PUBLIC SCHOOLS AND RELIGION

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PUBLIC SCHOOLS
AND RELIGION

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PUBLIC SCHOOLS AND RELIGION
TABLE OF CONTENTS

PUBLIC SCHOOLS AND RELIGION 1

A. Introduction 1
B. Development of the Lemon Test 2

STATE CONSTITUTIONAL PROVISIONS 4

PRAYER IN SCHOOL 7

A. Classroom Prayer 7
B. Period of Silence for Voluntary Prayer 9
C. Prayer at Graduation Ceremony 10
D. Prayer at Athletic Events 12
E. Editing of Graduation Speech 14
F. Invocations at Board Meetings 18
G. Pledge of Allegiance 20

NCLB GUIDANCE ON CONSTITUTIONALLY PROTECTED PRAYER AND RELATED CASE LAW 21

A. Issuance of the Guidance 21
B. Overview of the Guidance 21
C. Student Prayer in School 22
D. Neutrality of School District Employees 22
E. Release of Students 25
F. Student Work 25
G. Student Speakers 27
H. Mandated Prayers or Prayers Sponsored by the School District 27

ACCOMMODATION OF RELIGIOUS OBSERVANCES 28

A. Release Time 28
B. Holidays and Time Off From Work 35
C. Separate School District 37

DISPLAY OF RELIGIOUS SYMBOLS AND RELIGIOUS EXPRESSION IN THE WORKPLACE AND IN PUBLIC SCHOOLS 38

A. Introduction 38
B. Display of Nativity Scenes 38
C. Display of Religious Books and Materials 40
D. Discussion of Religion with Clients 41

E. **Display of Ten Commandments** 44
F. **Discussion of Religious Holidays** 46
G. **Display of Portrait of Jesus** 49

SERVICES PROVIDED TO RELIGIOUS SCHOOLS 49

A. **Reimbursement For Parochial School Services** 49
B. **Assistance to Students**....53
C. **School Voucher Programs**....55

RELIGIOUS GROUPS ON CAMPUS DURING SCHOOL....58

A. **Case Law**....58
B. **Equal Access Act** 58

USE OF SCHOOL FACILITIES BY RELIGIOUS GROUPS AFTER SCHOOL 61

DISTRIBUTION OF RELIGIOUS LITERATURE 63

A. **Distribution of Bibles in the Classroom**....63
B. **Distribution of Religious Materials Outside of School** 64
C. **Distribution of Materials to Students to Take Home** 66

CHALLENGES TO SCHOOL CURRICULUM,
BOOKS AND INSTRUCTIONAL MATERIALS....69

A. **The Teaching of Evolution** 69
B. **Challenges to Textbooks and Instructional Materials**....70

RELIGIOUS CLOTHING IN THE CLASSROOM 76

USE OF CHURCH FACILITIES BY PUBLIC SCHOOLS 77

THE FREE EXERCISE OF RELIGION....81

A. **Introduction**....81
B. **Unemployment Benefits**....81
C. **Compulsory School Attendance**....82
D. **Compulsory Use of School Textbooks**....83
E. **Pledge of Allegiance and Patriotic Songs**....83
F. **Discussion of Personal Religious Beliefs** 84
G. **Animal Sacrifice** 85
H. **Federal Legislation**....85

PUBLIC SCHOOLS AND RELIGION

A. Introduction

The First Amendment of the United States Constitution states "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ."[1] The precise meaning of these words has been difficult for the courts to define.

Generally, the United States Supreme Court has developed separate constitutional tests for the Establishment Clause and the Free Exercise Clause of the First Amendment. Under the Establishment Clause, the United States Supreme Court has held that government may not aid religion, but what constitutes aid is a matter of dispute. At first, the United States Supreme Court erected a high and impregnable wall of separation between church and state. The subsequent court decisions have transformed that wall into a "blurred and indistinct and variable barrier."[2]

The Establishment Clause of the First Amendment can be traced to the Revolutionary War. At that time, a movement to attain more complete religious liberty paralleled the political movement for independence from Great Britain. The movement sought freedom from the "established church" or state church whose members received special privileges in civil society.[3]

In many colonies, the "established" church was the Church of England or Anglican Church; in several other colonies, it was the Congregationalist Church. Opposition to an "established" church during the Revolutionary period centered largely on the Anglican Church.[4] After defeating Great Britain, the former colonists sought to implement the idea of religious freedom by "disestablishing" those churches which had previously allied themselves with Great Britain and their colonial governors.[5] The main goals of "disestablishment" were to:

1. Provide an equal opportunity to all to hold public office regardless of church affiliation;

2. Abolish taxes for the support of a church to which the taxpayer did not belong;

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[1] U.S. Constitution, First Amendment.

[2] Everson v. Board of Education, 330 U.S. 1, 18, 67 S.Ct. 504 (1947); Lemon v. Kurtzman, 403 U.S. 602, 614, 91 S.Ct. 2105 (1971).

[3] See, C. Antieau, A. Downey, E. Roberts, Freedom From Federal Establishment, 1-2 (1964). Freedom from an established church at the time of the Revolutionary War meant freedom from: (1) A state church officially recognized and protected by the sovereign; (2) A state church whose members alone were eligible to vote, to hold public office, and to practice a profession; (3) A state church which compelled religious conformity under penalty of fine and imprisonment; (4) A state church financed by taxes; (5) A state church which alone could freely function; and (6) A state church which alone could perform marriages, burials, etc.

[4] Id. at 2. The Congregational Church was the established church in Massachusetts, Connecticut and New Hampshire. The Anglican Church was the established church in Virginia, North Carolina and South Carolina. Rhode Island, Pennsylvania and Delaware had a large measure of religious freedom and no established church.

[5] Id. at 30.

3. Abolish laws requiring dissenters and members of minority sects to attend services of the dominant faith;

4. Provide equal economic opportunity to dissenters and end all advantages and preferences possessed by members of the dominant faith;

5. Terminate all "establishments" whether they were exclusive "establishments" (for example, Anglican or Congregationalist) or multiple "establishments" (such as Protestant); and

6. Ensure equal opportunity to all to practice a faith.[6]

The key change brought about by the "disestablishment" movement was the end of public funds to support religion. Tax support for "established" churches had been prevalent during the colonial period. In Virginia, the parish collected taxes from all persons within the territory regardless of church affiliation and a sizeable portion of this money was used to support the Anglican Church in Virginia. As the number of sects increased, dissenters and members of minority sects became more vocal in protesting the unfairness of a system which required them to financially support a church whose ideology and beliefs might clash with their own.[7]

Shortly after the signing of the Declaration of Independence, Presbyterians in Virginia protested to the Virginia Legislature the unfairness of the "church" tax. The Presbyterians sought to exempt their members from the tax and make contributions to the established church voluntary.[8] Both Thomas Jefferson and James Madison were instrumental in the fight against this tax. It was at this time that James Madison wrote his famous "Memorial Remonstrance Against Religious Assessments"[9] in which he argued that religion must be left to each man's conscience and that civil government should remain aloof from religion so that religion and government could flourish. Madison argued that collaboration between civil government and religion degraded both and that attempts by civil governments to impose religious conformity only led to strife and bloodshed.[10] The Virginia Legislature shortly thereafter passed a bill exempting all dissenters and minority sect members from paying taxes to the Anglican Church.[11]

B. Development of the Lemon Test

Many years passed before the issue of public support of religion came before the United States Supreme Court. The Supreme Court first faced the issue in the case of

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[6] Id. at 31.
[7] Id. at 31-32.
[8] Id. at 32.
[9] James Madison, Memorial and Remonstrance Against Religious Assessments, in The Complete Madison, 299 (S. Padovar Ed. 1953).
[10] Id. at 303-04.
[11] Freedom From the Federal Establishment, at 32.

Everson v. Board of Education.[12] Justice Black, writing for the majority, traced the origins for the Establishment Clause to the early settlers who migrated from Europe "to escape the bondage of laws which compelled them to support and attend government-favored churches."[13] Dissenters and members of minority churches found themselves required "to pay tithes and taxes to support government-sponsored churches whose ministers preached inflammatory sermons designed to strengthen and consolidate the established faith by generating a burning hatred against dissenters."[14] As a result, in Virginia, "people . . . reached the conviction that individual religious liberty could be achieved best under a government which was stripped of all power to tax, to support, or otherwise to assist any or all religions, or to interfere with the beliefs of any religious individual or group."[15]

The Court in Everson interpreted the Establishment Clause as prohibiting a state from levying a tax in any amount to support any religious activities or institutions.[16] The Court upheld a New Jersey statute which reimbursed the parents of Catholic school students for their children's bus fares as a general welfare measure.[17] The Court held that the New Jersey statute was a neutral measure designed to afford safe travel for all school children and should not be struck down "if it is within the State's constitutional power even though it approaches the verge of that power."[18]

The Supreme Court in Everson did not pinpoint when a statute went beyond the "verge of that power." It was not until the case of School District of Abington Township v. Schempp[19] that the Court began to define the "verge of power." In Schempp, the Supreme Court struck down a state law requiring the reading of the Bible in public schools on the basis that it went beyond the New Jersey transportation reimbursement statute and thus violated the Establishment Clause of the First Amendment.[20] The Schempp court formulated a two-part test to determine if a statute violated the Establishment Clause.[21] First, the statute must have a secular legislative purpose and, second, the primary effect of the statute must neither advance nor inhibit religion. The Supreme Court added a third part to the test in Walz v. Tax Commission[22] holding that tax exemptions for religious institutions were constitutional and noted taxation of religious institutions would result in "excessive government entanglement with religion."[23] The three part test is also known as the "Lemon test." The three elements of the "Lemon test" are:

1. The statute must have a secular legislative purpose.

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[12] 330 U.S. 1, 675 S.Ct. 504 (1946).
[13] Id. at 8.
[14] Id. at 10.
[15] Id. at 11.
[16] Id. at 16.
[17] Id. at 16.
[18] Id. at 16.
[19] 374 U.S. 2031, 83 S.Ct. 1560 (1963).
[20] Id. at 222.
[21] Ibid.
[22] 397 U.S. 664 (1970).
[23] Id. at 674.

2. The statute's principal or primary effect must be one that neither advances nor inhibits religion.

3. The statute must not foster an excessive government entanglement with religion.[24]

This new standard of excessive government entanglement was used in Lemon v. Kurtzman[25] to strike down state statutes authorizing salary supplements to parochial school teachers and reimbursement to parochial schools for textbooks, instructional materials, and secular education services.[26]

STATE CONSTITUTIONAL PROVISIONS

The California Constitution contains several provisions relating to freedom of religion.[27] Article I, Section 4 of the California Constitution states:

> "Free exercise and enjoyment of religion without discrimination or preference are guaranteed. This liberty of conscience does not excuse acts that are licentious or inconsistent with the peace or safety of the State. The Legislature shall make no law respecting an establishment of religion.
>
> "A person is not incompetent to be a witness or juror because of his or her opinions on religious beliefs."

Article IX, Section 8, of the California Constitution states:

> "No public money shall ever be appropriated for the support of any sectarian or denominational school, or any school not under the exclusive control of the officers of the public schools; nor shall any sectarian or denominational doctrine be taught, or instruction thereon be permitted, directly or indirectly, in any of the common schools of this State."

Article XVI, Section 5 of the California Constitution states:

> "Neither the Legislature, nor any county, city and county, township, school district, or other municipal corporation, shall ever make an appropriation, or pay from

[24] See, Lemon v. Kurtzman, 91 S.Ct. 2105 (1971).
[25] 403 U.S. 602, 91 S.Ct. 2105 (1971).
[26] Id. at 622.
[27] See, California Constitution, Article I, section 4, Article IX, section 8, Article XVI, section 5.

> any public fund whatever, or grant anything to or in aid of any religious sect, church, creed, or sectarian purpose, or help to support or sustain any school, college, university, hospital, or other institution controlled by any religious creed, church, or sectarian denomination whatever; nor shall any grant or donation of personal property or real estate ever be made by the state, or any city, city and county, town, or other municipal corporation for any religious creed, church, or sectarian purpose whatever; provided that nothing in this section shall prevent the Legislature granting aid pursuant to Section 3 of Article XVI."

The United States Supreme Court in Locke v. Davey,[28] held that the State of Washington's funding of scholarships, except for the pursuit of a devotional theology degree, was constitutional and did not violate the Free Exercise Clause of the First Amendment of the United States Constitution. The Court's ruling may be significant in later issues that affect public schools and community colleges.

In Locke v. Davey, the State of Washington established a scholarship program to assist academically gifted students with postsecondary education expenses. In accordance with the Washington State Constitution, students were not permitted to use a scholarship at an institution if they were pursuing a degree in devotional theology.

A student who applies for the scholarship and meets the academic and income requirements is notified that he or she is eligible for the scholarship if he or she meets the enrollment requirements. Once a student enrolls at an eligible institution, the institution must certify that the student is enrolled at least half-time and that the student is not pursuing a degree in devotional theology. The institution, rather than the state, determines whether the student's major is devotional.

The religion clauses of the First Amendment provide:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ."

As the United States Supreme Court noted, the two clauses, the Establishment Clause and the Free Exercise Clause, are frequently in tension. As the Court noted:

> "In other words, there are some state actions permitted by the Establishment Clause, but not required by the Free Exercise Clause.

[28] 540 U.S. 712, 124 S.Ct. 1307 (2004).

> "This case involves that 'play in the joints' described above. Under our Establishment Clause precedent, the link between government funds and religious training is broken by the independent and private choice of recipients. . . . As such, there is no doubt that the State could, consistent with the Federal Constitution, permit Promise Scholars to pursue a degree in devotional theology . . . and the State does not contend otherwise. The question before us, however, is whether Washington, pursuant to its own constitution, which has been authoritatively interpreted as prohibiting even indirectly funding religious instruction that will prepare students for the ministry . . . can deny them such funding without violating the free exercise clause."

The student cited the previous case of Church of Lukumi Babalu Aye, Inc. v. Hialeah,[29] in which the United States Supreme Court held that a city ordinance that made it a crime to engage in certain types of animal slaughter was unconstitutional since it sought to suppress ritualistic animal sacrifices of the Santeria religion. The Court noted that Washington's Constitution imposes neither criminal nor civil sanctions of any type and does not require students to choose between their religious beliefs and receiving government benefits, but rather the State of Washington has merely chosen not to fund a distinct category of instruction.[30]

The Court rejected Justice Scalia's dissenting view that when a state funds training for all secular professions it must also fund training for religious professions. The Court stated, "That a state would deal differently with religious education for the ministry than with education for other callings is a product of these views, not evidence of hostility toward religion."

The Court noted that the Washington Constitution draws a more stringent line than that drawn by the United States Constitution and noted that many state constitutions contain similar provisions. The Court noted that the Washington program was not hostile to religion because it includes religion in its benefits by allowing students who attend pervasively religious schools that are accredited to participate so long as they are not majoring in devotional ministry. The Court concluded by stating:

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[29] 508 U.S. 520 (1993).

[30] The California Constitution contains similar provisions to the Washington Constitution. Article I, section 4 of the California Constitution states:

"Free exercise and enjoyment of religion without discrimination or preference are guaranteed. This liberty of conscience does not excuse acts that are licentious or inconsistent with the peace or safety of the State. The Legislature shall make no law respecting an establishment of religion.

"A person is not incompetent to be a witness or juror because of his or her opinions on religious beliefs."

> "The State's interest in not funding the pursuit of devotional degrees is substantial and the exclusion of such funding places a relatively minor burden on Promise Scholars. If any room exists between the two religion clauses, it must be here. We do not venture further into this difficult area in order to uphold the Promise Scholarship Program as currently operated by the State of Washington."

The decision in Locke v. Davey may affect future programs developed by the State of California, community colleges and school districts.

PRAYER IN SCHOOL

A. Classroom Prayer

Classroom prayer in a daily program composed by state officials for public schools has been held to violate the First Amendment prohibition against the establishment of religion. Even if the prayer is nondenominational, voluntary and does not establish a particular religious sect to the exclusion of all others, the Supreme Court has found the practice unconstitutional.[31]

In Engel v. Vitale, the United States Supreme Court found that the 22-word prayer composed by the state for use in New York's program of daily classroom recitation was a religious activity.[32] The Court held that it was not the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by government. The Court stated:

> "The Establishment Clause, unlike the free exercise clause, does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce non-observing individuals or not...when the power, prestige and financial support of government is placed behind a particular religious belief, the indirect corrosive pressure upon religious minorities to conform to the prevailing officially approved religion is plain."[33]

[31] Engel v. Vitale, 370 U.S. 421, 82 S.Ct. 1261 (1962). The recitation of a verse that did not include the word "God" was found to be unconstitutional in De Spain v. DeKalb County Community School District, 384 F.2d 836 (7th Cir. 1967), cert. denied 390 U.S. 906 (1986).
[32] Id. at 424.
[33] Id. at 430-431.

In School District of Abington Township v. Schempp,[34] the United States Supreme Court found that requiring the reading of verses from the Bible to be a violation of the Establishment Clause.

The Pennsylvania statute stated:

> "At least ten verses from the Holy Bible shall be read without comment at the opening of each public school on each school day. Any child shall be excused from such Bible reading, or attending such Bible reading, upon the written request of his parent or guardian."[35]

The plaintiffs were members of the Unitarian Church and brought an action seeking to enjoin the enforcement of the statute at Abington Senior High School. There, the Bible reading was broadcast into each room via the intercom system and followed by the recitation of the Lord's prayer. The exercises were closed with the flag salute and announcements regarding school business. Participation in these exercises was voluntary. The students reading the verses from the Bible selected a passage and read from any version the student chose. The school furnished the King James version of the Bible to the students and copies were circulated to each teacher by the school district. The Supreme Court noted that while religion has been closely identified with our history, the founding fathers also believed in religious freedom.[36] The Court noted that the views of Thomas Jefferson and James Madison came to be incorporated into the Constitution that the freedom to worship was indispensable in a country whose people came from the four corners of the earth and brought with them a diversity of religious opinions.[37]

The Court stated that the Constitution does not deny the value or the necessity for religious training, teaching or observance, rather it secures their free exercise, while at the same time denying the state the ability to undertake or prescribe religious training, teaching or observance in any form or degree.[38]

The Court found that by requiring Bible reading at the opening of the school day and recitation of the Lord's Prayer by the students in unison, that these exercises became part of the curricular activities of students who were required by law to attend school. This reading and recitation were found to be a religious ceremony, and therefore it was found to be a violation of the Establishment Clause.[39]

The state had argued that unless the religious exercises were permitted, a religion of secularism would be established in the public schools. The Court rejected this

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[34] 374 U.S. 203, 83 S.Ct. 1560 (1963).
[35] 24 Pa.Stat. section 15-1516, as amended, public law 1928 (Supp. 1960).
[36] Id. at 212.
[37] Id. at 214.
[38] Id. at 218.
[39] Id. at 223.

argument and found that not allowing religious exercises in the public schools would preserve government's neutrality toward religion.[40] The Court stated:

> "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, but the exercises here do not fall into those categories. They are religious exercises required by the state in violation of the command of the First Amendment that the government maintain strict neutrality, neither aiding nor imposing religion."[41]

B. Period of Silence for Voluntary Prayer

In Wallace v. Jaffree,[42] the United States Supreme Court held unconstitutional an Alabama statute which authorized a period of silence for meditation or voluntary prayer. The Court held that Alabama statute violated the first prong of the test established in Lemon v. Kurtzman,[43] which required that the statute must have a secular legislative purpose. The Court held that the Alabama statute's purpose was to endorse religion and that the enactment of the statute was not motivated by any clearly secular purpose.

However, in concurring opinions, Justice Powell and Justice O'Connor indicated that some moment of silence statutes may be constitutional.[44] Yet, in a later case, the United States Supreme Court, on procedural grounds, refused to review a Court of Appeals decision striking down as unconstitutional a New Jersey statute authorizing a moment of silence in the public schools.[45]

Invocations or prayers at high school graduation ceremonies have also been held to violate the Establishment Clause of the First Amendment of the United States Constitution and similar provisions in the California Constitution.[46]

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[40] Id. at 225.
[41] Id. at 225.
[42] 472 U.S. 38, 105 S.Ct. 2479 (1985).
[43] 403 U.S. 602, 91 S.Ct. 2105 (1971).
[44] Wallace 472 at 2493-2504.
[45] May v. Cooperman, 780 F.2d 240 (3rd Cir. 1985), appeal dismissed, Karcher v. May, 484 U.S. 72, 108 S.Ct. 388 (1987).
[46] Lee v. Weisman, 505 U.S. 577, 112 S.Ct. 2649 (1992); Sands v. Morongo Unified School District, 53 Cal.3d 863, 281 Cal.Rptr. 34 (1991), cert. denied 112 S.Ct. 3026 (1992); Bennett v. Livermore Unified School District, 193 Cal.App.3d 1012, 238 Cal.Rptr. 819 (1987). Cases in other states have upheld invocations or prayers at graduation ceremonies on the basis that attendance was voluntary. Wiest v. Mt. Lebanon School District, 457 Pa. 166, 320 A.2d 362 (1974), cert. denied 419 U.S. 967, 95 S.Ct. 231, 42 L.Ed.2d 183 (1974); Grossburg v. Deusebio, 380 F.Supp. 285 (E.D.Va. 1974); Goodwin v. Cross County School District, 394 F.Supp. 417 (E.D.Ark. 1973). The reading of morning devotional readings over the school's public address system was held to be unconstitutional in Hall v. Board of School Commissioners, 656 F.2d 999 (5th Cir. 1981).

C. Prayer at Graduation Ceremony

In Lee v. Weisman,[47] the school principal instituted a prayer as part of the graduation ceremony. The U.S. Supreme Court found this unconstitutional, noting that there are heightened concerns with protecting freedom of religion from coercive pressure in the elementary and secondary public schools. The Court stated that even though the graduation ceremony was voluntary, it was not appropriate for the state to place a student in the position of choosing whether to miss the graduation ceremony or attend and listen to a prayer which the student might find objectionable. The Court recognized that high school graduation is one of life's most significant occasions. Even though attendance at high school graduation is not mandatory, the Court found that a student was not free to be absent from the graduation exercise since absence would require forfeiture of an intangible benefit which motivated the student through youth.

The Court stated:

> ". . . the state imposed character of an invocation and benediction by clergy selected by the school combined to make the prayer a state sanctioned religious exercise in which the student was left with no alternative but to submit."[48]

The Court noted that the First Amendment protects religious freedom and free speech in different ways:

> "The First Amendment protects speech and religion by quite different mechanisms. Speech is protected by insuring its full expression even when the government participates, for the very object of some of our most important speech is to persuade the government to adopt an idea as its own. . . . The method for protecting freedom of worship and freedom of conscience in religious matters is quite the reverse. In religious debate or expression, the government is not a prime participant, for the Framers deemed religious establishment antithetical to the freedom of all. The Free Exercise Clause embraces a freedom of conscience and worship that has close parallels in the speech provisions of the First Amendment, but the Establishment Clause is a specific prohibition on forms of state intervention in religious affairs with no precise counterpart in the speech provisions. . . . The explanation lies in the lesson of history that was and is the inspiration for the Establishment Clause, the lesson

[47] 505 U.S. 577, 112 S.Ct. 2649 (1992).
[48] Id. at 2660.

> that in the hands of government what might begin as a tolerant expression of religious views, may end in a policy to indoctrinate and coerce. A state-created orthodoxy puts at grave risk that freedom of belief and conscience which are the sole assurance that religious faith is real, not imposed."[49]

In a concurring opinion, Justice Souter, joined by Justice Stevens and O'Connor, argued that there is a historical basis for the court's interpretation of the Establishment Clause and the Lemon test. Justice Souter traced the history of the Establishment Clause as it made its way through the committees of Congress and noted that at one point the proposed language was broader than the present language and the language was more narrowly drawn.[50]

Justice Souter noted that various proposals used the phrases "a religion," "a national religion," "one religious sect," or "articles of faith." Justice Souter found it significant that the Framers of the Constitution considered and deliberately rejected the narrow language that was proposed and instead extended the prohibition to state support for "religion" in general.[51]

Based on this historical review, Justice Souter concluded that Congress intended to prohibit government from favoring religion in general over nonreligion and that there is historical support for the line of cases which established the Lemon test. Justice Souter concluded, based on the Lemon test, that public school prayers at public school graduations convey an endorsement of religion to the students and are therefore unconstitutional.

In a strongly worded dissent, Justice Scalia, joined by Chief Justice Rehnquist, Justice White and Justice Thomas, severely criticized the notion that prayer at a public school graduation is somehow coercive. In the view of the dissenters, public prayer at civic gatherings has occurred throughout history and is an American tradition. The dissent cites the fact that George Washington, Thomas Jefferson and James Madison included prayers in their inaugural speeches. The dissenters stated that the Lemon test should be rejected and that government should accommodate religion and allow religious practices in public life, so long as they do not favor one religion or religious sect in particular. The dissenters based their view on the contention that there is no historical basis for the line of cases which have erected a wall of separation between church and state and which have set forth the Lemon test.[52]

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[49] Id. at 2657-2658.
[50] Id. at 2667-2678.
[51] Id. at 2669-2670.
[52] Id. at 2678-2686.

D. Prayer at Athletic Events

In Doe v. Duncanville Independent School District,[53] a student and her father sued the school district challenging the school district's practice of permitting the basketball coach to sponsor prayers at the end of games and at practices. The Court of Appeals held that the student and father were entitled to a preliminary injunction since, under Lee v. Weisman,[54] there was a substantial likelihood they would prevail at trial.

Jane Doe was a seventh grader at Reed Junior High School in Duncanville, Texas on a girls' basketball team. The girls' basketball coach regularly began or ended practice with a team recitation of the Lord's Prayer. Even though she was uncomfortable with the religious practice, Doe participated in reciting the prayers out of a desire not to create any controversy. At the end of Doe's first basketball game, the Lord's Prayer was recited in the center of the court with the girls on their hands and knees, heads bowed with the coach standing over them. Over the following weeks, prayers were said prior to leaving the school for away games, as well as before exiting the bus upon the team's return. These prayers were usually started either at the coach's signal or at the coach's request.[55]

After attending a game and seeing his daughter participate in the prayer, Jane Doe's father asked how she felt about participating. Jane Doe stated that she preferred not to participate and John Doe told his daughter that she did not have to join in the prayers. After informing the coach that she would no longer participate in the prayers, the coach required Jane Doe to stand apart from the rest of the team while the coaches and students prayed. The Does contended that she was singled out and subjected to criticism on the basis of her religious beliefs and that fellow students asked her whether she was a Christian and spectators asked why she was not praying. Additionally, the records showed that Jane Doe's history teacher called her a "little atheist" during a class lecture.[56]

The Court of Appeals issued an injunction against this prayer since, under Lee v. Weisman, there was a substantial likelihood of success.[57] The Court of Appeals rejected the argument that the Equal Access Act applied. The Court of Appeal stated:

> "Lee is merely the most recent in a long line of cases carving out of the Establishment Clause what essentially amounts to a per se rule prohibiting public-school-related or initiated religious expression or indoctrination. Nothing the DISD has presented persuades us that the instant case materially differs from this long-established line of cases."[58]

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[53] 994 F.2d 160, 83 Ed.Law Rep. 945 (5th Cir. 1993).
[54] 505 U.S. 577, 112 S.Ct. 2649 (1992).
[55] Duncanville, 994 at 161-162.
[56] Id. at 162-163.
[57] Id. at 164.
[58] Id. at 165.

In Borden v. School District of the Township of East Brunswick,[59] the Third Circuit Court of Appeals held that the head football coach at East Brunswick High School violated the Establishment Clause by engaging in prayer activities with the East Brunswick High School football team by organizing, participating in, and leading prayer activities with his team. The Court of Appeals held that by leading prayer activities with the team, the football coach was endorsing religion. The court upheld the school district's policy prohibiting faculty participation in student-initiated prayer.

In recent cases, the appellate courts have wrestled with the issue of student-initiated prayer and when and under what circumstances student-initiated prayer will be permitted in public schools.[60] In California, the state courts have prohibited prayers at graduation ceremonies.[61]

In Santa Fe Independent School District v. Doe,[62] the court held that a school district's policy of permitting student led, student initiated prayers at football games violates the Establishment Clause of the First Amendment and was therefore unconstitutional. The Supreme Court held that the delivery of an invocation on school property at school sponsored events over the school's public address system by a speaker representing the student body under the supervision of the school faculty and pursuant to a school policy that allowed the students to vote on whether to have a public prayer at a football game violated the Establishment Clause. The court struck down the practice of allowing a majority of the student body to decide whether a student delivered invocation will take place. The court also held that some students, such as cheerleaders, members of the band and the team members themselves were required to attend football games, sometimes for class credit, and thus were forced to decide whether to attend the games or listen to what could be a religious message contrary to their personal beliefs.[63]

The decision in Santa Fe Independent School District is consistent with prior lower court cases affecting California schools. In Collins v. Chandler Unified School District,[64] the Court of Appeals held that a public school could not permit the student council to open assemblies with a prayer. In Sands v. Morongo Unified School District,[65] the California Supreme Court held that religious invocations and benedictions at public high school graduation ceremonies were unconstitutional. In Sands, the president of the graduating class, in consultation with the vice principal, selected speakers to conduct the invocation and benediction. In Bennett v. Livermore Unified School District,[66] the California Court of Appeal ruled that a planned invocation at a graduation

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[59] 523 F.3d 153 (3rd Cir. 2008).

[60] Doe v. Madison School District, 147 F.3d 832 (9th Cir. 1998), dismissed as moot, 177 F.3d 789 (9th Cir. 1999); Jones v. Clear Creek Independent School District, 977 F.2d 963 (5th Cir. 1992); Doe v. Santa Fe Independent School District, 168 F.3d 806 (5th Cir. 1999); American Civil Liberties Union of New Jersey v. Black Horse Pike Regional Board of Education, 84 F.3d 1471 (3rd Cir. 1996); Chandler v. James, 180 F.3d 1254 (11th Cir. 1999).

[61] Sands v. Morongo Unified School District, 53 Cal.3d 863 (1991); Bennett v. Livermore Unified School District, 193 Cal.App.3d 1012 (1987).

[62] 120 S.Ct. 2266 (2000).

[63] Ibid.

[64] 644 F. 2d 759 (9th Cir. 1981).

[65] 53 Cal.3d 863 (1991).

[66] 193 Cal.App. 3d 1012 (1987).

ceremony in which the school district appointed a student to give an invocation was unconstitutional.

E. Editing of Graduation Speech

In Cole v. Oroville Union High School District,[67] the Ninth Circuit Court of Appeals upheld the censorship of proselytizing language in a graduation speech. The Court described the speech as follows:

> "Niemeyer's proposed speech was a religious sermon, which advised the audience that 'we are all God's children, through Jesus Christ's death when we accept his free love and saving grace in our lives,' and requested that the audience accept that 'God created us' and that man's plans 'will not fully succeed unless we pattern our lives after Jesus' example.' Finally, Niemeyer's speech called upon the audience to 'accept God's love and grace' and 'yield to God our lives.' Cole's proposed invocation referred repeatedly to the heavenly Father and Father God, and concluded 'we ask all these things in the precious holy name of Jesus Christ, Amen.'"[68]

The Court of Appeals in Cole held that the school district did not violate the student's freedom of speech and that censorship of the speech was necessary to avoid an Establishment Clause violation.

In Lassonde v. Pleasanton Unified School District,[69] the United States Court of Appeals held that a school district may censor a student's high school graduation speech that contained sectarian proselytizing provisions to avoid violating the Establishment Clause of the First Amendment.

A review of the facts in Lassonde indicates that Nicholas Lassonde was a student at Amador Valley High School and was asked to deliver a speech at his high school graduation in June, 1999. The student drafted a speech that quoted extensively from the Bible. The student explained that he intended for the speech to express his desire for his fellow graduates to develop a personal relationship with God through faith in Christ in order to better their lives.[70]

The principal of the school maintained control over all aspects of the graduation ceremony and asked the student to submit a draft of his speech. The student did so. The plaintiff reviewed the draft and, in conjunction with the school district's attorney, determined that allowing a student to deliver an overtly proselytizing speech at a public

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[67] 228 F.3d 1092, 147 Ed.Law Rep. 878 (9th Cir. 2000).
[68] Id. at 1097.
[69] 320 F.3d 979, 173 Ed.Law Rep. 778 (9th Cir. 2003).
[70] Id. at 981.

high school graduation ceremony would violate the Establishment clauses of both the United States and California Constitutions. The school district advised the student that references to God as they related to the student's own beliefs were permissible, but that proselytizing comments were not.[71]

The school district deleted three paragraphs from the speech.[72] The district allowed the student to retain several personal references to his religion, including a dedication to the memory of his grandfather, who had planned to attend the graduation who, just that past week, had gone "home to be with the Lord." The student also closed his speech with the words, "good luck and God bless!"

Before the student agreed to excise the proselytizing portions of the graduation speech, the student engaged in discussions with the school district, and the student's attorney suggested that the school district provide a disclaimer that would state that the views of the student speakers did not represent the views of the school district. The school district rejected this suggestion. The parties eventually reached a compromise and the student agreed that he would deliver his speech without the proselytizing passages and would hand out copies of the full text of his proposed draft speech just outside the site where the graduation ceremony would be held.[73]

On June 18, 1999, Amador Valley High School held its graduation ceremony. The ceremony took place at the Alameda County Fairgrounds, but was financed and insured entirely by the school district and was conducted entirely under the school's direction. The student delivered his speech at the ceremony and distributed the handouts as agreed. When the student reached the portions of the speech that had been deleted, he informed his fellow students that portions had been censored and told the audience that he would distribute copies of the uncensored speech outside the graduation ceremony, and that he would give the full speech on Sunday at his church.[74]

A year later, the student filed a lawsuit, alleging violation of his constitutional rights to free speech, religious liberty, and equal protection.

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[71] Ibid.

[72] The deleted paragraphs read as follows:

I urge you to seek out the Lord, and let Him guide you. Through His power, you can stand tall in the face of darkness, and survive the trends of "modern society".

As Psalm 146 says, "Do not put your trust in princes, in mortal men, who cannot even save themselves. When their spirit departs, they return to the ground; on that very day their plans come to nothing. Blessed is he whose help is the God of Jacob, whose hope is in the Lord his God, the Maker of heaven and earth, the sea, and everything in them – the Lord, who remains faithful forever. He upholds the cause of the oppressed and gives food to the hungry. The Lord sets prisoners free, the Lord gives sight to the blind, the Lord lifts up those who are bowed down, the Lord loves the righteous. The Lord watches over the alien and sustains the fatherless and the widow, but he frustrates the ways of the wicked."

… "For the wages of sin is death; but the gift of God is eternal life through Jesus Christ our Lord." Have you accepted the gift, or will you pay the ultimate price? Ibid.

[73] Id. at 981-82.

[74] Id. at 982.

The Court of Appeals held that under its decision in a prior case, Cole v. Oroville Union High School District,[75] that the school district acted in a constitutional manner to avoid a conflict with the Establishment Clause. The Court of Appeals noted that in Cole, one of the student speakers sought to give similar proselytizing speeches at the graduation ceremony.[76]

As was the school district's policy in Pleasanton Unified School District, the school district in Cole reviewed the speeches before the graduation ceremony took place. The school district required the students in Cole to tone down the proselytizing and sectarian religious references. In Cole, the Court of Appeals held that the school district had to censor the speech in order to avoid the appearance of government sponsorship of religion, and that allowing the speech would have had an impermissibly coercive effect on dissenters, requiring them to participate in a religious practice even by their silence.[77]

The Court of Appeals in Lassonde held that the school district's control over the graduation ceremony, especially student speech, makes it apparent that the sectarian speech would have borne the imprint of the district and would have appeared to be sponsored by the school district. Speakers were selected by the school solely because of their academic achievement. In effect, the school endorsed and sponsored the speakers as representative examples of the success of the school's own educational mission. The principal reviewed and approved the speeches beforehand. The facilities, although not owned by the school district, were rented and insured by the district for the ceremony and were, during the ceremony, operated completely by the school.[78]

The Court of Appeals in Lassonde held that allowing the sectarian speech would have constituted school district coercion of attendance and participation in a religious practice since proselytizing, no less than prayer, is a religious practice, in violation of the U.S. Supreme Court's decision in Lee v. Weisman,[79] and Santa Fe Independent School District v. Doe.[80]

In Lassonde v. Pleasanton Unified School District,[81] the Court of Appeals upheld the deletion of proselytizing portions of a graduation speech which the Court quoted as follows:

> "I urge you to seek out the Lord, and let Him guide you. Through His power, you can stand tall in the face of darkness, and survive the trends of 'modern society.'
>
> As Psalm 146 says, 'Do not put your trust in princes, in mortal men, who cannot even save themselves.

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[75] 228 F.3d 1092 (9th Cir. 2000).
[76] 320 F.3d 979, 983-985 (9th Cir. 2003).
[77] Id. at 983-985.
[78] Ibid.
[79] 505 U.S. 577 (1992).
[80] 530 U.S. 290 (2000).
[81] 320 F.3d 979, 173 Ed.Law Rep. 778 (9th Cir. 2003).

When their spirit departs, they return to the ground; on that very day their plans come to nothing. Blessed is he whose help is the God of Jacob, whose hope is in the Lord his God, the Maker of heaven and earth, the sea, and everything in them – the Lord, who remains faithful forever. He upholds the cause of the oppressed and gives food to the hungry. The Lord sets prisoners free, the Lord gives sight to the blind, the Lord loves the righteous. The Lord watches over the alien and sustains the fatherless and the widow, but he frustrates the ways of the wicked.'

… 'For the wages of sin is death; but the gift of God is eternal life through Jesus Christ our Lord.' Have you accepted the gift, or will you pay the ultimate price?"[82]

The Court of Appeals held that the school district did not violate the First Amendment rights of the student by requiring the student to delete that passage from the graduation speech and allowing the student to distribute the entire speech with the deleted portions to members of the audience afterward as they were leaving the graduation ceremony.

The Court of Appeals made three primary points:

1. The school district's censoring of portions of the speech was necessary to avoid a violation of the Establishment Clause.

2. Even if a disclaimer were given, permitting a proselytizing speech at a public school's graduation ceremony would amount to coerced participation in a religious practice. Regardless of any offered disclaimer, a reasonable dissenter still could feel that there is no choice but to participate in the proselytizing in order to attend high school graduation.

3. The school district provided a less restrictive alternative to absolute censorship by permitting the student to distribute copies of the complete draft just outside the graduation location.[83]

The Court of Appeals rejected the student's argument that the U.S. Supreme Court's decision in Good News Club v. Milford Central School District,[84] applied. In Good News Club, the Supreme Court held that a New York School District's regulation that allowed after hours access to school facilities for all interested parties except those espousing a religious message constituted impermissible viewpoint discrimination. The

[82] Id. at 981.
[83] 320 F.3d 979, 983-985 (9th Cir. 2003).
[84] 533 U.S. 98 (2001).

Supreme Court concluded that the school district's interest in avoiding a violation of the Establishment Clause was not compelling enough to justify discrimination on the basis of the speaker's viewpoint. However, Good News Club involved religious activities that took place outside of school hours and participation was purely voluntary. The Supreme Court distinguished its decision in Lee v. Weisman, which involved a public school graduation by noting that attendance at the graduation ceremony was obligatory and as indicated in Lee, high school graduation is one of life's most significant occasions.[85]

F. Invocations at Board Meetings

The United States Supreme Court in Town of Greece v. Galloway[86] held that the town of Greece had not violated the Establishment Clause of the First Amendment of the United States Constitution by beginning its monthly board meetings with a prayer. The Supreme Court concluded that the town of Greece's practices were consistent with the Court's previous opinion in Marsh v. Chambers[87] in which the U.S. Supreme Court upheld the Nebraska Legislature's practice of opening its legislative sessions with a prayer or invocation.

The town of Greece would begin each of its town meetings after the roll call and the Pledge of Allegiance by inviting a local member of the clergy to the front of the room to deliver an invocation. After the prayer, the town council would thank the minister for serving as the board's chaplain for the month and present the clergyperson with a commemorative plaque. The Court stated that the prayer was intended to place the town board members in a solemn and deliberative frame of mind, to invoke divine guidance in town affairs, and to follow a tradition practiced by Congress and dozens of state legislatures across the country.[88]

The town followed an informal method for selecting clergy members, all of whom are unpaid volunteers. A town employee would call the congregations in the town of Greece listed in a local directory until the employee found a minister available for that month's meeting. The town compiled a list of chaplains who had accepted invitations and agreed to return in the future.[89]

The town of Greece has a population of 94,000 and is adjacent to the city of Rochester, New York. Nearly all of the congregations in the town of Greece were Christian and from 1999 to 2007, all of the participating ministers were as well.[90]

The town neither reviewed the prayers in advance of the meetings nor provided guidance as to their tone or content. The town let the guest clergy compose their own

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[85] 505 U.S. 577, 595 (1992).
[86] 134 S.Ct. 1811 (2014). See, also, Rubin v. City of Lancaster, 710 F.3d. 1087 (9th Cir. 2013) (City Council may have invocation that mentions Jesus).
[87] 463 U.S. 783 (1983).
[88] Id. at 1816.
[89] Id. at 1816.
[90] Id. at 1816.

prayers. Some of the prayers emphasized both civic and religious themes, and others "spoke in a distinctly Christian idiom."[91]

The district court on summary judgment upheld the practices of the town of Greece as consistent with the First Amendment. The Court of Appeals for the Second Circuit reversed and held that some aspects of the town's practices conveyed the message that the town was endorsing Christianity and found the town's practices unconstitutional. The town appealed to the United States Supreme Court and the Supreme Court reversed the judgment of the Court of Appeals.

The United States Supreme Court, in an opinion by Justice Kennedy and joined by four other justices in a 5-4 decision, began its legal analysis with Marsh v. Chambers.[92] In that decision, the Supreme Court found no First Amendment violation in the Nebraska Legislature's practice of opening its sessions with a prayer delivered by a chaplain paid from state funds. The Court held that legislative prayer, while religious in nature, has long been understood as compatible with the Establishment Clause. The Court noted that Congress, since the framing of the Constitution in 1789, conducted invocations to lend gravity to public business, remind lawmakers to transcend petty differences in pursuit of a higher purpose, and to express a common aspiration for a just and peaceful society.[93]

The Supreme Court noted that the first Congress provided for the appointment of chaplains only days after approving the language of the First Amendment. The Court found that history shows that the practice of legislative prayer is permitted under the Establishment Clause. The Court stated:

> "An insistence on nonsectarian or ecumenical prayer as a single, fixed standard is not consistent with the tradition of legislative prayer outlined in the Court's cases. The Court found the prayers in Marsh consistent with the First Amendment not because they espoused only a generic theism but because our history and tradition have shown that prayer in this limited context could 'co-exist with the principles of disestablishment and religious freedom.'"[94]

The Supreme Court further stated that requiring chaplains to redact the religious content from their message in order to make it acceptable for the public sphere would be impermissible. The Court stated that government may not mandate a civic religion that stifles any but the most generic reference to the sacred any more than it may prescribe a religious orthodoxy.[95] The Court further stated:

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[91] Id. at 1816-17.
[92] 463 U.S. 783 (1983).
[93] Id. at 1818-20.
[94] Id. at 1820.
[95] Id. at 1822.

> “In rejecting the suggestion that legislative prayer must be nonsectarian, the Court does not imply that no constraints remain on its content. The relevant constraint derives from its place at the opening of legislative sessions, where it is meant to lend gravity to the occasion and reflect values long part of the Nation’s heritage. Prayer that is solemn and respectful in tone, that invites lawmakers to reflect upon the shared ideals and common ends before they embark on the fractious business of governing, serves that legitimate function. If the course and practice over time shows that the invocations denigrate non-believers or religious minorities, threaten damnation, or preach conversion, many present may consider the prayer to fall short of the desire to elevate the purpose of the occasion and to unite lawmakers in their common effort. That circumstance would present a different case than the one presently before the Court.”[96] [Emphasis added]

Thus, the Court indicated that prayers or invocation that criticize or denigrate non-believers or religious minorities, or threaten non-believers or religious minorities with damnation, or that preach conversion, may be prohibited. The Court stated that absent a pattern of prayers that over time denigrate, proselytize or betray an impermissible government purpose, the town of Greece’s practices were constitutionally permissible. The Court concluded by saying that so long as the town maintains a policy of non-discrimination, the Constitution does not require it to search beyond its borders for non-Christian prayer-givers in an effort to achieve religious balancing.[97]

In dissent, four justices would have found the town of Greece’s practices unconstitutional. The dissenting opinion expressed concern that the town’s practices focused on Christian prayer and were not inclusive of other religions.[98]

G. Pledge of Allegiance

In contrast, in Sherman v. Community Consolidated School District 21 of Wheeling Township,[99] the Court of Appeals held that the Pledge of Allegiance is secular rather than sectarian and is not a prayer. The court held that the phrase, “under God” does not make the Pledge of Allegiance a prayer whose recitation violates the Establishment Clause of the First Amendment. The Court of Appeals noted the Pledge of Allegiance was similar to the issuance of presidential proclamations of religious fasting and thanksgiving and noted that James Madison, the author of the First Amendment issued such proclamations. The court also considered such practices as taking the oath on the Bible in court and opening sessions of the Supreme Court with,

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[96] Id. at 1823.
[97] Id. at 1823-28.
[98] Id. at 1838-54.
[99] 980 F.2d 437 (7th Cir. 1992).

"God save the United States and this honorable court" to be secular in nature. The Court of Appeals stated:

> "When it decided Engel v. Vitale, the first of the school prayer cases, the Court recognized this tradition and distinguished ceremonial references to God from supplications for divine assistance: 'There is of course nothing in the decision reached here that is inconsistent with the fact that school children and others are officially encouraged to express love for our country by reciting historical documents such as the Declaration of Independence which contains references to the Deity or by singing officially espoused anthems which include the composer's professions of faith in a Supreme Being, or with the fact that there are many manifestations in our public life of belief in God. Such patriotic or ceremonial occasions bear no true resemblance to the unquestioned religious exercise that the State of New York has sponsored in this instance.'"[100]

NCLB GUIDANCE ON CONSTITUTIONALLY PROTECTED PRAYER AND RELATED CASE LAW

A. Issuance of the Guidance

The No Child Left Behind Act (NCLB),[101] requires that no later than September 1, 2002, and every two years thereafter, the United States Secretary of Education shall provide guidance to state educational agencies, local educational agencies and the public on constitutionally protected prayer in public elementary schools and secondary schools. As a condition of receiving federal funds under the NCLB, the local educational agency is required to certify in writing to the state educational agency that no policy of the local educational agency prevents or otherwise denies participation in constitutionally protected prayer in public elementary and secondary schools as set forth in the Guidance.

The United States Department of Education did not issue the Guidance by September 1, 2002. However, on February 7, 2003, the Guidance on Constitutionally Protected Prayer in Public Elementary and Secondary Schools was issued.

B. Overview of the Guidance

The Guidance provides an overview of governing constitutional principles defining the relationship between religion and government in the United States. The relationship is governed by the First Amendment of the United States Constitution and in

[100] Id. at 446-47.
[101] 20 U.S.C. Section 7904.

particular, the Establishment Clause and the Free Exercise Clauses of the First Amendment which state, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."

The United States Supreme Court has established a three part test for determining whether laws, policies and practices violate the Establishment Clause. To be constitutional these laws, policies and practices must:

1. Have a secular purpose;

2. Not have the purpose or effect of advancing or inhibiting religion;

3. Not result in excessive entanglement with religion.

Utilizing this three part test (also known as the Lemon Test), the United States Supreme Court has ruled that public schools may not conduct school sponsored prayers in the classroom, at a graduation ceremony, or at football games.[102]

C. Student Prayer in School

However, these court cases do not hold that individual students may not pray in school when they are not engaged in school activities or instruction so long as they do not disrupt the educational program. As the Guidance points out, students may read their Bibles or other scriptures, say grace before meals, and pray or study religious materials with fellow students during recess, the lunch hour or other non-instructional time to the same extent that they may engage in non-religious activities. School authorities may impose rules of order on school activities but they may not discriminate against student prayer or religious speech in applying these rules.[103]

The Guidance goes on to state that students may organize prayer groups and religious clubs to the same extent that students are permitted to organize other non-curricular student activity groups under the Equal Access Act. Such groups must be given the same access to school facilities as is given to other non-curricular groups without discrimination. This principle was recently affirmed by the United States Court of Appeal in Prince v. Jacoby.[104]

D. Neutrality of School District Employees

The Guidance also points out that the school district and employees of the school district are required to be neutral in religious matters and are prohibited from encouraging

[102] See, Engel v. Vitale, 370 U.S. 421 (1962); School District of Abington Township v. Schempp, 374 U.S. 203 (1963); Lee v. Weisman, 505 U.S. 577 (1992), Santa Fe Independent School District v. Doe, 530 U.S. 290 (2000).
[103] Guidance on Constitutionally Protected Prayer in Public Elementary and Secondary Schools, pgs. 3-4 (February 7, 2003).
[104] 303 F.3d 1074 (9th Cir. 2002).

or discouraging prayer and from actively participating in religious activity with students. Teachers may take part in religious activity before school or during lunch when they are not participating in their official capacities. Teachers may, for example, meet with other teachers for prayer or Bible study to the same extent that they may engage in other conversation or non-religious activities. If the school has a "minute of silence," "moment of silence" or other quiet period during the school day, students are free to pray silently or not to pray during these periods of time. Teachers and other school employees may neither encourage nor discourage students from praying during moments of silence.[105]

In Stratechuk v. Board of Education,[106] the Third Circuit Court of Appeals upheld a school district's policy regarding the performance of celebratory religious music at school sponsored events. The Court of Appeal held that the school district's policy had a secular purpose, did not convey a message of disapproval of religion, did not foster an excessive entanglement with religion, did not exhibit endorsement or hostility toward religion and did not violate students' or parents' First Amendment rights to receive information and ideas.

In order to maintain a policy of complete religious neutrality, the school district adopted a policy which prohibited celebratory religious music at school sponsored events. The district court upheld the school district's discretion to maintain and enforce the policy. The plaintiffs appealed.[107]

The district's policy stated that it was the goal of the school district to foster mutual understanding and respect for the right of all individuals regarding their beliefs, values and customs. In pursuing this goal, the policy requires an objective teaching about religion and its role in the social and historical development of civilization and states that the activity should have a secular purpose, the activity should neither advance nor inhibit religion and the activity should have relevance to the curriculum.[108]

The section of the policy related to religious holidays provided that religious holidays are not to be celebrated in the schools, except in the form of the secular nature of that holiday. Opportunities to learn about cultural and religious traditions must be provided within the framework of the curriculum.[109]

Following the adoption of the policy, the school district received a complaint from the parent about the religious nature of the songs performed in the fall of 2003. After meeting with faculty and staff, the district superintendent issued a memo with the following points:

"1. All programs will be reviewed and approved by me. . .

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[105] Guidance, pg. 4.
[106] 587 F.3d 597, 250 Ed.Law Rep. 907 (3rd Cir. 2009).
[107] Id. at 599-603.
[108] Id. at 599-600.
[109] Ibid.

2. We will avoid any selection which is considered to represent any religious holiday, be it Christmas, Hanukkah, etc. This holds true for any vocal or instrumental setting.

3. I would strongly suggest you gear towards the seasonal selections – Winter Wonderland, Frosty The Snowman, etc. Music centered on Peace is also a nice touch.

4. For the High School, the Brass Ensemble repertoire must also adhere to this policy, so the traditional carols must be eliminated from the repertoire.

5. The MKL [sic] Gospel Choir cannot perform at the CHS Holiday Assembly for the student body.

6. Your printed programs for any Holiday concert must avoid graphics which refer to the holidays, such as Christmas Trees and dreidels."[110]

Under the memo, the songs "Joy to the World," "Oh Come, All Ye Faithful," "Hark, the Herald Angels Sing," and "Silent Night" would not be allowed, although in the curriculum, they were allowed to be taught. The music performed at the December 2004 concert approved by the district superintendent included "Jingle Bell Rock," Vivaldi's "Gloria," "Winter Wonderland," "Hava Nagila," "Madrigal of the Bells," "Rudolph the Red-Nosed Reindeer," and "Frosty the Snowman."[111]

In his lawsuit, the plaintiff alleged a violation of the Establishment Clause of the First Amendment. The Court of Appeals applied the Lemon test, which states that a state law or governmental action violates the Establishment Clause if it lacks a secular purpose, its principle or primary effect advances or inhibits religion, or it fosters an excessive government entanglement with religion. In applying the Lemon test, the Court of Appeals found that there was a secular purpose in the policy, which was to avoid government endorsement of religious holidays and a potential Establishment Clause violation. The Court of Appeals rejected the plaintiff's argument that other circuit courts of appeal have upheld policies which allowed religious music at school events.[112] The Court of Appeals stated:

> "The cases cited by Stratechuk all upheld the policy of the respective schools or school districts. That is far different from holding that the First Amendment compels a school district to permit religious holiday music or risk running afoul of the First Amendment. Stratechuk has offered no persuasive authority that the First Amendment prevents

[110] Ibid.
[111] Id. at 600.
[112] Id. at 603-10

> South Orange-Maplewood School District from formulating a policy that precludes performance of religious holiday music." [113]

The Court of Appeals concluded that school districts have leeway in deciding whether to include religious songs at school performances. The decision on how to best create an inclusive environment in public schools is left to the sound discretion of school authorities. The Court of Appeals found that there is no constitutional violation in the school district's policy or its application in this case.[114]

E. Release of Students

The Guidance indicates that it has long been established that schools have the discretion to release students to off premises religious instruction, provided that schools do not encourage or discourage participation in such instruction or penalize students for attending or not attending such programs. Schools may also excuse students from class to "remove a significant burden on their religious exercise, where doing so would not impose material burden on other students." As the Guidance points out, it would be lawful for schools to excuse Muslim students briefly from class to enable them to fulfill their religious obligations to pray during Ramadan. In addition, the Guidance points out that school districts that have policies or practices of excusing students from class on the basis of parent's requests for accommodation of non-religious needs should treat parent requests based on religious needs in the same manner.[115]

F. Student Work

The Guidance states, "Students may express their beliefs about religion in homework, artwork and other written and oral assignments free from discrimination based on the religious content of their submission." The student's work should be judged by ordinary academic standards of substance and relevance and against other legitimate pedagogical concerns identified by the school. For example, if the teacher's assignment involves the writing of a poem, if a student submits a poem in the form of a prayer it should be judged on the basis of academic standards (e.g. literary quality) and neither penalize nor reward the student's work on account of its religious content.[116]

In Busch v. Marple Newtown School District,[117] the Third Circuit Court of Appeals ruled in favor of the school district. The plaintiffs, a mother and son, brought free speech, Establishment Clause and equal protection claims against defendant school district.

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[113] Id. at 605.
[114] Id. at 610.
[115] Guidance, pg. 4.
[116] Guidance, pg. 5.
[117] 567 F.3d 89, 244 Ed.Law Rep. 1023 (3rd Cir. 2009).

The plaintiff, the mother of a kindergarten student, sought to read several psalms from the Bible in her son's kindergarten class as part of an educational activity in which students were given the opportunity to share information about themselves by bringing in a poster with pictures, drawings or magazine cut outs of their family, hobbies or interests.[118]

The school barred the reading of the Bible passages to the students as a violation of the Establishment Clause. The District Court and the Third Circuit Court of Appeals upheld the district and prohibited the reading of the Bible in the kindergarten class.[119]

In Nurre vs. Whitehead,[120] the Ninth Circuit Court of Appeals held that a school district's action prohibiting students from playing the musical piece "Ave Maria" did not violate the student's right to free speech under the First Amendment and did not violate the Establishment Clause.

The school district had received complaints after the 2005 graduation ceremony at Jackson High School that the music that was played was too religious in content. Sensitive to this criticism, the school district advised principals that the graduation ceremonies should be secular in nature including the musical performances. For this reason, the administration at Jackson High School advised the students that they could not play Ave Maria due to its religious overtones.[121]

The Plaintiffs alleged that in the past the school had allowed students to choose the music that would be played at the graduation and that the district changed that policy due to the religious nature of the music they wish to choose. The court concluded:

> "We therefore hold that the district's action in keeping all musical performances at graduation 'entirely secular' in nature was reasonable in light of the circumstances surrounding a high school graduation, and therefore it did not violate Nurre's right to free speech."[122]

The court further held that the school district did not violate the Establishment Clause by prohibiting the playing of Ave Maria. The court held that the district had a secular purpose, (i.e., to remain neutral) and that the district's action did not have the principal or primary effect of advancing or inhibiting religion, and did not foster an excessive governmental entanglement with religion. The court noted that the district's actions could be perceived as an attempt to avoid conflict with the Establishment Clause.[123]

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[118] Id. at 92.
[119] Id. at 101.
[120] 580 F.3d 1087, 249 Ed.Law Rep. 76 (9th Cir. 2009).
[121] Id. at 1091.
[122] Id. at 1095.
[123] Id. at 1098-99.

Significantly, the court also held that it did not believe that the performance of Ave Maria would necessarily violate the Establishment Clause. The court only held that the school district's actions were reasonable in light of past experience and did not violate the student's constitutional rights.[124]

G. Student Speakers

The Guidance states student speakers at student assemblies and extracurricular activities such as sporting events may not be selected on a basis that either favors or disfavors religious speech. Where student speakers are selected on the basis of generally neutral, even-handed criteria and retain primary control over the content of their expression, that expression is not attributable to the school and therefore may not be restricted because of its religious or anti-religious content. By contrast where school officials determine or substantially control the content of what is expressed such speech is attributable to the school and may not include prayer or other specifically religious or anti-religious content. To avoid any mistaken perception that a school endorses student speech that is not in fact attributable to the school, school officials may make appropriate neutral disclaimers to clarify such speech is the speaker's and not the school's.[125]

H. Mandated Prayers or Prayers Sponsored by the School District

The Guidance states that school officials may not mandate or organize prayer at graduation or select speakers for such events in a manner that favors religious speech such as prayer. Where students or other private graduation speakers are selected on the basis of genuinely neutral, even-handed criteria and retain control over the content of their expression that expression is not attributable to the school and, therefore, may not be restricted because of its religious or anti-religious content. To avoid any mistake in perception that a school endorses student or other private speech that is not in fact attributable to the school, school officials may make appropriate neutral disclaimers to clarify that such speech is the speaker's and not the school's.[126]

The Guidance points out that school officials may not mandate or organize religious ceremonies. However, if a school makes its facilities and related services available to other private groups, it must make its facilities and services available on the same terms to organizers of privately sponsored religious baccalaureate ceremonies. In addition, a school may disclaim official endorsement of events sponsored by private groups, provided it does so in a manner that neither favors nor disfavors groups who meet to engage in prayer or religious speech.[127] In California, the Civic Center Act makes school facilities available to community groups after school and on weekends.[128] Private groups wishing to organize or sponsor a baccalaureate ceremony or other religious ceremony may apply for the use of school facilities under the Civic Center Act.

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[124] Ibid.
[125] Guidance, pg. 5.
[126] Guidance, pg. 5.
[127] Guidance, pg. 5.
[128] Education Code section 38130 et seq.

ACCOMMODATION OF RELIGIOUS OBSERVANCES

A. Release Time

The Constitution does not require absolute separation of church and state. In fact, absolute separation of church and state may not be possible in a country founded in large part upon religious principles by people with strong religious beliefs. Programs which allow students early dismissal from school at parental request so that children may attend religious instruction away from the public school have been held to be a permissible and constitutional accommodation of religion.[129]

In McCollum v. Board of Education,[130] the United States Supreme Court held that it was a violation of the Establishment Clause for a school district to allow religious instruction on school property. The court held that the use of tax-supported property for religious instruction and the close cooperation between the school authorities and the religious council in promoting religious education was unconstitutional.

In Zorach v. Clauson,[131] the United States Supreme Court upheld a New York program which permitted public schools to release students during the school day so that they may leave the school buildings and school grounds and go to religious centers for religious instruction or devotional exercises. The court held that this release time program involved neither religious instruction in public school classrooms nor the expenditure of public funds, and therefore, was different than the program found to be unconstitutional in McCollum.[132] The court noted that no student was forced to go to the religious classroom and no religious exercise or instruction was brought to the classrooms of the public schools. A student was free to choose whether to participate in religious instruction and the record indicated that school authorities were neutral with respect to releasing students for religious instruction. The court stated:

> "There cannot be the slightest doubt that the First Amendment reflects the philosophy that church and state should be separated. . . . The First Amendment, however, does not say that in every and all respects there shall be a separation of church and state. Rather, it studiously defines the manner, the specific ways, in which there shall be no concert or union or dependency one on the other. Otherwise, the state and religion would be aliens to each other – hostile, suspicious, and even unfriendly. Churches could not be required to pay even property taxes. Municipalities would not be permitted to render police or fire protection to religious groups. Policemen who helped parishioners into their places of worship would violate the Constitution. Prayers in our legislative halls; the appeals to the Almighty in the messages of the Chief Executive; the proclamations making Thanksgiving Day a holiday; 'so help me God' in our courtroom

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[129] Zorach v. Clauson, 343 U.S. 306, 312, 72 S.Ct. 679, 683 (1952). However, a public school may not provide release time for religion instruction on public school property. McCollum v. Board of Education, 333 U.S. 203 (1948).
[130] 333 U.S. 203, 68 S.Ct. 461 (1948).
[131] 343 U.S. 306, 72 S.Ct. 679 (1952).
[132] Id. at 308-309.

oaths – these and all other references to the Almighty that run through our laws, our public rituals, our ceremonies, would be flouting the First Amendment. A fastidious atheist or agnostic could even object to the supplication with which the court opens each session: 'God save the United States and this Honorable Court.'"[133]

The court noted that to invalidate release time for religious instruction would be an extreme interpretation of the Establishment Clause and would have wide and profound effects. The court stated:

> "We are a religious people whose institutions presuppose a Supreme Being. We guarantee the freedom to worship as one chooses. We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary. We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma. When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to suit sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe. Government may not finance religious groups, nor undertake religious instruction, nor blend secular and sectarian education, nor use secular institutions to force one or some religion on any person. But we find no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence. The government must be neutral when it comes to competition between sects. It may not thrust any sect on any person. It may not make a religious observance compulsory. It may not coerce anyone to attend church, to observe a religious holiday, or to take religious instruction, but it can close its doors or suspend its operations as to those who want to repair to their religious sanctuary for worship or instruction. No more than that is undertaken here."[134]

The court concluded by stating that in McCollum, the classrooms were used for religious instruction and the force of the public school was used to promote that instruction. The court distinguished the New York program by stating that public schools do no more than accommodate their schedules to a program of outside religious instruction.[135]

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[133] Id. at 312-313.
[134] Id. at 313-314.
[135] Id. at 315.

In a number of subsequent cases, the lower courts have applied the teachings of McCollum and Zorach. In Smith v. Smith,[136] the Fourth Circuit Court of Appeals held that a religious instruction program in trailers parked on streets adjacent to the schools or in nearby churches was constitutional. The challenged program operated in three elementary schools in the school district. The religious organization obtained the school's enrollment list and mailed cards to the parents asking if they consent to their children's participation in the religious instructional program. The children deposited the cards at school and the religious organization collected them and informed the school which children should be released. The court found that the public school officials did not encourage the children to attend the religious classes, and that the religious organization officials did not enter the schools to solicit students.

The court found that 27 classes of children received approximately one hour of religious instruction a week. The public school principals and the religious school officials worked together to coordinate their schedules. The children who did not participate in religious instruction remained in the classroom but the teacher did not provide formal instruction. The Court of Appeals held that the school district's release of students for religious instruction was similar to the program approved in Zorach and that the school district only adjusted its schedule to accommodate the religious needs of the students. The Court of Appeals stated:

> "In the instant case, the accommodations of the school program to religious training were generous and thorough-going, but the public school classrooms where the students were compelled by state law to be, were not turned over to religious instruction. Therefore, the case is indistinguishable from and controlled by Zorach. Under it, the Harrisonburg release-time program must be constitutional."[137]

In Lanner v. Wimmer,[138] the Tenth Circuit Court of Appeals upheld a release program for religious instruction in Utah where students received religious instruction next door to the public school. The court noted that in Zorach, the United States Supreme Court upheld the release of students to attend religious instruction off school premises.[139] The Court of Appeals rejected arguments that the integration of the release time program into the public school schedule and the similarity of church buildings to public school buildings made the program unconstitutional. In addition, the court held that allowing the religious school to hear announcements at the public school over the intercom system did not make the program unconstitutional.

In Lanner v. Wimmer,[140] the Court of Appeals upheld Utah's release time program in general, but held that the granting of state credit for courses offered in the release time program violated the Establishment Clause of the First Amendment.

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[136] 523 F.2d 121 (4th Cir. 1975).
[137] Id. at 124.
[138] 662 F.2d 1349 (10th Cir. 1981).
[139] Id. at 1357.
[140] 662 F.2d 1349, 1 Ed.Law Rep. 138 (10th Cir. 1981).

In Lanner, any student could enroll in a course sponsored by any religious organization during the release time program. The overwhelming use of the program was by students attending classes offered by the Church of Jesus Christ of Latter Day Saints (LDS). When registering for junior high or high school, each student completed and returned a pre-registration form or class schedule to the junior high school or high school. If the student wanted to attend the LDS seminary, he or she indicated their wishes by requesting release time on the pre-registration form.

The Court of Appeals held that the public school's assumption of the burden of gathering attendance reports at the religious release time courses violated the third prong of the Lemon test prohibiting entanglement with religion, and therefore, was unconstitutional.[141] The court also found a Constitutional problem with granting credit for release time courses. The court stated:

> "The Constitutional problem with the administration of 'elective credit' when such credit is granted to some released-time courses but not to others based upon a religious test is that it requires the public school officials to entangle themselves excessively in church-sponsored institutions by examining and monitoring the content of courses offered there to insure that they are not 'mainly denominational.'"[142]

In Doe v. Human,[143] the United States District Court held that the teaching of Bible classes during regular school hours in school buildings was unconstitutional. Parents who did not wish their children to attend the Bible classes could arrange for them to spend time in the library, in tutoring sessions, or in other unspecified instructional activities. Ninety-six percent of the children attended the Bible classes. The court held that the practice of providing religious instruction in school buildings was struck down by the United States Supreme Court in McCollum v. Board of Education as a violation of the Establishment Clause.[144] The court noted that the court in Zorach upheld a program where students were released from public schools so that they could attend religious instruction off campus.[145]

In Doe v. Shenandoah County School Board,[146] the United States District Court held that the provision of religious instruction in school buses that appear to be owned by the school district (except for the name of the school district on the side of the bus) was unconstitutional. The court noted that at various times, these buses were parked in the school parking lot and at different locations on the road passing directly in front of the school entrance. The court also noted that religious instructors entered the school building for the purpose of recruiting students and to distribute enrollment cards. It is

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[141] Id. at 1358-1359.
[142] Id. at 1361.
[143] 725 F.Supp. 1503 (W.D. Ark. 1989).
[144] Id. at 1504-05.
[145] Id. at 1508.
[146] 730 F.Supp. 913 (W.D. Va. 1990).

alleged that the religious instructors told the students, while holding up a bag of candy, that each student would receive a prize if all of the cards were returned. When the plaintiff failed to return his card, he was subjected to substantial pressure by other students, as well as his teacher, to return the card. In particular, the students were told that they would not get their candy unless all the cards were returned. On a second visit, the religious instructor told the students that she could not provide them with the candy because some of the children had not returned their cards.

The court found that public school teachers had assisted the religion release program by passing out and collecting enrollment cards in violation of the First Amendment. The court stated:

> "The primary distinction between this case and both Smith and Zorach is that the religious education is taking place on what appears to be school property. Photographs tendered by the plaintiffs indicate that the WRE school bus, which in most respects is indistinguishable from the defendants' school buses, parks directly in front of the entrance to plaintiffs' school and only a matter of inches from the school sidewalk. At other times, the bus has parked in the school parking lot. While religious instruction is not taking place inside the school building as it was in McCollum, it is also not taking place at locations well removed from school property as it was in Zorach. Even if it is true that the street directly in front of the school or the parking lot are not legally titled to the school, the factor of overarching importance is the symbolic impact created by the appearance of official involvement. . . . This is a factor which is present regardless of the niceties of title. The second important distinction is the fact that WRE personnel have entered the defendants' classrooms to recruit students, and that employees of the defendants have taken an active part in the recruitment effort both by physical participation in the enrollment process and by verbal encouragement of the students. The defendants' actions have gone beyond a mere accommodation of the desires of parents that their children have sectarian instruction available to them. . . . These facts render this case unlike Zorach and open to different analysis."[147]

In Doe v. Porter,[148] the Sixth Circuit Court of Appeals held that the school district violated the Establishment Clause when it allowed religious instruction in the county's elementary schools. The Bible Education Ministry provided volunteer instructors who entered the public classrooms and provided instruction for thirty minutes, once a week, during the school day in three county schools.

The Court of Appeals held that the program was an unconstitutional establishment of religion. The court held that the program did not have a secular purpose, advanced and

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[147] Id. at 918.
[148] 370 F.3d. 558 (6th Cir. 2004).

aided religion, and fostered an excessive entanglement between the state and religion in violation of the tests set forth in Lemon v. Kurtzman.[149]

In Pierce v. Sullivan West Central School District,[150] the Second Circuit Court of Appeal held that a New York school district's release time program which released students to participate in religious instruction at a Catholic Church next door to the school or at a program conducted by the Protestant-based Child Evangelism Fellowship across the street from the school did not violate the Establishment Clause and were constitutional. The court noted that participation in either program required parental permission and was limited to one hour of instruction in the middle of every Tuesday morning. Those students whose parents did not allow them to attend religious instruction remained in the school classroom without organized activities. The plaintiffs alleged that the program, as implemented, violated the Establishment Clause because:

1. It humiliated them.

2. It left nonparticipants in the program with nothing to do during compulsory time that must be spent in the classroom and gave teachers no guidance on how to use that time.

3. It conveyed a message of endorsement of religion to especially susceptible young pupils during prime learning time.

4. It violated the terms of the regulation by allowing students to leave in the middle of the morning.

5. It enabled the students receiving religious instruction to bring religious literature into the classrooms.[151]

The Court of Appeals rejected these arguments and held that there was no evidence in the record that teachers or other school officials acted in any way to humiliate or coerce students. The court found that the program did not use public funds and involved no onsite religious instruction. The court found that the program was purely voluntary and the fact that the churches were in close geographic proximity to the school did not constitute a constitutional violation. The court held that not every state action implicating religion is invalid if one or a few citizens find it offensive. People may take offense at all manner of religious as well as non-religious messages, but offense alone does not in every case show a violation.[152]

In H.S. v. Huntington County Community School Corporation,[153] the United States District Court held that a school district violated the Establishment Clause by allowing a church association to place a trailer on school property for voluntary religious

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[149] Id. at 562-64. See, also, Lemon v. Kurtzman, 403 U.S. 602, 612-613, 91 S.Ct. 2105 (1971).
[150] 379 F.3d 56 (2nd Cir. 2004).
[151] Id. at 58.
[152] Id. at 61.
[153] 616 F.Supp.2d 863 (M.D. Ind. 2009).

instruction during school hours. The court held that the district's program was similar to the programs struck down as unconstitutional in McCollum v. Board of Education.

In California, Education Code section 46014 allows school districts to excuse students from school in order to participate in religious exercises or to receive moral and religious instruction at their respective places of worship, or at other suitable places if certain conditions are met. The Attorney General, in a 1981 opinion, interpreted Education Code section 46014 and stated that parents and students do not have a constitutional right to engage in release time religious education, unless attendance at school interferes with the free exercise of religion by unreasonably denying them the opportunity for religious education.[154]

The Attorney General's opinion states that if a school district authorizes students to participate in a release time religious education program under Education Code section 46014, the school district may take reasonable, necessary and administrative steps to inform parents of the existence of release time in the district and to obtain the parent's consent for students to participate in release time programs. Several court cases have reached a contrary result, and held that school districts may not assist religious organizations in the administration of enrollment and attendance of students in their release time programs.[155] In Culbertson v. Oakridge School District No. 76,[156] the Court of Appeals stated, "The requirement that the teachers distribute the slips, however, goes beyond opening access to a limited open forum. It puts teachers at the service of the club. Not just an empty classroom but a teacher's nod of encouragement is thereby afforded the club's religious program. The line between benevolent neutrality and endorsement is fine. Here it is overstepped. . . ."[157]

In summary, the Establishment Clause of the First Amendment of the United States Constitution prohibits the following as unconstitutional:

1. Providing religious instruction in public school buildings.

2. Assisting religious organizations in the recruitment of students for their religious program.

3. Facilitating the enrollment of students in religious programs by providing enrollment forms to students at the public school or sending the enrollment forms home with students.

4. Providing electricity or other financial support to the religious program.

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[154] 64 Ops.Cal.Atty.Gen. 346 (1981).
[155] See, Culbertson v. Oakridge School District No. 76, 258 F.3d 1061, 1065, 155 Ed.Law Rep. 1085 (9th Cir. 2001) (the requirement that teachers distribute permission slips oversteps the line of neutrality); Lanner v. Wimmer, 662 F.2d 1349, 1363 (10th Cir. 1981) (school district's procedure of having public school students pick up attendance slips from released time courses was unconstitutional).
[156] Ibid.
[157] Id. at 1065.

The Establishment Clause of the First Amendment permits the following as constitutional:

1. Releasing students during school to attend religious programs off the school property.

2. Allowing religious organizations to park their trailer on city streets adjacent to the school.

3. Allowing students to take informational flyers home for religious and nonreligious activities.

B. Holidays and Time Off From Work

As an employer, school districts as well as other employers, must make reasonable accommodations under the Free Exercise Clause of the First Amendment to adjust the work environment to accommodate employees' religious beliefs. In some cases, employers may be required to modify the work schedule of religiously observant employees for religious holidays.[158] Once the employer offers the employee a reasonable accommodation, the employer is not required to further show that each of the employee's alternative accommodation proposals would result in undue hardship.[159]

The granting of a holiday by the state to coincide with a religious observance does not necessarily violate the Establishment Clause. For example, the United States Supreme Court has held that state laws requiring businesses to close on Sunday are not unconstitutional. In McCollum v. Maryland,[160] the United States Supreme Court held that although early enactments prohibiting various forms of labor on Sundays were motivated by religious principles involving the sanctity of the Sabbath, such legislation no longer retains its Christian character. The Court held that its purpose today is to set aside a uniform day of rest for all citizens which comports with such valid and entirely secular state police objectives as health, safety, recreation and wellbeing of the state's citizens.[161]

In Mandel v. Hodges,[162] the California Court of Appeal held that California's practice of providing state employees a paid holiday between the hours of noon and 3 p.m. on Good Friday, violated the United States and California Constitutions. The state practice did not serve a clearly secular legislative purpose, the practice had a primary effect of advancing religion and constituted excessive entanglement with religion in violation of the Establishment Clause of the First Amendment. In a later case, the Court of Appeal upheld a union negotiated agreement making Good Friday a paid holiday for

[158] Ansonia Board of Education v. Philbrook, 479 U.S. 60, 107 S.Ct. 367 (1986).
[159] Id. at 372.
[160] 366 U.S. 420, 81 S.Ct. 1101 (1961).
[161] Id. at 431-450.
[162] 54 Cal.App.3d 596, 127 Cal.Rptr. 244 (1976). See, also, Metzl v. Leininger, 850 F.Supp. 740 (N.D.Ill. 1994).

school district classified employees as part of a fringe benefit package.[163] The Court of Appeals distinguished the Mandel decision by stating:

> "The three-hour paid holiday to state employees on Good Friday in Mandel resulted from governmental action by the Governor pursuant to discretionary power vested in him by the Legislature . . . Here, the holiday arose out of negotiations between CSEA and the District as part of a wage and fringe benefit agreement for the 1974-75 school year. The union representatives were empowered to engage in such negotiations . . . the board of trustees was vested with authority to approve the holidays chosen by CSEA . . . Such statutes do not in any way encourage a choice of Good Friday over any other holiday. Thus, while the Legislature vested the board with the power to declare certain school holidays, the discretionary authority in requesting said days rested primarily with a nongovernmental entity, CSEA. The constitutional infirmity in Mandel, of granting the chief executive of the state with a discretionary power that was exercised in favor of a Christian, rather than a non-Christian holiday, is absent in the case at hand . . . The state, through its highest elected officials, is not in the position of advancing or inhibiting a particular religion. Under the facts of this case the effect, if any, on religious institutions is indirect and incidental and such an effect has never been held sufficient to warrant invalidation of state law. . . ."[164]

The Court of Appeal noted that there were also secular considerations in the union choosing Good Friday as a holiday since Good Friday fell within the traditional spring vacation and would afford classified employees a longer spring vacation.[165]

In Cammack v. Waihee,[166] the Court of Appeals upheld the constitutionality of a Hawaii statute declaring Good Friday to be a state holiday. In 1941, the territory of Hawaii enacted a bill declaring that Good Friday would be established as a territorial holiday. Upon statehood, the legislation was ratified and designated as a state holiday. Good Friday is also a public holiday in twelve other states.[167]

In Hawaii, state holidays result in many state and local government offices being closed. All collective bargaining agreements currently in effect between public employees and their employers provide for numerous paid leave days. Good Friday is

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[163] California School Employees Association v. Sequoia Union High School District, 67 Cal.App.3d 157, 136 Cal.Rptr. 594 (1977).
[164] Id. at 160.
[165] Id. at 161.
[166] 932 F.2d 765 (9th Cir. 1991), cert. denied 112 S.Ct. 3027.
[167] Id. at 766.

included as one such paid leave day. These collective bargaining agreements cover approximately 65 percent of Hawaii's public employees.[168]

The Court of Appeals reviewed the legislative history of the statute and determined that there was a secular purpose in the passage of the statute which was to provide more legal holidays for employees. The court noted that the most ardent proponents of the statute in this litigation are labor unions who have incorporated the statutory holidays into their collective bargaining agreements with state and local governments. The Court of Appeals stated:

> "It is of no constitutional moment that Hawaii selected a day of traditional Christian worship, rather than a neutral date, for its spring holiday once it identified the need. The Supreme Court has recently identified as an 'unavoidable consequence of democratic government' the majority's political accommodation of its own religious practices and corresponding 'relative disadvantage [to] those religious practices that are not widely engaged in . . . The government may (and some times must) accommodate religious practices and . . . may do so without violating the Establishment Clause. . . .'"[169]

The Court of Appeals distinguished Mandel v. Hodges[170] by noting that in Mandel, the Governor of California ordered the closing of state offices on Good Friday between the hours of noon and 3 p.m., coinciding purposefully with the traditional time for worship. In addition, the personnel manual explained that the reason for the governor's order was to allow state employees three hours off for worship. In Cammack, the employees had the entire day off, not just the three hours associated with the Christian worship period. Therefore, Hawaiian public employees were not encouraged in any way to use the holiday for worship, but could use the time off for recreation, shopping, or for any purpose they wish. The Court of Appeals also found that the statute did not have the primary effect of advancing religion and compared it to the Sunday closing laws approved by the United States Supreme Court in McCollum v. Maryland.[171] The Court of Appeals found that the Hawaiian statute was similar to the Sunday closing laws, and that it established a uniform day of rest for the community. The Court of Appeals also found no excessive government entanglement with religion.[172]

C. Separate School District

In Board of Education v. Grumet,[173] the United States Supreme Court held that a state statute which carved out a separate school district to serve a distinct religious

[168] Id. at 767.
[169] Id. at 776.
[170] 54 Cal.App.3d 546, 127 Cal.Rptr. 244 (1976).
[171] Cammack, 932 at 778.
[172] Id. at 781.
[173] 114 S.Ct. 2481 (1994).

population violated the Establishment Clause. The Court concluded that the statute failed the test of neutrality toward religion and delegated power to an electorate defined by common religious belief and practice showing religious favoritism. The Court found that, therefore, it crossed the line of permissible accommodation of religion to impermissible establishment of religion.[174]

DISPLAY OF RELIGIOUS SYMBOLS AND RELIGIOUS EXPRESSION IN THE WORKPLACE AND IN PUBLIC SCHOOLS

A. Introduction

The display of religious symbols in public schools has been a frequent source of litigation. For example, in Stone v. Graham,[175] the United States Supreme Court held that a Kentucky statute that authorized the posting, at private expense, of the Ten Commandments in every public school classroom was unconstitutional on the basis that the purpose was religious. The Court found that while several of the commandments related to secular matters such as prohibiting murder, theft, adultery and false witness, other commandments were clearly religious, such as those commanding persons to serve God, avoid idolatry and keep the Sabbath.[176]

B. Display of Nativity Scenes

In Lynch v. Donnelly,[177] the United States Supreme Court allowed a privately owned nativity scene to be erected by the City of Pawtucket at public expense in a public park. However, the California Supreme Court in Fox v. City of Los Angeles[178] enjoined the City of Los Angeles from displaying a lighted cross on City Hall. The California Supreme Court held that both the United States Constitution and the California Constitution prohibited all laws respecting an establishment of religion and the erection of a cross, which is a symbol of the Christian religion, violated the neutrality which the government should maintain.[179]

In County of Allegheny v. American Civil Liberties Union,[180] the United States Supreme Court ordered a creche (which was accompanied by a sign stating that it had been donated by a Roman Catholic organization and a banner stating, "Glory to God in

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[174] Ibid.
[175] 449 U.S. 39, 101 S.Ct. 192 (1980).
[176] Ibid.
[177] 465 U.S. 668, 104 S.Ct. 1355 (1984).
[178] 22 Cal.3d 792, 150 Cal.Rptr. 867 (1978).
[179] Ibid.
[180] 492 U.S. 573, 109 S.Ct. 3086 (1989). See, also, Hewitt v. Joyner, 940 F.2d 1561 (9th Cir. 1991) cert. denied 112 S.Ct. 969 (1962) (New Testament scenes in county park violate California Constitution); Ellis v. City of La Mesa, 990 F.2d 1518 (9th Cir. 1993), cert. denied 115 S.Ct. 311 (1994) (Christian cross on public property violates California Constitution's no preference clause).

the Highest") removed from the City Hall. Yet, the Court allowed a menorah to be displayed in front of another public building with a Christmas tree and other seasonal decorations. The Court stated that the display of the creche, viewed in its overall context, violated the Establishment Clause because it conveyed a religious message when seen in conjunction with its location and its banner. The Court stated:

> "There is no doubt, of course, that the creche itself is capable of communicating a religious message. [Citations omitted] Indeed, the creche in this lawsuit uses words, as well as the picture of the nativity scene, to make its religious meaning unmistakably clear. 'Glory to God in the Highest!' says the angel in the creche -- Glory to God because of the birth of Jesus. This praise to God in Christian terms is indisputably religious – indeed sectarian – just as it is when said in the Gospel or in a church service. (Citations omitted.)
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> "Under the Court's holding in Lynch, the effect of a creche display turns on its setting. Here, unlike in Lynch, nothing in the context of the display detracts from the creche's religious message. The Lynch display comprised a series of figures and objects, each group of which had its own focal point. Santa's house and his reindeer were objects of attention separate from the creche, and had their specific visual story to tell. . . . Here, in contrast, the creche stands alone: it is the single element of the display on the Grand Staircase.
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> * * *
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> "Furthermore, the creche sits on the Grand Staircase, the 'main' and 'most beautiful part' of the building that is the seat of county government. No viewer could reasonably think that it occupies this location without the support and approval of the government. Thus, by permitting the 'display of the creche in this particular physical setting,' . . . the county sends an unmistakable message that it supports and promotes the Christian praise to God that is the creche's religious message."[181]

On the other hand, the Court found that the menorah, which was one symbol among many in a display, passed the Lemon test.[182]

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[181] Id. at 598-99.

[182] See, also, Fox v. City of Los Angeles, 22 Cal.3d 792 (1978); Okrand v. City of Los Angeles, 207 Cal.App.3d 566 (1989), rehearing denied (1989).

C. Display of Religious Books and Materials

The case of Roberts v. Madigan[183] involved the display of religious materials in a school setting. In Roberts, a school principal required that a teacher remove Christian books from the classroom, keep his Bible in, not on his desk, and remove a poster from his classroom stating, "You have only to open your eyes to see the hand of God."[184]

The Bible was used by the teacher for personal silent reading. Two Christian books were available for his pupils to use during silent reading. The Court of Appeals upheld the principal's action, stating that the teacher was a role model. The teacher's conduct in having these books in the classroom, the teacher's silent reading of the Bible and the poster created the appearance that the teacher was advancing his religious views and was not in keeping with the mission of the school, which was to remain neutral in religious matters.[185]

The teacher, along with parents of several children, sought injunctive and declaratory relief against the school district. The teacher asserted that the district had abridged his First Amendment rights to free speech, academic freedom and access to information, and that the district had violated the Establishment Clause of the First Amendment.[186]

Although the teacher brought his action based upon the Free Speech Clause of the Constitution, the court considered both that clause and the Free Exercise Clause and applied an Establishment Clause analysis. The court noted that school officials have a difficult task in exercising their broad discretion in the management of school affairs which must include the balancing of the First Amendment rights of teachers to freely express and exercise their religious preferences with the First Amendment rights of students to be free of religious indoctrination in the classroom. The court further went on to restate the established principle that school officials have an affirmative duty to ensure that individual teachers are not violating the Establishment Clause.[187]

The teacher in the Roberts case made the argument that the principal's actions were showing a hostility towards religion, which was furtherance of the religion of secularism. The court dismissed the argument, holding that the primary effect of the district's actions was not to further the interest of those who believe in no religion, but to insulate students from undue exposure to the teacher's religious beliefs and to prevent a violation of the Establishment Clause. The Court of Appeals stated:

> "The removal of materials from the classroom is acceptable when it is determined that the materials are being used in a manner that violates Establishment Clause guarantees. Thus, the Establishment Clause focuses on the

[183] Roberts v. Madigan, 921 F.2d 1047 (10th Cir. 1990), cert. denied 112 S.Ct. 3025 (1992).
[184] Ibid.
[185] Ibid.
[186] Ibid.
[187] Ibid.

> manner of *use* to which materials are put; it does not focus on the content of the materials per se. For example, the books about American Indian religion could be used in violation of the Establishment Clause if they were taught in a proselytizing manner. Because they were not so used, however, those books do not violate the Establishment Clause by the very existence of their content. It is neither wise nor necessary to require school officials to sterilize their classrooms and libraries of any materials with religious references in order to prevent teachers from inculcating specific religious values. Instead, school officials must be allowed, within certain bounds, to exercise discretion in determining what materials or classroom practices are being used appropriately. . . .
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> * * *
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> ". . . We are particularly mindful, as was the district court, that there is a 'difference between teaching *about* religion, which is acceptable, and teaching religion, which is not.' Roberts v. Madigan, 702 F.Supp. 1505, 1517 (D.Colo. 1989). Mr. Roberts' avowed purpose for reading his Bible in class was to model reading for the students. Because Mr. Roberts chose to keep his Bible on his desk continuously and read it frequently, Ms. Madigan feared that Mr. Roberts was setting a Christian tone in his classroom. Having formed that impression, Ms. Madigan had a duty to take corrective steps, and to do so in a religiously neutral manner."[188]

The Court of Appeals concluded that the teacher's action seen in context revealed a religious purpose and, therefore, the school principal acted properly in removing the books and asking the teacher to keep his Bible in his desk.

D. Discussion of Religion with Clients

In Berry v. Department of Social Services,[189] the Court of Appeals held that a public employer may prohibit a public employee from discussing religion with clients, displaying religious items in the employee's cubicle and using a conference room for prayer meetings. The Court of Appeals held that the Tehama County Department of Social Services in setting these requirements did not violate the employee's free speech or free exercise of religion rights under the First Amendment.

Daniel M. Berry worked for the Tehama County Department of Social Services assisting unemployed and underemployed clients in their transition out of welfare

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[188] Id. at 1055-56.
[189] 447 F.3d 642 (9th Cir. 2006).

programs. As part of his duties, Mr. Berry frequently conducted client interviews. Approximately 90% of these interviews took place in Mr. Berry's cubicle.

Mr. Berry was uncomfortable with restrictions prohibiting him from discussing religion with his clients, displaying religious items in his cubicle and using a conference room for prayer meetings. Believing that it conflicted with his religious beliefs, Mr. Berry discussed his concerns with the employer and the employer sent him a letter outlining these requirements. The Department of Social Services did not prohibit Mr. Berry from talking about religion with his colleagues.

Mr. Berry filed an action in federal court alleging that the Department of Social Services failed to accommodate his religious beliefs and violated his free speech rights and should have allowed him to display religious objects in his cubicle, use the conference room for voluntary prayer group meetings and to share his religious views with clients when they initiate the discussion or are open and receptive to such discussions.

The Court of Appeals noted that a court must balance the interest of the employee as a citizen commenting upon matters of public concern and the interest of the state, as an employer, in promoting the efficiency of the public services it performs through its employees. The Court of Appeals held that the employer has an interest in avoiding a violation of the Establishment Clause of the First Amendment by not appearing to endorse religion or a religious viewpoint in the workplace. In a previous case, the Court of Appeals held that a school district had an interest in avoiding an Establishment Clause violation and could direct a teacher not to talk about religion with students.[190] The Court of Appeals held that avoiding an Establishment Clause violation is a compelling state interest. The Court of Appeals stated:

> "The Department's clients seek assistance from Mr. Berry in his capacity as an agent of the state. Accordingly, they may be motivated to seek ways of ingratiating themselves with Mr. Berry, or conversely, they may seek reasons to explain a perceived failure to assist them. It follows at any discussion by Mr. Berry of his religion runs a real danger of entangling the Department with religion. This danger is heightened by Mr. Berry's admission that unless restricted, he will share his faith with others and pray with them. Although Mr. Berry states he will do so 'when appropriate' he does not explain how he determines when sharing his religion is appropriate. Furthermore, any legal consequences from Mr. Berry's discussion of religion with clients will fall upon the Department, as much as, if not more than, on Mr. Berry. We conclude that under the balancing test, the Department's need to avoid possible violations of the Establishment Clause of the First

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[190] See, Peloza v. Capistrano Unified School District, 37 F.3d 517, 522 (9th Cir. 1994).

> Amendment outweighs the restriction's curtailment on Mr. Berry's religious speech on the job."[191]

The Court of Appeals went on to hold that the Department of Social Services' restrictions on the display of religious items was reasonable since government has a greater interest in controlling what materials are posted on its property than it does in controlling the speech of the people who work for it. The court observed that material posted on the walls of the corridors of government offices may be interpreted as representing the views of the state. The Court of Appeals observed that members of the public might reasonably interpret the presence of visible religious items as government endorsement of religion. The Court of Appeals also held that Mr. Berry was not deprived of his Bible since he could keep it in his desk drawer and read it whenever he did not have a client with him in his cubicle. Displaying the Bible in front of clients implicitly endorses a religious message and the court held that the Department of Social Services reasonably seeks to avoid an implied endorsement of religion by requiring Mr. Berry to keep the Bible in his desk drawer.

With respect to the use of the conference room, the Court of Appeals held that it was not a public forum and that the Department of Social Services could bar its use for prayer meetings. The Department had barred the use of the room by outside groups but had allowed employees to use the room for birthday parties and baby showers. The court held that such restrictions were reasonable. The holding in this case will apply to districts as well.

Intertwined with the issue of the display of religious symbols is the discussion of religion in the workplace or in the classroom. In Engel v. Vitale[192] and Abington v. Schempp,[193] the United States Supreme Court ruled that public schools may not sponsor religious practices such as prayer in the public schools. However, the Court indicated that school districts may teach about religion. The Court stated in Abington:

> "In addition, it 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." [Emphasis added.][194]

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[191] Id. at 651.
[192] 370 U.S. 421, 82 S.Ct. 1261 (1962).
[193] 374 U.S. 203, 83 S.Ct. 1560 (1963).
[194] Id. at 225.

E. Display of Ten Commandments

In Stone v. Graham,[195] the United States Supreme Court struck down a Kentucky law requiring the posting of the Ten Commandments on the wall of each public school classroom. The Court stated:

> "The pre-eminent purpose for posting the Ten Commandments on schoolroom walls is plainly religious in nature. The Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths, and no legislative recitation of a supposed secular purpose can blind us to that fact. The Commandments do not confine themselves to arguably secular matters, such as honoring one's parents, killing or murder, adultery, stealing, false witness, and covetousness. See Exodus 20: 12-17; Deuteronomy 5: 16-21. Rather, the first part of the Commandments concerns the religious duties of believers: worshiping the Lord God alone, avoiding idolatry, not using the Lord's name in vain, and observing the Sabbath Day. See Exodus 20: 1-11; Deuteronomy 5: 6-15.
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> "This is not a case in which the Ten Commandments are integrated into the school curriculum, where the Bible may constitutionally be used in an appropriate study of history, civilization, ethics, comparative religion, or the like. Abington School District. v. Schempp, *supra,* at 225. Posting of religious texts on the wall serves no such educational function. If the posted copies of the Ten Commandments are to have any effect at all, it will be to induce the schoolchildren to read, meditate upon, perhaps to venerate and obey, the Commandments. However desirable this might be as a matter of private devotion, it is not a permissible state objective under the Establishment Clause."[196]

In McCreary County v. American Civil Liberties Union,[197] a five member majority held that a display of the Ten Commandments in two counties in Kentucky violated the Establishment Clause of the First Amendment. The court majority found that the display did not have a secular purpose and had the primary effect of advancing religion and, therefore, violated the Establishment Clause.

In Van Orden v. Perry,[198] the United States Supreme Court was unable to render a majority opinion. A plurality opinion of four justices (Chief Justice Rehnquist, Justice

[195] 449 U.S. 39, 101 S.Ct. 192 (1980).
[196] Id. at 41-42.
[197] 545 U.S. 844, 125 S.Ct. 2722 (2005).
[198] 545 U.S. 679, 125 S.Ct. 2854 (2005).

Scalia, Justice Kennedy and Justice Thomas) concluded that the Establishment Clause allowed the display of a monument inscribed with the Ten Commandments on the Texas State Capitol grounds. Justice Breyer concurred in the results but did not agree with the reasoning of the Chief Justice.

Since the Van Orden decision was decided by a divided court with only a plurality opinion rather than a majority opinion, and the McCreary County decision was decided by a majority of the justices, the McCreary County case will probably be the precedent setting case cited in future decisions.

In McCreary County, Justice Souter wrote the majority opinion and held that the posting of the Ten Commandments on the walls of two Kentucky courthouses did not serve a secular purpose and was an advancement of religion in violation of the first two prongs of the Lemon test. The Court looked at the underlying facts surrounding the adoption of the county resolutions authorizing the display of the Ten Commandments and found that the counties had a religious purpose or motivation for posting the Ten Commandments.

In applying the Lemon test, Justice Souter stated that the basis of the Lemon test and the United States Supreme Court analysis of the Establishment Clause is that the First Amendment mandates governmental neutrality between religion and non-religion. The Court stated:

> "When the government acts with the ostensible and predominate purpose of advancing religion, it violates the central Establishment Clause value of official neutrality, there being no neutrality when the government's ostensible object is to take sides."

The Court stated that favoring one faith over another or adherents to religion over non-adherents clashes with the understanding reached after decades of religious war that liberty and social stability demand a religious tolerance that respects the religious views of all citizens. By favoring religion, the government sends the message to non-adherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders and favored members of the political community.

The majority opinion noted that the Framers of the Constitution not only sought to protect the integrity of individual conscious in religious matters but to guard against the civic divisiveness that follows when government weighs in on one side of the religious debate.

In a concurring opinion, Justice O'Connor noted that the First Amendment expresses our Nation's fundamental commitment to religious liberty by protecting the free exercise of religion and barring establishment of religion. Justice O'Connor stated that the Religion Clauses were designed to safeguard the freedom of conscious and belief that immigrants had sought when they came to America so that they could practice their

religion freely. The goal of the Religion Clauses was to carry out the Founding Fathers' plan of preserving religious liberty to the fullest extent possible in a pluralistic society. Justice O'Connor stated:

> "At a time when we see around the world the violent consequences of the assumption of religious authority by government, Americans may count themselves fortunate: Our regard for constitutional boundaries has protected us from similar travails, while allowing private religious exercise to flourish. . . . Those who would renegotiate the boundaries between church and state must therefore answer a difficult question: Why would we trade a system that has served us so well for one that has served others so poorly?"

Justice O'Connor noted that the Framers of the Constitution lived at a time when our national religious diversity was neither as robust nor as well recognized as it is now and that the Framers may not have foreseen the variety of religions that would eventually make this nation their home but they worried that the same authority which would establish Christianity to the exclusion of all other religions might establish a particular sect of Christians to the exclusion of all other sects. Therefore, Justice O'Connor concluded that the Religion Clauses protected adherents to all religions as well as those who believe in no religion at all. Justice O'Connor concluded:

> "We owe our First Amendment to a generation with a profound commitment to religion and a profound commitment to religious liberty – visionaries who held their faith 'with enough confidence to believe that what should be rendered to God does not need to be decided and collected by Caesar.' "

F. Discussion of Religious Holidays

In Florey v. Sioux Falls School District,[199] the Court of Appeals held that teaching about religious holidays rather than celebrating holidays is permissible. Discussion about how and when holidays are celebrated, their origins, histories and generally agreed upon meanings, are permissible. The approach should be objective neither promoting nor inhibiting religion. The study of religious holidays should not be used as an opportunity to proselytize or to inject personal religious beliefs into the discussions. In Florey, the Court of Appeals stated:

> "The First Amendment does not forbid all mention of religion in public schools; it is the advancement or inhibition of religion that is prohibited. . . . Hence, the study of religion is not forbidden 'when presented objectively as part of a secular program of education.'

[199] 619 F.2d 1311 (8th Cir. 1980).

> Abington School District v. Schempp, *supra,* at 225. We view the term 'study' to include more than mere classroom instruction; public performance may be a legitimate part of secular study. This does not mean, of course, that religious ceremonies can be performed in the public schools under the guise of 'study.' It does mean, however, that when the primary purpose served by a given school activity is secular, that activity is not made unconstitutional by the inclusion of some religious content. . . .
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> "It is unquestioned that public school students may be taught about the customs and cultural heritage of the United States and other countries. . . . The district court expressly found that much of the art, literature and music associated with traditional holidays, particularly Christmas, has 'acquired a significance which is no longer confined to the religious sphere of life. It has become integrated into our national culture and heritage.' Furthermore, the rules guarantee that all material used has secular or cultural significance: Only holidays with both religious and secular basis may be observed; music, art, literature and drama may be included in the curriculum only if presented in a prudent and objective manner and only as a part of the cultural and religious heritage of the holiday; and religious symbols may be used only as a teaching aid or resource and only if they are displayed as a part of the cultural and religious heritage of the holiday and are temporary in nature. . . ."[emphasis added][200]

The court in Florey went on to identify an unconstitutional activity. A responsive discourse (engaged in prior to the district's new policy) between the teacher and the class entitled, "The Beginner's Christmas Quiz" was a predominately religious activity which exceeded constitutional limits. The "Quiz" constituted a series of questions (from the teacher) and answers (from the class) as follows:

> "Teacher: Of whom did heavenly angels sing,
> And news about His birthday bring?
> Class: Jesus.
> Teacher: Now, can you name the little town
> Where they the Baby Jesus found?
> Class: Bethlehem.
> Teacher: Where had they made a little bed
> For Christ, the blessed Savior's head?
> Class: In a manger in a cattle stall.
> Teacher: What is the day we celebrate

[200] Id. at 1315-1317.

As birthday of this One so great?
Class: Christmas."[201]

The display of religious symbols in the classroom should be handled very carefully. Not all displays of religious symbols are prohibited. The context of the display and the message it conveys are extremely important. Religious symbols may be displayed in a neutral manner as part of an objective study of religion in the overall context of a secular program of education. Religious materials should not be displayed to further a religious purpose such as inducing children to accept the tenets of a particular faith.

Similar rules apply to the discussion of religion in the classroom:

1. The school's study of religion should be objective, neutral and academic rather than sectarian or devotional;

2. The purpose of the discussion about religion should be to develop student awareness of world religions rather than student acceptance or belief in a particular religion;

3. The discussion should involve the study of religion not the practice of religion or the observance of religious holidays or ceremonies;

4. The discussion may expose students to the diversity of religious views that exist in the world but may not impose a particular religious point of view or represent that a particular religious point of view is the correct point of view;

5. The discussion may educate students about the various religions of the world but may not promote a religion or denigrate or disparage any religion and should not seek to induce or persuade a student to conform his or her behavior or conduct to a particular religious belief or practice.[202]

In Clever v. Cherryhill Township Board of Education,[203] the federal district court held that a school district policy requiring classrooms to maintain calendars depicting a variety of national, ethnic and religious holidays and permitting seasonal displays containing religious symbols, did not violate the Establishment Clause. The calendars recognized a large variety of national, cultural, ethnic and religious holidays which were taken from a district approved list. In some instances, the holidays were marked not only by words, but also by a religious symbol. The district also had a policy with respect to decorations and symbols of holiday displays. The religious symbols were to be displayed simultaneously with at least one other religious symbol and at least one cultural and/or

[201] Id. at 1318.
[202] "Religion in the Public School Curriculum - Questions and Answers," National School Boards Association.
[203] 838 F.Supp. 929, 87 Ed.Law Rep. 848 (D.N.J. 1993).

ethnic symbol. A display had to be accompanied by a written explanation that described the cultural, ethnic or religious significance of the symbols used in the display. The primary purpose of all displays was to promote educational goals of advancing student knowledge about our nation's cultural, ethnic and religious heritage of diversity.[204] The court held that this district's policy had a genuine secular purpose, did not impermissibly promote religion, and did not unduly entangle the government with religion. Therefore, it found no First Amendment violation.[205]

G. Display of Portrait of Jesus

In Washegesic v. Bloomingdale Public Schools,[206] the Court of Appeals ordered the removal of a portrait of Jesus Christ from display in the hallway. The Court of Appeals held that the display failed all three prongs of the Lemon test.[207]

The majority opinion in McCreary County maintains in place existing jurisprudence with respect to the display of religious symbols in the classroom. The decision in McCreary County applies the Lemon test and the concept of religious neutrality by government with respect to the display of religious symbols.

Therefore, the display of religious symbols in the classroom should be handled very carefully. Not all displays of religious symbols are prohibited. The context of the display and the message it conveys are extremely important. Religious symbols may be displayed in a neutral manner as part of an objective study of religion in the overall context of a secular program of education. Religious materials should not be displayed to further a religious purpose such as inducing children to accept the tenets of a particular faith.

SERVICES PROVIDED TO RELIGIOUS SCHOOLS

A. Reimbursement For Parochial School Services

Under the three part test developed by the United States Supreme Court in Lemon v. Kurtzman,[208] the United States Supreme Court has struck down state statutes reimbursing parents for parochial school tuition, reimbursing parochial schools for the cost of preparing, administering and evaluating examinations, reimbursing parochial schools for building repairs and maintenance, granting tax credits or deductions for parents with children attending parochial schools and authorizing the loan of instructional equipment to parochial schools.[209]

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[204] Id. at 933-934.
[205] Id. at 941-942.
[206] 33 F.3d 679, 94 Ed.Law Rep. 32 (6th Cir. 1994).
[207] Id. at 683. The Court held that there was no secular purpose. The portrait advances religion and its display entangled the government with religion.
[208] 403 U.S. 602, 91 S.Ct. 2105 (1971).
[209] Sloan v. Lemon, 413 U.S. 825 (1973) (reimbursement of religious school tuition held unconstitutional) (Pennsylvania statute providing for reimbursement of religious group tuition paid by parents had the primary effect of advancing religion, and therefore, violated the Establishment Clause); Levitt v. Committee for Public Education and

In Meek v. Pittenger,[210] the United States Supreme Court struck down a Pennsylvania statute which provided speech and hearing therapy to students at nonpublic school campuses. The Court in Meek stated:

> "The prophylactic contacts required to ensure that teachers play a strictly nonideological role . . . necessarily give rise to a constitutionally intolerable degree of entanglement between church and state. The same excessive entanglement would be required for Pennsylvania to be 'certain,' as it must be, that . . . personnel do not advance the religious mission of the church-related schools in which they serve."[211]

In Wolman v. Walter,[212] the United States Supreme Court upheld parts of an Ohio statute which authorized textbook loans to private school children, diagnostic services within the private schools, therapeutic services outside the private school premises and standardized tests and scoring services. The Court struck down parts of the Ohio statute which authorized field trip transportation services to parochial schools and a loan of instructional materials and equipment to parochial school students.

The Court was deeply divided with separate opinions written by Justice Brennan, Justice Marshall, Justice Powell and Justice Stevens.[213] In upholding the provisions of the Ohio statute which authorized diagnostic services for private school students at the parochial school, the court noted:

> "The reason for considering diagnostic services to be different from teaching or counseling is readily apparent. First, diagnostic services, unlike teaching or counseling, have little or no educational content and are not closely associated with the educational mission of the non-public school. Accordingly, any pressure on the public diagnostician to allow the intrusion of sectarian views is greatly reduced. Second, the diagnostician has only limited contact with the child, and that contact involves chiefly the

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Religious Liberty, 413 U.S. 472 (1973). Cf., Committee for Public Education and Liberty v. Regan, 444 U.S. 646 (1980) (Court used three-part test to uphold state statute; state statute providing for reimbursement to religious schools' expenses related to administration, grading and compiling and reporting of standardized tests violated the Establishment Clause); Committee for Public Educ. v. Nyquist, 413 U.S. 756 (1973) (statute which provided for maintenance and repair grants to religious schools and tuition reimbursement grants and tax benefits to parents with children attending religious schools had the primary effect of advancing religion and violated the Establishment Clause); Meek v. Pittenger, 421 U.S. 349 (1975) (provision of speech and hearing therapy at parochial school held unconstitutional); Board of Education v. Allen, 392 U.S. 236 (1968) (New York law requiring the lending of textbooks to parochial school students free of charge did not violate Establishment Clause); Walz v. Tax Commission, 397 U.S. 664 (1970) (statute exempting property owned by religious organizations from taxation did not violate Establishment Clause).

[210] 421 U.S. 349 (1975).

[211] Id. at 370.

[212] 433 U.S. 229 (1977).

[213] Ibid.

> use of objective and professional testing methods to detect students in need of treatment. The nature of the relationship between the diagnostician and the pupil does not provide the same opportunity for the transmission of sectarian views as attends the relationship between teacher and student or that between counselor and student. We conclude that providing diagnostic services on the nonpublic school premises will not create an impermissible risk of the fostering of ideological views. It follows that there is no need for excessive surveillance, and there will not be impermissible entanglement."[214]

The Court also upheld provisions of the Ohio statute which authorized state expenditures for therapeutic, guidance, and remedial services for students with special needs attending parochial schools.[215] The services were to be performed, however, at public schools, public centers, or mobile units located outside the parochial school's premises.[216] Again, the Court reasoned that in providing therapeutic services to parochial school students at public facilities, there was an insubstantial possibility that the therapeutic services provided by the state would be misused or redirected to further the religious aims of the church operating the school.[217]

In Grand Rapids School District v. Ball,[218] the United States Supreme Court held that two school district programs that provide classes to non-public school students at

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[214] Id. at 244. See, also, New York v. Cathedral Academy, 434 U.S. 125 (1977) (statute authorizing reimbursement to religious schools for their expenses in performing state required record keeping and testing services violated the Establishment Clause); Committee for Public Education and Religious Liberty v. Regan, 444 U.S. 646 (1980) (New York statute providing for cash reimbursement to religious schools for cost of administering and grading state written tests did not violate the First Amendment); Mueller v. Allen, 463 U.S. 388 (1983) (Minnesota statute allowing deductions from state income tax for educational expenses incurred by parents of elementary and secondary students, including those in religious schools, did not violate the First Amendment).
[215] Id. at 248.
[216] The particular Ohio statute intended:
"(G) To provide therapeutic psychological and speech and hearing services to pupils attending non-public schools within the district. Such services shall be provided in the public school, in public centers, or in mobile units located off of the non-public premises as determined by the state department of education . . . (H) To provide guidance and counseling services to pupils attending non-public schools within the district. Such services shall be provided in the public school, in public centers, or in mobile units located off of the non-public premises as determined by the state department of education . . . (I) To provide remedial services to pupils attending non-public schools within the district. Such services shall be provided in the public school, in public centers, or in mobile units located off of the non-public premises as determined by the state department of education. (K) To provide programs for the deaf, blind, emotionally disturbed, crippled, and physically handicapped children attending non-public schools with the district. Such services shall be provided in the public schools, in public centers, or in mobile units located off of the non-public premises as determined by the state department of education." Id. at 244 n.12 (quoting Ohio Rev.Code Ann. sections 3317.06(G)(H)(I)(K) (emphasis added).
[217] Id. at 244. "The fact that a unit on a neutral site on occasion may serve only sectarian pupils does not provoke the same concerns that troubled the court in Meek. The influence on a therapist's behavior that is exerted by the fact that he serves a sectarian pupil is qualitatively different from the influence of the pervasive atmosphere of a religious institution. The dangers perceived in Meek arose from the nature of the institution, not from the nature of the pupils.
Accordingly, we hold that providing therapeutic and remedial services at a neutral site off the premises of the non-public schools will not have the impermissible effect of advancing religion. Neither will there be any excessive entanglement arising from supervision of public employees to insure that they maintain a neutral stance." 433 U.S. at 247-48 (footnotes and citations omitted).
[218] 473 U.S. 373, 105 S.Ct. 3216, 25 Ed.Law Rep.1006 (1985).

public expense in classrooms located in and leased from the non-public schools violated the Establishment Clause of the United States Constitution. The school district programs offered classes during the regular school day that were intended to supplement the core curriculum courses required by the State of Michigan. Forty of the forty-one private schools involved in the programs were religious schools. The Court held that the primary or principal effect of the school district programs was to advance religion and therefore violated the Establishment Clause.

The Court stated:

> ". . . our cases have consistently recognized that even . . . a praiseworthy, secular purpose cannot validate government aid to parochial schools when the aid has the effect of promoting a single religion or religion generally or when the aid unduly entangles the government in matters religious. For just as religion throughout history has provided spiritual comfort, guidance, and inspiration to many, it can also serve powerfully to divide societies and to exclude those whose beliefs are not in accord with the particular religions or sects that have from time to time achieved dominance. The solution to this problem adopted by the Framers and consistently recognized by this Court is jealously to guard the right of every individual to worship according to dictates of conscience while requiring the government to maintain a course of neutrality among religions, and between religion and non-religion."[219]

The Court was concerned that when conducting a supposedly secular class in the pervasively sectarian environment of the religious school, a teacher may knowingly or unwillingly tailor the content of the course to fit the school's announced religious goals.[220] The Court noted:

> "We conclude that the challenged programs have the effect of promoting religion in three ways. The state-paid instructors, influenced by the pervasively sectarian nature of the religious schools in which they work, may subtly or overtly indoctrinate the students in particular religious tenets at public expense. The symbolic union of church and state inherent in the provision of secular, state-provided instruction in the religious school buildings threatens to convey a message of state support for religion to students and to the general public. Finally, the programs in effect subsidize the religious functions of the parochial schools by taking over a substantial portion of their responsibility for

[219] Id. at 3221-22.
[220] Id. at 3225-26.

> teaching secular subjects. For these reasons, the conclusion is inescapable that the Community Education and Shared Time programs have the 'primary or principal' effect of advancing religion, and therefore, violate the dictates of the Establishment Clause of the First Amendment."[221]

B. Assistance to Students

In Witters v. Washington Department of Services for the Blind,[222] the United States Supreme Court held that a state may extend vocational assistance funds to a blind student who is studying at a religiously affiliated college to become a pastor. The Court held that since the assistance program paid the funds directly to students who then chose the educational institution they wished to attend, there were no financial incentives for students to attend a sectarian college. Therefore, the statute had a secular purpose, did not have the primary effect of advancing religion, did not involve an excessive government entanglement with religion, and was therefore constitutional.

In Zobrest v. Catalina Foothills School District,[223] the United States Supreme Court held that the provision of the services of a sign language interpreter under the Individuals with Disabilities Education Act (IDEA) to a student attending a Catholic high school did not violate the Establishment Clause. The Court cited Witters and Mueller, and held that the service at issue was part of a general government program that distributes benefits neutrally to any student who qualifies as disabled under the IDEA without regard to the sectarian nature of the school the child attends. The Court stated:

> "By according parents freedom to select a school of their choice, the statute ensures that a government-paid interpreter will be present in a sectarian school only as a result of the private decision of individual parents. In other words, because the IDEA creates no financial incentive for parents to choose a sectarian school, an interpreter's presence there cannot be attributed to state decision-making. Viewed against the backdrop of Mueller and Witters then, the Court of Appeals erred in its decision. When the government offers a neutral service on the premises of a sectarian school as part of a general program, that 'is in no way skewed toward religion' . . . it follows under our prior decisions that provision of that service does not offend the Establishment Clause."[224]

The Court went on to note that the task of a sign language interpreter is quite different from that of a teacher or guidance counselor. A sign language interpreter is

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[221] Id. at 3230.
[222] 474 U.S. 41, 106 S.Ct. 748, 29 Ed.Law Rep. 496 (1986).
[223] 113 S.Ct. 2462, 83 Ed.Law Rep. 930 (1993).
[224] Id. at 2467.

required to accurately interpret whatever material is presented to the class as a whole. Since the sign language interpreter will neither add nor subtract from the environment, the provision of such assistance is not barred by the Establishment Clause.[225]

In Agostini v. Felton, the United States Supreme Court ruled that the Establishment Clause did not constitutionally bar a school district from providing supplemental remedial instruction to disadvantaged students under the federal Title I program with public school teachers on the premises of the parochial school. The decision overrules the decision in Aguilar v. Felton.[226] The Court in Agostini based its reversal on subsequent case law decided after Aguilar.[227] In Zobrest v. Catalina Foothills School District,[228] the Court held that it was permissible under the Establishment Clause to place a publicly employed sign language interpreter in a parochial school. The Court in Zobrest held that placing a public employee in the parochial school did not advance religion and that it must be assumed that the interpreter would dutifully discharge her responsibilities as a full time public employee and comply with the ethical guidelines of her profession by accurately translating what was said. The Court rejected the notion that the interpreter would be pressured by the pervasively sectarian surroundings to inculcate religion by adding or subtracting from the lectures that would be translated. In Zobrest, the United States Supreme Court also rejected the assumption from Aguilar v. Felton and its companion case, School District of Grand Rapids v. Ball,[229] that the presence of Title I teachers in parochial school classrooms will, without more, create the impression of a "symbolic union" between church and state.

The Court also cited Witters v. Washington Department of Services for the Blind,[230] in which the Court held that the Establishment Clause did not bar a state from issuing a vocational tuition grant to a blind person who wished to use the grant to attend a Christian college and become a pastor, missionary or youth director. Even though the grant recipient clearly would use the money to obtain religious education, the Court held that the tuition grants were made available generally without regard to the sectarian or nonsectarian nature of the institution benefited. Since the grants were disbursed directly to students, the Court held that the state was neutral and was no different from a state issuing a paycheck to one of its employees knowing that the employee would donate part or all of the check to a religious institution.

Based on Zobrest and Witters, the Court in Agostini held that the only difference between a constitutional program and an unconstitutional one was the location of the classroom since the degree of cooperation between Title ψ instructors and parochial school faculty was the same no matter where the services were provided. The Court held that there was no logical basis upon which to conclude that Title ψ services were an

[225] Id. at 2469.
[226] Agostini v. Felton, 117 S.Ct. 1997 (1997); 473 U.S. 402 (1985).
[227] Witters v. Washington Department of Services for the Blind, 474 U.S. 481 (1986); Zobrest v. Catalina Foothills School District, 509 U.S. 1 (1993).
[228] 509 U.S. 1 (1993).
[229] 473 U.S. 373 (1985).
[230] 474 U.S. 481 (1986)

impermissible subsidy of religion when offered on campus but not when offered off campus.

The Court went on to hold that the third prong of the Lemon test, excessive government entanglement with religion, was not violated. The Court stated:

> ". . . After Zobrest, we no longer presume that public employees will inculcate religion simply because they happen to be in a sectarian environment. Since we have abandoned the assumption that properly instructed public employees will fail to discharge their duties faithfully, we must also discard the assumption that pervasive monitoring of Title I teachers is required. There is no suggestion in the record before us that unannounced monthly visits of public supervisors are insufficient to prevent or to detect inculcation of religion by public employees. Moreover, we have not found excessive entanglement in cases in which states imposed far more onerous burdens on religious instruction than the monitoring system at issue here.
>
> "To summarize, New York City's Title I program does not run afoul of any of three primary criteria we currently use to evaluate whether government aid has the effect of advancing religion; it does not result in governmental indoctrination; define its recipients by reference to religion; or create an excessive entanglement. We therefore hold that a federally funded program providing supplemental remedial instruction to disadvantaged children on a neutral basis is not invalid under the Establishment Clause when such instruction is given on the premises of sectarian schools by government employees pursuant to a program containing safeguards such as those present here. . . ."[231]

Based on the above court cases, it appears that public school may not provide instructional services at parochial school sites, but may provide certain supplementary services such as sign language interpretation. Secular services may be provided to parochial school students by public school teachers at religious school sites.

C. School Voucher Programs

In Zelman v. Simmons-Harris, [232] the United States Supreme Court held that a private school voucher program instituted by the state of Ohio, for children who reside in the Cleveland City School District, was constitutional and did not violate the Establishment Clause of the First Amendment of the United States Constitution. The

[231] Agostini v. Felton, 117 S.Ct. 1997, 2016 (1997).
[232] 122 S.Ct. 2460 (2002).

landmark decision will allow other states to institute similar private school voucher programs, if they wish.

The Cleveland program provided tuition aid in the form of vouchers to parents of low income families. The vouchers could be used in any private school, religious or non-religious. Families with incomes below 200% of the poverty line are given priority and are eligible to receive 90% of private school tuition, up to $2,250.00 with a co-payment cap of $250.00. For all other families, the program pays 75% of tuition costs, up to $1,875.00, with no co-payment cap.

The court reviewed prior Establishment Clause cases and noted that in Lemon v. Kurtzman,[233] the United States Supreme Court had established a three-part test for determining whether laws violate the Establishment Clause. To be constitutional, the laws must:

1. Have a secular purpose;

2. Not have the purpose or effect of advancing or inhibiting religion;

3. Not result in excessive government entanglement with religion.

In the majority opinion, Chief Justice Rehnquist held that the private school voucher program served a secular purpose by providing parents with educational choices for their children. Chief Justice Rehnquist held that the private school voucher program did not advance religion because the program was neutral and parents made private choices as to whether the child would enroll in a religious or non-religious private school with the voucher. Chief Justice Rehnquist stated:

> "Mueller, Witters and Zobrest thus made clear that where a government aid program is neutral with respect to religion, and provides assistance directly to a broad class of citizens who, in turn, direct government aid to religious schools wholly as a result of their own genuine and independent private choice, the program is not readily subject to challenge under the Establishment Clause. . . . the incidental advancement of a religious mission, or the perceived endorsement of a religious message, is reasonably attributable to the individual recipient, not to the government, whose role ends with the disbursement of benefits. . . .

[233] 403 U.S. 602, 612-613 (1971).

> “We believe that the program challenged here is a program of true private choice, consistent with Mueller, Witters and Zobrest and thus, constitutional. . . .
>
> “In sum, the Ohio program is entirely neutral with respect to religion. It provides benefits directly to a wide spectrum of individuals, defined only by financial need and residence in a particular school district. It permits such individuals to exercise genuine choice among options public and private, secular and religious. The program is, therefore, a program of true private choice. In keeping with an unbroken line of decisions, rejecting challenges to similar programs, we held that the program does not offend the Establishment Clause.”[234]

Four justices dissented from the majority opinion. Justice Souter wrote that the private school voucher program violated the second prong of the Lemon Test by aiding religion. Justice Souter stated that religious instruction at taxpayer expense should not be condoned under the Establishment Clause.

Justice Breyer in his dissenting opinion concentrated on the third prong of the Lemon test – excessive entanglement. Justice Breyer wrote that one of the main purposes of the Establishment Clause was to protect the nation’s social fabric from religious conflict by avoiding excessive entanglement between government and religion. Justice Breyer wrote:

> “These Clauses [the Establishment Clause and Free Exercise Clause] embody an understanding, reached in the 17th century after decades of religious war, that liberty and social stability demand a religious tolerance that respects the religious views of all citizens, permits those citizens to ‘worship God in their own way’ and allows all families to teach their children and to form their characters as they wish. . . . The Clauses reflect the Framer’s vision of an American nation free of the religious strife that had long plagued the nations of Europe.”[235]

Justice Breyer quoted Lemon v. Kurtzman as holding that political debate and division are normal and healthy manifestations of a democratic system of government, but political division along religious lines, was one of the principal evils against which the Establishment Clause was intended to protect.

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[234] Id. at 652-653, 662-663.
[235] Id. at 718.

The debate over private school vouchers will now shift to Congress, state legislatures, and possibly the voters in the form of state ballot initiatives. The voters in California have twice rejected similar private school voucher measures.

RELIGIOUS GROUPS ON CAMPUS DURING SCHOOL

A. Case Law

In Johnson v. Huntington Beach Union High School District,[236] the Court of Appeal held that a school district's refusal to allow a Bible club to meet on a high school campus was permissible under the Establishment Clause of the United States Constitution. The Court of Appeal held that the primary effect of allowing a Bible Study club to meet on a school campus would be to advance religion and thus violate the second part of the three part Lemon test.[237]

In Widmar v. Vincent,[238] the United States Supreme Court held that a state university, having created a forum generally open for use by student groups, was required to justify its exclusion of religious groups who wish to meet on the campus and the University of Missouri's exclusionary policy violated the fundamental principle that state regulation of speech should be content neutral. The Court held that a policy of equal access would not violate the Establishment Clause of the First Amendment.

B. Equal Access Act

Following the Widmar v. Vincent decision, Congress enacted the Equal Access Act. The Equal Access Act provides that all public secondary schools which receive federal financial assistance and which operate limited open forums may not deny equal access to students who wish to conduct a meeting within that limited open forum on the basis of the religious, political, philosophical, or other content of such meetings.[239] A limited open forum is defined as a public secondary school which grants or offers an opportunity for one or more non-curriculum related student groups to meet on the school premises during non-instructional time.[240]

The courts have held that a school organization or club could seek injunctive relief against a school district where the club alleged that a school district violated the Equal Access Act.[241] In Perumal v. Saddleback Valley Unified School District,[242] the California Court of Appeal upheld the right of a school district to maintain a closed forum policy and prohibit religious groups from meeting on campus. The Court of

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[236] 68 Cal.App.3d 1, 137 Cal.Rptr. 43 (1977); see, also, Brandon v. Board of Education, 635 F.2d 971 (2nd Cir. 1980), cert. denied 454 U.S. 1123.
[237] 68 Cal.App.3d 1, 137 Cal.Rptr. 43 (1977); see, also, Brandon v. Board of Education, 635 F.2d 971 (2nd Cir. 1980).
[238] 454 U.S. 263, 102 S.Ct. 269 (1981).
[239] 20 U.S.C. Section 4071, Pub.L. 98-377, Title VIII, Section 802, Aug. 11, 1984, 98 Stat. 1302.
[240] Ibid.
[241] Student Coalition for Peace v. Lower Merion School District Board of School Directors, 776 F.2d 431 (3d Cir. 1985), on remand 633 F.Supp. 1040 (1986).
[242] 198 Cal.App.3d 64, 243 Cal.Rptr. 545 (1988).

Appeal held that the Equal Access Act did not apply since the district had chosen to maintain a closed forum rather than a limited open forum.

The United States Supreme Court upheld the constitutionality of the Equal Access Act in Board of Education v. Mergens.[243] The Court noted that the Equal Access Act was patterned after its decision in Widmar v. Vincent, and held that the Act had a secular purpose, would not have the primary effect of advancing religion and would not result in an excessive entanglement between government and religion.[244] The court also interpreted the phrase non-curriculum related student groups in the Act as groups that are not directly related to the body of courses offered by the school.[245]

In Prince v. Jacoby,[246] the Court of Appeals held that under the Equal Access Act,[247] a Bible club was entitled to the same benefits as other student clubs when the high school operated a limited open forum (i.e., allowed noncurriculum related clubs to meet at lunch or after school). The Court of Appeals held that the school district violated the Equal Access Act and the student's First Amendment rights by denying her Bible club the same rights and benefits as other school district student clubs and by refusing to allow the Bible club equal access to school facilities on a religion-neutral basis.

The student was an eleventh grade student at Spanaway Lake High School in the Bethel School District in Washington State. The student established a Christian Bible club called "World Changers." The purpose of the World Changers was to address issues of interest to students from a religious perspective, including service to the student body and the community. The school district refused World Changers' attempt to form the club as an officially recognized associated student body noncurriculum-related club. The school district classified the Bible club as a District Policy 5525 Club, which limited the benefits that the club received. The benefits included access to associated student body money to fund club activities as well as free participation in the associated student body fund raising events such as the annual craft fair, the school auction, and other fund raising events. The Bible club was refused access to the school year book, produced with associated student body funds free of charge. The Bible club was also denied access to facilities to publicize their events, including the right to post flyers throughout the school rather than on a single bulletin board, and the use of the public address system. The Bible club was also denied the use of school supplies having priority access to audio visual equipment and the use of school vehicles for field trips as other clubs were allowed.

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[243] Board of Education of the Westside Community Schools v. Mergens, 110 S.Ct. 2356 (1990). See, also, Van Shoick v. Saddleback Valley Unified School District, 104 Cal.Rptr. 2d 562 (2001).
[244] Id. at 2364.
[245] Id. at 2366. See, also, Garnett v. Renton School District, 987 F.2d 641, 81 Ed.Law Rep. 704 (9th Cir. 1993), in which the Court of Appeals held that the Equal Access Act preempts state law, including the Washington State Constitution. The court held that states cannot abridge rights granted by federal law, but may be more protective of individual rights than the federal constitution. In Shu v. Roslyn Union Free School District, 85 F.3d 839, 109 Ed.Law Rep. 1145 (2nd Cir. 1996), the Court of Appeals held that under the Equal Access Act, a religious club must be open to all students regardless of religious belief.
[246] 303 F.3d 1074 (9th Cir. 2002).
[247] 20 U.S.C. Section 4071 et seq.

The Court of Appeals cited the U.S. Supreme Court's decisions in Widmar v. Vincent, [248] and Board of Education v. Mergens,[249] and held that the Equal Access Act requires that school districts not discriminate against religious-oriented clubs and that they be provided equal access to school facilities in the same manner as nonreligious clubs.

In Truth v. Kent School District,[250] the Court of Appeals held that the First Amendment rights of a religious club were not violated when the school district refused to approve the club as a recognized student club due to its general membership provision.

The general membership provision required members to comply in good faith with Christian character, Christian speech, Christian behavior and Christian conduct as generally described in the Bible. In order to be a voting member or officer, students were required to sign a statement of faith. The statement of faith required the person to affirm that he or she believes the Bible to be the inspired, the only infallible, authoritative rule of God. A member must also pledge that he or she believes "that Salvation is an undeserved gift from God," and that only by "acceptance of Jesus Christ as my personal savior, through his death on the cross for my sins, is my faith made real."[251]

The Court of Appeals held that the school district, based on its policy against discrimination based on religion, may refuse to approve the request for recognition by the club. The Court of Appeals held that the general membership requirements discriminated against non-Christians.[252]

In Bible Club v. Placentia Yorba Linda School District,[253] the United States District Court issued a preliminary injunction against the school district and ordered the school district to grant the Bible Club the same access to Esperanza High School facilities and resources enjoyed by other clubs, including the rights to:

1. Conduct meetings during non-instructional time on campus.

2. List the club in the high school yearbook with an accompanying photo.

3. List the club on the high school website and in the high school parent handbook with an accompanying photo.

4. Have access to an advisor.

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[248] 454 U.S. 263 (1981).
[249] 496 U.S. 226 (1990).
[250] 524 F.3d 957 (9th Cir. 2008). On April 25, 2008, the Court of Appeals issued an order withdrawing the opinion filed on August 24, 2007 and replacing that opinion with a concurrently filed opinion.
[251] Id. at 962.
[252] Id. at 974.
[253] 573 F.Supp.2d 1291 (C.D. Cal. 2008).

5. Have access to district resources, including equipment, supplies and funding.

The district court held that the Bible Club was extremely likely to succeed on the merits of its case because the school district had likely violated the club's rights under the First Amendment and Equal Access Act, the club had made sufficient showing of irreparable harm, the balance of hardships favored issuing the injunction, and public interest favored issuing the injunction. The court found that Esperanza High School had created a limited open forum by admitting student clubs, like the Red Cross Club and Students Making a Difference Club, that are not related to the school curriculum. Because the high school had created a limited open forum, the high school was compelled to grant equal access to the Bible Club under the First Amendment and the Equal Access Act.

USE OF SCHOOL FACILITIES BY RELIGIOUS GROUPS AFTER SCHOOL

The courts have held that school districts may not discriminate against religious groups seeking to use school facilities after school.[254] In Lamb's Chapel v. Center Moriches Union Free School District,[255] the United States Supreme Court held that a school district's denial of after-hours use of school property to a religious group where nonreligious groups were allowed such access by state law violated the First Amendment. The New York statute authorized local school boards to adopt reasonable regulations for the use of school property for specified purposes when the property is not in use for school purposes.[256] The New York statute did not include meetings for religious purposes on its list of permitted uses. The school board of the Center Moriches Union Free School District issued rules and regulations authorizing the use of school property after school hours for social, civic or recreational uses and for use by political organizations, but prohibited use by any group for religious purposes.[257]

Lamb's Chapel, an evangelical church, applied to the school district for permission to use school facilities to show a six-part film series containing lectures by

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[254] Lamb's Chapel v. Center Moriches Union Free School District, 113 S.Ct. 2141, 83 Ed.Law. Rep. 30 (1993); Travis v. Owego-Appalachian School District, 927 F.2d 688, 66 Ed.Law Rep. 75 (2nd Cir. 1991); Fairfax Covenant Church v. Fairfax County School Board, 17 F.3d 703, 89 Ed.Law Rep. 763 (4th Cir. 1994); Good News/Good Sports Club v. School District of the City of Ladue, 28 F.3d 1501, 92 Ed.Law Rep. 1148 (8th Cir. 1994). See, also, Randall v. Pegan, 765 F.Supp. 793, 68 Ed.Law Rep. 395 (W.D.N.Y. 1991); Shumway v. Albany County School District, 826 F.Supp. 1320, 84 Ed.Law Rep. 989 (D.Wyo. 1993).

[255] 113 S.Ct. 2141, 83 Ed.Law Rep. 30 (1993).

[256] California has a similar statute commonly known as the Civic Center Act, Education Code section 38130 et seq. Education Code section 38131(a) states:

"(a) There is a civic center at each and every public school facility and grounds within the state where the citizens, parent-teachers' associations, camp fire girls, boy scout troops, farmers' organizations, school-community advisory councils, senior citizens' organizations, clubs, and associations formed for recreational, educational, political, economic, artistic, or moral activities of the public school districts may engage in supervised recreational activities, and where they may meet and discuss, from time to time, as they may desire, any subjects and questions which in their judgment pertain to the educational, political, economic, artistic, and moral interests of the citizens of the communities in which they reside."

[257] Lamb's Chapel, 113 S.Ct. at 2144.

Dr. James Dobson. The brochure regarding the film series indicated that Dr. Dobson's views included his belief in traditional family values. The application was denied by the district on the grounds that the film appeared to be church related.[258] The Supreme Court held that while a public agency may limit the uses of its property, where it opens its property for use for social or civic purposes, it may not exclude only religious speech or the discussion of social or civic issues from a religious standpoint.[259]

The Supreme Court also found that exhibition of the film would not violate the Establishment Clause. It had a secular purpose, did not have the principal or primary effect of advancing or inhibiting a religion, and it did not foster an excessive entanglement with religion.[260]

The United States Supreme Court in Good News Club v. Milford Central School,[261] held that a school district in New York violated the First Amendment rights of a religious organization, by refusing to allow the religious organization to meet on school property, after school hours. The court held that when a school district allows nonreligious groups to meet on school property after hours, it may not discriminate against religious groups, and that religious groups, under these circumstances, are entitled to the protection of the Free Speech Clause of the First Amendment.

In Travis v. Owego-Appalachian School District,[262] the Court of Appeals held that a school district's refusal to allow a non-profit pregnancy counseling organization which promoted Christianity to use the school auditorium for a fundraiser, violated the First Amendment. The Court of Appeals held that the school district through past practice had created a limited public forum, and, therefore, the denial violated the free speech clause of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment.[263] In Fairfax Covenant Church v. Fairfax County School Board,[264] the Court of Appeals held that a regulation allowing a school district to charge churches a higher rate for use of school facilities than non-church related organizations violated the free speech clause of the First Amendment. The court rejected the school district's argument that its actions were justified by its concern about violating the Establishment Clause.

In Good News/Good Sports Club v. School District of the City of Ladue,[265] the Court of Appeals held that a school district's policy of not allowing a religious club the same access to school district property after school as non-religious organizations was viewpoint discrimination in violation of the First Amendment. The school district closed its facilities between 3 p.m. and 6 p.m. on school days to all community groups except for Girl Scouts, Boy Scouts, Cub Scouts, Tiger Cub Scouts, Brownies and athletic groups.

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[258] Id. at 2144-2145.
[259] Id. at 2147.
[260] Id. at 2148.
[261] 121 S.Ct. 2093 (2001).
[262] 927 F.2d 688, 66 Ed.Law Rep. 75 (2nd Cir. 1991).
[263] Id. at 689.
[264] 17 F.3d 703, 89 Ed.Law Rep. 763 (4th Cir. 1994).
[265] 28 F.3d 1501, 92 Ed.Law Rep. 1148 (8th Cir. 1994).

The policy also prohibited the scouts from engaging in any religious speech from 3 p.m. to 6 p.m. The Good News/Good Sports Club was a non-denominational religious group to foster moral development of junior high school students from the perspective of Christian religious values. The Club's activities included prayer and Bible reading.

The Court of Appeals reviewed the trial court record and found that the scouts and the Good News Club were concerned with the moral development of youth, but presented different viewpoints or perspectives on how to foster the moral development of youth. Thus, the court concluded that the school district's policy resulted in viewpoint discrimination against the Good News Club and did not serve a compelling governmental interest.[266]

The Court of Appeals rejected the argument that use by the Good News Club would violate the Establishment Clause. The court found that after-school use of school facilities by community and student groups served a secular purpose because it provided a forum for the exchange of ideas and social intercourse. The court also found that the primary effect was not the advancement of religion, but to foster the development of a student's social and cultural awareness.

In California, the Civic Center Act sets forth several requirements for charging fees for the use of school property depending on the intended use.[267] Non-profit organizations and club or associations organized to promote youth and school activities, including Girl Scouts, Boy Scouts, Camp Fire, Inc., parent/teachers' associations and school-community advisory councils must be provided access to school facilities without charge.[268] School districts may charge an amount not to exceed their direct costs for use of school facilities to any entity, including religious organizations or churches that supervise sports league activities for youths.[269] Where admission fees are charged or contributions are solicited and the net receipts are not expended for the welfare of the pupils of the district or for charitable purposes, the district is required to charge fair rental value for the use of the property.[270]

DISTRIBUTION OF RELIGIOUS LITERATURE

A. Distribution of Bibles in the Classroom

In Berger v. Rensselaer Central School Corporation,[271] the Court of Appeals held that the practice of the Gideon International Organization distributing Bibles in public school classrooms was unconstitutional. The Gideons would send two representatives once a year to each of the five classrooms of fifth graders. The date was cleared with the

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[266] Id. at 1503.
[267] Education Code section 38134.
[268] Education Code section 38134(a).
[269] Education Code sections 38134(b) and (c).
[270] Education Code section 38134(e).
[271] 982 F.2d 1160 (7th Cir. 1993), cert. denied 113 S.Ct. 2344; see, also, Meltzer v. Board of Public Instruction of Orange County, 577 F.2d 311 (5th Cir. 1978), cert. denied 439 U.S. 1089.

principal and distribution of the Bibles took place during regular school hours. The Gideons spoke a minute or two about their organization and encouraged the students to read the Bible. After the presentation, the students were instructed to take a Bible from the stack of Bibles placed on the table or desk. During some years, the Bibles were distributed in the auditorium or gymnasium, and the fifth graders were assembled in the auditorium or gymnasium for a short presentation by the Gideons. The Court of Appeals rejected the school district's argument that the free speech provision of the First Amendment protected the distribution of Bibles in the classroom during school hours because the school district participated in the Bible distribution. The Court of Appeals also found that the school district was not an open forum for community speech, since the classrooms were not open to all.

The Court of Appeals distinguished the case from Widmar v. Vincent[272] which involved access to classrooms after school, noting that the Gideons sought access to classrooms during school. Also, there was no captive audience in Widmar because the classrooms were empty. However, in the Rensselaer school district, the children had no choice but to sit through the Gideon's presentation and the distribution of Bibles. The Court of Appeals stated:

> "The only reason the Gideons find schools a more amendable point of solicitation than, say, a church or local mall, is ease of distribution, since all children are compelled by law to attend school and the vast majority attend public schools. That the Gideons seek access to children and not facilities, as in Widmar, is self-evident. . . . Even the slightest consideration should yield the conclusion that public school officials entrusted with the education of youngsters can never give up total control over the content of what transpires in classrooms, not least because the children are a captive audience. If they don't like what they see or hear, they are most assuredly not free to get up and leave. . . ."[273]

The Court found that this practice advanced religion and entangled government unnecessarily in religious affairs.

B. Distribution of Religious Materials Outside of School

The courts have treated distribution of religious literature outside of school before or after the school day in a different manner.[274] In Hedges v. Wauconda Community

[272] 454 U.S. 263, 102 S.Ct. 269 (1981).
[273] Berger, 982 F.2d at 1167-68.
[274] See, Hedges v. Wauconda Community Unit School District No. 118, 9 F.3d 1295 (7th Cir. 1993); Johnston-Loehner v. O'Brian, 859 F.Supp. 575 (M.D.Fla. 1994) (policy requiring students who wish to distribute written materials on school grounds to obtain the prior approval of the school of the superintendent is unconstitutional); Schanou v. Lancaster County School District, 863 F.Supp. 1048 (D.Neb. 1994) (Gideons may distribute Bibles to children after school on sidewalk outside of school).

Unit School District No. 118,[275] a student wished to distribute a church publication outside her school before the start of the school day. The principal refused to allow the distribution of the literature. The school district policy prohibited students from distributing written materials which expressed religious beliefs or points of views, that students would reasonably believe to be sponsored, endorsed or given official imprimatur by the school. The Court of Appeals held that the government may not discriminate against religious speech when speech on other subjects is permitted in the same place at the same time.[276] The court held that the school district had gone too far in attempting to avoid a violation of the Establishment Clause. The Court of Appeals stated:

> "Just as a school may remain politically neutral by reminding pupils and parents that it does not adopt the views of students who wear political buttons in the halls or public officials who tout their party's achievements in the auditorium, so a school may remain religiously neutral by reminding pupils and parents that it does not adopt the views of students who pass out religious literature before school. It must refrain from promoting the distribution of such literature but can remain neutral by treating religious speech the same way it treats political speech. One school district crossed the line in Berger v. Rensselaer Central School Corp. [citations omitted] when it gave the Gideons preferential treatment, convened the student body to hear their presentation, and required each pupil to accept a Bible in a formal ceremony. Permitting individual students to pass out literature with religious themes, at times and places they can pass out literature with political or artistic themes, does not entail a similar preference."[277]

The Court of Appeals noted that a central location for distribution may help the school district disassociate itself from the students' expression because the table will be used to disseminate opposing points of view and may bear a sign reminding students that the school does not endorse what the students hand out. The Court of Appeals also held that students could distribute literature written by third parties.[278]

School district policies which limit the distribution of religious materials by students to areas outside the school and prohibit such distribution in the hallways in the school district have been upheld as reasonable time, place, and manner restrictions so long as the same restrictions were placed on nonreligious materials.[279]

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[275] 9 F.3d 1295, 1296 (7th Cir. 1993).
[276] Id. at 1297.
[277] Id. at 1298.
[278] Id. at 1301.
[279] Hemry v. School Board of Colorado Springs, 760 F.Supp. 856 (D.Col. 1991).

C. Distribution of Materials to Students to Take Home

In Hills v. Scottsdale Unified School District,[280] the Court of Appeals held that a school district in Arizona violated the First Amendment rights of a summer camp operator by not allowing the summer camp operator to distribute flyers to students and parents in the same manner as other summer camps due to the religious references in the materials.

The school district had a policy of permitting non-profit organizations to distribute literature through its schools promoting events and activities of interest to students, but prohibiting any flyers of a commercial, political or religious nature. The District refused to allow Joseph Hills to distribute a brochure for a summer camp that included two classes regarding the Bible. The Court of Appeals concluded that the school district discriminated against Hills on the basis of his religious viewpoint and denied Mr. Hills equal access to the public schools.[281]

The Court of Appeals noted that school districts are not required to have policies that allow outside groups to distribute or display brochures and other promotional literature to its students. However, if districts do have such a policy, they may not discriminate based on the viewpoint of the materials. In the Hills case, the school district permitted brochures to be made available to students by placing them in teachers' mailboxes and then the teachers would distribute it to their students. The school district's policy had a community service purpose of distributing information to parents and children who would be most interested in participating in these community activities. Previous acceptable flyers included materials promoting summer camps, art classes, sports leagues, artistic performances or exhibits, and various YMCA, boys and girls clubs and scouting activities.[282]

The brochure that Mr. Hills sought to distribute offered two classes entitled "Bible Heroes" and "Bible Tales." The course descriptions of these classes contained religious references. At first the district approved distribution of Mr. Hills' flyer with a disclaimer stating that the school district neither endorses nor sponsors the organization or activity represented in the document, but later the district reversed itself and refused distribution to avoid a possible Establishment Clause violation.[283]

The Court of Appeals held that the school district, by allowing the distribution of flyers and brochures, created a limited open forum. Therefore, any restrictions on speech in the context of a limited public forum must be both viewpoint neutral and reasonable in light of the purpose served by the forum. In essence, the court found that since the school district had opened its forum to summer camps to advertise their services to students, it

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[280] 176 Ed.Law Rep. 557, 329 F.3d 1044 (9th Cir. 2003).
[281] Id. at 1047.
[282] Id. at 1050.
[283] Id. at 1048.

could not discriminate against Mr. Hills' summer camp simply due to the references to religious courses offered at the summer camp.[284]

The Court noted that the school district could have prohibited all summer camps and similar activities from distributing brochures, but it could not discriminate among summer camps once it opened up the forum to summer camps. The Court held that if an organization proposes to advertise an otherwise permissible type of extracurricular event, it must be allowed to do so, even if the event is cast from a particular religious viewpoint.[285] The Court stated:

> "Thus, for example, we believe the district's policy could validly exclude a 'religious tract' aimed at converting students to a particular belief, because the school's forum was never opened for pure discourse. We doubt, however, that the policy could exclude advertisements of the local Passover Seder or a Christmas performance of Handel's Messiah, as these are extracurricular activities that would no doubt be 'of interest' to many school children."[286]

The Court went on to state that the district had created only a limited public forum, and therefore it could still exercise some control over the content of Hills' brochure, to the extent that some of the language in the proposed brochure exceeds the scope of the district's forum. The Court, in essence, stated that to the extent that Mr. Hills' literature attempted to convert students to a particular religious belief, it could be regulated. The Court held that the district is not obligated to distribute material that, in the guise of announcing an event, contains direct exhortations to religious observance.[287] The Court stated:

> "In other words, the district cannot refuse to distribute literature advertising a program with underlying religious content where it distributes quite similar literature for secular summer camps, but it can refuse to distribute literature that itself contains proselytizing language. The difference is subtle, but important."[288]

The Court of Appeals held that the Establishment Clause of the First Amendment did not require the school district to prohibit the distribution of Mr. Hills' brochure. The Court noted that there was little likelihood of the perception of endorsement of religion and that it was even less likely if the school district included a disclaimer.[289]

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[284] Id. at 1048-1053.
[285] Id. at 1052.
[286] Id. at 1052.
[287] Id. at 1053.
[288] Id. at 1053.
[289] Id. at 1053-1056.

The Court of Appeals went on to state that the district had created only a limited public forum, and therefore it could still exercise some control over the content of Hills' brochure, to the extent that some of the language in the proposed brochure exceeds the scope of the district's forum. The Court, in essence, stated that to the extent that Mr. Hills' literature attempted to go beyond simply advertising a program and attempted to convert students to a particular religious belief, it could be regulated. The Court held that the district is not obligated to distribute material that, in the guise of announcing an event, contains direct exhortations to religious observance.

The Court of Appeals in Hills noted that the Hills brochure contained the following language:

> "Did you know that if a child does not come to the knowledge of JESUS CHRIST, and learn the importance of Bible reading by age 12, chances are slim that they ever will in this life? We think it is important to start as young as possible!"[290]

The Court of Appeals in Hills commented on the language in the brochure by stating:

> "This language was promotional not only of the class but of religion, and went beyond a description of the organization's general religious mission to directly exhort the reader to involve children in religious observance. We stated in Prince that the World Changers Club could announce its meetings using the school's facilities but could not in so doing 'pray and proselytize.' … Likewise, the district is not obligated to distribute material that, in the guise of announcing an event, contains direct exhortations to religious observance; this exceeds the purpose of the forum the district created. Exclusion of such material would not be based on viewpoint but on subject matter. In other words, the district cannot refuse to distribute literature advertising a program with underlying religious content where it distributes quite similar literature for secular summer camps, but it can refuse to distribute literature that itself contains proselytizing language. The difference is subtle, but important."[291] [Emphasis added]

[290] Id. at 1052.
[291] Id. at 1052-1053. See also, Merriam-Webster's Collegiate Dictionary (10th Edition) (1999), which defines the word "proselytize" as, "…to induce someone to convert to one's faith …to recruit someone to join one's party, institution or cause …to recruit or convert to a new faith, institution or cause."

CHALLENGES TO SCHOOL CURRICULUM, BOOKS AND INSTRUCTIONAL MATERIALS

A. The Teaching of Evolution

In recent years, a number of religious groups have sought to prohibit the teaching of certain subjects in the public schools, arguing that their religious beliefs were being violated. In Epperson v. Arkansas,[292] the United States Supreme Court struck down an Arkansas statute that prohibited the teaching of evolution in the public schools.

The Legislature in Louisiana subsequently passed the Balanced Treatment for Creation-Science and Evolution-Science in Public Schools Instruction Act.[293] In Edwards v. Aguillard,[294] the United States Supreme Court held that the statute violated the Establishment Clause of the First Amendment. The Louisiana statute prohibited the teaching of the theory of evolution in the public schools unless accompanied by instruction in "creation science." The United States Supreme Court held that the primary purpose of the Louisiana statute was to advance a particular religious belief and, therefore, the statute violated the Establishment Clause of the United States Constitution. The Court noted:

> "In this case, the purpose of the Creationism Act was to restructure the science curriculum to conform with a particular religious viewpoint. Out of many possible science subjects taught in the public schools, the legislature chose to affect the teaching of one scientific theory that historically has been opposed by certain religious sects. As in Epperson, the legislature passed the Act to give preference to those religious groups which have as one of their tenets the creation of humankind by a divine creator . . . Similarly, the Creationism Act is designed either to promote the theory of creation science which embodies a particular religious tenet by requiring that creation science be taught whenever evolution is taught or to prohibit the teaching of a scientific theory disfavored by certain religious sects by forbidding the teaching of evolution when creation science is not also taught. The Establishment Clause, however, forbids alike the preference of a religious doctrine or the prohibition of theory which is deemed antagonistic to a particular dogma. . . . Because the primary purpose of the Creationism Act is to advance a particular religious belief, the Act endorses religion in violation of the First Amendment."[295]

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[292] Epperson v. Arkansas, 393 U.S. 97, 895 S.Ct. 266 (1968).
[293] La.Rev.Stat.Ann. sections 17:286.1-17:286.7 (West 1982).
[294] 482 U.S. 578, 107 S.Ct. 2573, 39 Ed.Law Rep. 958 (1987).
[295] Id. at 2582

In several cases, teachers have attempted to assert a First Amendment right to teach the nonevolutionary theory of creation in the classroom. In Webster v. New Lenox School District No. 122,[296] the Court of Appeals held that a social studies teacher did not have a right to teach the theory of creation. The school district could restrict classroom instruction to the curriculum and direct a teacher to refrain from advocating a particular religious viewpoint. The court held that the teaching of creation science would constitute religious advocacy in violation of the Establishment Clause.

A similar conclusion was reached in a lawsuit brought by a high school biology teacher. He alleged that the school district's requirement that he teach the theory of evolution in his biology class violated the Establishment Clause and his free speech rights.[297] The Court of Appeals rejected the teacher's claim holding that evolution was not a religion, but a biological concept or theory, and therefore, its teaching did not violate the Establishment Clause.[298]

B. Challenges to Textbooks and Instructional Materials

The courts have also rejected allegations that textbooks dealing with secular subjects advance or inhibit religion. In Smith v. Board of School Commissioners,[299] the Court of Appeal stated that these textbooks conveyed:

> ". . . such values as independent thought, tolerance of diverse views, self-respect, maturity, self-reliance, and logical decision-making. This is an entirely appropriate secular effect . . . It is true that the textbooks contain ideas that are consistent with secular humanism; the textbooks also contain ideas consistent with theistic religion. However, as discussed above, mere consistency with religious tenets is insufficient to constitute unconstitutional advancement of religion."[300]

Religious groups have also raised a number of challenges to sex education courses. In Citizens for Parental Rights v. San Mateo County Board of Education,[301] a group of parents challenged the sex education curriculum of the public schools contending that the program was contrary to their religious beliefs. The Court of Appeals held that since students could be excused from any part of the program to which the parents objected, there was no violation of the Establishment Clause or Free Exercise clause of the First Amendment and no violation of the right of privacy of the parents. The Court of Appeals stated:

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[296] 917 F.2d 1004, 63 Ed.Law Rep. 749 (7th Cir. 1990)
[297] Peloza v. Capistrano Unified School District, 37 F.3d 517, 94 Ed.Law Rep. 1159 (9th Cir. 1994).
[298] Id. at 522.
[299] 827 F.2d 684, 41 Ed.Law Rep. 452 (11th Cir. 1987).
[300] Id. at 692.
[301] 51 Cal.App.3d 1, 124 Cal.Rptr. 68 (1975). See, also, Medeiros v. Kiyosaki, 478 p.2d 314 (Hawaii 1970).

> ". . . the parents . . . contend that they have an exclusive constitutional right to teach their children about family life and sexual matters in their own homes, and that such exclusive right would prohibit the teaching of these matters in the schools. No authority is cited in support of this novel proposition, and this court knows of no such constitutional right."[302]

Parents have also challenged other parts of the curriculum as violating their religious beliefs. In Grove v. Mead School District No. 354,[303] parents of a public school student sought court action to remove the book, The Learning Tree by Gordon Parks, from the sophomore English literature curriculum based on the parents' religious objections. The plaintiffs contended that the use of The Learning Tree violated the Establishment Clause and the Free Exercise clause of the First Amendment. The Court of Appeals stated:

> "The free exercise clause recognizes the right of every person to choose among types of religious training and observance, free of state compulsion. . . . To establish a violation of that clause, a litigant must show that challenged state action has a coercive effect that operates against the litigant's practice of his or her religion. . . .
>
> "The burden of Grove's free exercise of religion was minimal. Cassie was assigned an alternate book as soon as she and Grove objected to The Learning Tree. Cassie was given permission to avoid classroom discussions of The Learning Tree. We agree with the district court's findings that no coercion existed.
>
> "The state interest in providing well-rounded public education would be critically impeded by accommodation of Grove's wishes.. . .
>
> "In light of the absence of coercion and the critical threat to public education, we conclude that the school board has not violated the free exercise clause."[304]

The Court of Appeals went on to find no violation of the Establishment Clause.

> "Appellants contend that the use of The Learning Tree in an English literature class has a primary effect of inhibiting their religion, fundamentalist Christianity, and advancing

[302] Citizens v. San Mateo, 51 Cal.App.3d at 32-33.
[303] 753 F.2d 1528, 22 Ed.Law Rep. 1141 (9th Cir. 1985), cert. denied 106 S.Ct. 85.
[304] Id. at 1533-34.

> the religion of secular humanism. The district court concluded that the use of the book was not a religious activity and that it served a secular educational function. . .
>
> "The central theme of the novel is life, especially racism, from the perspective of a teenage boy in a working class black family. Comment on religion is a very minor portion of the book. Its primary effect is secular."[305]

The United States Supreme Court has long recognized that school districts have broad discretion in the management of school affairs and that public education is committed to the control of state and local authorities.[306] Generally, local school boards are permitted to establish and apply their curriculum in such a way as to transmit community values and to make educational decisions based upon their personal, social, political and moral views.[307] However, the power and discretion granted to school boards must be exercised in a manner which complies with the First Amendment. Therefore, school districts may not remove books from high school and junior high school libraries solely because they disagree with the viewpoint of the books, but may remove the books for legitimate pedagogical or educational reasons.[308] The educational unsuitability of the books must be the true reason for a book's exclusion and not just a pretextual expression for exclusion because the board disagrees with the religious or philosophical ideas expressed in the books.[309] It has also been held that it is not in violation of the Establishment Clause when a school allows a Bible to be placed in a school library.[310] The removal of books from the curriculum deemed to be vulgar and sexually explicit has been upheld by the courts.[311] However, where school boards removed from all school libraries books containing descriptions of voodoo spells because they violated the board member's values, concepts of morality and religious beliefs, the court found a violation of the First Amendment.[312]

In Mozert v. Hawkins County Board of Education,[313] the Court of Appeals held that a public school requirement that all students in grades one through eight use a prescribed set of reading textbooks did not violate the Free Exercise clause of the United States Constitution. The parents contended that the required textbooks exposed their children to objectionable ideas. The school district contended that it would place an impermissible burden upon the school district to provide alternative textbooks to the objecting students and asserted that the school district had a compelling interest in the uniformity of reading texts.

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[305] Id. at 1534.
[306] Board of Education Island Trees Union Free School District No. 26 v. Pico, 457 U.S. 853, 102 S.Ct. 2799 (1982).
[307] Ibid.
[308] Ibid. See, also, McCarthy v. Fletcher, 207 Cal.App.3d 130, 254 Cal.Rptr. 714 (1989).
[309] McCarthy at 144.
[310] Roberts v. Madigan, 921 F.2d 1047, 64 Ed.Law Rep. 1038 (10th Cir. 1990).
[311] Virgil v. School Board of Columbia County, 862 F.2d 1517, 50 Ed.Law Rep. 718 (11th Cir. 1989).
[312] Delcarpio v. St. Tammany Parish School Board, 865 F.Supp. 350, 95 Ed.Law Rep. 231 (E.D. La. 1994).
[313] 827 F.2d 1058, 41 Ed.Law. Rep. 473 (6th Cir. 1987).

The Court of Appeals held that mere exposure to objectionable ideas does not constitute a burden on the Free Exercise of a person's religion. The Court of Appeals stated:

> "Being exposed to other students performing these acts might be offensive to the plaintiffs, but it does not constitute the compulsion described in the Supreme Court cases, where the objector was required to affirm or deny a religious belief or engage or refrain from engaging in a practice contrary to sincerely held religious beliefs.
>
> "[G]overnmental actions that merely offend or cast doubt on religious beliefs do not on that account violate free exercise. An actual burden on the profession or exercise of religion is required."[314]

In two Court of Appeals decisions, it was held that the use of the Impressions Reading Series in the school curriculum did not violate the Establishment Clause.

In Fleischfresser v. Directors of School District 200,[315] the court found that the reading series had a secular purpose, did not endorse any religion, and did not foster excessive entanglement of government with religion, and thus, did not violate the Establishment Clause. In addition, the court found no substantial burden on the plaintiffs' free exercise of religion. The reading series served a compelling government purpose of educating children by improving their reading skills and developing imagination and creativity.[316]

In Brown v. Woodland Joint Unified School District,[317] the plaintiffs asserted that there should be a subjective standard for determining whether a challenged practice or curriculum appears to children as endorsing or disapproving of a religion. The Court of Appeals rejected this favoring instead an objective standard.[318] The court held that the challenged selections which involved reading, discussing, or contemplating witches, their behavior, or witchcraft, could not reasonably be viewed as communicating a message of endorsement.

> "The Establishment Clause is not violated because government action happens to coincide or harmonize with the tenets of some or all religions . . .
>
> "We agree with the Seventh Circuit's conclusion. It is not disputed that the author-editors of Impressions drew upon the folklore of diverse cultures for the charms, spells,

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[314] Id. at 1066-68.
[315] Fleischfresser v. Directors of School District 200, 15 F.3d 680, 89 Ed.Law Rep. 429 (7th Cir. 1994).
[316] Ibid.
[317] 27 F.3d 1373 (9th Cir. 1994).
[318] Id. at 1383.

> wizards, and witches used in the challenged selections. McGowan and Smith indicate that the coincidence or resemblance of the figures and myths of folklore to the practitioners and practices of witchcraft does not cause state use of such folklore to endorse witchcraft or to cause students to believe reasonably that they are participating in religious ritual. The Browns thus cannot create a genuine issue of material facts simply by virtue of the coincidental resemblance of the challenged selections to witchcraft ritual.
>
> "The fact that the challenged selections constitute only a minute part of the Impressions curriculum further ensures that an objective observer in the position of an elementary school student would not view them as religious rituals endorsing witchcraft. . . ."[319]

Thus, the court in Brown, ruled that there was no violation of the Establishment Clause by the use of the Impressions series.[320]

In Sedlock v. Baird,[321] the Court of Appeal held that the yoga program established by the Encinitas Union School District did not violate the Establishment Clause of the California Constitution.[322] The Court of Appeal held that the yoga program was a secular program and that the program did not have the primary effect of advancing or inhibiting religion and did not excessively entangle the school district in religion.

In February 2013, the parents of two students in the Encinitas Union School District sued the school district for injunctive and declaratory relief, seeking a court order declaring the yoga program instituted by the school district as a component of its physical education curriculum as a violation of the religious freedom provisions of the California Constitution. The parents sought a court order seeking to prohibit the school district from continuing to implement its yoga program and declare the program unconstitutional.[323]

The court extensively reviewed the factual background of the yoga program instituted by the Encinitas Union School District and noted that the program involved instruction in performing various yoga poses, proper breathing and relaxation. The classes also contained instruction designed to instill various character traits, such as empathy and respect.

When the school district began implementing the program, some parents complained the program was religious. The school district responded by removing any

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[319] Id. at 1381.
[320] Id. at 1395.
[321] 235 Cal.App.4th 874 (2015).
[322] Cal.Const. Article 1, Section 4.
[323] 235 Cal.App.4th 874, 878 (2015).

component of the program considered to be cultural or that could arguably be deemed religious. A tree poster was removed and all Sanskrit language was removed. Postcards from India were removed and the terminology was changed to be more culturally neutral.

The Court of Appeal reviewed the Establishment Clause of the California Constitution, Article 1, Section 4, that states in part, "The Legislature shall make no law respecting an establishment of religion." The California Supreme Court has previously ruled that the protection against the establishment of religion embedded in the California Constitution does not create broader protection than those rights created under the First Amendment of the United States Constitution.[324] The Court of Appeal then utilized the test developed by the United States Supreme Court in Establishment Clause cases.[325]

The parents alleged that the yoga program adopted by the school district advanced the religion of Hinduism. The Court of Appeal relied on the trial court's findings (the trial court reviewed the yoga curriculum and videos of students in yoga classes) and ruled that the program was devoid of any religious, mystical, or spiritual trappings. The Court of Appeal stated:

> "We have carefully reviewed the evidence upon which the trial court made this determination, and agreed that a reasonable observer would view the content of the district's yoga program as being entirely secular. As the trial court described in its statement of decision, the district's yoga classes consist of instruction in performing yoga poses, breathing, and relaxation, combined with lessons on building positive personal character traits, such as respect and empathy. We see nothing in the content of the district's yoga program that would cause a reasonable observer to conclude that the program had the primary effect of either advancing or inhibiting religion."[326]

The Court of Appeal noted that the fact that the yoga program's practices may be consistent with a particular religion's practices does not have the primary effect of advancing religion.[327] The Court of Appeal rejected the parents' argument that yoga itself has religious roots, and therefore, practicing yoga advances religion. The Court of Appeal concluded:

> "While the practice of yoga may be religious in some contexts, yoga classes as taught in the district are, as the trial court determined, 'devoid of any religious, mystical, or spiritual trappings.' Accordingly, we conclude that the trial court properly determined that the district's yoga program

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[324] East Bay Asian Local Development Corp. v. State of California, 24 Cal.4th 693 (2000).
[325] See, Lemon v. Kurtzman, 403 U.S. 602 (1971).
[326] Id. at 889.
[327] Brown v. Woodland Joint Unified School District, 27 F.3d. 1373 (9th Cir. 1994).

> does not constitute an establishment of religion in violation of Article 1, Section 4 of the California Constitution."[328]

In summary, the Court of Appeal held that the Encinitas Union School District was not prohibited from implementing its yoga program.

RELIGIOUS CLOTHING IN THE CLASSROOM

The issue of the wearing of religious garb by teachers in the classroom has not been frequently litigated.[329]

In Cooper v. Eugene School District,[330] the Supreme Court of Oregon held that a state statute prohibiting the wearing of religious garb in the classroom was constitutional. The court upheld the statute as an act by the Legislature to maintain religious neutrality in the public schools and, in essence, to avoid giving children or their parents the impression that the school, through its teacher, endorses or shares the religious commitment of one religious group. The Oregon Supreme Court stated:

> "In excluding teachers whose dress is a constant and inescapable visual reminder of their religious commitment, laws like ORS 342.650 respect and contribute to the child's right to the free exercise and enjoyment of its religious opinions or heritage untroubled by being out of step with those of the teacher."[331]

The Oregon Supreme Court went on to uphold the revocation of the teacher's certificate for violating the Oregon statute.[332]

In U.S. v. Board of Education of the School District of Philadelphia,[333] the Court of Appeals held that a state statute barring public school teachers from wearing religious garb in the classroom did not violate Title VII of the 1964 Civil Rights Act. The court observed that government actions specifically directed at religion and which burden an individual's free exercise of religion can only be sustained if they are narrowly tailored to a compelling state interest.[334] The court upheld the statute here, noting that it banned all

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[328] 235 Cal.App.4th 874, 899 (2015).
[329] See, Goldman v. Weinberger, 475 U.S. 503, 106 S.Ct. 1310 (1986). (Military regulation prohibiting headgear indoors applied to Jewish servicemen's yarmulkes was held to be constitutional); Menorah v. Illinois High School Association, 683 F.2d 1030 (7th Cir. 1982), U.S. cert. denied, 459 U.S. 1156. (Rule forbidding headgear while playing basketball applied to yarmulkes was held to be constitutional); Cooper v. Eugene School District, 723 P.2d 298, 34 Ed.Law Rep. 614 (Or. 1986); U.S. v. Board of Education for the School District of Philadelphia, 911 F.2d 882, 62 Ed.Law Rep. 460 (3d. 1990).
[330] 723 P.2d 298 (Or. 1986).
[331] Id. at 310.
[332] Id. at 381.
[333] 911 F.2d 882, 62 Ed.Law Rep. 460 (3d Cir. 1990); 42 U.S.C. Section 2000e et seq.
[334] Id. at 889.

religious attire and was enforced by the Commonwealth of Pennsylvania in a nondiscriminatory manner. The Court of Appeals stated:

> "We therefore accept that the Commonwealth regards the wearing of religious attire by teachers while teaching as a significant threat to the maintenance of religious neutrality in the public school system, and accordingly conclude that it would impose an undue hardship to require the Commonwealth to accommodate Ms. Reardon and others similarly situated."[335]

USE OF CHURCH FACILITIES BY PUBLIC SCHOOLS

The use of church facilities for public school classes or other activities is a controversial one. As of this date, there has been only one federal appellate decision ruling on this issue.[336]

In Lemke v. Black,[337] the federal district court enjoined a school district from scheduling a high school graduation ceremony in a Roman Catholic church. The court found that a graduation ceremony is a school function, even though attendance is voluntary and students organize much of the ceremony. The court stated:

> "The decision to hold a public school ceremony in a Catholic Church with knowledge that some prospective participants could not attend without violating their consciences cannot be allowed without a showing that there is an overriding secular need to use those particular facilities."[338]

The court found that religious polarization would increase as a result of holding the graduation in a church and might cause political divisiveness along sectarian lines. For these reasons, the federal district court found irreparable harm to the constitutional rights of prospective graduates and issued the injunction.[339]

In Spacco v. Bridgewater School Department,[340] the federal district court issued a preliminary injunction enjoining a school district from leasing a facility at a Roman Catholic church that was also used to conduct church business. The school district had leased space to hold public school classes at the St. Thomas Sequoia Parish Center.

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[335] Id. at 894.
[336] Doe v. Elmbrook School District, 687 F.3d 840, 282 Ed.Law Rep. 829 (7th Cir. 2012). See, also, State v. Nebraska State Board of Education, 195 N.W.2d 161 (Neb. 1972); Brown v. Heller, 273 N.Y.S.2d 713 (1966); Fisher v. Clackamas County School District, 12, 13 Or.App. 56, 507 P.2d 839 (Or. 1973); Lemke v. Black, 376 F.Supp. 87 (E.D.Wis. 1974); Spacco v. Bridgewater School Department, 722 F.Supp. 834, 56 Ed.Law Rep. 1149 (D.Mass. 1989).
[337] 376 F.Supp. 87 (E.D. Wis. 1974).
[338] Id. at 89.
[339] Id. at 90.
[340] 722 F.Supp. 834, 56 Ed.Law Rep. 1149 (D.Mass. 1989).

The lease required that the school district not use the rented facilities in any manner which was inconsistent with the teachings of the Roman Catholic church, required the school district to rely upon and defer to the teaching authority of the Roman Catholic Archbishop of Boston in this regard, and provided that if any provisions of the lease were continuously violated that the school district might be evicted from the Parish Center on 14 days' notice. The lease also provided that if the requirement that the school district's use of the facility conform to the teachings of the Catholic Church was declared invalid, the lease would automatically terminate. In addition, the public school students were regularly exposed to religious symbols in the course of their public school enrollment and to a parish priest, who periodically greeted them.

The court held that the plaintiffs were likely to prevail on their claim that the Establishment Clause was violated for two reasons. First, the lease and use of the Parish Center had a primary effect of endorsing the Roman Catholic religion because the school district's conduct concerning the lease conveyed the impermissible message that Roman Catholics are preferred and other individuals are disfavored. Second, the lease involved the impermissible delegation or sharing of the school district's responsibility for the public school curriculum with the Roman Catholic Church, and thus excessively entangled church and state.[341]

Thus, it appears that the courts will look at the context in which church facilities are used by school districts to determine whether the Establishment Clause has been violated. Where a church facility is separate and apart from other church facilities and it has no physical features which distinguish it as a religious facility, it may be possible for a school district to lease such facilities. However, where the facility is closely connected with a church and conveys a message of endorsement, an Establishment Clause violation will be found.

The most recent appellate case illustrates this point. In Doe v. Elmbrook School District,[342] the Seventh Circuit Court of Appeals held that a school district in Wisconsin violated the Establishment Clause of the First Amendment when it held a high school graduation at a Christian church rented by the district for the occasion.[343] The Court of Appeals did not hold that school districts could never use a church facility for a graduation or other activity but, that, in this case, where there were numerous religious symbols displayed as well as religious literature, an impermissible message of endorsement was conveyed which rendered the use unconstitutional.[344]

The Elmbrook School District held their high school graduation ceremonies for two of their high schools in the main sanctuary of Elmbrook Church, a local Christian evangelical and non-denominational religious institution. The school district practice began in 2000 and continued through 2009.[345]

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[341] Id. at 835.
[342] 687 F.3d 840 (7th Cir. 2012).
[343] While the decisions of the Seventh Circuit are not binding in California, the reasoning of the court might be persuasive to federal and state courts in California.
[344] Id. at 843-44.
[345] Id. at 844.

The school district indicated that it moved the graduation ceremonies to the church after complaints that the high school gymnasium was too hot, cramped and uncomfortable. The church offered a better alternative with more comfortable seats and ample free parking.[346]

The Court of Appeals described the atmosphere of the church as emphatically Christian. Crosses and other religious symbols adorned the church grounds and the exterior of the church building. The court noted that there was a large cross on the church roof and to reach the sanctuary, visitors must pass through the church lobby which contain tables and stations filled with evangelical literature, much of which addresses children and teens. The church facilities also included religious banners, symbols and posters that decorate the walls. During some of the graduation ceremonies, church members manned the information booths that contained religious literature and during one graduation ceremony, church members passed out religious literature in the lobby.[347]

The Court of Appeals noted that the graduation ceremonies took place on the dais at the front of the sanctuary, where school officials and students with roles in the ceremony are seated. A large Latin cross, fixed to the wall, hung over the dais and dominated the proceedings according to the court. The Church refused to cover the cross during graduation ceremonies, but did agree to remove any nonpermanent religious symbols from the dais. During the ceremonies, graduating seniors and guests, sat in pews and Bibles and hymnal books remained in the pews.[348]

In 2001, several parents began asking the school district to stop holding graduation ceremonies at the Church because the parent, a non-Christian, did not want her child exposed to the Church's teachings. The parents filed an action in the United States District Court and the district court ruled in favor of the school district. A panel of the Seventh Circuit Court of Appeals affirmed the district court's decision. However, on rehearing en banc, the Court of Appeals reversed, found a violation of the Establishment Clause of the First Amendment and remanded the matter back to the district court.[349]

The Court of Appeals held that conducting a public school graduation ceremony in a church in which information booths staffed by members of the church contain religious literature and banners with appeals for children to join the church runs afoul of the First Amendment's Establishment Clause.[350] The court stated:

> "In this case, high school students and their younger siblings were exposed to graduation ceremonies that put spiritual capstone on an otherwise-secular education. Literally and figuratively towering over the graduation proceedings in the church's sanctuary space was a 15 to 20 foot tall Latin cross, the

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[346] Id. at 844.
[347] Id. at 845-46.
[348] Id. at 846-47.
[349] Id. at 848-49.
[350] Id. at 851.

preeminent symbol of Christianity."[351]

The Court of Appeals noted that in choosing the location, "…the sheer religiosity of the space created a likelihood that high school students and the younger siblings would perceive a link between church and state."[352] The court was concerned about the likelihood that high school students and their younger siblings would perceive a message of endorsement by the school district of the church's beliefs and teachings.

In addition to impermissibly endorsing religion, the Court of Appeals found the school district's decision to use Elmbrook Church for graduations was religiously coercive. The court noted that when the power, prestige and financial support of a school district is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain.[353] The court stated:

> "Once the school district creates a captive audience, the coercive potential of endorsement can operate. When a student who holds minority (or no) religious beliefs observes classmates at a graduation event taking advantage of the Elmbrook Church's offerings or meditating on its symbols (or posing for pictures in front of them) or speaking with its staff members, the law of imitation operates. . . .and may create subtle pressure to honor the day in a similar manner. . . .
>
> "In sum, if constitutional doctrine teaches that a school cannot create a pervasively religious environment in the classroom…it appears overly formalistic to allow a school to engage in identical practices when it acts through a short-term lessee…The same risk that children in particular will perceive the state as endorsing a set of religious beliefs is present both when exposure to a pervasively religious environment occurs in the classroom and when government summons students to an offsite location for important ceremonial events. . . .
>
> "We conclude that the practice of holding high school graduation ceremonies in the Elmbrook Church sanctuary conveys an impermissible message of endorsement. Under the circumstances here, the message of endorsement carried an impermissible aspect of coercion, and the practice has had the unfortunate side effect of fostering the very divisiveness that the Establishment Clause has designed to prevent."[354]

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[351] Id. at 852.
[352] Id. at 853.
[353] Id. at 854.
[354] Id. at 855-56.

The Court of Appeals concluded that the school district's practice of using the Elmbrook Church for graduation ceremonies was unconstitutional under the Establishment Clause of the First Amendment and remanded the matter back to the district court for further proceedings.[355]

School districts should use caution when renting facilities owned by religious institutions for school activities such as graduations. It may be permissible to use church facilities that are not pervasively religious (e.g. a social hall without any religious symbols) under some circumstances.

THE FREE EXERCISE OF RELIGION

A. Introduction

The free exercise clause of the First Amendment provides that Congress shall make no law prohibiting the free exercise of religion.[356] With respect to the free exercise clause of the First Amendment, the United States Supreme Court test for infringement requires Government coercion of actual religious practices. In School District of Abington Township v. Schempp,[357] the United States Supreme Court stated:

> "Hence it is necessary in a free exercise case for one to show the coercive effect . . . against him in the practice of his religion. The distinction between the two clauses is apparent – a violation of the free exercise clause is predicated on coercion, while the establishment clause violation need not be so predicated."[358]

B. Unemployment Benefits

In Sherbert v. Verner,[359] the United States Supreme Court held that the state of South Carolina did not show a compelling state interest when it denied unemployment benefits to an individual who refused to work on Saturday for religious reasons. The individual had been terminated by her South Carolina employer because she would not work on Saturday. The South Carolina Unemployment Compensation Act stated that to be eligible for benefits, a claimant must be able to work and available for work, and that a claimant is ineligible for benefits if he has failed, without good cause, to accept available suitable work when offered.

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[355] Id. at 856.
[356] United States Constitution, First Amendment.
[357] 374 U.S. 203 (1963).
[358] Id. at 222-23.
[359] 374 U.S. 398, 399, 83 S.Ct. 1790, 1791 (1963).

The United States Supreme Court noted that the Free Exercise clause prohibits government regulation of religious beliefs.[360] It also prohibits government from compelling people to affirm a belief they find repugnant.[361] It prohibits discrimination against individuals or groups because they hold religious views abhorrent to the local authorities,[362] and it prohibits the use of the taxing power to inhibit any religious view.[363] However, where there is a substantial threat to public safety, peace or order, government regulation has been upheld despite claims of violation of the Free Exercise clause.[364]

In Sherbert, the Court held that in order for the South Carolina statute to be constitutional it must: 1) Pose no infringement by the state on the plaintiff's constitutional rights of free exercise of religion; or 2) Only incidentally burden the free exercise of the plaintiff's religion and it must be justified by a compelling state interest within the state's constitutional power to regulate.[365] Here, the Court held there was not a sufficient compelling state interest.

In Thomas v. Review Board,[366] the United States Supreme Court held that the State of Indiana could not deny unemployment benefits to an individual who refused a transfer to a factory which made parts for military tanks due to his religious beliefs as a Jehovah's Witness. The Court held that the State of Indiana had failed to show that it had engaged in the least restrictive means of achieving a compelling state interest.[367] The Court stated, "Here, as in Sherbert, the employee was put to a choice between fidelity to religious belief or cessation of work; the coercive impact on Thomas is indistinguishable from Sherbert . . ."[368]

In Employment Division v. Smith,[369] the United States Supreme Court held that a state did not violate the Free Exercise Clause of the First Amendment when it refused unemployment benefits to Native Americans fired from their employment as drug rehabilitation counselors for smoking peyote in religious ceremonies. The Supreme Court refused to apply the compelling state interest test to determine the constitutionality of the state policy.

C. Compulsory School Attendance

In Wisconsin v. Yoder,[370] the United States Supreme Court held that a compulsory school attendance law, while neutral on its face, violated the free exercise rights of members of the Amish religion, whose religious beliefs compelled them to

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[360] See, Cantwell v. Connecticut, 310 U.S. 296, 303, 60 S.Ct. 900 (1940).
[361] Torcaso v. Watkins, 367 U.S. 488, 81 S.Ct. 1680 (1961).
[362] Fawler v. Rhode Island, 345 U.S. 67, 73 S.Ct. 5261 (1953).
[363] Merdock v. Pennsylvania, 319 U.S. 105, 635 S.Ct. 80 (1943); Fallett v. McCormick, 321 U.S. 573, 64 S.Ct. 717 (1944).
[364] See, Reynolds v. United States, 98 U.S. 145, 25 L.Ed. 244 (1878) (banning polygamy); Prince v. Massachusetts, 321 U.S. 158, 64 S.Ct. 438 (1944) (banning child labor).
[365] Id. at 1793.
[366] 450 U.S. 707, 101 S.Ct. 1425 (1981).
[367] Ibid.
[368] Id. at 1431-1432.
[369] 494 U.S. 872 (1990).
[370] 406 U.S. 205, 92 S.Ct. 1526 (1972).

refuse to send their children to public or private school after they had graduated from the eighth grade. The members of the Amish religion believed that high school attendance was contrary to the Amish religion and way of life, and that high school attendance would endanger their own salvation and that of their children. The Court found that the law as applied to the Amish would substantially interfere with the practice of a legitimate religious belief and that there must be a state interest of sufficient magnitude to override the interests of the Amish claiming protection under the Free Exercise Clause of the First Amendment. The Court stated:

> "The essence of all that has been said and written on this subject is that only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion. We can accept it is settled, therefore, that, however strong the State's interest in universal compulsory education, it is by no means absolute to the exclusion or subordination of all other interests."[371]

D. Compulsory Use of School Textbooks

In Mozert v. Hawkins County Board of Education,[372] the Court of Appeals refused to require a school district to modify or change a reading series used in their elementary schools even though it conflicted with the fundamental Christian beliefs of the plaintiffs. The court held that there was no compulsion to do an act that violated the plaintiffs' religious convictions. The court held that merely being exposed to ideas contrary to plaintiffs' religious views did not require the students to affirm or deny a religious belief and therefore, did not place an unconstitutional burden on the students' free exercise of religion.[373]

E. Pledge of Allegiance and Patriotic Songs

In Palmer v. Board of Education,[374] plaintiff was a public school teacher who objected to participating in the Pledge of Allegiance, the singing of patriotic songs, and the celebration of certain national holidays as violating her religious beliefs. Efforts were made by the school district to accommodate plaintiff's religious beliefs at a particular school and elsewhere, but could not be reasonably accomplished.[375] The court framed the issue as to whether a public school teacher is free to disregard the prescribed curriculum concerning patriotic matters, when to conform to the curriculum would conflict with her religious principles. The court stated:

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[371] Id. at 214.
[372] 827 F.2d 1058 41 Ed.Law Rep. 473 (6th Cir. 1987).
[373] Id. at 1065.
[374] 603 F.2d 1271 (7th Cir. 1979). The court in Palmer distinguished Russo v. Central School District No. 1, 469 F.2d. 623 (2nd Cir. 1972), in which the court struck down the discharge of a probationary art teacher for refusing to participate in the Pledge of Allegiance. The court in Palmer noted that the teacher did not refuse to perform any of her other duties.
[375] Id. at 1272.

> "Plaintiff in seeking to conduct herself in accordance with her religious beliefs neglects to consider the impact on her students who are not members of her faith. Because of her religious beliefs, plaintiff would deprive her students of an elementary knowledge and appreciation of our national heritage. She considers it to be promoting idolatry, it was explained during oral argument, to teach, for instance, about President Lincoln and why we observe his birthday. However, it would apparently not offend her religious views to teach about some of our past leaders less proudly regarded. There would only be provided a distorted and unbalanced view of our country's history. Parents have a vital interest in what their children are taught. Their representatives have in general prescribed a curriculum. There is a compelling state interest in the choice and adherence to a suitable curriculum for the benefit of our young citizens and society. It cannot be left to individual teachers to teach what they please. Plaintiff's right to her own religious views and practices remains unfettered, but she has no constitutional right to require others to submit to her views and to forego a portion of their education they would otherwise be entitled to enjoy. . . ."[376]

F. Discussion of Personal Religious Beliefs

In Peloza v. Capistrano Unified School District,[377] the plaintiff alleged that the school district violated his free speech rights and free exercise of religion by ordering him to refrain from discussing his religious beliefs with students during instructional time, and telling any students who attempted to initiate such conversations with him to consult their parents or clergy. The Court of Appeals stated:

> "While at the high school, whether he is in the classroom or outside of it during contract time, Peloza is not just any ordinary citizen. He is a teacher. He is one of those especially respected persons chosen to teach in the high school's classroom. He is clothed with the mantle of one who imparts knowledge and wisdom. His expressions of opinion are all the more believable because he is a teacher. The likelihood of high school students equating his views with those of the school is substantial. To permit him to discuss his religious beliefs with students during school time on school grounds would violate the Establishment

[376] Id. at 1274.
[377] 37 F.3d. 517, 94 Ed.Law Rep. 517 (9th Cir. 1994).

> Clause of the First Amendment. Such speech would not have a secular purpose, would have the primary effect of advancing religion, and would entangle the school with religion. In sum, it would flunk all three parts of the test articulated in Lemon v. Kurtzman, (citation omitted). . . ."[378]

G. Animal Sacrifice

In Church of the Lukumi Babalu Aye, Inc. v. Hialeah,[379] the United States Supreme Court examined a city ordinance which banned animal sacrifice by prohibiting the unnecessary or cruel killing of an animal. The Court found the ordinance was not a rule of general application nor was it neutral. Therefore, it must meet the compelling interest test -- it must be justified by a compelling government interest and must be narrowly tailored to advance that interest. The Court found that the ordinance was directed toward the suppression of one religious sect's practice of animal sacrifice and was not narrowly tailored to accomplish a compelling governmental interest, and therefore, the ordinance violated the free exercise clause of the First Amendment.[380]

H. Federal Legislation

In response, Congress enacted the Religious Freedom Restoration Act of 1993.[381] The Act was declared unconstitutional by the United Sates Supreme Court in City of Boerne v. Flores.[382] The Court held that Congress exceeded its power to legislate and violated the traditional separation of powers between the legislative and judicial boundaries of government.[383] The status and precedential value of cases interpreting the Religious Freedom Restoration Act are now uncertain. Congress has not enacted new legislation on this subject.

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[378] Id. at 522.
[379] 113 S.Ct. 22 17 (1993).
[380] Ibid. See, also, Denooyer v. Merimelli, 193 U.S.App. Lexus 30084 (6th Cir. 1993) (in an unpublished decision, the court upheld a school's refusal to allow a student to show her classic video tape of the student singing a religious proselytizing song in a church service); Cheema v. Thompson, 194 U.S. App. Lexus, 24 160 (9th Cir. 1994) (school district failed to accommodate religious beliefs under the Religious Freedom Restoration Act of seeking children who wore ceremonial knives ("kirpans") to school).
[381] 42 U.S.C. Section 2000bb et seq.
[382] 117 S.Ct. 2157, 521 U.S. 507 (1997).
[383] Ibid.