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THE UNIVERSITY OF OKLAHOMA

COLLEGE OF EDUCATION

FINE ARTS EDUCATION AND RELIGION: AN ANALYSIS OF PRIMARY SOURCES OF LAW FOR ESTABLISHMENT CLAUSE JURISPRUDENCE AND ITS IMPLICATIONS FOR PRACTICE

A Dissertation

SUBMITTED TO THE GRADUATE FACULTY

in partial fulfillment of the requirements for the

degree of

Doctor of Education

By

Sheron R. Dewberry

Norman, Oklahoma

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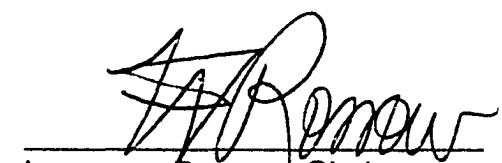
A Dissertation APPROVED

FOR THE DEPARTMENT OF EDUCATIONAL

LEADERSHIP AND POLICY STUDIES

BY



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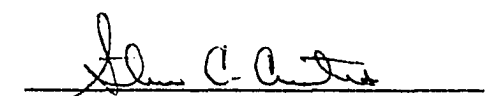

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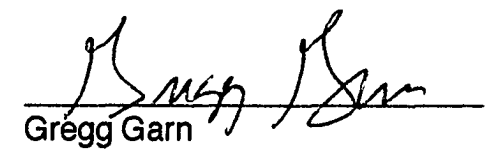

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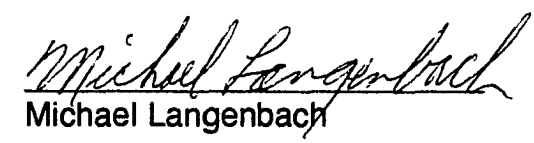

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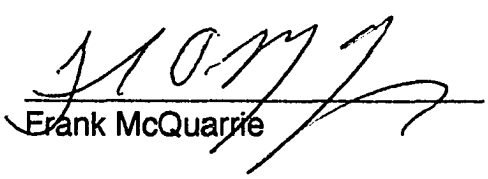

Frank McQuarrie

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ABSTRACT

The purpose of this study was to present a legal analysis of the past, current, and possible future direction of the courts and administrative agencies on church/state issues related to Fine Arts Education.

The study employed the techniques of legal research as a means to seek perspective on the interpretation of Establishment Clause jurisprudence as it pertains to Fine Arts curriculum. The scope of the study included cases pertaining to Fine Arts Education decided by appellate and district courts between 1980 and 2002. The study also included legislation from three states that pertained to the use of religious materials and content in public schools.

A pattern of constitutionally acceptable and unacceptable practices emerged from the analysis of case law and legislation. A pattern of use regarding particular tests of constitutionality was also discovered. The tests of constitutionality provided the basis for the construction of a Framework for the use of religious materials in Fine Arts Education. The pattern of practices provided the basis for the creation of a Model of Appropriate Practice for Fine Arts educators.

CHAPTER I

INTRODUCTION

Background and Rationale

The study of music, drama, and art in the public schools often involves the performance and re-creation of works from different periods in history. It is commonplace for a Fine Arts curriculum to include objectives which encourage students to become exposed to different artistic styles and genres. It is equally common for style periods in history to include material which is religious in origin.

> That the religions and the arts are closely associated is evidenced by the architecture, paintings, drawings, sculptures, the many forms of liturgical music, costumes, symbolic artifacts, floor and wall coverings, landscaping, illuminated manuscripts, sacred literature,or dance that are part of many religious occasions and places.[1]

However, the inclusion of religious subject matter in the curriculum has raised some constitutional questions. Issues center around the ongoing debate as to whether the inclusion of religious material can be allowed in public schools without violating the Establishment Clause of the Constitution. Of equal concern is the possible negative effect on the quality of curriculum that might result from the complete elimination of sectarian themes. The complexities involved in interpreting the appropriateness of curriculum and practices are exacerbated by an accelerating judicial and legislative change in constitutional analysis of the free exercise and establishment clauses.

> From legislative topical concerns, such as teaching creationism and moments of silence, to student expression concerns, such as religious clubs and distribution of religious literature, courts

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[1] Iris M. Yob, *Religious Music and Multicultural Education,* 2 PHILOSOPHY OF MUSIC EDUCATION REVIEW. 69(1995).

> have found that a "one size fits all" legal standard simply does not work in dealing with religious issues in the public sector.[2]

This constitutional predicament is rooted in the deep seated religious traditions of the United States. Religion is an integral part of the country's history. This is evidenced when one examines literary documents and social institutions.

> Although it was founded to be a secular, democratic, and pluralistic nation--not a religious state--the United States has a traditional link to Christianity. The founders believed that civic virtue rested in large part on religion, specifically on Christian values. But they believed equally in the people's right to worship as they please, free from the restraints of state sponsored religion.[3]

The Eighth Circuit Court of Appeals acknowledged in *Florey v. Sioux Falls* that the Supreme Court of the United States has frequently recognized the close relationship between religion and American history and culture.[4] The eighth circuit placed particular emphasis on the lower court's discussion of student performance of religious works:

> to allow students . . . not to perform [religious art, literature, and music when] such works have developed an independent secular and artistic significance would give students a truncated view of our culture.[5]

Authors Piediscalzi and Collie support this view in their text regarding religion in school curriculum. The authors give prominence to the contention that a curriculum which does not include the study of religion is incomplete.[6] The American Choral Directors Association, a fine arts organization dedicated,

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[2] Ralph D. Mawdsley & Charles J. Russo, *Religion in Public Education: Rosenberger Fuels an Ongoing Debate,* 103 Ed. Law. Rep. 13, 13-15 (1995).

[3] Randy Hitz & Paula Butterfield, *When Church meets State,* 181 **AMERICAN SCHOOL BOARD JOURNAL.** 43 (1994).

[4] Florey v. Sioux Falls, 619 F.2d 1311 (1980).

[5] 464 F. Supp. at 916.

[6] **NICHOLAS PIEDISCALZI & WILLIAM E. COLLIE, TEACHING ABOUT RELIGION IN THE PUBLIC SCHOOLS** 13-21 (1977).

in part, to music education, issued a statement emphasizing the educational and historic value of choral music which is sacred in origin:

> Such an exclusion [of choral music] has as its parallel the study of art with any paintings related to the various religions of the world, the study of literature without mention of the Bible, or the study of architecture without reference to the great temples and cathedrals of the world.[7]

Public school choir and orchestra programs have traditionally performed music with religious origins and references.[8] The importance of sacred themes in the Fine Arts curriculum is articulated in Justice Jackson's concurring opinion in *McCollum v. Board of Education :*

> Perhaps subjects such as mathematics, physics, or chemistry are, or can be completely secularized. But it would not seem practical to teach either practice or appreciation of the arts if we are to forbid exposure of youth to any religious inferences. Music without sacred music, architecture minus the cathedral, or painting without the scriptural themes would be eccentric and incomplete, even from a secular point of view.[9]

However, scholars such as Robert S. Alley see the use of religious material in schools as a means for certain inclined communities to self-righteously impose religious ritual through the use of a governmental entity.[10]

> What has happened and is happening in dozens of communities respecting religion in public schools must be viewed as a national

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[7] Short Subject, *Music with Sacred Text: Vital to Choral Music and to the Choral Art,* 13 **THE CHORAL JOURNAL.** 3 (1992).

[8] Laurie Goodstein, *Prayer Directive May not Settle All Cases: Many Religious Disputes Fall in Gray Zone,* **WASHINGTON POST,** July 15, 1995, at A01.

[9] McCollum v. Board of Education, 333 U. S. 203, 235 (1948).

[10] **ROBERT S. ALLEY, WITHOUT A PRAYER: RELIGIOUS EXPRESSION IN PUBLIC SCHOOLS** 21(1996).

> story with emerging patterns that have major significance for our constitutional democracy.[11]

The courts have become involved in these community conflicts because of the failure of the political or social system in keeping the debate on religion from affecting education.[12] Legal judgments have had a tremendous impact in recent years in altering practices in education.[13] Court decisions have led to the emergence of educational policies based on school district officials' interpretations of those decisions. Hawley suggests that emerging trends in this arena merit the attention of researchers:

> Studies into policies emanating from court decisions merit the attention of researchers as such investigations may furnish educators with a clearer understanding of the ramifications of such decisions.[14]

Lisa Ness Seidman specifically identified music curriculum as a possible avenue for the establishment of religion based on the religious content of selections.[15] Seidman advocated the complete elimination of religious material from the public school curriculum:

> balancing . . .student performances with representations of all traditions and holidays does not cure them of their constitutional defects. By requiring public schools to eliminate religious activities from their curricula, all students, regardless of what they believe, will be able to participate and learn in an environment free from the subtle pressures that result when church and state are inpermissibly joined.[16]

A further polemic exists between organizations such as the "National Committee for Public Education and Religious Liberty" who stress First

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[11] Id. at 27.

[12] **HANDBOOK OF RESEARCH ON MUSIC TEACHING AND LEARNING** 763 (Richard Colwell ed., Schirmer Books 1992).

[13] *Id.*

[14] *Id.* at 764.

[15] Lisa Ness Seidman, Note, Religious Music in the Public Schools: Music to Establishment Clause Ears?, 65 **GEO. WASH. L. REV.** 466, 470 (1997).

[16] *Id.* at 470.

Amendment safeguards against government-imposed religion; and organizations akin to the "Christian Coalition," who champion the First Amendment's free exercise of religion.[17] The creative and expressive freedom inherent in traditional Fine Arts curricula creates the prospect for a precarious future of continued curricular autonomy when one considers the varying interpretations of what governmental agencies such as the public schools can allow. Fine Arts performances and activities which involve the use of religious material or themes create a potential for problems in maintaining a balance between protecting the free speech rights of students and avoiding establishment clause violations while maintaining an appropriate fine arts curriculum.

> Not every religious expression falls neatly into a category of either speech or worship . . . Religious music or art might be thought of as either speech with a religious theme or worship . . . any analysis of religious speech in the public schools under the first amendment will present some line-drawing problems.[18]

The first amendment of the Constitution was theoretically fashioned to allow the free exercise of religion without the governmental establishment of religion:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .[19]

However, the courts have struggled with judicial questions surrounding religious issues in the public schools for over thirty years. Mawdsley and Russo blame the failure of judicial efforts to create a national public policy on the following components: the nature of the religious activity; the age or

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[17] Andrea Stone, *Jewish Teen Stands Against Utah Choir's Christian Tone,* **USA TODAY,** November 2, 1995, at 4A.

[18] Christina Engstrom Martin, Comment, *Student-Initiated Religious Expression After Mergens and Weisman,* 61 **U. CHI. L.REV.** 1565, 1583 (1994).

[19] **U.S. CONST.** amend. I, section 1.

maturity of those affected; the setting; and the role of public officials in addressing religious activities.[20] For example, in recent cases such as *Lee v. Weisman*,[21] the "traditional" standard of analysis for establishment clause jurisprudence established in *Lemon v. Kurtzman* was replaced.
The "Lemon Test" is an analysis based on determining whether the " primary effect" of a policy or practice is to advance or prohibit religion, or if there is 'excessive entanglement ' with religion on the part of the government . [22] The *Lee v. Weisman* decision was based on "Coercion Analysis" which holds governmental agencies to a standard which prohibits coercing anyone to support or participate in any exercise which would act to establish or promote religion.[23]

This tendency of the courts to utilize various standards of analysis has made the policy making process particularly difficult for public schools. School districts have attempted to combat problems with religion in the curriculum by creating policies or statements of philosophy regarding the use of religious materials and/or themes. For example, in Skokie, a culturally diverse community in Chicago, the school board drafted a policy which addressed the cultural discomfort that certain members of the community felt during the holiday season when music concerts were performed which included works which were religious in origin. The policy directed the avoidance of anything that could be construed as religious celebration during the holidays. The policy served to eliminate any religious music from winter concerts.[24] An Albuquerque, New Mexico school district policy that established guidelines on the separation of

[20] Mawdsley & Russo, *supra* note 1 at 13, 14.
[21] Lee v. Weisman, 505 U.S. 602 (1992).
[22] Lemon v. Kurtzman, 403 U. S. 602 (1971).
[23] *Id.*
[24] Ken Armstrong, *PC on Earth, Good will at School Shows Some so Multicultural; Others Ban Religious Songs,* CHICAGO TRIBUNE, December 23, 1994 , at 1, *available in* WL 6556365.

religion from regular school activity led to the suspension and eventual firing of music teacher, Frank Rotolo. Mr. Rotolo was fired because he presented a holiday program which included musical selections which were primarily religious in content. School officials had earlier instructed Mr. Rotolo to alter his Christmas concert by calling it a "Winter Concert" and to eliminate certain religious selections. Although the teacher did initially comply with these requests, he did not alter the selections further when he was asked to by school officials a day before the concert. School officials proposed disciplinary action against Mr. Rotolo because they believed the program was not "balanced" and did not contain music from other religious and cultural backgrounds.[25]

These conflicts involving religious speech and religious exercise in Fine Arts curricula are an indication of the clash caused by the subtlety in interpreting purpose and intent when compared with perception and effect.

> The religious speech-religious exercise distinction has been criticized on several fronts . . . Religious people might categorize [religious] music or art differently from nonreligious people. For example, a religious student might consider singing religious music a religious exercise, whereas a nonreligious student might consider it speech about religion and not a religious exercise.[26]

Purpose of the Study

The purpose of this study is to present a legal analysis of the past, current, and possible future direction of the courts and administrative agencies on church/state issues related to Fine Arts education. An integral part of this study will be the examination of both the policies and practices regarding the utilization of religious material in public school Fine Arts curricula which have

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[25] Associated Press, *Choir Director Suspended for 'Religious ' Christmas Concert,* ***WASHINGTON TIMES,*** December 28, 1997, at 1.

[26] Martin, *supra* note 8 , at 1583.

led to the advancement of a judicial remedy and/or regulation. During the twenty-two years from 1980 to 2002, the Circuit Courts of Appeal and District Courts decided at least seventeen cases under the Establishment Clause with implications for the Fine Arts. By analyzing the decisions in these cases, this study will address issues affecting Fine Arts programs in the public schools.

Research Questions

There now exists a significant body of jurisprudence specifically pertaining to church/state issues related to Fine Arts education. The questions to be explored in this study are: 1) Can a clear position regarding the constitutionality of Fine Arts Education that include religious content be determined in case law?: 2) What positions are contained in the Primary Sources of Law in the area of religion and Fine Arts Education: 3) What changes in practice may be anticipated in the future, given current judicial interpretations of the Establishment Clause: 4) What general guidelines can be suggested to Fine Arts teachers in order to ensure compliance with the Establishment Clause?

Methodology

The method for this study will be two-fold. First, the study will seek to determine what tests of constitutionality the courts are utilizing when addressing issues related to the Arts. The second part of this thesis examines the constitutionality of utilizing religious materials in varying public school contexts. This examination will be based upon the U. S. Supreme Court analysis of Establishment Clause concerns. Implications for the future use of different tests of constitutionality will be explored.

Significance of the Study

The complexities involved in the interpretation of the Establishment

Clause have caused schools to become caught in the middle of a societal debate regarding the role of religion in American life. As a practical matter, the increasing diversity and complexity of the cultural make-up of communities, have forced educators to become cognizant of the necessity of avoiding religious indoctrination. However, the line between indoctrination and antipathy towards religion can appear to be vague or nonexistent to certain interest groups; such as those groups associated with the "religious right" and the "American Atheists." Hitz and Butterfield have described the resulting tension between respecting other people's religious or secular views and promoting a specific set of religious beliefs as a cornerstone of our democracy.[27] Further complications arise when one considers that religion was practiced through prayer and/or song in the public schools until 1962 when the Supreme Court held school prayer unconstitutional.[28] Despite *Engel v. Vitale*, the study of the arts, until recent times, was based on a general belief that there was an element of "universality" to the material and themes presented in the arts curriculum. The arts were viewed as a representation and reflection of peoples, cultures, and traditions of all lands and styles of all eras, which includes significant religious works.[29]

The philosophical understanding of the arts in a "universal context" has been negatively impacted by the polarization of two factions which have been described by Hitz and Butterfield as the "separationists" and "accommodationists." The separationists emphasize the need to separate church and state, while the accommodationists promote the belief that keeping all references to religion out of school classrooms promotes secular

[27] Hitz & Butterfield, *supra* note 2, at 43.
[28] Engel v. Vitale, 370 U. S. 421 (1962).
[29] *Music with Sacred Text, supra* note 4.

humanism.[30] Separationists would contend that any reference to religion in the Fine Arts curriculum would have the effect, whether intentional or unintentional, of advancing religion. John Hartenstein, a proponent of this view, would argue that the First Amendment of the Constitution can only be upheld if the perspectives of non-Christians are given as much consideration as those of Christians. To this end, he believes that the elimination of all religious expression in the public schools is the only way that government can protect the religious interests of all students.[31]

Accommodationists would argue that the elimination of religious material from the Fine Arts curriculum would violate the rights of students who have such beliefs as well as promote the belief in no religion. Critics such as Cal Thomas blame the growing secularization of our culture as the reason for certain recent attacks on religious expression. Thomas advocates that those with religious sensibilities show their displeasure with the lack of freedom in government schools by placing their children in private schools or teaching them at home until public schools "shape up." [32]

Recent events played out in the the media and the courts reflect the intense controversy regarding religious expression pertaining to areas related to fine arts curriculum.

> Public school choirs and orchestras across the country routinely perform music with religious origins and references. Questions regarding the appropriateness of religious repertoire and the venue of such performances have been raised. [33]

The controversy concerning religious expression in schools has even

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[30] Hitz & Butterfield, *supra* note 2, at 44.

[31] John M. Hartenstein, Comment, *A Christmas Issue: Christian Holiday Celebration in the Public Elementary Schools is an Establishment of Religion*, 80 **CALIF. L. REV.** 981.

[32] Cal Thomas, *Court Gives Students Lesson in Abusing the Constitution*, **PHILADELPHIA DAILY NEWS**, June 22, 1995, at 32.

[33] Goodstein, *supra* note 5.

been addressed in a speech given by former President Clinton:

> I have been advised by the Department of Justice and the Department of Education that the First Amendment permits-- and protects-- a greater degree of religious expression in public schools than many Americans may now understand.[34]

The president indicated that art, music, and other subjects could be considered in regard to their association with aspects of religion. President Clinton further indicated that students have certain rights of expression:

> Students may express their beliefs about religion in the form of homework, artwork, and other written and oral assignments free of discrimination based on the religious content of their submissions . . . .[35]

But one has only to become cognizant of certain incidents to discover that perceptions of permissible religious expression are not as clear cut as the president's comments would seem to suggest. Consider the difficulty that Baltimore, Maryland student, Brian McConnell experienced when he decided to make a cross for his grandmother's grave as an ungraded extra project for his technical education class. School officials became concerned that the assembly of a cross at school would violate the constitutional separation of church and state.[36] Brian was allowed to cut the separate pieces of wood necessary to complete the cross, but was directed to construct the cross at home. The school principal described the teacher's decision to have Brian construct the cross at home as cautious, but justifiable given the unresolved questions in schools regarding separation of church and state.[37]

Those who objected to this incident cited extremism in the interpretation of the First Amendment. One critic facetiously suggested that schools should

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[34] Memorandum on Religious Expressions in Public Schools, 31 WEEKLY COMP. PRES. DOC. JOURNAL.1227 (July 17, 1995).
[35] *Id.* at 1229.
[36] *A Cross In the Classroom?*, BALT. SUM., June 20, 1994, at 6A.
[37] *Id at. 6A.*

have to stop teaching the entire Renaissance/Baroque period and prohibit student trips to the National Gallery in Washington because of the possible exposure to music, architecture, or paintings with religious themes.[38]

Bauchman v. West High School pertained to Rachel Bauchman, a Utah high school student at West High School, who objected to religious music being sung at her high school graduation.[39] She filed a suit in district court claiming the choir director violated her constitutional rights by consistently selecting explicitly religious music for the high school choir's performances. Rachel moved for a temporary restraining order barring the choir from performing two songs of a religious nature at the high school's graduation ceremony. The district court held that Bauchman's constitutional rights were not violated by the inclusion of religious songs in the school's repertoire. The court ruled that such songs do not constitute sung prayers; instead they are part of the school's curriculum and subject to a different standard of review. After the district court denied her request, Rachel appealed to the10th Circuit Court of Appeals. The 10th Circuit Court of Appeals ordered the choir not to sing religious songs at the school's graduation ceremony. Despite the cooperation of school officials with the restraining order, students rebelled and sang one of the banned tunes.

The Fifth Circuit Court of Appeals supported the use of a religious song as a choir theme song in a Texas school while rejecting teacher-led or teacher-supported prayer during extracurricular activities in *Doe v. Duncanville.* The court reversed a lower court's holding against religious music by stating that such a finding would disqualify a majority of choral music and further impose "restriction that would require hostility, not neutrality towards religion."[40]

Doe v. Madison represents the unsuccessful attempt that a parent made

[38] *Id* at 6A.
[39] Bauchman v. West High School, 132 F.3d 542 (10th Cir. 1995).
[40] Doe v. Duncanville Independent School District, 70 F. 3d 402 (5th Cir. 1995).

to change Rexburg, Idaho district's high school graduation policy for student speakers.[41] The graduation policy allowed students who were chosen for their academic abilities to "deliver address, poem, reading, song, musical presentation, prayer or any other pronouncement of their choice."[42] The Ninth Circuit held that due to the students being vested with total control of the content of their pronouncement, rather than school officials, that the policy was neutral and, therefore, did not violate the establishment clause. [43]

Fine Arts curriculum decisions may be affected by *Joki v. Board of Education of Schuylerville Central School District.* A student painting of the crucifixion that was displayed in a New York school auditorium, was found to be in violation of the Establishment Clause. Although the school argued that the painting was surrounded by other nonreligious pictures, the court held that the painting had the primary effect of endorsing religion.[44]

DeNooyer v. Livonia Public Schools involved the student loss of a free speech claim against a Michigan teacher who refused to allow the student to show a videotape of the student singing a Christian song as part of her "Very Important Person of the Week" presentation.[45]

Educational policy makers will be helped by this study because it will offer some clarification to interpretations of a number of perceived problems associated with religion and the Fine Arts curriculum. The information acquired may be used to aid policy-makers in making decisions regarding religion in the curriculum which are acceptable to the pluralistic society existent in schools. As Hitz and Butterfield point out, the public schools, as part of our democratic

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[41] Doe v. Madison School District, 147 F. 3d. 832 (9th Cir. 1998).
[42] *Id.* at 608.
[43] *Id.*
[44] Joki v. Board of Schuylerville Central School District, 745 F. Supp. 823 (N.D. Ny 1990).
[45] DeNooyer v. Livonia Public Schools, 799 F. Supp. 744 (E. D. Mich 1992).

society, must meet the needs of all citizens, regardless of religious belief.[46] The Freedom Forum First Amendment Center seeks to inform those who read their pamphlet regarding religion in the public schools:

> The religious liberty principles of the First Amendment provide the civic framework within which we are able to debate our differences, to understand one another, and to forge school policies that serve the common good in public education.[47]

The study should help to determine whether or not policy makers in the public schools are eliminating religious material from the fine arts curriculum due to legal forces. From this analysis, implications for the future of fine arts curriculum design and the inclusion of religious material in all curriculum areas can be inferred.

Definition of Terms

Accommodationist--Those who believe that the Establishment Clause was designed to only prevent the establishment of a national religion and/or the prevention of one religion to be given prevalence over others.

Appellate Court-- A court of review to determine whether or not the rulings and judgment of the court below upon the case were correct (e.g. Circuit Courts of Appeal).[48]

Defendant--The party responding to the law suit.[49]

Establishment Clause---The first section of the First Amendment of the U. S. Constitution that states: "Congress shall make no law respecting an establishment of religion. . . "[50]

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[46] Hitz & Butterfield, *supra* note 2 , at 44.

[47] THE FREEDOM FORUM FIRST AMENDMENT CENTER AT VANDERBILT UNIVERSITY, A PARENT'S GUIDE TO RELIGION IN THE PUBLIC SCHOOLS 1 (1995).

[48] BARRON'S LAW DICTIONARY 51 (3rd ed. 1991).

[49] *Id.* at 125.

[50] U.S. CONST. amend. I, section 1.

Fine Arts Education ---The study of music, drama, art, dance, and literature or any other discipline related to creative reproduction and expression.

Holding-- Any ruling of the court. . .[51]

Plaintiff--The one who initially brings the suit.[52]

Precedent--A previously decided case which is recognized as authority for the disposition of future cases.[53]

Primary Sources of Law -- Those recorded rules which will be enforced by the state. They may be found in decisions of appellate courts, statutes passed by legislatures, executive decrees, and regulations and rulings of administrative agencies.

Separationist--Those who believe that the Establishment Clause erects a wall of separation between church and state in a manner that prohibits all forms of government support of religion.

Summary Judgment--A judgment rendered by the court in response to a motion by the plaintiff or defendant, who claims that absence of factual dispute of one or more issues eliminates the need to send those issues to the jury.[54]

Scope and Limitations

The scope of this study will include analysis of U.S. Supreme Court, Circuit Court, and District Court decisions in cases that involve the Fine Arts. The U.S. Supreme Court, being the court of last resort in the federal court system, has the final word on federal issues raised in state courts. Because of this distinction, all lower federal and state courts must follow the Supreme Court's decisions interpreting the Constitution. Some of the cases that will be analyzed in this study will be from lower courts and, therefore, not carry the

[51] **BARRON'S**,*supra* note 48 at 219.
[52] *Id.* at 353.
[53] *Id.* at 364.
[54] **BARRON'S**, *supra* note 48 at 473.

binding power outside their jurisdiction that Supreme Court decisions do. However, these cases are significant because of their mandate to follow patterns of interpretation employed by the Supreme Court.

Research Method and Design

This dissertation will employ the techniques of legal research. Legal research employs the practice of citing an authority or authorities to show the impetus for legal decisions, propositions, or arguments.[55] Legal authority in this study will refer to court jurisdiction, state and national legislation, and local agency regulations. It will also be used to denote judicial or legislative precedent.[56] Chapter two will review the historical development of the Establishment Clause. Chapter two will also review literature related to the interpretation of the Establishment Clause jurisprudence, legislation, and regulation in the area of education. Chapter three of this study will further outline the format and procedures of legal research design. Chapter four will analyze cases specific to Fine Arts Education. Chapter five examines future directions of Establishment Clause jurisprudence and presents conclusions from the study.

Summary

Conflicts between school practices and the First Amendment have long been considered one of the most serious issues in education. Legal scholars have espoused that few legal issues provoke more controversy than religious expression in the public schools.[57] Martha McCarthy believes that there are "no signs of diminishing church/state conflicts involving public education."[58]

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[55] **THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION** I. I.3, at 4 (Columbia Law Review Ass'n et al. eds., 17th ed. 2000).
[56] **BARRON'S,** *supra* note 48 at 36.
[57] Martin, *supra* note 8, at 1565.
[58] Martha M. McCarthy, Commentary, *Free Speech Versus Anti-Establishment: Is There a Hierarchy of First Amendment Rights?,* 108 **ED. LAW REP.** 475(1996).

Although this study will focus on the Fine Arts, implications for all curricular areas can be extrapolated.

CHAPTER II

HISTORICAL REVIEW OF LITERATURE PERTAINING TO ESTABLISHMENT CLAUSE

Introduction

The First Amendment and, in particular, the Establishment Clause, has undergone a vigorous amount of "evolutionary" interpretation since its inception as a part of the Bill of Rights in 1789. The purpose of this chapter is to discuss the historical antecedents of Establishment Clause interpretation, philosophies, and jurisprudence. The evolution of Establishment Clause interpretation can be examined in relation to Supreme Court membership, as well as socio-cultural, political and judicial eras of thought and philosophy.

> The Supreme Court's influence is not limited to directly determining what practices are permitted and which are forbidden under the Constitution. . . "Through its pronouncements current conventions about the Constitution take compact shape, decide cases, provide guidance to public officials, and stimulate debate, reaction, and development of further pronouncements."[59]

Colonial Origins of the American Constitution

The political documents derived from the establishment of the colonies could be attributed to providing the impetus for American constitutionalism.[60] Constitutional historian, Donald Lutz has identified two constitutional traditions that are a part of the documents that preceded the American constitution:

> The first tradition can be found in the charters, letters-patent, and instructions for the colonists written in England. . . . The second tradition is found in the covenants, compacts, agree-

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[59] Eric W. Treene, *Article & Essays: Religion, The Public Square, and the Presidency*, 24 **HARV. J. L. & PUB. POL'Y** 573, 575-76 n.14 (2001).

[60] **COLONIAL ORIGINS OF THE AMERICAN CONSTITUTION** xx(Donald S. Lutz ed., Liberty Fund Inc. 1998).

ments, ordinances, codes, and oaths written by the colonists themselves.[61]

Some of the essential elements established in early documents provided the foundation of the document that has served to define government in the United States for over two-hundred years.

Donald Lutz identified four distinct foundation elements that exist exclusively, or in part, in colonial documents that affected the composition of the American constitution: (1) the founding or creation of a people; (2) the founding or creation of a government; (3) the self-definition of the people in terms of shared values and goals so that the founded people may cross generations; and (4) the specification of a form of government through the creation of institutions for collective decision making.[62]

One of the political/historical theories related to the composition of American constitutional documents is espoused by Eric Vogelin and became a focus of research for Willmoore Kendall and George Carey. The premise advocated is nothing less than the belief that there are shared symbols which dominate the political history of any people who seek to form a collective. Vogelin identifies the basic symbolizations of Western civilization as variants of the original symbolization of the Judeo-Christian religious tradition.[63] Kendall and Carey expounded upon this point of view by conducting research on a sample of colonial documents to determine the frequency of existence regarding Judeo-Christian elements. Kendall and Carey concluded that there are a number of basic religious elements that exist in all of the early colonial documents studied and that these symbols are found in American political documents written 150 years later, after the colonial era, but in a differentiated

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[61] *Id.* at XXI.
[62] *Id.* at XXIII.
[63] *Id.* at XVI.

form.[64]

The establishment of religion is a common theme found in colonial documents. This is likely due, in a large part, to the fact that many of the early colonies were established as a means for their members to escape restrictions placed on the practice of their own religious beliefs. These beliefs were often in opposition to the state endorsed religions in their country of origin. The "Watertown Covenant of 1630," the first collective document made by the Watertown colonists, is an example of the establishment of religion in the colony by establishing a church-state. The following excerpt illustrates this concept:

> We whose Names are hereto subscribed, having through God's mercy escaped out of the Pollutions of the World, and been taken into the Society of his People, with all Thankfulness do hereby both with Heart and Hand ask-knowledge, That his Gracious Goodness, and Fatherly Care, toward us: And for further and more full Declaration thereof, to the present and future Ages, have undertaken (for the promoting of his Glory and the Churches Good, and the Honour of our Blessed Jesus, in our more full and free subjecting of our selves and ours, under his Gracious Government, in the Practice of, and Obedience unto all his holy Ordinances and Orders, which he hath pleased to prescribe and impose upon us) a long and hazardous Voyage from East to West, From Old England in Europe, to New England in America that we may walk before him, and serve him, without Fear in Holiness and Righteousness, all the days of our lives . . . [65]

Perhaps one of the great ironies of constitutional history in America is that many of the very colonists who had experienced religious persecution proceeded to create constitutions that placed restrictions upon religious expression that rivaled any of the persecution they had experienced in their native land. Consider, for example, the penalty set forth in Connecticut in 1642 for failure to worship God:

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[64] *Id.*

[65] *Id.* at 38.

> If any man after legall conviction, shall have or worship any other God but the Lord God, he shall be put to death. Deu. 13;6, and 17.2 Ex. [66]

The Virginia Colony levied fines against those who did not attend church:

> 2. That whosoever shall absent himselfe from divine service any Sunday without an allowable excuse shall forfeite a pound of tobacco, and he that absenteth himselfe a month shall forfeite 50 lb. of tobacco.[67]

The restrictions placed upon people of different faiths other than the established one of the colony were subjected to censure, banishment, and death. The Massachusetts colony constitution of 1647 provided for strict treatment of persons of at least two different faiths:

> Ana-Baptists. Forasmuch as experience hath plentifully & often proved that since the first arising of the Ana-baptists about a hundred years past they have been the Incendiaries of Common-Wealths & the Infectors of persons in main matters of Religion, & the Troublers of Churches in most places where they have been, & that they who have held the baptizing of Infants unlawful, have usually held other errors or heresies together therewith . . . It is therefore ordered by this Court & Authoritie thereof, that if any person or persons within this shall either openly condemn or oppose the baptizing of Infants. . . and shall appear to the Court wilfully and obstinately to continue therein, after due means of conviction, everie such person or persons shall be sentenced to Banishment . . .[68]

> Jesuits. This court taking into consideration the great wars, combustions and divisions which are this day in Europe . . . That no Jesuit, or spiritual or ecclesiastical person ordained by authoritie of the Pope, or Sea of Rome shall henceforth at any time repair to, or come within this jurisdiction: and if any such person shall give just suspicion that he is one of such Societie or Order . . . . he shall be committed to prison, or . . . tryed and proceeded

[66] *Id.* at 229.
[67] *Id.* at 339, 340.
[68] *Id.* at 100, 101.

> with Banishment . . . and if any person so banished shall be taken the second time within this jurisdiction upon lawfull tryall and conviction he shall be put to death.[69]

The Pennsylvania colony was founded by William Penn, a man who was purported to be committed to religious liberty. And yet, although persons of any religion were allowed to "live peaceably and quietly under the civil government," a professed belief in Jesus Christ was a prerequisite for voting or holding any public office.[70]

It was in this environment of established churches and religious censure that the founders worked to construct a document that created a government each colony would accept.

> The problem to be considered and solved when the First Amendment was proposed was not one of hazy or comparative insignificance, but was one of blunt and stark reality, which had perplexed and plagued the nations of Western Civilization for 14 centuries, and during that long period, the union of Church and State . . . had produced neither peace on earth, nor good will to man.[71]

The Constitutional Convention of 1789

When the Constitution and Bill of Rights was ratified in 1789, the "state church" was a part of the constitutions of many of the original colonies. Official state religions and churches supported by state revenues were commonplace.[72]

> We all learned in elementary school that the first settlers came to America to escape religious persecution in Europe and to practice their religion freely in a new land. What we often forget, however, is that as the colonies developed during the seventeenth century, they too became intolerant toward "minority"religions: many passed anti-catholic laws or imposed ecclesiastical views

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[69] *Id.* at 118, 119.

[70] *Id.* at 288.

[71] Martha Mc Carthy, *Article, Religion and Education: Whither the Establishment Clause?*, **75 IND.L.J.** 123, 123(2000).

[72] Jay J. Butler, Education and the Religion Clauses: The Rehnquist Court, 1986-1991 (1993)(unpublished Ph.D. dissertation, University of Colorado (Denver)) (on file with the University of Colorado Library).

> on their citizens. Prior to the adoption of the Constitution, only two states (Maryland and Rhode Island) provided full religious freedoms--the remaining eleven had some restrictive laws. Six states had established state religions. Puritanism was the official faith of the Massachusetts Bay Colony, for instance, while Virginia established itself under the Church of England.[73]

James Madison, often called the "father" or "master builder" of the constitution was the leading proponent of the concept of freedom of religion. Alexander and Alexander identify Madison's "Memorial and Remonstrance Against Religious Assessments" as one of the basic antecedents to the First Amendment.[74] Madison was aligned with such diverse religious groups as Baptists and Jews who were experiencing religious persecution in his native state of Virginia, where the Church of England was established as the state church. Although Madison was not an original supporter of a "bill of rights," adversaries to the Constitution, such as Patrick Henry, caused him to become the primary drafter. The Bill of Rights basically guaranteed that the Constitution would be ratified.

One of Madison's first drafts of the Bill of Rights included the following section on religion:

> The Civil Rights of none shall be abridged on the account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext infringed.[75]

After much debate and revision, the comparatively simple and broad Establishment and Free Exercise clauses were adopted into the First Amendment.

Madison's original proposal for the wording of the simplified

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[73] LEE EPSTEIN & THOMAS G. WALKER: CONSTITUTIONAL LAW FOR A CHANGING AMERICA 95 (3rd. ed. 1998).

[74] KERN ALEXANDER & M. DAVID ALEXANDER, THE LAW OF SCHOOL, STUDENTS AND TEACHERS 119 (2nd ed. 1995).

[75] EPSTEIN & WALKER, *supra* note 67, at 96.

establishment clause said that Congress shall not establish "any national religion." Madison's phraseology is reputed to have originated from legislation Thomas Jefferson introduced in the Virginia Legislature in 1779. The "Bill of Religious Freedom" said that "no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever."[76]

Yale scholar, Akhil Amar puts forth additional grounds for the creation of the Establishment Clause:

> The establishment clause did more than prohibit congress from establishing a national church. It's mandate that Congress shall make no law "respecting an establishment of religion" also prohibited the national legislature from interfering with, or trying to disestablish, churches established by state and local governments.[77]

This interpretation of the reasoning behind the creation of the Establishment Clause is problematic when considering the present application of the First Amendment to the states. This style of reasoning would seemingly negate the possibility of ever appropriately applying the First Amendment to state law. Akhil Amar finds this ambiguity to be one of the primary reasons for the development and conflict among diverse interpretations of the amendment.

> The special pinprick of the point is this: the nature of the states' establishment-clause right against federal disestablishment makes it quite awkward to mechanically "incorporate" the clause against the states via the Fourteenth Amendment . . . to apply the clause against a state government is precisely to eliminate its right to choose whether to establish a religion--a right clearly confined by the establishment clause itself.[78]

<u>Religion and Education</u>

> For if state-established churches in the eighteenth century were in some ways like today's public schools, other churches also played the role of educators, as Tocqueville stressed: "Almost all education is entrusted to the clergy.[79]

[76] *Id.* at 147.

[77] **AKHIL REED AMAR, THE BILL OF RIGHTS** 32 (1998).

[78] *Id.* at 33.

[79] **AMAR**, supra note 71, at 45 n.107.

The concept of "public school education" barely existed in the early American colonies. Southern colonies such as Virginia saw education as a luxury to be enjoyed by only those of wealth and privilege. Private education, controlled by the church, was seen as the most ideal structure in the colonial south:

> It is better to place education under church influence, than under that of the State. . . The government cannot, itself, educate the communities; it can only act by a cloud of irresponsible and ignorant school masters; nor would it be right for it to exercise the power, if it possessed the ability of imparting a good education. . . Schools originated and sustained by private, or denominational enterprise, are best; of such kinds are the schools of Richmond.[80]

Although Massachusetts was the first colony to initiate a form of public education, the establishment was aligned with the advancement of religion. The Massachusetts Act of 1642 called for certain chosen men or "selectmen" to monitor parents and apprentices' masters compliance with ensuring the literacy of their charges, so that children would be able to read and understand religious principles and public laws.[81] The "Old Satan Deluder" Act of 1647 required that towns of fifty householders to hire a teacher at public expense and that every town of one hundred families establish a Latin grammar school to prepare youth for Harvard College.[82] This law was the first legal basis for a public school system in America.[83]

The trend towards relating the function of schools with religion continued to be part of state constitutions well into the 18th century:

> The Pennsylvania Constitution of 1776. . . dealt with public schools and religious organizations in back-to-back sections, and treated "religious societies" as entities designed for the "encouragement

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[80] JAMES A. KEENE, A HISTORY OF MUSIC EDUCATION IN THE UNITED STATES 60 (1982).
[81] *Id.*
[82] *Id.*
[83] *Id.*

> of virtue" and "for the advancement of religion or learning." The Massachusetts Constitution of 1780 likewise spoke of "public institutions" and "public teachers" in its provisions for establishing churches, and declared that "the happiness of a people, and the good order" of society "depend upon piety, religion, and morality." The language of Article III of the Northwest Ordinance of 1787, adopted by the Federation Congress during the very summer that the Philadelphia convention met, was to similar effect: "Religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged." Consider also the Massachusetts Constitution's language concerning Harvard College: "[O]ur wise and pious ancestors . . . laid the foundation of Harvard College . . . [E]ncouragement of arts and sciences, and all good literature, tends to honor of God, the advantage of the Christian religion, and the great benefit of this and the other United States of America . . . [84]

Given the historical entanglement of education and religion, it is not surprising that the first challenge regarding the incorporation of the Establishment Clause occurred in *Everson v. Board of Education.*

Separationists and Accommodationists

Epstein and Walker identify three different views regarding governmental involvement in religious expression. Legal scholars have conducted various analyses of the original intent of the founders. Analyses are based upon the following: (1) interpretations of Madison's drafts of the Bill of Rights in which he calls for prohibition of a national church; and (2) comments made by Thomas Jefferson in a letter to the Danbury Baptist Association in which he wrote that the First Amendment built "a wall of separation between Church and State."[85] Historical evidence can be found to support the following views:

> 1. The Religious Establishment Clause erects a solid wall of separation between church and state, prohibiting most, if not all, forms of public aid for or support of religion.
>
> 2. The Religious Establishment Clause may erect a wall

[84] **AMAR**, *supra* note 71, at 44 nn.101-103.

[85] **EPSTEIN & WALKER**, *supra* note 67, at 147.

> of separation between church and state, but that wall of separation only forbids the state to prefer one religion over another--not nondiscriminatory support or aid for all religions.
>
> 3. The Religious Establishment Clause simply prohibits the the establishment of a national religion.[86]

View number one is promoted by Separationist scholars. Martha McCarthy defines basic separationism as the sentiment that religious liberty will be enhanced by adhering to the principle that religion is not the concern of the government.[87] *Everson v. Board of Education* was the first case in which the Supreme Court provided an explicit analysis for its decisions regarding the religious clauses.[88] Justice Black delivered the opinion of the court regarding this view by stating:

> The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions or prefer one religion over another . . . In the words of Jefferson, the clause against establishment of religion by law was intended to erect a "wall of separation between Church and State."[89]

Separationists on the Supreme Court continued to advocate an approach of Establishment Clause interpretation that was articulated in some detail by Justice Stevens in *Zorach v. Clauson*:

> There is much talk of the separation of Church and State in the history of the Bill of Rights and in the decisions clustering around the First Amendment . . . There cannot be the slightest doubt that the First Amendment reflects the philosophy that Church and State should be separated. And so far as interference with the "free exercise" of religion and an "establishment" of religion are concerned, this separation must be complete and unequivocal. The First Amendment

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[86] *Id.* at 149.
[87] Mc Carthy, *supra* note 65, at 126, 127.
[88] Everson v. Board of Education, 330 U.S. 1 (1947).
[89] *Id.* at 15-16.

> with the scope of its coverage permits no exception; the prohibition is absolute.[90]

Professor Nadine Strossen, former president of the American Civil Liberties Union promotes a popular view of separationism as important to preserving a sacred, holy concept of religion as it is for preserving a secular state.[91]

Despite the fact that the concept of separationism was the dominant philosophy advocated by the Supreme Court during the 1960's, the accommodationist view (represented in Epstein and Walker's view 2 and 3) has experienced a resurgence in popularity during the last fifteen years. Accommodationists maintain that Thomas Jefferson's statement regarding a "wall of separation" has been broadly misinterpreted. Proponents of this philosophy such as Pat Robertson believe that separation of church and state means separation between ecclesiastical institutions and the "apparatus of government."[92] Laura Hempen identifies three principal concepts that form the tenets of the accommodationist position:

> First, consideration of the Founders' intent in writing the Establishment Clause and incorporating it into the Constitution provides some insight. Second, the actions of the Founders indicate that the clause's essential purpose was to prevent the creation of a national religion and to give church-state arrangement autonomy from the federal government. . . Finally, legal positivism is the manner by which constitutional rights are to be interpreted. . . [93]

Accommodationist scholar Michael Malbin conducted analytical research

[90] Zorach v. Clausen, 343 U.S. 306 (1952).

[91] Nadine Strossen, *Symposium, How Much God in the Schools?: A Discussion of Religion's Role in the Classroom*, 4 **WM & MARY BILL OF RTS. J.** 607, 620 (1995).

[92] Pat Robertson, *Symposium, How Much God in the Schools?: Squeezing Religion out of the Public Square--The Supreme Court, Lemon and the Myth of the Secular Society*, 4 **WM & MARY BILL OF RTS. J.** 223, 224 (1995).

[93] Laura M. Hempen, *Note, Board of Education of Kiryas Joel School District v. Grumet: Accommodationists Strike a Blow to the Wall of Separation*, 39 **ST. LOUIS L.J.** 1389, 1396-97 (1995).

regarding the intent of the founders and found that the majority of the founders ascribed to the views associated with accommodationist philosophy.[94]

Finally, accommodationists commonly point to certain practices of the founders which provided advantages to sectarian organizations and sectarian interests:

> 1) Publicly owned lands were made available to religious faiths and to their affiliated religiously oriented educational institutions.
>
> 2) Public funds were provided for religious sects and to their church-related educational institutions.
>
> 3) Tax exemptions were given to religious denominations and to the affiliated religiously oriented educational institutions.
>
> 4) States aided in the financing of church construction as well as the erection and maintenance of church-related schools, by authorizing the conduct of lotteries by religious faiths.
>
> 5) Governmental units employed and paid chaplains in their conventions, legislatures, and armed forces; prayers were publicly read.[95]

The original intent of the founders has been consistently interpreted in Supreme Court establishment clause jurisprudence and has become the lynch pin for debate regarding the alleged inconsistency that the use of this form of analysis seems to promote.

Accommodationist and Separationist philosophies have become the progenitors of a more intensive form of judicial scrutiny. This 1940's phenomenon was an outgrowth of the rise of the concept of judicial activism as an integral part of judicial review. The concept of judicial activism was first

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[94] MICHAEL J. MALBIN, RELIGION AND POLITICS: THE INTENTIONS OF THE AUTHORS OF THE FIRST AMENDMENT 39 (1978).

[95] Hempen, *supra* note 84, at 1398.

outlined by Justice Stone and was proposed as a means for the Court to pay special attention to cases that involved "discrete and insular minorities."[96] Justice Stone suggested in a footnote in *United States v. Carolene Products* that the following areas were worthy of special judicial scrutiny by the Court: (1) encroachments on first amendment freedoms; (2) government action impeding or corrupting the political process; and (3) acts affecting adversely the rights of racial, religious, or national minorities.[97] Justice Stone suggested that judicial self-restraint must yield way when first amendment freedoms are threatened.[98] Professor Alpheus Mason applied this description to the Court under the leadership of Chief Justice Warren when he stated: "Chief Justice Warren's Court has embellished the Constitution, particularly the Bill of Rights and the fourteenth amendment, with political theory--the doctrine of egalitarianism--to protect and promote civil liberties."[99]

Judicial activism presumably led to the first application of the First Amendment to actions in individual states in *Everson v. Board of Education.* "Incorporation" is the expansion of the of the Bill of Rights as law for state governmental activity. Incorporation is achieved through the interpretation of the first section of the Fourteenth Amendment. The Fourteenth Amendment defines rights of citizenship and basic civil rights:

> All persons born or naturalized in the United States, and subject to jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction

[96] Alpheus Mason, *Judicial Activism: Old and New*, 55 **VIRG. L. REV.** 385 (1969) reprinted in **THE SUPREME COURT IN AMERICAN SOCIETY: EQUAL JUSTICE UNDER LAW** 343, 352 (Kermit L. Hall ed. Garland 2001).
[97] *Id.*
[98] *Id.*
[99] *Id.*

the equal protection of the laws.[100]

The due process and equal protection clauses of the fourteenth amendment are typically the foundation of jurisprudence in the area of education.

The Establishment Clause in the Warren Court Era

Everson v. Board of Education[101] and six other Establishment Clause cases were decided during the Warren Court Era and are identified by scholars as significant because of their direct impact upon heretofore common practices in the public schools.

McCollum v. Board of Education[102] and *Zorach v. Clausen*[103] pertained to release time for religious instruction. *Engel v. Vitale*[104] and *Abington v. Schempp*[105] dealt with prayer and Bible reading in the public schools. *Board of Education v. Allen*[106] joined Everson as a challenge to government financial aid for private, sectarian schools, while *Epperson v. Arkansas*[107] was the first challenge to school curriculum.

Subsequent analysis and comparison of opinions in the aforementioned cases serve to illuminate what Epstein and Walker refer to as the "divisive and complex nature" of religious establishment questions.[108] The complexity involves the paradox between the Warren Court's consistent application of separationist doctrine and the inconsistency of the Court in providing separationist outcomes in every case:

> That the adoption of a similar historical version of religious establishment could lead to such disparate outcomes is a

[100] **U. S. CONST.** amend. XIV.
[101] 330 U. S. 1 (1947).
[102] 333 U. S. 293 (1948).
[103] 343 U. S. 306 (1952).
[104] 370 U. S. 421 (1962).
[105] 374 U. S. 203 (1963).
[106] 392 U. S. 236 (1968).
[107] 393 U. S. 97 (1968).
[108] **EPSTEIN & WALKER**, *supra* note 67, at 156.

> problem that continued to confound this area of the law at least through the Warren Court (and, as we shall see, crops up today).[109]

The cases in the following section will be discussed according to category and subject matter.

Release Time for Religious Instruction

A. *McCollum v. Board of Education* & *Zorach v. Clausen*

> The First Amendment rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere.[110]

The practice of allowing privately employed religious teachers to instruct students on school property during the school day was challenged in *McCollum*. The Court struck down the voluntary practice of students attending religious classes for thirty to forty-five minutes a day based on the fact that students were basically excused from secular subjects that were being provided to students who chose not to study religion. Justice Black delivered the opinion that emphasized the influence of public school facilities being utilized as a means to "aid religious groups to spread their faith:"

> The foregoing facts, . . . show the use of tax-supported property for religious instruction and the close cooperation between the school authorities and religious council in promoting religious education. . . . Pupils compelled by law to go to school for secular education are released in part from their legal duty upon the condition that they attend the religious classes. This is beyond all question a utilization of the tax-established and tax-supported public school system to aid religious groups to spread their faith.[111]

While the Court adopted a complete separationist stance in McCollum, the Court in *Zorach v. Clausen*[112] allowed for accommodation of religious instruction during the school day provided that the instruction did not involve the

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[109] *Id.*

[110] McCollum v. Board of Education, 333 U. S. 203, 212 (1948).

[111] *Id.* at 209-10.

[112] 343 U. S. 306 (1952).

use of school facilities. The Court upheld a New York City program that allowed students to be released from school on a regular basis to attend religious centers of instruction. The Court very clearly delineates the rationale for this decision by comparing and contrasting this case with McCollum:

> This "released time" program involves neither religious instruction in the public school classrooms nor the expenditure of public funds. All costs, including the application blanks, are paid by the religious organizations. The case is therefore unlike McCollum v. Board of Education, 333 U.S. 203 . . .[113]

This case is particularly significant for the Court's description of the concept of government neutrality towards religion. Justice Douglas emphasizes the importance of government accommodation of religious tradition without particular partiality to any one religious sect nor general hostility to religious practices:

> When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions . . . 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. . . The government must be neutral when it comes to competition between religious sects. . . 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 to those who want to repair to their religious sanctuary for worship or instruction. . .[114]

The decision in *Zorach* was controversial because of its derivation from the Court's reasoning in *McCollum*. Indeed, Justice Black, who wrote opinion of the Court for McCollum, leveled his focus on the danger of such inconsistency when he commented in the dissent in *Zorach* that:

> State help to religion injects political and party prejudices into a holy field. It too often substitutes force for prayer, hate for love, and persecution for persuasion. Government should not be allowed,

[113] *Id.* at 308-09.
[114] *Id.* at 313-14.

> under cover of the soft euphemism of "cooperation" to steal into the sacred area of religious choice.[115]

Prayer and Bible Reading

A. *Engel v. Vitale* and *Abington v. Schempp*

> But the purposes underlying the Establishment Clause go much further than that. Its first and most immediate purpose rested on a belief that a union of government and religion tends to destroy government and to degrade religion.[116]

The case that is often identified by various interest groups with the phrase, "when they took prayer out of school," *Engel* pertained to a parent challenge to a state composed, non-demoninational prayer. The state of New York recommended each school principal to have the following prayer said aloud daily in each classroom:

> Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country.[117]

The Court, with the concurrence of eight of the nine sitting justices, held that recitation of the prayer composed by the New York State Board of Regents was a violation of the Establishment Clause because it was part of a "religious program carried on by the government."[118]

> The First Amendment was added to the Constitution to stand as a guarantee that neither the power nor the prestige of the Federal Government would be used to control, support or influence the kinds of prayer the American people can say . . .[119]

The decision in *Abington v. Schempp*[120] was significant both for its length (117 pages) and for its articulation of the "strict scrutiny test" that was used during the Warren Court Era to determine violations of the Establishment

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[115] *Id.* at 320 (Black, H., dissenting).
[116] Engel v. Vitale, 370 U. S. 421, 431 (1962).
[117] *Id.* at 422.
[118] *Id.* at 429.
[119] *Id.*
[120] 374 U. S. 203 (1963).

Clause. The Pennsylvania law that required "At least ten verses from the Holy Bible shall be read, without comment, at the opening of each public school on each school day,"[121] was struck down based on criteria that was explained by the majority opinion of Justice Clark:

> The test may be stated as follows: What are the purpose and primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion.[122]

Despite the ruling that the Pennsylvania law was unconstitutional, the Court did indicate that teaching the Bible as literature would be constitutional:

> 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.[123]

Public School Curriculum

Epperson v. Arkansas

> The First Amendment mandates governmental neutrality between religion and religion, and between religion and non religion.[124]

The question of evolution became a topic for the Court when an Arkansas biology teacher challenged a 1928 Arkansas statute which prohibited the teaching of evolution in public schools and universities. The Court determined in *Epperson v. Arkansas* that this statute was a violation of the Establishment Clause because it was enacted for the non-secular purpose of promoting a religious viewpoint rather than a non-religious view of man's origins.

As early as 1872, this Court said: "The law knows no heresy, and

[121] *Id.* at 205.
[122] *Id.* at 222.
[123] *Id.* at 225.
[124] Epperson v. Arkansas, 393 U. S. 97, 104 (1968).

> is committed to the support of no dogma, the establishment of no sect." *Watson v. Jones*, 13 Wall. 679,678 . . . In this present case, there can be no doubt that Arkansas has sought to prevent its teachers from discussing the theory of evolution because it is contrary to the belief of some that the Book of Genesis must be the exclusive source of doctrine as to the origin of man.[125]

Government Aid to Private Schools

Everson v. Board of Education and *Board of Education v. Allen*

> In *Allen* the Court acknowledged that secular and religious teachings were not necessarily so intertwined that secular textbooks furnished to students by the State were in fact instrumental in the teaching of religion. [126]

Despite the fact that there was more than twenty years between the *Everson* and *Allen* decisions, the "child benefit doctrine" first utilized in *Cochran v. Louisiana State Board of Education*[127] was applied in both instances. The doctrine is based upon the principle that benefits which are provided to children, rather than to the school are permissible under the Constitution.

In *Board of Education v. Allen,* the Supreme Court upheld a New York statute that required school districts to supply parochial and private as well as public schools with free, secular textbooks for all students in grades seven through twelve. The Supreme Court determined that in both *Everson* and *Allen* that the Establishment Clause allows all citizens to benefit equally from state laws regardless of religious affiliation.

> But such is obviously not the purpose of the First Amendment. That Amendment requires the state to be neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions than it is to favor them.[128]

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[125] *Id.*

[126] Lemon v. Kurtzman, 403 U. S. 602, 613 (1971).

[127] 281 U. S. 370 (1930).

[128] *Everson*, 330 U. S. at 18.

The Establishment Clause in the Burger Era

Chief Justice Warren Burger ushered in a new era of analysis and standard of scrutiny when he suggested in *Walz v. Tax Commission of the City of New York*[129] that "excessive entanglement" be considered in addition to the "purpose" and "primary effect" prongs of the traditional strict scrutiny test of constitutionality.

> Determining the legislative purpose of tax exemption is not aimed at establishing, sponsoring, or supporting religion does not end the inquiry, however. We must also be sure that the end--the effect--is not an excessive government entanglement with religion.[130]

The theory put forth in this case involving property tax exemptions for public and private universities came to full fruition in *Lemon v. Kurtzman.*[131]

The Burger Era was the genesis of the prominent "Lemon Test" and other tests of constitutionality which evolved from the Court's move from a strict separationist interpretation of analysis to an increasing consideration of accommodationist philosophy in the latter years.

In the following sections, cases representative of the various tests of constitutionality utilized or proposed during the Burger Era will be discussed. The evolution of Establishment Clause jurisprudence will be examined in terms of Burger's utilization of the 3-pronged "Lemon Test" and his subsequent disillusionment with his own creation towards the end of his tenure. Legislative influence in Establishment Clause interpretation occurred through the enactment of the Equal Access Act. The judicial analysis of the Act was presented in *Board of Education of Westside Community School v. Mergens*[132]

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[129] 397 U. S. 664 (1970).
[130] *Id.* at 674.
[131] 403 U. S. 602 (1971).
[132] 496 U. S. 226 (1990).

which upheld the notion of religious groups maintaining equal access to school facilities. However, as is characteristic of many decisions in the Burger Era, different "tests" or standards of review were utilized by different justices to reach the same conclusion. Epstein and Walker identify this trend as characteristic of how divided the Court is over the appropriate standard by which to adjudicate religious establishment cases.[133]

> The justices have come in for much criticism from scholars who argue that they have made "distinctions" that would glaze the minds of medieval scholastics." Analysts also criticize the Court for its inability to achieve consensus over the application of *Lemon.* This area of law is marked by dissenting and concurring opinions and judgments of the Court, rather than majority opinions.[134]

Four standards of review, including The *Lemon Test*, *Non-Preferentialism*, *Endorsement Test*, and *Coercion,* exist in majority as well as concurring and dissenting opinions.

The "Test" in *Lemon v. Kurtzman*

> Every analysis in this area must begin with consideration of the cumulative criteria developed by the Court over many years. Three such tests may be gleaned from our cases. First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, Board of Education v. Allen; finally, the statute must not foster "an excessive government entanglement with religion." [135]

The twin cases *Lemon v. Kurtzman* and *Early v. DiCenso* provided the model by which a plethora of cases pertaining to educational practices and policies have been analyzed. These landmark cases involved the attempt of Pennsylvania and Rhode Island to provide funding for teacher salaries and secular educational services for private, sectarian schools.

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[133] **EPSTEIN & WALKER**, *supra* note 67, at 170 n.44.
[134] 403 U. S. 602, 612-13 (1971).
[135] *Id.* at 607.

> Pennsylvania has adopted a statutory program that provides financial support to nonpublic elementary and secondary schools by way of reimbursement for the cost of teachers' salaries, textbooks, and instructional materials in specified secular subjects. Rhode Island has adopted a statute under which the State pays directly to teachers in nonpublic elementary schools a supplement of 15% of their annual salary. Under each statute state aid has been given to church-related educational institutions as well as other private schools. We hold that both statutes are unconstitutional.[136]

The basis upon which these statutes were struck down involved the justices interpretation of the "excessive entanglement" prong of the Lemon test.

> The substantial religious character of these church-related schools gives rise to entangling church-state relationships of the kind the Religious Clauses sought to avoid. . . The dangers and corresponding entanglements are enhanced by the particular form of aid that the Rhode Island Act provides.[137]

The Court was particularly concerned with the danger of entanglement created by the 'ideological' character of parochial school teachers. The supposition was that parochial teachers, particularly nuns, whose vocation is religious, would have great difficulty subverting their religious views while teaching any subject.

> A dedicated religious person, teaching in a school affiliated with his or her faith and operated to inculcate its tenets, will inevitably experience great difficulty in remaining religiously neutral. . . . With the best of intentions such a teacher would find it hard to make a total separation between secular teaching and religious doctrine. What would appear to some to be essential to good citizenship might well for others border on or constitute instruction in religion. Further difficulties are inherent in the combination of religious discipline and the possibility of disagreement between teacher and religious authorities over the meaning of statutory restrictions.[138]

Finally, the Court considered the state's "restrictions and surveillance" of programs in religious schools to further contribute to excessive entanglement.

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[136] *Id.* at 616.
[137] *Id.* at 618-19.
[138] *Id.* at 621-22.

> In particular the government's post-audit power to inspect and evaluate a church-related school's financial records and to determine which expenditures are religious and which are secular creates an intimate and continuing relationship between church and state. . . The highways of church and state relationships are not likely to be one-way streets, and the Constitution's authors sought to protect religious worship from the pervasive power of government.[139]

Separationist doctrine was bolstered by the use of the tripartite test articulated in *Lemon.* Cases pertaining to issues in education were particularly affected by this standard of review. The Lemon test was utilized in all school cases during the 1980's and continued to dominate in education until the early 1990's.

Despite the fact that *Lemon* gained such prominence, its primary progenitor, Chief Justice Burger, became disappointed with *Lemon's* rather consistent tendency to lead to strictly separationist outcomes. Burger attempted to provide a philosophical justification for departing from Lemon in his dissent in *Committee for Public Education and Religious liberty v. Nyquist:*

> While there is no straight line running through our decisions interpreting the Establishment Clause . . . our cases do, it seems . . . lay down one, solid basic principle: that the Establishment Clause does not forbid governments. . . to enact a program of general welfare. . . even though many . . . elect to use those benefits in ways that "aid" religious instruction. . . . This fundamental principle which I see running through our prior decisions. . . is premised more on experience and history than logic.[140]

Despite Burger's disillusionment with the Lemon test it still stands as the most frequently utilized standard in the history of Establishment Clause jurisprudence.

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[139] 413 U. S. 756, 799 (1973).

[140] Lynch v. Donnelly, 465 U. S. 668, 687-88 (1984).

The "Endorsement" Test

> The Establishment Clause prohibits government from making adherence to a religion relevant in any way to a person's standing in the political community. Government can run afoul of that prohibition in two principal ways. One is excessive entanglement with religious institutions, which may interfere with the independence of the institutions, give the institutions access to governmental powers not fully shared by non adherents of the religion, and foster the creation of political constituencies defined along religious lines. The second and more direct infringement is government endorsement or disapproval of religion. Endorsement sends a message to non adherents that they are outsiders, not full members of the political community. Disapproval sends the opposite message.[141]

The relationship between the Endorsement test and holiday displays is akin to the relationship between the Lemon test and financial aid to schools. Justice Sandra Day O'Connor introduced the Endorsement test in *Lynch v. Donnelly* as a means of enhancement of the "purpose prong" of the Lemon test in order to "suggest a clarification of Establishment Clause doctrine."[142] Justice O'Connor proposed that governmental advancement or inhibition of religion must be determined through analysis of the government's intent to send a message of endorsement or censure. It has been proposed that inquiry under the Endorsement test is context specific and should take into account history, effects of ubiquity on religious significance, and particular circumstances of each case.[143]

The question explored in *Lynch* involved the constitutionality of a city's inclusion of a Nativity Scene as a part of its annual Christmas display. The issue described according to O'Connor's philosophy was presented in the following statements:

[141] *Id.* at 687-88 (O' Connor, S., Concurring).
[142] *Id.*
[143] Wallace v. Jafree, 472 U. S. 38, 70 (1985) (O'Connor, S., concurring).

> The central issue in this case is whether Pawtucket has endorsed Christianity by its display of the creche. To answer that question, we must examine both what Pawtucket intended to communicate in displaying the creche and what message the city's display actually conveyed.[144]

The majority opinion, written by Chief Justice Burger, applied the traditional *Lemon* standard in the holding that the Pawtucket, Rhode Island Christmas display did not violate the Establishment Clause. However, Burger attempted to emphasize his move from a strict adherence to Lemon when he stated :

> In the line-drawing process we have also found it useful to . . . [follow the three-part *Lemon* test]. But, we have repeatedly emphasized our unwillingness to be confined to any single test or criterion in this sensitive area. . . [145]

The first case in which the endorsement test was utilized in a majority opinion occurred during the Rehnquist Era. *County of Allegheny v. American Civil Liberties Union* involved a constitutional challenge to a Christmas display that included a creche, Christmas tree and Menorah.[146] The Court upheld the coupling of the Menorah with the Christmas tree, but found the creche to be a violation of the Establishment Clause. Justice Blackmun held that the creche was displayed in a manner that violated the establishment of religion clause, because the county, by associating itself with the display, did not merely acknowledge Christmas as a cultural phenomenon but celebrated the holiday in a way that had the effect of endorsing a patently Christian message.[147] The Menorah was found to be displayed in a manner that did not endorse religion, but simply recognized both Chanukah and Christmas as part of the same secular winter-holiday season.[148]

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[144] 465 U. S. 668, 690 (1984).
[145] *Id.* at 679.
[146] 492 U. S. 573.
[147] *Id.* at 601.
[148] *Id.* at 489.

Scholars suggest that Justice O'Connor's endorsement test is linked to the accommodationist school of thought because she promotes the idea that government's mere acknowledgement of religion in law or policy does not violate the Establishment Clause.[149] O'Connor has also called upon the judiciary to be "deferential and limited" in considering what the purpose of a legislature in enacting a law.[150]

The Equal Access Act and Endorsement

> It shall be unlawful for any public secondary school which receives Federal financial assistance and which has a limited open forum to deny equal access or a fair opportunity to, or discriminate against, any students who wish to conduct a meeting within that limited open forum on the basis of the religious, political, philosophical, or other content of the speech at such meetings.[151]

The Equal Access Act, enacted by Congress in 1984, provided legislative extension and support to the reasoning put forth by the Court in *Widmar v. Vincent.*[152] *Widmar* involved a university policy which denied religious groups access to university facilities. The religious group, "Cornerstone," claimed that this policy denied them the right of free exercise of religion. The University of Missouri regarded their policy as a means to prevent the establishment of religion on campus.

Utilizing *Lemon*, the Court held in favor of the religious group by iterating the University's stated purpose for its policies to "have the secular purpose of encouraging the exchange of ideas."[153] Additionally, the Court reasoned that any benefit religious groups obtained from equal access would be "incidental" and, thus, pass the "primary effect" prong of the Lemon test.[154] Equal access

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[149] *Wallace*, 472 U. S. at 70 (O'Connor., concurring).
[150] *Id.* at 74-75.
[151] 20 U.S.C. section 4071 (a) (1984).
[152] 454 U. S. 263.
[153] *Id* at 272 no. 10.
[154] *Id.* at 274.

was further promoted as a way to avoid the "excessive entanglement" that might result from the University's attempt to regulate the actions and content of speech of certain groups.[155]

While *Widmar* pertained to University students, The Equal Access Act of 1984 specifically targeted secondary school students. This legislation was challenged in *Board of Education of Westside v. Mergens.*[156] Bridget Mergens, a Nebraska high school student, attempted to gain permission to form a religious club for the purpose of Bible study, discussion, and prayer. The school denied Bridget's request primarily on the belief that a religious group would violate the Establishment Clause. The Court was called upon to provide clarification regarding the terms "limited open forum" and "noncurriculum related student group." The Court clarified "limited open forum" by quoting that such a forum exists whenever a public secondary school "grants an offering to or opportunity for one or more non curriculum related student groups to meet on school premises during non instructional time."[157] "Noncurriculum related student group" was defined as any student group that does not directly relate to the body of courses offered by the school.[158] The Court further reasoned that "even if a public secondary school allows only one "noncurriculum related student group" to meet, the Act's obligations are triggered and the school may not deny other clubs, on the basis of the content of their speech, equal access to meet on school premises during non instructional time."[159]

Mergens was a plurality opinion written by Justice O'Connor who adopted the logic of the endorsement test:

There is a crucial difference between speech endorsing religion

[155] *Id.* at 272.
[156] 496 U. S. 266.
[157] *Id.* at 235.
[158] *Id.* at 239.
[159] *Id.* at 237.

> which the Establishment Clause forbids, and private speech endorsing religion which the Free Speech and Free Exercise Clauses protect.[160]

School Prayer and Endorsement

Traces of Endorsement Test philosophy exist in *Wallace v. Jafree,*[161] the premiere school prayer jurisprudence during the Burger Era. Justice Stevens, in delivering the opinion of the Court, struck down an Alabama statue that called for teachers to lead "willing students in a a prescribed prayer to Almighty God. . . the Creator and Supreme Judge of the world."[162] The Court applied Lemon, but utilized Justice O'Connor's modification of the purpose prong. The rationale for declaring legislation 16-1-20.1 unconstitutional pertained to government endorsement:

> The Legislature enacted 16-20-20.1 . . . for the sole purpose of expressing the State's endorsement of prayer activities for one minute at the beginning of each school day. . . Such an endorsement is not consistent with the established principle that the Government must pursue a course of complete neutrality toward religion.[163]

Justice O'Connor's concurrence promoted her belief in the effectiveness of the endorsement test "because of the analytic content it gives to the Lemon-mandated inquiry into legislative purpose and effect."[164] She restated the issue that the Court analyzed to declare the statute unconstitutional in terms of the principles contained in her endorsement analysis:

> At issue today is whether state moment of silence statutes in general and Alabama's moment of silence statute in particular, embody an impermissible endorsement of prayer in public schools.[165]

Alternative tests of constitutionality, such as the Endorsement test, began to become the rule rather than the exception toward the end of the Burger Era.

[160] *Id.* at 250.
[161] 472 U. S. 38 (1985).
[162] *Id.* at 40 n. 2.
[163] *Id.* at 60.
[164] *Id.* at 69 (O'Connor., concurring).
[165] *Id.* at 70.

The move towards accommodationist interpretations at end of Burger's tenure as Chief Justice has been described as a "drizzle" that has become a "torrent in the Rehnquist Court."[166] The non-preferentialist dissent written by future Chief Justice Rehnquist in *Wallace v. Jafree* foreshadowed the future direction of the Court:

> The Framers intended the Establishment Clause to prohibit the designation of any church as a 'national' one. The Clause was also designed to stop the Federal Government from asserting a preference for one religious denomination or sect over others.[167]

The Establishment Clause in the Rehnquist Era

> Notwithstanding the absence of a historical basis for this theory of rigid separation, the wall idea might well have served as a useful albeit misguided analytical concept, had it led the Court to unified and principled results in Establishment Clause cases. The opposite, unfortunately, has been true; in the 38 years since Everson our Establishment Clause cases have been neither principled nor unified. Our recent opinions, many of them hopelessly divided pluralities, have with embarrassing candor conceded that the "wall of separation" is merely a "blurred, indistinct, and variable barrier," which "is not wholly accurate" and can only be "dimly perceived."[168]

The move towards accommodation and away from the "wall of separation" characterized by Lemon has gained momentum since William Rehnquist became Chief Justice of the Court in 1986. Rehnquist took over a Court in the process of transition with regard to both personnel and philosophy. During his tenure, six new justices joined the ranks of the Court. The change dramatically altered the character of Establishment Clause jurisprudence. Particular justices, such as Kennedy and Souter, constructed new tests of constitutionality that took a more liberal view of religious expression. The justices have yet to come to consensus and identify a singular method of

[166] Julian Kossow, *Preaching to The Public School Choir: The Establishment Clause, Rachel Bauchman, and the Search for the Elusive Line*, 24 **FLA. STA. U. L. REV.** 79, 94 (1996).
[167] *Wallace*, 472 U. S., at 113.
[168] *Wallace*, 472 at 106-07 (Rehnquist, W., dissenting).

constitutional analysis. Rehnquist has resided over a Court in which each of the Establishment Clause cases in the 1990's has produced at least four separate judicial opinions.

John Witte has identified four alternative styles of analysis utilized during the Rehnquist Era: Endorsement, Coercion, Neutrality, and Equal Treatment (Non-preferentialism):

> All of these approaches have aimed to replace the Lemon Test and to nuance the underlying separationist and accommodationist approaches that antedate and inform the Lemon Test. None of these approaches has as yet, commanded a consistent majority of the Court, and none has interred the Lemon Test entirely.[169]

Alternative analyses will be examined in the following sections for the purpose of illuminating the "remarkable evolution" of the Establishment Clause in the decade of the 90's.[170]

Coercion Analysis

> Our cases disclose two limiting principles: government may not coerce anyone to support or participate in any religion or its exercise; and it may not, in the guise of avoiding hostility or callous indifference, give direct benefits to a religion in such a degree that it in fact "establishes a religion or religious faith, or tends to do so."[171]

The endorsement standard employed by Justice O'Connor has been referred to as a "species" of the Coercion test created by Justice Kennedy.[172] Peterson defines the "Coercion Standard" as one employing two factors on a sliding scale: the content of the message conveyed, and the coercion employed in communicating that message.[173]

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[169] **JOHN WITTE JR., RELIGION AND THE CONSTITUTIONAL EXPERIMENT, 163** (2000).
[170] Ralph D. Mawdsley, *The Role of Intent Under the Establishment Clause in Measuring Government-Religion Interaction*, 128 **ED.LAW** [15] (Oct. 1, 1998).
[171] *Allegheny*, 492 U.S. at 659.
[172] Matthew A. Peterson, *Note, The Supreme Court's Coercion Test: Insufficient Constitutional Protection For America's Religious Minorities*, **11 CORNELL J. L. & PUB. POL'Y** 245, 247 (2001).
[173] *Id.* at 245.

The Coercion test, along with the Endorsement test, has formed what Michael Perry refers to as "the moderate version of the non-establishment norm in constitutional jurisprudence."[174]

> The moderate version allows that government may affirm a certain, few and very basic religious beliefs, but government may do so only non-coercively. . . As Justice O'Connor has noted, the "moderate" version seeks to maintain some government recognition while forbidding any element of coercion in that recognition.[175]

The fundamental difference between coercion and endorsement lies in the interpretation of the "reasonable observer" standard. Under Coercion Analysis government endorsement of religion is determined by whether "some reasonable observers would attribute a religious message to the State."[176]

The Coercion standard was utilized in the majority opinion in *Lee v. Weisman.*[177] In this case involving school prayer at graduation ceremonies, a student objected to a local rabbi's rendition of a "nonsectarian" prayer at a middle school graduation. The rabbi was given instructions regarding the content of his remarks through a pamphlet entitled " Guidelines for Civic Occasions." The school principal provided the rabbi with this set of directions. The Court held the practice surrounding the prayer at Nathan Bishop Middle School unconstitutional because the State's policy involved "psychological coercion" of secondary school students in particular.

> As we have observed before, there are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools . . . Our decisions in *Engel v. Vitale* and *Abington School District* recognize, among other things, that prayer exercises in public schools carry a particular risk of indirect coercion.[178]

Justice Kennedy, in writing the opinion of the Court, emphasized the

[174] *Id.* at 248, n.22.
[175] *Id.* at n.23.
[176] *Id.* at 247 n.20.
[177] 505 U. S. 577 (1992).
[178] *Id.* at 592.

significance of a graduation ceremony in our society and culture as proof that the argument that students have the right to choose not to attend the ceremony if they object to its content is invalid.

> The importance of the event is the point the school district and the United States rely upon to argue that a formal prayer ought to be permitted, but it becomes one of the principal reasons why their argument must fail. . . The Constitution forbids the State to exact religious conformity from a student at the price of attending her own high school graduation. . . . The prayer exercises in this case are especially improper because the State has in every practical sense compelled attendance and participation in an explicit religious exercise at an event of singular importance to every student.[179]

One of the interesting features of *Lee* lies in the significance of the variant concurring and dissenting opinions. Each of these opinions showed the divergent preferences for specific tests of constitutionality. Justice Blackmun's concurring opinion was based on the established *Lemon* doctrine:

> In 1971, Chief Justice Burger reviewed the Court's past decisions and found: "Three. . . tests may be gleaned from our cases." *Lemon v. Kurtzman*. . . After Lemon, the Court continued to rely on these basic principles in resolving Establishment Clause disputes. Application of these principles to the facts of this case is straightforward. There can be "no doubt" that the "invocation of God's blessings" delivered at Nathan Bishop Middle School "is a religious activity."[180]

Justice Scalia's dissent, which is famous for its scathing reference to of the majority opinion as a "jurisprudential disaster," is equally as famous for his premature pronouncement of the death of Lemon:

> Our religion-clause jurisprudence has become bedeviled (so to speak) by reliance on formulaic abstractions that are not derived from, but positively conflict with, our long-accepted constitutional traditions. Foremost among these has been the so-called Lemon test, . . .which has received well-earned criticism from many members of this Court . . . The Court today demonstrates the irrelevance of Lemon by

[179] *Id.* at 595, 596, 598.
[180] *Id.* at 602-03 (Blackmun, H., concurring).

> essentially ignoring it, and the interment of that case may be the one happy byproduct of the Court's otherwise lamentable decision.[181]

Justice Souter, in his concurring opinion, introduced a neutrality test, in order to correct what he believed were the deficiencies of predictability in the Endorsement test and the narrow scope of the Coercion standard.

Neutrality

> While the Establishment Clause's concept of neutrality is not self-revealing, our recent cases have invested it with specific content: the state may not favor or endorse either religion generally over nonreligion or nonreligion over others. . .[182]

Justice Souter refers to his neutrality test as a means to "hold true to a line of precedent from which there is no adequate historical case to depart."[183] His philosophy is based upon the belief that any governmental action that accommodates or cooperates with religion in a way that favors religion over non-religion is a violation of the Establishment Clause.[184] The original intent of the founders, according to Souter, should be based upon deductions that can be drawn from examining the Establishment Clause's "textual development."[185]

> What we . . . know of the Framers' experience underscores the observation of one prominent commentator, that confining the Establishment Clause to a prohibition on preferential aid "requires a premise that the Framers were extraordinarily bad drafters-that they believed one thing but adopted language that said something substantially different, and they did so after repeatedly attending to the choice of language. . ." We must presume, since there is no conclusive evidence to the contrary, that the Framers embraced the significance of their textual judgment. Thus, on balance, history neither contradicts nor warrants reconsideration of the settled principle that the Establishment Clause forbids support for religion in general no less than support for one religion or some.[186]

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[181] *Id.* at 644 (Rehnquist, W., dissenting).
[182] *Id.* at 627 (Souter, D., concurring).
[183] *Id.* at 610 (Souter, D., concurring).
[184] *Id.* at 616 (Souter, D., concurring).
[185] *Id.* at 612 (Souter, D., concurring).
[186] *Id.* at 615-616 (Souter, D., concurring).

Souter's neutrality approach was utilized in a plurality opinion in *Kiryas Joel Village School District v. Grumet*[187] Kiryas Joel pertained to New York's attempt to establish a school district with boundaries that intentionally mirrored those of a Hasidic Jewish Community. The Court held that the State's involvement in creating a school attendance area for the purpose of meeting the needs of handicapped students as unconstitutional. According to the neutrality standard, the State violated the Establishment Clause by giving preference to the Hasidic community's desire to remain separated from those that were not of their particular belief.

> A principle at the heart of the establishment of religion clause of the Federal Constitution's First Amendment is that government should not prefer one religion to another, or religion to irreligion. . . Aiding a single, small religious group causes no less a constitutional problem, under the establishment of religion clause of the Federal Constitution's First Amendment, than would follow aiding a sect with more members or aiding religion as a whole.[188]

Despite the Court's disapproval of New York's districting plan, Justice Souter was careful to leave the door open, as it were, for the government's accommodation of religion under certain circumstances. Government can accommodate religion if government is careful not to sponsor religion:

> There is ample room under the establishment of religion clause of the Federal Constitution's First Amendment for benevolent neutrality which will permit religious exercise to exist without governmental sponsorship or interference; the government may, and sometimes must, accommodate religious practices without violating the establishment of religion clause.[189]

The Court's acknowledgement of the possible coexistence of government and religion became indicative of the increasingly accommodationist reasoning that is a prominent feature of the Rehnquist Era.

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[187] 512 U. S. 687 (1994).
[188] *Id.* at 703, 705.
[189] *Id.* at 705-706.

Non-Preferentialism

> The Framers intended the Establishment Clause to prohibit the designation of any church as a 'national' one. The Clause was also designed to stop the Federal Government from asserting a preference for one religious denomination or sect over others.[190]

The advocates of non-preferentialism are generally associated with the conservative members of the Court. Chief Justice Rehnquist, Justice Scalia, and Justice Thomas are strong proponents of the philosophy that government and religion can co-exist as long as a specific religion is not preferred or promoted over others. Non-preferentialism emphasizes the equality of religious expression with secular forms of expression:

> In recent cases. . . the Court has said more explicitly that religious institutions and individuals are not "disabled by the First Amendment" from equal access to forums open to others, or from equal participation in government programs in which nonreligious parties participate." Thus in *Capitol Square v. Pinette* (1995), the Court upheld the private display of a cross in a public square that was "open to all on equal terms."[191]

Non-preferentialism was the approach Justice Kennedy employed in *Rosenberger v. University of Virginia* .[192] Rosenberger involved the University of Virginia's denial of funds to an extracurricular organization that was formed to:

> "publish a magazine of philosophical and religious expression," "to facilitate discussion which fosters an atmosphere of sensitivity to and tolerance of Christian viewpoints," and "to provide a unifying focus for Christians of multicultural backgrounds."[193]

The "Wide Awake Productions" organization had gained status as a university "Contracted Independent Organization." This meant that the organization had adhered to such guidelines as signing a disclaimer saying they were independent of the university. Despite their compliance with

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[190] *Wallace*, 472 at 113.

[191] **WITTE**, *supra* note 151 at 162 nn.68-69.

[192] 515 U. S. 819 (1995).

[193] *Id.* at 825-26.

regulations, "Wide Awake Productions" was denied funds to pay for the costs associated with producing a student newspaper. The university alleged that payment for the cost of printing "Wide Awake: A Christian Perspective," would be a violation of the Establishment Clause.

The Court reasoned that denial of funds to the organization simply because it was a religious organization amounted to viewpoint discrimination:

> Discrimination against speech because of its message is presumed to be unconstitutional. . . When the government targets not subject matter but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant. *See R.A.V. v. St. Paul* (1992). Viewpoint discrimination is thus an egregious form of content discrimination.[194]

Restriction of an organization based upon its religious orientation would, according to the philosophy of the Court, move the government from a position of neutrality to a position of hostility towards religion:

> The first case in our modern Establishment Clause jurisprudence was *Everson v. Board of Ed. of Ewing* (1947). There we cautioned that in enforcing the prohibition against laws respecting establishment of religion, we "be sure that we do not inadvertently prohibit [the government] from extending its general state law benefits to all its citizens without regard to their religious belief." We have held that the guarantee of neutrality is respected, not offended, when the government, following neutral criteria and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones are broad and diverse.[195]

The decision in *Rosenberger* served as additional "cement" to an emerging pattern of accommodationist outcomes during the Rehnquist Era. This pattern is particularly evident in cases pertaining to equal access to facilities and funding.

Endorsement, Coercion, Neutrality, and Non-preferentialism are four alternatives conceived to enhance or neutralize the dominance of the Lemon

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[194] *Id.* at 828-29.
[195] *Id.* at 839.

test. The consistency of Lemon in rendering strictly separationist outcomes became problematic for justices whose philosophies are in conflict with an absolute "wall of separation." Scholars have speculated that the Rehnquist Era's alternative tests of constitutionality may have been influenced various by interest groups that have been involved in swaying the Court in favor of various causes. In the following section, the special interest groups that have traditionally sought to affect Establishment Clause jurisprudence will be discussed.

Special Interest Groups

> The Justices have freely acknowledged the special role "private attorneys general" (i.e. public interest law groups) can play in litigation. Writing in 1963, the Court proclaimed, "Groups which find themselves unable to receive their objectives through the ballot frequently turn to the Courts. . ." [196]

Special interest groups have been heavily involved in Establishment Clause litigation since the 1950's. Their influence in legal opinions is significant. Lee Epstein's examination of various studies of interest groups has revealed that "scholars conducting studies of particular cases of interest groups argue that legal opinions and briefs often parallel each other."[197] Organizations have utilized a variety of participatory techniques in order to intervene, influence, and promote certain viewpoints:

> If recent research indicates anything about interest group litigation it is this: the vast majority of U.S. Supreme Court cases attract the participation of interest groups as direct sponsors, when groups provide attorneys and resources to bring suit, or as amici curiae, when groups file third party, "friend of the court" briefs.[198]

Parties with similar matters of concern have traditionally formed alliances to encourage the Court in advancing accommodationist or separationist

[196] Lee Epstein, *Interest Group Litigation During the Rehnquist Court Era*, **4 J. L. & POL.** 639, 649 n.54(1993).
[197] *Id.* at 652.
[198] *Id.* at 644.

outcomes:

> With each passing decade, it has become more likely that organized interests participate on both sides of religious establishment cases in particular. Generally speaking, these interests belong to one of two camps: separationist groups that want a strict separation of church and state and accommodationist groups that support greater intermingling between political and religious institutions.[199]

Separationist advocates include The American Civil Liberties Union, The American Jewish Congress, and the Americans United for Separation of Church and State. Of the sixty-seven church-state cases adjudicated in the Court between 1951 and 1971, fifty one featured the involvement of at least one of these groups.[200]

Since 1971, the involvement of these interest groups has continued to steadily increase. Lee Epstein found in his study of special interest groups during the Rehnquist Era that amicus briefs were filed in 100% of the church-state cases heard by the Court between 1986 and 1992.[201]

Separationist groups have been responsible for a vast majority of this activism. In landmark cases such as *Lemon v. Kurtzman*, various interests have joined forces with plaintiffs in the filing of suits. For example, Afton Lemon was assisted by the Pennsylvania Civil Liberties Union, the American Jewish Congress, the NAACP, and the Pennsylvania Education Association.

Organizations favoring accommodationist outcomes in the Courts include the U.S. Catholic Conference, the Christian Legal Society, and the National Jewish Commission of Law and Public Affairs. The support of these groups in church-state issues has primarily taken the form of supporting defendants against separationist challenges. Defendants are usually governmental personnel, bodies, or agencies such as school boards, superintendents, or

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[199] EPSTEIN & WALKER, *supra* note 67, at 160.

[200] FRANK J. SORAUF, THE WALL OF SEPARATION 31 (1976).

[201] EPSTEIN, supra note 186, at 685.

state departments. Frank Sorauf describes the typical role of accommodationist groups in the following manner:

> It is . . . the "unseen hand" of the adversary litigation that selects the defendant and defines his role. If others act, he is acted upon. The structure of this church-state litigation assigns to him the representation of accommodationist interests. Organized accommodationists . . . have taken a few initiatives as plaintiffs, but the major share of their activity has been directed to finding a place and a role in these church-state cases, even though others serve as defendants of record.[202]

Therefore, the success of separationist groups in "seeing their policy objectives etched into law"[203] during the Warren and Burger eras led to the rise in organized accommodationist activity. Legal scholars refer to the escalation of interest group involvement as judicial pluralism:

> If pluralism in the judiciary means anything, it is this: not only will interest groups use the courts to achieve their objectives, but courts will find themselves the targets of increasing pressure group activity.[204]

Epstein cites three possible objectives of interest groups involved in judicial pluralism: balancing interests, legal interpretation, and receptivity of the courts.[205] Accommodationist groups have become more aggressive in utilizing the courts to "assert their arguments and counter their opponents claims."[206] Separationist groups have become particularly skilled at gaining influence in the courts by presenting arguments to convince the judiciary to interpret laws to support their beliefs.[207] During the Burger and Rehnquist eras, changes in the composition of the Court led groups to believe that an increasingly conservative judiciary might be more receptive to accommodationist interests.[208]

In recent years accommodationist and separationist groups have

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[202] SORAUF, *supra* note 190, at 178.
[203] EPSTEIN, *supra* note 186, at 658.
[204] *Id.* at 659.
[205] *Id.* at 656.
[206] *Id.*
[207] *Id.*
[208] *Id.*

attempted to come to a consensus regarding religious expression in public schools. This effort has manifested itself in the collaborative authorship of pamphlets designed to resolve philosophical differences. "A Teachers' Guide to Religion in the Public Schools," [209] is a publication written by the First Amendment Center and endorsed by groups as diverse as the American Jewish Congress and the Baptist Joint Committee on Public Affairs. The following statement is written in the opening section of the pamphlet in order to convey the message that consensus is possible despite the history of differences among certain groups:

> This teacher's guide is intended to move beyond the confusion and conflict that has surrounded religion in public schools since the early days of the common school movement. For most of our history, extremes have shaped much of the debate. On one end of the spectrum are those who advocate promotion of religion (usually their own) in school practices and policies. On the other end are those who view public schools as religion-free zones. Neither of these approaches is consistent with the guiding principles of the Religion Clauses of the First Amendment.[210]

The pamphlet includes a statement taken out of "Religious Liberty, Public Education, and the Future of Democracy." The following principle is purported to be issued by 24 national organizations:

> Public schools may not inculcate nor inhibit religion. They must be places where religion and religious conviction are treated with fairness and respect. Public schools uphold the First Amendment when they protect the religious liberty rights of students of all faiths or none. Schools demonstrate fairness when they ensure that the curriculum includes study about religion, where appropriate, as an important part of a complete education.[211]

The positive tone of the opening statements in this collaborative pamphlet is counterbalanced with a statement that serves as a disclaimer:

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[209] FIRST AMENDMENT CENTER, A TEACHER'S GUIDE TO RELIGION IN THE PUBLIC SCHOOLS (1999).
[210] *Id.* at 1.
[211] *Id.*

> This guide is not intended to render legal advice on specific legal questions; it is designed to provide general information on the subject of religion and the public schools.[212]

Given the considerable amount of Establishment Clause litigation that is generated due to issues in public schools, such a disclaimer is inevitable.

[212] *Id.*

CHAPTER III

RESEARCH DESIGN AND METHODOLOGY

Design of Study

> Systematic inquiry in the law can be described as a form of historical-legal research that is neither qualitative nor quantitative. In other words., it is a systematic investigation involving the interpretation and explanation of the law.[213]

The problem addressed in this study was the lack of clarity in interpretation of the constitutional appropriateness of utilizing fine arts instructional materials with religious content. The purpose of this study was to determine the status of the courts as to the most current interpretation of the application of the establishment clause to the content of fine arts curriculum. The influences of community values as well as political and interest groups upon practices and policies advocated in the public schools will also be examined within the context of Establishment Clause jurisprudence.

The study utilized legal research as a means of perspective-seeking. The very nature of legal research is that the outcome of such an endeavor provides a vantage point from which practices and procedures can be implicated and speculated upon. Charles Russo illustrates the parameters of legal research in the following manner:

> As it attempts to make sense of the evolving reality known as the law, legal research employs a time line that looks at the past, present, and future for the variety of purposes. By placing a legal dispute in perspective, researchers in Education Law hope not only to inform policy makers and

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[213] Charles J. Russo, Legal Research: *The "Traditional" Method, in* **RESEARCH THAT MAKES A DIFFERENCE: COMPLEMENTARY METHODS FOR EXAMINING LEGAL ISSUES IN EDUCATION** 33, 34 (David Schimmel, ed., NOLPE 1996).

> practitioners about the meaning and status of the law, but also seek to raise questions for future research.[214]

The type of data collected in this study included legal documents, newspaper articles, policy, and legal reviews. The culmination of the analysis of this kind of data will be to create a perceptual foundation upon which the Model of Appropriate Practice can be constructed.

Aagaard, Vaughn, and Langenbach describe the perspective-seeking researcher as one whose goal is to generate implications for further study.[215] Because one of the goals of the study is to generate implications for policy development in the area of religious expression, perspective-seeking methodology is indicated.

Cohen and Olsen define legal research as the process of finding the law that governs activities in human society.[216] Specifically, the study utilizes a combination of legal research and policy analysis in order to identify patterns and themes in order to gain perspective to construct a model of appropriate practice based upon: the relationship between societal and legal forces in the formation of policy related to religious content in curriculum; the historical interpretations of the Establishment Clause of the First Amendment that particularly relate to the appropriateness or inappropriateness of the inclusion of religious content in the Fine Arts curriculum; court decisions that directly relate to the Fine Arts and First Amendment rights; and the possible future thrust of state laws, school district policies and legal trends regarding curriculum content. A Model of Appropriate Practice is applicable to the perspective-seeking technique involving moving from specific data to a higher level of

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[214] *Id.* at 35.

[215] MICHAEL LANGENBACH ET AL., AN INTRODUCTION TO EDUCATIONAL RESEARCH 14 (1994).

[216] MORRIS L. COHEN & KENT C. OLSON, LEGAL RESEARCH IN A NUTSHELL 1 (5th ed. 1992).

abstraction.[217]

Legal research involves the collection of data from sources of authority that vary in their merit and level of influence upon general practice. The term "authority" describes the value, worth or quality of documents with regard to the legal issue being studied.[218] Cohen and Olsen identify three broad categories of legal literature that are the chief elements of legal research: (a) primary sources, (b) finding tools; and (c) secondary materials.[219]

Primary legal sources are those that that involve decisions of appellate courts, statutes passed by legislatures, executive decrees, and regulations and rulings of administrative agencies.[220] Larry Teply divides primary legal sources into three categories: (1) statutory law (legislation); (2) common law (judicial opinions); and (3) administrative law (regulations and agency decisions).[221] Examples of statutory sources utilized in this study include the Utah statutory code pertaining to "Maintaining constitutional freedom in public schools."[222] Examples of common law utilized in this study are numerous and include historical selections of Establishment Clause jurisprudence as well as cases specifically pertaining to Fine Arts curriculum. Administrative law in the form of school district/board policies and regulations will be analyzed.

The use of chronological citation in the reporting of decisions and statutes has been the means by which legal history has always been recorded. Finding tools were created as a means to efficiently access this large body of law. Cohen and Olsen identify digests, annotations, citators, and annotated codes as the finding tools that provide access to points of law.[223] Computerized

[217] LANGENBACH ET AL., *supra* note 205, at 14.
[218] Butler, *supra* note 66, at 9.
[219] COHEN & OLSEN, *supra* note 206, at 3.
[220] *Id.*
[221] LARRY TEPLY, LEGAL RESEARCH AND CITATION 1 (1989).
[222] UTAH CODE ANN. tit. 53A, section13- 101. 1(1999)
[223] COHEN & OLSEN, *supra* note 206, at 5.

systems of legal research such as "Legal Trac," "Lexis -Nexis Academic Universe," and "Westlaw" were utilized in this study to locate sources.

Secondary sources are comprised of data that is based upon analysis, discussion, and/or interpretation of primary sources of law. Kunz, Schmedemann, Downs, and Bates describe secondary authority by stating that it is not primary authority because it is commentary in nature and is created by individuals and nongovernmental bodies.[224] Although secondary sources do not carry the weight in terms of having the authority of actual law, these resources can have influence on the way a law is interpreted depending upon the prestige of the authors or the quality of their scholarship.[225] Secondary materials utilized in this study included law reviews, informational legal pamphlets, encyclopedias, periodicals, textbooks, and monographs.

Procedures

The impetus of this research came directly from newspaper reports of the initial filing in the case *Bauchman v. West High School.* The initial step in this research involved finding district court findings in this case in order to find the issues involved. The researcher conducted a preliminary search of resources to determine whether a comprehensive study of the issues involved in examining the use of religious material as part of a Fine Arts curriculum existed. The cultural, social, and ceremonial influences of artistic expression has been widely studied and the appropriateness of the use of certain genres has been debated. However, no definitive examination of the issues involved had taken place within the context of legal research. The application of First Amendment principles to the Fine Arts curriculum was identified as the primary focus of study.

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[224] KUNZ ET AL., THE PROCESS OF LEGAL RESEARCH 6 (1996).
[225] COHEN & OLSEN, *supra* note 206, at 6.

Secondary sources, particularly, legal reviews and fine arts journals, were studied in order to construct a table of cases directly applicable to fine arts curriculum. These sources were key to examining the philosophical and precedential patterns that scholars interpret as having an influence on court decisions, state and local policies, and professional practice. The study of secondary sources, coupled with the analysis of relevant court decisions as primary sources, supplies the foundation for the compilation of applicable data.

The analysis of historical explanation of constitutional issues as well as philosophical reasoning and phraseology utilized in reporting court decisions and legal policies is the means by which implications for future practice can be conjectured. A Model of Appropriate Practice was constructed as a culmination of seeking perspective upon what could be described as a broad outline or "framework." A Framework is defined as a basic structure which "supports and gives shape."[226] Mawdsley and Russo's "Analytical Framework for Reviewing Religious Activities in Public Schools" contributed as a prototype for the Model of Appropriate Practice constructed as a product of this research.[227]

The formation of chapters for this research was constructed upon the principle of building a "case" for the practice of utilizing materials with religious themes as part of a comprehensive education in the area of fine arts. Kunz, Schmedemann, Downs, and Bateson identify the following criteria as the goal of a researcher in building a legal case:

> *correct:* the law that governs your client's facts and that applies to the time the situation occurred;
> *comprehensive:* necessary mandatory primary authority, helpful persuasive primary authority, and useful secondary authority

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[226] WEBSTER'S DICTIONARY OF THE ENGLISH LANGUAGE 373 (1991).
[227] Ralph D. Mawdsley & Charles J. Russo, *An Analytical Framework For Reviewing Religious Activities in Public Schools*, 128 ED.LAW REP. [943] (Oct. 29, 1998).

credible: authority that carries weight because of its quality and the expertise of its authors.[228]

The five chapters of this research were constructed in adherence to this criteria.

Chapter two traces the historical antecedents of the Establishment Clause of the First Amendment of the Constitution. Particular attention was paid to the cultural, societal, and political influences and their subsequent bearing on interpretation. Accommodationist and Separationist ideologies were discussed as well as the impact of the various methods of analysis that were influenced by the composition of Supreme Court members.

Chapter two also outlines and analyzes the paramount cases in the area of public school education with regard to curriculum. Eras of court leadership are examined in order to delineate the Supreme Court's treatment of religion in the public schools. Specific areas of jurisprudence that may be applied to the study of fine arts, including school prayer, graduations, benedictions, moment-of-silence statutes, and religious school curricula and programs are the primary focus.

Chapter four examines case law that specifically relates to first amendment challenges to fine arts instruction. Concurring and dissenting opinions were discussed as they relate to practices, procedures, and level of influence in determining the appropriateness of curriculum materials. The Court's reasoning will be applied to fine arts programs, examining both the content of selections and the context in which they are performed.

The culminating chapter of this study involves the summarization of the impact of the Establishment Clause upon Fine Arts curriculum. Primary and secondary sources utilized in this study provided the basis for the identification of common patterns for evaluating the Establishment Clause and the discussion

[228] KUNZ ET AL., *supra* note 214, at 7.

of the ramifications of teaching, performing, and utilizing materials with sacred content. Analytical Frameworks created by scholars and illustrated in legal reviews contributed to the construction of a Model of Appropriate Practice. The purpose of the Model of Appropriate Practice is to define boundaries suggested by interpretations of the Establishment Clause and to limit the likelihood of Establishment Clause violations.

Data Collection and Treatment

The doctrine of stare decisis is preeminent in the accumulation of data or evidence in legal research. This doctrine is based upon the principle of case precedent and is defined by Barron's Law Dictionary as "to stand by that which was decided."[229] Roberts and Schluter list three inherent advantages to the fundamental process of courts considering precedent in their decision making:

> First, stare decisis promotes a sense of stability to our law which is essential if there is to be publicconfidence in the judicial system. Second, stare decisis provides some predictability of the outcome of the case. It is important for lawyers to adviser their clients with confidence and they can do so with a measure of certainty because of this doctrine. Third, stare decisis ensures fairness by the court. This means that individuals will be treated the same way given a certain set of facts. The doctrine is important to the legal researcher because it highlights the emphasis on case law in the American legal system.[230]

The examination and analysis of Supreme Court and appellate court decisions, by nature of their broad application as well as their influence in dictating the actions of state and local entities, is indicated in this kind of study.

The compilation of relevant case law for this study was facilitated by the availability of cases reported in publications which focus on educational issues. *West's Education Law Reporter* and *West's Education Law Review* are

[229] BARRON'S, *supra* note 48 at 461.

[230] BONITA K. ROBERTS & LINDA L. SCHLUETER, LEGAL RESEARCH GUIDE: PATTERNS AND PRACTICE 3 (2nd ed. 1990).

publications that provide the full text of Supreme Court decisions as well as scholarly reviews written by authors who are authorities in the area of Education Law.

Each case was analyzed in a way that is consistent with what is referred to as "briefing" a case. Stanley Kinyon defines briefing a case as "making a brief written summary or abstract of the case in your own words."[231] The purpose of this method of study is to learn the legal principles applied in reaching decisions and to gain insight into the judicial reasoning process.[232] Four elements have been identified as essential in analyzing and understanding judicial decisions: (1) Statement of Facts--acknowledgement of the parties involved, the type of action, facilitating events that led to the suit, and the progression of the suit through the courts; (2) Issues--statement(s) of the question that must be answered in order to resolve the dispute; (3) Decision--the court's statement of the final judicial opinion; (4) Reasoning--the majority opinion is a written statement that clarifies the reasoning or justification used to arrive at the decision.[233] Those court members who do not agree with the reasoning of the majority may write a dissenting opinion to clarify their reasoning for disagreeing with the majority.

The Lexis-Nexus database provided source materials for state statutes and codes pertaining to curriculum and applicable to the study. There are states in which legislation, regulation, and policies were enacted to address the treatment of instruction with regard to religious themes.

Various interest groups such as the "American Jewish Congress," "Freedom Forum," and the "National PTA" have been involved in creating

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[231] Stanley V. Kinyon, *"Briefing" Cases, in* **STUDY GUIDE FOR LAW STUDENTS** 2, 2 (West Publishing 1993).
[232] *Id.*
[233] *Id.*

pamphlets to attempt to clarify what activities are appropriate in the public schools. These pamphlets were useful in providing a nonlegal view of religious expression.

Summary

The process of legal research employed in this study required the integration of skills identified as strategic to building a successful case. The skills employed were as follows: developing research terminology, using secondary sources for background and references, formulating issues to research in primary authority, researching those issues in various forms of primary authority, and incorporating nonlegal materials where appropriate.[234]

[234] KUNZ ET AL, *supra* note 218, at 8.

CHAPTER IV

ANALYSIS AND INTERPRETATION OF DATA: ESTABLISHMENT CLAUSE CASES AND LEGISLATION RELATED TO FINE ARTS EDUCATION

Cases and Legislation Involving Fine Arts Education and The Establishment Clause

Establishment Clause challenges to Fine Arts Education and legislation regarding the use of religious materials can be categorized according to six issues:

(1) Songs, Holidays, Ceremonies and Performances; (2) Literature; (3) Student Assignments; (4) Student Clubs and The Equal Access Act; (5) Artwork; and (6) State Legislation. Cases brought before district and appellate courts will be analyzed in the following sections. Commonalities found among the various legal decisions and legislative statutes will be extrapolated and culminated into a Framework and Model of Appropriate Practice for Fine Arts educators.

Songs, Holidays, Ceremonies and Performances

> We view the term "study" to include more than mere classroom instruction; public performance may be a legitimate part of secular study. . . [W]hen the primary purpose served by a given school activity is secular, that activity is not made unconstitutional by the inclusion of some religious content.[235]

A. *Florey v. Sioux Falls*[236]

Roger Florey, along with the parents of other Kindergarten students who attended school in the Sioux Falls South Dakota School District, took issue with a Christmas assembly that featured a play with music and dialogue concerning the events surrounding the birth of Jesus Christ:

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[235] Florey v. Sioux Falls, 619 F. 2d 1311, 1316 (1980).
[236] *Id.*

> Teacher: Of whom did heav'nly 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. . .[237]

Due to parent complaints that this assembly as well as previous assemblies amounted to a religious exercise, the Sioux Falls School Board convened a citizens' committee to study and create a policy based on appropriate church/state relationships as applied to school activities. Members of the committee included clergymen of the Jewish, Catholic, and Protestant religions, an attorney, a member of the American Civil Liberties Union, the Director of Music for the school district, and parents and teachers in the district. The committee developed guidelines and policy to address the use of religious material in the school district. Rules were developed to limit holiday observances to those activities that served both religious and secular objectives. Rule three allowed music, art, literature, and drama with a religious theme to be included in the curriculum if presented "in a prudent and objective manner and as a traditional part of the cultural and religious heritage of the particular holiday."[238] Rule four permitted the use of religious symbols in teaching if they were used as an "example of the cultural and religious heritage of the holiday and were temporary in nature."[239] A group of parents, led by Roger Florey, brought suit against the school district alleging that the guidelines and policy statements were violations of the First Amendment. The Eighth Circuit Court of Appeals held that the policy and rules were not violative of the First Amendment because the policies passed the 3-pronged "Lemon Test" which indicated that the allowed holiday observance had both a secular and religious purpose. The guidelines and policies were deemed as an attempt at advancing or inhibiting religion. The primary effect of the guidelines and

[237] *Id.* at 1318.
[238] *Id.* at 1319.
[239] *Id.* at 1320.

policies was not found to constitute an establishment of religion nor an excessive entanglement with religion. In addition, the Court of Appeals reasoned that past objectionable Christmas assemblies would not be allowed under the new guidelines and policies established by the school district.

> [M]usic, 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.[240]

B. *Clever v. Cherry Hill*[241]

Holiday acknowledgement of diverse cultures and religions prompted a constitutional challenge in *Clever v. Cherry Hill*. Fred Clever, along with residents and parents of students in the Cherry Hill Township, as well as the American Civil Liberties Union of New Jersey, disputed a school district policy that required classrooms to maintain a school calendar containing dates, symbols, and other information regarding national, ethnic, and religious holidays. The school district enacted this policy for the purpose of fostering "mutual understanding and respect for the rights of individuals regarding their beliefs, values, and customs."[242] The policy also allowed schools to erect seasonal displays for a length of time not to exceed ten school days. Specific references were made to musical performances or concerts:

> Any school musical program or concert composed of several choral and instrumental selections, shall have secular educational value and shall not be, nor have the effect of being, religiously oriented or a religious celebration. While individual religious pieces of music may be performed for their musical value, the total effect of a music program or concert shall be non-religious.[243]

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[240] *Id.* at 1317.
[241] Clever v. Cherry Hill, 838 F. Supp. 929 (E.D. NJ 1993).
[242] *Id.* at 932.
[243] *Id.* at 943, 944.

The district court expressed the following view regarding the significance of the issues in this case:

> This case explores the constitutionally amorphous dividing line between the laudable educational goal of promoting a student's knowledge of and appreciation for this nation's cultural and religious diversity, and the impermissible endorsement of religion forbidden by the Establishment Clause of the United States and New Jersey constitutions.[244]

The district court applied the Lemon test in order to determine whether "Policy JO" violated the Establishment Clause. The court determined that the national secularism and cultural nature of religious holidays such as Christmas and Chanukah rendered it possible for their study and celebration in schools to serve a secular educational mission:

> Religion is a pervasive and enduring human phenomenon which is is an appropriate, if not desirable, subject of secular study. It is hard to imagine how such study can be undertaken without exposing students to the religious doctrines and symbols of others.[245]

The diversity of religions presented in the school calendar and in school displays was utilized as the basis for the district court's conclusion that the school district was not endorsing any particular religion:

> Given the emphasis Policy JO places on religious diversity, there is is simply no basis for concluding that it endorses any particular religion. Nor can it be said to favor religion over non-religion.[246]

The third prong of the Lemon test involves analysis as to whether any practice constitutes the government's involvement or "excessive entanglement" with religion. The district court determined that curriculum choices do not require the constant supervision that would render practices such as funding to parochial schools unconstitutional.

> As did *Florey*, we explicitly reject the "entanglement" challenge based on a school district's efforts to insure compliance with the

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[244] *Id.* at 932.
[245] *Id.* at 939.
[246] *Id.* at 940.

> Establishment Clause in the operation of its schools. This is the type of decision inherent in every curriculum choice and would be faced by school administrators . . . even if the rules did not exist. Given the uncertain state of Supreme Court guidance in this area, plaintiffs' argument might leave school administrators no choice but "to exclude religion from every aspect" of school life. There is no Supreme Court precedent which suggests this result.[247]

The court held in favor of the school district's policy and practices related to the cultural calendar.

C. *Doe v. Aldine*[248]

A song posted over the entrance leading to a school gymnasium at Aldine Senior High School produced enough controversy to invite a constitutional challenge. Aldine Senior High School in Texas had a tradition of singing the "Aldine School Prayer" at school games, pep rallies and graduations. The school band often provided accompaniment to the following text:

> Dear God, please bless our school and all it stands for. Help keep us free from sin, honest and true, courage and faith to make our school the victor. In Jesus' name we pray, Amen.[249]

The district court decided to utilize the lemon test in order to address two issues:

> (1) [W]hether the activities of the defendants violated the Establishment Clause or (2) whether, as defendants contend, the restriction of those activities would mean an impermissible encroachment on the individual's constitutional right to freely exercise his or her religion.[250]

The school district argued that the sectarian school prayer served the secular purpose of promoting school spirit and pride. The district court rejected this reasoning by putting forth a principle established as a precedent in *Abington v. Schempp*:

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[247] *Id.* at 941.
[248] Doe v. Aldine Independent School District, 563 F. Supp. 883 (S.D. Tex 1982).
[249] *Id.* at 884.
[250] *Id.* at 885.

> A school district or other governmental body cannot seek to advance non-religious goals and values, no matter how laudatory, through religious means.[251]

Therefore, the prayer failed to pass the "secular purpose" component of Lemon.

The school district argued that the "primary effect" of performing the school prayer was to neither advance or inhibit religion, because students had the choice as to whether or not to participate in the activity. The district court rejected this argument based upon the principle that making an activity voluntary does not make it constitutionally acceptable.

> The limits of the first amendment are not avoided by simply making the prayer voluntary. As has been emphasized repeatedly by the courts, voluntariness is not relevant to a first amendment inquiry. In this case, Aldine Senior High School sponsored the events where the prayer was sung. Pep rallies, football games, and graduation ceremonies are considered to be an integral part of the school's extracurricular program and as such provide a powerful incentive for students to attend. . . This court has found that defendants' practice carries with it the implied recognition and approval of religious activity.[252]

The school district argued that they had not violated the "excessive entanglement" prong of the Lemon test because the school prayer was recited during extracurricular activities and that attendance at these events was voluntary. The district court rejected this argument because of the involvement of the principal and other school personnel in these activities.

> In this case, it is apparent that Aldine High School personnel are active in the supervision of the events where the religious activity occurs. . . Aldine School district facilities were used as the site of the religious activity and District employees were involved in supervising both the school property and the events which took place there. Therefore, as a matter of law, the court concludes that the defendant did not avoid an excessive entanglement with religion and has not met the third prong of the [Lemon] test.[253]

The final argument raised by the school district involved claims that a

[251] *Id.* at 886.
[252] *Id.* at 887.
[253] *Id.*

restriction placed on reciting the school prayer would be a violation of students' free exercise of religion. The district court rejected this argument because performing the school prayer was not a student-initiated activity.

> [T]he activity which the court addresses is not an independent, unofficial invocation of God's help by the students, but rather a state initiated, encouraged and supervised regular practice which occurs on school property during extracurricular events which are an important part of the school's program. The distinction is significant and controlling. The former is an inviolable right; the latter according to purpose, effect, and entanglement analysis of the Supreme Court, is an impermissible establishment of religion.[254]

The district court held that the reciting, singing, or posting of the "Aldine School Prayer" was in violation of the First Amendment .

D. *Doe v. Duncanville*[255]

The Fifth Circuit Court of Appeals was ultimately called upon to determine the appropriateness of several Duncanville, Texas School District practices including permitting a choir to adopt a Christian religious song as its theme song. A lower court had issued a permanent injunction against the following practices:

> (1) permitting its employees to lead, encourage, promote or participate in prayers with students during curricular or extracurricular events; (2) permitting its employees to lead, authorize, encourage or condone the recitation or singing of religious songs as the theme songs of the school's choirs; (3) authorizing, permitting or condoning the distribution of Gideon Bibles to fifth grade students by representatives of the Gideon Society, except to the extent permitted by the Equal Access Act.[256]

The Fifth Circuit Court of Appeals utilized Justice O'Connor's Endorsement Test as the means to: (1) uphold the district courts's injunction against school employee participation in prayer; (2) reverse the district court's injunction against choice of a religious song as the choir theme song; and

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[254] *Id.* at 888.

[255] Doe v. Duncanville Independent School District, 70 F. 3d 402 (5th Cir. 1995).

[256] *Id.*

(3) remand the decision against the distribution of Bibles because the plaintiffs lacked standing to assert a claim.

The circuit court's reversal of the decision regarding the choir's religious theme song is particularly significant because of the reasoning presented in response to the following claims brought forth by the plaintiffs:

> [T]he Does essentially contend that the act of treating The Lord Bless You and Keep You as the theme song, rather than as simply one song in the repertoire, transforms the permissible practice of singing this song into an endorsement of religion.[257]

The singular and unique reasoning for the Fifth Circuit's determination that the use of the theme song did not represent an endorsement of religion had to do with the dominance of religious music in choral literature and the legitimate secular reasons for utilizing this literature:

> Legitimate secular reasons exist for maintaining *The Lord Bless You and Keep You* as the theme song. As the choir director, David McCullar testified, this song is particularly useful to teach students to sight read and to sing a cappella. In Mr. McCullar's words, it is also "a good piece of music . . . by a reputable composer. . ." At trial, Mr. McCullar estimated that 60-75 percent of serious choral music is based on sacred themes or text. Given the dominance of religious music in this field, DISD can hardly be presumed to be advancing or endorsing religion by allowing its choirs to sing a religious theme song. As a matter of statistical probability, the song best suited to be the theme is more likely to be religious than not.[258]

The court was careful to distinguish its position regarding utilization of a piece of choral music as a theme song from the utilization of a song as a religious exercise as was the case in *Doe v. Aldine:*

> This distinguishes the song here from the prayer set to music in Doe v. Aldine . . . In Aldine, the challenged song was a school-composed prayer set to music which students sang before athletic events. The song in Aldine was more akin to the pre-game prayers . . . than the widely recognized choral music at issue. The fact that singing these songs is not a religious exercise also means that maintaining them as

[257] *Id.*

[258] *Id.* at 407.

> theme songs does not impermissibly entangle government with religion or coerce students into participating in a religious activity.[259]

The Fifth Circuit concluded its reasoning by emphasizing that a position of neutrality towards religion allows for the use of religious choral music.

E. *Skarin v. Woodbine*[260]

A piece of religious choral music that was to be performed at the Woodbine Community High School graduation ceremony prompted the Skarin family to bring a constitutional challenge against the Woodbine Community School District in Iowa. Donovan and Ruby Skarin objected to singing "The Lord's Prayer" in rehearsals and at the graduation ceremony.

The Skarins first voiced their objections to the school principal and to a school board member. They were told that the objectionable choral piece was a tradition that was approved of by the majority of the community. However, the principal and the choral director at Woodbine decided not to include "The Lord's Prayer" in the 2002 graduation ceremony. Nevertheless, the Woodbine school board, who received complaints regarding the planned omission of the choral piece, voted to direct the choir to include "The Lord's Prayer" along with a second secular song at the 2002 graduation ceremony.

The district court utilized a combination of the lemon test and coercion analysis to come to the following holding:

> The court permanently enjoins the Woodbine High School Choir from performing "The Lord's Prayer" at graduation ceremonies and from rehearsing "The Lord's Prayer" for performance at graduation ceremonies for as long as Ruby and Donovan Skarin are students at Woodbine High School.[261]

The district court rejected the school board's reasoning that the choral piece should be allowed because the majority of students and parents wanted it

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[259] *Id.* at n.7.
[260] Skarin v. Woodbine Community School District, 204 F. Supp. 2d 1195 (S.D. IA 2002).
[261] *Id.* at 1198.

to be so:

> That the majority of the students, choir members, and parents want "The Lord's Prayer" to be a part of the program is not a factor in the Constitutional analysis. This is not a situation where the majority may rule. Our constitution prohibits state-compelled religious conformance.[262]

The district court further reasoned that the coercion that is exemplified in the inherent pressure of compulsory attendance at events such as graduation renders alternatives such as non-participation insufficient according to the precedent set forth in *Lee v. Weisman*:

> The school cannot within the confines of the Establishment Clause force a student to choose between attending and participating in school functions and not attending only to avoid personally offensive religious rituals. . . Moreover, the inclusion of a secular choral piece at the graduation ceremony does not relieve the offended student from having to make an awkward choice. Respondents have given this court no basis for ignoring or disavowing the clear teachings and controlling United States Supreme Court precedent.[263]

The district court's knowledge of statements made by members of the Woodbine School Board contributed to the court's additional analysis utilizing the Lemon test:

> The court is persuaded that one audio tape recording of the January 17 board meeting was erased at the request of one or more Board members because it contained statements by Board President Pryor and other Board Members candidly stating that "The Lord's Prayer" would be reinstated in the 2002 graduation program because "We are Christians" and "Lawyers be Damned." . . . As applied to the facts here, the Board's insistence on inclusion of "The Lord's Prayer" had no real secular purpose, has a primary effect of encouraging Christianity, and fosters excessive entanglement between the government, here the Board, and the Christian religion that the Board would promote by having "The Lord's Prayer" sung at graduation.[264]

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[262] *Id.*

[263] *Id.*

[264] *Id.* at 1197.

F. *Doe v. Madison*[265]

The Ninth Circuit Court of Appeals was called upon to decide whether an Idaho school district's policy that allowed student speakers at graduation to choose to include religious expression in their presentations violated the Establishment Clause. Jane Doe, an unidentified parent, objected to the following Madison School District graduation policy:

> [A] minimum of four students are invited to speak at commencement exercises according to academic class standing. If a student accepts the invitation, she decides individually the content of her pronouncement. She may choose to deliver an "address, poem, reading, song, musical presentation, prayer or any other pronouncement." In no case may the school administration "censor any presentation or require any content." At most, it can "advise the participants about the appropriate language for the audience and occasion"; but the student-speaker is free to reject the advice.[266]

Jane Doe claimed that the graduation policy violated the coercion standard standard utilized in *Lee v. Weisman*. The court rejected the argument that the policy placed inappropriate pressure on students to conform to possible religious objectives of the state. Although the court conceded that the pressure on students to attend and participate in graduation ceremonies was probably a factor, the absence of state control of individual speech made the policy acceptable:

> [I]t is the absence of this control which saves the graduation policy at issue from facial constitutional invalidation. . . [T]he facial provisions of the policy at issue here include three distinct features. First, students--not clergy--deliver the presentations. Second, these student-speakers are selected by academic performance, a purely neutral and secular criterion. Third, once chosen, these individual students have autonomy over content. . . The significance of these features cannot be overstated.[267]

The court further rejected the claim that the school district's policy was in

[265] Doe v. Madison School District, 147 F. 3d. 832 (9th Cir. 1998).
[266] *Id.* at 834.
[267] *Id.* at 835.

opposition to the Lemon test. The court explained that the policy included providing honored students with the freedom to speak or perform in whatever manner they chose:

> The district court found that the school's graduation policy on its face was motivated, at least in part, by a number of secular purposes, including a desire to grant top students the autonomy to deliver uncensored speech. Unwilling to trivialize the importance of bestowing responsibility on young adults at this significant moment in their student careers, we agree.[268]

The Ninth Circuit utilized the district policy's disclaimer as a means to explain its view that the policy does not have the effect of advancing religion:

> Any presentation by participants of graduation exercises is the private expression of the individual participants and does not necessarily reflect any official position of Madison School District #321, its Board of Trustees, administration or employees or indicate the views of any other graduate. The Board of Trustees of the Madison School District #321 recognizes that at graduation time and throughout the course of the remedial process, there will be instances when religious values, religious practices and religious persons will have some interaction with the public schools and students. The Board of Trustees, however, does not endorse religion, but recognizes the rights of individuals to have the freedom to express their individual, political, social, or religious view, for this is the essence of education.[269]

The court found that the district's policy did not constitute an excessive entanglement with religion because the content of the policy enjoins the school district from being required to analyze the speech to determine its religious content:

> Such an effort would force the school into the impossible task of deciding which words and activities fall within the the concept of religion.[270]

The Ninth Circuit upheld the policy in its entirety.

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[268] *Id.* at 837.
[269] *Id.* at 837, 838.
[270] *Id.* at 838.

G. *Bauchman v. West High School*[271]

Rachel Bauchman, a student at West High School in Salt Lake City, Utah, took issue with the musical literature, performance venues, and procedural practices of her teacher and choir director, Mr. Torgerson. Rachel felt that many of the practices in the choral program were established for the purpose of advocating Christianity in general, and more specifically, the Mormon faith.

The following allegations were a part of her original complaint:

> More specifically, she claims (1) as a member of the Choir she was required to perform a preponderance of Christian devotional music; (2) Mr. Torgerson selected songs for the religious messages they conveyed; (3) the Choir was required to perform Christian devotional songs at religious sites dominated by crucifixes and other religious symbols; (4) Mr. Torgerson selected religious sites for Choir performances with the purpose and effect of publicly identifying the Choir with religious institutions; (5) Mr. Torgerson berated and ostracized students, like herself, who dissented against his religious advocacy; (6) Mr. Torgerson covertly organized a Choir tour for select Choir members to perform religious songs at religious venues in southern California; and (7) Mr. Torgerson deliberately scheduled the Choir to sing two explicitly Christian devotional songs during West High School's 1995 graduation.[272]

The Tenth Circuit Court of Appeals determined that the claims that could be legally addressed by the Court fell into three categories:

> the performance of religious music, the performance at religious sites, and the public ridicule and harassment she experienced as a result of the defendants' collective response to her objections.[273]

The Tenth Circuit created a hybrid test to determine the constitutionality of Bauchman's claims. The reasoning behind such a creation lay in their view of the ambiguity of Establishment Clause jurisprudence and traditional tests. Their solution was to combine components of two traditional tests:

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[271] Bauchman v. West High School, 132 F.3d 542 (10th Cir. 1997).
[272] *Id.* at 546.
[273] *Id.* at 553.

> Having struggled to meaningfully apply to purpose component of the endorsement test to the alleged Establishment Clause violation in this case, we agree it is an unworkable standard that offers no useful guidance to courts, legislators or other government actors who must assess whether government conduct goes against the grain of religious liberty the Establishment Clause is intended to protect. Nevertheless, the uncertainty surrounding the present Court's position regarding the appropriate Establishment Clause analysis, in general, cautions us to apply both the purpose and effect components of the refined endorsement test together with the entanglement criterion imposed by Lemon, when evaluating Ms. Bauchman's Establishment Clause claim. To survive a motion to dismiss, Ms. Bauchman's must allege facts which, accepted as true, suggest a violation of any part of this analysis.[274]

The court applied the purpose prong of the endorsement test by determining whether a secular purpose existed for the use of religious music in the choral program. The court also considered whether there could be a secular purpose in the choir's performances in religious venues such as churches. *Doe v. Duncanville* was referenced as case precedent in generating a number of secular purposes for the study of religious music:

> Here, we discern a number of plausible secular purposes for the defendants' conduct. For example, it is recognized that a significant percentage of serious choral music is based on religious themes or text. See, e.g., Doe v. Duncanville (Citations omitted). Any choral curriculum designed to expose students to the full array of vocal music culture therefore can be expected to reflect a significant number of religious songs. Moreover, a vocal music instructor would be expected to select any particular piece of choral music, like any particular piece of secular choral music, in part for its unique qualities useful to teach a variety of vocal music skills (i.e. sight reading, intonation, harmonization, expression). [275]

The court also generated secular purposes for the use of venues associated with religious:

> Plausible secular reasons also exist for performing school choir concerts in churches and other venues associated with religious institutions. Such venues often are acoustically superior to high school auditoriums or gymnasiums, yet still provide adequate

[274] *Id.* at 552.
[275] *Id.* at 554.

> seating capacity. Moreover, by performing in such venues, an instructor can showcase his choir to the general public in an atmosphere conducive to the performance of serious choral music.[276]

The court provided additional evidence to support the finding that the choral music program had a secular purpose by describing the deficiencies of the plaintiff's allegations:

> Ms. Bauchman . . . fails to allege any facts indicating (1) West High School's vocal music curriculum was out of step with traditional public high school vocal music curricula, (2) the acoustics and/or seating at the selected performance venues were unsuitable for the performance and public enjoyment of serious vocal music, or (3) the defendants' "actual" purpose was otherwise inconsistent with the prevalent secular objectives noted above. Ms. Bauchman's allegations instead focus solely on (1) the religious component of the Choir's activities--she was required to practice and perform songs with religious lyrics at sites dominated by crosses and other religious images, and (2) the defendants' conduct, not in selecting such songs and venues (the challenged activity), but in response to her objections--she was ridiculed for objecting to such songs and performance sites sites, and defendants inadequately and inappropriately responded to her objections. These allegations are insufficient to support her Establishment Clause claim given the obvious secular purposes for defendants' conduct. . . Accordingly, Ms. Bauchman's complaint fails to state an Establishment clause claim under the purpose component of the endorsement test.[277]

The second component of the endorsement test involves determining whether a practice has the primary effect of advancing or endorsing religion. The court utilized the "reasonable observer" standard to differentiate between incidental and intentional endorsement of religion:

> The Establishment Clause prohibits only those school activities which, in the eyes of a reasonable observer, advance or promote religion or a particular religious belief.[278]

The court considered the purpose, context and history of education and religion in Salt Lake City as well as the prevalent history of religious themes in

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[276] *Id.*
[277] *Id.* at 555.
[278] *Id.*

vocal music in order to determine whether or not intentional endorsement of religion was indicated:

> [T]he Choir represents one of Salt Lake City's public high schools and is comprised of a diverse group of students; many of the Choir's songs have religious content--content predominantly representative of Judeo-Christian beliefs; in contrast to a church choir, this Choir also performs a variety of secular songs; the Choir's talent is displayed in the diverse array of songs performed and in a number of different public (religious and nonreligious) settings, all of which reflect the community's culture and heritage. Certainly, any given observer will give more or less meaning to the lyrics of a particular song sung in a particular venue based on that observer's individual experiences and spiritual beliefs. However, the natural consequences of the Choir's alleged activities, viewed in context in their entirety by a reasonable observer, would not be the advancement or endorsement of religion. Ms. Bauchman's complaint therefore fails to support a claim that the Choir curriculum or Choir activities have a principle or primary effect of endorsing religion.[279]

The court restated the definition of "excessive entanglement" that was utilized in *Florey* to determine that a reasonable observer would not perceive a violation of this component of the Lemon test:

> [W]e have rejected the notion that Ms. Bauchman's allegations regarding the Choir's singing of religious songs in religious venues alone support a claim that defendants' conduct endorses religion. Instead, we believe a reasonable observer could conclude the selection of religious songs from a body of choral music predominated by songs with religious themes and text, and the selection of public performance venues affiliated with religious institutions, without more, amount to religiously neutral educational choices. Consequently, we perceive no state involvement with recognized religious activity.[280]

Ms. Bauchman's claims regarding her subjection to public ridicule and harassment were rejected due to insufficient evidence:

> Certainly, Ms. Bauchman's allegations she was criticized and retaliated against for opposing the religious content of the Choir curriculum, taken as true, evidence a lack of sensitivity, crudeness, and poor judgment unbefitting of high school students, their

[279] *Id.* at 555, 556.
[280] *Id.* at 556.

> parents, and especially, public school teachers and administrators. However, such claims do not rise to the level of a constitutional violation. [281]

The court also rejected Ms. Bauchman's free speech and free exercise claims based on the fact that the choir director provided her with the option of non-participation in activities that were offensive to her with no affect on her grade.

> On its face, Ms. Bauchman's complaint states the songs and performances were a required, graded component of Choir participation, but she was given the option of not participating to the extent such participation conflicted with her religious beliefs. Moreover, she was assured her Choir grade would not be affected by any limited participation. We conclude the fact Ms. Bauchman had a choice whether or not to sing songs she believed infringed upon her exercise of religious freedom, with no adverse impact on her academic record, negates the element of coercion and therefore defeats the Free Exercise claim. . . For the same reasons. . . we conclude her complaint fails to allege facts sufficient to show she was coerced or compelled to engage in any Choir activities. . . against her will. The district court properly dismissed Ms. Bauchman's Free Speech claim for having failed to establish a necessary element of the alleged violation.[282]

The court did acknowledge that the allegations regarding Mr. Torgerson's conduct did support a concept that the choir director was a Christian man. However, this fact alone, was not sufficient to support an Establishment Clause claim:

> Having carefully reviewed the entire record before the district court, we respect Ms. Bauchman's individual perception as to the religious purpose and effect of these events and Mr. Torgerson's conduct, generally. Ultimately, however, we conclude that although Ms. Bauchman's allegations may support an observation that Mr. Torgerson is a religious man who struggles to expunge his spiritual convictions from his teaching, they fall short of supporting the required elements of an Establishment Clause claim--e.g., Mr. Jorgenson actually taught or proselytized his religious beliefs, advocated Christianity in general, condemned or criticized others' beliefs,

[281] *Id.*

[282] *Id.* at 557.

> conducted or permitted prayer or other religious exercises by or with Choir members.[283]

The Tenth Circuit Court of Appeals dismissed all of Ms. Bauchman's claims and affirmed the district court's decision to move for summary judgment.

Summary of Familiar Themes

The Lemon test is the standard of review utilized in a majority of cases pertaining to songs, holidays, and performances. One might expect that the use of the Lemon test would render traditional separationist holdings in the cases analyzed. However, two of the four that were analyzed strictly according to the Lemon test resulted in an outcome that would be characterized as accommodationist. The activities that earned the approval of the courts in *Florey v. Sioux Falls* and *Clever v. Cherry Hill* were based on school district policies that emphasized the concept of "legitimate secular purpose" for the use of religious materials.

> *Florey*: Study of religion in public schools is not forbidden when presented objectively as part of a secular program of education and the term "study" includes more than mere classroom instruction; public performance may be a legitimate part of secular study.[284]

> *Clever*: In absence of demonstrating governmental endorsement of particular set of religious beliefs, display of religious symbols on government property in connection with legitimate secular purpose, i.e., celebration of Christmas, does not compel conclusion that religion, generally, is being favored over non-religion.[285]

In *Florey* and *Clever*, curriculum objectives associated with the course of study were articulated. The classroom or a similar educational setting was the primary setting for may of the proposed activities.

Defendants in *Florey* and *Clever* successfully emphasized the importance of religion as a means to teach students about a variety of cultures.

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[283] *Id.* at 561.

[284] *Florey*, 619 F.2d at 1311.

[285] Clever v. Cherry Hill Township Board of Education, 838 F. Supp. 929. (E. D. NJ 1993).

Defendants in both cases were able to produce policy which articulated this purpose.

> *Florey*: *Recognition of Religious Beliefs and Customs:* . . . The Sioux Falls School District recognizes that one of its educational goals is to advance the students' knowledge and appreciation of the role that our religious heritage has played in the social, cultural and historical development of civilization.[286]
>
> *Clever*: *The Use of Cultural, Ethnic, or Religious Themes In Our Educational Program*: We believe that it is our responsibility as educators to foster mutual understanding and respect for the rights of all individuals regarding their beliefs, values, and customs. In pursuing this goal the Board recognizes that we have a diverse community with a variety of cultural, ethnic, and religious backgrounds and we are cognizant of the special significance of seasonal observances and religious holidays.[287]

Defendants in *Florey* and *Clever* presented policy that successfully convinced the courts that religious themes are an integral part of a comprehensive study of the arts.

> *Florey*: Religion in the Curriculum: (2)The emphasis on religious themes in the arts, literature and history should be only as extensive as necessary for a balanced and comprehensive study of these areas. Such studies should never foster any particular religious tenets or demean any religious beliefs.[288]
>
> *Clever*: *The Use of Cultural, Ethnic, or Religious Themes In Our Educational Program* . . .: (6) Any school musical program or concert composed of several choral and instrumental selections, shall have secular educational value and shall not be, nor have the effect of being, religiously oriented or a religious celebration. While individual religious pieces of music may be performed for their musical value, the total effect of a music program or concert shall be non-religious.[289]

The Lemon test was utilized to the detriment of the defendants in *Doe v.*

[286] *Florey*, 619 F.2d at 1319.
[287] *Clever*, 838 F. Supp. at 941
[288] *Florey*, 619 F. 2d at 1320.
[289] *Clever*, 838 F. Supp. at 943.

Aldine and *Skarin v. Woodbine.* Two factors led to the demise of the questionable practices associated with these cases: (1) Venue; and (2) a community tradition of religiosity related to the practices involved.

Venue: Both Doe and Skarin pertain to activities that are not part of the regular curriculum, per se, but are traditional and common school functions supported by students, school personnel, and the community. The "Aldine School Prayer" in *Doe* was regularly performed as the "school song" at school sports events. Likewise, "The Lord's Prayer" by Albert Hay Malotte, in *Skarin* had become a traditional part of the high school graduation attended by most high school seniors and members of the educational community. Football games and graduation ceremonies are an integral part of school culture. These venues that provided the backdrop for the religious expression in both cases was significant to the courts' disapproval of the questionable practices:

> *Doe*: These words [The Aldine School Prayer] are posted in raised block letters on the wall over the entrance to the gymnasium at Aldine Senior High School and are recited or sung by students to music played by the Aldine School band at athletic contest, pep rallies, and at graduation ceremonies. These events take place in the gymnasium and the at the football stadium, which are the property of the District. These activities take place before or after regular school hours, but are sponsored by Aldine Senior High School and form a part of the school's regular extracurricular program.[290]

> *Skarin*: Donovan and Ruby Skarin . . . are offended by having either to sing "The Lord's Prayer" in rehearsals and at graduation, or to be excluded from the choir's rehearsals and performance of that prayer set to music. Their mother . . . has attended several Woodbine High School graduation ceremonies for her older children, as well as those honoring friends' children. She has been increasingly disturbed and offended by having "The Lord's Prayer" sung in the school at graduation.[291]

[290] Doe v. Aldine Independent School District, 563 F. Supp. 883, 884. (S. D. Tex 1982).
[291] Skarin v. Woodbine, 204 F. Supp. 2d 1195, 1196. (S. D. IA 2002).

Tradition of Religiosity: The religious text of the songs performed in both *Doe* and *Skarin* could be traced back to perceptions of religiosity that related to prayers from the Christian Bible. These prayers were traditionally recited exclusively by those of the Christian faith:

> *Doe*: There is no doubt that the words of the Aldine school song constitute a prayer since they call on God for his blessing and contain an avowal of divine faith.[292]

> *Skarin*: The affidavits of two professors . . . credibly establish that the words of "The Lord's Prayer" and its ritual unison recitation or singing are central to the Christian faith and liturgy. Christians believe Jesus taught the prayer to his disciples.[293]

The three additional cases associated with songs, holidays, and performances utilized tests of constitutionality that typically result in accommodationist outcomes. The holdings in *Doe v. Madison*, *Doe v. Duncanville*, and *Bauchman v. West High School* reflect this pattern.

Doe v. Duncanville and *Bauchman v. West High School* share the singular issue as to whether religious music is appropriate in the context of daily classroom curriculum and public performance. Like the holdings in *Florey* and *Clever*, the courts in *Duncanville* and *Bauchman* chose to place favorable emphasis on the "secular purpose" of certain types of religious materials.

Two distinct characteristics regarding the courts' approval of the secular purpose of religious materials are predominant in *Doe* and *Bauchman*: (1) The preponderance of choral music with sacred themes; and (2) the value of variety of music of various genres, including religious music, in teaching vital music skills.

Preponderance of Sacred Music: The court in *Doe v. Duncanville* was the first to utilize the reasoning that the preponderance of sacred choral music

[292] *Aldine*, 563 F. Supp. at 885.
[293] Skarin, 204 F. Supp. at 1197.

increased the likelihood that music with religious themes would be sung in a choral music class and the court in *Bauchman* utilized this reasoning as precedent:

> *Duncanville*: At trial, Mr. McCullar estimated 60-75 percent of serious choral music is based on sacred themes or text. . . As a matter of statistical probability, the song best suited to be the theme is more likely to be religious than not. Indeed, to forbid DISD from having a theme song that is religious would force DISD to disqualify the majority of appropriate choral music simply because it is religious.[294]

> *Bauchman*: [W]e discern a number of plausible secular purposes for the defendants' conduct. For example, it is recognized that a significant percentage of serious choral music is based on religious themes or text . . . Any choral curriculum designed to expose students to the full array of vocal music culture therefore can be expected to reflect a significant number of religious songs.[295]

The Value of Religious Music in Teaching Skills: The court in *Duncanville* recognized the value of "good music" regardless of its religious subject matter in teaching pertaining to the curriculum:

> *Duncanville*: Legitimate secular reasons exist for maintaining *The Lord Bless You and Keep You* as the theme song. As the choir director, David McCullar, testified, this song is particularly useful to teach students to sight read and to sing *a capella*.[296]

The court in *Bauchman* mirrored these sentiments regarding the West High School choral curriculum:

> *Bauchman*: [A] vocal music instructor would be expected to select any particular piece of choral music, in part for its unique qualities useful to teach a variety of vocal music skills (i.e., sight reading, intonation, harmonization,

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[294] Doe v. Duncanville Independent School District, 70 F. 3d 402, 407. (5th Cir. 1995).
[295] Bauchman v. West High School, 132 F. 3d 542, 554. (10th Cir. 1997).
[296] *Duncanville*, 70 F. 3d at 407.

expression).[297]

The difficulty in securing a legally appropriate vehicle for the use of Fine Arts religious expression in graduation ceremonies would seem insurmountable given the "coercion" precedent set in *Lee v. Weisman.* The Lemon-based decision in *Skarin v. Woodbine* seems equally as problematic. However, the defendants in *Doe v. Madison* seem to have provided an opportunity for religious content to be allowed in graduation ceremonies without Establishment Clause violation. The existence of two elements provided for acceptable expression: (1) The existence of a school policy that relinquishes state control of expression to student speakers; (2) The inclusion of religious expression as a choice among a variety of possible modes of expression in graduation presentations.

The *Madison* court utilized language from *Lee* which indicated what elements might make religious expression non-coercive in a graduation ceremony:

> Indeed, three of the judges in five-member *Lee* majority made special note that:If the State had chosen its graduation day speakers according to wholly secular criteria, and if one of those speakers (not a state actor) had individually chosen to deliver a religious message, it would have been harder to attribute an endorsement of religion to the State.[298]

Literature

> The . . . [p]olicies recognize the legitimacy of teaching "about religions and the role and influence of religion in history, literature, art music, science or any other area in which religion has played a role," but cautioned that: "Such teaching should: 1) foster knowledge about religion, not indoctrination into religion; 2) be academic, not devotional; or testimonial; 3) promote awareness of religion, not sponsor its practice; 4) inform students about the diversity of religious views rather than impose one

[297] *Bauchman,* 132 F. 3d at 554.

[298] Doe v. Madison School District, 147 F. 3d. 832, 835. (9th Cir. 1998).

particular view; and 5) promote understanding and respect rather than divisiveness."[299]

A. *Fleischfresser v. Directors of School District 200*[300]

Parental objections to literature from a reading series prompted a lawsuit against a Wheaton, Illinois school district. Parents made the following allegations regarding the "Impressions Reading Series:"

> [T]he series "fosters a religious belief in the existence of superior beings exercising power over human beings by imposing rules of conduct, with the promise and threat of future rewards and punishments," and focuses on supernatural beings including "wizards, sorcerers, giants and unspecified creatures with supernatural powers." The parents also claim that use of the series "indoctrinates children in values directly opposed to their Christian beliefs by teaching tricks, despair, deceit, parental disrespect and by denigrating Christian symbols and holidays.[301]

The Seventh Circuit Court of Appeals addressed the parental allegations by outlining the history of school activities that were determined to be violations of the Establishment Clause:

> [C]ourts have held a number of activities to be violations of the Establishment Clause. These include: 1) inviting clergy to offer invocation and benediction prayers at formal graduation ceremonies for high schools and middle schools; 2) daily readings from the Bible; 3) daily recitation of the Lord's Prayer; 4) distributing Gideon Bibles to fifth grade public school students; 5) posting the Ten Commandments in every classroom; 6) requiring the teaching of evolution science with creation science or not at all; 7) beginning school assemblies with prayer; and 8) teaching a Transcendental Meditation course that includes a ceremony involving offerings to a deity.[302]

The court determined that there is a legal-historical distinction between these violations and the use of textbooks in the public school curriculum:

> Courts have not been inclined to find a violation of the First Amendment . . . with respect to the use of certain books in a

[299] Daugherty v. Vanguard, 116 F. Supp. 2d 897, 914. (W. D. Mich 2000).
[300] Fleischfresser v. Directors of School District 200, 15 F.3d 680. (7th Cir. 1994).
[301] *Id.* at 683.
[302] *Id.* at 686.

> public school curriculum. . . Moreover, even the Bible itself may be used in public schools to teach literary and historical lessons. . .[303]

The court considered whether paganism, witchcraft, and satanism could be defined as religious and, thus, fall under the Establishment Clause. The court reasoned that the use of characters such as witches and goblins in stories in the reading series was not sufficient to warrant an Establishment Clause claim. This was in large part due to the fact that the disgruntled parents were seen to be speculating or making assumptions that the stories in the reading series represent the beliefs of a group of people that they could not readily identify:

> In this case . . . the district court had and we have before us a party claiming that the use of a collection of stories, a very few of which resonate with beliefs held by some people, somewhere, of some religion, has established this religion in a public school. This allegation of some amorphous religion becomes so much speculation as to what some people might believe. This amorphous character makes it difficult for us to reconcile the parents' claim with the purpose of the Establishment Clause.[304]

The court applied the Lemon Test as a means to further reinforce the lack of foundation for the parental claims. The court enunciated the view that public school curricula is appropriate whenever it is aligned with secular purposes:

> Government action is improper where this is no secular purpose to support it, but to determine that there is no secular purpose, we must find that the action was "motivated by wholly by religious considerations. . ." [P]ublic school curricula traditionally rely on fantasy and "make-believe" to hold a student's attention to develop reading skills and instill a sense of creativity and imagination. That this particular series relies on witches and goblins in a few stories to develop the children's minds fits the norm. As a result, we hold that the directors' use of the series had a secular purpose.[305]

[303] *Id.* at 687.
[304] *Id.* at 688.
[305] *Id.* at 688.

The court held that the primary effect of the Impressions Reading Series did not constitute an advancement or inhibition of religion due to its secular nature. The court looked at the series as a whole rather than just the stories in question in its analysis. The secular purpose of the reading series was found to lie in its use as a means to improve students' reading skills. The court strengthened its argument by pointing out that the series also included stories tied to the Christian tradition:

> The stories which the parents contend are offensive are a relatively small minority when compared to the series as a whole. Further, the series is also comprised of some stories, also in a small minority, which presumably are consistent with the parents' Catholic and Protestant beliefs, including "The Best Christmas Pageant Ever," "How Six Found Christmas," and "The Twelve Days of Christmas." But, it is not enough that certain stories in the series strike the parents as reflecting the religions of Neo-Paganism or Witchcraft, or reference Christian holidays. The Establishment Clause is not violated because government action "happens to coincide to harmonize with the tenets of some or all religions. . ." In this case, the primary or principle effect of the use of the reading series at issue is not to endorse these religions, but simply to educate the children by improving their reading skills and to develop imagination and creativity. Any religious references are secondary, if not trivial. Therefore, the use of the series withstands scrutiny under this prong of the test.[306]

The court rejected the argument that the existence of a curriculum review committee was reason to believe that there was excessive entanglement between government and religion. The parents alleged that the curriculum review committee's examination and approval of the reading series constituted excessive entanglement.

> This claim is without merit. School boards have broad discretion in determining curricula in their schools. Further, there is no allegation that the publisher of the reading series is a religious organization or that the directors are in some way dealing with a particular religious organization. Nothing, then supports a claim

[306] *Id.* at 689.

> that the use of this reading series constitutes excessive entanglement with religion.[307]

The court was also called upon to examine parents' claims that the use of the series prevented them from exercising their right to teach certain religious values to their children. The court analyzed this claim by comparing the parents' rights to exercise their religion against the government's compulsion to educate students. The court held in favor of the school district regarding this claim.

> We have discussed that the Impressions Reading Series is used to build and enhance students' reading skills and develop their senses of imagination and creativity. These skills are are fundamental to children of this age, and it is critical that the directors select the best tools available to them to teach these skills. Having done this, they have properly performed the government's function of providing quality public school education. . . Therefore, we find that the government's interest in providing a well-rounded education would be critically impeded by accommodation of the parents' wishes, and we hold that this interest is sufficient to override the burden of parents' free exercise of their religion.[308]

The Seventh Circuit Court of Appeals upheld the district court's summary judgment in favor of the school district.

B. *Roberts v. Madigan*[309]

Kenneth Roberts, a fifth grade teacher at Barkley Gardens Elementary School in Denver, Colorado, utilized a daily silent reading time for all his students. Students were allowed to read books they brought from home or checked out from the school library or selections from Mr. Robert's classroom library. Controversy erupted over Mr. Robert's inclusion of two Christian books in his classroom. Others took issue over his frequent practice of reading the Bible in front of students during the daily silent reading time.

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[307] *Id.*

[308] *Id.* at 690.

[309] Roberts v. Madigan, 921 F.2d 1047 (10th Cir. 1990).

Mr. Roberts was asked by principal, Kathleen Madigan, to remove the two Christian books from his classroom library. Kathleen Madigan not only asked Mr. Roberts to remove "The Bible in Pictures" and "The Life of Jesus" from his classroom library, but also asked that he keep his Bible out of sight during school hours. Ms. Madigan stated that she wanted to "maintain separation of church and state."[310]

The Tenth Circuit Court of Appeals addressed Mr. Robert's claims that the school district violated the Establishment through the following actions:

> (1) removing "The Bible in Pictures" and "The Story of Jesus" from the classroom library, (2) ordering Mr. Roberts not to read his Bible in the classroom during school hours, (3) ordering Mr. Roberts to keep his Bible off his desk during school hours, (4) removing the Bible from the school library.[311]

The court utilized the Lemon Test to determine if the school district violated the Establishment Clause.

Principal Madigan's written directive provided evidence that the school district's purpose in preventing Mr. Roberts from utilizing and displaying Christian materials was secular.

> The directive stated her sole purpose as follows: "The law is clear that religion may not be taught in a public school. To avoid the appearance of teaching religion, I have given you this directive. . ." We find no evidence in the record that suggests a purpose for the district's action other than that stated in the written directive. We therefore affirm the district court's finding that the school district had a secular purpose for its actions, namely, to assure that none of Mr. Roberts' classroom materials or conduct violated the Establishment Clause.[312]

Mr. Roberts claimed that the school district violated the "primary effect" prong of the Lemon Test because the removal of the Christian books provided for the conveyance of a message of disapproval toward Christianity. Mr.

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[310] *Id.* at 1053.
[311] *Id.*
[312] Id. at 1054.

Roberts cited the failure of the district to remove books dealing with gods and goddesses and a unit that he was allowed to teach about American Indian culture as proof of this disapproval. The court rejected this argument and accepted the purpose outlined by the school district:

> The removal of materials from the classroom is acceptable when it is determined that the materials are being used in a manner that violates the Establishment Clause guarantees. Thus, the Establishment Clause focuses on the 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.[313]

Since there were no allegations pertaining to excessive entanglement, the court held that the school district did not violate the Establishment Clause. The court did, however, support the district court's reasoning that Mr. Roberts did, himself, violate the Establishment Clause.

> The district court, after reviewing the testimony and evidence, correctly found that there was an improper religious purpose behind Mr. Roberts' use of the Bible and the presence of the religious books in his classroom library. Upon analyzing Mr. Roberts' actions within the classroom environment at the time the dispute arose, including the poster on the classroom wall requesting readers to open their eyes to see the hand of God, we agree that the evidence sufficiently demonstrated that Mr. Robert's actions were prompted by a religious purpose. . . We believe that the district court also properly concluded that Mr. Roberts' actions, when viewed in their entirety, had the primary effect of communicating a message of endorsement of a religion to the impressionable ten-, eleven-, and twelve-year-old children in his class.[314]

The Tenth Circuit Court of Appeals affirmed the ruling in favor of the school district.

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[313] *Id.* at 1055.

[314] *Id.* at 1057.

C. *Wiley v. Dobson*[315]

Bible study courses in two elementary schools in two school districts in Tennessee were the basis for a dual lawsuit. Parents of students in two school districts sought to eliminate Bible courses from the schools' curriculum.

The district court addressed the issues in this case by analyzing lessons from each of the two courses. The court established its basis for analysis by referring the reasoning in prior opinions related to Bible study courses (*Wiley v. Franklin*, 468 F. Sup. 133 and 404 F. Supp. 525).

The district court established the following constitutional standards for Bible study courses:

> "For a Bible study course offered in public schools to be Constitutionally permissible under the First Amendment Establishment Clause, the following tests must be met: (a) the nature, intent and purpose of the course must be secular; (b) the primary effect of the course must neither advance nor inhibit religion; (c) the course must be offered in a manner that avoids excessive entanglement between government and religion. . ." The ultimate test of the constitutionality of any course of instruction founded upon the Bible must depend upon classroom performance. It is that which is taught in the classroom that renders a course so founded constitutionally permissible or constitutionally impermissible in a public school setting. If that with is taught avoids such religious instruction and is confined to objective and non-devotional instruction in biblical literature, biblical history and biblical social customs, all with the purpose of helping students gain a "greater appreciation of the Bible as a great work of literature," and source of "countless works of literature, art and music" or of assisting students acquire "greater insights into the many historical events recorded in the Bible" or of affording students a greater insight into the "many social customs upon which the Bible has had a significant influence," all as proposed in the Curriculum Guide, no constitutional barrier would arise to such classroom instruction.[316]

The court analyzed three Bible class lessons taught in the City of Chattanooga school system. One lesson pertained to the story of Joshua and

[315] Wiley v. Dobson, 497 F. Supp. 390 (E. D. Tenn 1980).
[316] *Id.* at 394.

Jericho. The second lesson pertained to the parable of the talents. The third lesson involved a narrative of the story of Saul and David. The court determined that these lessons had a secular purpose:

> [T]he intent and purpose of the lessons appear to be secular. Their primary effect appears neither to advance nor to inhibit religion. They appear to be non-devotional instruction in biblical history or biblical literature. The Court is accordingly of the opinion that the lessons include no Constitutionally impermissible religious instruction.[317]

The court also analyzed ten Bible classes taught by teachers in the Hamilton County School system. One of the lessons involved a narrative story about the biblical character, Daniel. The lesson involved discussion about God as the supreme being "who determines whether people live or die."[318] A second lesson was about the biblical character, Moses. Students were instructed that Moses was given instructions by God regarding building and furnishing a tabernacle. A third lesson consisted of a story about the destruction of Sodom and Gomorrah. Part of the narrative involved descriptions of God's punishment for human wickedness. The court determined that the lessons could not pass the court's guidelines for constitutionality:

> [I]t would appear that the primary effect of the lessons would be to promote religious beliefs, and not to convey biblical literary, historical, or social incidents, themes or information in a non-religious or secular manner. . .[319]

The district court determined that the secular nature of the Bible course provided by the City of Chattanooga school district was acceptable and not a violation of the Establishment Clause. However, the sectarian themes found in the course in Hamilton County school district led to the court's determination that the course should be eliminated because its content violated the

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[317] *Id.* at 395.
[318] *Id.*
[319] *Id.* at 396.

Establishment Clause.

Summary of Familiar Themes

The authority of school officials to determine the content of curriculum that achieves secular purposes is a principle that is paramount in the aforementioned cases:

> *Fleischfresser*: [W]e must be "vigilant in monitoring compliance with the Establishment Clause in . . . schools." . . . We are also mindful, however, that this heightened concern is balanced to a great degree by the broad discretion of a school board to select its public school curriculum.[320]

> *Roberts*: [S]chool officials must be allowed, within certain bounds, to exercise discretion in determining what materials or classroom practices are being used appropriately. "The Court has repeatedly emphasized the need for affirming the comprehensive authority of the States and school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools."[321]

Fleischfresser v. Directors and *Roberts v. Madigan* involved issues that pertained to school officials making decisions regarding religious content in curriculum. Despite the fact that the two school districts in these cases made divergent decisions regarding the inclusion of religious materials in the classroom, the reasoning of the courts in supporting each district was similiar. The courts emphasized that neutrality in selection of materials can be maintained despite the fact that some people may be offended by materials utilized:

> *Fleischfresser*: While the parents and their children may be sincerely offended by some passages in the reading series, they raise a constitutional claim only if the use of the series establishes a religion.[322]

> *Roberts*: Mr. Roberts contends that the district, by removing

[320] Fleischfresser v. Directors of School District 200, 15 F. 3d 680, 686. (7th Cir. 1994).
[321] Roberts v. Madigan, 921 F. 2d 1047, 1055. (10th Cir. 1990).
[322] *Fleischfresser*, 15 F.3d at 687.

> the Bible from the classroom, necessarily conveyed a message of disapproval toward Christianity. . . The mere fact the actions were aimed exclusively at Christian religious materials does not automatically mean the actions' primary effect was to send a disapproving message regarding Christianity in the public schools. . . there is a difference between teaching about religion, which is acceptable, and teaching religion which is not.[323]

The accommodationist approach utilized in *Wiley v. Dobson* aligns with *Fleischfresser* and *Roberts* in its acknowledgement that religious materials such as the Bible can be utilized in a secular non-prosletyzing manner in the public schools:

> Wiley: If that which is taught avoids. . . religious instruction and is confined to objective and non-devotional instruction in biblical literature, biblical history. . . or of affording students greater insight . . . no constitutional barrier would arise to such classroom instruction.[324]
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> Fleischfresser: [T]he Bible itself may be used in public schools to teach literary and historical lessons.[325]
>
> Roberts: It is neither wise nor necessary to require school officials to sterilize their classrooms and libraries of any materials with religious references. . .[326]

Student Assignments

> We affirm all children in their own traditions. Freedom of religion is a fundamental right. A separation of church and state mandates no official or unofficial sponsorship of religion and the schools must remain wholly neutral. Thus a teacher may teach about religion . . . but shall not act as a disseminating agent for any religions or anti-religious document, book, article, person, agency or the like. It is the responsibility of all faculty members and the administration to see that such activities do not place an atmosphere of social compulsion or ostracism on those who choose to or not to participate in any religious/cultural exercise or activity (Letter dated January 15, 1991, from Dr. Gage to Mrs. DeNooyer).[327]

[323] *Roberts*, 921 F.2d at 1055.
[324] Wiley v. Dobson, 497 F. Supp. 390, 394. (E. D. Tenn 1980).
[325] *Fleischfresser*, 15 F.3d at 687.
[326] *Roberts*, 921 F.2d at 1055.
[327] DeNooyer v. Livonia Public Schools, 799 F. Supp. 744, 747. (E. D. Mich 1992).

A. *DeNooyer v. Livonia*[328]

Kelly DeNooyer was a second grade student at McKinley Elementary School in the Livonia Public Schools in Michigan. Her second grade teacher, Mrs. Sandra Solomon, instituted a "show and tell" program in which one student per week was featured and allowed the opportunity to make an oral presentation. The purpose of the "V.I.P." program was to provide an avenue to fulfill the following curriculum objectives: "to promote poise and self esteem through developing oral communication skills in the classroom."[329]

Kelly's proposed oral presentation was a videotape of herself singing a religious song during a church service. The song, "I Came to Love You Early," was comprised of the following lyrics:

> Verse 1
> I felt sometimes I didn't have a story I could share.
> I wasn't rescued from a past destroyed by dark despair.
> O but, Jesus, I have memories of the times that we've been through.
> And I wouldn't trade one moment of growing up with You.
> Refrain
> I came to love you early, came to know You young.
> You touched my heart, dear Jesus, when my life had just begun.
> I gave You my tomorrows and a childish heart of sin,
> And You've saved me from a lifetime of what I might have been. . .[330]

Kelly's teacher, Mrs. Solomon, was concerned about the proselytizing content of the proposed presentation. Mrs. Solomon sought advice from her principal, Jane Van Poperin. Both educators agreed that the tape should not be shown in class.

Mrs. Solomon informed Kelly and her mother Ilene of the school's decision. Ilene DeNooyer contacted the principal, the Director of Elementary Education, and an Assistant Superintendent in an attempt to persuade school officials to allow the presentation. School officials provided several reasons for

[328] *Id.*
[329] *Id.* at 745.
[330] *Id.* at 745, 746 n.1.

denying the videotaped presentation. Mrs. Solomon was concerned that videotape presentations might begin to dominate the V.I.P. program. Additional time would have to be utilized in reviewing the tapes for content. The time taken for review could take away from classroom instruction. In addition, Mrs. Solomon felt that videotaped presentations did not appropriately advance the educational objective of "developing self-esteem through oral presentation."

Chief among the concerns provided by school officials was the religious content of the videotaped presentation:

> The school administrators were . . . concerned about the message of the song on the videotape, which is about a young child accepting Jesus Christ as her savior. Mrs. Solomon felt that second graders might not have the maturity to understand the context in which the song was presented, that the students might assume that the School District endorsed the message of the song, and that the song might embarrass or offend other students and their parents.[331]

Ilene and Kelly DeNooyer filed suit against the school district. Allegations included violations of their Constitutional rights to freedom of speech, free exercise of religion, equal protection, freedom of association and the liberty interest of a parent to educate her child.

The school district claimed Establishment Clause concerns in defense of their decision to prohibit the videotaped presentation. The DeNooyers accused the school district of inequity in addressing these concerns. This allegation was based upon an incident in which another student in Kelly's class was allowed to display and explain the significance of a Menorah during a presentation regarding Israel.

The district court determined that the school's interest in avoiding violations of the Establishment Clause was appropriate. However, the court determined that a different standard of review was indicated in this case:

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[331] *Id.* at 747.

> Although the religion clauses of the First Amendment are implicated due to the religious character of the speech at issue in this case, in essence this is a free speech case. . . In this case. . . the court need only find that concern about the impact of the religious message of the tape on a second grade audience, presented during class time, was a legitimate pedagogical concern.[332]

The court's holding in favor of the school district was based upon the free speech standards established as precedent in *Hazelwood v. Kuhlmeier*.[333] The court determined that proposed classroom presentation was speech related to the curriculum and, therefore, subject to the regulation of school officials. The court determined that the school district need not consider Establishment Clause issues in "closed forum" of a classroom:

> The Court need not decide that a contrary decision by the defendants would have violated the Establishment Clause. The Court's discussion of the Defendants' rationale in refusing to permit the video based on the ability of the second grade students to distinguish between private speech and school sponsored speech should not be confused with an inquiry under the Establishment Clause. This Court merely finds that the School District's restriction on Kelly's speech was reasonable, regardless of whether permitting the speech would have violated the Establishment Clause.[334]

The district court granted a motion for summary judgment in favor of the school district.

B. *C. H. v. Olivia*[335]

A student-created religious poster and a reading from the "Beginner's Bible" caused C.H., the parent of Z.H., to file suit against the Medford Township Board of Education, school personnel, and the New Jersey State Board of Education. Among the claims presented by the plaintiffs was the accusation that the classroom teacher's actions violated the Establishment Clause because her actions promoted hostility toward religion:

[332] *Id.* at 748.
[333] *Id.* at 751.
[334] 484 U. S. 260.
[335] C. H. v. Olivia, 990 F. Supp. 341 (E. D. NJ 1997).

> In very strong terms, the plaintiffs claim that the Medford defendants' actions constituted "nothing short of religious cleansing." Moreover, they claim that the defendants have established a "religion of secularism" by their alleged hostility towards religion.[338]

Z.H. was a student at Haines Elementary School in New Jersey. As a Kindergarten student, Z.H. and his fellow classmates were asked to make posters that reflected things for which they were thankful. Z.H. created a poster that expressed his thankfulness for Jesus. The student posters were placed in the school hallway. Presumably, due to the poster's religious content, Z.H.'s poster was removed from the hallway while the regular classroom teacher was absent. When the regular teacher returned, the poster was again placed in the hallway, but in a less prominent position than it was previously displayed.

The following year, when Z.H. was a first grade student, he was involved in a reading incentive program offered by his teacher, Grace Olivia. Ms. Olivia provided a reward system for students who maintained a certain level of reading proficiency. Students who successfully met the criteria were allowed to read a book of their choosing to the entire class. Z.H. chose a story called "A Big Family" from a collection of stories in the "Beginner's Bible." Because of the religious content of the story, Ms. Olivia decided to have Z.H. read his story to her without the class being present. C.H., the mother of Z.H., claimed violations of the Free Exercise and Establishment clauses.

The district court addressed the plaintiff's claim that Z.H.'s right to freedom of expression by citing case law that illustrates the school district's right to restrict the content of speech in the non-public forum of a classroom.

> In the context of the classroom, the inquiry is more specific: educators may "exercise editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns . . . "content-based restrictions

[338] *Id.* at 354.

> on speech need only be 'reasonable in light of the purpose served by the forum and . . . viewpoint neutral. . .'"[337]

The court analyzed the plaintiffs claims of Establishment Clause violations in utilizing the Lemon test. The court found that the actions of the district did not violate any of the components of the three-pronged test:

> The Medford defendants concede that the poster was removed and relocated because it had a religious theme. . . Nonetheless, the defendants' actions neither advanced nor inhibited religion, nor did the defendants create an excessive entanglement with religion. . . . Z.H. had no constitutional right to have his religious poster poster displayed prominently in his public school, therefore merely relocating it had no impact on his, or anyone else's religion. Furthermore, the defendants did not create or foster any sort of government involvement with religion by the simple act of relocating the poster.
>
> Neither did prohibiting Z.H. from reading the "Beginner's Bible" to his class violate the Establishment Clause. Z.H.'s teacher properly exercised her editorial control over the students' reading selections to ensure the material was appropriate for their educational level. . . Moreover, the plaintiffs have not shown how Z.H..'s teacher's actions advanced or inhibited religion in any sense. She never did or said anything regarding his faith. . . Z.H. was merely forbidden from reading the book to his classmates during school hours. . . Finally, no excessive entanglement was created by this act.[338]

The court further rejected the plaintiff's request that the State of New Jersey enact a similar policy involving the following elements to allow student religious expression:

> [W]herein students may express their religious beliefs in the form of reports, homework, art work and other classwork, free of discrimination based on the religious content of their submissions and a policy prohibiting teachers from modifying or excluding religious views from assignments when such religious views would otherwise be germane to the assignment.[339]

The court concluded that the state should not "involve themselves in

[337] *Id.* at 353, n.18.
[338] *Id.* at 354, 355.
[339] *Id.* at 355.

religious matters concerning its students."[340]

> Religious liberty as guaranteed in the Bill of Rights allows individuals to decide if they want to be religious and, if so, how to practice their religion free from coercion or control. The state defendants should not be asked to involve themselves in religious matters concerning its students. Far from protecting religious freedom, implementing the policy requested would endanger fundamental religious liberties.[341]

The court held in favor of the Medford School District.

Summary of Familiar Themes

The courts continue to recognize the authority of school officials to determine the manner of speech deemed acceptable in the "closed forum" of the classroom. School officials are granted this control as long as they remain "viewpoint neutral" and avoid hostility towards religion.

Although school districts in *C.H. v. Olivia* and *DeNooyer v. Livonia* defended the limits placed on religious literature by explaining their attempt to avoid Establishment Clause violations, the courts insisted that this level of explanation was unnecessary because school officials' actions were reasonably related to pedagogical concerns:

> *C.H.*: Both incidents--relocating the poster of Jesus and disallowing Z.H. to read the "Beginner's Bible" to his class--were reasonably related to legitimate pedagogical concerns.[342]

> *DeNooyer*: Kelly DeNooyer's second grade classroom was a closed forum during class hours, at the time she wished to show her videotape. Because Kelly asserts a right to speech in a closed forum, the school authorities may regulate the content of her speech in any reasonable manner. . .[343]

The Equal Access Act

The Equal Access Act states in part: It shall be unlawful for any

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[340] *Id.*

[341] *Id.* at 355, 356.

[342] *Id.* at 353.

[343] DeNooyer v. Livonia Public Schools, 799 F. Supp. 744, 749 (E.D. Mich 1992).

> public secondary school which receives Federal financial assistance and which has a limited open forum to deny access or a fair opportunity to, or discriminate against, any students who wish to conduct a meeting within that limited open forum on the basis of the religious, political, philosophical, or other content of the speech at such meetings. . .The Equal Access Act was enacted to clarify and confirm the First Amendment rights of freedom of speech, freedom of association, and free exercise of religion which accrue to public school students who desire to voluntarily exercise those rights during extracurricular or non-instructional periods of the day when the school permits extracurricular activities. . .This act was intended to represent a careful balancing of the First Amendment Free Speech and Establishment Clause interests at stake.[344]

A. *Sease v. School District of Philadelphia*[345]

A student and former member of the Central High School Gospel Choir filed suit against the School District of Philadelphia. Karen Sease's allegations centered around the issue as to whether an organization that performs religious material, has regular prayer and utilizes religious speakers at concerts can be denied the sponsorship of a school employee without violating the constitutional rights of its members. The School District of Philadelphia defended its policies by professing their obligation to conform to the Equal Access Act.

The Central High School Gospel Choir was formed by African-American students in 1987. The students gained permission to form the group from school personnel. Students asked a school secretary, Willma Safford, to act as sponsor and director of the choir. The following characteristics regarding the organization and activities of the choir were described by the court:

> The gospel choir is a non-credit, non-curriculum student group that meets on a weekly basis during non-instructional hours at Central High. The Gospel Choir has sung at school assemblies during the school day at Central High, and has used the school's public address

[344] Sease v. School District of Philadelphia, 811 F. Supp. 183, 189. n.3 (E. D. Pa 1993).
[345] *Id.*

> system and its organ. . . Between 1987 and 1991, the Gospel Choir also performed at churches, universities, public schools, theater, on television, and in other public places throughout the Philadelphia area.[346]

Dr. Pavel, the school's president (principal) objected to the manner in which the choir's organizational structure was maintained. His objections centered around the participation of Willma Safford, a full-time secretary at Central High, in conduction of the business of the choir during school hours while she was being paid as a school employee. The following activities were attributed to Ms. Safford and were seen by Dr. Pavel as a violation of school policy:

> Mrs. Safford is responsible for the overall leadership, organization, administration and management of the choir. She regularly organizes and conducts its practice sessions, is responsible for its fundraising, books concerts for the Gospel Choir outside of Central High, obtains buildings and P.A. systems for its concerts, and corresponds with the general public--using the Central High letter-head on behalf of the choir. . . Mrs. Safford also receives letters at the school from churches and other organizations requesting the Gospel Choir performances. Additionally, Mrs. Safford receives telephone calls on the Gospel Choir's behalf at Central High.[347]

Individuals who were no longer students at Central High were allowed to participate in the choir's performances. The choir's repertoire was primarily religious. Ms. Safford frequently participated in or conducted prayers before and after choir practices.

Dr. Pavel corresponded with the Gospel Choir in order to inform them of their violations of school policy and also to offer suggestions to rectify these violations:

> Dr. Pavel's stated. . . that "any future [Gospel Choir] programs are to be concert format, and not include any outside speakers or ' religious messages. . .'In a memorandum dated December 3, 1990, Dr. Pavel provided the Gospel Choir with three alternatives:

[346] *Id.* at 184.

[347] *Id.*

> (1) the Gospel Choir would continue as it had been functioning, but move its activities"off-site" (away from Central High); (2) the Gospel Choir could change to a totally student-directed organization; or (3) the Gospel Choir could change its organization to comply with the new [School District] policy.[348]

The Gospel Choir never submitted to any of the conditions outlined by Dr. Pavel. School administrators once again asked the choir to alter their repertoire to include no more than 20% of religious music or continue their activities both on and off campus without the participation of school personnel.

The plaintiffs filed suit seeking injunctive and declarative relief regarding the following issues:

> (1) Plaintiffs' allege that they will suffer irreparable harm, injury, and damage if a temporary restraining order is not granted precluding the School District from forbidding Willma Safford to continue as director of the Gospel Choir, as well as precluding the School District's policy of reviewing the Gospel Choir's material to ensure compliance with the Equal Access Act; (2) a declaration that the School District's policy of prior review, and policy that the Gospel Choir not be permitted to sing any religious music violates the Gospel Choir's First Amendment rights; (3) a declaration that the School District's policy forbidding Willma Safford to continue as director of the Gospel Choir violates the Gospel Choir's First Amendment rights; (4) a declaration that the School District's treatment of the Gospel Choir violates their equal protection rights, because the School District allegedly discriminated against the Gospel Choir on the basis of the race of the majority of its members; and, (5) a declaration that the School District's "prior restraint" of the Gospel Choir is unconstitutional.[349]

The school district countered by requesting that the district court support a summary judgment based upon the following criteria:

> The School District asserts that the undisputed material facts demonstrate that : (1) the Gospel Choir functions in violation of the Equal Access Act; (2) the Gospel Choir functions in violation of the Establishment Clause; and, (3) the School District's actions which were taken to ensure compliance with the Equal Access Act and the Establishment Clause were

[348] *Id.* at 186.
[349] *Id.* at 187.

> reasonable and do not create a cause of action for which the School District can be held liable.[350]

The district court began its analysis by determining that the activities of the Gospel Choir were, in fact, subject to the mandates outlined in the Equal Access Act:

> The Gospel Choir's rights, if any, to equal access to Central High facilities, are governed by the Equal Access Act. Accordingly, any access to school facilities provided by Central High School or the School District to the Gospel Choir must be in accord with the requirements and subject to the restrictions of the Act.[351]

The court further outlined the portions of the Equal Access Act that pertained to the alleged violations of the Gospel Choir:

> The Act goes on to provide restrictions on the use of school premises . . . in order to ensure that there is no violation of the Establishment Clause, among other things, on the part of the school, the Act states: Schools shall be deemed to offer a fair opportunity to students who wish to conduct a meeting within its limited open forum if such school uniformly provides that-- "(1) the meeting is voluntary; (2) there is no sponsorship of the meeting *by the school*, the government, *or its agents or employees*; (3) employees or agents of the school or government are present at religious meetings *only in a nonparticipatory capacity;* (4) the meeting does not materially and substantially interfere with the orderly conduct of educational activities within the school; and (5) *nonschool persons may not direct, conduct, control, or regularly attend activities of student groups.*"

The court agreed with the school district's contention that the choir's activities violated the Equal Access Act. The court outlined specific areas of violations that pertained to this case:

> The School District, if it allows the Gospel Choir to continue to operate as it is, will fail to meet the criteria of the Equal Access Act in a number of significant and substantial ways: 1. The Gospel Choir is sponsored by Central High and the Central High and the School District, has an official School District Employee as its sponsor, and another School District

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[350] *Id.*

[351] *Id.* at 189.

> Employee as its director. A violation of 4071(c)(2) of the Act.
> 2. Mrs. Safford is present at all practices and meetings of the Gospel Choir in a *participatory* capacity. A violation of sections 4071(c)(2) and (c)(3) of the Act.
> 3. A number of non-school persons regularly attend the activities of the Gospel Choir. A violation of section 4071(c)(5) of the Act.[352]

The court rejected the plaintiffs' argument that the choir's activities and repertoire were non-religious and based on African-American cultural influences. The court provided evidence that plaintiffs attempt to utilize the precedent established in *Florey* was not applicable to the facts in this case:

> Although Plaintiffs suggest that the songs sung by the Gospel Choir enjoy a cultural significance similiar to that described in *Florey*, the deposition testimony of Mrs. Safford undercuts this suggestion, since, as she testified, most, if not all of the songs performed by the Gospel Choir between 1987 and 1990 were written during the past ten years, (Safford Dep., Vol. I, at 34, 91-92.) many if not all of these songs are also performed by white gospel groups. . . Also, the *Florey* court emphasized the importance of adhering to school district policies and rules--a point which Plaintiffs continually ignore.[353]

The court also rejected the plaintiffs' interpretation of the Equal Access Act with regards to school employee, Willma Safford's involvement with the Gospel Choir:

> Plaintiffs' . . . belief that the purpose of the act's prohibition of participation by a school employee in student religious activities is to prevent school students from feeling coerced into participating in religious activities due to the participation of an authority figure such as a teacher. Although this is certainly a purpose of the Act's proscription. . . the express language of the statute and the legislative history clearly supports an interpretation that *any school employee*, notwithstanding her duties is prohibited from participating in these types of religious activities.[354]

Due to lack of substantive evidence, the court rejected the plaintiffs'

[352] *Id.*
[353] *Id.* at 191. n.5
[354] *Id.* at 192.

Equal Protection, Free Speech and Association claims. The court concluded that the school district's actions were motivated by a desire to comply with the Equal Access Act:

> Accordingly, I conclude that Plaintiffs' present conduct causes the School District to violate the Equal Access Act, thus the School District's policies are measures intended merely to bring the Plaintiffs actions in accord with the Act.[355]

The Pennsylvania District Court granted the School District of Philadelphia's motion for summary judgment in their favor.

B. *Gernetzke v. Kenosha*[356]

Two students from George N. Tremper Senior High School in Kenosha, Wisconsin, filed suit against the Kenosha Unified School District. The students alleged that their constitutional rights to religious freedom had been violated. The cause of the plaintiffs' complaint involved murals that were to be painted in the main hallway of the school.

School officials invited all forty-two extracurricular student groups at the school to participate in this activity. The plaintiffs were members of the school's Bible Club. The Bible Club submitted a mural design that comprised of the following elements:

> [T]he Club submitted a sketch for a mural 4 feet by 5 feet depicting a heart, two doves, an open Bible with a well-known passage from the New Testament (John 3:16 "For God so loved the world, that he gave his only begotten Son, that whosoever believeth in him should not perish, but have everlasting life") and a large cross.[357]

The principal approved every element of the design except the cross. The principal's reasons for excluding the cross were two-fold: (1) He felt that the inclusion of a blatantly religious symbol would invite the possibility of a lawsuit based on the Establishment Clause; and (2) He was concerned that if

[355] *Id.* at 193.
[356] Gernetzke v. Kenosha, 274 F.3d 464. (7th Cir. 2001).
[357] *Id.* at 466.

he approved a cross, he might also have to approve symbols such as a swastika or satanic symbols and these, in turn might cause student unrest and disruption of the educational environment.

> The school body includes adherents of both these unlovely creeds--and in fact the Bible Club's mural was defaced with a witchcraft symbol, and a group of skinheads unsuccessfully petitioned the principal to allow them to paint a mural containing a swastika. (According to a newspaper article in the record, the school has "active [white] supremacists enrolled there" and there have been racial incidents.) The principal had also forbidden mention of a specific brand of beer in the mural proposed by the Students Against Drunk Driving.[358]

The students filed suit as an objection to the exclusion of the cross in their mural. They based their complaint on their interpretation of a violation of the terms of the Equal Access Act.

The Seventh Circuit Court of Appeals found no evidence of discrimination that would indicate a violation of the Act. Furthermore, the court accepted the reasoning of school officials regarding the possible legal and supervision issues that the inclusion of the cross might invite. The court acknowledged the wisdom of the principal's decision in denying the inclusion of a variety of controversial sacred and secular symbols:

> The principal forbade the inclusion of a large cross in the Club's mural because he was afraid that it might invite a lawsuit and incite ugly conflicts among the students. His reaction to the swastika, and to the naming of a brand of beer, in proposed secular murals shows that he was discriminating not against religion but merely against displays, religious or secular, that he reasonably believed likely to lead to litigation or disorder. (The naming of a specific brand of beer in the mural of a student abstinence group might have encouraged students to show their defiance by getting drunk on it.)[359]

The court also acknowledged that the principal's decisions were

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[358] *Id.*

[359] *Id.*

acceptable under the provisions of the Equal Access Act. The Act allows school officials the authority to make decisions that protect the safety of students:

> The principal's decision to forbid the display of the cross was in any event insulated from liability under the Act by the provision that "nothing in [the Act] shall be construed to limit the authority of the school . . . to maintain order and discipline on school premises." 20 U.S.C. Section 4071(f).[360]

After rejecting the plaintiffs' free speech claims by labeling them "dim," the Seventh Circuit Court of Appeals ruled in favor of the Kenosha Unified School District.

Summary of Familiar Themes

The freedoms and limitations associated with a "limited open forum" are of primary significance in the two cases pertaining to the Equal Access Act. The court in *Sease* utilized text from the Congressional Record to explain the freedoms that would be allowed through the establishment of a limited open forum:

> The Equal Access Act was enacted to clarify and confirm the First Amendment rights of freedom of speech, freedom of association, and free exercise of religion which accrue to public school students who desire to voluntarily exercise those rights during extracurricular or non-instructional periods of the school day when the school permits extracurricular activities. S. Rep. No. 357, 98th Cong., 2d Sess. at 3 (1984).[361]

In both *Sease* and *Gernetzke*, plaintiffs unsuccessfully attempted to interpret the Equal Access Act in a manner that would allow student organizations constitutional "carte blanche" in a way that would limit the school's authority to oversee and provide appropriate interpretations of the Act and, thus, limit violations of the Establishment Clause.

> *Sease*: Defendant . . . asserts that the school district has a right to condition access to school facilities: indeed . . . the

[360] *Id.* at 467.

[361] Sease v. School District of Philadelphia, 811 F. Supp. 183, 188. (E. D. Pa 1993).

> School District is obligated to condition access to school facilities in accord with the statutory provisions enumerated in the Equal Access Act . . . Contrary to Plaintiffs' assertion, it is not unconstitutional for the School District to condition access to Central High on compliance with the Equal Access Act.[362]
>
> *Gernetzke*: The principal's decision to forbid the display of the cross was in any event insulated from liability under the Act by the provision that "nothing in [the Act] shall be construed to limit the authority of the school . . . to maintain order and discipline on school premises." 20 U.S.C. section 4071 (f).[363]

Artwork

> To an impressionable student, even the mere appearance of secular involvement in religious activities might indicate that the state has placed its imprimatur on a particular religious creed. . .[364]

A. *Joki v. Schuylerville*[365]

Robert and Susan Joki objected to Schuylerville High School's auditorium display of a student's painting which included religious themes. The painting had been donated in 1965 by Craig Martin, then a senior student at the school. The painting was part of a school program geared towards providing for students, "planning careers in art with the opportunity to create original works from original themes without interference from supervision."[366] The painting was described in the following manner:

> The central figure in the painting portrays a man nailed to a wooden cross. . . This figure is bleeding from the left side of his chest. . . Across his forehead are two intertwined, white lines containing red highlighting which appears to be a crown of thorns. Further, a shell burst of yellow light surrounds the cross upon which the central figure is hanging. . . Other figures in the painting include two other men nailed to crosses, a man tossing a net into the water, a woman mourning, two

[362] *Id.* at 187.
[363] Gernetzke v. Kenosha, 274 F.3d 464, 467. (7th Cir. 2001).
[364] Joki v. Schuylerville Central School District, 745 F. Supp. 823, (N. D. Ny 1990).
[365] *Id.*
[366] *Id.* at 824.

> men fighting and a man carrying two engraved stone tablets. . . The man carrying the tablets has a long gray beard and is situated directly to the left of the central cross. . . The tablets have the Roman numerals I through X inscribed on them. . .[367]

The Joki's claim that the central figure in the painting depicts Jesus Christ and, thus, conveys a religious message in violation of the Establishment Clause. Specifically, the plaintiffs claimed that the painting violated the "primary effect" prong of the Lemon test:

> For the purposes of plaintiffs' motion for summary judgment, plaintiffs style their argument in terms of the "effect" prong of the Lemon test as follows: The painting conveys a religious message. Defendants' display of the painting has the effect of placing the imprimatur of state authority upon that religious message. Thus, the defendants' display of the painting runs contrary to the establishment clause of the first amendment to the United States Constitution.[368]

The school district claimed that the inclusion of non-religious elements in the painting made the painting secular. The school district further claimed that the central figure's resemblance to Jesus at the crucifixion was incidental and "merely congruous with the artist's alleged theme of 'man's inhumanity to man.'"

> Defendants advance two principal arguments in opposition to plaintiffs' motion for summary judgment. First, defendants submit that the painting is merely "community art work" and in no way provokes religious reflections, even to devout Christians. . . Second, defendants argue that, even if the purported figures are religious, the display in this instance contains certain features which neutralize the religious effect and negate any government endorsement of a religious message.[369]

The district court chose to utilize the manner of analysis set forth in *Allegheny v. ACLU:*

> While difficult to interpret and replete with concurring and dissenting opinions, Allegheny stands as the Court's latest attempt to interpret the "effects" element of the Lemon

[367] *Id.*
[368] *Id.* at 825.
[369] *Id.* at 828.

> inquiry . . . [T]his court will generally follow the approaches taken by Justices Blackmun and O'Connor as their positions, which are similar although somewhat different, best fulfill the the criteria of constituting the positions "taken by those Members who concurred in the judgments on the narrowest of grounds. . ." ("every government practice mustbe judged in its unique circumstances to determine whether it constitutes an endorsement or disapproval of religion").[370]

The court reasoned that the painting would be perceived by the "average observer" as religious:

> Taking into account the significant message behind the Crucifixion and the skeptical way in which the Court views sectarian messages in public schools, this court concludes as a matter of law that the painting has the primary effect of endorsing Christianity. First, the school displays the painting permanently and not part of a holiday setting. Further, the school's display contains no placards to explain the paintings meaning or reason for being there. . . Moreover, this is not a case where the school displays the painting as part of a student art exhibit. Finally, the presence of the non-religious figures, rather than neutralizing the religious effect of the painting, blend into the scene of the Crucifixion and complete the picture as an average observer would perceive it to be. Though some negating features may be present, the cross occupies a highly prominent place in the painting and draws attention of the eye.[371]

The court granted the plaintiffs' motion for summary judgment. The school district was ordered to remove the painting from the wall in the auditorium.

B. *Washegesic v. Bloomingdale Public Schools*[372]

Eric Pensinger, a senior at Bloomingdale Secondary School, objected to a portrait called "Head of Christ" (by Warner Sallman) being displayed in a hallway outside the gymnasium and the principal's offices. The portrait had hung in this position for thirty years. Eric filed suit alleging that the display of the

[370] *Id.* at 825.
[371] *Id.* at 831.
[372] Washegesic v. Bloomingdale Public Schools, 33 F.3d 679. (6th Cir. 1994).

portrait violated the Establishment Clause.

The Sixth Circuit Court of Appeals approved the lower court's use of the Lemon test to determine that the display of the portrait violated the Establishment Clause.

> The display here fails all three prongs of *Lemon.* The portrait is moving for many of us brought up in the Christian faith, but that is the problem. The school has not come up with a secular purpose. The portrait advances religion. Its display entangles government with religion.[373]

The court likened the display of the portrait to the the posting of the Ten Commandments that was rejected by the Supreme Court in *Stone v. Graham.*[374]

> The support of sectarian prayers and pictures or similar religious acts and symbols by public schools violates the accommodation we made long ago with the religious history and traditions of our country. That accommodation requires "a neutral state designed to foster the most extensive liberty of conscience compatible with a similar or equal liberty for others. . ." The school has violated that principle.[375]

The court rejected the school district's argument that the picture was representative of many religions other than Christianity. The court reasoned that Christ is considered a central figure only in the Christian faith and the Establishment Clause protects the rights of those whose beliefs do not conform to this ideal.

> [C]hrist is central only to Christianity, and his portrait has a proselytizing, affirming effect that some non-believers find deeply offensive. Though the portrait, like school prayers may seem "de minimis" to the great majority, particularly those raised in the Christian faith and those who do not care about religion, a few see it as a governmental statement favoring one religious group and downplaying others. It is the rights of these few that the Establishment Clause protects in this case.[376]

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[373] *Id.* at 683.
[374] *Id.*
[375] *Id.*
[376] *Id.* at 684.

The court also rejected the school district's argument that the hallway constituted a limited open forum as defined by the Equal Access Act. The Sixth Circuit agreed with the district court's reasoning that the control of the hallway and its contents rested solely with school personnel:

> The hallway is not a limited public forum because the school maintains the right to control what is posted there and does not offer space to other religions and causes. The focus must be on the preference of individuals, not the preference of the school itself. . . The school's ownership and display of the portrait endorses the Christian religion and promotes it exclusively.[377]

The Sixth Circuit Court of Appeals denied the school district's motion to vacate, remand, and dismiss the ruling of the district court. The school district was ordered to remove the painting from the hallway.

C. *Fleming v. Jefferson County School District*[378]

The shooting that involved students from Columbine High School in Colorado was a tragedy shared by the school district and the entire community. As part of a community-wide healing process, the school librarian, Elizabeth Keating, and the school art teacher, Barbara Hirokawa proposed that tiles painted by students, parents, and members of the community be placed throughout the school for the following purpose:

> Students will have another opportunity to come into the school and become more comfortable with the surroundings. By participating in creating the tile art, they will also be a part of reconstruction of their school.[379]

School district personnel which included the area administrator, Barbara Monseau and mental health professionals coordinated to establish guidelines for the artwork that was to be painted on the tiles:

To assure that the interior of the building would remain a positive

[377] *Id.*
[378] Fleming v. Jefferson County School District, 298 F.3d 918. (10th Cir. 2002).
[379] *Id.* at 920, 921.

> learning environment and not become a memorial to the tragedy, Ms. Monseu directed that there could be no references to the attack, to the date of the attack, April 20, 1999, or 4/20/93 [sic], no names or initials of students, no Columbine ribbons, no religious symbols, and nothing obscene or offensive. Tiles that did not conform to the guidelines were not to be hung.[380]

When parents initially objected to restrictions placed on the artwork to be painted on the tiles, Ms. Monseau allowed parents to include the names of their children, initials, and dates other than the date of the shooting. Restrictions regarding religious symbols, date of the shooting, and restriction of obscene or offensive materials were maintained.

Parents and students who felt that they were not being allowed to paint tiles in the way they wanted brought suit against the school district regarding alleged violation of their Free Speech and Establishment Clause rights. Initially, the district court held in favor of the parents and students. The Jefferson County School District filed an appeal of this decision.

The Tenth Circuit Court of Appeals reversed the decision of the district court based upon the reasoning that the district court utilized the improper standard of review:

> The district court held that the tiles at issue constituted neither government speech, nor "school-sponsored" speech, but were private speech in a limited public forum. It found that the District's guidelines prohibiting the date of the shooting was not reasonable in light of the tile project's purpose, and that the prohibition on religious symbols was not viewpoint neutral. We disagree with the district court that the tile project is not "school-sponsored" speech as defined by *Hazelwood School District v. Kuhlmeier* . . .[381]

The Tenth Circuit held that the tiles constituted school-sponsored speech and as such should be analyzed according to the Free Speech analysis in *Hazelwood*:

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[380] *Id.* at 921.

[381] *Id.* at 923.

The court believed the school district's policy that restricted religious symbols was "reasonably related to a pedagogical interest."[382] The school district provided the court with two pedagogical reasons for its restriction on religious expression:

> (1) [R]eligious references may serve as a reminder of the shooting, and (2) to prevent the walls from becoming a situs for religious debate, which would be disruptive to the learning environment. We do not need to address the first reason because we find the latter of these to be reasonably related to the restriction on all religious symbols.[383]

The Tenth Circuit concluded its analysis by explaining the potential hazards of requiring the use of *Rosenberger's* "viewpoint neutrality" standard when analyzing religious speech in a public school setting:

> In this case, the wisdom of the Supreme Court in *Hazelwood* of fashioning a separate analysis for school sponsored speech is obvious. If the District were required to be viewpoint neutral in this matter, the District would be required to post tiles with inflammatory and divisive statements, such as "God is Hate," once it allows tiles that say "God is Love." When posed with such a choice, schools may very well elect to not sponsor speech at all, thereby limiting speech instead of increasing it. The District could be forced to provide an opportunity for potentially thousands of participants to repainting their tiles without any meaningful restrictions by the District, leading to a potentially disruptive atmosphere in which to try to educate the students of Columbine High School.[384]

The Tenth Circuit Court of Appeals reversed the judgment of the district court. The Tenth Circuit further ordered the district court's injunction vacated and, thus, the school district did not have to allow some plaintiffs to paint tiles in any way they wished and other plaintiffs' tiles that were rejected to be included in the display.

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[382] *Id.* at 925.
[383] *Id.* at 933.
[384] *Id.* at 934.

Summary of Familiar Themes

Permanent displays of religious artwork, whether student-generated or professionally-created, failed to pass the Lemon test in *Washegisic* and *Joki.*

> *Washegesic*: Display of portrait of Jesus Christ in public school hallway violated establishment clause; portrait had no secular purpose, portrait was not integrated into any course of study, and school controlled portrait.[385]

> *Joki*: School's display of student's painting in auditorium has effect of conveying message of government endorsement of Christianity and, thus, was prohibited by First Amendment: painting prominently displayed figure whom average observer would believe to be Jesus Christ at his crucifixion; painting lacked any meaningful neutralizer negating features, despite presence of some nonreligious figures or figures that were not identifiable by average observer as religious personages; painting was displayed permanently, and not as part of any holiday setting.[386]

The reasoning applied in approving the Columbine High School's limitation of religious expression in the painting of tiles in Fleming was the same as in cases pertaining to student assignments, literature, and the Equal Access Act. The standard utilized in all these cases is based upon the the precedent regarding school's control of pedagogical content:

> *Fleming* : The Seventh Circuit in Gernetzke v. Kenosha Unified School district No. 1, 274 F.3d 464 (7th Cir. 2001), recognized similar concerns, upholding a principal's decision prohibiting a religious group's posting of a cross because he feared that allowing the cross "might also require him to approve murals of a Satanic or neo-nazi character, which would cause an uproar." Like those courts, we believe that the District's restriction on religious symbols was reasonably related to its legitimate goal of preventing disruptive religious debate on the school's walls.[387]

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[385] Washegesic v. Bloomingdale Public School, 33 F.3d 679, 680. (6th Cir. 1994).
[386] Joki v. Board of Schuylerville Central School District, 745 F. Supp. 823, 824. (N. D. Ny 1990).
[387] Fleming v. Jefferson County School District, 298 F.3d 918, 934. (10th Cir. 2002).

State Legislation

Three states have enacted legislative statutes specifically pertaining to the inclusion of religious materials and/or subject matter into the curriculum. Utah, Mississippi, and California have allowed for the accommodation of references to religion with the following stipulations: (1) Religious materials and references are part of a secular course of study; (2) Instruction does not advocate the belief of a particular religious group or sect; (3) References to religion are "incidental" and "illustrative" in the course of study.

A. Utah State Code-- *Maintaining Constitutional Freedom in the Public Schools*

> (1) Any instructional activity, performance, or display which includes the examination of or presentations about religion, political or religious thought or expression, or the influence thereof of music, art, literature, law, politics, history, or any other element of the curriculum, including comparative study of religions, which is designed to achieve secular objectives included within the context of a course or activity and conducted in accordance with applicable rules of the state and local boards of education, may be undertaken in the public schools.
>
> (2) No aspect of cultural heritage, political theory, moral theory, or societal value shall be included within or excluded from public school curricula for the primary reason that it affirms, ignores, or denies religious belief, religious doctrine, a religious sect, or the existence of a spiritual realm or supreme being.
>
> (3) Public schools may not sponsor prayer or religious devotionals.
>
> (4) School officials and employees may not use their positions to endorse, promote, or disparage a particular religious, demoninational, sectarian, agnostic, or atheistic belief or viewpoint.[388]

[388] UTAH CODE ANN. tit. 53A, section13-101.1 (2002).

B. Mississippi Code-- *Religious Matters Proper for Inclusion in Public School Courses*

> Nothing in this code shall be construed to prevent any local school board, in its discretion, from allowing references to religion or references to or the use of religious literature, history, art, music or other things having a religious significance in the public school of such district when such references or uses do not constitute aid to any religious sect or sectarian purpose and when such references or uses are incidental to or illustrative of matters properly included in the course of study.[389]

C. California Code--*Religious Matters Properly Included in Courses of Study*

> Nothing in this code shall be construed to prevent, or exclude from the public schools, references to religion or references to or the use of religious literature, dance, music, theatre, and visual arts or other things having a religious significance when such references or uses do not constitute instruction in religious principles or aid to any religious sect, church, creed, or sectarian purpose and when such references or uses are incidental and illustrative of matters properly included in the course of study.[390]

Summary

This chapter presented an analysis of case law and legislation pertaining to Fine Arts Education and the Establishment Clause. The data were organized into six categories.

Category One pertained to case law involving songs, holidays, ceremonies and performances. The researcher found that the Lemon test was the most frequently utilized form of review to determine the constitutionality of materials and practices. The principle of "secular educational purpose" was preeminent in this category.

Venue also played an important role in court decisions. Expression related to extracurricular activities such as sports or ceremonies such as

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[389] MISS. CODE ANN. tit. 37, section13-161. (2002).

[390] CAL. CODE ANN. tit. 2, section 51511. (2002).

graduation that occurred outside of the curriculum involved in regular classroom instruction, were subjected to a stricter interpretation of the Establishment Clause. Only student-directed expression managed to gain the approval of the courts.

Category Two pertained to literature. The researcher found that religious material that is part of a collection and is utilized in the context of a "secular educational purpose," was deemed acceptable by the courts. The courts, in general, have attempted to preserve the authority of school officials in determining the content of curriculum, so long as the curriculum delivered in a manner that is non-proselytizing and viewpoint neutral. Even the study of the Bible as literature has been upheld by the courts.

Category Three pertained to student assignments. The courts have consistently defined the classroom as a limited forum. As such, school officials have been given control over the contents of assignments that are accepted from students. The courts have utilized the concept of "legitimate pedagogical concern" to advocate school officials editorial control in limiting religious expression in the classroom.

Category Four pertained to the Equal Access Act. The courts have continued to support the accommodation of student-led religious expression that this legislation was designed to protect.

However, the courts have continued to recognize the authority of school officials to interpret, create, and enforce policies that guarantee that the provisions of the Act are adhered to in a manner that prevents violations of the Establishment Clause. The courts have also upheld the Act's provision of school control of any kind of expression that could possibly contribute to the disruption of the educational environment.

Category Five pertained to artwork. The permanent display of artwork containing religious elements has not been looked upon favorably by the courts. The courts have ruled that religious artwork that reflects the beliefs of one sect and are displayed permanently cannot pass any of the requirements of the three-pronged Lemon test.

Category Six pertained to state legislation regarding the use of religious materials or content in Fine Arts Education. Legislation from the states of Utah, Mississippi, and California is based on case precedent first presented in *Florey*. The legislation is designed to accommodate the use of religious content in the classroom.

Familiar themes in court decisions were extrapolated and supported by examples from the text of the analyzed cases and legislation. Accommodationist themes were found to be dominant in categories pertaining to songs, holidays, performances, literature, legislation, and student clubs. Separationist themes were found to be dominant in categories pertaining to ceremonies, student assignments, and artwork.

CHAPTER V

FINDINGS, IMPLICATIONS, FRAMEWORK AND MODEL OF APPROPRIATE PRACTICE

Overview

This chapter is a review of the research purpose, methodology and questions pertaining to Fine Arts Education and the Establishment Clause. The data analyzed from Chapter Four will be summarized and findings will be discussed. The findings will be culminated into a Framework and Model of Appropriate Practice. Implications regarding the future of religious expression in Fine Arts Education will be proposed in terms of accommodationist and separationist philosophies.

Review of the Study

The purpose of this study was to present a legal analysis for the past, current, and possible future direction of the courts and administrative agencies regarding church/state issues related to Fine Arts Education. Seventeen District Court and Circuit Court of Appeals court cases were analyzed because of their implications for the use of religious materials in Fine Arts curriculum. Two of the seventeen cases analyzed involved interpretation of The Equal Access Act. Legislation pertaining to religious expression was reviewed from the states of Utah, Mississippi, and California.

The methodology for this study involved determining what tests of constitutionality were preeminent in Fine Arts cases and examining the constitutionality of utilizing religious materials in various contexts.

Four research questions guided this study: 1) Can a clear position regarding the constitutionality of Fine Arts Education that includes religious content be determined in case law?; 2) What positions are contained in the

Primary Sources of Law in the area of religion and Fine Arts Education?; 3) What changes in practice may be anticipated in the future, given current judicial interpretations of the Establishment Clause?; 4) What general guidelines can be suggested to Fine Arts teachers in order to ensure compliance with the Establishment Clause?

Findings

This study attempted to determine the legal ramifications of utilizing religious materials, resources and references in Fine Arts Education. A pattern of use regarding particular tests of constitutionality was discovered. In addition, a pattern of constitutionally acceptable and unacceptable practices emerged from an analysis of case law and legislation. The tests of constitutionality form the foundation for a framework for the use of religious material in Fine Arts Education. The pattern of acceptable practices provides resources to create a Model of Appropriate Practice.

Tests of Constitutionality

> Every analysis in this area must begin with consideration of the cumulative criteria developed by the Court over many years. Three such tests may be gleaned from our cases. First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, *Board of Education v. Allen*; finally, the statute must not foster "an excessive government entanglement with religion." *Walz*[391]

The Lemon test was the standard utilized by the courts in analyzing the majority of cases pertaining to Fine Arts Education. Twelve of the seventeen cases analyzed utilized the test in its entirety or portions thereof. The Endorsement test, which is based upon the government's intent to send a message of endorsement or censure, was utilized as a standard of review in two cases. The legislative mandates that are a part of the Equal Access Act

[391] 403 U.S. 602, 607 (1971).

were utilized to determine constitutionality in two cases. The Coercion standard of review was utilized as a part of the analysis in one case that pertained to a graduation ceremony. Three cases presented to the courts were analyzed according to the free speech standard which approaches school district practices according to their relationship to legitimate pedagogical concerns.

The standards of review utilized and the outcome of court decisions suggest a five-step Framework for Fine Arts educators to utilize in determining the appropriateness of religious content in the curriculum. The Model of Appropriate Practice will reflect specific practices that have survived legal challenges to the Establishment Clause.

Framework

1) *Does the religious content serve a secular educational purpose?*

Secular educational purposes are those practices that relate to the prescribed curriculum of the school district. Curriculum objectives are usually stated in terms of certain skills students are expected to acquire in a course of study.

2) *Can the venue in which the religious content is presented be perceived as neutral?*

The courts have considered the closed forum of the classroom as neutral if religious content serves a secular educational purpose. The courts have also approved the performing of choir concerts in churches and other religious institutions if the reason for selection of such a venue is due to such secular considerations as the acoustics or seating.

The courts have considered religious content in state-sponsored extracurricular activities such as sports and graduation ceremonies as coercive and an endorsement of religion. The school district has to avoid the perception

that specific sectarian values have the school's approval. Student-directed religious expression at extracurricular events and graduations has gained approval in the courts if the school district agrees to relinquish editorial control of the content.

3) *Does a significant amount of variety exist in the curriculum to the extent that one religious tradition is not shown preference over others?*

A curriculum that maintains diversity in terms of exposing students to a variety of cultural, religious, and ethnic traditions avoids the perception of endorsement or advancement of one particular religion. Inclusion of various religious traditions in a secular course of study also avoids the perception of hostility to or inhibition of religion.

4) *Does the use of religious material or content involve any permanent visual display?*

Permanent display of religious material has been viewed by the courts as a violation of the Establishment Clause. Policies which call for temporary display of religious content with regard to ethnic, holiday, and cultural traditions or temporary exhibition of student work that contains religious elements is acceptable to achieve secular educational objectives.

5) Is the use of religious materials in the curriculum student-directed?

The Equal Access Act allows extracurricular student groups to engage in religious activities if the school maintains a limited open forum. Student groups must engage in these activities without any sponsorship from the school or participation of any school personnel.

In the closed forum of the classroom, students may utilize religious materials if school officials deem it appropriate. School officials have control to regulate the content of assignments. Officials can limit religious expression in

student assignments if a legitimate pedagogical concern exists.

Model of Appropriate Practice

The purpose of the Model of Appropriate Practice is to provide examples of practices that would not be in violation of the Establishment Clause.

A. *The Use of Religious Songs in Instruction and Performance*

The use of religious music to achieve secular educational objectives such as gaining skill in sight reading, harmonization, and intonation is acceptable as part of a course of study. The acknowledgement in case precedent that a significant percentage of choral music contains religious themes supports its use as an integral part of a comprehensive music curriculum. The performance of religious pieces such as Handel's "Messiah" would conform to secular objectives such as providing students the opportunity to perform a work of historical significance by a major composer; or providing students the opportunity to perform a piece of music with orchestral accompaniment.

B. *The Study of The Bible as Literature*

The study of the Bible in its social and historical context is considered secular so long as the instruction is non-proselytizing, objective, and does not seek to encourage or discourage certain beliefs. For example, a lesson regarding a parable from the Bible that is discussed in reference to its similarity to Aesop's fables, has been considered acceptable by the courts.

C. *The Comparative Study of Religion Through The Use of Music, Art, and Literature with Religious Themes as Part of a Multicultural Curriculum*

A curriculum that includes examination of holidays and cultural traditions is acceptable to meet the secular objective of gaining knowledge, understanding, and awareness of different cultures. Holidays and cultural

traditions such as Christmas and Chanukah have gained secular significance in American culture. A teacher-designed unit that allowed students to study the music, art, literature and religions of a particular country would be an example of building cultural awareness.

D. *The Temporary Visual Display of Religious Symbols , Seasonal Displays, and Artwork That Reflect a Variety of Religious and Cultural Traditions*

The display of a cultural calendar, bulletin boards, or artwork can be utilized as a teaching tool to provide multicultural instruction. Temporary displays of symbols such as the Star of David or the Hindu OM symbol were a part of displays deemed acceptable by the courts.

Implications and Conclusions

The Supreme Court's move towards the accommodation of religious expression is reflected in many of the decisions of the lower courts. District courts and Circuit Courts have consistently supported the incorporation of music, cultural art, and literature with religious content as part of a secular public school curriculum.

The lower courts have attempted to mimic Supreme Court jurisprudence that "protects this country's religious heritage and traditions."[392] Although the lower courts have not tolerated every type of religious expression, they have provided enough leeway to empower Fine Arts educators a means to avoid complete censorship of a significant amount of curriculum materials.

Furthermore, the initiative of the states of Utah, Mississippi, and California in enacting legislation geared towards the accommodation of religious expression in curriculum, raises this issue to a new level of significance. To date, no legal challenges have been raised to question the constitutionality of any of this legislation.

[392] Seidman, *supra* note 15 at 504.

Lisa Hempen believes that this trend towards accommodationist philosophy is the result of the following perceptions:

> The separationist approach, which pervaded judicial reasoning for decades culminating in Lemon, favored absolutist principles that frequently conflicted with the role of religion in our society. A recognition and dissatisfaction for this irreverence of traditional American customs bound up in a cumulative religious identity has prompted a renewed interest in the accommodationist approach.[393]

However, the "Wall of Separation" remains intact when one considers any activity that could be perceived or construed as school prayer. Extra-curricular performances of songs with references to biblical scriptures were rejected by the courts as state-endorsed and coercive expression.

Furthermore, the cases pertaining to student classroom assignments provide educators who suffer apprehension regarding the use of religious materials a legal basis of delimitation.

The conflict existent in interpretations of constitutionality leads one to the conclusion that Establishment Clause Jurisprudence in the area of Fine Arts Education can only be analyzed in regards to specific practices in specific instances. Although a fairly cogent pattern of acceptable and unacceptable practices exists, a clear pattern of consistent interpretation of the Establishment Clause does not exist. Theoretically, the principle of stare decisis should provide us with some consistency in adjudication. However, as the composition of the membership of various courts change and as the composition and requirements of society change, data from past decisions continue to be interpreted in new ways. The challenge for Fine Arts Educators will continue to be the maintenance of a comprehensive, culturally rich, and aesthetically

[393] Hempen, *supra* note 88 at 1427.

diverse program in a world that is constantly altering in its perception of what is both legal and appropriate.

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