

**THE COMMONWEALTH EDUCATIONAL POLICY INSTITUTE**

CENTER FOR PUBLIC POLICY - L. DOUGLAS WILDER SCHOOL OF GOVERNMENT AND PUBLIC AFFAIRS

CEPI Education Law Newsletter

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NOVEMBER 2006: Vol. 5-3

FREE EXERCISE OF RELIGION IN PUBLIC SCHOOLS: POLICY ISSUES**Overview**

Every year issues involving religion in public schools come before the courts. Why are subjects such as the Flag Salute and the Pledge of Allegiance, inclusion of religious studies in public school curriculum, the place of student prayer in public schools, access of student religious clubs, public financial aid to private church-related schools and vouchers, religious symbols on school property, student religious clubs, school plays and concerts, and others still causing litigation, when the United States Supreme Court has, over the years, handed down several benchmark decisions? There are four main reasons for this and these are: (1) the complexities of interpreting the religion clauses of the United States Constitution; (2) a sustained emphasis in local public school system policy to [a] deemphasize free exercise of religion, and [b] assume a position of “strict neutrality;” (3) inconsistencies found in various court decisions; and (4) deeply rooted emotions associated with the issues.

The purpose of this commentary is to (1) demonstrate how the first three reasons cited above have converged causing a tension to grow between non-establishment and free exercise of religion in public school systems, (2) show how past court decisions (especially those from the United States Supreme Court) have focused on Establishment Clause prohibitions and, in doing so, obscured individual rights and protections available under the Free Exercise Clause, (3) demonstrate an emerging judicial attitude reaffirming the rights and protections of the Free Exercise Clause through the application of a theory of accommodation, and (4) make suggestions for local school system policy in an era of growing religious diversity.

The First Amendment

The United States Constitution provides in relevant part that “Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof...” First Amendment (Declared ratified January 8, 1798) Made applicable to the states through the Fourteenth Amendment (Declared ratified July 28, 1868), the Establishment Clause requires that government be neutral in matters of religion, while the Free Exercise Clause provides that a person is free to express his/her religious beliefs absent government interference. (Vacca and Bosher (2003))

Historical Foundations: Accommodation of Diversity

Sixty years ago, Justice Hugo Black offered the following definition of the First Amendment's Establishment Clause: "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. Neither can force nor influence a person to go to or remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state or the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa." Everson v Board of Education (1947)

In a very lengthy opinion, however, while Justice Black's specific focus in the matter before him (*i.e.*, reimbursement of public and private school parents for bus transportation of their children) was on the Establishment Clause and the constitutional principle of *neutrality*, his statements make a strong case for defending the rights of citizens under First Amendment's Free Exercise Clause (*i.e.*, a citizen's right to practice religion and express religious beliefs absent government interference). In his view, while the First Amendment requires government "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." Everson (1947)

Free Exercise and the Underpinnings of Accommodation. Five years later, Justice Douglas applied Justice Black's Everson rationale. In Zorach v Clauson (1952), the Supreme Court upheld the constitutionality of a student released time program of religious instruction held off public school property. In what can be characterized as a spirit of *accommodation* of religious diversity, Justice Douglas opined, "We are a religious people whose institutions presuppose a Supreme Being. We guarantee the freedom to worship as one chooses. We make room for as wide a variety of beliefs and creeds as the spiritual needs of a man deem necessary. We sponsor an attitude on the part of government that shows no partiality to any group and that each flourish according to the zeal of its adherents and the appeal of its dogma." In his view, there is "no constitutional requirement which makes it necessary for government to be hostile to religion and throw its weight against efforts to widen the effective scope of religious influence." Zorach (1952)

Almost a decade later, this same attitude of *accommodation* can be found in a dissenting opinion filed by Justice Stewart in the landmark New York State Regents' prayer case, Engel v Vitale (1962). Justice Stewart stated, "The Court does not hold, nor could it, that New York has interfered with the free exercise of anybody's religion.... But the Court says that in permitting school children to say a simple prayer, the New York Authorities have established an 'official religion.' With all respect, I think the Court has misapplied a great constitutional principle. I cannot see how an 'official religion' is established by letting those who want to say a prayer say it." It is interesting to note that Justice Douglas in a concurring opinion expressed a similar thought when he said, "A religion is not established in the usual sense merely by letting those who choose to do say the prayer that the public school teacher leads." Engel (1962)

The following year, in Abington Township v Schempp (1963), the Supreme Court held in a Pennsylvania case that state-sponsored religious exercises in public schools violate the First Amendment. However, while applying the principle of *neutrality* in its Establishment Clause analysis, the high court also stated that "neutrality is found in the Free Exercise Clause, which recognizes the value of religious training, teaching and

observance and, more particularly, the right of every person to freely chose his own course with reference thereto, free of many compulsion from the State.” Schempp (1963) The Court then cautioned that the Free Exercise Clause “has never meant that a majority could use the machinery of the State to practice its beliefs.” Schempp (1963)

Undue Burden and Private Choice. In Sherbert v Verner (1963), a public employment case, the Supreme Court further expanded its view regarding government’s responsibility to accommodate and protect religious liberty. In Justice Brennan’s view, individuals should not be excluded from receiving government employment benefits “because of their faith or lack thereof...” Sherbert (1963) In a concurring opinion Justice Stewart added that “the Free Exercise Clause affirmatively requires government to create an atmosphere of hospitality and accommodation to individual belief and disbelief.” Sherbert (1963)

The Search for Balance. In the decade of the 1970’s it became evident that the First Amendment’s religion clauses were on a collision course. However, what became clear was the Supreme Court’s attempt to balance strict neutrality between church and state with accommodation of individual religious liberty and free exercise. Simply stated, the Court would not tolerate “either governmentally established religion or governmental interference with religion.” Walz v Tax Commission (1970) To accomplish this daunting “balancing act” the high court created a three-pronged standard of analysis. Lemon v Kurtzman (1971) When judging constitutionality under the First Amendment ask the following questions: (1) Does the act have a secular (non-religious) legislative purpose? (2) Does the primary effect of the act either advance or inhibit religion? (3) Does the act excessively entangle government and religion? Lemon (1971)

In effect, the Lemon standard quickly became “the standard.” It enabled the Supreme Court and the courts below it to search for sponsorship, financial support, and pervasive involvement of government entities in all types of religious activities. As one legal expert has commented, “this test had become a kind of ‘one size fits all’ measure in First Amendment disputes...” Russo (2004) In doing so the balance was tipped toward the Establishment Clause and away from the Free Exercise Clause. As Justice Powell observed, “...this Court repeatedly has recognized that tension inevitably exists between the Free Exercise and Establishment Clauses..., and that it may often not be possible to promote the former without offending the latter.” Committee for Public Education and Religious Liberty v Nyquist (1973)

The Establishment Clause Dominates Court Decisions. For two decades the courts were busy deciding a variety of religion-related issues involving public school systems. During the 1980’s and 1990’s the Lemon standard was consistently applied by judges to such matters as tax deductions for parents, community religious groups gaining access to school facilities, textbook selection, classroom assignments and discussions, student-initiated silent prayer, teacher-initiated classroom prayer, graduation prayer, moments of silence at the beginning of each school day, prayer before athletic events, distribution of Bibles and other religious materials in schools and classrooms, students and teachers wearing religious symbols and items of clothing at school, student clubs, and the Pledge of Allegiance. While resulting court decisions were inconsistent, one thing became clear. With few exceptions, because the courts followed a path of “strict neutrality,” the protections of free exercise were minimized. Vacca and Boshier (2003)

Student Speech and Expression. During this same era, however, student speech and religious expression rights and protections became a focus of national attention. In 1984, for example, Congress enacted the Equal Access Act (20 U.S.C. 4071). The E.A.A. provided that public secondary schools receiving federal funds and which operate a limited open forum for student expression shall not discriminate against students wishing to meet on the basis of religious, political, philosophical, or other content. In 1990, the United States Supreme Court

applied the E.A.A. and held, by a vote of 8 to 1, that a student-initiated, non-curricular Christian club could constitutionally meet on school grounds, during non-instructional time, in an activity period provided for student-initiated interest clubs. As Justice O'Connor stated, public school authorities may not deny voluntary, student-initiated clubs equal access to school facilities solely on the basis of the content of their speech. Board of Education v Mergens (1990) More recently, Justice Thomas opined in Good News Club v Milford Central (2001) that public school authorities must not show "hostility" toward religiously based student clubs. A student club seeking equal access to a student activity period cannot be denied access on the basis of religious, philosophical, or political beliefs, or other content of their speech.

Graduation Exercises. Having a prayer as a part of a public school graduation continues to generate controversy. In 1992 the Supreme Court ruled unconstitutional a nonsectarian prayer given by a clergyman as a part of a public middle school graduation exercise. Lee v Weisman (1992) The narrow issue before the Court was whether having a member of the clergy offer prayers as a part of the official graduation ceremony violated the Establishment Clause. The Court voted 5 to 4 that it did. As Justice Kennedy summarized, "The prayer exercises in this case are especially improper because the State has in every practical sense compelled student attendance and participation in an explicit religious exercise at an event of singular importance to every student, one the objecting student had no alternative to avoid." Lee (1992) However, Justice Kennedy offered the following clarification, "We do not hold that every action implicating religion is invalid if one or a few citizens find it offensive. People may take offense at all manner of religious as well as nonreligious messages, but offense alone does not in every case show a violation...." Lee (1992)

Two additional aspects of Lee v Weisman (1992) are significant. First, the Supreme Court did not rely on the Lemon (1971) standard of analysis to reach its decision; instead, it created a new standard called "coercion." Even though attendance at graduation is voluntary, said Justice Kennedy, the prayer was too coercive because it pressured students to show tacit approval by standing silently.

A Shift Toward Free Exercise. Based on a review of recent case law some legal experts have concluded "...the federal judiciary seems to be shifting away from its separationist stance and moving toward support for greater government accommodation of religion, especially in cases involving government aid to private schools. Even in public school cases, courts seem more likely to uphold student-initiated religious expression than they were a quarter century ago." McCarthy (2005) Other legal experts caution that "[a]ccommodations of free exercise and free speech rights can be interpreted as advancing religion in violation of the Establishment Clause, but overzealous efforts to guard against state sponsorship of religion can impinge on protections under the Free Exercise and Free Speech Clauses." Cambron-McCabe, et al. (2004)

The Executive Branch Wades In

The President and Student Prayer. In addition to the spate of court decisions, past Presidents of the United States publicly expressed an interest in protecting the place religion in the public sector. For example, on several public occasions President Carter openly discussed the importance and place of religion in his life. In 1995 President Clinton reaffirmed his support of the rights of students in public schools to say grace before meals, to pray individually, and to organize student-initiated religious clubs. More recently, with the direct support of President George W. Bush, Congress enacted the No Child Left Behind Act (NCLB) which requires, among many other things, that (1) public school officials annually certify to their state education agency that their school system policies do not prevent constitutionally protected prayer in schools, and (2) the United States Department of Education issue guidelines dealing with constitutionally protected prayer in public schools.

The key phrase in the above NCLB statements is “constitutionally protected prayer.” To give meaning to this phrase the reader must seek out and review court decisions on point, as well as review the laws of his/her own state. In the Commonwealth of Virginia, for example, students in public schools “may voluntarily engage in student-initiated prayer.” Code of Virginia, 22.1-203.1 (2005 Supp.)

Recent Case Law: A New Standard of Judicial Analysis Emerges

Recent court decisions continue to demonstrate an existing tension between establishment (endorsement, advancement, promotion) of religion and free exercise (individual liberty and expression) of religion. In Locke v Davey (2004), for example, the Supreme Court upheld the constitutionality of a state financed program that precluded students majoring in “devotional theology,” in post-secondary institutions from receiving a state scholarship. Chief Justice Rehnquist was convinced that the prohibition did not place an *undue burden* on religion and private choice. A student is not required to “choose between his religious beliefs and receiving a government benefit.” Locke (2004) Yet, that same year in Bannon v Palm Beach County School District (2004) the Eleventh Circuit held that public school officials did not engage in view-point discrimination when high school senior members of the Fellowship of Christian Athletes (FCA) had to remove religious symbols and words from a mural they painted on school property. Initially, students at the high school were encouraged and allowed to paint murals, of their own design, as part of a school beautification project. The court cited two reasons for upholding school officials. First, a public forum did not exist. Second, school officials acted to avoid a religious controversy in a religiously diverse school.

Two recent decisions from the United States Supreme Court seem equally puzzling. In McCreary v ACLU of Kentucky (2005), displays (which included, among other documents, a copy of the Ten Commandments) in two Kentucky courthouses were declared unconstitutional; yet, in Van Orden v Perry (2005), a monument (involving the Ten Commandments) on the grounds of the capitol of the State of Texas was declared constitutional. As inconsistent as the opinions seem, the judicial analysis applied in these two decisions applies the same criteria (history, intent, context, content, and viewer’s [reasonable observer’s] perceptions) to judge constitutionality under the First Amendment.

In essence, a new standard of judicial analysis, one that seeks accommodation of history, secular value, custom, tradition, and diversity of religious beliefs, while forbidding endorsement, emerged from McCreary (2005) and Van Orden (2005). To pass muster under the First Amendment, viewer perceptions also must be added to already existing criteria (especially, pervasive involvement of government). In doing so, a balance between non-establishment and free exercise is possible. See, for example, Jane Doe v South Iron R-1 School District (E.D. Mo. 2006), involving the distribution of Bibles to elementary school students, on school property, during the school day; and Selman, et al. v Cobb County School District (11th Cir. 2006), where classroom issues involving evolution and intelligent design were adjudicated.

Policy Implications

Public school student, parent, and staff populations are rapidly changing and expanding in ethnic, racial, and religious diversity. A shrinking number of local public school systems in this nation are as homogeneous as they once were, and none is isolated from a rapidly changing and shrinking outside world. The many cultures, languages, social customs, and religions of the world can be found in almost every public school building in America. In this new mix (diversity) of students, parents, and staff is a growing responsibility for local school system policy-makers to (1) be certain that the history, form of government, language, and traditions of the United States are taught to all students, (2) encourage and require a broadening of the curriculum and school

extra-curricular activities to meaningfully involve all students, and (3) promote understanding and respect between and among all students, parents, and staff. In my view there is a growing need for teaching about and showing examples of the various religions of the world---especially if number (3) above is to be accomplished. No court has ever said that a course in comparative religions cannot be taught in a public school.

If my analysis of the case law presented in this commentary is accurate, the judicial pendulum is swinging away from a “strict neutrality” (anti-establishment) position and toward a free exercise accommodation (more inclusive of religious diversity) philosophy. As such, local public school officials are free to break free from a “strict neutrality” frame of reference and be more open to and creative in their efforts to meet the needs of a rapidly growing and religiously diverse population. In doing so, however, mistakes of the past cannot be repeated. As Justice O’Connor cautioned us more than twenty-years ago, in the eyes of a reasonable observer government must not appear to “endorse” any particular religion. Lynch v Donnelly (1985)

What follow are some suggestions for consideration as existing policies are revisited and new policy statements are drafted. School system policy must make it clear that:

- The school system (the Board) does not discriminate against any individual on the basis of religion.
- The Board is vested with the legal authority to decide on the appropriateness of programs or activities held on school property or at school-sponsored events, on or off school grounds.
- The intent of the Board, its administrators, teachers, and staff is to accommodate the free exercise of bona fide religious beliefs on school property and at all school sponsored activities, and in curricular and extra-curricular programs, provided (1) the learning environment is free from disruption, and (2)safety and security are not jeopardized.
- No student will be compelled to participate in any program, class, class assignment, or school-sponsored activity that is offensive to his/her religious beliefs.
- Voluntary, student-initiated, faith-based, and constitutionally protected activities that *do not* (1) violate state law, (2) disrupt the learning environment and instructional time of the school day, (3) jeopardize the safety and security of others, (4) coerce others, especially other students, to join or take part, and (5) conflict with the school system’s policy and procedures (e.g., prior approval, faculty sponsor, and other required procedures) governing all student activities, will be accommodated to the extent practicable.

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Note: The views expressed in this commentary are those of the author.