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Furthering national values through religion in public school education: Comparing the United States, Australia and South Africa

Summary

Changing support, rejection or indifference to religion has shaped the relationship between government and religion in the United States, Australia and South Africa. The place of religion as moulder of national values in education has been determined by judicial interpretation in the United States, by legislature in Australia and by legislation, administration and constitutional interpretation in South Africa. These countries have faced the challenges of *whether* and *how* to permit the propagation of religious values into public education. Having a more accommodationist interpretation, Australia has well nigh furthered Christian values at public schools, which would not be allowed under the United States Constitution. South Africa has evolved its own legislative, judicial and administrative approach to addressing religion at schools from a perspective of impartiality, while aspiring to urge learners to achieve higher levels of moral judgment. The three approaches imply fundamental constitutional, political and judicial differences that allow little commonality. The varied legal mechanisms used by the three countries namely reflect differing historical and legal developments.

Die bevordering van landswaardes deur middel van godsdiens in openbare skoolonderwys: in vergelyking van Amerika, Australië en Suid-Afrika

Veranderende ondersteuning, verwerping of ongeërgdheid teenoor godsdiens het aan die verhouding tussen die regering en godsdiens in die Verenigde State, Australië en Suid-Afrika vorm gegee. Die plek van godsdiens as vormgewer aan nasionale waardes in die onderwys is bepaal deur regsvertolking in die Verenigde State, deur wetgewing in Australië en deur wetgewing, administrasie en grondwetlike vertolking in Suid-Afrika. Hierdie lande het die uitdaging getrotseer van *óf* en *hoé* die bevordering van godsdienstige waardes in openbare onderwys toegelaat moet word. Aangesien hulle 'n meer tegemoetkomende vertolking het, het Australië Christelike waardes op openbare skole bykans bevorder, iets wat nie onder die Verenigde State-Grondwet toegelaat sou word nie. Suid-Afrika het sy eie wetgewende, juridiese en administratiewe benadering tot die hantering van godsdiens op skole ontwikkel vanuit 'n perspektief van onpartydigheid, terwyl hulle daarop mik dat leerders hoër vlakke van morele oordeel moet ontwikkel. Die drie benaderinge veronderstel grondwetlike, politieke en juridiese verskille wat min in gemeen het. Die verskillende regsmeganismes wat deur die drie lande benut word, weerspieël naamlik verskillende historiese en regsgeldige ontwikkelinge.

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1. Introduction

The relationship between government and religion in the United States, Australia, and South Africa has been marked by a changing historical and cultural kaleidoscope of support, rejection, and/or indifference toward 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 at their schools.

Comparing the United States' approach to religion and public education with that of Australia and South Africa affords some interesting similarities and contrasts. The varied legal mechanisms used by the three countries reflect differing historical and legal developments. All three countries have written constitutions with the United States and South Africa having a bill of rights in their constitutions. Both the United States 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 legislature in Australia, fairly equally by legislative/administrative and constitutional interpretation in South Africa, and almost exclusively by judicial interpretation in the United States.

As Justice Antonin Scalia postulated after a recent United States Supreme Court decision: "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."[1] 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."[2] The status of religion in the country's public schools has largely been defined through interpretive interplay of the United States Constitution's Establishment, Free Exercise and Free Speech Clauses.[3]

Australia does not have a right to free speech apart from a common law interpretation of an implied constitutional right to free speech related to political matters.[4] Moreover, most school students in Australia wear school uniforms averting the issues of free expression associated with the appropriateness of t-shirt messages in the United States[5]. Grounds for contesting individual rights in Australia are based on Australia's federal and state anti-discrimination legislation. However, the Australian government strongly endorses the promotion of values through education, in both public and private schooling.[6]

1 See *McCreary County v ACLU* 545 U.S. 844 (2005). Scalia, J. dissenting; majority decision invalidated posting of Ten Commandments in public libraries.
2 Garfield 2007:469.
3 Mawdsley 2003:809.
4 *Nationwide News Pty Ltd v Wills* (1) (1992) 177 CLR 1, endorsed in *Theophanus v Herald & Weekly Times Ltd.* [1994] HCA 46 (1994) 182 CLR 104, finding an implied constitutional right of the population to political information and therefore a corresponding right to broadcast such information, but that "implication does not extend to freedom of expression generally" .
5 For a comprehensive discussion of a fairly extensive amount of litigation in United States courts concerning learner use of T-shirts to present religious (as well as secular) messages, see Mawdsley 2007:69.
6 For example, *Racial Discrimination Act* 1975 (Cth), *Equal Opportunity Act* 1984 (SA), *Equal Opportunity Act* 1995 (Vic), *Anti-Discrimination Act* 1991 (Qld).

South Africa, under its post-apartheid Constitution,[7] protects "freedom of conscience, religion, thought, belief and opinion"[8], but does so against the overarching secular and democratic values of human dignity, equality and freedom enshrined in its Bill of Rights.[9] Yet, although these basic rights and values afford some protection against the power of the state to restrict religious expression,[10] the Constitution permits such expression to be limited by the government as long as the limitation is reasonable and justifiable.[11] Constitutional rights and values are further supplemented by the Ministry of Education's Manifesto on Values, Education and Democracy[12] that expresses shared aspirations as to the direction that public schools should take to help learners achieve higher levels of moral judgment. At the same time the Schools Act[13] allows for "religious observances (to be) conducted at a public school ... if such observances are conducted on an equitable basis and attendance at them by learners and staff members is free and voluntary."

The structure of this article comprises of addressing the furthering of national values through religion at public schools by looking at the situation within the United States, Australia and South Africa separately. In the first instance, the United States' perspective will focus on an overview of the role and place of religion in public education, pointing out the judicial tension concerning religious values, indicating the competing values of parents/public schools/learners, and discussing federal statutes that would be relevant to the topic. In the second instance the Australian perspective will focus on presenting how they balance values, religion and public education. In the third instance, the South African perspective will indicate the role and place of religious education at these public schools, pointing out the administrative approach which is followed, describing both the current judicial approach towards protecting values at public school education level and also the judicial limitation that occurs when protecting some of these values. The article is rounded off by a conclusion that points out the challenges and the debate gleaned from the perspectives of these three countries.

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7 *Constitution of the Republic of South Africa*, Act 108 of 1996.
8 Section 15.
9 Section 7.
10 Beckmann *et al* 1995:6.
11 Section 36 which guarantees the following:
"The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including –
the nature of the right;
the importance of the purpose of the limitation;
the nature and extent of the limitation;
the relation between the limitation and its purpose; and
less restrictive means to achieve the purpose.
Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights."
12 Manifeto 2001:iv.
13 *South African Schools Act*: section 7.

2. United States

2.1 The role and place of religion in public education: an overview

At 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*,[14] a non-school case wherein it upheld the display of a city-owned crèche in a park in Rhode Island, "[t]here 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."[15] This sentiment is perhaps best represented in Justice Douglas's oft-quoted expression in *Zorach v Clauson*,[16] where the Supreme Court asserted pointedly in validating a programme allowing release of public school learners[17] from classes to attend off-campus religious exercises in New York City, "We are a religious people whose institutions presuppose a Supreme Being."[18] Yet, despite the Court's observations, over sixty years of public school-related establishment clause litigation has produced badly split decisions regarding the place of religion in public education.[19]

2.2 Judicial tension in recognising religious values

The First Amendment of the United States Constitution has two religion clauses, one preventing the establishment of religion and the other protecting the free exercise of religion.[20] Until fairly recently, the Establishment Clause had a dominant role in shaping the relationship between government and religion with courts invoking a separation of church and state metaphor[21] to diminish free

14 465 U.S. 668 (1984).
15 465 U.S. 674 (1984).
16 343 U.S. 306 (1952).
17 Those enrolled in primary and secondary schools in the United States and Australia are referred to as students, but for the sake of consistency in this article, the terms "learner/learners" will be used to apply to school-going persons at United States, Australian and South African schools.
18 343 U.S. 313 (1952).
19 See *McCollum v Board of Education of Champaign-Urbana* 333 U.S. 203 (1948) with *Doe ex rel. Doe v Beaumont Independent School Dist.* 173 F.3d 274 (5th Cir.1999).
20 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 ...".
21 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 January 1, 1802 was sent to Nehemiah Dodge, Ephraim Robbins, and Stephen S. Nelson, A Committee of the Danbury Baptist Association. 16 Writings of Thomas Jefferson 281 (Andrew A., ed. 1903). 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."

exercise claims.[22] To a large extent, the exclusion of religion from the public schools reflected the U.S. Supreme Court's *Lemon v Kurtzman*[23] decision where the Court in a government aid to religion case held that the Establishment Clause prohibited aid to religious schools unless the aid represented a secular purpose, neither advanced nor inhibited religion, and did not represent an entanglement between religion and the government. However, within the past two decades, the *Lemon* test has become less prominent with the result that government assistance to religious schools has been permitted under theories of parent choice[24] or neutrality.[25] The most dramatic change has occurred in the use of the Free Speech Clause to protect religious speech, extending that protection to a broad range of expressive activities.[26]

To say, though, that religion-based values have a place in U.S. public schools is not to say, however, that religion is valued at those schools. The status of religion in the county's public schools has largely been defined through interpretive interplay of the U.S. Constitution's Establishment, Free Exercise, and Free Speech clauses.[27] 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[28], have become critical landmarks reflecting a separationist approach to the role of religion in education.[29] However, in more recent years, the Supreme Court's use of the First Amendment's Free Speech Clause as a powerful counterweight to the Establishment Clause has revitalised the place of religion at public schools and, in the process, has reinvigorated those

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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).

22 See *School Dist. of Abington v Schempp* 374 U.S. 203 (1963) invalidating under establishment clause state statute requiring reading from religious books over claim that not reading from religious books violated free exercise of those learners who wanted the reading to take place. But also see *McDaniel v. Paty* 435 U.S. 618 (1978) invalidating 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.

23 403 U.S. 602, 612-13 (1971).

24 See *Zelman v Simmons-Harris* 536 U.S. 639 (2002), upholding state funding of vouchers that can be used for tuition at religious schools where the money is treated as being distributed to parents rather than to the religious schools.

25 See *Mitchell v Helms* 530 U.S. 793 (2000), upholding on a neutrality theory, the loaning of educational materials to religious schools where the same materials were also distributed to public schools.

26 Generally the seminal case in education is *Widmar v Vincent* 454 U.S. 263 (1981) where the Court invalidated a public university policy prohibiting learner organisations from using university facilities for their meetings, using the free speech clause. The seminal case for K-12 education is *Lamb's Chapel v Center Moriches Union Free Sch. Dist.* 508 U.S. 384 (1983) where the Court unanimously applied the free speech clause to prohibit a public school district from engaging in viewpoint discrimination when refusing to permit the church to use its facilities for a religious film series.

27 See generally, Mawdsley 2003:809-824.

28 *School Dist. of Abington Tp. v Schempp* 374 U.S. 203 (1963); *Engel v Vitale* 370 U.S. 421 (1962).

29 Mawdsley & Beckmann 2006:60.

who strive for a more accommodationist approach to religion.[30] 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 learner values, has crystallised around such issues as distribution of religious literature, school recognition of learner religious clubs, and access by community religious groups to hold their meetings on public school premises.[31]

2.3 Competing values of parents, learners and public schools

In *Lamb's Chapel v Center Moriches Union Free School District* (*Lamb's Chapel*)[32], the US Supreme Court created, for K-12 schools, religious speech as a fully protected subset of free of free speech in the First Amendment. The Court followed the reasoning of *Widmar v Vincent* (*Widmar*)[33], decided 12 years earlier and applied to higher education that, when public universities create a limited public forum permitting expression by students or outside groups, it cannot engage in viewpoint discrimination by prohibiting expression based on religious content. The advent of constitutionality protected religious expression in *Lamb's Chapel* provided parents and students a vehicle for resisting efforts by school officials to limit or eliminate student religious expression. However, free speech and the parent direction of their children's education, while related in the sense that they advocate for the child, differ in that direction of children's education is the right of parents while religious speech at public schools necessarily requires the active involvement of the child. In essence, while the liberty clause right of parents to direct their children's education is basically only an access question as to the forum in which children will be taught, religious speech tests the right of students to present their religious views within the public school.

The United States Supreme Court early recognised in *Meyer v Nebraska* (*Meyer*)[34] and *Pierce v Society of Sisters* (*Pierce*)[35] that parents have a fundamental constitutional right under the liberty clause of the Fourteenth Amendment to direct the education of their children. Forty-seven years after *Pierce*, the Supreme Court, in *Wisconsin v Yoder* (*Yoder*),[36] invoked the Free Exercise Clause to permit Amish parents to send their children to their own one-room Amish schools through the eighth grade without having to comply with the State of Wisconsin's legislative requirement of school attendance until age 16, because applying that requirement to the Amish religious community "would [have] gravely endanger[ed] if not destroy[ed] the free exercise of [the parents'] religious beliefs."[37]

However, although the Supreme Court has acknowledged that parents have a constitutionally protected right to give religious value to their children's

30 Mawdsley 2005:633.
31 See Mawdsley & Beckmann 2006:60.
32 508 US 384 (1993).
33 454 US 263 (1981).
34 262 U.S. 390, 396 (1923) invalidating, as contrary to parents' right to direct education of children under the Fourteenth Amendment's liberty clause, a state statute criminalising the "teach[ing] [of] any subject to any person in any language than the English language".
35 268 U.S. 510 (1925).
36 406 U.S. 205 (1972).
37 406 U.S. 219 (1972).

education by choosing religious schools,[38] federal and state courts have recognised a limitation on this value. While parents have a constitutionally protected right to give religious value to their children's education by choosing religious schools, courts generally have not provided a corresponding right to have religious values reflected in the design or implementation of the public school's programmes or curriculum.[39]

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.[40] Because of the limited rights of parents to assert constitutionally grounded religious claims regarding internal school matters, the emphasis has shifted to the development of these constitutional rights for the students themselves. The judicial development of a balance between the religious rights of students and the authority of school officials to control their schools has been manifested in the Supreme Court's 40-year interpretation of the Free Speech Clause. The nascent of learner constitutional free expression rights began with the United States Supreme Court's assertion in *Tinker v. Des Moines Independent School District* (*Tinker*)[41] that neither: "[s]tudents [n]or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[42] However, within *Tinker* itself, the Court began what arguably has been the unravelling of learner expressive rights by setting forth two tests for restricting such expression; school officials can prohibit or restrict learner expression when it: "[m]aterially and substantially

38 See *Barrett v Steubenville City Schs.* 388 F.3 967 & 973 (6th Cir. 2004) denying immunity for the school superintendent who was sued in his individual capacity for refusing to hire a substitute teacher in a full-time teaching position unless the teacher removed his child from a Catholic school and enrolled him in the public school; finding for the parent concerning the right to direct the education of his child: "In this case, Barrett decided 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."

39 See *Brown v Hot, Sexy, and Safer Productions, Inc.*, 68 F.3d 525, 537 (1st Cir. 1995) denying parent's claim for damages pursuant to right to direct education of child where high school had failed to follow its policy of securing parental consent prior to assembly featuring sexually explicit presentation as part of school's AIDS Awareness week; *Mozert v Hawkins County Bd. of Educ.*, 827 F.2d 1058 (6th Cir. 1987) rejecting parental free exercise claim that public school needed to provide alternative reading for their children because exposure to the content of public school's existing reading series violated religious beliefs of the parents.

40 For the seminal United States Supreme Court case citing to parents parens patriae as applied to schools, see *Prince v Mass.* 321 United States 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 section 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."

41 393 U.S. 503 (1969).

42 393 U.S. 506 (1969).

interfere[s] with the requirements of appropriate discipline in the operation of the school"[43] or when that expression: "[c]olli[des] with the rights of other learners to be secure and to be let alone."[44] Seventeen years after *Tinker*, the Supreme Court, in *Bethel School District No. 403 v. Fraser* (*Fraser*),[45] set forth a third test, ruling, in a case upholding school discipline for a learner delivering an inappropriate speech replete with sexual innuendo, that: "[i]t is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse."[46] The *Fraser* Court declared that: "The function of schools ... to inculcate fundamental values... of civility essential to a democratic society must, of course, include tolerance of divergent political and religious views, even when the views expressed may be unpopular... these fundamental values must also take into account... the sensibilities of others, and, in the case of a school, the sensibilities of fellow [learners]."[47]

Two years after *Fraser*, the Supreme Court, in upholding, in *Hazelwood School District v Kuhlmeier* (*Hazelwood*)[48], a school principal's authority to delete portions of a school newspaper prepared as part of a journalism course, ruled, in a fourth test, that as long as school officials' regulation of learner expression is: "[r]easonably related to legitimate pedagogical concerns,[49] ... educators' authority over school-sponsored publications, theatrical productions, and other expressive activities might reasonably [be] perceive[d] to bear the imprimatur of the school"[50] by learners, parents and members of the public. Finally, most recently in declaring its fifth test, the Supreme Court, in upholding in *Morse v Frederick (Morse)*[51] school suspension of a learner for displaying a banner at a school activity interpreted by school officials as promoting the use of drugs, held that: "A principal may, consistent with the First Amendment, restrict learner speech at a school event, when that speech is reasonably viewed as promoting illegal drug use [in violation of published school policy]."[52]

With these five differing and, arguably, conflicting tests, American public school officials are authorised to restrict or prohibit learner expression, including religion-based expression, where those officials perceive that expression to be at cross purposes with the values a school desires to further by creating an open and welcoming environment for all learners. A few case examples reflect the varying impact that these five tests have had on learner expression of religious values.

In *Bannon v School District of Palm Beach County*,[53] the Eleventh Circuit held that, although high school officials had permitted all learner organisations to display comments relevant to their organisation in a school hallway, a school

43 393 U.S. 509 (1969).
44 393 U.S. 507 (1969).
45 478 U.S. 675 (1986).
46 478 U.S. 683 (1986).
47 478 U.S. 681 (1986).
48 484 U.S. 260 (1988).
49 484 U.S. 272 (1988).
50 484 U.S. 271 (1988).
51 127 S.Ct. 2618 (2007).
52 127 S.Ct. 2625 (2007).
53 387 F.3d 1208, 1215 (11th Cir. 2004).

principal could require that a religious organisation delete the words, God and Jesus, from its display because, even though there was no evidence of disruption under the first *Tinker* standard, the *Hazelwood* standard could be applied to ban: "[student] expression [that] bore the imprimatur of the school and occurred in the context of a curricular activity."[54] In *Zamecnik v. Indian Prairie School Dist. Board of Education* (*Zamecnik*)[55] a federal district court balanced the views of an: "...evangelical Christian" learner'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."[56] While the school would permit the learner to wear a T-shirt with a message, "Be Happy, Be Straight," the school would not permit the learner to wear the T-shirt at issue in the case, "Be Happy, Not Gay." Invoking the "rights of other students" test from *Tinker*, the court reasoned that: "[p]ublic 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."[57] However, in *Nixon v. Northern Local School District Board of Education,*[58] a federal district court granted injunctive relief to a high school learner permitting him to wear a T-shirt with the message: "Homosexuality is a sin! Islam is a lie! Abortion is murder!" because the school had produced no evidence that the T-shirt message violated the *Tinker* disruption test.

A recent Ninth Circuit decision has effectively captured the difficult task for school officials in balancing religion-based expression with one or more of the Supreme Court's tests. In *Truth v. Kent School District (Truth)*,[59] the school district relied on the second *Tinker* and *Morse* tests and refused to recognise the free expression claims of a religious learner organisation that it be permitted to organise itself: "... as a biblically-based club for those students interested in growing in their relationship with Jesus Christ;" to limit its voting membership to: "...members professing belief in the Bible and in Jesus Christ;" and, to require voting member 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.'"[60] At issue in *Truth* was not a drug policy as in *Morse*, but rather a school policy prohibiting discrimination among learner organisations in a broad range of areas, including religion. *Truth* represented the clash of two value systems – the religious organisation's membership rules requiring adherence to specified biblical values and the school's non-discrimination policy mandating tolerance and diversity by prohibiting discrimination in learner organisation membership and participation. In the end, the Ninth Circuit, even though it had no evidence of disruption to the educational process, upheld the school's enforcement

54 387 F.3d, 1215 (11th Cir. 2004).
55 2007 WL 1141597 (N.D. Ill. 2007).
56 2007 WL 1141597 7 (N.D. Ill. 2007).
57 2007 WL 1141597 8 (N.D. Ill. 2007) quoting from *Tinker*, 393 U.S. 508.
58 383 F.Supp. 2d 965 (S.D. Ohio 2005).
59 499 F.3d 999, 1007 (9th Cir. 2007).
60 499 F.3d 999, 1004 (9th Cir. 2007).

of its non-discrimination policy and its rejection of the learner organisation's permission to meet, because: "States [as well as their administrative units, school districts] have the constitutional authority to enact legislation prohibiting invidious discrimination."[61]

The Ninth Circuit's decision in *Truth* suggests that the Supreme Court's Morse test applies to more than school policies on drug use and can be applied to furtherance of broad social policies related generally to tolerance and respect. Even where a learner religious organisation (such as *Truth*) had generated no disruption under the first *Tinker* test or vulgarity under *Fraser* and was not part of the school curriculum for purposes of the *Hazelwood* test, the religious values shared by some learners can be restricted or prohibited under the combination of the *Morse* established school policy and the second *Tinker* "rights of other students" tests. Whether national public policy is best served by permitting public schools to block not only learner expression in support of illegal activities (use or possession of drugs), but also religion-based expression at variance with a school's efforts to create a non-discriminatory environment, remains to be seen. While organisational (or institutional)[62] 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 either individuals or organisations with similar beliefs cannot have protected the expression of their shared religious beliefs in public schools casts a troubling shadow over the formation of public school policies that have the effect of banning some religious values from schools, even when those values have not disrupted the educational process.

The Supreme Court's *Tinker*, *Hazelwood*, *Fraser* and *Morse* decisions demonstrate how fragile the expressive rights of students are. In effect, while students possess a free speech right to express their religious viewpoints, that right can be restricted or prohibited where the expression creates disruption (*Tinker*), is vulgar or lewd (*Fraser*), is a part of the school's pedagogy (*Hazelwood*), or is contrary to established school policies (*Morse*). Depending on the rationale used, a federal court has enjoined enforcement of a school rule limiting distribution of non-school materials only before and after the school day reasoning that the school district has failed to produce evidence that distribution during non-instructional times during the school day would be disruptive.[63] On the other hand, federal courts have upheld restrictions on student distribution of literature not approved by the school principal,[64] or a school rule that prohibits distribution of literature (including religious literature) in hallways between classes,[65] determining that such school rules were content neutral and reasonable. In yet another case, a school could regulate the content of a religious message painted on panels in school hallways because the school's control over the content related to the

61 499 F.3d 999, 1009 (9th Cir. 2007).
62 See for example *Bob Jones Univ v U.S.* 461 U.S. 574 (1983) upholding Internal Revenue Service's revocation of university's tax exempt status for discriminatory dating and marriage policies based on university's longstanding and sincerely held religious beliefs.
63 *Raker v Fredrick County Pub Schs* 470 F.Supp.2d 634 (WD Va 2007.
64 *Krestan v Deer Valley Unified Sch Dist* 561 F. Supp. 2d 1078 (D. Ariz 2008).
65 *M.A.L. v Kinsland* 543 F. 3d 841 (6th Cir 2008).

school's curriculum.[66] In the difficult and delicate balance of the establishment clause and the free speech clause,[67] predictability as to whether school districts that have policies permitting student religious expression speech will be upheld has become problematic, with longstanding school policies permitting such expression subject to likely being invalidated.[68]

2.4 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),[69] Congress used the power of the purse to impose a balance in the treatment of religious, political, philosophical or other learner-initiated and learner-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*),[70] determined that Congress could prohibit all secondary schools receiving federal financial assistance (in fact, all public schools in the United States) from denying learner-initiated and learner-led, non-curriculum-related religious groups from meeting during non-instructional time on school premises.

To date, the Supreme Court has provided very little guidance to public schools regarding the appropriate balance to be struck between public schools' value-laden policies and the religious value-laden objections to those policies. In *Boy Scouts of America v. Dale (Dale)*,[71] the Supreme Court rejected the application of a state non-discrimination statute, prohibiting sexual orientation discrimination, to a boy scout organisation's removal of a homosexual assistant scoutmaster, observing 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.[72] Two years after Dale, Congress exercised its power over the purse by enacting *The Boy Scouts of America Equal Access Act* (BSAEAA)[73] to prohibit any school receiving federal funds and with a limited public forum from discriminating against the Boy Scouts in denying them access to public school premises.

In sum, the United States experience in the formulation of an appropriate value-laden relationship between the expression of religious beliefs by individuals or learner clubs and the determination of school district policies related to the operation of their schools has largely been the responsibility of the judicial rather than the legislative branch of government. Much of the United States

66 *Bannon v Sch Dist of Palm Beach County* 387 F. 3d 1208 (11th Cir 2004).
67 Mawdsley & Beckmann 2006:75-84.
68 *Doe v South Iron R-1 Sch Dist* 498 F. 3d 878 (8th Cir 2007), invalidating school policy permitting distribution of Bibles on school premises.
69 20 U.S.C. paragraphs 4071-4074.
70 496 U.S. 226 (1990).
71 530 U.S. 640 (2000) holding that applying New Jersey's public accommodations law to require Boy Scouts to admit plaintiff homosexual as scoutmaster would violate Boy Scouts' First Amendment right of expressive association.
72 *Dale*, 530 U.S. at 648.
73 20 U.S.C.A. paragraph 7905.

judicial debate has been framed by the accommodation-separation approaches to the role and place of religion at public schools. Contrary to Australia that has given a more accommodationist interpretation to its establishment clause, the United States Establishment Clause has been weighed down by a long history of separation of government and religion, and more recently, of judicial sanctioning, as in *Truth*, of Supreme Court tests that result in a disparate impact on religious-based values. Whether the school rule in *Truth* would have applied with the same effect to other learner organisations based on race, national origin or gender was never addressed and remains unclear.

3. Australia

3.1 Values, religion and education in Australia

Australia is a multicultural nation, with migrants from many nations over nearly three centuries joining the original Indigenous population.[74] As a nation formed from a mix of cultures, the Australian Constitution of 1900 established respect for different values and education as part of our founding principles. Australia's Constitution, like the United States Constitution, has an establishment clause.[75] However, the clause has been interpreted by Australia quite differently from the United States with particular import for schools. Religion, values and education are allowed to merge within public and private education.[76] A major difference arises in how both public and private education are addressed at state and national levels.

First, public education in Australia, as in the United States, originated from early provision by churches, particularly for the poor, with education 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 fibre of the child. Certainly, as public education grew over the 20th century, the values promoted were for the common good of the Australian nation,[77] rather than for the individual's development. However, religious education continues to be

74 Australian Bureau of statistics (ABS), 2008. Yearbook of Australia 2008. "Country of Birth". (ABS).

75 *Commonwealth of Australia Constitution Act* 1901 paragraph 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."

76 Australian Bureau of Statistics 2007: Australia has two sectors of school education: government (public) and non-government (private). The private sector includes schools that are both religious-based and secular, with some 67 per cent of learners in public schools, and 33 per cent in private schools. Of the latter, 62 per cent are in Catholic schools. *Education (Accreditation of Non-State Schools) Act* 2001 (Qld): schools have to be credited at state level to operate.

77 Wyeth, E.R. (195 – date unknown) Education in Queensland. A history of education in Queensland and in the Moreton Bay District of New South Wales, Melbourne, Australia: ACER.

permitted as an activity within school hours at public schools, led by external clerics, although contestations as to what constitutes a religion and the time allowed for this occur on a regular basis.[78]

The major difference between the Australian and United States interpretations of the establishment clause for schools is that direct public funding is provided to the non-government schooling sector, irrespective of religious or secular status, for the same purposes as for public or government schools.[79] Such a funding arrangement was introduced in the late 1960s as part of a platform to win an election, was popular and is now difficult to challenge. An early challenge on the constitutional validity of such public funding of religious-based schools was led by the Attorney-General of Victoria against the Commonwealth Government (*Black*, also known as the 'DOGS' case).[80] In the leading decision for the High Court, Barwick CJ stated that the statute allowing provision of funding to schools that incorporated religious activities was not a statutory authorisation of the religious activity: "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."[81] Furthermore, religion was stated to be "an incidental or indirect consequence of the pursuit of the educational purpose" of the schools receiving assistance.[82]

Talk of further challenges to this interpretation of the separation of church and state has not led to further legal action, [83] in part because of the numbers of learners in private schooling and an expected voter backlash. However, private schools in Australia receive less federal and state funding than public schools, and an influx of learners into the public sector could have serious consequences.

Public commentary and individual challenges still arise as to the basis of religion allowed at schools and to perceived bias. For example, an individual challenge in New South Wales alleged, unsuccessfully, that prayer, hymns and grace before meals with a Christian orientation at a government school was "dogmatic and polemic" religious instruction, as opposed to the general religious instruction allowed under an 1880 Act.[84] In 1967, a course in General Religious and Moral Education had been introduced to schools designed to teach learners about Christianity and to promote moral values. Children read

78 For example, a major debate has been the inclusion of the Humaninst Society in school religion time, see Bachelard 2008: www.theage.co.au (acessed 21 December 2008).

79 See the federal funding provisions act, *Schools Assistance (Learning Together – Achievement Through Chice and Opportunity) Act* 2004 (Cth). However, the level of funding differs across public and private schools.

80 Attorney-General (Vict.); *Ex Rel. Black v The Commonwealth* (1981) 146 CLR 559.

81 Attorney-General (Vict.); *Ex Rel. Black v The Commonwealth* (1981) 146 CLR 584.

82 Attorney-General (Vict.); *Ex Rel. Black v The Commonwealth* (1981) 146 CLR 656. This has subsequently been tested with a non-government religious based school recently closed down, in part for not following the prescribed curriculum of the state. See Lampathakis & Cox 2007.

83 Doherty 2004. The religion of focus was Catholic education, however, not minority religions.

84 *Benjamin v Downs* [1976] 2 NSWLR 199; *Public Instruction Act* 1880 (NSW) section 7.

stories from the Scriptures, while teachers were advised to present them from an objective standpoint, not becoming involved in stating any creed or expressing a denominational view or personal belief. All discussions had to be directed towards a common understanding of the concepts right and wrong, and of a positive life.

The underlying moral tenets were to be emphasised and the curriculum was not compulsory.[85] However, the Court upheld the fact that the teaching and general religious education curriculums were within the boundaries of the type of general religious education envisaged in the original 19th century Act. The teaching of a general Christian theme and values was allowable, but prioritising a specific Christian religion at a public school would be dogmatic.

Prioritising religious values within a school could fall foul of Australian anti-discrimination laws, not constitutional issues. Values within schools can be more problematic in education practice in Australia. For example, in Queensland in 2002, Catholic schools were refusing to employ homosexual teachers or those in known *de facto* relationships. However, a compromise was reached. The schools could not act in a discriminatory way against individuals because of lifestyle, but were allowed to employ teachers who were in accord with the school ethos. The Queensland *Anti-Discrimination Act 1991* allows the imposition of: "[G]enuine occupational requirements" for positive discrimination, including behaviours consistent with an employer's religious beliefs.[86]

In Australia, then, general and specific instruction in religion can be provided in both private and public schooling, supported through government funding, without challenge. Further, Australian governments for some time, whichever political party is in power, have promoted "Australian" values and moral and civic behaviour, both in the general population and through schools, as outcomes for Australian education. These 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 sort of egalitarianism that embraces mutual respect, fair play, and compassion for those in need."[87] The Australian government provides considerable funding and support for schools by the development of curriculum and resources, and funding of research and evaluation projects, for implementation of values curriculum.[88] [89]

The *National Framework for Values Education in Australian Schools*[90] stipulates nine values for Australian schooling to build what is referred to as "character":

1. Care and Compassion: Care for yourself and others.

85 *Benjamin v Downs* [1976] 2 NSWLR 199, 202-203.
86 § 25(1) (3). The Queensland Government was forced to back-down in this matter. See, for example, www.cathnews.com (acccessed 21 December 2008).
87 See www.citizenship.gov.au. (accessed 21 December 2008).
88 See www.valueseducation.edu.au. See, also, Curriculum Corporation/Department of Education, Science and Training (accessed 21 December 2008).
89 See www.valueseducation.edu.au. National Framework for Values Education in Australian Schools 4 (accessed 21 December 2008).
90 See www.valueseducation.edu.au. See, also, Curriculum Corporation/Department of Education, Science and Training (DEST) 2006 (accessed 21 December 2008).

2. Doing Your Best: Seek to accomplish something worthy and admirable, try hard and 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 conducts; 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.[91]

The more overt development of this government promotion of values, in their broadest moral sense, in education in Australia, occurs through use of the power of the purse to direct the activities of states and territories.[92] As noted, public funding is available for all schools. However, such funding comes with conditions. By agreement, all states and territories, and hence all schools, have agreed to a national civics and citizenship curriculum.[93] The leverage through funding is that all schools must agree to participate in a sample-based national testing programme on a periodic basis of learner performance in this area.[94]

The Australian government further introduced funding for school chaplains[95] to promote the spiritual and emotional well-being of school communities: "Chaplains will be expected to provide general religious...advice, comfort and support to all [learners] and staff, regardless of...religious denomination, irrespective of...religious beliefs. The choice of chaplaincy services, including the religious affiliation, is a decision for the local school community, following broad

91 See www.valueseducation.edu.au. National Framework for Values Education in Australian Schools 4 (accessed 21 December 2008).

92 Australia has six states and two territories over a large geographic area, with a population of less than 21 million people. This may facilitate federal intervention. In *Black v The Commonwealth*: 585 1981:585, 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." This has not been subsequently tested.

93 See www.civicscitizenship.edu.au (accessed 21 December 2008).

94 See, for example, *Schools Assistance (Learning Together—Achievement Through Choice and Opportunity) Act* 2004 § 14(1)(f), section 31(h) (requirements for provision), section (19)(4) (requirement for agreed common testing standards and national tests), section 36(4) (inclusion in national accountability).

95 See www.dest.gov.au (accessed 21 December 2008).

consultation. [Learners] are not obliged to participate. Parents and [learners] will be informed about the availability and non-compulsory nature of the chaplaincy services."

In Australia, then, values, religion and education are now totally merged within the operation of the nation. The Australian Commonwealth government has been increasing its control of education curriculum and delivery through the power of the purse, including values, moral and spiritual development of all children. The principles endorsed by the Australian government demonstrate respect for all religions and freedom to practice. Overall, while all religions and values are meant to be respected, many of the policies enacted at government level have a clear basis in Christian origins. The term "chaplain" with its origins in and definition in terms of Christian religions for the most recent initiative demonstrates this. However, the first non-Christian chaplain has been appointed and some schools prefer the term pastoral support worker.[96] In Australia, values are important. We accept religious values at schools but more broadly seek to promote "Australian values" without necessarily understanding yet what these are. Most importantly, education is seen to have a major role to play in their development.

4. South Africa

4.1 The role and place of religion at public schools

Historically in South Africa education and religion have been inextricably linked. In educational policy attempts were made to produce an intellectual and a philosophical framework for the Afrikaans movement in terms of Christian National Education during apartheid.[97] In fact, "ideological control of ... educational institutions (was) maintained by Christian Nationalism."[98]

Since the dawn of a democratic South Africa, both personal[99] and educational[100] values have owed their origins to personal principles derived from religious worldviews. These personal and institutional values have influenced decision-making[101] and shaped actions and attitudes.[102]

South Africa has recently characterised its approach to religion and education as a "co-operative model" that recognises the "[s]eparate spheres for religion and the state" under the Constitution, but also "[the] scope for interaction between the two."[103] It has declared its "co-operative model" to be a reaction both against the "theocratic model" under apartheid "that tried to

96 Indeed, changes to this initiative are occurring, with schools able to use other support services if they cannot identify a suitable chaplain within six months (see http://www.deewr.gov/Schooling/NationalSchoolChaplaincyProgram/Pages/home.aspx) (accessed 21 December 2008).
97 Du Toit 1975:19-50.
98 Adam 1975:310.
99 De Klerk & Rens 2003:353-371.
100 Fowler *et al* 2000.
101 Kluckhorn 1954:388-433.
102 Eyre & Eyre 1993.
103 National Policy on Religion and Education (National Policy) § 3.

impose religion in public institutions"[104] 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."[105] In fact, the National Policy on Religion and Education (National Policy) notes that while:

> [W]e 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 [learners] 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 [learner].[106]

In fact, religion has been 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."[107]

4.2 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 under Apartheid for addressing the interaction of religion and education had resulted in learners with non-Christian viewpoints being unfairly discriminated against based on their religious beliefs[108] and, thus, the intention of the eventual National Policy[109] was to ensure that schools attended to "the spiritual dimensions of society."[110]

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.[111] Thus, the final copy of the National Policy replaced a draft copy's assurance of "positive neutrality"[112] with the phrase, "positive impartiality".[113] While the former referred to an attitude of indifference, the latter implied one of fairness. Similarly, the phrase

104 National Policy § 3.
105 National Policy § 3.
106 National Policy § 29.
107 National Policy § 10 & 64: "Since the state is not a religious organization, theological body, or inter-faith forum, the state cannot allow unfair access to the use 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."
108 Draft National Policy on Religion and Education (Draft Policy) 2003.
109 General Notice 1307 Government Gazette 25459 of 12 September 2003.
110 Draft Policy 2003 Introduction.
111 See, for example, Preambles of *National Education Policy Act* 27 of 1996 and *South African Schools Act* 84 of 1996.
112 Draft Policy 2003 § 5.
113 National Policy §5.

"constitutional separation"[114] was replaced by "constitutional impartiality,"[115] also displaying an intention in post-Apartheid South Africa to maintain fairness consistent with the fundamental, constitutional rights of all concerned parties.

Despite these changes, the National Policy was grounded in a secular worldview, since it professed neither a biblical nor a religious bias. Despite the concern that studying religion from a neutral perspective negated the notion of remaining impartial,[116] the National Policy was seen as important for furthering nation-building,[117] a process that called for religion education to reach specific outcomes and relay values that the State had identified as desirable.[118] Thus, within the framework of what the post-Apartheid government considered to be neutrality or impartiality, religion has become an instrument of the State.[119] Ironically enough this situation is reminiscent of religion being very much an instrument of the State during the apartheid years, when a so-called "unity of purpose" was introduced into corporate action with the church maintaining the government and vice versa.[120]

In South Africa, the Ministry of Education[121] identified ten secular values that would be the cornerstones of all educational values, therefore at the same time superimposing them upon religion: democracy, social justice and equity, equality, non-racism and non-sexism, *Ubuntu* (people honestly accepting each other and valuing existing differences), an open society, accountability, rule of law, respect, and reconciliation.

Pursuant to the ten principles above, the Ministry of Education offered religion at public schools and accorded learners the opportunity not only to explore the morality and values that substantiate religions, but also to reaffirm their own values of diversity, tolerance, respect, justice, compassion and commitment.[122] However, despite South Africa's fundamental constitutional values of human dignity, equality and freedom, as well as the express constitutional protection of religious beliefs, whether the National Policy has been implemented as designed is another matter. No serious research has been undertaken to date to determine how South African public schools are implementing the National Policy, or whether they are implementing it at all. Despite only a very few law cases addressing the balance between religious values and the government's secular values, the results thus far suggest a mixed message.

114 Draft Policy § 71.
115 National Policy § 71.
116 Malherbe 2006:645.
117 National Policy §10: "The policy for the role of religion is driven by the dual mandate of celebrating diversity and building national unity" and §. 8: "Religion education should contribute to creating diversity and building national unity."
118 National Policy § 14 & 19.
119 Malherbe 2006:645.
120 Van Zyl Slabbert 1975:9.
121 Manifesto on Values, Education and Democracy 2001:iii-v.
122 Manifesto on Values, Education and Democracy 2001:vii.

4.3 Religion and education: a judicial approach to protecting values

One of the challenges in the court rooms of South Africa would be to interpret and apply fundamentally guaranteed values[123] fairly and consistently. In just such an instance, the KwaZulu-Natal Equality High Court addressed the case of a mother who contested a school Code of Conduct which prohibited learners from wearing any jewellery except earrings and a watch[124]. The High Court, in overturning the decision of the Equality Court for the District of Durban[125] that punishment of the learner for wearing a Hindu nose stud did not violate the school's Code of Conduct, reasoned that the school had acted pursuant to a flawed perspective in claiming that it was important to treat all female learners in the same way.[126] Based on the fact that 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 "[p] eople who [were] not similarly situated should not be treated alike ... [and that] [t]he school['s] fail[ure] to differentiate in favour of [plaintiff] ... represented an] impair[ment] [of her] human dignity."[127]

Not satisfied that the High Court had characterised the matter as an equality claim under the Equality Act, the applicant took the case on appeal.[128] In reaching its judgment, the Constitutional Court (CC) considered both the practical effect that a court order could have at school level and the combined importance and complexity of the matter.[129] The court[130] recognised firstly that any order it made would have definite practical relevance, since the department's guidelines[131] purports no mandatory adherence. Secondly, this matter addressed contentious issues regarding the nature of the protection granted to cultural and religious values at school level and the importance and complexity of such issues were reflected by the varying approaches of not only the South African courts, but also those in foreign jurisdictions.[132]

123 *Constitution of the Republic of South Africa*, 1996.
124 *Pillay v MEC for Education, KwaZulu-Natal and Others (Pillay EqC)* 2006 6 SA 363 (EqC).
125 See *Pillay v KZN Minister of Education and Others* Equality Court for the District of Durban Case No. 61/2005
126 See *Pillay* EqC § 25.
127 See *Pillay EqC* § 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) § 132 where Judge Sachs states 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 levelling 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, marginalization, stigma and punishment. At best, it celebrates the vitality that difference brings to any society."
128 *MEC for Education, KwaZulu-Natal, and Others v Pillay* 2008 1 SA 474 (CC) (Pillay CC).
129 *Pillay CC*: § 32.
130 Constitutional Court .
131 *National Guidelines on School Uniforms* 2006.
132 *Pillay CC*: § 33-35.

In sum, this Court[133] came to the conclusion that the school's Code of Conduct had failed to rid itself of existing structures of discrimination by insisting on uniformity. The final CC judgment consisted of finding (a) that the school had *discriminated unfairly* against the respondent's daughter[134], and (b) that the school had to amend the Code of Conduct so as to include the reasonable accommodation of religiously based deviations and a procedure for applying and possibly granting such exemptions.

In assessing both the High Court and CC's balancing of competing values (the school's enforcement of its Code of Conduct versus an individual learner's religious beliefs), the case has raised some question as to whether the result would be consistent with the Bill of Rights.[135] *Pillay EqC* and *Pillay* CC leave unclear why items of outward appearance grounded in religious values should be treated differently than child-rearing practices also grounded in religious values (see *Christian Education South Africa v Minister of Education*).[136]

In *Antonie v Governing Body, Settlers High School and Others* (*Antonie*),[137] a fifteen-year-old Grade 10 learner who chose to wear her hair in dreadlocks following her conversion to Rastafarianism challenged a School Governing Body decision to suspend her for five days for violating the school's Code of Conduct. Denying that her misconduct had caused (in language reminiscent of *Tinker*) "disruption and uncertainty"[138] as alleged by the School Governing Body, the learner emphasised, instead, "her need to express her religious convictions and to develop her individuality."[139] Nonetheless, the School Governing Body, contending that the learner'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 learner's suspension, the High Court in *Antonie* reasoned that to enforce the school's code in a rigid manner without considering the expressive nature of the dreadlocks "would bring it into conflict with the justice, fairness and reasonableness which underpin our new Constitution and centuries of common law."[140] In addition, the court determined that punishment of the learner 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 behaviour" was a blatant violation of human dignity.[142]

In *Antonie* and *Pillay*, the learner's religious values, supported by the constitutional rights to human dignity and expression, overruled the schools' values reflected in its authority to make and enforce a consistent dress code

133 *Pillay CC*: § 17.
134 *Pillay CC*: § 115.
135 Constitution chapter 2.
136 2000 10 BCLR 1051 (CC) (Christian Education) see infra fn 145-149.
137 2002 (4) SA 738 (C).
138 2002 (4) SA 741 (C).
139 2002 (4) SA 741 (C).
140 2002 (4) SA 741 (C).
141 2002 (4) SA 742 (C).
142 2002 (4) SA 742 (C).

throughout the school. Although the impact of *Antonie* and *Pillay* has yet to be explored in other South African court decisions, the limitations placed on public schools in these cases may suggest that dress codes are the kind of rules that allow for greater variation where individual learners' religious or cultural values are at issue. However, one must query, if dress codes must accommodate religious and cultural differences, how courts would address the carrying or wearing of religious or cultural iconic objects that might be used to harm other learners at school.

4.3.1 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] recognised 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 criminalising 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]

143 *Prince v President, Cape Law Society and Others* 2002 (3) BCLR 231 (CC): upholding the refusal of the Cape Law Society to register plaintiff as an attorney because of two convictions for possession and use of cannabis.

144 While the Constitutional Court shares some jurisdictional similarity to the United States 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." United States Const., Art. III, § 2. Compare Constitution of South Africa section 167(3): jurisdiction of the Constitutional Court is limited to "constitutional matters and issues connected with decisions on constitutional matters".

145 *Prince* at § 104, see fn 143.

146 *Prince* at § 111. Worth noting is the Constitutional Court's reliance on *Employment Div. v Smit* 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, see Mawdsley 1992:76.

147 *Prince* at § 115 where the Constitutional Court relied on a § 35 from *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC).

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 values of the common good and of protecting individual religious values when they may be at cross purposes with that common good. 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 would be subject to individual exceptions. Twelve years prior to *Prince,* the United States Supreme Court, in *Employment Division v. Smith*,[148] faced the same conflicting values as in *Prince* and struck the same balance, with a result that has had a devastating impact on the protection of religious values under the free exercise clause.[149] Before South African courts become too entangled in parsing the significance of individual rights, one might consider the admonition of the United States Supreme Court's Justice Thomas, in calling for the reversal of *Tinker*, that the operation of public schools should be the task of "[l]ocal school boards, not the courts".[150]

In a more direct incursion into the operation of schools, the Constitutional Court, in *Christian Education*,[151] upheld an amendment to the South African Schools Act prohibiting corporal punishment at all public and private schools.[152] 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,"[153] 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"[154]. 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,"[155] 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."[156]

As in *Prince*, the Court in *Christian Education* leaves little in the way of guidance for how to determine the values to be honoured. To declare, on one hand, that "believers cannot claim an automatic right to be exempted by their

148 494 U.S. 872 (1990) upholding denial of unemployment compensation to two former state employees, dismissed for using a prohibited substance (peyote) and rejecting the use of the free exercise clause as a defence where a law is "neutral and generally applicable".

149 See Mawdsley 1992:76. See, also, *Locke v Davey*, 540 U.S. 712, 719 (2004) holding that a state scholarship prohibited to a person pursuing a theology major did not violate the free exercise clause because, even though awarding the scholarship would not have violated the establishment clause, a "play in the joints" exists between the two religion clauses that permits exclusion of a religious benefit without demonstrating hostility toward religion.

150 *Morse v Frederick* 127 S.Ct. 2636 (Thomas J concurring).

151 2000 10 BCLR 1051 (CC).

152 Act 84 of 1996: section 10.

153 *Christian:* § 2.

154 *Christian*: § 15 & 38.

155 *Christian:* § 39.

156 *Christian:* § 43.

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,"[157] 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 United States,[158] have children simply become "creature[s] of the state"[159] whose rights are subject to the values of changing political and legal majorities?

5. Conclusion

Religion is the source of values that speak to a wide range of societal issues impacting 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, intolerance and lack of respect for diversity that are part of society at large. In declaring and enforcing appropriate standards for learner conduct, schools struggle to create a culture in which all learners have a shared sense of values. Creating that shared culture can be difficult where rules are simply propagated without considering underlying religious beliefs and practices that may, in the past, have provided a helpful framework and context for those religious values.

As reflected in this article, the challenge in the United States, Australia, and South Africa has been whether, when or how to permit the infusion of diverse religious values into public education. In both the United States and Australia, the debate has revolved around a separationist versus an accommodationist interpretation of establishment clauses in their respective constitutions. Australia, with a more accommodationist interpretation, has permitted support of religion and religious incursions into public schools to the point of furthering Christian values that would not be allowed under the United States Constitution. South Africa, with its more recent Constitution, has evolved 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".

While one would like to find common ground among the approaches taken toward religion and values in the three countries discussed in this article, the reality is that the three approaches reflect fundamental constitutional, political and judicial differences that allow for relatively little commonality. The current interpretations of the South African and Australian Constitutions allow for greater degrees of political involvement by the State in the determination of religious values at public schools than would be possible under the United

157 *Christian:* § 35.

158 While South Africa's Constitution contains panoply of basic rights for "a person under the age of 18 years," it contains no corresponding protections for the rights of parents.

159 *Pierce* 268 U.S. 535 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."

States Constitution's establishment clause. However, while these values in Australia and South Africa at present represent a Christian perspective, what will the political response be as the non-Christian religion populations in Australia and South Africa gain numerical and political prominence?[160] In the end, the United States judiciary's invocation of the establishment clause's "high and impregnable wall" as a means of severely limiting political involvement in determining public school religion-related values[161] may well be viewed as preferable to having religious values framed by political majorities.[162]

160 An issue arising in Australia is the role of local governments and planing decisions regarding schools, which may be creating a barrier to the establishment of some religious schools. See Cumming (2009) "Current issues for schools and religions in Australia." Paper presented at Education Law Association Conference, Louisville, Kentucky, October 21-23 2009.

161 See *Edwards v Aguillard* 482 U.S. 578, 591 (1987) invalidating Louisiana's Balanced Treatment for Creation-Science and Evolution-Science in Public School Instruction Act as having "[t]he pre-eminent purpose of ... advanc[ing] the religious viewpoint that a supernatural being created humankind."

162 Pipes 2007. Just how high the establishment clause barrier really is will have to be assessed in terms of whether New York City's first madras public school, although touted as an Arabic-speaking school, will also be immersed in the Islamic religion.

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