-led, student-initiated prayer, including student speeches with religious reference, at commencement ceremonies has led to mixed results. Some courts argue that the speeches are purely student-written and delivered and, therefore, are permissible in respect for the students honored with the opportunity to speak.[18] For example, according to the Eleventh Circuit Court of Appeals in *Chandler v. Siegelman*, "The Free Exercise Clause does not permit the State to confine religious speech to whispers or banish it to broom closets."[19] In another fascinating recent case with similar reasoning, the Eighth Circuit Court of Appeals held that a school board member's graduation speech, which contained a statement of regret over the forced removal of student-led religious invocations and benedictions from the ceremony and eventually contained the text of the *Lord's Prayer*, was permissible under the Establishment Clause, in that the board member was also speaking as a parent of a graduate.[20] According to the court, this dual role was enough to make the speech "private" and not sponsored by the school board. Furthermore, there was no evidence that any other school official was aware of the content of the speech. As a result, the speech did not bear the imprimatur of the school. In contrast, other courts argue that the connection between a school policy that allows students (and perhaps parents of graduates) to write their own speeches is enough for school sponsorship of prayer in violation of the First Amendment.[21] In addition, while student speeches with private, personal references to religion may be fine, such speeches with proselytizing comments are not.[22] In *Lassonde v. Pleasanton Unified School District*, a public school prohibited a graduating senior from delivering his complete salutatorian's speech because it contained proselytizing comments – "I urge you to seek out

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[18] See, e.g., *Adler v. Duval County Sch. Bd.*, 250 F.3d 1330 (11th Cir. 2001), and *Chandler v. Siegelman*, 230 F.3d 1313 (11th Cir. 2000), *reh'g en banc denied*, 248 F.3d 1032 (11th Cir. 2001) (the courts held that the speeches were purely student-led and student-initiated).

[19] 230 F.3d at 1316.

[20] Doe v. The Sch. Dist. Of the City of Norfolk (Nebraska), 340 F.3d 605 (8th Cir. 2003).

[21] See, e.g., *Deveney v. Board of Educ. of County of Kanawha*, 231 F. Supp.2d 483 (S.D. W.Va. 2002) (student-led, student initiated graduation invocation was illegal, as the principal reviewed the text in advance).

[22] *Lassonde v. Pleasanton Unified Sch. Dist.*, 320 F.3d 979 (9th Cir. 2003).

the Lord, and let Him guide you."[23] The Ninth Circuit agreed with the school and its Establishment Clause defense.[24]

When religious content moves from graduations and athletic fields into the classroom curricula themselves, the distinction between teaching *about* religion (usually permissible if taught neutrally) and teaching *in* religion (rarely, if ever, permissible) becomes even more important. While earlier Court precedent states rather clearly that sponsored, endorsed, or coerced prayer in public schools is unconstitutional, a few courts have held that prayers set to music, even as part of the traditional music curriculum, are also impermissible.[25] For example, in *Skarin v. Woodbine Community School District*, the court granted an injunction preventing a high school choir from rehearsing and performing Malotte's *The Lord's Prayer*.[26] The case was apparently the source of much local controversy, not the least of which came from the plaintiffs' aunt, a board member who supported the choir's performance. Some of the recorded proceedings from a board meeting had board members saying things like "We are Christians" and "Lawyers be Damned." Experts, however, testified that the song is a Christian prayer set to music. There was no proceeding at a board meeting testifying to the musical, educational, or other secular value to the song, and the court, applying *Lee* and *Santa Fe*, held for the plaintiffs. Contrary to the result in *Skarin*, other courts have held that much curriculum is not complete without some balanced neutral coverage of the topic being taught.[27]

In the analysis of religion in the curriculum, courts have applied each of the three Establishment Clause standards. Particularly susceptible to the purpose prong of the *Lemon* test are state laws and school board policies either forbidding the teaching of evolution or requiring the teaching of Creationism. In 1968, the Supreme Court declared invalid a criminal statute that prohibited the teaching of evolution.[28] Finding a violation of the Establishment Clause, the Court held that the state's undoubted right to prescribe the curriculum for its public schools does not carry with it the right to prohibit (under a criminal law) the teaching of a scientific theory, where the prohibition is based on reasons that violate the First Amendment.

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[23] 320 F.3d 979 (9th Cir. 2003).

[24] See also Cole v. Oroville Union High Sch. Dist., 228 F.3d 1092 (9th Cir. 2000) (similar result in favor of the school in a case with nearly identical facts).

[25] See Skarin v. Woodbine Comm. Sch. Dist., 204 F. Supp.2d 1195 (S.D. Iowa 2002), and Doe v. Aldine Indep. Sch. Dist., 563 F. Supp. 883 (S.D. Tex. 1982).

[26] 204 F. Supp.2d 1195 (S.D. Iowa 2002).

[27] See, e.g., Bauchman v. West High Sch., 132 F.3d 542 (10th Cir. 1997), *infra*, notes 48-49 and accompanying text.

[28] Epperson v. Arkansas, 393 U.S. 97 (1968).

Two decades later, in *Edwards v. Aguillard*, the Court struck down a state law that required balanced treatment of "evolution science" and "creation science."[29] Finding that the state's legislative intent was to advance a particular religious doctrine in the name of science, the Court spoke rather directly:

> [The Supreme Court has been] particularly vigilant in monitoring the compliance with the Establishment Clause in elementary and secondary schools. … Families entrust public schools with the education of their children, but condition their trust on the understanding that the classroom will not purposely be used to advance religious views that may conflict with the private beliefs of the students and his or her family. Students are impressionable and their attendance is involuntary.[30]

To combat this impressionability, several schools recently have turned to disclaimer statements placed in science textbooks or read to students in class before lessons on evolution. In two such cases, federal courts have invalidated this practice. [31] For example, in *Selman v. Cobb County Board of Education*, a school board elected to place a disclaimer sticker in its newly adopted science textbooks to supplement the district's compliance with state science standards and the required teaching of evolution. The sticker read as follows: "This textbook contains material on evolution. Evolution is a theory, not a fact, regarding the origin of living things. This material should be approached with an open mind, studied carefully, and critically considered." The federal district court for the Northern District of Georgia struck down the practice and ordered the stickers removed. While the court found that encouraging critical analysis of scientific theory and reducing the discomfort that comes with studying material that is objectionable or inconsistent with personal beliefs to be secular purposes, it proceeded to hold that the reasonable observer would find that the stickers would constitute an endorsement of religion. According to the court, the reasonable observer in Cobb County was intimately familiar with the tension-filled textbook adoption process and would easily see that the stickers were motivated by the religious objections to the study of evolution. In the end, the sticker undermined the teaching of evolution, which is required in the state of Georgia, and favors adherents of religious views of origins theory.

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[29] 428 U.S. 578 (1987).

[30] Id. at 583-584.

[31] See Freiler v. Tangipahoa Parish Bd. of Educ., 185 F.3d 337 (5th Cir. 1999), cert. denied, 530 U.S. 1251 (2000), and Selman v. Cobb County Sch. Dist., No. 02-CV-2325-CC, 2005 U.S. Dist. Lexis 432 (N.D. Ga. Jan. 13, 2005).

> The distinction of evolution as a theory rather than fact is the distinction most religiously motivated individuals have specifically asked school boards to make in the most recent anti-evolution movement, and that is exactly what parents in Cobb County did in this case.[32]

The purpose and effect prongs of the *Lemon* test, along with the endorsement and coercion tests, have been used to invalidate courses and classroom activities that involve religious activities. Despite *Schempp*'s important statement that the Bible and other religious texts could conceivably be used in history, social studies and language arts classes, schools that cannot articulate a legitimate secular purpose and neutral effect for their academic activities will find themselves on the short end of the balance. In recent years, courts have held that courses in the Bible – when the Bible is taught in isolation and as fact – violate the Establishment Clause.[33] Rather pointedly, the court in *Gibson v. Lee County School Board* found "it difficult to conceive how the account of the resurrection or of miracles could be taught as secular history."[34] Similarly, classroom activities that are considered religious practices will be struck down as impermissible endorsement and coercion. Examples include the construction of Hindu masks and "worry dolls,"[35] a program in Bible Education Ministry required students to memorize Biblical verses and sing religious songs,[36] and an elective high school course in transcendental meditation required attendance and participation in a formal religious ceremony.[37] Importantly, courts have also noted that, for purposes of the endorsement test and the necessary determination of impressionability, the "reasonable observers" are the students in the classes.[38]

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[32] *Selman*, at *73-74.

[33] See, e.g., Herdahl v. Pontotoc County Sch. Bd., 933 F. Supp. 582 (N.D. Miss. 1996) (the court ended a fifty-year tradition of teaching courses in the Bible), and Gibson v. Lee County Sch. Bd., 1. F. Supp.2d 1426 (M.D. Fla. 1998) (two courses in Bible history are struck down).

[34] 1 F. Supp.2d at 1434.

[35] Altman v. Board of Educ. of the Bedford Central Sch. Dist., 45 F. Supp.2d 368 (S.D.N.Y. 1999), affirmed in part, vacated in part, and reversed in part, 245 F.3d 49 (2d Cir. 2001). For a full discussion of *Altman* and its legal and educational impact, see Charles J. Russo and Ralph Mawdsley, Psychological Coercion and the Public School Classroom: An Analysis of *Altman v. Bedford Central School District*," Australia & New Zealand J. of Law & Educ., Vol. 5, No. 2, 2000, at 16-26.

[36] Doe v. Porter, 370 F.3d 558 (6th Cir. 2004).

[37] Malnak v. Yogi, 592 F.2d 197 (3d Cir. 1979).

Finally, until recently, courts have invariably held that the posting of the Ten Commandments and other religious texts in classrooms or on school premises is an unconstitutional establishment of religion.[39] On June 27, 2005, however, the United States Supreme Court – in two separate 5-4 decisions – held that a display of the Ten Commandments on public grounds demands individual scrutiny to determine whether it amounts to government endorsement of religion. In *Van Orden v. Perry*, the Court permitted the posting of the Ten Commandments along with several other historical markers and monuments on the grounds of the Texas State Capitol.[40] In *McCreary County v. ACLU*, however, the Court held that individual postings of the Ten Commandments in county courthouses were unlawful.[41]

NEUTRALITY IN CURRICULUM: YOU MAY TEACH ABOUT RELIGION

Even with some of the court decisions striking down activities such as student prayer at school events, separate courses in the Bible, and the engagement of what amounts to religious practices, it remains true that while schools are not permitted to teach *in* religion, they may teach *about* religion. In other words, when balanced for educational quality, presentation of complete subject matter, and religious neutrality, the teaching and presentation of religion in music, art, drama, literature, and history is still tricky, but may be constitutional. For example, history courses in comparative religions and cultures, with objective presentation and multiple sources (not just the Bible) may be acceptable.[42] Admittedly, as is seen in cases like *Selman* (the disclaimer stickers for science texts with units on evolution), parents pull a lot of weight with school boards and often derail neutral teaching about religion. In *Cole v. Maine School*

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[38] See, e.g., Doe v. Porter, 370 F.3d at 563. But see Rusk v. Crestview Local Sch. Dist., 379 F.3d (6th Cir. 2004) (noting that, for purposes of a literature/flyer distribution policy, the parents are the reasonable observers).

[39] See Stone v. Graham, 449 U.S. 39 (1980) (classroom posting of the Ten Commandments); Doe v. Harlan County School District, 96 F. Supp.2d 667 (E.D. Ky. 2000) (classroom posting of the Ten Commandments, in conjunction with the posting of government document prints and government speeches with religious references); and Baker v. Adams County/Ohio Valley Sch. Bd., 310 F.3d 927 (6th Cir. 2002) (outside displays of the "Foundations of American Law and Government," including a monument of the Ten Commandments).

[40] No. 03-1500, 2005 U.S. Lexis 5215 (June 27, 2005).

[41] No. 03-1693, 2005 U.S. LEXIS 5211 (June 27, 2005).

[42] Herdahl v. Pontotoc County Sch. Bd., 933 F. Supp. 582 (N.D. Miss. 1996) (court permitted a course in the Biblical history of the Ancient Middle East), and Cole v. Maine Sch. Admin. Dist. No. 1, Civ. No. 03-205-B-W, 2004 U.S. Dist. Lexis 24746 (D. Me. Dec. 3, 2004).

Administrative District No. 1, a veteran teacher was challenged for the content in his middle school social studies course on history, culture, and religion of the Eastern hemisphere.[43] After a parent visited the teacher's class and complained to the principal about the religious content in the course, the district's curriculum coordinator and several of the district's administrators and teachers directed the teacher to teach from an allegedly outdated book that covered only Europe and the Soviet Union. In response to the teacher lawsuit, the federal district court rejected the school district's motion for summary judgment and held that the teacher had presented a viable issue as to whether the school officials' directive was motivated by the school's desire to eliminate the study of non-Christian religions from the social studies curriculum.

Contrary to rulings like *Skarin*,[44] which held that prayers set to music are still, effectively, prayers in public schools, several courts have upheld public school curricular decisions even when the curriculum contains religious materials or activities.[45] In *Florey v. Sioux Falls School District*, for example, a school district drafted a policy governing holiday observances that required objective, balanced, and prudent presentation of religious themes.[46] A federal court of appeals upheld it under the *Lemon* test. According to the court, the policy illustrated a non-religious purpose and had the primary effect of advancing a secular program of education. Finally, although the court noted that it is virtually impossible to develop a public school curriculum that does not affect religious or non-religious sensibilities, the court found that the policy did not excessively entangle the school with religion. On the observance of holidays, the court held that it is permissible for a public school to sponsor activities and programs "as a traditional part of the cultural and religious heritage of the particular holiday."[47] On the inclusion of religious material in the curriculum as a whole, the court urged public school districts that such inclusion should be objective and only as extensive as is necessary for balanced and comprehensive study intrinsic to the learning experience.

Making a similar statement was the Seventh Circuit Court of Appeals in *Bauchman v. West High School*.[48] In *Bauchman*, a Jewish high school student filed suit against her school district alleging violations of Establishment

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[43] Cole v. Maine Sch. Admin. Dist. No. 1, Civ. No. 03-205-B-W, 2004 U.S. Dist. Lexis24746 (D. Me. Dec. 3, 2004).

[44] See, *supra*, notes 25-27 and accompanying text.

[45] See, e.g., Doe v. Duncanville Indep. Sch. Dist., 70 F.3d 402 (7th Cir. 1995) ("The Lord Bless You and Keep You" and "Go Ye Now in Peace," performed at a school graduation, were not constitutional violations. They had been sung for years as traditions, but were performed for musical value, not religious endorsement.)

[46] 619 F.2d 1311 (8th Cir. 1980).

[47] Id. at 1319 (citing to the approved policy).

[48] 132 F.3d 542 (10th Cir. 1997).

Clause by her choir director. The choir was filled by audition and was an elective course for academic credit. The director allegedly advocated, promoted, endorsed, and proselytized his Christian faith in the music performed, the concert venues, and the messages and effects gained through those performances. In addition, he allegedly berated and ostracized the students who dissented from his views. Lastly, the plaintiff challenged the selection of songs performed at graduation ("Friends" and "The Lord Bless You and Keep You"). After a lengthy procedural history, the Tenth Circuit Court of Appeals ultimately held for the school district. On the purpose prong of the endorsement test, the court said:

> The Constitution does not require that the purpose of every government-sanctioned activity be unrelated to religion. Courts have long recognized the historical, social and cultural significance of religion in our lives and in the world, generally. Courts have recognized that a variety of motives and purposes are implicated by government activity in a pluralistic society. Accordingly, there is a legitimate time, manner and place for the discussion of religion in the public classroom.[49]

The court listed several secular purposes for performing sacred music, even in churches and other religious venues: (1) exposure to the full array of music history; (2) secular qualities in music, like sight-reading, intonation, harmony, expression; (3) acoustically superior venues; and (4) opportunities to showcase the school and the talents of its students. On the effect prong, the court applied the reasonable observer inquiry and found that the reasonable observer in Salt Lake City is aware of the purpose, context, and history of that city's public education system. Overall, that observer would not perceive an endorsement of religion.

In a case involving classroom displays and calendars, a federal trial court in New Jersey found that, while the district's policy on classroom calendars did not require the inclusion of religious holidays, the events covered on the calendars were both secular and sacred, and they included a wide variety of religions and cultures.[50] The court stated:

> that it is the responsibility of educators to "foster mutual understanding and respect for the rights of all individuals regarding their beliefs, values, and customs." In a nation as diverse as America, it is impossible to overestimate the secular importance of teaching this lesson. … If our public schools cannot teach this mutual

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[49] Id. at 553-554.

[50] Clever v. Cherry Hill Township Bd. of Educ., 838 F. Supp. 929 (D.N.J. 1993).

> understanding and respect, it is hard to envision another societal institution that could do the job effectively.[51]

Other classroom curricular activities upheld as neutral include elementary lessons about Lord Ganesha (a Hindu deity), the celebration of Earth Day, permitting children to play the card game "Magic: The Gathering," engaging students in yoga exercises, and studying the lives of Buddha and Quetzalcoatl.[52] At the middle and high school level, deeper appreciation of certain subjects may call for a deeper discussion of their religious aspects. The court in *Crockett v. Sorensen*, offers the following statement:

> In art, one cannot truly appreciate such great works as da Vinci's *Last Supper*, Michelangelo's work in the Sistine Chapel, or Albrecht Durer's woodcuts without some basic understanding of what the Bible contains. Without some introduction to the Book of Isaiah, Handel's *Messiah* loses much of its force and importance. Literature is replete with biblical allusion. Some of the better known works which rely heavily on allusions from the Bible include Milton's *Paradise Lost*; the plays of Shakespeare, especially *Measure for Measure*; Blake's *Marriage of Heaven and Hell*; Melville's *Moby Dick*; Faulkner's *Absalom, Absalom*; T.S. Eliot's *The Wasteland*; and C.S. Lewis' *The Screwtape Letters*.[53]

LEGITIMATE PEDAGOGICAL CONCERNS: THE DESIRE TO AVOID ESTABLISHMENT OF RELIGION[54]

In the previous section of this paper, several court decisions were presented in which school policies and practices respecting the inclusion of religion in curriculum were upheld, thus upholding public school curricular authority against the individual right to be free from alleged establishment. Also

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[51] Id. at 939.

[52] Altman v. Board of Educ. of the Bedford Central Sch. Dist., 45 F. Supp.2d 368 (S.D.N.Y. 1999), affirmed in part, vacated in part, and reversed in part, 245 F.3d 49 (2d Cir. 2001).

[53] 568 F. Supp. 1422, 1425 (W.D. Va. 1983).

[54] The phrase "legitimate pedagogical concerns" comes from the Supreme Court's opinion in *Hazelwood Independent School District v. Kuhlmeier*, 484 U.S. 260 (1988). In *Hazelwood*, the Court upheld a school principal's decision to cut two pages of a school-sponsored newspaper that contained student-written articles on sensitive subjects. The Court held that school districts retain editorial control over the content and style of student speech in school-sponsored events if such restriction is reasonably related to legitimate pedagogical concerns. In such cases, the school has a legitimate concern in speech that might reasonably be perceived to bear the imprimatur of the school, even when such expression is student-originated.

upholding curricular authority are several court decisions that, instead of *favoring* religion in curriculum, *disfavor* it in an attempt to avoid constitutional challenge. In other words, schools that offer *the avoidance of Establishment Clause violations* as a "legitimate pedagogical concern" are often successful against challenges that students and parents bring when the students and parents wish to engage in religious activity or produce/present religious material in the classroom. This defense, taken from the majority opinion in *Hazelwood Independent School District v. Kuhlmeier*,[55] a case about the censorship of student speech in school-sponsored activities, also works against challenges raised by teachers regarding their conduct and expression in the classroom, and often against challenges from parents and families over the exclusion of religious symbols in school-wide beautification projects, such as murals and brick and/or tile walkways.

Most of the cases that uphold a school's decision to prohibit religious speech by students in the classroom involve elementary school children: "Curricular standards, especially those that occur in kindergarten and first grade, when children are most impressionable, should not be lightly overturned."[56] An operative example is *C.H. v. Oliva*.[57] In *Oliva*, kindergarten students were asked to make posters depicting things for which they were thankful. One student expressed thanks for Jesus Christ. While his regular teacher was absent, the poster was removed from the wall due to its religious theme. A year later, when the child was in first grade, one of his assignments was to choose a book and read it to the rest of his class. He chose a children's adaptation of stories from the Bible. His teacher (Oliva) refused to let him read that particular book. He read the book only to Oliva.[58] His mother filed suit. On the free speech issue, the trial court held that the classroom is not a public forum and, as a result, the school may impose reasonable viewpoint-neutral restrictions on speech of students, teachers, and other members of the school community. Under a *Hazelwood* analysis, the court found a legitimate pedagogical concern in avoiding the Establishment of religion. The child was not permitted to read his chosen book because, in effect, it was the Bible. According to the court, if a teacher were to praise a child's reading of a religious story, young classmates may think that such praise is an endorsement of religion.[59]

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[55] 484 U.S. 260 (1988).

[56] Walz v. Egg Harbor Township Bd. of Educ., 342 F.3d 271, 277 (3d Cir. 2003).

[57] 990 F. Supp. 341 (D.N.J. 1997), affirmed in part and vacated in part on procedural grounds, 226 F.3d 198 (3d Cir. 2000).

[58] In many cases involving religious material in student homework, the teachers will ask that the student present the work privately in order to avoid the air of endorsement.

Two similar cases, also involving student posters, yielded the same result. In *Phillips v. Oxford Separate Municipal School District*, a federal trial court upheld a school's removal of a middle school student's student council campaign poster because the poster contained a reprint of a Renaissance painting depicting Mary and baby Jesus.[60] Similarly, the teachers in *Peck v. Baldwinsville Central School District*[61] worried that a poster on environmental conservation depicting Jesus Christ would send the message to impressionable kids that the school endorsed Christianity. Relying on the school's curricular authority and deferring to the judgment of educators, the court in *Peck* held for the school: "Their exercise of discretion is entitled to substantial deference not only because they are professional educators, but also because they are best situated to evaluate the potential effect of the situation on the students and parents and on the ongoing educational process."[62]

While the schools in *Oliva* and *Peck* successfully used the avoidance of Establishment Clause violations as a defense to their decisions, many teachers in similar cases also rely on the fact that the inclusion of religious material is not relevant to the original assignment[63] or that the assignments themselves were not appropriately completed – not due to the disputed religious content, but rather due to the poor academic execution by the student, or due to the student's bias or prejudice.[64] Regardless of the reasons teachers and administrators assert to limit the student delivery or submission of religion-based coursework, school policy making and enforcement should be careful not to punish or discriminate against students for their religious or non-religious beliefs.[65]

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[59] *See also DeNooyer v. Livonia Pub. Sch.*, 799 F. Supp. 744 (E.D. Mich. 1992), in which a court upheld a teacher's decision not to allow a second-grade student, for show-and-tell, to show a video of her singing a song for a church service; and *Walz v. Egg Harbor Township Bd. of Educ.*, 342 F.3d 271 (3d Cir. 2003), in which the court upheld a school's refusal to allow a child to distribute candy canes with proselytizing messages attached.

[60] 314 F. Supp.2d 643 (N.D. Miss. 2003) (the poster of the student, Mary Phillips, contained the phrase, "He chose Mary. You should too").

[61] Peck v. Baldwinsville Cent. Sch. Dist., 99-CV-1847, 2000 U.S. Dist. LEXIS 13362 (N.D.N.Y. 2000).

[62] Id. at *21.

[63] Id. In *Peck*, the teacher argued, in part, that the inclusion of Jesus in the poster was not related to the subject of environmental conservation.

[64] Duran v. Nitsche, 780 F. Supp. 1048 (E.D. Pa. 1991) (the teacher disallowed a student's oral report on "The Power of God," except as delivered in a private meeting); Settle v. Dickson County Sch. Bd., 53 F.3d 152 (6th Cir. 1995) (teacher refused to allow a student to complete a report on the life of Jesus Christ because she felt that the student's pre-existing knowledge was already too high and intense).

[65] See Florey, 619 F.2d at 1320.

With respect to the religious materials, conduct, or expression of teachers in classrooms, courts have routinely upheld school restriction or punishment when the school's decision is reasonably related to the pedagogical concern of the avoidance of establishment. Examples include excessive religious comments and conversations in class,[66] the teaching of creationism or the expression of creationist views,[67] the maintenance of in-class teacher libraries that include religious texts,[68] and the wearing of proselytizing clothing.[69]

The final set of cases in which the schools assert the avoidance of Establishment Clause violations as their defense to the inclusion of religious material in curricular activities involves students and parents who wish to include religious images and expressions in school-wide art or architecture projects. The most noteworthy example is *Fleming v. Jefferson County School District*.[70] In *Fleming*, students, alumni, and family members of students at Littleton, Colorado's Columbine High School were invited to submit 4-inch-by-4-inch ceramic tiles for a wall art project intended to help rebuild the school after two students killed a dozen students, one teacher, and then themselves in mass shootings in April 1999. Project administrators required that the files not have any references to the attack, the date of attack, names or initials of teachers and students, no religious symbols, and no obscene or offensive images. Plaintiffs challenged the rejection of some of the tiles with religious words and images, including "Jesus Christ is Lord," "4/20/99 Jesus Wept", and "There is no peace says the Lord for the wicked". The court of appeals upheld the school's decision to refuse the tiles. The court applied the rules adopted by the Supreme Court in *Hazelwood Independent School District* and held that the school was a nonpublic forum and the tiles bore the imprimatur of the school. The school cited a few legitimate pedagogical concerns. First, the tile project was connected with rebuilding the school and making the school's hallways conducive to learning. Second, the school was concerned with the emotional maturity of the intended audience and the sensitivity of the topics depicted. Finally, the school wanted to avoid an Establishment Clause violation and did not want the tile project to become a "situs for religious debate."[71] Recently, in

[66] Marchi v. Board of Cooperative Educ. Services, 173 F.3d 469 (2d Cir. 1999).

[67] Peloza v. Capistrano Unified Sch. Dist., 37 F.3d 517 (9th Cir. 1994), cert. denied, 115 S. Ct. 2640 (1995); and Webster v. New Lenox Sch. Dist. No. 122, 917 F.2d 1004 (7th Cir. 1990).

[68] Roberts v. Madigan, 921 F.2d 1047 (10th Cir. 1990), cert. denied, 505 U.S. 1218 (1992).

[69] Downing v. West Haven Bd. of Educ., 162 F. Supp.2d 19 (D. Conn. 2001).

[70] No. 01-1512, 2002 U.S. App. Lexis12779 (10th Cir. June 27, 2002).

contrast to the decision in *Fleming*, two federal trial courts have held in favor of the parents, students, and community members, arguing that religious messages on bricks and tiles did not bear the imprimatur of the school, but rather private speech.[72]

SCHOOLS' CURRICULAR AUTHORITY PLACES LIMITS ON FREE EXERCISE AND ESTABLISHMENT CLAIMS FROM STUDENTS/PARENTS

Pretty consistently, courts have upheld the curriculum of public schools against challenges that the curriculum or certain aspects of it violate the Free Exercise of students and parents. Secondarily, plaintiffs in these same cases also raise Establishment Clause challenges in that the public school curriculum is allegedly hostile to religion or, in the alternative, that it establishes the religion of "secular humanism."[73] Basically, most often, the courts uphold the notion that schools have authority to set curriculum and parents and students cannot expect to go through a full public school experience without encountering views that differ from their own.[74]

A representative example is *Fleischfresser v. Directors of School Board 200*.[75] In *Fleischfresser*, parents claimed that the use of the *Impressions* reading series violated both the Establishment Clause and the Free Exercise Clause. Particularly, the parents claimed that many of the themes and characters in the readings (e.g., wizards, sorcerers, giants, and other creatures of supernatural powers) conflicted with their Christian beliefs. On the Establishment Clause issue, there was no violation. In fact, the court found that

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[71] For other examples, see Anderson v. Mexico Academy and Cent. Sch., 186 F. Supp.2d 193 (N.D.N.Y. 2002), and Gernetzke v Kenosha Unified School District, 274 F.3d 464 (7th Cir. 2001), cert. denied, 122 S. Ct. 1606 (2002).

[72] Demmon v. Loudoun County Pub. Sch., 342 F. Supp.2d 474 (E.D. Va. 2004), and Seidman v. Paradise Valley Unif. Sch. Dist. No. 69, 327 F. Supp.2d 1098 (D. Ariz. 2004).

[73] For a discussion of "secular humanism," see *Smith v. Board of Commissioners of Mobile County*, 827 F.2d 624 (11th Cir. 1987).

[74] In a case involving a free exercise challenge to an elementary school reading series, the court upheld the school's curriculum and noted that the parents, if they are offended by the curriculum of public schools, have the option of home schooling their children or enrolling them in private religious schools. Mozert v. Hawkins County Bd. of Educ., 827 F.2d 1058 (6th Cir. 1987), cert. denied, 484 U.S. 1066 (1988). But see Citizens for a Responsible Curriculum v. Montgomery County Pub. Sch., Civ. Action No. AW-05-1194, U.S. Dist. Lexis8130 (D. Md. May 5, 2005) (temporary restraining order granted for the parents in a heated dispute over the inclusion of homosexuality in health and sex education; the school district's curriculum expressly disparaged particular religions as being intolerant of homosexuality).

[75] 15 F.3d 680 (7th Cir. 1994).

the stories that offended the plaintiffs here constituted a small minority of the stories included in the series.[76] According to the court, *Impressions* also includes several stories consistent with Christianity. "In this case, the primary or principle effect of the use of the reading series at issue is not to endorse these religions, but simply to educate the children by improving their reading skills and to develop imagination and creativity."[77] On the Free Exercise claim, the court held that, despite the sincerity of the parents' beliefs, the governmental interest in public school education –"at the apex of the function of government" – outweighs the parents' interests. "We find that the government's interest in providing a well-rounded education would be critically impeded by accommodation of the parents' wishes."[78] Despite this statement seemingly against accommodation of parents' and students' religious beliefs, it is certainly permissible for schools to offer accommodations short of eliminating books or rewriting curriculum. These accommodations usually come in the form of alternative readings or opportunities to opt out of certain class assignments and discussions.[79] Of course, these accommodations have their reasonable limits. Over-accommodation would effectively gut the curriculum. One court perhaps said it best: "If an Establishment Clause violation arose each time a student believed that a school practice either advanced or disapproved of a religion, school curricula would be reduced to the lowest common denominator, permitting each student to become a 'curriculum review committee' unto himself or herself."[80]

Deference to the state's authority to control the curriculum cannot and should not be underestimated. Clearly, there are heated arguments over the inclusion of evolution and creationism in science class, just as there are complaints about the inclusion of fantasy stories and holiday celebrations in elementary schools. But deference to the expertise in pedagogy and content ought to be maintained most strongly. For example, there are numerous scientists who fear, perhaps correctly, that a biology class that presents both evolution and religion-based theories of origins would greatly disrespect science.[81] Making a strong statement on the curricular rights of public school systems, a federal trial court stated:

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[76] In a nearly identical case also involving the *Impressions* series, the plaintiffs complained about only 32 of about 10,000 reading selections. See Brown v. Woodland Joint Unified Sch. Dist., 27 F.3d 1373 (9th Cir. 1994).

[77] 15 F.3d at 689.

[78] Id. at 690.

[79] Grove v. Mead Sch. Dist. No. 354, 753 F.2d 1528 (9th Cir.), cert. denied, 474 U.S. 826 (1985) (the use of "The Learning Tree" in a sophomore English class presented only minimal burden on the students' Free Exercise rights).

[80] Brown v. Woodland Joint Unified Sch. Dist., 27 F.3d 1373, 1379 (9th Cir. 1994).

[81] See, e.g., the discussion of *Selman* above.

> If defendants [school officials] were required by law to grant plaintiff's request, then any parent would be able to exercise a right to have his or her child excluded from the mandatory parts of the health course or another course to which the parent objected.... Giving each parent a veto over required courses or lessons would undermine the state's authority to establish a minimum course of study for its youth.[82]

On the other hand, there are increasingly strong arguments that multiple perspectives must be presented in order to respect the religious freedoms and expression rights of parents and students. The next two sections of the paper address such claims.

PRIVATE EXPRESSION: NEUTRALITY AND THE ALLOWANCE OF PERSONAL CHOICES

Generally, when First Amendment freedom of expression combats First Amendment Establishment Clause, free expression wins. The primary examples upholding individual expression rights against a school's fear of Establishment Clause violation come from the Equal Access Act,[83] use of school facilities by religious community groups, moments of silence at school-sponsored events, and student and staff distribution of religious literature.

The Equal Access Act says that public schools receiving federal financial assistance and providing a "limited open forum" may not deny, "on the basis of the religious, political, philosophical, or other content of the speech at such meetings," equal access to student who wish to conduct a meeting within the forum. A school creates a limited open forum whenever it allows a non-curricular student club to meet during non-instructional time.[84] Under the Act, teachers and other staff may serve as advisors to student religious clubs, but may not participate in religious activities. In *Board of Education of the Westside Community School v. Mergens*, the Supreme Court held that private devotional speech initiated and managed by students is constitutional under the Equal Access Act.[85] Accordingly, the school may not deny access simply because the ideas of a group are controversial or unacceptable some members of the community. If the school opens its forum to other non-curricular student groups, it had to provide space and time for a student Christian Club. Courts

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[82] Leebaert v. Harrington, 193 F. Supp.2d 491, 502 (D. Conn. 2002), *aff'd*, 332 F.3d 134 (2d Cir. 2003).

[83] 20 U.S.C. § 4071 (2003).

[84] In Donovan v. Punxatawney Area School Board, 336 F.3d 211 (3d Cir. 2003), the court held that "non-instructional time" also includes time during school hours when students are required to be there, so long as no traditional instruction is taking place. These times could include lunch periods or special activity periods.

[85] 496 U.S. 226 (1990).

have held that religious student groups allowed under the Equal Access Act do not bear the imprimatur of state involvement as they relate to non-participating students.[86]

Part of permitting private student expression and upholding neutrality in equal access is treating all student clubs fairly. While there may be some exceptions, a school district policy that refuses to afford a religious student club with all of the same benefits afforded other student clubs denies equal access and a fair opportunity under the Equal Access Act and denies freedom of speech under the First Amendment.[87] In *Prince v. Jacoby*, the school district, fearing an Establishment Clause violation, denied the Christian group, the World Changers, access to the schools' special fund for student groups, bulletin boards, yearbook space, facilities during the school day, and priority use of audio/visual equipment and school vehicles. On the issues of school funds for student clubs and access to bulletin boards and other media, the court held that the Equal Access Act demanded that the World Changers have equal access. However, on the issues of meeting during the school day and use of A/V equipment and vehicles, the court held for the school. Another limitation to the Equal Access Act, with respect to a feared Establishment Clause violation, came in *Gernetzke v Kenosha Unified School District*, where the court held that the Equal Access Act and the Free Exercise Clause do not require a school to permit a student Bible Club to include a large cross on a hallway mural.[88] The mural was part of a school-wide project involving all of the school's clubs. As part of the review process, the principal approved the mural without the cross.

While less directly connected to classroom curriculum, the Equal Access Act is important for the purposes of this discussion and for the purposes of balancing the rights of members of the school community. Citing to long-standing First Amendment jurisprudence, one court made this point as follows:

> The only way to maintain the "independence and vigor of Americans who grow up here" is through tolerating speech that school authorities may vehemently disagree with. "Our history says that it is this sort of hazardous freedom – this kind of openness – that is the basis of our national strength." The democratic response to speech that people disagree with is more speech: by allowing students to express both the

[86] Herdahl v. Pontotoc County Sch. Dist., 933 F. Supp. 582 (N.D. Miss. 1996). However, school-wide devotionals over the school's intercom system and classroom-led pre-lunch prayer were not permitted.

[87] Prince v. Jacoby, 303 F.3d 1074 (9th Cir. 2002).

[88] 274 F.3d 464 (7th Cir. 2001), cert. denied, 122 S. Ct. 1606 (2002).

popular and unpopular viewpoints society can foster "enlightened opinion."[89]

Also involving a clash between traditional First Amendment freedom of expression and the Establishment Clause are disputes over the use of school facilities. Recently, a short string of Supreme Court cases has favored the rights of outside community groups who wish to use school facilities, even though the groups are associated with religious activities. In *Lamb's Chapel v. Center Moriches Union Free School District*,[90] a school denied the request of an evangelical church group that wanted to use school facilities to show a film series on family relationships and child rearing. The school defended its decision on a policy that allowed groups to rent school property, but disallowed use of such property for religious purposes. The group challenged the denial and, ultimately, the Supreme Court held in favor of the group. Because school policy allowed other groups to use school facilities for family issues, to deny the religious group the same rights would be viewpoint discrimination in violation of the free speech clause of the First Amendment. With similar reasoning, the Supreme Court in *Rosenberger v. Rector and Visitors of University of Virginia* held that a university's refusal to fund a student publication because the publication addressed issues from a religious perspective violated the free speech clause.[91] Finally, and most recently, in *Good News Club v. Milford Central School*,[92] the Good News Club, a private Christian organization for children ages 6-12, applied to the public school district for permission to use school facilities for the Club's after school meetings. Pursuant to school policy, the district denied the request. The policy allowed groups to use facilities for (1) instruction in any branch of education, learning, or the arts; (2) social, civic, and recreational meetings and entertainment events; and (3) other uses pertaining to the welfare of the community, provided that such uses are non-exclusive and open to the general public. The policy prohibited use of the facilities for religious purposes. The stated purpose of the Good News Club is to have "a fun time of singing songs, hearing a Bible lesson, and memorizing scripture." Following its reasoning in *Lamb's Chapel* and *Rosenberger*, the Supreme Court held for the Good News Club. Since the policy allowed other groups to meet for purposes of character education and moral development, the school could not deny a group that covered those topics from a religious perspective.[93] Note, in addition, that

[89] Colin v. Orange Unified Sch. Dist., 83 F. Supp.2d 1135, 1141 (C.D. Cal. 2000) (citing to Tinker v. Des Moines Indep. Comm. Sch. Dist., 393 U.S. 503 (1969), and Cantwell v. Connecticut, 310 U.S. 296 (1940)).

[90] 508 U.S. 384 (1993).

[91] 515 U.S. 819 (1995).

[92] 121 S. Ct. 2093 (2001).

public school teachers may also serve as the teachers for after-school religion-affiliated groups such as the Good News Club without violating the Establishment Clause.[94]

School policies regulating moments of silence represent another balancing opportunity for courts, schools, and school officials. While it is generally well settled that school-sponsored prayer, whether school-led or student-led, is unconstitutional, school-sponsored moments of silence may be permissible.[95] In *Bown v. Gwinnett County School District*, a federal appeals court upheld a Georgia statute permitting public schools and teachers to conduct a moment of quiet reflection in their classrooms.[96] Applying *Lemon*, the court found a clear secular purpose. According to the Act's preamble, "The General Assembly finds that in today's hectic society, all too few of our citizens are able to experience even a moment of quiet reflection before plunging headlong into the day's activities."[97] Furthermore, the statute's language itself expressly prohibits connecting the moment of silence to a religious service or religious instruction. On the second prong, the court found no endorsement of religion or coercion to engage in a religious activity. On the third prong, the court found no entanglement. All that was required of teachers is the allowance of a silent minute. There was no leading of prayer allowed, nor was audible prayer permitted.[98] Note that the moment of silence must be silent. In a recent case, the Eleventh Circuit Court of Appeals held that a public school's practice of daily moments of silence violated the Establishment Clause, when it was

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[93] See also Culbertson v. Oakridge Sch. Dist. No. 76, 258 F.3d 1061 (9th Cir. 2001), Child Evangelism Fellowship of Maryland v. Montgomery County Pub. Sch., Civ. No. PJM 03-162, 2005 U.S. Dist. LEXIS 7608 (D. Md. Mar. 24, 2005), Campbell v. St. Tammany Parish Sch. Bd., Civ. No. 98-2605, 2003 U.S. Dist. LEXIS 13559 (E.D. La. July 30, 2003), and Bronx Household of Faith v. Board of Educ. of the City of New York, 331 F.3d 342 (2d Cir. 2003) (even groups and activities that are "quintessentially religious" may be permitted to use public school facilities in which limited public forums have been created).

[94] Wigg v. Sioux Falls Sch. Dist. 49-5, 382 F.3d 807 (8th Cir. 2004).

[95] Wording of the moment of silence policy or statute is particularly important. See Wallace v. Jaffree, 472 U.S. 38 (1985) (Supreme Court struck down a state statute allowing for a moment of silence for "meditation or voluntary prayer" because the state already had a statute that allowed for "meditation").

[96] 112 F.3d 1464 (11th Cir. 1997).

[97] Id. at 1466.

[98] See also *Brown v. Gilmore*, 258 F.3d 265 (4th Cir. 2001), where the Fourth Circuit Court of Appeals upheld a statute that authorized, but did not require, local school boards to establish a minute of silence in their classrooms for the expressly stated purpose of allowing students to "meditate, pray, or engage in any other silent activity which does not interfere with, distract, or impede other pupils in the like exercise of individual choice."

discovered that a teacher began each homeroom moment of silence with the phrase, "Let us pray" and often ended with "Amen."[99]

Reflecting another form of private religious expression in balance with school authority are policies that restrict or permit the distribution of religious literature at school. The standard Establishment Clause tests apply, but to mixed results. While the avoidance of establishment is a compelling governmental interest, schools must consider less intrusive time, place, and manner restrictions on private religious speech.[100] An outright ban on such literature distribution may not be constitutional. However, some consideration must be paid to the age and impressionability of the children involved. The younger the children, the more possible it is that the distribution of religious literature, whether or not student/staff-created, will be interpreted as an endorsement of religion.[101] However, even for the younger students, there may be exceptions. Distribution of literature with proselytizing messages on them is likely unconstitutional, while flyers advertising food drives that happen to sponsored by local churches are likely fine.[102] For older students, the result may be different. For example, a policy permitting students to post flyers in the school library or on tables in hallways may be constitutional, provided that the policy is not discriminatory and is enforced with reasonable time, place, and manner restrictions. There are also arguments that literature distribution policies apply to parents as the reasonable observers for purposes of the endorsement test.[103] In effect, schools do not endorse everything they fail to censor.[104]

FREE EXERCISE OF RELIGION: RELIGION WINS CHALLENGE AGAINST SCHOOL/STATE POLICY

When accommodation of the Free Exercise of religion for staff, students, and parents is possible, it is encouraged (e.g., alternate readings/assignments, excused absences for religious holy days, special diet, prayer opportunities, and religious leave for staff). It is well settled and well regarded that "teachers and students do not shed their constitutional rights at the schoolhouse gate."[105]

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[99] Holloman v. Harland, 370 F.3d 1252 (11th Cir. 2004) (the plaintiff student was also punished for silently raising his fist during the daily recitation of the pledge of allegiance).

[100] Slotterback v. Interboro Sch. Dist., 766 F. Supp. 280 (E.D. Pa. 1991).

[101] See Walz v. Egg Harbor Twp. Bd. of Educ., 342 F.3d 271 (3d Cir. 2003).

[102] Rusk v. Crestview Local Sch., 379 F.3d 418 (6th Cir. 2004).

[103] Id.

[104] Peck v. Upshur County Bd. of Educ., No. 96-2544, 1998 U.S. Lexis 18793 (4th Cir. Aug. 14, 1998).

[105] Tinker v. Des Moines Indep. Comm. Sch. Dist., 393 U.S. 503, 506 (1969).

Individual, private, personal, non-disruptive prayer is permissible in public schools and ought to be accommodated. Unlike the substance-based curriculum claims in the cases presented above, where the proposed accommodation would generally cause undue hardship, damage, and disruption to the overall curriculum, there are some programs and practices that allow accommodation. The most common accommodation, perhaps, is the one made for the recitation of the Pledge of Allegiance. While the Pledge is currently under fire in a rather newsworthy Establishment Clause case,[106] the use of the Pledge in schools first hit the Supreme Court in a Free Exercise case during World War II. In *West Virginia State Bd. of Educ. v. Barnette*,[107] Jehovah's Witnesses refused to participate in their public school's daily recitation of the Pledge of Allegiance because their religion viewed the flag as a "graven image." On free speech and free exercise claims, the Court held for the students. In the quintessential Court language balancing individual rights against the weight of the school's policies, the Court stated:

> The very purpose of the Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.[108]

IRELAND: HISTORY, TRADITION, AND THE CAMPAIGN TO SEPARATE CHURCH AND STATE

So far as the leaders of Irish nationalism were concerned, the more militant among them took their views on civil and religious liberty from the principles of the French and American revolutions. Constitutional nationalists, like Daniel O'Connell, also believed in the separation of church and State and were in many ways pioneers of what we nowadays would call Christian democracy. They did not therefore object to guarantees on this subject being written into the various Home Rule Bills.[109]

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[106] Newdow v. U.S. Congress, 292 F.3d 597 (9th Cir.2002).

[107] 319 U.S. 624 (1943).

[108] Id. at 642.

Current politics and law in Ireland with respect religion in school curricula are very dependent on (and reverent to) the nation's history in politics and law. And perhaps that is not so surprising from a country whose definition and character are so intimately related to the majority religion of its population, Roman Catholicism.[110] In a country with such an overwhelming majority religion, the lines quoted above – from Ireland's major case addressing the legal relationship between church and state – continue to emphasize greatly the free exercise of religion and the freedom from governmental discrimination on the basis of religion. In fact, the discussion of religion in public life in Ireland appears to be much more steeped in the religious rights of each individual, regardless of a person's religious affiliation, than it is in that individual's freedom from governmental establishment, endorsement, or in Ireland, *endowment* of religion.[111] And education is no exception. Make no mistake, though; the State-aided schools in Ireland definitely carry with them their own religious identities. There is, quite simply, however, a broad legal, public, and political acceptance of that fact.[112]

IRELAND'S EDUCATIONAL SYSTEM

In Ireland, the State has a constitutional responsibility for the national educational system. However, Irish schools are not owned and operated by the State, but rather by community groups – usually religious ones.[113] Most schools in Ireland are denominational, and have been for almost two centuries, with boards of education today that are at least partially controlled by the Catholic Church. According to the Irish Constitution, religious instruction is offered, but is not required. Parents may exempt their children from religious instruction.[114] While the schools in Ireland are not owned and operated by the state, the country's educational system is a "State-aided" one, with a high percentage of the costs paid by the government.

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[109] Campaign to Separate Church and State in Ireland v. The Minister for Education, 1998 3 IR 343, [1998].

[110] From a 2002 census, 88.4% of the population of Ireland reported an affiliation with the Roman Catholic Church. *International Religious Freedom Report 2004*, released by the Bureau of Democracy, Human Rights, and Labor. Retrieved December 14, 2004, from http://www.state.gov/g/drl/rls/irf/2004/35461.htm.

[111] See Gerald Whyte, Religion and the Irish Constitution, 30 J. Marshall L. Rev. 725 (1997).

[112] See S.I. Strong, Christian Constitutions: Do They Protect Internationally Recognized Human Rights and Minimize the Potential for Violence within a Society? A Comparative Analysis of American and Irish Constitutional Law and Their Religious Elements, 29 Case W. Res. J. Int'l L. 1 (1997).

[113] Id. See also www.europaworld.com.

[114] Ir. Const. Art. 44.2.4

Historically, there were conflicts over the presence of religion in State-aided education in Irish schools – on one hand, whether religion would be recognized at all; and on the other hand, which religion would predominate. Despite these conflicts, the move to a national system of education was seen as largely positive, as the system opened up education to a large segment of the population that did not have access to education at the primary, secondary, or post-secondary levels before. Today, despite the large homogeneous religious majority and the general acceptance of denominational schools, the conflict continues. Even among those who support the Catholic Church's presence in education, there is a push for the Church to open up its doors more widely and, as Ireland becomes more religiously diverse, listen to all of the voices represented I the schools. According to Michele Dillon, Ireland's Catholic Church can no longer take its traditional base for granted.[115] Even stronger is the commentary by Des McCarron, who is helping to lead the charge for the full separation of church and state in Ireland.[116] According to McCarron, the Catholic Church controls two-thirds of the nation's secondary schools and 3300 of the 3500 primary schools. Educate Together, an advocacy group in Ireland, reported that there are increasing numbers of parents and families of diverse religions who must send their children to schools that conflict with their lawful religious preferences. The organization has attempted to open religion-free schools with government approval, but cites that the national department of education has failed to provide the support. Such inaction, according to the group, "will almost inevitably lead parents to seek their rights through the courts."[117] Suffice it to say, however, history and tradition reign and the courts have not heard many cases on the matter.

THE CAMPAIGN TO SEPARATE CHURCH AND STATE IN IRELAND

The staunch support Ireland shows for the individual freedom of religion is shown in its constitutional provisions on religion, codified in Article 44:

1. The State acknowledges that the homage of public worship is due to Almighty God. It shall hold his Name in reverence, and shall respect and honour religion.

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[115] Michele Dillon, Irish Catholicism: What Will it Become?, 132 Commonweal 10 (2005).

[116] Des McCarron, Church Power in the South: Home Rule or Rome Rule?, Workers Solidarity No. 32 (1991). Retrieved December 14, 2004, from http://flag.blackened.net/revolt/ws91/church32.html.

[117] Census Volume on Religion Emphases Need to Develop Educate Together Sector, Educate Together, Vol. 4, no. 4 (April 12, 2004). Retrieved December 14, 2004, from http://www.educatetogether.ie/news/ETEN0404.htm.

2.1. Freedom of conscience and the free profession and practice of religion are, subject to public order and morality, guaranteed to every citizen.
2.2. The State guarantees not to endow any religion.
2.3. The State shall not impose any disabilities or make any discrimination on the ground of religious profession, belief, or status.
2.4. Legislation providing State aid for schools shall not discriminate between schools under the management of different religious denominations, nor be such as to affect prejudicially the right of any child to attend a school receiving public money without attending religious instruction at that school.
2.5. Every religious denomination shall have the right to manage its own affairs, own, acquire and administer property, movable and immovable, and maintain institutions for religious and charitable purposes.
2.6 The property of any religious denomination of any educational institution shall not be diverted save for necessary works of public utility and on payment of compensation.[118]

Just like any traditional constitution, Ireland's sets forth a balance among the rights and responsibilities of citizens and government. In the provisions on religion, Ireland's constitution pays particular attention to free exercise and anti-discrimination. Fascinatingly, Ireland's constitution also contains a provision particular to religion and education – Article 44.2.4 – balancing the rights of the institutions receiving State aid and the rights of the children who wish not to receive instruction in religion and implying that government, education, and religion will have a formal relationship in Irish life.

In contrast to the arguably parallel provision in the United States Constitution, the "endowment" clause of the Irish Constitution has been litigated in only one major case.[119] In *Campaign to Separate Church and State in Ireland v. The Minister for Education* (hereafter *Campaign*), the plaintiff, a corporation, alleged an unlawful "endowment" of religion in the government-supported national educational system that paid the salaries of school chaplains. At the time, over £1.2 million were spent annually on the chaplains. Historically, the chaplains were religious professionals (e.g., priests and nuns as chaplains in Catholic schools); but many are laypersons today. The school chaplain serves as a member of the school's religion department and works with the principal to organize worship services and religious instruction (in accordance with parents and local bishops). The chaplain's pastoral roles include personal contact with students in classes, recreational activities, and cultural activities. Informally, chaplains serve as counselors in religious, moral,

[118] Ir Const. Art. 44.

[119] The word "parallel" is used lightly, however, as the Irish Supreme Court has, in fact, made unanimous distinction between "establishment" and "endowment."

social, educational, personal, and family matters. In its case, the plaintiff used cases from United States establishment clause jurisprudence. But, in a lower court ruling, the Irish High Court judge distinguished those cases and noted the difference between "establishment" and "endowment." On appeal and in an issue that parallels *Lemon v. Kurtzman* in the United States, the Irish Supreme Court affirmed and held, unanimously, that the government payment of the salaries of school chaplains is lawful under Ireland's constitution.

In his opinion, Justice Barrington reiterated a strong statement from a 1997 Supreme Court opinion:

> The system [of state-supported denominational schools] does not involve the endowment of any religion. The endowment of a religion implies the selection of a favored State religion for which permanent financial provision is made out of taxation or otherwise. This kind of endowment is outlawed by Article 44.2.2 of the Constitution.[120]

Justice Barrington argued that Ireland's traditional and historical system of denominational schools was clearly well known to the framers of the Constitution. Accordingly, the direct references in the Constitution to state aid to schools reveal two central facts. First, the Constitution does not contemplate that state aid is an endowment of religion. And second, the Constitution does contemplate that any child may attend any school, regardless of religious profession, belief, or status, and need not participate in religious instruction. Having said that, though, Justice Barrington's opinion in *Campaign* proudly supported the impact of religion on State-aided education in Ireland:

> [E]ach denominational school has its own ethos. Teachers of a particular religious persuasion do not convey their ideas merely through formal instruction but tend to organize the schools in such a way as best to promote the religious values which they themselves embrace. The framers of the Constitution were clearly aware of this when they contemplated the provision of funds for denominational education. They cannot therefore have regarded such provision as an "endowment" of any religion or religions.[121]

Moreover, the constitutional provisions involving state aid to schools in Ireland make a distinction between religious "education," a broad term encompassing all the work of the school – its ethos – and religious "instruction," a narrower term encompassing specific curriculum in religion. Under Article 44.2.4, children who attend state-aided schools are permitted to opt out of religious

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[120] *Campaign*, citing *The Employment Equality Bill, 1996* [1997] 2 IR 321, at 354.

[121] Id. (J Barrington)

instruction, but "the Constitution cannot protect [them] from being influenced, to some degree, by the religious 'ethos' of the school."

Justice Keane, in his decision, was equally respectful of the history of the Constitutional provisions at issue in *Campaign* and argued that Article 44.2.4 makes it clear that the State may provide aid to schools under the management of different religious denominations, and may include religious instruction as part of the curricula. Important for the discussion in this paper, Justice Keane also argued that the history of the Establishment Clause in the United States has no comparison to Ireland's history, as there is a central distinction to be made between "establishment of religion" and "endowment of religion," making United States case law unpersuasive:

> In contrast, the first amendment to the Constitution of the United States of America expressly prohibits Congress making any law "respecting an establishment of religion…." The amendment was construed by Thomas Jefferson as creating "a wall of separation" between church and State…. The problems posed for the United States Supreme Court in reconciling this strict construction of the Establishment Clause, as it came to be known, with the major part played by religion in American life are vividly illustrated in the decisions cited in this case, replete with vigorously argued dissents. The provisions of our Constitution are, however, so markedly different that … these authorities are not of assistance in the construction of Article 44.2.2.[122]

Ireland's Article 44.2.2, in contrast to the Establishment Clause in the United States, was intended to declare unlawful the "vesting of property or income in a religion" in a perpetual or quasi-perpetual form. "It was not designed to render unlawful the comprehensive system of aid to denominational education which had become so central a feature of the Irish schools system."[123] As a result, the government funding of the salaries of school chaplains is not an endowment of religion, but a lawful means to the attainment of the goals of public education in Ireland.

THE UNITED STATES AND IRELAND: BALANCES AND CONCLUSIONS

Despite their different respective journeys over the centuries, Ireland and the United States – with respect to religion – share some revolutionary stories. From the American Revolution of the late 1700s came a United States Constitution with an emphasis on religious freedom and the freedom from governmental establishment of religion. From the Irish Revolution of the 1910s and 1920s came a self-governing Dominion of 26 counties (the south of

[122] Id. (J Keane)

[123] Id. (J Keane)

Ireland) within the British Empire and three major iterations of the Irish Constitution between 1919 and 1937. The first one, drafted in 1919 at the height of the War for Independence, was designed to gain international favor for the independence movement. The second one, the Constitution of the Irish Free State of 1922, reflected a greater compromise between militant republicans and moderate loyalists. By 1937, however, a completely new Constitution was drafted that accomplished a few significant things. First, the new government weakened its links with the United Kingdom. Second, it retained the liberal democratic tradition of the Irish Free State. And third, it explicitly provided for the "social teaching of the Catholic Church in relation to such areas as the family, education, and private property."[124] So, a Constitution born of revolution became a Constitution of evolution – and one that emphasized rather strongly religious freedom and anti-discrimination.

Both Ireland and the United States are products of their own histories. Respectful of its endowment clause, free exercise clause, and strong anti-discrimination provisions from legislative and constitutional law, Ireland remains overwhelmingly Roman Catholic – not only in population, but also in philosophy (though in recent decline), government, business, social life, and education. Yes, Ireland is a product of its own history – and so is the United States a product of its own history. The United States was born of revolution designed, primarily, for religious freedom and the freedom from government establishment of it. And, yes, many government entities, including public schools, are accused of violating these freedoms. The same set of colonies that fought against taxation without representation has become a union of red states and blue states that often "taxes" and fails to represent. In more specific terms, American public schools are often caught implementing policies or engaging in practices that endorse religion in curriculum and more than a few civil libertarian plaintiffs are pleased to host the tea parties.

Having said this, however, there is also a strong argument that religion and public school curriculum should not be separated to the extent that they are – that they *cannot* be separated to the extent that they are. Hence the fierce debate over the alleged wall of separation between church and state continues.[125]

American schools defend the decisions they make on several factors: (1) it is the state's authority to set curriculum; (2) the necessity and requirement that a full, neutral curriculum be presented; (3) the desire to avoid Establishment Clause violations; and (4) the desire to respect the religious preferences and practices of stakeholders. The most recent defenses from individuals and states, particularly in cases involving the Pledge of Allegiance and posting of the Ten Commandments, emphasize the religious history of the

[124] Whyte, supra note 111, at 728.

[125] Recall that Justice Keane, in his opinion in *Campaign*, argued that the "wall of separation" was unworkable in Ireland as an overly strict interpretation of Ireland's endowment clause.

nation and urge the judiciary not to dismiss it. In separate concurring opinions in *Elk Grove Unified School District v. Newdow*, Justice Rehnquist and O'Connor argued that the presence of the word "God" in the Pledge of Allegiance did not violate the Establishment Clause.[126] Justice Rehnquist noted that historical examples of the use of the word "God" and other references to religion in public speeches and documents abound, including presidential inaugural addresses, Thanksgiving proclamations, and Lincoln's Gettysburg Address. He also noted the nation's motto, "In God We Trust" and the Supreme Court Marshal's opening proclamation, dating back to 1827, which concludes with the words "God save the United States and this honorable Court." Similarly, Justice O'Connor argued that the history and ubiquity of the Pledge in American life, the absence of worship or prayer in the Pledge, the absence of reference to a particular religion, and the Pledge's minimal religious content dictate a conclusion that the reasonable observer would not perceive a government endorsement of religion in the recitation of the Pledge. Ending her opinion, she stated:

> Certain ceremonial references to God and religion in our Nation are the inevitable consequence of the religious history that gave birth to our founding principles of liberty. It would be ironic indeed if this Court were to wield our constitutional commitment to religious freedom so as to sever our ties to the traditions developed to honor it.[127]

While the decisions in the recent Ten Commandments cases are decidedly mixed, Rehnquist's opinion in *Van Orden v. Perry*, which received four votes and argued for the allowance of the posting on the grounds of the Texas State Capitol, recognized the role of God in the heritage of the United States.[128] According to Rehnquist, the legality of the posting of the Ten Commandments should depend on the nation's history and the nature of the monument – presented rather passively for over 40 years as one of a set of historical monuments and sculptures. The Court's past opinions reflect an "unbroken acknowledgment" by all three branches of government of religion's role in American life. Rehnquist did note, however, that the posting of the Ten Commandments in public school classrooms, invalidated in *Stone v. Graham*,[129] remains unlawful as pervasive and not passive and neutrally presented. In contrast to the decision in *Van Orden*, the Court in *McCreary v. ACLU* struck down the posting of readily visible copies of the Ten

[126] 124 S. Ct. 2301 (2004).

[127] Id. at 2327.

[128] No. 03-1500, 2005 U.S. Lexis 5215 (June 27, 2005). Justice Breyer's concurring opinion in Van Orden resulted in a five-vote majority upholding the Texas posting of the Ten Commandments.

[129] 449 U.S. 39 (1980).

Commandments on government property.[130] Relying on the context development of these postings, the Court's five-vote majority argued that the secular purpose prong of the *Lemon* test may be used to determine the legality of such a government practice and held that the postings violated the Establishment Clause.

The Pledge and Ten Commandments cases are the current representatives in a very heated, ongoing debate over the presence of religion in American public life. Clearly, with fluctuating and divergent interpretations and applications of the religion clauses in the United States Constitution, the debate will continue for quite some time. But, now, with more fervor than ever before, the history of the United States itself is an operative voice in the dialogue. Granted, while a contentious religion-dominated history served to hurt school districts in cases like *Selman* and *Santa Fe*, it may serve to help some government entities. In the name of religious neutrality and the presentation of a full curriculum, the larger educational authority to set curriculum may claim that American history demands some coverage of religion in school. And certainly some individuals promote a balance that favors the inclusion of religion in curriculum and larger public life, as well. On the other hand, educational authority has been successful arguing that a traditional anti-establishment history demands a position of religion-free neutrality. And separationist individuals are more than happy to support this position.

Irish history dictates that endowment is different from establishment and the unanimous decision in *Campaign* seems to answer the "balancing" question rather unambiguously. So, what's the better reading of American history? The heavily litigated constitutional provisions and steep case law offer some guidance. But the dialogue – or tea party – continues.

[130] No. 03-1693, 2005 U.S. LEXIS 5211 (June 27, 2005).