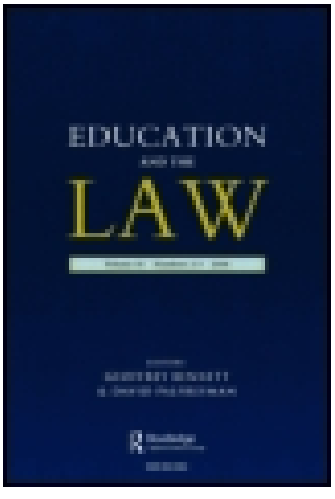

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Building a nation: religion and values in the public schools of the USA, Australia, and South Africa

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Although the systems of public schools differ among Australia, South Africa and the USA, all three countries recognize that religion plays a significant role in determining values. All three countries have written constitutions but only South Africa and the USA have a Bill of Rights that protects persons' exercise of religious beliefs. In Australia, the place of religion in education has largely been shaped by state legislatures, administrative regulations and interpretations of the national constitution. In the USA, the long tradition of religious values being represented in public education has been severely restricted over the past 60 years, resulting in artificial judicial lines being drawn between private religious expression and government expression. However, even private expression can be prohibited if it interferes with the educational mission of a school. South Africa had a long tradition of Christian religious practices in government schools under apartheid. However, the post-apartheid 1996 Constitution and 1996 South African Schools Act still give these schools considerable latitude in investing religious values into the educational process. In Australia, values, religion and education have always been a preoccupation of those providing education, although the blurring of public and private education in Australia has resulted in a different direction for the role of religion than in the USA.

Keywords: religion; values; free expression; constitutions

Introduction

Public schoolshave been identified as the 'the primary vehicle for transmitting the values on which society rests,'[1] a function that serves to 'awaken the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment.'[2] The purpose of this article is to compare and contrast the place and role of religion and religious values in public schools.

The legal mechanisms that the three countries considered in this paper have used to determine and shape the place and value of religion in their schools vary. All three countries have written constitutions, with the USA and South Africa having a bill of rights in their constitutions. Both the US and Australian constitutions contain establishment clauses, but the interpretation of these clauses differs significantly. The place of religion in education has been shaped largely by legislatures in Australia, fairly equally by legislative/administrative and constitutional interpretation in South Africa, and almost exclusively by constitutional interpretation in the USA.

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Values and religion: an overview

Religion has a significant role to play in the framing of, and commentary concerning, such significant values in education as respect for and obedience of teachers and students, industry and diligence in completing important tasks, and tolerance of and for the beliefs and views of others. As US Supreme Court Justice Antonin Scalia observed in a losing cause: 'Those who wrote the Constitution believed that morality was essential to the well-being of society and that encouragement of religion was the best way to foster morality.'[3] From the formation of the first American public schools in the 1820s, these schools were seen as the primary vehicle for 'communicat[ing] shared values' and religion was viewed as necessary 'to undergird those values.'[4]

> The notion of teaching children morality by some means that did not involve religion would hardly have entered the American mind. Morality, it was understood, derived from religion, and for even the most liberal of the Protestants who made up the northeastern elite in the 1820s and '30s, that meant morality came from the Bible, especially the Gospels. Without religion there could be no foundation stone on which to rest basic values of honesty and rule [accordingly].[5]

Following World War II, while a religious flavour in public education continued in the USA, as represented in Congress adding 'under God' to the Pledge of Allegiance,[6] the emphasis shifted to the development of a legal secularism in the courts. In the first Supreme Court decision, *Everson v. Board of Education*,[7] testing the applicability of the establishment clause to American schools, the Court upheld free public transportation for children at religious schools, but with the caveat that the wall of separation of church and state 'must be kept high and impregnable.'[8]

The result, as suggested by the Constitution of South Africa, the most recent of the three countries (USA, Australia, and South Africa) to adopt a new written constitution, suggests that the core values important to a country (including its education), even if connected to a religion in the past, can, nonetheless, become secularized and separated from religion.[9] In essence, the debate concerning religion and values has been reframed from one of determining the extent to which a nation's values owe their origin to religion to one of determining whether religion itself is valued in public schools.[10] Courts and legislatures have not made this question of value an easy one to assess and the degree of differential treatment given to religion in schools has become a benchmark for assessing whether public schools are instilling the values necessary for citizenship.[11]

The relationship between government and religion in the USA, Australia, and South Africa has been marked by a changing historical and cultural kaleidoscope of support, rejection, and/or indifference towards religion. The changing succession of responses to the place of religion in the public education systems of the three countries has become reflective of how they value the importance of religion in their schools.

To say that religion has value in US culture is not to say, however, that religion is valued in its public schools. The status of religion in the country's public schools has largely been defined through interpretive interplay of the US Constitution's establishment, free exercise, and free speech clauses.[12] Seminal Supreme Court decisions over 40 years ago prohibiting, under the establishment clause, the longstanding public school practices of prayer and bible reading in schools[13] have become critical landmarks reflecting a separationist approach to religion and education.[14] Two decades of subsequent litigation further refined this separationist stance to the point where the exclusion of religion came perilously close at times to hostility towards religion.[15] However, in more recent years the Supreme Court's use of the free speech clause as a powerful counterweight to the establishment clause has

revitalized the place of religion in public schools, and in the process has reinvigorated those who strive for a more accommodationist approach to religion.[16] This tension between separationists, who desire to largely extricate all religion from public education, and accommodationists, who see religion in schools as the foundation for important student values, has crystallized around such issues as the distribution of religious literature, school recognition of student religious clubs, and access by community religious groups to hold their meetings on public school premises.[17]

Comparative examination of Australian education law and religious issues with those of the USA (with its extensive case law history) and with South Africa (with its constitutional and rights frameworks that have emerged from recent and confrontational societal development) affords an interesting contrast. Australians do not have a right to free speech, apart from a common law interpretation of free speech related to political matters, and most schools in Australia require students to wear school uniforms, averting issues of appropriateness of values expressed through T-shirt messages,[18] which would be addressed more as a good order issue than concerning the rights of an individual. Issues that have arisen that relate to individual rights are based more in federal and state anti-discrimination legislation.

South Africa recognizes an intimate bond between values and people's deepest convictions, frequently rooted in religion. The South African Constitution[19] has proved itself sensitive to this issue, because the democratic values of human dignity, equality, and freedom enshrined in its Bill of Rights[20] affirm the fundamental rights of all South Africans. These basic values, while affording citizens some protection against the power of the state and providing them with some assurance that they will be able to exercise a certain degree of control over their own lives,[21] can be limited by the state, however, as long as the limitation is reasonable and justifiable.[22] In addition, the Ministry of Education's *Manifesto on values*, Education and Democracy[23] acknowledges values as transcending language and culture and, at the same time, expressing shared aspirations as to the direction that government schools should take to help students achieve higher levels of moral judgment.[24]

United States of America

In American public schools the extensive history of litigation involving values has been inextricably connected with religion. As the Supreme Court observed in *Lynch v. Donnelly*,[25] a non-school case wherein it upheld the display by a city owned crèche in a park in Rhode Island: 'There is an unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789.'[26] This sentiment is perhaps best represented in Justice Douglas' oft quoted expression in *Zorach v. Clauson*,[27] where the Supreme Court asserted pointedly in validating a program allowing release of public school students from classes to attend off-campus religious exercises in New York City: 'We are a religious people whose institutions presuppose a Supreme Being.'[28] Yet, despite the Court's observations, sixty years of public school-related establishment clause litigation since 1947[29] has produced badly split decisions regarding the place of religion in public education.

Religion and its value in public education play a role in three broad kinds of school-related law cases. A first kind of litigation is represented by lawsuits testing the responsibility of public schools to protect the free speech rights of students or religious community groups who want access to public school premises to further their religious purposes.[30] A second line of cases is represented by lawsuits challenging government aid to

religious schools under the Establishment Clause where the aid is alleged to have the purpose or effect of advancing or sponsoring the religious values of the schools.[31] A third kind of case involves objections by school officials or parents to materials or events within a school where religion, although not the sole (and perhaps not always a clearly articulated) basis for objection, nonetheless is grounded in values that can be viewed as religious in nature.[32] American public education has been likened to a 'market place of ideas'[33] and, in the light of the tensions that emerge over the place of religion in American public schools, this article provides a perspective on the place of religious beliefs and values in those schools.

Judicial tension under the religion clauses

The First Amendment of the US Constitution has two religion clauses, one preventing the establishment of religion and the other protecting the free exercise of religion.[34] Until fairly recently the establishment clause had a dominant role in shaping the relationship between government and religion, with courts invoking the legal fiction of separation of church and state[35] to diminish free exercise claims.[36] Within the past two decades, though, religious practices and distribution of religious materials in public schools have increasingly been accorded protection as expressive activities under the First Amendment's free speech clause.[37] However, while federal courts generally have had some success in preventing public school districts from treating religious expression differently from other kinds of expression, the courts have not been as successful in compelling those districts to rethink their approach to religion. Despite the contemporary educational concern about diversity, the legal legacy of the separation of church and state fiction has been difficult to overcome when religious expressive activities find their way into public schools.[38]

The important values inherent in diversity – respect for and tolerance of differences – have taken root where race, gender, and national ethnicity are concerned,[39] but only in a limited and grudging fashion where religion is at issue.[40] The irony of this distinction is that not only can religion be an object of diversity, in much the same manner as race and national origin, but it can also be the source of basic human values that serve as a motivation for the respect and tolerance of other persons. Respect for and tolerance of other persons and their religions can be part of the value system of public education, but religious diversity is difficult to recognize or appreciate where religion itself has been excised from public schools. Justice Scalia, dissenting in *Lee v. Weisman*[41] where the Supreme Court struck down graduation prayers,[42] opined in a losing cause 'that maintaining respect for the religious observances of others is a fundamental civic virtue that government (including the public schools) can and should cultivate.'[43]

The development of a national approach to the role of religion in public schools has been patchwork at best.[44] Undergirding much of the litigation involving public schools and religion have been three legal developments concerning the right of parents to direct the education of their children, the authority of public schools to control their curriculum, and the right of students to express themselves in schools.

Parental rights under the liberty clause

The US Supreme Court early recognized in *Pierce v. Society of Sisters* (*Pierce*)[45] that parents have a fundamental constitutional right under the liberty clause of the Fourteenth Amendment to direct the education of their children. In *Pierce* the State of Oregon enacted a statute requiring all students to attend public schools and the Supreme Court, in

invalidating the statute and reflecting upon the diversity offered by different kinds of schools, observed that:

> The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the state.[46]

In more recent Supreme Court decisions the right to direct children's education has become more broadly restated as the right of private choice, a right that has sustained government assistance to students in religious schools.[47] In other words, what gives value to education is the right of parents to choose the venue for their children's education, particularly when the education in those venues is religious in nature.[48] However, while parents have a constitutionally protected right to give religious value to their children's education by choosing religious schools, courts generally do not provide a corresponding right of parent choice to have their religious values reflected in the design or implementation of the public school's curriculum.[49]

The right of parents to direct their children's education must be juxtaposed with the inherent *parens patriae* right that each state has under the Tenth Amendment to operate a system of free public schools.[50] The Supreme Court, in giving force to this right in *Hazelwood School District v. Kuhlmeier* (*Hazelwood*),[51] upheld the right of a high school principal to delete articles from the student newspaper that was prepared and published as part of the school's journalism course. In rejecting the student editor's free speech claim the Court held that a public school has authority over its curriculum and can control both the pedagogy and content of curriculum as long as 'their actions are reasonably related to legitimate pedagogical concerns.'[52] Declaring that schools are entitled to ensure that

> participants learn whatever lessons the activity is designed to learn, that readers or listeners are not exposed to material that may be inappropriate for their level of maturity, and that the views of the individual are speaker are not erroneously attributed to the school,[53]

the *Hazelwood* Court opined expansively that 'the education of the Nation's youth is primarily the responsibility of parents, teachers, and state and local school officials.'[54] However, the authority of the school has remained the primary focus and almost two decades later the Supreme Court, in *Morse v. Frederick*,[55] upheld suspension of a student, despite a challenge by parents on behalf of their son, where a student's allegedly pro-drug message on a banner at a school activity could be reasonably interpreted as suggesting that 'the norms in [the] school ... tolerated such behavior.'[56] In the end the anti-drug values of the school reigned supreme when counterbalanced against the free expression claims of parents and students.[57]

Free speech and viewpoint discrimination

Finally, the Court, over thirty-five years ago in *Tinker v. Des Moines Independent School District* (*Tinker*),[58] recognized that students in public schools have private free expression rights under the free speech clause of the First Amendment unless the expression 'materially disrupts classwork or involves substantial disorder or invasion of the rights of others.'[59] After the Supreme Court's unanimous decision in *Lamb's Chapel v. Center Moriches Union Free School District* (*Lamb's Chapel*),[60] recognizing that private religious expression is protected free speech and prohibiting viewpoint discrimination, federal courts have become immersed in determining when religious expression can be prohibited or

otherwise restricted. Most recently, a federal district court, in *Zamecnik v. Indian Prairie School District Board of Education* (*Zamecnik*),[61] balanced the views of an 'evangelical Christian' student's opposition to homosexuality with a high school's written policy prohibiting the wearing of 'garments or jewelry with messages, graphics or symbols ... which are derogatory, inflammatory, sexual, or discriminatory.'[62] While the school would permit the student to wear a T-shirt with a message, 'Be Happy, Be Straight,' the school would not permit the student to wear the T-shirt at issue in the case, 'Be Happy, Not Gay.' Invoking the 'rights of others' language from *Tinker*, the court reasoned that 'Public school students who may be injured by verbal assaults on the basis of a core identifying characteristic such as race, religion, or sexual orientation, have a right to be free from such attacks while on school campuses' and that 'a student's right to "be secure and to be let alone" ... involves not only freedom from physical assaults but from psychological attacks that cause young people to question their self-worth and their rightful place in society.'[63] While *Zamecnik* suggests that public schools can craft their policies in such a way so as to restrict expression that reflects negatively on the rights of others, other courts have not been that restrictive. In *Nixon v. Northern Local School District Board of Education*[64] a federal district court granted injunctive relief to a high school student permitting him to wear a T-shirt with the message, 'Homosexuality is a sin! Islam is a lie! Abortion is murder!' where the school produced no evidence that the T-shirt message violated the *Tinker* disruption test.

The *Zamecnik* and *Nixon* cases suggest that American public schools walk a tightrope in determining how to give value to student expressions that may be at cross purposes with the values a school desires to further in creating an open and welcoming environment for all students. The fact that US courts have demonstrated a clear inclination to support distribution of religious materials that either declare the proselytizing message of a particular student[65] or the opposition to an issue not associated with the status of students (such as opposition to abortion) only serves to exacerbate the tension between personal and public values.[66]

The Supreme Court, in *Morse v. Frederick*,[67] addressed a student's 'Bong Hits 4 Jesus' banner displayed on a street outside the entrance to the high school and held that public school officials could take reasonable action to safeguard those students entrusted to their care from the promotion or use of illegal drugs. Recognizing that this was, in fact, a school speech case the Court upheld as reasonable the school principal's interpretation that 'Bong Hits 4 Jesus' was an illegal drug message, even though other interpretations were possible.[68] The Court's observation that the banner did not concern a 'political or religious message'[69] suggests that *Morse* was not intended to circumscribe all student expression. However, the Court noted that 'the mode of analysis set forth in *Tinker* is not absolute,'[70] suggesting that public schools, in addition to punishing student conduct in opposition to its anti-drug policies, may also be able to establish other own value-laden norms that will likewise be immune from student free speech challenges even in the absence of evidence of disruption under a *Tinker* standard.

The Ninth Circuit Court of Appeals recent decision in *Truth v. Kent School District* (*Truth*),[71] suggests just such a result. In *Truth* the school district refused to recognize the student religious organization Truth and permit it to use school facilities and resources because, contrary to the district's non-discrimination policy prohibiting discrimination on the basis of religion,[72] the organization 'provided a biblically based club for those students interested in growing in their relationship with Jesus Christ,' restricted voting membership to 'members professing belief in the Bible and in Jesus Christ,' and required voting members and officers to sign a 'statement of faith ... affirm[ing] that he or she believes

"the Bible to be the inspired, the only infallible, authoritative Word of God.'"[73] *Truth* represented the clash of two value systems – the organization's membership rules requiring adherence to specified biblical values and the school's non-discrimination policy purportedly mandating tolerance and diversity by prohibiting discrimination in a number of areas, including religion. In the end the Ninth Circuit, with no evidence of disruption to the educational process, upheld the school's enforcement of its non-discrimination policy and rejection of Truth's permission to meet, because 'States [as well as their administrative units, school districts] have the constitutional authority to enact legislation prohibiting invidious discrimination.'[74]

The Ninth Circuit's decision in *Truth* suggests that the Supreme Court's *Morse* decision has tilted the balance in the religion–values debate away from protected religious expression and in favor of school policies that broadly oppose unacceptable conduct that goes far beyond opposition to illegal activity (such as possession and use of drugs). *Morse*, as interpreted through the Ninth Circuit's decision in *Truth*, intimates approval both for the authority of schools to declare and implement broad social policies and to limit student opposition to those policies. Although the Supreme Court's holding in *Morse* was limited to the facts before it (student expression in support of illegal drugs), the law of unintended consequences would suggest that the Court's holding could just as easily be wrenched from its factual context and be applied, as it was by the Ninth Circuit in *Truth*, to the restriction of religion-based expression. In such a case one can query, it would seem, the extent to which religious values are being valued at all in public schools. While organizational (or institutional)[75] religious values (as represented in *Truth*) can, arguably, be separated from the religious beliefs of individuals (as represented in *Zamecnik* and *Nixon*), the notion that individuals with similar beliefs cannot share and have protected their similar collective beliefs seems like a distinction without a difference.

Federal statutes

Legislation has not had the prominence in fashioning religious values in public education that it has in Australia and South Africa. However, in the Equal Access Act (EAA)[76] Congress used the power of the purse to impose a balance in the treatment of religious, political, philosophical, or other student-initiated and student-led speech. In upholding the constitutionality of the EAA against an establishment clause challenge the Supreme Court in *Board of Education of Westside Community Schools v. Mergens* (*Mergens*),[77] determined that Congress could prohibit all secondary schools receiving federal financial assistance (all public schools in the USA) from denying student-initiated and student-led, non-curriculum-related religious groups from meeting during non-instructional time on school premises. Although the impetus for passage of the EAA came from claimants desirous of allowing religious meetings in public schools, the statute has had two other major effects. First, once *Mergens* eliminated the Establishment Clause as an excuse for treating religious groups differently than non-religious ones, the emphasis shifted beginning with *Lamb's Chapel* to providing constitutional protection for religious expression. Second, the EAA has been used by a wider range of student groups, especially gay/straight clubs, to gain access to meeting space on public school premises, providing an interesting example of the law of unintended consequences. The EAA was enacted by Congress in response to the insistence of evangelical Christian student groups that they be allowed to meet on school premises, but the more recent use of the EAA by gay/lesbian student groups has prompted those who consider homosexuality objectionable to their own religious values.[78]

The debate around religious values and gay/lesbian rights has had an interesting federal judicial sequel. In *Boy Scouts of America v. Dale* (*Dale*)[79] the Supreme Court rejected the application of a state non-discrimination statute, prohibiting sexual orientation discrimination, to a boy scout organization's removal of a homosexual assistant scoutmaster. In rejecting an alleged state non-discrimination law violation the Supreme Court in *Dale* observed that 'forced inclusion of an unwanted person in a group infringes the group's freedom of expressive rights if the presence of that person affects in a significant way the group's ability to advocate' its viewpoint.[80] In response to this decision a number of public school districts enacted rules prohibiting the Boy Scouts from using public school property for their meetings, alleging that the organization's policy against homosexual leaders violated state laws or school board rules. Two years after *Dale* Congress exercised its power over the purse again by enacting The Boy Scouts of America Equal Access Act (BSAEAA)[81] to prohibit any school receiving federal funds and with a limited public forum from discriminating against the Boy Scouts by denying the organization access to public school premises.

In the light of the Supreme Court's *Dale* decision and Congress' EAA (as well as BSAEAA) statute that appear to allow protection of beliefs opposing otherwise protected values (e.g. sexual orientation choices) one must query whether the Ninth Circuit's decision in *Truth* is at cross purposes with these federal pronouncements. In parsing *Dale* and the EAA the Ninth Circuit reasoned that: (1) 'the guarantee of equal access [under the EAA] does not require special treatment for religious groups';[82] (2) the school district's non-discrimination policies in *Truth* were 'content-neutral . . . not time, place or manner restrictions,' thus suggesting that 'Congress did not intend the [EAA] to apply to nondiscrimination policies';[83] (3) those 'merely seek[ing] general membership status [in Truth] [were] not seek[ing] to participate on equal footing [under a 'forced inclusion' theory] with Truth's voting members or leaders . . . [or as] a leader of the organization' [as had been the case in *Dale*].[84]

These reasons, while patently reasonable, do not, one could argue, account for the disparate impact that even content neutral rules can have on religious beliefs, nor have other federal courts been as quick to use content neutrality as a means of undercutting Congress' protection of 'religious, political, philosophical, or other speech content.'[85]

Public school districts can, of course, avoid both the EAA or the BSAEAA altogether by rejecting all federal funding, a choice that none have made, or by limiting access to their facilities only to curriculum-related groups.[86] However, the success of public schools requires parent and broader community support and denying access to community groups is not likely to create a climate of support to encourage passage of tax levies.

In sum, the US experience in fashioning the relationship between religion and education has occurred largely in the courtroom rather than the legislature. Unfortunately, that approach has not been conducive to the development of a coherent and cohesive policy, such as is more evident in Australia and South Africa. In contrast to Australia, which has given a more accommodationist interpretation to its establishment clause, the US establishment clause has been weighed down by a long history of separation of government and religion and, more recently, of reluctance to accord religious beliefs constitutional protection even though a government entity's neutral policy may affect religious beliefs in a disproportionate manner.

Australia

Values, religion, and education in Australia

Australia today is a multicultural nation. It has the original indigenous populations, early English, Scottish and Irish migration, European migration during the 1950s, and an increasing migrant (and refugee) population from Asia, particularly South-East Asia. Religion, values, and education have always been a preoccupation of the public and those providing education. Issues relating to these in Australia have the same origins as in the USA. However, modern day practices that allow acceptability of the blurring of the three within public and private education[87] have evolved in quite different directions to those in the USA.

First, public education in Australia has the same historical origin as in the USA. Originally most schooling that was available was provided by churches, as charitable work.[88] An Australian report in 1821 urged the need for education so 'that as little control as possible be left to the parents over the time, the habits or dispositions of their children,'[89] and education was seen as important for moral and religious development. The introduction of free, secular, and compulsory education in the 1870s drew considerable debate from the churches and the community as to their ongoing involvement in education, its purposes, and possible detrimental effect of the changes on the moral fiber of the child. As in other nations, by the early twentieth century the values promoted by the new public schooling and curriculum were the industrial development of the Australian nation,[90] rather than the individual's development, although religious education that promoted the single religion of Christianity was permitted within school hours in a specific time allocation.

At the same time that public education provision legislation was being developed the Australian Constitution was being written prior to formation of the federation in 1901. The Australian Constitution, like the US Constitution, has an establishment clause.[91] However, the second point of difference with the USA is that direct public funding is provided to the non-government schooling sector, irrespective of religious or secular status, for both capital works and student instruction. This was introduced during the late 1960s as part of a political platform to win an election. The concept of public funding for all was popular with the electorate, succeeded, and has grown ever since. However, public funding for non-government, particularly religious, schools has not been without some controversy on a number of fronts. The constitutional validity of provision of public funds to schools that had a religious foundation was tested in the seminal case between an Attorney-General of Victoria and the Commonwealth Government (*Black*).[92] In a leading decision for the High Court Chief Justice Barwick stated:

> I have been unable to find any statutory authorization by the Commonwealth of any religious activity on the part of the non-government schools in the course of their educational activities. That there is no statutory prohibition of such religious activities in the course of authorized educational activities is scarce enough to make the appropriation and granting statutes, laws for establishing a religion in the only sense, in my opinion, those words can have in the Constitution. What the Constitution prohibits is the making of a law for establishing a religion. This, it seems to me, does not involve prohibition of any law which may assist the practice of a religion and, in particular, of the Christian religion.[93]

Justice Wilson elaborated further that in the provision of funding to religious schools religion was:

> an incidental or indirect consequence of the pursuit of the educational purpose. In no case is religion a criterion which attracts a grant. Even the most 'religious' of the schools which have received assistance are first and foremost educational institutions which are required to strive for a range and quality of education which is at least comparable to government schools.[94]

The High Court in *Black* also argued that the Establishment Clause in the Australian Constitution, and the Constitutional papers, did not establish a separationist view of church and state.[95] Changes in Australian Government policy in the late 1990s allowed very small schools to have access to federal public funding. In many cases such small schools have a minority or more fundamentalist religious approach. This may cause some questioning as to whether religious instruction is incidental to overall educational provision. In 2004 the teachers' union in New South Wales indicated that it would again challenge the constitutional validity of public funding for non-government schools as it was argued that evidence was available that public funding was being used to promote religious education.[96] However, the challenge did not appear to eventuate, possibly due to lack of public support for the position being taken. The current status, therefore, is that considerable public funding is provided to religious schools where religious education is actively taught.

One of the few individual (as opposed to government-led) cases in Australia on the topic of religious instruction in schools was a challenge in New South Wales that the saying of prayers, hymn singing, and saying grace before meals with a Christian orientation in a government school was 'dogmatic and polemic' religious instruction, as opposed to the general religious instruction allowed under an 1880 Act.[97] In 1967 a course in 'General religious and moral education' had been introduced to schools designed to teach students about Christianity and to promote moral values. Children read stories from the Scriptures, with teachers advised that:

> Stories are to be presented objectively. The teacher should refrain from any statement of creed or expression of denominational views or personal belief. Rather, any discussion needs to be directed towards the general understanding of the concepts of right and wrong, and of the good life.

The underlying moral tenets were to be emphasised. The curriculum was not compulsory.[98] In this challenge the Court held that the teaching that had occurred and the general religious education curriculum were within the boundaries of the type of general religious education that were envisaged in the original nineteenth century act. The teaching of a general Christian theme and values was allowable, although prioritizing a specific Christian religion would have been dogmatic.

As noted, Australian anti-discrimination laws and tribunals appear very effective in handling individual cases that may be treated as individual rights issues in other nations. For example, in Queensland in 2002 Catholic schools were refusing to employ homosexual teachers or those in known de facto relationships. The *Queensland anti-discrimination act 1991* allows the imposition of 'genuine occupational requirements' for positive discrimination, including behaviors consistent with an employer's religious beliefs.[99] The Queensland Government sought to narrow the term in 2002 Amendments to the Act, but was unsuccessful in the face of the church lobbying. However, a compromise was reached. The schools could not act in a discriminatory way against individuals because of lifestyle as long as they did not disclose their status in the classroom, but were allowed to employ teachers who were in accord with the school ethos. In Australia, then, general and specific religion in school can underpin educational instruction in both private and public schooling, supported through government funding, without successful challenge.

The third area of difference between Australia and the USA is that, despite our Constitutions that federated prior independent states,[100] the Australian Commonwealth

government has been using its power of the purse far more effectively than could occur in the USA to manage affairs that have in the past been seen as the domain of the states. With recent international concerns with security and the increasing diversity of the Australian population the Australian government has been active in promoting 'Australian' values and moral and civic behavior, both in the general population and through schools.

> The Australian values include respect for the freedom and dignity of the individual, equality of men and women, freedom of religion, commitment to the rule of law, Parliamentary democracy, and a spirit of egalitarianism that embraces mutual respect, fair play, and compassion for those in need.[101]

Future aspiring Australian citizens will need to complete a 45 minute, computer-based, multiple choice test in English on Australian values. Sample questions have not yet been released although public speculation about which Australian values may be truly important are rife.

In schools the federal government has been active in promoting a 'Civics and citizenship education' curriculum for implementation across Australia,[102] with funding tied to inclusion of civics and citizenship education learning outcomes in the state curriculum, and national testing and reporting on the area.[103] The nation also has a *National framework for values education in Australian schools*[104] that stipulates nine values for Australian schooling to build 'character'.

(1) Care and compassion: care for self and others.
(2) Doing your best: seek to accomplish something worthy and admirable, try hard, pursue excellence.
(3) Fair go: pursue and protect the common good where all people are treated fairly for a just society.
(4) Freedom: enjoy all the rights and privileges of Australian citizenship free from unnecessary interference or control, and stand up for the rights of others.
(5) Honesty and trustworthiness: be honest, sincere and seek the truth.
(6) Integrity: act in accordance with principles of moral and ethical conduct, ensure consistency between words and deeds.
(7) Respect: treat others with consideration and regard, respect another person's point of view.
(8) Responsibility: be accountable for one's own actions, resolve differences in constructive, non-violent and peaceful ways, contribute to society and to civic life, take care of the environment.
(9) Understanding, tolerance and inclusion: be aware of others and their cultures, accept diversity within a democratic society, being included and including others.[105]

In its most recent initiative the Australian government has introduced funding for a chaplaincy initiative across all schools[106] to promote the 'spiritual and emotional well-being of school communities.'

> Chaplains will be expected to provide general religious and personal advice, comfort and support to all students and staff, regardless of their religious denomination, irrespective of their religious beliefs. The choice of chaplaincy services, including the religious affiliation, is a decision for the local school community, following broad consultation. Students are not obliged to participate. Parents and students will be informed about the availability and non-compulsory nature of the chaplaincy services.

School communities, on a voluntary basis, will apply for funding to employ chaplains who must be accredited through a recognised or accepted religious organization.[107]

In Australia, then, values, religion, and education appear to have revisited the status of the late eighteenth century and early settlement by European immigrants and become totally merged within the operation of the nation. Although some states are enacting their own rights bills, the Australian Commonwealth government has been increasing its power to direct education through the power of the purse. This has included not just traditional curriculum content areas, but issues of values and the moral and spiritual development of all children. In comparative legal analyses with the USA it is often interesting to identify how often apparently similar societies differ at a major level between the strength of the individual right and the proposition of the common good. In every action the Australian government demonstrates respect for all religions and freedom to practise, however, the concept of the values that are espoused have a clear basis in Christian origins. In every action there is an increasing undertone of mainstream and Christian beliefs. The very selection of the term 'chaplain,' with its origins and definition in Christian religions, for the latest initiative appears to endorse this. In Australia values are free – as long as they are Australian values – and education is seen as having a major role to play in their development.

South Africa

The role of values in the lives of South Africans could best be evaluated by probing their origin,[108] stemming from the application of personal principles derived from a world view grounded in a specific religion. From another perspective, the foundation of educational values is embedded in life values which are developed within a world view that has a religious commitment at its core.[109] When looking for a definition of the term values a researcher might fall back on that of values being explicit or implicit opinions that are characteristic of individuals or groups and to which their preference is given in making decisions.[110] Moreover, values form the basis for making decisions and influence the standards of actions and attitudes that shape who people are, how they live, and how they treat others.[111]

South Africa characterizes its approach to religion and education as a 'co-operative model' that recognizes the 'Separate spheres for religion and the state' under the Constitution, but also '[the] scope for interaction between the two.'[112] It declares its 'co-operative model' to be a reaction both against the 'theocratic model' under apartheid 'that tried to impose religion in public institutions'[113] and against 'a separationist model ... [that] completely divorce[s] the religious and secular spheres of a society, such as in France or the United States.'[114] In fact, the National Policy on Religion and Education notes that while:

> we could reject any place for religion in education, by arguing that the mutual acceptance of our common humanity is the only solution for societal harmony, [w]e believe that we will do much better as a country if our pupils are exposed to a variety of religious and secular belief systems, in a well-informed manner, which gives rise to a genuine respect for the adherents and practices of all of these, without diminishing in any way the preferred choice of the pupil.[115]

In fact, religion is part of the country's commitment to 'nation building' in the sense that the National Policy 'is driven by the dual mandate of celebrating diversity and building national unity.'[116]

Religion and education: an administrative approach

In attempting to reach a level of consensus about the ideal relationship between religion and education the Department of Education in 2000 started a process of formal consultation with the public (including religious leaders of all persuasions, education unions, school governing body associations, and media debates) for the purpose of formulating a written policy. The absence of a prior framework for addressing the interaction of religion and education had resulted in learners being unfairly discriminated against based on their religious beliefs[117] and, thus, the intention of the eventual National Policy on Religion and Education (National Policy)[118] was to ensure that schools attended to the spiritual dimensions of society.[119]

During the formulation process language in the National Policy underwent a metamorphosis to reflect the objective of South African education to uphold the fundamental constitutional rights of all the concerned parties.[120] Thus, the final copy of the National Policy replaced a draft copy's assurance of positive neutrality[121] with the phrase positive impartiality.[122] While the former refers to an attitude of indifference, the latter implies one of fairness. Similarly, the phrase constitutional separation[123] was replaced by constitutional impartiality,[124] also displaying an intention to remain fair, which is reminiscent of the objective of South African education to uphold the fundamental rights of all concerned parties, as guaranteed by the Constitution.

Despite these changes, the National Policy seems to be grounded in a secular world view, since it professes neither a biblical nor a religious bias. To study religion from a neutral vantage point is equal to approaching it from a declinatory viewpoint[125] that negates the notion of remaining impartial. On the other hand, the National Policy contributes towards nation building,[126] which calls for religious education to reach specific outcomes and relay values that the state has identified.[127] In this context religion becomes an instrument of the state, without regard to neutrality or impartiality.[128]

In South Africa the Ministry of Education[129] has identified 10 values in an attempt to bring the Constitution to life in the classroom.

(1) Democracy: a society's means to engage critically with itself.
(2) Social justice and equity: freedom from the material straits of poverty.
(3) Equality: access to schooling must be equal.
(4) Non-racism and non-sexism: black and female learners must have the same opportunities to reach their potential as white and male learners.
(5) *Ubuntu* (human dignity): mutual understanding and active appreciation of the value of human difference.
(6) An open society: a society that knows how to talk and how to listen will not have to resort to violence.
(7) Accountability: there can be no rights without responsibilities.
(8) Rule of law: commonly accepted codes will grant meaning to accountability.
(9) Respect: a necessary precondition for progress and productivity.
(10) Reconciliation: healing past differences and redressing matters in material ways.

The above seems to be an honest effort in teaching the Constitution and applying it practically in programmes and policy.

According to the Ministry of Education offering religious education in schools would offer learners the opportunity not only to explore the morality and values that substantiate the religions that inspire society but also to reaffirm the values of diversity, tolerance,

respect, justice, compassion, and commitment in themselves.[130] Although South Africa's constitutional values of human rights, equality, and freedom of religion and belief are highly acclaimed, a dichotomy has developed between religious policy and practice at the school level. The National Policy[131] acknowledges the contribution of religion in society by encouraging South Africans to create and maintain a distinctively unique relationship between religion and education. Whether the National Policy has been implemented as designed is another matter.

Religion and education: a judicial approach to protecting values

In *Pillay v. MEC for Education, KwaZulu Natal and Others* (*Pillay*)[132] the High Court in KwaZulu Natal addressed a student's challenge to a Code of Conduct prohibiting all jewelry except earrings and a watch. The High Court, in overturning the decision of the Equality Court for the District of Durban[133] that punishment of the student for wearing a Hindu nose stud did not violate the school's Code of Conduct, reasoned that the school acted pursuant to a flawed perspective in claiming that it was important to treat all female students in the same way.[134] Because the plaintiff belonged to a socially vulnerable group which suffered from historically created patterns of disadvantage (the Hindu/Indian group) the High Court concluded that 'People who [were] not similarly situated should not be treated alike. . . . The school['s] fail[ure] to differentiate in favour of [the plaintiff] . . . represented [an] impair[ment of her] human dignity.'[135]

In assessing the High Court's balancing of competing values (the school's enactment and enforcement of its code of conduct and an individual student's religious beliefs) one must query whether the result is consistent with the South African Constitution's Bill of Rights. The High Court's *Pillay* decision suggests that outward appearance related to religious beliefs (dress requirements) can be treated as distinctively different, rather than as equal, to other religious aspects, such as the public display of religious symbols, punitive measures connected to religious beliefs,[136] or public confirmation of faith at school.

In *Danielle Antonie v Governing Body, The Settlers High School & Head Western Cape Education Department* (*Antonie*)[137] a 15-year-old Grade 10 student who chose to wear her hair in dreadlocks as a result of converting to Rastafarianism challenged a School Governing Body (a parent group elected in every school to operate that school) decision to suspend her for five days for violating the school's code of conduct. Denying that her misconduct had caused 'disruption and uncertainty'[138] as alleged by the Governing Body, the student emphasized, instead, 'her need to express her religious convictions and to develop her individuality.'[139] Nonetheless, the Governing Body, contending that the student's persistent defiance in wearing her dreadlocks without tying up her hair transgressed a code of conduct provision, found her guilty of serious misconduct.

In reversing the student's suspension the High Court in *Antonie* reasoned that to enforce the school's code of conduct in a rigid manner without considering the expressive nature of the dreadlocks 'would bring it into conflict with the justice, fairness and reasonableness which underpins our new Constitution and centuries of common law.'[140] In addition, the court determined that punishment of the student for having dreadlocks and wearing a hat infringed her human dignity. Defining human dignity as 'mutual respect including respect for one another's convictions and cultural traditions,'[141] the High Court reasoned that treating the wearing of dreadlocks and a hat as 'akin to immoral, promiscuous or shockingly inappropriate behavior' was 'a blatant absurdity.'[142]

Antonie presents competing values similar to those discussed above in *Truth*. However, the competing values in *Antonie* differ somewhat from those in *Truth*. In *Truth* the court

balanced an organization's right to project its religious beliefs with a school's right to further tolerance and diversity. In *Antonie* the student's constitutional rights to human dignity and expression were balanced against an organization's (school's) authority to enforce its dress code. One can query whether, whatever values might be associated with a school's insistence on the corporate sameness of students' appearance (or even the sameness of organizational compliance with non-discrimination policies), such values have the same quality and forcefulness as those dealing with individual religious rights grounded expressly in the South Africa Constitution. Although the impact of *Antonie* has yet to be realized in other South African court decisions, one can speculate that dress codes may be the kind of rules that allow for greater variation where individual students' religious or cultural objections are at issue.

The judiciary's limitation on protecting values

However, the assertion of individual constitutional rights will not always prevail where the values opposing those rights have a significant impact on society. In a non-education case, *Prince v. President, Cape Law Society and Others* (*Prince*),[143] also involving the Rastafarian religion, the Constitutional Court[144] recognized that even though the use of cannabis represented a fundamental religious practice for Rastafarians and that banning such use would represent a limitation on that practice, the fundamental social policy in fighting drug abuse was more compelling and excluding Rastafarians from the ban would be financially and administratively impossible. Finding that the statute criminalizing the use of cannabis was content neutral and not 'aimed at ... the ten thousand Rastafarians in South Africa,'[145] the Court reasoned that the State's compelling interest in

> curtail[ing] ... the world trade in cannabis ... [of which] South Africa is one of the major sources ... would be substantially impaired ... were the State to be required to devise some form of exception to the general prohibition against the possession or use of cannabis in order to cater for the religious rights of Rastafarians.[146]

Thus, while a state

> should, wherever reasonably possible, seek to avoid putting believers to extremely painful and intensely burdensome choices of either being true to their faith or else respectful of the law ... a society can cohere only if all its participants accept that certain basic norms and standards are binding.[147]

Although not an education case, *Prince* reflects the practical realities of the interesting, yet difficult, balance that needs to be drawn between legislating for the common good and protecting individual rights and freedoms. The Constitutional Court's decision in *Prince*, when compared with *Antonie* and *Pillay*, exposes the slippery slope that South African courts face in determining what kinds of value-laden rules will be subject to individual exceptions. If dress codes must accommodate religious and cultural differences, what about the carrying or wearing of religious or cultural iconic objects to school that might be used to harm other students? Before South African courts become too entangled in parsing the significance of individual rights one might consider the admonition of the US Supreme Court's Justice Thomas in calling for the reversal of *Tinker*, that the operation of public schools should be the task of 'Local school boards, not the courts.'[148]

In a more direct incursion into the operation of schools the Constitutional Court, in *Christian Education South Africa v. Minister of Education* (*Christian Education*),[149] upheld an amendment to the South African Schools Act prohibiting corporal punishment in all

public and private schools.[150] In rejecting the claims of 196 independent schools 'that the blanket prohibition of its use in its schools invade[d] their individual, parental and community rights freely to practise their [Christian] religion'[151] the Court opined that while 'parents have a general interest in living their lives in a community setting according to their religious beliefs, ... they may no longer authorise teachers to apply corporal punishment in their name pursuant to their beliefs'[152] Accepting 'that the prohibition of corporal punishment is part and parcel of a national programme to transform the education system, to bring it into line with the letter and spirit of the Constitution,'[153] the Court declared that 'the State['s] ... interest in protecting pupils from degradation and indignity ... [implicates] the core value of human dignity in our Bill of Rights.'[154]

As in *Prince*, the Court in *Christian Education* leaves little in the way of guidance for how to determine the values to be honored. To declare, on one hand, that 'believers cannot claim an automatic right to be exempted by their beliefs from the laws of the land,' but, on the other, that 'the State ... should ... seek to avoid putting believers to extremely painful and intensely burdensome choices of either being true to their faith or else respectful of the law'[155] is simply recreating the slippery slope. In a country such as South Africa where parents enjoy none of the constitutional rights associated with *Pierce*, *Meyer*, and *Yoder* in the USA[156] have children simply become 'creature[s] of the state'[157] whose rights are subject to the values of changing political and legal majorities?

Conclusion

Religion is the source of values that speak to a wide range of societal issues having an impact on schools. Public schools are microcosms of the societies in which they function and, thus, the schools must face the same problems of drugs, violence, tolerance, and diversity that are part of society at large. In declaring and enforcing appropriate standards for student conduct schools struggle to create a culture in which all students have a shared sense of values. Creating that shared culture can be difficult where rules are simply propagated without the underlying religious beliefs and practices that can provide a framework and context for those values.

As reflected in this article, the challenge in the USA, Australia, and South Africa has been whether, when, or how to permit the infusion of religious values into public education. In both the USA and Australia the debate has revolved around a separationist versus an accomodationist interpretation of the establishment clauses in the respective countries' constitutions. Australia, with a more accomodationist interpretation, has permitted support of religion and religious incursions into public schools that would not be allowed under the US Constitution. South Africa, with its more recent Constitution, is evolving its own legislative, judicial, and administrative approach to addressing religion and schools from a neutrality and impartiality perspective, but also an approach that has at its core the political agenda of 'nation building.'

Notes

1. *Plyler v. Doe*, 457 U.S. 202, 221 (*Education Law Report* 4: 953) (1982).
2. *Brown v. Board of Education*, 347 U.S. 483, 493 (1954).
3. See *McCreary County v. ACLU*, 545 U.S. 844 (2005) (Justice Scalia dissenting). Majority decision invalidating the posting of the Ten Commandments in libraries.
4. Garfield, Alan. 2007. What should we celebrate on constitution day? *Georgia Law Review* 41: 453, 469.

5. Feldman, Noah. 2005. *Divided by god: America's church–stste problem and what we should do about it*, 59–60. New York: Farrar, Straus and Giroux.
6. See *Newdow v. U.S. Congress*, 292 F.3d 597, 609 (9th Circuit 2002) [citing 100 Congressional Record 8618 (1954), *amended on denial of rehearing*], 328 F.3d 466 (9th Circuit 2003) [*revised*], Elk Grove Unified School District v. Newdow, 542 U.S. 1, 18–9 (2004) (holding that the plaintiff/father lacked the standing to bring the action).
7. 330 U.S. 1, 18 (1947).
8. 330 U.S. 1, 18 (1947)..
9. See, for example, *South Africa constitution, bill of rights*, sect. 1, 7, 36, 39 (three key constitutional values of human dignity, equality, and freedom, plus protection of religious freedom); US Constitution, Amendment 1 (protection of free exercise of religion). For a discussion of the similarities and differences between South Africa and the USA concerning the role of religion in public schools, see Mawdsley, Ralph, and Johan Beckmann. 2006. Religion in public schools: An American and South African perspective. *Education Law Report* 204: 445.
10. See *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000). In response to the majority's invalidation of a school district policy that would have permitted a religious message/prayer before home football games the comment by Chief Justice Rehnquist in his dissenting opinion is worth noting. 'the tone of the Court's opinion ... that the school district's student-message opinion is invalid on its face under the Establishment Clause ... bristles with hostility to all things religious in public life.' See also *Santa Fe Independent School District v. Doe*, 530 U.S. 318 (Chief justice Rehnquist dissenting).
11. See, for example, *Wisconsin v. Yoder*, 406 U.S. 205, 221 (1972), holding that Amish education only through the eighth grade was sufficient 'to prepare [the Amish] as citizens to participate effectively and intelligently in our open political system ... [and] to be self-reliant and self-sufficient participants in society.'
12. See, generally, Mawdsley, Ralph. 2003. Leveling the field for religious clubs: The interface of the Equal Access Act, free speech, and the establishment clause. *Education Law Report* 174: 809.
13. *School District of Abington Township v. Schempp*, 374 U.S. 203 (1963); *Engel v. Vitale*, 370 U.S. 421 (1962).
14. See, for example, Mawdsley, Ralph, and Johan Beckmann. 2006. The U.S. Supreme Court continues to struggle with the meaning of the establishment clause and its role in assuring fair and balanced treatment of religion. *Australia and New Zealand Journal of Law and Education* 10: 73.
15. See, for example, Mawdsley, Ralph. 2002. Religious issues and public school instruction: The search for neutrality. *Education Law Report* 167: 573.
16. See Mawdsley, Ralph. 2005. Access by religious community organizations to public schools: A degrees of separation analysis. *Education Law Report* 193: 633.
17. See generally, Mawdsley, Ralph, and Beckmann, Johan. 2006. The U.S. Supreme Court continues to struggle with the meaning of the establishment clause and its role in assuring fair and balanced treatment of religion. *De Jure* 39: 60.
18. For a comprehensive discussion of a fairly extensive amount of litigation in US courts concerning student use of T-shirts to present religious (as well as secular) messages, see Mawdsley, Ralph. 2007. Sailing the uncharted waters of free speech rights in public schools: The rocky shoals and uncertain surrents of student T-shirt expression, *Education Law Report* 219: 1.
19. Constitution of the Republic of South Africa of 1996.
20. Constitution of the Republic of South Africa of 1996, Ch. 2.
21. Beckmann, J.L., J.C. Klopper, L.M. Maree, J.G. Prinsloo, and C.M. Roos. 1995. *Schools and the constitution*, 6. Pretoria: Via Afrika.
22. South Africa Constitution, sect. 36.
23. Ministry of Education. 2001. *Manifesto on values*, iv.
24. Ministry of Education. 2001. *Manifesto on values*, iv.
25. 465 U.S. 668 (1984).
26. 465 U.S. 674 (1984).
27. 343 U.S. 306 (1952).
28. 343 U.S. 313 (1952).
29. In its second public school-related establishment clause case (following *Everson v. Board of Education*) the Court invalidated a school board's practice of permitting clergy to use school facilities to present religious lessons to students during regular school hours. See *McCollum v.*

Board of Education of Champaign-Urbana, 333 U.S. 203 (1948). For a similar, more recent case see *Doe ex rel. Doe v. Beaumont Independent School District*, 173 F.3d 274 (5th Circuit 1999).

30. See, for example, *Hsu v. Roslyn Union Free School District*, 85 F.3d 839, 858 (2nd Circuit 1996), invalidating a public school's refusal to permit a religious club to meet on school premises where the club's constitution required that the president, vice-president, and music coordinator be 'Christians', even though the requirement violated the school district's anti-discrimination policy for student clubs. The Second Circuit upheld the religious requirement under the Equal Access Act because 'Guaranteeing that these officers will be dedicated Christians assures that the Club's programs, in which any student is of course free to participate, will be imbued with certain qualities of commitment and spirituality.' But see, *Truth v. Kent School District*, 2007 WL 2406865 (9th Circuit 2007), upholding the refusal of a school board, acting pursuant to its non-discrimination policy, to recognize a student religious club whose constitution limited voting membership to persons who met a specific religious requirement that included opposition to homsexuality.
31. See, for example, *Zobrest v. Catalina Foothills School District*, 509 U.S. 1, 4 (1993), upholding a public school-funded sign language interpreter under IDEA to provide assistance at a Catholic school selected by parents 'for religious reasons,' even though the interpreter 'would be a mouthpiece for religious instruction,' because the interpreter was provided according to neutral eligibility criteria and private choice.
32. See, for example, *Brown v. Hot, Sexy, and Safer Productions, Inc.*, 68 F.3d 525, 537 (1st Circuit 1995), holding that a high school's permitting a sexually graphic assembly program did not violate a number of plaintiff-parent constitutional claims, among which was interference with 'religious values regarding chastity and morality' under free exercise of religion.
33. See *Board of Education, Island Trees Union Free School District No. 26 v. Pico*, 457 U.S. 853, 867 (1982), invalidating school board's removal of books from school library based on content of books where removal would deny students access to ideas under the First Amendment.
34. According to the First Amendment to the United States Constitution, which was adopted in 1791, in relevant part, 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; . . ..'
35. The metaphor of separation of church and state owes its origin not to judicial interpretations but rather to a letter by President Thomas Jefferson to the Danbury Baptist Association to allay their fears that the central government might establish a state religion. The letter of 1 January 1802 was sent to Nehemiah Dodge, Ephraim Robbins, and Stephen S. Nelson, A Committee of the Danbury Baptist Association. Andrew, A. ed. 1903. *Writings of Thomas Jefferson*, Vol. 16, 281. Jefferson wrote:

> Believing with you that religion is a matter which lies solely between man and his God . . . I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should 'make no law respecting an establishment of religion, or prohibiting the free exercise thereof,' thus building a wall of separation between church and state.

The Supreme Court first used the term in *Reynolds v. United States*, 98 U.S. 145, 164, 25 L.Ed. 244 (1878), rejecting a Free Exercise Clause challenge to a federal statute prohibiting the practice of polygamy. For a criticism of Jefferson's separation of church and state as 'a mistaken understanding of constitutional history,' see *Wallace v. Jaffree*, 472 U.S. 38, 91 (1985) (Chief Justice Rehnquist dissenting), the majority striking down a state statute providing for a moment of silent prayer or meditation at the beginning of each school day.

36. See *School District of Abington v. Schempp*, 374 U.S. 203 (1963), invalidating under the establishment clause a state statute requiring reading from religious book over the claim that not reading from religious books violated free exercise by those students who wanted the reading to take place. But see *McDaniel v. Paty*, 435 U.S. 618 (1978), invalidating a state statute prohibiting members of the clergy from being candidates for public office as a violation of their free exercise right to practice their religion without interference from government.
37. The seminal case in education generally is *Widmar v. Vincent*, 454 U.S. 263 (1981), where the court invalidated under the free speech clause a public university policy prohibiting student

organizations from using university facilities for their meetings. The seminal case for K–12 education is *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1983), where a unanimous court applied the free speech clause to prohibit a public school district from engaging in viewpoint discrimination when it refused to permit a church to use its facilities for a religious film series.

38. See, for example, *Settle v. Dickson County School Board*, 53 F.3d 152, 154 (6th Circuit 1995), upholding a teacher's refusal to permit a student to write a paper on 'The life of Jesus Christ,' in part because the teacher stated to the school board that 'the law says that we are not to deal with religious issues in the classroom.'
39. The debate regarding diversity in non-religious areas has been hotly contested. cf. *Grutter v. Bollinger*, 539 U.S. 306 (2003), upholding the use of race as a factor to allow for diversity in law school admissions, with *Gratz v. Bollinger*, 539 U.S. 244 (2003), invalidating the use of quotas based on race as measure for assuring diversity. For the latest US Supreme Court pronouncement concerning diversity see *Parents Involved in Community Schools v. Seattle School District No. 1*, 127 S.Ct. 2738 (2007), invalidating a school district's use of racial classification in a student assignment plan for elementary school assignments and transfer requests where districts failed to show that use of racial classifications in their student assignment plans was necessary to achieve their stated goal of racial diversity.
40. See, generally, Mawdsley, Ralph. 2006. Solicitation of personal messages for display on public school premises: What are the First Amendment considerations? *Education Law Report* 213: 909, arguing that religious messages are treated less favorably than other kinds of expression.
41. 505 U.S. 577 (1992).
42. Members of the clergy could be invited by middle school principals to offer an invocation and benediction at graduation. Clergy were selected from a list of those who had expressed an interest in participating and the clergy were provided with a handbook describing how the prayers should be non-denominational. 505 U.S. 580 (1992)
43. 505 U.S. 638 (1992) (Justice Scalia dissenting).
44. See, generally, Mawdsley, Ralph, and James Mawdsley. 2007. Balancing a university's nondiscrimination policy regarding sexual orientation with the expressive rights of student religious organizations: A USA perspective. *Australia and New Zealand Journal of Law and Education* 12: 47, discussing whether the application of educational institutions' non-discrimination policies to student religious organizations' religious beliefs in opposition to homosexual conduct allows discrimination against religious beliefs.
45. 268 U.S. 510 (1925).
46. 268 U.S. 535 (1925).
47. See *Zelman v. Simmons-Hammond*, 536 U.S. 639, 653 (2002), upholding the constitutionality of a voucher plan for disadvantaged students in Cleveland, Ohio, to attend private (virtually all religious) schools in the city, finding no establishment clause violation because the plan was 'a program of true private choice'; *Zobrest v. Catalina Foothills School District*, 509 U.S. 1 (1993), upholding the use of a publicly paid sign language interpreter at a religious school as part of the Individuals with Education Disabilities Act: 'By according parents freedom to select a school of their choice, the statute ensures that a government-paid interpreter will be present in a sectarian school only as a result of the private decision of individual parents.' 509 U.S. 10 (1993).
48. See *Barrett v. Steubenville City Schools*, 388 F.3 967 (6th Circuit 2004), denying governmental immunity to a school superintendent sued in his individual capacity when he refused to hire a substitute teacher for a full-time teaching position unless the teacher removed his child from a Catholic school and enrolled him in the public school and finding that the parent stated a claim for violation of his right to direct the education of his child. 'In this case Barrett made a decision to send his son to private school. Barrett's choice in directing his son's education is activity shielded by his constitutionally protected right of liberty.' 388 F.3 973 (6th Circuit 2004).
49. See *Brown v. Hot, Sexy, and Safer Productions, Inc.*, 68 F.3d 525, 537 (1st Circuit 1995), denying parent's claim for damages pursuant to their right to direct the education of their child when a high school had failed to follow its policy of securing parental consent prior to an assembly featuring a sexually explicit presentation as part of the school's AIDS awareness week; *Mozert v. Hawkins County Board of Education*, 827 F.2d 1058 (6th Circuit 1987), rejecting a parent free exercise claim that a public school needed to provide an alternative reading book for their children because exposure to the content of the public school's existing reading series violated the religious beliefs of the parents.

50. For the seminal US Supreme Court case citing parens patriae as applied to schools see *Prince v. Massachussetts*, 321 U.S. 158, 166 (1944), 'the state as parens patriae may restrict the parent's control by requiring school attendance.' For an application of parens patriae to parental choice of an educational venue see *Runyon v. McCrary*, 427 U.S. 160 (1976), holding that black parents whose children were denied admission to an all white school had a damages claim under sec. 1981 of the Civil Rights Act of 1964, observing that while the school 'remain[ed] presumptively free to inculcate whatever values and standards they deem desirable,' the rights of parents under *Meyer*, *Pierce*, and *Yoder* to make educational choices for their children did not extend to 'replac[ing] state educational requirements with their own idiosyncratic views of what knowledge a child needs to be a productive and happy society member.'
51. 484 U.S. 260 (1988).
52. 484 U.S. 273 (1988).
53. 484 U.S. 271 (1988).
54. 484 U.S. 273 (1988).
55. 127 S.Ct. 2618 (2007), upholding the disciplining of a student for displaying a message on a banner, 'Bong Hits 4 Jesus,' that the principal reasonably interpreted as promoting illegal drug use.
56. 127 S.Ct. 2628 (2007).
57. See, for example, *Bannon v. School District of Palm Beach County*, 387 F.3d 1208, 1215 (11th Circuit 2004), upholding school banning of a religious message and symbol painted on hallway panels where, despite permission having been granted by the school, the court of appeals opined that '[the student's] expression bore the imprimatur of the school and occurred in the context of a curricular activity.'
58. 393 U.S. 503 (1969).
59. 393 U.S. 513 (1969).
60. 508 U.S. 384 (1993).
61. 2007 WL 1141597 (N.D. Ill. 2007).
62. 2007 WL 1141597 * (N.D. Ill. 2007).
63. 2007 WL 1141597 *8 (N.D. Ill. 2007), quoting from *Tinker*, 393 U.S. 508.
64. 383 F.Supp.2d 965 (S.D.Ohio 2005).
65. See, for example, *M.B. v. Liverpool Central School District*, 487 F.Supp.2d 117 (N.D.N.Y. 2007), granting injunctive relief to a fifth grade student to distribute a personal statement flyer concerning the impact that Christ had on her life where there was no evidence of disruption.
66. See, for example, *M.A.L. v. Kinsland*, 2007 WL 313283 (E.D. Mich. 2007), granting injunctive relief to an eighth grade student to distribute literature in hallways regarding her opposition to abortion where there was no evidence of disruption.
67. *Frederick v. Morse*, 127 S.Ct. 2618 (*Education Law Report* 220: 50) (2007).
68. The dissent in *Morse* variously referred to the sign's message as 'curious,' 'ambiguous,' 'nonsense,' 'ridiculous,' 'obscure,' 'silly,' 'quixotic,' and 'stupid.' *Frederick v. Morse*, 127 S.Ct. 2643–9 (2007) (Justice Stevens dissenting).
69. *Frederick v. Morse*, 127 S.Ct. 2625 (2007).
70. *Frederick v. Morse*, 127 S.Ct. 2627 (2007).
71. .2007 WL 2406865 (9th Circuit 2007).
72. The actual category was 'creed' but all parties accepted that it was the same as 'religion.' 2007 WL 2406865 *3 (9th Circuit 2007).
73. 2007 WL 2406865 *2 (9th Circuit 2007).
74. 2007 WL 2406865 *8 (9th Circuit 2007).
75. See, for example, *Bob Jones University v. U.S.*, 461 U.S. 574 (1983), upholding the Internal Revenue Service's revocation of the University's tax exempt status for discriminatory dating and marriage policies based on the University's longstanding and sincerely held religious beliefs.
76. .20 U.S.C. sect. 4071–4.
77. .496 U.S. 226 (1990).
78. See, generally, Mawdsley, Ralph. 2001. The Equal Access Act and public schools: What are the legal rights related to recognizing gay student groups? *Brigham Young University Education and Law Journal* 2001: 1. See also, Pratt, Carolyn. 2007. Protecting the marketplace of ideas in the classroom: Why the Equal Access Act and the First Amendment require the recognition of gay/straight alliances in America's public schools. *First Amendment Law Review* 5: 370.

79. 530 U.S. 640 (2000), holding that applying New Jersey's public accommodations law to require Boy Scouts to admit plaintiff homosexual as a scoutmaster would violate Boy Scouts' First Amendment right of expressive association. See also, Pratt, Carolyn. 2007. *First Amendment Law Review* 5: 370.
80. *Dale*, 530 U.S. 648.
81. 20 U.S.C.A. sect. 7905.
82. *Truth*, 2007 WL 2406865 *11.
83. *Truth*, 2007 WL 2406865 *11.
84. *Truth*, 2007 WL 2406865 *14. The Ninth Circuit in *Truth* rejected two 'forced inclusion' claims made by Truth pursuant to the Supreme Court's decision in *Dale* where the Court held that the state non-discrimination law requiring the Boy Scouts to admit a gay rights activist violated the First Amendment because it 'force[d] the organization to send a message ... that [it] accepts homosexual conduct as a legitimate form of behavior.' *Truth*, 2007 WL 2406865 *14, quoting *Dale*, 530 U.S. 653. The Ninth Circuit reasoned that 'forced inclusion' did not apply because: (1) 'The general members [in Truth] do not control the club's Bible study and prayer functions ... not lead the club in its activities [and could] not vote;' and, (2) those denied general membership in Truth did not 'want to be an equal participant in the organization.. ., [nor] want to be a leader of the organization.'
85. 20 U.S.C.A. sect. 4071(a). See *Hsu v. Roslyn Union Free School District No. 3*, 85 F.3d 839 (*Education Law Report* 109: 1145) (2d Circuit 1996), invalidating a school's refusal to permit a religious club to meet and upholding under the free speech clause the club's right to set religious requirements for its officers; *ALIVE v. Farmington Public Schools*, 2007 WL 2572023 (E.D. Mich. 5 September 2007), granting a religious club the same rights under the EAA to meet on school premises as non-religious student clubs, including access to facilities and other resources.
86. The EAA requires that where a school has created a 'limited open forum' by permitting a non-curriculum related club to meet on school premises it must provide the same 'opportunity for [any other] noncurriculum related student groups to meet on school premises during noninstructional time.' 20 U.S.C. sect. 4071(b).
87. In Australia we generally refer to two sectors of education: government (public) and non-government (private). The non-government sector includes schools that are both religious based and secular, with, in 2005, 67% of students in government schools and 33% in non-government schools. Of the latter, 62% were in Catholic schools. Australian Bureau of Statistics. *Year Book Australia, 2007*. Primary and Secondary Education. http://www.abs.gov.au/Ausstats/abs@.nsf/7d12b0f6763c78caca257061001cc588/588AE52EA6776274CA25723600031906?opendocument. There are state and federal controls on the establishment of schools, and what constitutes a school. See, for example, *Education (accreditation of non-state schools) act 2001* (Qld).
88. Fees were paid by all 'except orphans and children of paupers' (Wyeth, E.R. n.d. *Education in Queensland. A history of education in Queensland and in the Moreton Bay District of New South Wales*, 7. Melbourne, Australia: ACER).
89. Wyeth, E.R. n.d. *Education in Queensland. A history of education in Queensland and in the Moreton Bay District of New South Wales*, 3. Melbourne, Australia: ACER.
90. Goldin, C. 2001. The human capital century and American leadership: Virtues of the past. *Journal of Economic History* 61: 263–92.
91. Australian Constitution, sect. 116: 'The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth.'
92. Attorney-General (Victoria); *Ex Rel. Black v. The Commonwealth* (1981) 146 CLR 559.
93. Attorney-General (Victoria); *Ex Rel. Black v. The Commonwealth* (1981) 146 CLR 584.
94. Attorney-General (Victoria); *Ex Rel. Black v. The Commonwealth* (1981) 146 CLR 656.
95. Attorney-General (Victoria); *Ex Rel. Black v. The Commonwealth* (1981) 146 CLR 654.
96. See, for example, Doherty, Linda. 2004. Legal challenge to federal cash for religious teaching. *Sydney Morning Herald*, 5 May. http://www.smh.com.au/articles/2004/07/05/1089000092854.html. The religion of focus was Catholic education, however, not minority religions.
97. *Benjamin v. Downs* [1976] 2 NSWLR 199; *Public instruction act* 1880 (NSW) s 7.
98. *Benjamin v. Downs* [1976] 2 NSWLR 199, 202–3.
99. Sect. 25(1), (3), Queensland Anti-discrimination act 1991. The Queensland Government had sought to impose tighter anti-discrimination laws on the Catholic Church schools on this

matter, but was forced to back down. See, for example, *Church may fight Queensland discrimination laws*. http://www.cathnews.com/news/211/77.php; *Compromise struck on Queensland discrimination issue*. http://www.cathnews.com/news/211/155.php.

100. Australia has only six states and two territories, and a small population of less than 21 million people, given its geographic size comparable with the USA. This may facilitate federal intervention in comparison with the much larger number of states and population that exist in the USA. However, it is interesting to note that in the seminal case, *Black*, education was stated to be 'a subject matter of State power. Education is within the State legislative area: and its furtherance is undoubtedly a concern of the State.' (*Black*, 146 CLR 585).
101. Australian Government, Department of Immigration and Citizenship. 2007. *Australian values – general questions*. http://www.citizenship.gov.au/news/citizenship-test/Australian_values.htm. (The Department of Immigration and Citizenship was formerly known as the Department of Immigration and Migrant Affairs.)
102. See http://www.civicsandcitizenship.edu.au/cce/.
103. See, for example, *Schools assistance (learning together – achievement through choice and opportunity) act 2004*, sect. 14(1)(f), s 31(h), requirements for provision; s 19(4), requirement for agreed common testing standards and national tests; s 36(4), inclusion in national accountability.
104. Commonwealth of Australia. 2005. *National framework for values education in Australian schools*. http://www.valueseducation.edu.au/values/. See also, Curriculum Corporation (CC)/Department of Education, Science and Training (DEST) (2006). *Implementing the national framework for values education in Australian schools*. Canberra, Australia: CC/DEST.
105. *National Framework* at 4.
106. Department of Education, Science and Training (DEST)/Commonwealth of Australia. 2007. *National school chaplaincy programme guidelines*. http://www.dest.gov.au/sectors/school_education/policy_initiatives_reviews/key_issues/school_chaplaincy_programme/default >.
107. Which religions are officially recognized is always an issue of contention. The Humanist Society has tried to have space for instruction during the Religious Instruction periods available in Queensland schools. Their success is not known at this stage but had been at least initially rejected as not a recognized religion.
108. De Klerk, J., and J. Rens. 2003. The role of values in school discipline. *Koers* 68, no. 4: 353–71.
109. Fowler, S., H.W. Van Brummelen, and J. Van Dyk. 2000. *Christian schooling education for freedom*. Potchefstroom, South Africa: Potchefstroom University for Christian Higher Education.
110. Kluckhorn, C. 1954. Values and value orientation in the theory of action. In *Toward a general theory of action*, ed. T. Parsons and E.A. Shills, 388–433. Cambridge, MA: Harvard University Press.
111. Eyre, J., and R. Eyre. 1993. *Teaching our children values*, 15. New York: Simon & Schuster.
112. Department of Education. *National policy on religion and education*, para. 3.
113. Department of Education. *National policy on religion and education*, para. 3.
114. Department of Education. *National policy on religion and education*, para. 3.
115. Department of Education. *National policy on religion and education*, para. 29.
116. Department of Education. *National policy on religion and education*, para. 10. See *National policy on religion and education*, para. 64, 'Since the state is not a religious organization, theological body, or inter-faith forum, the state cannot allow unfair access to the use of its resources to propagate any particular religion or religions. The state must maintain parity of esteem with respect to religion, religious or secular beliefs in all of its public institutions, including its public schools.'
117. Kader Asmal. *Draft policy on religion and education*, 20 June 2003.
118. Standing Advisory Committee. Government notice 1307, *Government Gazette* 25459, 12 September 2003.
119. Introduction to *Draft policy on religion and education*.
120. See, for example, the preambles of the *National education policy act 27*, 1996, and the *South African schools act 84*, 1996.
121. Kader Asmal. *Draft national policy on religion and education*, para. 5.
122. *National policy on religion and education*, para. 5.
123. *Draft national policy on religion and education*, para. 71.
124. *National policy on religion and education*, para. 71.

125. Malherbe, R. 2003. Enkele kwelvrae oor die grondwetlike beskerming van die reg op godsdiensvryheid, *Tydskrif Vir Suid-Afrikaanse Reg* 47, no. 1/2: 645.
126. *National policy on religion and education*, para.10, 'The policy for the role of religion is driven by the dual mandate of celebrating diversity and building national unity'; para. 8, 'Religion education should contribute to creating diversity and building national unity.'
127. *National policy on religion and education*, para. 14 & 19.
128. Malherbe, R. 2003. *Tydskrif Vir SA Reg* 47, no. 1/2: 645.
129. Ministry of Education. 2001. *Manifesto on values, education and democracy*, iii–v. Formeset Printers Cape.
130. Ministry of Education. *Manifesto on values, education and democracy*, vii.
131. Ministry of Education. *Manifesto on values, education and democracy*, 67.
132. 2006 (6) SA 363 (High Court).
133. See *Pilay v. Minister of Education and Others*, case 61/2005.
134. See *Pilay v. Minister of Education and Others*, sect. 25.
135. See *Pilay v. Minister of Education and Others*, para. 23 & 26. See also *National Coalition for Gay and Lesbian Equality and Another v. Minister of Justice and Others* 1999 (1) SA 6 (CC) (1998 (12) BCLR 1517) para. 132, where Judge Sachs stated that:

> equality should not be confused with uniformity; in fact, uniformity can be the enemy of equality. Equality means equal concern and respect across difference. It does not presuppose the elimination or suppression of difference. . . . Equality therefore does not imply a leveling or homogenization of behaviour but an acknowledgement and acceptance of difference. At the very least, it affirms that difference should not be the basis for exclusion, margin alization, stigma and punishment. At best, it celebrates the vitality that difference brings to any society.

136. *Christian Education South Africa v. Minister of Education* 2000 10 BCLR 1051 (CC), fn. 99.
137. 2002(4) SA 738, case 3791/200, Cape of Good Hope Provincial Division of the High Court of South Africa.
138. 2002(4) SA 741.
139. 2002(4) SA 741.
140. 2002(4) SA 741.
141. 2002(4) SA 742.
142. *Danielle Antonie v. Governing Body, The Settlers High School & Head Western Cape Education Department*, 2002 (4) SA at 743.
143. *Prince v. President, Cape Law Society and Others* 2002 (3) BCLR 231 (CC), upholding the refusal of the Cape Law Society to register the plaintiff as an attorney because of two convictions for possession and use of cannabis.
144. The Constitutional Court is the highest appellate court in South Africa. While the Constitutional Court shares some jurisdictional similarity to the US Supreme Court, the latter has broader jurisdiction extending to 'all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties.' *US Constitution*, Article III, sect. 2. Compare this with the *Constitution of South Africa*, sect. 167, which states that the jurisdiction of the Constitutional Court is limited to 'constitutional matters, and issues connected with decisions on constitutional matters.'
145. *Constitution of South Africa*, para. 104.
146. *Constitution of South Africa*, para. 111. It is worth noting that the Constitutional Court's reliance on *Employment Division v. Smith*, 494 U.S. 872, 881 (1990), that upheld employee dismissals following their use of an illegal substance, peyote, as part of a Native American religious ceremony, the Court reasoning that the free exercise clause was not a defense to 'neutral, generally applicable' laws. For a critique of *Employment Division v Smith*, see Mawdsley, Ralph. 1992. Employment Division v. Smith Revisited: The constriction of free exercise rights under the United States Constitution. *Education Law Report* 76: 1.
147. *Constitution of South Africa*, para. 115.
148. *Morse v. Frederick*, 127 S.Ct. 2636 (Justice Thomas concurring).
149. 2000 10 BCLR 1051 (CC).

150. *South African schools act 84*, 1996, sect. 10, 'No person may administer corporal punishment at a school to a learner.'
151. *Christian Education South Africa v. Minister of Education*, para. 2.
152. *Christian Education South Africa v. Minister of Education*, para. 15 & 38.
153. *Christian Education South Africa v. Minister of Education*, para. 39.
154. *Christian Education South Africa v. Minister of Education*, para. 43.
155. *Christian Education South Africa v. Minister of Education*, 35.
156. While South Africa's Constitution contains a panoply of basic rights for 'a person under the age of 18 years,' it contains no corresponding protections for the rights of parents. See, generally, *Constitution of South Africa*, sect. 28(1):

    (1) Every child has the right
        a. to a name and a nationality from birth;
        b. to family care or parental care, or to appropriate alternative care when removed from the family environment;
        c. to basic nutrition, shelter, basic health care services and social services;
        d. to be protected from maltreatment, neglect, abuse or degradation;
        e. to be protected from exploitative labour practices;
        f. not to be required or permitted to perform work or provide services
            i. that are inappropriate for a person of that child's age; or
            ii. place at risk the child's well-being, education, physical or mental health or spiritual, moral or social development;
        g. not to be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under sections 12 and 35, the child may be detained only for the shortest appropriate period of time, and has the right to be
            i. kept separately from detained persons over the age of 18 years; and
            ii. treated in a manner, and kept in conditions, that take account of the child's age;
        h. to have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result; and not to be used directly in armed conflict, and to be protected in times of armed conflict.

157. *Pierce v. Society of Sisters*, 268 U.S. 535, in invalidating a state statute requiring that all children attend public schools, the Supreme Court opined that 'The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.'