Cometh the Revolution: The Case for Overruling McCollum v. Board of Education

Gordon Butler

Follow this and additional works at: https://ideas.dickinsonlaw.psu.edu/dlra

Recommended Citation
Available at: https://ideas.dickinsonlaw.psu.edu/dlra/vol99/iss4/2

This Article is brought to you for free and open access by the Law Reviews at Dickinson Law IDEAS. It has been accepted for inclusion in Dickinson Law Review by an authorized editor of Dickinson Law IDEAS. For more information, please contact lja10@psu.edu.
Cometh the Revolution: The Case for Overruling McCollum v. Board of Education

By Gordon Butler*

TABLE OF CONTENTS

INTRODUCTION 845

PART A: Law, Culture, and Religion 853
  1. Introduction to Part A 853
  2. Religion Determines Culture 854
  3. Religion and Law Interact 858
     a. The American Legal System 859
     b. The Virginia Experience 869
     c. The Present Crisis 872
  4. Schools: A Cultural Battleground 880
  5. Many Solutions 882

*Associate Professor of Law, St. Thomas University; B.E.E. Georgia Institute of Technology; J.D. University of Texas at Austin; LL.M. (Taxation) New York University; M.B.A. University of Dayton. The author would like to express his appreciation for the assistance received in the preparation of this article from research assistants James George Bannoura, Diane Medley, and Wendy Sue Wallberg; for the encouragement and intellectual stimulation of faculty colleagues Dean Daniel J. Morrissey, Associate Dean Jay Silver and Professor Siegfried Wiessner; for introduction into the area of religion and law from the author's brother, Charles Butler, and St. Thomas University colleague Ray Rufo. The author would also like to express his appreciation for the financial and other scholarship support provided from St. Thomas University School of Law.
6. A Proposal

PART B: Legal Structure of Religion in Public Schools
   1. Introduction to Part B.
   2. The First Amendment and The Doctrine of Incorporation
   3. *McCollum v. Board of Education* and Its Progeny
   4. Educational Premises Used by the Court
      a. Education is Important
      b. Separation of Secular Education
      c. The Symbolic Union
      d. Children are Easily Influenced
      e. Separation Produces Feelings of Inferiority
      f. Parental Choice
      g. Religion in Education is Divisive
      h. No Institutional Entanglement
   5. Reversal of *McCollum* Under *Casey*
      a. The *Casey* Standard
      b. Changed Conditions in the Schools
      c. The Court’s Latest Decision
   6. Reexamination of Premises
      a. Public Education’s Changing Purposes
      b. Secular Education a Myth
      c. Symbolic Union Can be Neutralized
      d. Moral Influence on Children Crucial
      e. Celebrating Diversity Counters Inferiority
      f. Parental Choice Builds Respect
      g. Divisiveness Can be Countered
      h. Entanglement is Minimal
   7. *McCollum* a Better Solution Than *Zorach*
   8. Advantages of On-Premise Religious Training

Conclusion
INTRODUCTION

In *Illinois ex rel. McCollum v. Board of Education*, a 1948 Supreme Court case, Justice Frankfurter stated that public education was "the symbol of our democracy and the most pervasive means for promoting our common destiny." This is an alarming statement. It suggests that our common destiny is in the hands of the government, not the people. Additionally, by using the word "destiny," Justice Frankfurter raised a religious concept of a determined future, held in the hands of the public school. Since religion has been expelled from the school house, the statement suggests that a destiny and a culture can be achieved without religion. Most alarming, this concept of a destiny and a culture apart from religion is wrong; yet, it has become the cornerstone of the Supreme Court's Establishment Clause jurisprudence as applied to elementary and secondary public schools.

This Article will address two ways in which the isolation of religion from destiny and culture is fundamentally wrong. Part A will show that culture, particularly American culture, and law, including the religion clauses of the First Amendment, are dependent upon and actually stem from religion. While the analysis in Part A is not presented as the only possible understanding of the origins of culture and law in America, it is a sufficient analysis to justify a place for religion in the nurturing of future generations. It suggests that religion is a crucial and perhaps determining thread in the fabric of America, a thread which, to use one of Justice Frankfurter's metaphors, cannot be removed from the educational process without unraveling the entire fabric. Many will deem this portion irrelevant, primarily because historical development and the field of historical jurisprudence are presently considered of little import. However, a religious analysis is essential to understanding the development of American society, the American legal system, and the very doctrine of religious liberty.

Part B will examine the basic premises underlying the Supreme

---

2. *Id.* at 231 (Frankfurter, J., concurring). *See also Edwards v. Aguillard*, 482 U.S. 578, 584 (1986) ("The public school is at once the symbol of our democracy and the most pervasive means for promoting our common destiny. In no activity of the State is it more vital to keep out divisive forces than in its schools . . . .").
4. The term "premises" is used throughout this Article in a broad sense to include the relevant bases underlying the decisions discussed. These premises include the societal setting in which the cases arose as well as the predispositions of the judges making the decisions. The basic thesis of this Article that in 1948, when the *McCollum* decision was rendered, the public school system was performing its function in a manner which allowed students to grow into responsible adults, thus
Court decisions affecting religion in public elementary and secondary schools; it will suggest that developments since the first Establishment Clause cases have invalidated the educational premises upon which those decisions rely. These changes include the now well known breakdown of the family, a spiraling illegitimacy rate, and the pressures of a drug culture. All of these combine to destroy the lives of millions of youths in America, particularly those who are poor and most dependent on the free public school system.

Our common destiny is becoming a nightmare for those dependent upon the state. For the government to monopolize education without providing a means for religious development is analogous to agreeing to feed the people while eliminating vitamin C from the provisions supplied. Value laden decisions by government bureaucrats are denying a vital element to American society. The societal belief that the total removal of religion from public schools is destructive to education is illustrated graphically in the growth of Protestant Christian schools, home schooling, and the present pressure for a constitutional amendment addressing school prayer. The sensible approach suggested in this Article is educationally sound and consistent with the Constitution and likely to lead to a slowing of the segregation of civil society between schools and religious citizens.

American society is rapidly segregating over religious issues. Strong support by conservative Christians swept the Republicans to a landslide victory in the November, 1994, Congressional elections. The Republican-controlled Congress, through its “Contract with America,” seems duty bound to address the prospect of a constitutional amendment authorizing prayer in the public schools. Whatever one may think of producing relatively stable families upon which society depends for ordered liberty. By comparison, moral conditions have deteriorated to the point that society today is losing its ability to generate respect for the law and is reaching a saturation point in its ability to house its criminals. Furthermore, McCollum, being one of the first cases in the Establishment Clause area, reflected an aggressive separationist attitude which has proven unworkable in practice; this is being recognized by current justices. Perhaps the term “conditioning factors,” as used in 1 HAROLD LASSWELL & MYRES S. MCDougAL, JURISPRUDENCE FOR A FREE SOCIETY: STUDIES IN LAW, SCIENCE AND POLICY 277-296 (1992), would be a preferable term since it recognizes the broad multiplicity of processes and value choices which lead up to, and determine, any particular decision.


7. While the Republican “Contract with America” does not call for a constitutional
the wisdom of amending the Constitution for this purpose, the fact remains that a large and passionate group of Americans has felt such an amendment necessary for over thirty years. This group's frustration has led to the perception that the federal government is insensitive to the desires of the people. This sentiment was powerfully voiced on the November 8th, 1994 ballot.

The United States Supreme Court, in *McCollum* and its progeny, has erected an artificial "wall of separation" between church and state. This wall, like the Berlin Wall, must fall of its own weight, either by constitutional amendment or by fiat of the Supreme Court. This Article will argue that the wall of separation fundamentally misconceives the role of religion in the American social and legal systems, at its inception as well as today. The Article will bring under close scrutiny the premises on which leading cases rest, and will suggest a remedy that would bring religion back into public schools, at parents' choice and under their control.

Overturning the prayer decisions through a constitutional amendment may have the effect of unraveling fifty years of constitutional jurisprudence relating to the religion clauses. It should be noted that these prayer decisions came after nearly fifteen years of constitutional development in the First Amendment Religion Clause area. Perhaps the few Establishment Clause decisions preceding the 1962 and 1963 prayer decisions were only a preliminary exploration of the First Amendment; the individual situations addressed were not of individual significance or did not relate to the heart of the Establishment Clause objectives. These pre-1963 cases could therefore be reviewed to determine whether changed

---

amendment authorizing prayer in public schools, the Republican leadership openly endorsed the concept. However, as discussion on the contract has become more intense, social and cultural issues such as the prayer amendment has been put on hold. See Stephen Green, *Vote on School-Prayer Issue Shelved*, SAN DIEGO UNION-TRIB. Jan. 7, 1995, at A1.

8. Steve McFarland, director of the Center for Law and Religious Freedom, a division of the Christian Legal Society, has stated that the organization's position that, while state mandated prayer should be avoided, the perceived hostility of government toward religion necessitates a constitutional amendment to recognize and protect the right of religious students to express their views freely with other persons. *CLS Seeks Broader Protection for Student Religious Expression*, 15 CHRISTIAN LEGAL SOC’Y. Q., Winter 1994, at 16. Statistical support for prayer is tied to the way the survey question is phrased. When the question is whether students should be allowed to pray in school, the result is as high as 80%. When the question is whether students should be required to participate in prayer, the result can be as low as 17%. Questions relating to moments of silence draw a 60% approval. See ROBERT BOSTON, *WHY THE RELIGIOUS RIGHT IS WRONG ABOUT SEPARATION OF CHURCH & STATE* 112-113 (1993).


facts, circumstances, or understandings of facts have since rendered the decisions obsolete and in need of reflection. One case on point is *McCollum*, a 1948 decision dealing with a program allowing schools to set aside a period of time each week for voluntary, parental sponsored religious instruction. This practice was held unconstitutional because the Court perceived that the state was involved in coercing and regulating attendance at the schools.

Reconsidering *McCollum* may simply be a recognition that, in an increasingly pluralistic society, separating religious and secular influences is impossible, and that keeping religion in a second class status is equivalent to establishing non-religion. Citizens desire to pass their culture on to their children; the institutions of society are established to facilitate that desire. A large segment of American society views the public school as a hindrance to that process. Many have left the public system for privately operated Christian schools, while others have opted for home schooling.

Radical changes over the past forty years in the United States’ social structure have resulted in a need to review *McCollum*. One may go further and charge that the social structure is breaking down or is in a state of collapse. The family, which has been viewed as the building block of society, is giving way to assaults from a variety of directions. Today, unmarried women account for nearly 30% of all births.

---

12. *Id.* at 209-10.
13. Regrettably, the superintendent of a highly progressive and well financed school system in a planned community, when asked by the author whether the new community school system had made any response to the religious needs of students, stated that they did not expect many fundamentalist students because of the economics of the community. Personal discussion in Columbus, Ohio, July 1993. In other words, housing costs and taxes would screen the community from religious demands in the school system. The school authorities simply were not concerned with losing religious students.
14. In 1991, 3.3 million school-age children (approximately 10% of all school-age children) were being educated outside of public schools. These students included 2.5 million students in Roman Catholic schools (down from 5.7 million students in 1964), 400,000 students in preparatory schools, 300,000 students in home schooling, 50,000 students in Afrocentric schools, and 25,000 students in for-profit schools. Thomas Toch et al., *The Exodus*, U.S. NEWS & WORLD REP., Dec. 9, 1991, at 66-77. See, Dennis P. Doyle, *The Storm Before the Lull: The Future of Private Schooling in America in Challenge to American Schools*, THE CASE FOR STANDARDS AND VALUES 147-69 (John H. Bunzel ed., 1985); JAMES DAVISON HUNTER, CULTURE WARS, THE STRUGGLE TO DEFINE AMERICA, 198-211 (1990) (discussing alternatives to public schools).
than 50% of all marriages end in divorce.\textsuperscript{16} Arrest rates for juvenile violent crimes increased from 137 per 100,000 in 1965 to 430.6 per 100,000 in 1990.\textsuperscript{17} Legal abortion terminated over 1,700,000 pregnancies in 1991.\textsuperscript{18} Suicide is the second leading cause of death among teenagers.\textsuperscript{19} Social ills are exacerbated by the increasing disparity between rich and poor. These trends continue despite record levels of social spending which leave more and more people in poverty.\textsuperscript{20}

Schools are struggling with problems they are not equipped to handle.\textsuperscript{21} Teachers in 1940, prior to \textit{McCollum}, reported that talking out of turn, chewing gum, making noise, running in the halls, cutting in line, dress code violations, and littering were the top disciplinary problems.\textsuperscript{22} By 1990 the list had changed to include drug abuse, alcohol abuse, pregnancy, suicide, rape, robbery, and assault.\textsuperscript{23} In his highly influential 1993 \textit{Wall Street Journal} opinion piece,\textsuperscript{24} Charles Murray commented on the problem of illegitimate births. Murray noted that in the 1960s Daniel Patrick Moynihan had predicted the emergence of a black underclass as the result of an illegitimacy rate approaching 26%.\textsuperscript{25} Moynihan felt that the lack of fathers to rear and restrain children would cause crime rates in black communities to skyrocket. By 1990, the illegitimacy rate of blacks had increased in excess of 65%.\textsuperscript{26} Murray's piece pointed out that white illegitimacy was approaching 23% and that

\begin{enumerate}
\item See \textit{Bennett}, supra note 15, at 59 (citing National Commission on Children, \textit{Just the Facts: A Summary of Recent Information on America's Children and Their Families} (1993)).
\item \textit{Id.} at 29.
\item \textit{Id.} at 68. Eighty-one percent of all abortions are performed on women 29 years old and under, and 81% are performed on women who are single, divorced, separated or widowed. \textit{Id.} at 69.
\item \textit{Id.} at 78. The rate of suicide increased from 3.6 per 100,000 in 1960 to 11.3 per 100,000 among teenagers between 15 and 19 years old. \textit{Id.}
\item \textit{Bennett, supra} note 15, at 119-23.
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Murray, supra} note 24.
\item \textit{Id.}
the emergence of the white underclass would threaten the broader community.\textsuperscript{27}

These serious social problems have undoubtedly contributed to a deterioration in the performance of public school students. Over the last thirty years American youths have exhibited a decline in SAT scores and other standard measures of performance.\textsuperscript{28} During the same time, the resources made available to public schools increased dramatically.\textsuperscript{29} In 1960, the average per-student expenditure was $2,035 (in constant 1990 dollars); by 1990, the per-student expenditure had increased to $5,247.\textsuperscript{30} As a result, the public system is under increasing criticism for its inability to solve the numerous social ills affecting the young in society.

Many solutions have been posed for the problems. These range from pragmatic suggestions of beginning sex education at the kindergarten level, to distributing condoms in schools, to placing metal detectors and police in the hallways. One solution that has not been considered is to call for assistance from the religious institutions that have traditionally provided the moral training of the community.\textsuperscript{31} Such a

\begin{quote}
\textsuperscript{27} According to Murray:

[If] the proportion of fatherless boys in a given community were to reach such levels, surely the culture must be "Lord of the Flies": writ large, the values of unsocialized male adolescents made norms - physical violence, immediate gratification and predatory sex. That is the culture now taking over the black inner city.

My proposition is that illegitimacy is the single most important social problem of our time - more important than crime, drugs, poverty, illiteracy, welfare or homelessness - because it drives everything else.

The ethical underpinning for the policies I am about to describe is this: Bringing a child into the world is the most important thing most human beings ever do. Bringing a child into the world when one is not emotionally or financially prepared to be a parent is wrong. The child deserves society's support. The parent does not.

Murray, \textit{supra} note 24, at A14. In 1965, then Assistant Secretary of Labor Daniel Patrick Moynihan (now U.S. Senator from New York) stated:

From the wild Irish slums of the 19th century Eastern seaboard to the riot-torn suburbs of Los Angeles, there is one unmistakable lesson in American history: A community that allows a large number of young men to grow up in broken families, dominated by women, never acquiring any stable relationship to male authority, never acquiring any rational expectations about the future--that community asks for and gets chaos. . . . [In such a society] crime, violence, unrest, unrestrained lashing out at the whole social structure--these are not only to be expected, they are very nearly inevitable.

\textit{Bennett, supra} note 15, at 53.

\textsuperscript{28} \textit{Bennett, supra} note 15, at 83-84.

\textsuperscript{29} \textit{Id.} at 90-91.

\textsuperscript{30} William J. Bennett, \textit{The Index of Leading Cultural Indicators}, Mar. 1993, at 21

\textsuperscript{31} In Bowen v. Kendrick, 487 U.S. 589 (1988), the Supreme Court held that a statute authorizing grants to nonprofit organizations, including religious organizations, for services and research in the area of premarital adolescent sexual relations and pregnancy was not facially unconstitutional. \textit{Id.} at 593. However, use of the grants to promote religious doctrines would be
solution would permit public schools to facilitate voluntary, parentally supervised and controlled religious training as a part of the curriculum. This training would provide a basic consistent value system which, at least from the standpoint of those values shared by Christians, Jews, Muslims and a number of other religions, emphasizes personal responsibility, stable family structures, respect for parents, teachers, and governmental authorities, respect for the person and property of others, the sanctity of truth, and the value of work and commitment. That such a solution has not been considered may be the result of authorities concluding that religious training in a public school setting would cause sectarian strife. Others would find that religious training might offend children who do not share the belief system of the majority. Yet if this is truly an age of diversity and respect for differing views and cultures, how can diversity and respect for differing views be seriously taught if religious views are kept away from the education process? Presently those who strongly hold religious views are labeled fundamentalists; anyone holding such views is suspect and a candidate for isolation. This is not diversity.

The real hurdle to allowing religious training in public schools is the interpretation of the First Amendment’s Establishment Clause, which has eliminated such training since the Supreme Court first addressed the issue in 1948. At that point, the Supreme Court began its effort to remove all traces of the Christian religion from the public school. Such decisive action has created the impression that the Court was making a routine application of the Establishment Clause. However, it is surprising that the Establishment Clause was not recognized as applicable to state action and to such practices until eighty years after the Fourteenth Amendment was enacted. As a result, more than forty years after the Supreme Court began applying the Establishment Clause to the states, it continues to struggle in defining an Establishment Clause jurisprudence, convinced only of its need to protect school children from any interaction with religion at the school house.

While the Supreme Court has exhibited a zeal for eliminating religion from public schools, it has asserted that the public school system is the chief means by which culture is to be transmitted. This

unconstitutional. Id. at 609. Both Justices O’Connor and Kennedy concurred in the opinion, recognizing that participation by religious organizations, while presenting sensitive issues, does not result in automatic violations of the Constitution. Id. at 623-24. Clearly, this was a more sensitive participation than the traditional religious efforts in hospitals and soup kitchens as asserted by Justice Blackmun in dissent. Id. at 640 (Blackmun, J., dissenting).

combination of principles reflects a simple, but tragic, conclusion that culture is not dependent on religion and can be developed and transmitted from generation to generation without a religious basis. Such a conclusion defies not only the history of civilization in general, but also the history of the United States. The only major attempt to achieve a society without religion, the Soviet Union, collapsed from cultural decay in 1989.\textsuperscript{33} If a public school system, totally devoid of religious training, is viewed as the chief means by which American culture is transmitted from generation to generation, as the Supreme Court supposes, then Christians and Jews will have been proven wrong in their 4000 year old claim that “man shall not live by bread alone, but by every word of God.”\textsuperscript{34}

This Article will illustrate how current Establishment Clause jurisprudence, which seeks to micro-manage the interaction of public schools and religion, prevents the educational establishment from coming to grips with American society’s religious character and fosters disrespect by denying the law’s dependence on religion as a justification for its authority. Indeed, the religious foundation of the doctrine of church-state institutional separation and the support the religious community has given that doctrine are generally ignored. Recognition of the historical dependence of law on religion should preclude a jurisprudence that permits government to monopolize education (an essentially parental function which traditionally includes a strong religious component), expels the religious component from education under the guise of fulfilling a Constitutional mandate designed to protect religion, and then claims that the public school is the chief means of fulfilling the nation’s destiny. This Article will suggest that permitting voluntary, parentally controlled religious instruction, as was the case for fifty years preceding \textit{McCollum}, offers the promise of releasing the religious expression inherently present in the educational process, thus giving full respect to the dignity and diversity of the cultural and religious heritages present in American culture.

\textsuperscript{33} See Pope John Paul II’s 1991 encyclical, \textit{Centesimus Annus}, in \textit{Origins: CNS Documentary Service}, May 16, 1991, Vol. 21: No. 1 at 1, in which he claims that communism’s basic flaw was that it denied the nature of persons reflected in the Christian belief that mankind was created in the image of God and that an essential part of that image is a degree of economic freedom. The Pope lived in communist Poland until his elevation to the papacy. \textit{Id.} at 6.

\textsuperscript{34} \textit{Luke} 4:4 (King James). See also \textit{Deuteronomy} 8:3 (King James). Catholic scholar John Courtney Murray reached a similar conclusion in 1948 regarding the Court’s view of the public school when he said, “It exists, supposedly, in order to promote democracy. Yet it is constitutionally forbidden to promote those religious beliefs which are foundations of democracy.” John Courtney Murray, \textit{A Common Enemy, A Common Cause}, FIRST THINGS, Oct. 1992, at 35.
PART A: Law, Culture, and Religion

1. Introduction to PART A.

If American society is as overwhelmingly involved in religion as many people have suggested, how has it come about that this society is attempting to educate its children in an environment sanitized against religion? To answer this question we must look to the ground from which our culture and law developed.

Doctrines of government, culture, and law are more than the decision of the lawgiver. They represent fundamental values, transmitted from generation to generation, held by a people and reflected in their culture. Whether the government should determine which values are transmitted is, of course, an important question. However, it is largely a moot question, since, by accepting responsibility for the education of the young, government dominates the institution that the Supreme Court credits as being “the very foundation of good citizenship [and] a principal instrument in awakening the child to cultural values . . . and in helping him to adjust normally to his environment.”

The wellsprings of our legal system and culture must be explored to determine whether, and the extent to which, religion can be shown to be a private or a public matter. The education of the child will determine the future of the country, or in the Supreme Court’s parlance, “our common destiny.” Whether that future is prosperous and whether liberty is maintained will depend largely upon how religion and government resolve the conflict involving the nature of elementary and secondary school education. In the process of examining these points, the following questions must be addressed:

1. Can a democratic government be maintained without the support of a commonly acknowledged religious value system?

2. Can a religious value system be established and maintained without involving the educational system at the elementary and secondary levels?

35. Tocqueville stated: “Upon my arrival in the United States, the religious aspect of the country was the first thing that struck my attention; and the longer I stayed there the more did I perceive the great political consequences resulting from this state of things, to which I was unaccustomed.” ALEXIS DE TOQUEVILLE, DEMOCRACY IN AMERICA in SYDNEY E. AHLSTROM, A RELIGIOUS HISTORY OF THE AMERICAN PEOPLE 386 (1972).

3. Do the Supreme Court decisions under the First Amendment Establishment Clause prevent the state and local governments from accommodating the teaching of a religious value system as part of the regular educational program in the elementary and secondary schools?

While definitive answers to these questions are not possible, this Article will argue that a general religious agreement as to the nature of a moral and just society is necessary in order to support a democratic government. Democratic government that is built on the consent of the governed and that promotes individual freedom depends on a population that voluntarily and continually submits to the law of the land; this submission must be out of a personal conviction rather than out of a fear of reprisal from the lawgiver. Further, the public school system, charged with educating ninety percent of the school children in the United States and built on the premise that religious training is unnecessary to the educational process, cannot be expected to infuse the degree of commitment and civic responsibility required to maintain a democratic government. Finally, numerous Supreme Court decisions have sought to enforce a strict separationist view of the Establishment Clause, particularly with respect to situations involving elementary and secondary schools, thereby promoting the secularization of the educational system.

2. Religion Determines Culture

The history of the United States is the history of a people struggling to achieve religious aspirations. Therefore, an American culture void of religious expression, as the school system is expected to transmit, is a contradiction in terms. Tocqueville saw the United States as a county where religion was a part of every public act.\(^3\)\(^7\) The culture of a society underlies its law and structure of government, and law is only important to the extent it relates to the people with which it interacts. "The words *culture* and *cultivate* share the same root, *cultus*, and . . . this Latin word

\(^{37}\) Tocqueville stated:

Religion in America takes no direct part in the government of society, but nevertheless it must be regarded as the foremost of the political institutions of that country; for if it does not impart a taste for freedom, it facilitates the use of free institutions. [I] am certain that they hold it to be indispensable to the maintenance of republican institutions. This opinion is not peculiar to a class of citizen or to a party, but it belongs to the whole nation, and to every rank of society.

Tocqueville, *supra* note 35, at 386.
derived from the verb, *colere*, that meant both to worship and to till the soil." Russell Kirk notes that:

In the beginning culture arises from the cult: that is, people are joined together in worship, and out of their religious association grows the organized human community. Common cultivation of crops, common defense, common laws, cooperation in much else--these are the rudiments of a people's culture. If that culture succeeds, it may grow into a civilization.38

To consider the impact of religion on American culture and law, the work of well known sociologist Robert Bellah must be examined. In his book, *The Broken Covenant*,40 Bellah explores the Puritan view of "covenant," around which the cultural heritage of America developed. Bellah is concerned with the implications of that concept on law; he contrasts the original religious concept of government in the colonies with the current utilitarian view of government. He concludes that the loss of religious commitment has caused a crisis in identity:

[T]he liberal utilitarian model was not the fundamental religious and moral conception of America, open as the latter was in certain directions to the development of that model. That original conception, *which has never ceased to be operative*, was based on an imaginative religious and moral conception of life that took account of a much broader range of social, ethical, aesthetic, and religious needs than the utilitarian model can deal with.41

Bellah goes on to warn of the grave situation being faced at the end of the twentieth century:

Without arguing for the literal revival of that earlier conception, I hope to show that only a new imaginative, religious, moral, and social context for science and technology will make it possible to weather the storms that seem to be closing in on us in the late 20th century. I am convinced that the continued and increased dominance of the complex of capitalism, utilitarianism, and the belief that the only road to truth is science will rapidly lead to the destruction of American

---

39. RUSSELL KIRK, AMERICA'S BRITISH CULTURE (1993), quoted in Beisner, supra note 38, at 104.
40. ROBERT N. BELLAH, THE BROKEN COVENANT (2d ed. 1992). The following discussion relies heavily on this work.
41. Id. at xxi (emphasis added).
society, or possibly in an effort to stave off destruction, to a technical
tyrranny of the "brave new world" variety.\textsuperscript{42}

In colonial times, the culture, institutions, form of government, and Constitution of the United States were deeply rooted in the religious heritage.\textsuperscript{43} Adopting Rousseau's term "civil religion," Bellah traces the history of the country from its first settlements. He develops the religious (Biblical) motifs which have been used to shape the country's history and bind its people together in a common destiny. From the standpoint of the American myth, he considers the period from the Declaration of Independence to the inauguration of George Washington as the "origin time of the nation." He points out that our bicentennial celebration commenced in 1976, commemorating the Declaration of Independence, rather than in 1789, commemorating the adoption of the Constitution. The adoption of the Declaration of Independence was the crucial date that effectively bound the people together in the act of revolution. The Declaration contains the following four direct religious references:

1. It refers to the "Laws of Nature and of Nature's God."\textsuperscript{44}
2. It states that "all men are created equal, that they are endowed by their Creator with certain inalienable Rights."\textsuperscript{45}
3. It appeals to the "Supreme Judge of the world for the rectitude of our intentions."\textsuperscript{46}
4. It states a "firm reliance on the protection of divine Providence."\textsuperscript{47}

This civil religion is strongly engraved on the American Conscience. George Washington could be viewed as the American Moses leading the American Israel through the wilderness of the revolutionary war. If such a thought seems far-fetched, consider Jefferson's words in his second inaugural address:

I shall need, too, the favor of that Being in whose hands we are, who led our fathers, as Israel of old, from their native land and planted them in a country flowing with all the necessaries and comforts of life.\textsuperscript{48}

\textsuperscript{42} Id.
\textsuperscript{43} Id. at 3. See also supra note 50.
\textsuperscript{44} THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).
\textsuperscript{45} Id. at para. 2.
\textsuperscript{46} Id. at para. 23.
\textsuperscript{47} Id.
\textsuperscript{48} THE COMPLETE JEFFERSON 414 (Saul K. Padover ed., 1943,) cited in BELLAH, supra note
Or consider Lincoln's second inaugural address:

If we shall suppose that American slavery is one of those offenses which, in the providence of God, must needs come, but which, having continued through His appointed time, He now wills to remove, and that He gives to both North and South this terrible war as the woe due to those by whom the offense came, shall we discern therein any departure from those divine attributes which believers in a living God always ascribe to Him? Fondly do we hope, fervently do we pray, that this mighty scourge of war may speedily pass away. Yet, if God wills that it continue until all the wealth piled by the bondsman's two hundred and fifty years of unrequited toil shall be sunk, and until every drop of blood drawn with the lash shall be paid by another drawn with the sword, as was said three thousand years ago, so still it must be said "the judgments of the Lord are true and righteous altogether."49

The Biblical motifs still stir the nation even into the late twentieth century, calling Americans to their highest vision. Recent examples include Martin Luther King's speech in 1968, when he placed himself in the character of Moses, seeing the Promised land from afar, yet knowing he will not enter it personally.50 King was convinced that African Americans would one day join hands with white Americans in that land.51 President Clinton tapped the Biblical motif with the phrase "Where there is no vision, the people perish"52 in his acceptance speech at the Democratic National Convention in 1992.53 He began to develop the theme of a "new covenant" for his campaign, which is also a common Biblical theme. Furthermore, national holidays, such as Memorial Day,
remind the people to rededicate themselves to the national vision by remembering the sacrifices that were made to establish freedom of the country. Religion has had a profound, if not determining, effect on American culture and, ultimately, its legal system.

Yet, the author Bellah is troubled. He suggests that the Constitutional aspirations of equality and justice have never been fully achieved, and calls for a renewal of the efforts to achieve them. Bellah warns that such aspirations are never achieved without strong religious commitment and support. In the late twentieth century, the disintegration of the religious influence in society has reached uncontrollable proportions. As a result, he predicts a crisis in America. The dimensions of that crisis will be discussed, but first the subject of religion will be taken up. The question will be asked, is religion important to law?

3. Religion and Law Interact

Religion is crucial to the ability of a free society to "establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity." Government can be effective in only two ways: government will enforce its decrees either by external force (i.e. the force of reason or the sword) or by the internal control of the conscience (i.e. enforcement by reliance on the good will and willingness of the people to follow its mandates). But what does it take to develop such good will and willingness, and how is it instilled in a citizenry?

Prominent comparative law scholar and legal historian, Harold Berman analyzes the historical context in which the Western legal

---

54. See BELLAH, supra note 40, at 100-104. As examples of areas in which inequality and injustices still prevail, Bellah cites African-Americans, other minorities, and the poor. Id.
55. BELLAH, supra note 40, at 151.
56. Id. at 162.
57. Id. at 142 ("Today the American civil religion is an empty and broken shell.").
58. Id. at 85.
59. U.S. CONST. pmbl.
60. Jesus of Nazareth admonished his followers to "Give therefore unto Caesar the things which are Caesar's; and unto God the things that are God's." Matthew 22:21 (King James). In doing so he established the principle of governing primarily through conscience. George Washington acknowledged that the republican form of government adopted by the United States was fit only for a people controlled by conscience (meaning a religious people). President Washington, Farewell Address (Sept. 17, 1796), reprinted in SAFIRE, supra note 51, at 362 (1992).
61. Harold Berman is the Robert W. Woodruff Professor of Law at Emory Law School and the James Barr Ames Professor of Law, emeritus, at Harvard Law School. He is well known for his work in the area of comparative law.
tradition developed and grew principally through the interaction of law and religion. After describing this relationship, he expresses his concern that, due to the radical separation of law and religion in the western world, law will eventually lose its respectability.

In light of Berman’s prediction, it is necessary to determine the role religion has played in the development of the Western legal tradition, the American legal tradition in particular. If that tradition is built on a religious foundation, it will be necessary to assess the extent to which religion has influenced law, and to determine whether such a foundation must be maintained. It is generally acknowledged that, in the twentieth century, jurisprudence has moved away from any religious foundation and toward a reliance on decisions of the law giving bodies. Religion has been privatized and radically separated from the public forum and decision-making apparatus of government. Nevertheless, if religion is a vital component in the resolution of society’s problems, it may be necessary for the public school system to serve as a vehicle to facilitate religious value training. If so, then the Supreme Court’s Establishment Clause decisions may be implicated.

a. The American Legal System

Western law developed out of the Christian heritage. Initially, it is important to recognize that the distinctive features of the Western legal tradition originated around 1075 with the Gregorian Revolution of 1075-1122. The Revolution made it possible for the Roman Church to create a separate corporate, hierarchical church, independent of the secular authorities and subject only to the Bishop of Rome. Within

63. Id. at 73-76.
64. The doctrine of religious liberty embodied in the First Amendment is a prime example of a governmental principle which was as much the product of theologians as lawyers and philosophers. See also infra note 75 and accompanying text.
65. Such features include, among others, the belief in the capacity of law to grow, the supremacy of law over political authorities, and the plurality of coterminous jurisdictions. See HAROLD J. BERMAN, LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION 9-10 (1983).
66. INTERACTION, supra note 62, at 57. Prior to that time the relationship between the secular and the sacred had been overlapping. Id. This was true throughout the Holy Roman Empire, which was inaugurated in 800 A.D. with the crowning of Charlemagne. S.M. HOUGHTON, SKETCHES FROM CHURCH HISTORY 32 (1980).
67. This event is also known as the “investiture controversy” because it involved the assertion of church authority to appoint church officials as against secular rulers. Berman states:

859
the church, a systematized body of law developed including criminal law, family law, inheritance law, property law, and contract law. This early system of law formed the common foundation, or more specifically a common language, of Western law.

The next major influence on the development of Western law was the Protestant Reformation and its belief in the power, indeed duty, of the individual to create new social organizations. Protestant thought was expressed in Lutheran and Calvinistic forms. Of particular importance for English and American law was the Calvinistic form of Protestantism. The Puritans in particular asserted a duty of Christians to reform the world and in carrying out this duty, incurred the hostility of the English crown. The Puritans' resistance "laid the foundations for

---

subordinate to the absolute monarchical authority of the bishop of Rome. . . . It led to the creation of a new kind of law for the church as well as new kinds of law for the various secular kingdoms.

INTERACTION, supra note 62, at 56.

68. Id. at 58. Berman states:

[There had been ecclesiastical canons long before . . . . However, there was no systematized body of ecclesiastical law, criminal law, family law, inheritance law, property law, or contract law, such as was created by the canonists of the twelfth and thirteenth centuries. The canon law of the later Middle Ages, which only today, eight centuries later, is being called into question by some leading Roman Catholics themselves, was the first modern legal system of the West and it prevailed in every country of Europe.

Id. at 57-58. Berman further observed:

The success of the canon law stimulated secular authorities to create their own professional courts and professional legal literature, to transform tribal, local, and feudal custom, and to create their own rival legal systems to govern feudal property relations, crimes of violence, mercantile transactions, and many other matters.

Id. at 59.

69. As stated by Berman:

The key to the renewal of law in the West from the sixteenth century on was the Protestant concept of the power of the individual, by God's grace, to change nature and to create new social relations through the exercise of his will. The Protestant concept of the individual will became central to the development of the modern law of property and contract.

Id. at 64-65.

70. INTERACTION, supra note 62, at 66.

71. The Calvinistic form included English Puritans, Scotch Presbyterians, and Dutch Reformed. Their influence was felt in the colonies of the new world in the seventeenth century. This Article does not explore the nuances between these sects, but focuses more particularly on the influence of English Puritans. See infra note 72.
the English and American law of civil rights and civil liberties expressed in their respective constitutions.

From the mid-sixteenth century through the seventeenth century, Calvinist theologians labored to develop the concept of covenant as an organizing principle of all human and divine relationships. The covenant idea was used to unify the two testaments (covenants) of the Bible and to develop the concepts of ecclesiastical, civil (e.g. marriage, government) and other appropriate relationships. Marriage is an example of the application of religious covenants to society. In 1525 one of the reformers "spoke of marriage as 'a most holy covenant' and perhaps inaugurated the great change in marriage theology which came when covenant replaced sacrament as the determinative element of marriage thought." This shift to a covenant emphasis view of marriage elevated the status of marriage and the family, but also introduced the possibility of divorce.

Puritan literature also demonstrates an intense interest in the relationship of religion to government. Puritans were notorious for

72. INTERACTION, supra note 62, at 67. According to Berman:

[The Puritans] added two new elements: first, a belief in the duty of Christians to reform the world . . . and second, a belief in the local congregation, under its elected minister and elders, as the seat of truth . . . . As the early Christian martyrs . . . the seventeenth-century Puritans . . . by their open disobedience to English law laid the foundations for the English and American law of civil rights and civil liberties as expressed in our respective Constitutions: freedom of speech and press, free exercise of religion, the privilege against self-incrimination, the independence of the jury from judicial dictation, the right not to be imprisoned without cause, and many other such rights and freedoms. We also owe to Calvinist congregationalism the religious basis of our concepts of social contract and government by consent of the governed.

Id. at 66-67.

73. For most law students, the concept of covenant is unknown. Nevertheless, early religious covenants were used as a model for civil covenants under which communities in the American colonial period operated. Examples are the Mayflower Compact of 1620 and the Pilgrim Code of Law of 1636. The latter, which incorporates the Mayflower Compact and the colonial grant from the King of England, added a description of political institutions and became the first constitution in the colonies. Consider that, by 1636, John Locke was only four years old.


[T]he heavy covenant emphasis on consent -- '... the partners must throughout their life together continually renew their consent' -- broke the indissolubility based on the sacramental view and opened the door to divorce once consent failed, as in the cases of adultery or willful desertion. It also reversed the traditional order of marriage purposes by emphasizing Genesis 2:18. Procreation, remedy for sin, and mutual society became mutual society, procreation, and remedy for sin. The family created by the marriage covenant was "welded . . . into a solidarity in Christ: through the Covenant of Grace's baptismal formula -- "to you and to your children"; and since the Church and State were considered to be composed of families rather than individuals, it became "the clearinghouse through which revisions in other institutions were mediated.

861
advocating personal liberties against the English Crown. This advocacy provided an impetus for the development of such basic civil rights concepts as the privilege against self incrimination and the right to be free from ex post facto acts.  

The concept of "religious liberty" and its offspring, the doctrine of separation of church and state, developed out of a gradual maturing of covenant thought during the seventeenth century. Puritan Roger Williams (1603-1683) had established religious liberty in the Rhode Island colony by the mid-seventeenth century. He believed that religious liberty was necessary to protect the church from the encroachments of government. Is it possible that Roger Williams, operating from a Christian perspective, is the intellectual father of the First Amendment? Many consider John Locke to be the intellectual source of the religion clauses in the Constitution. However, Locke received his ideas from Puritan sources, which he arguably did not credit because English society after the Revolution of 1689 was no longer receptive to Puritan thought.

75. As stated by Berman:  
[The Puritan] experience . . . was . . . crucial . . . in the development . . . of constitutional principles of civil rights . . . . They asserted a right to refuse to testify against themselves in criminal proceedings, and a right not to be prosecuted for an act that had not previously been declared to be criminal. They objected to excessive bail, excessive fines, cruel and unusual punishments, the presumption of guilt, the subjecting of the jury to the will of the judge, royal interference in adjudication, and torture. They objected to these on principle: first, that they were against the will of God; second, that they violated "the ancient constitution," the common law of former times—that is, before the Tudor-Stuart monarch had assumed supremacy over the church. Harold J. Berman, Law and Belief in Three Revolutions, 18 VAl. U. L. Rev. 569, 606-07 (1984), reprinted in FAITH AND ORDER: THE RECONCILIATION OF LAW AND RELIGION 83, 118-19 (1993).

76. This is the preferred term because it focuses on the true purpose of the doctrine, which is to protect religion.

77. Butler, supra note 74. Dr. Butler develops the relationship between religious liberty and seventeenth century covenant theology. He posits that as covenant theology developed, the religious view of the church/state relationship developed from one of intolerance (John Calvin, Theodore Beza, Samuel Rutherford, and John Cotton - stressing religious unity) to toleration (John Owen, Philip Mornay, Johannus Althusius, and John Selden - stressing religious peace) to religious liberty (John Goodwin, Roger Williams, Henry Vane the Younger, and Richard Overton - stressing religious purity). Id. at v-vi.

Where did Locke derive his political ideas? With regard to his general political principles one need not look far. They were being shouted from the housetops during the years he was at Westminster and Oxford, and they had been explicated again and again by the sons of Geneva with whom he was in contact throughout his life . . . .  

[Puritan] thinking is familiar to anyone who has read Locke's Letter concerning Toleration, for Locke did no more than restate the argument that had been fashioned by Independent
COMETH THE REVOLUTION

The standard law school curriculum gives students a basic familiarity with Western legal tradition from the time of the Constitution, but often conveys the impression that religion played little or no part in the process of drafting the Constitution or the Bill of Rights. Justice Brennan, in his lengthy concurring opinion in Schempp, refers to Locke, Jefferson, and Roger Williams as the sources of our ideas of religious liberty. Jefferson however, relied on Locke, and Locke on Williams. Therefore, religious liberty was the flower of Christian thought which bore fruit, in part, through the actions of nonbelievers. As stated by Justice Brennan:

When John Locke ventured in 1689, "I esteem it above all things necessary to distinguish exactly the business of civil government from that of religion and to settle the just bounds that lie between the one and the other," he anticipated the necessity which would be thought by the Framers to require adoption of a First Amendment, but not the difficulty that would be experienced in defining those "just bounds."

It has rightly been said of the history of the Establishment Clause that "our tradition of civil liberty rests not only on the secularism of a Thomas Jefferson but also on the fervent sectarianism . . . of a Roger Williams."

divines. . . . The parallels with the thought of Roger Williams, however, are so close that it is not an entirely implausible conjecture to suggest that Locke's major contribution may have been to reduce the rambling, lengthy, and incoherent exposition of the New England "firebrand" to orderly, abbreviated, and coherent form. Beyond a differing emphasis and concern, it is impossible to discover a single significant difference between the argument set forth by Williams and that later advanced by Locke. They scarcely differ even in the details of its practical application.


80. See David Little, Roger Williams and the Separation of Church and State, in Religion and the State: Essays in Honor of Leo Pfeffer 3, 7 (J. Wood ed., 1985) (suggesting that Locke's ideas were developed by Puritan Independents like John Milton, John Owen, John Goodwin, and Henry Stubbe, as well as Roger Williams).

81. Few Christians today adhere to the doctrine of predestination as held by such theologians as Augustine, Martin Luther, John Calvin, Jonathan Edwards and others. Nevertheless, the doctrine of predestination was the foundation upon which Roger Williams built his doctrine of religious liberty. See Little, supra note 80, at 12. Little shows how the influence of Roger Williams mediated through John Locke to Thomas Jefferson and through Baptist political activist Isaac Backus into the thought of Revolutionary America. Id. at 7-16.

82. Schempp, 374 U.S. at 231.

83. Id. at 259-60 (citing Freund, The Supreme Court of the United States 84 (1961)).

863
In crediting Williams and Locke, it is also proper to credit French lawyer turned theologian, John Calvin, a major contributor to the concept of the modern state with its system of representative government and individual liberties. Calvin's program for the civil state in Geneva, which began in 1536, was the experiment that fired the flames of liberty in England, Scotland, Holland, and, ultimately, New England. At the time of Calvin's arrival in Geneva, that city was much like other protestant cities. The religious reforms introduced by other reformers (e.g., Martin Luther in Germany and Ulrich Zwingli in Switzerland) did not include the establishment of an organized church, and the Roman Catholic Church still maintained the medieval theory of the supremacy of the church over the state. Into this void stepped John Calvin, with a desire to develop consistent theories of church and state that would acknowledge God as sovereign, as well as the power of government mediated through the people and for the benefit of the people. He established a representative government responsive to the people, yet subject to the written standards of the Word of God and the contracts (e.g., covenants and constitutions) between the people and government institutions. In this way the church government could serve as a check against arbitrary power. Coupled with Calvin's insistence on the independence of the church from civil authorities, this balance formed the model that could be used as a standard for civil government.

84. Calvin, of course, developed many of his concepts from the work of others. See BELLAH supra note 40, at 17.
85. See Herbert Foster, Calvin's Programme for a Puritan State in Geneva, 1536-1541, HARV. THEOLOGICAL REV. (1908), reprinted in, COLLECTED PAPERS OF HERBERT D. FOSTER 30-76 (privately printed, 1929) [hereinafter Calvin's Programme].
86. Id. at 43. Foster quotes a German scholar who made the following observation of Luther: "Luther, when he had preached and sowed the seed of the Word, left to the Holy Spirit the care of producing the fruit, while with his friend Philip he peacefully drank his glass of Wittenberg beer."
87. It is unfortunate that Calvin's contribution to republican government and other areas is overshadowed by his involvement in the execution of Michael Servetus, an individual who spread non-Trinitarian doctrine in Geneva. Prior to coming to Geneva, Servetus had barely escaped the executioner in France for his beliefs. One can only regret that John Calvin's thinking was not ahead of his time on this important subject as it was in so many other areas.

Calvin's ardent followers included New England's Roger Williams, as well as Scotch Presbyterians who flooded the Colonies in the early eighteenth century and provided strong support for non-establishment of religion as well as for principles of representative government. See, e.g., Samuel W. Calhoun, Conviction Without Imposition: A Response to Professor Greenawalt, IX J. LAW & RELIG. 293-98 (1992). See also JOHN CALVIN, INSTITUTES OF THE CHRISTIAN RELIGION in THE FOUNDERS' CONSTITUTION 44-45 (P. Kurland & R. Lerner eds., 1987) (discussing the role of civil and ecclesiastical bodies). For Clavin's classic statement on resistance to tyranny through people's representatives, see John Calvin, Institutes of the Christian Religion IV, xx, 31, noted in Calvin's Programme, supra, note 85, at 77.
COMETH THE REVOLUTION

Through Locke there filtered to the American Revolution five points of political Calvinism held by hundreds of Calvinists, but clarified through his *Civil Government*: fundamental law, natural rights, contract and consent of people, popular sovereignty, resistance to tyranny through responsible representatives. 88

It is not asserted that Locke, or even the Calvinists, were not influenced by other sources. Indeed, Calvinists did not claim that their ideas were fully original. 89

Religious sources have had a profound effect on the Western legal tradition. Thus, when a school system places religion in a second class status, it ignores the deep historical roots of the American experience. Even Rousseau, in his *Social Contract*, reflects an understanding of Calvin's contribution. Rousseau, a child of Geneva, stated:

> Those who consider Calvin only as theologian fail to recognize the breadth of his genius. The editing of our wise laws, in which he had a large share, does him as much honor as his *Institutes*. Whatever revolution time may bring in our religion, so long as the love of country and liberty is not extinct among us, the memory of this man will be held in reverence. 90

Calvin wed religion to morality and the result was good government, freedom, prosperity, and social consciousness. From the absolute sovereignty of God over all men, Calvin deduced man's moral obligation to society, and a consequent devotion to production and public service as part of his service to God. 91 The impact of Calvin's Geneva experiment


89. Herbert Foster noted:

> [Calvinists] built upon the past; but they "took the next step," possibly the most distinguishing contribution of Calvinism. Ancient and medieval writers had taught fundamental law, natural rights, contract, sovereignty of the people, obedience to God rather than man. Each of these teachings Calvinists carried into active resistance through law representatives following a "calling," ordained of God and responsible, not to "God and the Church," but to "God and the people." With a possible exception on this point, the contribution of Calvinism was not in origination, but in (1) carrying theories to logical conclusions; (2) tying them all together into a workable system; (3) developing the type of people capable of putting them into practice; (4) demonstrating that their principles work successfully in practice.

Id. at 176-77.

90. Herbert Foster, *Liberal Calvinism; the Remonstrants at the Synod of Dort in 1618*, HARV. THEOLOGICAL REV. (1923), reprinted in COLLECTED PAPERS OF HERBERT D. FOSTER 114 (privately printed, 1929) [hereinafter *Liberal Calvinism*].

91. See id. at 115. Foster credits Calvin with taking a significant step which opened the door
carried into the colonies of America. Edmund Burke in 1775 reminded Parliament that the colonists in America were Englishmen who loved their liberty.\textsuperscript{92} Connecting the English love of freedom with Calvin, historian, Winthrop Hudson, stated:

While the "love of freedom" had deep and ancient roots in English society, it had been nurtured and transformed into a "fierce spirit of liberty" during the first half of the seventeenth century when the religious issue had come to the fore and had become inextricably intermingled with the liberties of Englishmen. During the course of the constitutional struggle in England it became evident to the participants that certain theological convictions had definite political implications, . . . .

Burke described [Calvinistic Protestants] as "the most adverse to all subjection of mind and opinion." . . . It has been said of the early Calvinists that they feared God so much that they could not fear any man, be he king or emperor. . . . When John Knox informed Queen Mary that "right religion takes neither origin nor authority from

to the development of capitalism by refocusing the church's understanding of usury as follows:
Two examples will illustrate this. Calvin's epoch-making teaching that interest-taking was lawful and that "ydle money is altogether unprofitable," quoted, translated, and applied by his followers, and reinforced by his teaching of "calling," resulted in the extension of credit in the great Calvinistic trading peoples, Scotch, English, Dutch, and American colonists, and in their enormously increased economic power of production. It was illustrated more fully in the teachings regarding Sunday and "calling." Man must not merely rest on Sunday, but must do so in order that he may, like Master-workman work six days in the week, and "do all his work" in "that estate and calling which it shall please thee to ordain," where, "however humble his calling, each man can make his best contribution to the Kingdom of God." Boys and girls brought up on such prayers from Calvin's Catechism become social assets rather than social liabilities. On going to work they were taught to pray: "May we faithfully follow our estate and calling in pursuit of thy ordinance rather than in satisfaction of our ambition to enrich ourselves; yet if it shall please thee to make our labour to prosper, grant us the good-will to come to the aid of those in want, according to the power which thou hast given us."

\textit{Id.} See also \textsc{Eugen Von Bohm-Bawerk}, \textsc{Capital and Interest}, V-I at 18-19 (reprinted 1959) which sets out the theological arguments of religious reformer John Calvin and the legal arguments of French jurist Dumoulin (Carolus Molinaeus) against the cannonistic prohibition against interest taking.

92. \textsc{Winthrop S. Hudson}, \textsc{Religion in America} 83 (1965). Burke articulated this observation as follows:

\textit{England, Sir, is a nation which still I hope respects, and formerly adored, her freedom. The colonists emigrated from you when this part of your character was most predominant; and they took this bias and direction the moment they parted from your hands. They are therefore not only devoted to liberty, but to liberty according to English ideals, and on English principles. The Founders' Constitution, supra note 87, at 67.}
COMETH THE REVOLUTION

worldly princes but from the eternal God alone" and then told her that subjects therefore must not "frame their religion according to the appetite of their princes," he was speaking in the accent that was familiar to all sons of Geneva. . . .

Puritan political thought . . . reshaped the English constitution through the ordeal of civil war and became so deeply rooted in the consciousness of Englishmen [that] Defenders of the royal prerogative had few doubts as to the source of the rebellious and seditious notions of the time. . . . And in 1663 Robert South repeated the charge, saying: "In our account of the sons of Geneva, we will begin with the father of the faithful (faithful, I mean, to their old antimonarchical doctrines and assertions), this is, the great mufti of Geneva"--John Calvin.

Carrying the argument a step further, we see the impact of Puritan political thought in the colonies where Christians and Deists could find common ground in the cause of the revolution because the ideas emanated from common sources. A continuing and serious examination of the Western experience, particularly the religious sources of this experience, is crucial for the maintenance of freedom as it is currently known.

A further understanding of religion's impact on law in America is gleaned by looking at the history of governmental covenants. Many early state constitutions (often called charters) were reaffirmed in 1776,

93. HUDSON, supra note 92, at 84.
94. Id. at 85-86.
95. Winthrop Hudson stated:
The alliance of Christians with Deists [e.g. Washington, Jefferson, Franklin, Paine] in carrying forward the Revolution was not as strange as it may seem to be, for Deists did little more than appropriate Puritan political ideas. English Puritans as early as the 1640's had made a distinction between the realm of nature and the realm of grace, between natural revelation and special revelation. . . . Christians had no difficulty uniting with Deists for common political ends on the basis of the shared assumptions of "natural" religion. . . . William Penn (1644-1718), Algernon Sidney (1622-83), and John Locke (1632-1704) served as transmitters of Puritan political ideas to the Revolutionary generation.

96. See, e.g., Donald Kagan, Why Western History Matters, WALL ST. J., Dec. 28, 1994, at A-12 (reacting to a current controversy over the teaching of Western History at Yale University).
97. The age-old concept of covenant embodies the following principle:
the guarantee that the covenant requirements will be met and that the covenant promises will be fulfilled does not lie in any superior power that can and will force the parties to meet their mutual obligations, if need be, but only in the sacred character of the agreement and in the honor and faithfulness of the covenaining parties.

following the Declaration of Independence, with little change except the removal of references to the King (e.g. Connecticut, which readopted its 1662 Charter in 1776). The concept of federalism reflected in the relationship between state and national constitutions is built on the covenant idea. In fact the very word "federal" comes from the Latin "foedus," meaning covenant.

Early state constitutions influenced the content and structure of the Bill of Rights in the United States Constitution. Early state "political compacts" had two parts. The first portion contained a preamble and bill of rights; the second contained the constitution, or description of the governmental institutions being established. Before the adoption of the Bill of Rights in 1791, numerous colonial state constitutions contained bills of rights enumerating most of the rights currently found in the first ten amendments to the United States Constitution. Many of the colonial predecessors to the Bill of Rights contained marginal references to passages in the Bible that were thought to support such rights. It has been suggested that the Declaration of Independence is comparable to the first part of a colonial compact (containing an implied bill of rights on the basis of natural law), and the Constitution adopted in 1787 is comparable to the second part of that compact.

In addition to recognizing the religious basis of early state constitutions, it is important to note that the civil covenant, upon which the authority of civil government was founded, was limited to enforcing the duties between men as set forth in the Ten Commandments. Those duties included the commandments against murder, adultery, stealing, lying, and coveting as well as the duty to render respect for the established authorities.

98. Strict Separationist Robert Boston railed against the thought that the Declaration of Independence may have any current authority. He suggested that the only document of relevance is the Constitution with the amendments, and he pointed to the absence of any reference to God. See Boston, supra note 8, at 211.


100. Professor Siegfried Wiessner recently reconceptualized federalism on the basis of continuous consent as a technique of "allocating authority along the vertical axis of voluntarily entered-into and continually reaffirmed territorial communities." Siegfried Wiessner, Federalism: An Architecture for Freedom, 2 NEW EUROPE L. REV. 129 (1993).

101. See Lutz, supra note 99, at 22.

102. The material in this section is taken generally from Lutz, supra note 101.

103. For example, the Massachusetts Body of Liberties (1641) contained all but three of the twenty-eight rights enumerated in the first ten amendments to the Constitution. Lutz, supra note 101, at 39.

104. Id. at 35-40.

105. See Butler, supra note 74, at 258-60 (quoting Roger Williams, The Bloody Tenent Yet
Despite the influence of religious history and early state charters on the United States Constitution, their relevance is largely ignored in the study of constitutional law. Today, students of constitutional law begin their study with the 1787 document as though it came into being merely as the immediate creation of an enlightened group of men seeking to incorporate current thought. The religious history, or even the history of state constitutions, is seldom explored by law students.

b. The Virginia Experience

A continuing area of dispute in the interpretation of the Establishment Clause is the selection of the relevant historical background for interpreting the intentions of the Founders. Three positions have been advocated: (1) a complete wall of separation eliminating all cooperation between government and religion; (2) a restriction that prohibits only preferential aid; and (3) a restriction that prevents only a formal establishment of religion.106

The United States Supreme Court set the tone for Establishment Clause interpretation in *Everson v. Board of Education*,107 in which the Court applied the Establishment Clause against state action for the first time.108 The Court held that a state program which authorized local school boards to reimburse parents of children in public and private schools the cost of transportation was constitutional.109 Finding the program constitutional, Justice Black used the majority opinion to

---

107. 330 U.S. 1 (1947)
108. It is difficult to understand how the Court could incorporate the religion clauses into the Fourteenth Amendment and thereby make applicable to the states with hardly a comment, since the history of the Fourteenth Amendment gives no indication of the thought of disestablishing religion in the states. See Kurland, supra note 106, at 844-45. See also John S. Baker, Jr., The Establishment Clause as Intended: No Preference Among Sects and Pluralism in a Large Commercial Republic (1991), in EUGENE W. HICKOK, JR., THE BILL OF RIGHTS, ORIGINAL MEANING AND CURRENT UNDERSTANDING 47-48 (1991), in which the author argues that the question of incorporation is irrelevant to the question of original intent because the original intent was that the First Amendment only required that no preference be given to a particular sect.
109. The Court drew a line between "tax legislation which provides funds for the welfare of the general public and that which is designed to support institutions which teach religion." *Everson*, 330 U.S. at 14.
designate a strict separationist position. Justice Black utilized the history of disestablishment in Virginia as the ruling principle of interpretation in analyzing the Establishment Clause. Thomas Jefferson and James Madison were the prominent spokesmen of the Virginia tradition of strict separation. However, critics, including members of the Court, have challenged the Everson view of history, asserting that the Everson Court did not consider the proper historical background in interpreting the Establishment Clause.

110. A biographer of Justice Black noted that Black looked upon the result in Everson as a pyrrhic victory for those opposing his views of strict separation. ROGER NEWMAN, HUGO BLACK 363-64 (1994).

111. The Jeffersonian "wall of separation" has dominated Establishment Clause jurisprudence. However, Jefferson's views on religious liberty seem to focus on the liberty of opinion, and he has been criticized for failing to grasp the need for free exercise. See Hall, supra note 78, at 493, 497. Ultimately, Hall concludes that Madison is more in tune with the evangelical Roger Williams. Hall stated:

Although Madison's writings lack the evangelical fervor and profoundly Biblical orientation of Williams's tracts, they nevertheless share a common framework in which religion is protected because it is itself worth protecting and not simply banished from the public sphere to satisfy those like Jefferson who were bothered by any religion other than a mute and unseen one. The religious freedom envisioned by Madison was, like Williams's, a freedom at least in significant part for religion rather than a Jeffersonian freedom from religion. Moreover, Madison consistently recognized that freedom of religion had to embrace more than mere opinion, and even more than acts of worship.

Id. at 510. Madison's more enlightened view may be the result of his acquaintance with John Witherspoon. See M.E. BRADFORD, FOUNDING FATHERS, BRIEF LIVES OF THE FRAMERS OF THE UNITED STATES CONSTITUTION 44-45 (P. Kurland & R. Lerner eds., 1987).

112. That history centers on the efforts of Jefferson to disestablish the church in Virginia through a legislative act to prevent use of tax funds to support religious teachers. Everson, 330 U.S. at 11-12. So strong was the Court's reliance on the Virginia experience of Jefferson and Madison that the Court felt comfortable using the Jeffersonian metaphor, taken originally from Roger Williams, of a wall of separation. The metaphor appeared in a letter written fourteen years after the Bill of Rights was adopted. See id. at 16.

113. See Baker, supra note 108, at 41.

114. See Justice Rehnquist's attack on the Everson reliance on Jefferson's "wall of separation" in his dissent in Wallace v. Jaffree, 472 U.S. 38, 106-107 (1985) (Rehnquist, J., dissenting), in which he concludes that the Establishment Clause was designed to prohibit the establishment of a national religion, and perhaps to prevent discrimination among sects, but not as requiring neutrality on the part of government between religion and irreligion. Id. at 113-14.

Regarding the First Amendment religion clauses, Chief Justice Story stated that the "general, if not the universal sentiment in America was, that Christianity ought to receive encouragement from the state, so far as was not incompatible with the private rights of conscience, and the freedom of religious worship." 2 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 593 (1851) (footnote omitted). In the same volume, Story continued,

The real object of the amendment was, not to countenance, much less to advance, Mahometanism, or Judaism, or infidelity, by prosrating Christianity; but to exclude all rivalry among christian sects, and to prevent any national ecclesiastical establishment, which should give to a hierarchy the exclusive patronage of the national government.

Id. at 594.
From a historical perspective, the Supreme Court's reliance on a strict separationist view in *Everson* seems flawed. Since the First Amendment originally only applied to the federal government, the states were free to establish religions as well as schools based solely on religion. A glance at the beliefs of the majority of the Framers of the Constitution reveals their deep commitment to Christianity. Thus, had proponents of separatism proposed prohibiting the teaching of religion in schools by applying the amendment to the states, a sharp, extended debate would have undoubtedly resulted. However, a debate never took place because the proposal was not made. It seems evident that statesmen would not have seriously considered implementing an educational system based on the Supreme Court's premise in *Everson* that education at the primary and secondary level can be adequate without some element of religious instruction. This is particularly apparent when it is recognized that the impetus for universal education was the desire to educate people so they could read the Scriptures and become responsible and honest citizens. Education without religion was rare, and where secular education was suggested, training in personal virtue was the substitute for religion.

The Court recently concluded in *Lee v. Weisman* that Madison's opposition to a religious establishment did not rest solely upon its effect on non-adherents. According to the Court, a principle ground for Madison's view was that "[e]xperience witnesseth that ecclesiastical establishments, instead of maintaining the purity and efficacy of Religion, have had a contrary operation." The Court did not focus on Madison's reliance on the natural law principle that religious liberty, like other basic rights, is a gift of nature. Nor did the Court focus on Madison's appeal to the Supreme Lawgiver of the Universe to intervene to assist in the passing of the Remonstrance. It would be difficult to envision Madison, who appealed to God in the state legislature, as advocating an education that did not include a religious base.

116. See generally, 5 *The Encyclopedia of Education* 251-58 (Deighton ed., 1971). It is noted that the thought of permitting the national government to enter the field of education was rejected. "A federal policy for schools and even for a national university was briefly raised at the Constitutional Convention, but fear of centralized power, the prerogative of states' rights, and older colonial traditions of church sponsorship of schooling, together defeated arguments for a national educational design." *Id.* at 252.
118. *Id.* at 2657 (citing Memorial and Remonstrance Against Religious Assessments (1785), in 8 *Papers of James Madison* 301 (W. Rachal et al. eds., 1973)).
119. For a brief discussion of education in the colonies, see Kurland, *supra* note 107, at 853.
The Virginia experience with religious liberty was only a part of 150 years of debate and constitutional experimentation concerning religion and its relationship to the state before the adoption of the United States Constitution. Prior to Virginia’s experience, Pennsylvania had enjoyed 100 years of religious liberty during which the colony prospered amid great diversity. Subsequent to Virginia’s experience, a number of colonies enjoyed established churches. When Connecticut gave up its established church in 1818, Jefferson, then in retirement, was pleased. While non-establishment ultimately prevailed throughout the colonies, it was not by Constitutional mandate. Rather, non-establishment resulted from voluntary action of the states, which were left free to experiment in religious matters.

c. The Present Crisis

Man is religious by nature and one expression of his religion is through law. The early historian Plutarch wrote:

If you go through the world, you may find cities without walls, without letters, without rulers, without houses, without money, without theaters and games: but there was never yet seen nor
shall be seen by man a single city without temples and gods, or without prayers, oaths, prophecies, and sacrifices, used to obtain blessings and benefits, or to avert curses and calamities: nay I am of opinion that a city might be sooner built without any ground beneath it, than a commonwealth could be constituted altogether destitute of belief in the gods, or, being constituted, could be preserved.\textsuperscript{123}

Carl Jung, the founder of analytical psychology, also reached the conclusion that there is a religious function in the psyche of man that inevitably must be expressed.\textsuperscript{124} In contrasting the views of our intellectual forefathers, one may ask, "Where are the temples of the cultural elite today?" What has happened to the religious function of those who shape American culture? How can a society void of public interaction between law and religion enforce its laws?

In discussing the relation between law and religion, Harold Berman describes four qualities that characterize both the legal system and the religious beliefs of a people. These qualities, which are necessary for society to develop a respect for law, are ritual, tradition, authority and universality.\textsuperscript{125} They are essentially religious and impart a sense of sanctity and dignity to law and legal institutions. In return, law offers religion a sense of organization and structure through which religion expresses society's most fundamental religious values.\textsuperscript{126} By reflecting the religious nature of the people, law expresses the highest goals, values, and aspirations of society. In Berman's view, religion and law have

\begin{itemize}
\item \textsuperscript{123} Plutarch, \textit{Letter Against Colotes the Epicurean}, reprinted in \textsc{George Dana Boardman}, \textit{The Ten Commandments} 53 (1946). Where are the temples today? The religion of twentieth century man is science. Science and its sister, education, are looked to for solutions to all problems. Science has a theory of origins, evolution, which, although a theory of extreme speculation, is held to firmly and religiously. See \textsc{Phillip Johnson}, \textit{Darwin on Trial} (1991), in which law professor Phillip Johnson examines the evidence supporting Darwinian evolution and concludes that to believe in evolution theory is to do so in spite of a lack of evidence. Nevertheless, evolution has become the standard of scientific truth. Science offers an eschatology of a future solution to all problems as well as a present hope of immediate solutions. Hence, President Bush, in his 1990 State of the Union message to Congress, could state that "U.S. students must be the first in the world in math and science achievement." President George Bush, \textit{State of the Union Address} (Jan. 31, 1990) in \textsc{L.A. Times}, Feb. 1, 1990, at A19. Postmodern thought, however, with its emphasis on total relativeness, may threaten even the foundations of science.
\item \textsuperscript{124} He observed that adults in the second half of life fall ill (\textit{i.e.}, experience the meaningless of life) because they lose that which the living religions of every age have given to their followers. He concluded that these individuals cannot be truly healed without regaining their religious outlook on life. Jung did not, however, speak of any particular creed or membership of a church. \textsc{Carl G. Jung}, \textit{Modern Man in Search of a Soul} 229 (1933).
\item \textsuperscript{125} \textsc{Inter}action, \textit{supra} note 62, at 31-39.
\item \textsuperscript{126} \textit{Id.} at 77-105.
\end{itemize}
interacted in the Western World since the late eleventh and early twelfth centuries in such a way as to create the Western legal tradition.127

Today, with the radical separation of religion and law, a crises has developed which Berman calls a "crises of integrity."

According to Berman, law has degenerated into legalism, and religion, with its retreat from the public arena, has degenerated into pietism. Without a religious foundation, law's capacity to regulate society is in jeopardy. Professor Berman illustrated this point using the simple governmental function of protecting property:

To say, for example, that it is against human nature to tolerate indiscriminate stealing and that every society condemns and punishes certain kinds of taking of another's property is not the same thing as to say that there is an all-embracing moral reality, a purpose in the universe, which stealing offends. And when a society loses its capacity to say that--when it rests its law of property and of crime solely on its rational perception of human nature and of social necessity and not also on its religious commitment to universal values--then it is in danger of losing the capacity to protect property and to condemn and punish stealing.129

Compare Berman's statement with that of Professor Graeme Forbes of Tulane University:

Evidently, [Secretary of Education William Bennett] thinks there is an intimate relationship between our values and those of [the Judeo-Christian] tradition, but most of his former colleagues... would greet with derision the thesis that there is some conceptual or logical dependency of moral values or ethical principles upon the theological doctrines characteristic of the tradition. Stealing and killing are not wrong because God forbids them; presumably, God forbids them because they are wrong. The grounds of moral value do not lie in divine commands.130

127. Id. at 49-76.
128. Id. at 22-23, 143-44 n.1. See also BELLAH, supra note 40, at 142.
129. INTERACTION, supra note 62, at 39.
130. Forbes, Letter to the Editor, N.Y. TIMES, Aug. 27, 1985, at A22, reprinted in Norman Dorsen, The Religion Clauses and Nonbelievers, 27 WM. & MARY L. REV. 863, 871-72 (1986). The letter was the response of Professor Forbes to a statement by Secretary of Education William Bennett that "[o]ur values as a free people and the central values of the Judeo-Christian tradition are flesh of the flesh and blood of the blood." Id.
Professor Forbes goes on to credit the central values of a free society to the Enlightenment.131

However if Forbes’ view is erroneous, and Bennett and Berman are correct that law and basic values must be linked to religious precepts, profound questions arise in the areas of jurisprudence, constitutional law, theology, legal and religious history, sociology, and psychology. How strong is a legal system that rejects religious content if religion is a prerequisite for law to be respected? Can religions support and build respect for a system of law that protects abortion rights? Can contemporary American religion provide the foundation of support for a legal system that only reflects the view of corrupt politicians?

It is generally acknowledged that religion in America has become substantially a private matter without significant influence in government, business, law, or medicine. Conversely, religion played a crucial role in the Revolutionary War and the formation of constitutional government two hundred years ago (although a number of revolutionary leaders were advocates of the Enlightenment with its natural law emphasis).

Berman notes that this radical separation of law and religion has become more acute over the last forty years than at any other time in this country’s history.132 He suggests that law has become a mere pragmatic tool to achieve specific ends, and that this Enlightenment concept of separation and religion as private and psychological did not take root in America until the last forty years.133 For Berman, this radical separation of religion and law portents that law will no longer be respected.134 A purely instrumental theory of law becomes inefficient because, according to Berman, people will follow law voluntarily and willingly only when law is thought to be trustworthy, fair and a part of society.135 To expect compliance with law only when the enforcer is present is an inefficient method of law enforcement.136 Berman proves

131. Id. at 872. As stated by Professor Forbes:
Perhaps all Dr. Bennett meant was that in some historical or cultural way, the values that support the institutions of a free society are derived from the Judeo-Christian tradition. Among the central freedoms distinguishing free societies from their opposites are freedom of inquiry, of expression and tolerance of a variety of philosophical, religious and political outlooks. The idea that we owe such values to the Judeo-Christian tradition is ludicrous. We owe them to the Enlightenment.

Id.


133. Id. at 214-15.

134. Id.

135. Id.

136. Professor Berman explains:
his point that reliance on law as coercion is inefficient by looking at American cities today, where it is increasingly difficult to protect life and property. Laws cannot create fear where they do not create respect or a sense of perceived fairness. As a solution, Berman suggests that the separation of law and religion need not require a total separation of legal and religious values. This radical separation leads to perverse results in that it shields extreme cults from governmental inquiry, while preventing schools from openly and effectively transmitting the common culture.

In the past two generations the public philosophy of America has shifted radically from a religious to a secular theory of law, from a moral to a political or instrumental theory, and from a communitarian to an individualistic theory. Law is now generally considered to be simply a pragmatic device for accomplishing specific political, economic, and social objectives. This view of law, founded on utilitarianism, goes back to the Enlightenment. Prior to World War I, and even up to the Great depression, Americans as a people continued to believe that the Constitution and the legal system were rooted in a Covenant made with God by which this country was to be guided in its mission to be a "light to all the nations."

Likewise, it is only in the last two generations that the Enlightenment concept of religion as something wholly private and wholly psychological has come to dominate our discourse.

The radical separation of law and religion in twentieth century American thought creates a serious danger that law will not be respected. If law is to be measured only by standards of expediency, or workability, and not by standards of truth or rightness, then it will be difficult to enforce it against those who think that it does not serve their interests. Far more important than coercion in securing obedience to rules are such factors as trust, fairness, credibility, and affiliation. It is precisely when law is trusted and therefore does not require coercive sanctions that it is efficient.

Id. at 214-15 (footnotes omitted).

137. Berman stated:

Today this point has been proved in a negative way by the fact that in our cities that branch of law in which the sanctions are most severe--namely, criminal law--has been powerless to create fear where it has failed to create respect by other means. Today everyone knows that no amount of force which the police are capable of exerting can stop urban crime. In the last analysis, what deters crime is the tradition of being law-abiding, and this in turn depends upon a deeply or passionately held conviction that law is not only an instrument of secular policy but also part of the ultimate purpose and meaning of life.

LAW AND RELIGION, supra note 132, at 215-16. See also BELLAH, supra note 40, at 142.

138. LAW AND RELIGION, supra note 132, at 209. He further notes:

Increasingly, law has come to be seen not as a pointer or witness to the collective fulfillment of a higher aspiration and destiny but as an end in itself, the very purpose of our national existence, the ultimate bond of our unity as a people. We have come to believe in the Constitution for its own sake--to believe in the "free exercise" clause and the "establishment" clause for their own sake. We find legal neutrality in matters of religion to be convenient, and we know of no other principle that would be acceptable in a "pluralistic," that is, a first amendment, society. No other justification is thought to be needed.

The cult of self has already begun to have the effect both of gradually removing from public education and public discourse all references to traditional religion and of
Berman laments the possibility that the secular religion of America (e.g. scientific atheism, which claims not to be a religion) will push other religions from the public stage, resulting in the very persecution that it ascribes to other religions. The First Amendment alone does not safeguard our religious freedom; it is the First Amendment guarantee coupled with its original purpose of fostering a society in which political, legal, and religious values freely interact that safeguards our freedom.

Like Berman, Robert Bellah has pointed out that America's problems are essentially moral and religious. Bellah states:

If [America's] problems are, as I believe them to be, centrally moral and even religious, then the effort to sidestep them with purely technical organizational considerations can only worsen them.

It is one of the oldest of sociological generalizations that any coherent and viable society rests on a common set of moral understandings about good and bad, right and wrong, in the realm of individual and social action. It is almost as widely held that these common moral understandings must also in turn rest upon a common set of religious understandings that provide a picture of the universe in terms of which the moral understandings make sense. Such moral and religious understanding produce both a basic cultural legitimation for a society which is viewed as at least approximately in accord with them and a standard of judgment for the criticism of a society that is seen as deviating too far from them.

Bellah describes the synthesis of secular and religious sources in the American Constitutional system. Noting that both sources played a significant role, Bellah points to Jefferson's fusion of "laws of nature" gradually substituting its own jargon and ritual and its own morality and belief system.

Thus there is a danger that this new secular religion will, indeed, place all other religions in subordination to itself, inflicting on other the very mischief of which it complains.

Id. at 218. See also BELLAH, supra note 40, at 48.

139. Professor Berman, a prominent Soviet law scholar, is fully aware of the dismal record of atheistic governments to protect free expression, especially religious expression. The same can be said for the current Pope, John Paul II, who lived in, and resisted Communism in, Poland. See Centesimus Annus, supra note 33, at 9-12, where he describe the events of 1989 in terms of the Marxist denial of basic rights of workers and the spiritual void created by atheism which "deprived the younger generations of a sense of direction and in many cases led them, in the irrepressible search for personal identity and for the meaning of life, to rediscover the religious roots of their national cultures and to rediscover the person of Christ himself as the existentially adequate response to the desire in every human heart for goodness, truth and life." Id. at 10.

140. LAW AND RELIGION, supra note 132, at 219.

141. See BELLAH, supra note 40, at ix.
with "nature's god" in the Declaration of Independence. Bellah believes that this fusion, which was also reflected in republican formulas for civil compact and in the Puritan covenant, explains the "passion" and "reason" that produced the revolution and the constitution. For Bellah, revolution, with its religious furor, must be followed by the institutionalization of the revolutionary victory. The success of the American Revolution was institutionalized by the adoption of the Constitution. The same process was repeated at the time of the Civil War when the country moved to "institutionalize" that victory with the enactment of the Thirteenth, Fourteenth, and Fifteenth Amendments to the Constitution. At the time, Lincoln succeeded in imparting religious energy into the conflict. According to Bellah, the secret of the success of American government is that "[d]uring the American Revolution . . . the traditions of Protestant covenant theology and republican liberty were joined together, but the seam was still highly visible. By the time of the Civil War the fusion was complete, the garment seamless." Today, however, the unity and cohesiveness of

142. Id. As stated by Bellah:
The remarkable coherence of the American revolutionary movement and its successful conclusion in the constitution of a new civil order are due in considerable part to the convergence of the Puritan covenant pattern and the Montesquieuian republican pattern. The former was represented above all by New England, the latter by Virginia, but both were widely diffused in the consciousness of the colonial population. Both patterns saw society resting on the deep inner commitment of its members, the former through conversion, the latter through republican virtue. Both saw government as resting on law, which, in its positive form, was created by the active participation of those subject to it, yet ultimately derives from some higher source, either God or Nature. When Jefferson evoked at the beginning of the Declaration of Independence the "laws of nature and of nature's god" he was able to fuse the ultimate legitimating principles of both traditions. And when in concluding it he wrote, "And for the support of this declaration, with a firm reliance on the protection of divine providence, we mutually pledge to each other our lives, our fortunes, and our sacred honor," he was not only invoking a republican formula for the establishment of civil compact but echoing the formula of the Puritan covenant. Only the confluence of these two patterns can help us understand the fusion of passion and reason that, with such consistency, seems to have motivated the major actors in the revolutionary drama. (emphasis added)

143. Id. at 52. Bellah articulated:
I do claim that without those cultural and religious motives it is not possible to understand what has been called the Second American Revolution and its outcome in a new birth of freedom, partial and incomplete though that outcome, like the first one, was. Sidney Mead has argued that Abraham Lincoln is "the spiritual center of American history." Certainly in terms of the dialectic of covenant and chosenness. . . the Civil War, the event with which Lincoln is most closely identified, was a kind of culmination.

144. BELLAH, supra note 40, at 52-53. If Bellah is correct that a seamless web exists between
the society has broken down. It may be said that the covenant is broken, that the hopes and aspirations of the Civil War amendments have not been realized.

Bellah laments the loss of a sense of public virtue as a central principle of society, as well as the declining sense of personal obligation to one's occupation, family, and country. Moreover, he refuses to justify the unwillingness to impose moral obligations on one's self with the argument that basic institutions of society are unjust and serve the interests of a few at the expense of the many. Rather, Bellah identifies a paradox: "The declining sense of moral obligation, together with a heightened sense of distributive justice, may be partially explained by observing that both phenomena reflect the influence of the last remaining element of the common value system; individual freedom." Today freedom does not mean the freedom to do good but the freedom to pursue self-interest. Whether self-interest can provide a coherent morality for a viable society is open to doubt. Coupling several current phenomena together Bellah suggests:

> The complex of capitalism, utilitarianism, and science as a cultural form has its own world view, its own "religion" even-though it is an adamantly this-worldly one-and its own utopianism: the utopianism of total technical control, of course in the service of the "freedom" of individual self-interest.146

Bellah concludes, "The Pilgrim Fathers had a conception of covenant and of virtue which we badly need today." Earlier Biblical motifs do continue to mold society, at least in part, today. When successful, these motifs call people to a higher calling for which they willingly sacrifice, to paraphrase Jefferson, their lives, their liberty and their sacred honor.148

---

religion and secular ideas in the American experience, then the radical separation of religion from public education will have the effect of tearing the fabric of society apart. It will also have the effect of placing on churches and other religious institutions the burden of teaching the religious component of American history. See Hall, supra note 79, at 516. Hall stated:

> The theological foundation of religious freedom thus initially rested in large measure upon a theological premise shared by a broad, if not universal consensus of Americans at the close of the eighteenth century—-that religion consisted of duties owed to a Creator, and that these duties could not be surrendered in formation of a social compact.

Id. 145. See BELLAH, supra note 40, at xii.

146. Id. at xiii.

147. Id. at xv.

148. Id. at 62.
As Bellah points out, the public-school system serves as a particularly important context for the cultic celebration of civil rituals. At this level, the importance of the Supreme Court's view of the Establishment Clause comes into focus. In a recent opinion, Lee v. Weisman, the Court considered whether offering an invocation and benediction at public school graduation ceremonies violated the Establishment Clause of the First Amendment. It concluded that state involvement in the decision to offer such prayers, the selection of clergy, and the recommendation regarding the content of the prayer placed an impermissible, subtle, psychological pressure on students to participate, or appear to participate, in the religious exercise in violation of the Constitution.

Although the school board argued that the presentation was merely a reflection of our civil religion, the Court rejected any concept of a civil religion that could be considered as an accommodation of culture at graduation.

Thus, once an invocation is determined to be a religious exercise, it must be held to violate the Constitution. However, to view the invocation as a reflection of the best traditions and cultural heritage of this country not only pays homage to historical truth, but also calls the graduates to a high standard of sacrifice for the good of the nation and the preservation of its freedoms. By rejecting the cultural view of the invocation, the Court strikes to the heart of the country's ability to pass on to future generations the truths of America's history.

4. Schools: A Cultural Battleground

According to Diane Ravitch of Columbia University:

149. Id.
151. Id. at 2661.
152. The Court stated:

We are asked to recognize the existence of a practice of nonsectarian prayer, prayer within the embrace of what is known as the Judeo-Christian tradition, prayer which is more acceptable than one which, for example, makes explicit references to the God of Israel, or to Jesus Christ, or to a patron saint. There may be some support, as an empirical observation, to the statement of the Court of Appeals for the Sixth Circuit . . . that there has emerged in this country a civic religion, one which is tolerated when sectarian exercises are not. . . . If common ground can be defined which permits once conflicting faiths to express the shared conviction that there is an ethic and a morality which transcend human invention, the sense of community and purpose sought by all decent societies might be advanced. But though the First Amendment does not allow the government to stifle prayers which aspire to these ends, neither does it permit the government to undertake that task for itself.

Id. at 2656. See also Yehudah Mirsky, Civil Religion and the Establishment Clause, 95 YALE L.J. 1237 (1986) (describing the concept of civil religion).
COMETH THE REVOLUTION

Questions of race, ethnicity, and religion have been a paramount source of conflict in American education. The schools have often attracted the zealous attention of those who wish to influence the future, as well as those who wish to change the way we view the past. In our history, the schools have been not only an institution in which to teach young people skills and knowledge, but an arena where interest groups fight to preserve their values, or to revise judgments of history, or to bring about fundamental social change.  

Public schools are the battlegrounds where the answers to larger societal questions will be implemented. If moral and ethical values cannot be implemented, these other values will. Perhaps the current fascination with economics will be the priority of the future. Certainly the political dialogue of the 1992 presidential election confirms

154. In a January, 1992 Public Television program, three leading policy makers were asked to put themselves in the shoes of the next president. George M.C. Fisher, Chairman & CEO of Motorola, Inc. and head of the Council on Competitiveness set his priorities as "First, education. There is no doubt that this country has awakened to the fact that we have a problem in K through 12 education...." Professor Paul Krugman of M.I.T. said "The first three big things to do are children, children and infrastructure." Alice Rivlin, then senior fellow at the Brookings Institution and now Clinton Administration Budget Director, responded that the most important thing to revive the economy long term is saving and investment. She believes, however, that education is a local problem which must be addressed by the local community. Educational Broadcasting Corp., J. Graphics Transcripts, Adam Smith Show, Jan. 16, 1992 (Transcript #812).
155. See infra note 379. Since economics is likely to dominate government, one would think that we can have some control over our economic destinies. It is, therefore, remarkable that Paul Krugman made the following response to the question, "Why, briefly, did our standard of living stop rising over the last quarter of a century?:"

If we knew that we would have solved all the problems of economics. We don't really know. The most important thing, maybe, that one should know about productivity, about long-term economic growth, is that it is something of a mystery. We don't really know why some countries do well and some do badly and we don't really know why the magic went away for the U.S. economy. We can only make a list of things that we think probably contributed to it. If I had to name number one on the list, I would say the declining quality of education in the U.S.


If we put the economy first and explain our understanding of its workings with terms like "magic" and "mystery," we have not only abandoned the Judeo-Christian value structure, which places character above gain, but have replaced it with a quest for material security that we cannot control or direct. In a 1930s Japanese movie, a poor dying father who suffered at the hands of wealthy in-laws gave his 10 and 12 year old sons this advice: "Never put profit above people; when others pay wages of ten you pay twelve; Do this and things will go well with you." The FOUR SEASONS OF CHILDREN (Hiroshi Shimizu, director, 1939) The lesson is obvious: sound economics is built on character - not greed.
the existence of this trend, since President Bush initially placed an emphasis on traditional family values but abandoned that platform in response to overwhelming pressure to address economic issues. Governor Clinton, who stressed economic issues (values) almost exclusively throughout his campaign, was successful. Independent candidate Ross Perot based his entire candidacy on his ability to bring sanity to the country's fiscal dilemma and to restore the American dream. Not to be outdone, the Supreme Court addressed the economy in its latest decision on abortion rights with the following statement: "The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives."

Sound economics, however, must be built on the character of the people, which is essentially determined by religion. Michael Novak, in his recent book, The Catholic Ethic and the Spirit of Capitalism, acknowledged the core of Max Weber's great thesis on the Calvinist foundation of capitalism by stating, "[i]t was Max Weber's great achievement to discern that the humdrum and often drab work of economics, grubby and messy as it sometimes is, has a religious underpinning." The point is not to prove an economic thesis, but to show that the education process must instill values regarding what is important in life, what is the nature of man, and what is man's potential. These are all themes addressed by religion; thus, to exclude religion from any place in the education process distorts the truths being presented.

5. Many Solutions

With society's rejection of traditional religious values and emphasis upon self-interest and individual "rights," various solutions are being offered daily in all forums. Communitarians call for a reassertion of

156. See, e.g., E.J. Dionne, Jr., GOP Reassesses Values War; Collateral Damage Seen in Moral Attacks, WASH. POST, Aug. 27, 1992, at A1.
161. Id. at 1. However, Bellah notes, "That happiness is to attained through limitless material acquisition is denied by every religion and philosophy known to man but is preached incessantly by every American television set." BELLAH, supra note 40, at 134 (1975).
162. Harvard Law professor Mary Ann Glendon states that people who are attracted to the communitarian effort are those who "are tired of having to choose between the stinginess of extreme right and the simplicity of the extreme left . . . tired of having to choose between hardheaded laissez-faire and . . . big regulation . . . tired of hearing complicated issues stuffed into 10-second sound
community values. Professor Amitai Etzioni suggests that a community use family, schools, and neighborhoods as defenses against excessive individualism.\textsuperscript{163} Regarding schools he states:

Schools are the second line of defense. Suggestions that they step in where parents have failed and contribute to the character education of the young are often opposed with what is supposed to be a trump challenge: "Whose values will you inculcate?"

The fact is that there are numerous values we all share. While racism and prejudice and sexual harassment occur, no one seriously claims that these are morally justified. And while we may differ about the conditions under which one may tell a white lie, we all agree that lying to advance oneself at the cost of others is indecent. We abhor violence, favor democracy, and so on. To urge teachers to be value-neutral achieves only one thing: It leaves the young open to all other voices, from their peers to television, but muzzles their educators.\textsuperscript{164}

Analysts appear daily in the newspapers.\textsuperscript{165} One commentator suggests that a combination of approaches is necessary, including a structural approach (providing jobs), a rationalist approach (government benefits generous enough to form families), and a cultural approach (provide a non-traditional family solution).\textsuperscript{166} Recognizing the need for diversity in solutions, this commentator believes that the government should not try to find a single solution but should enable the states to find their own solutions. The only proviso would be that the states follow minimum precepts of equal protection and that each new initiative be independently evaluated. In other words, a national policy (e.g., a national family policy) should be rejected in favor of local initiatives.


\textsuperscript{164} Id.

\textsuperscript{165} In an editorial in the \textit{Miami Herald}, Gianni De Michelis, foreign minister of Italy from 1989 to 1992, suggested that Newtonian democracy consciously devised by French and British thinkers in the 18th century according to the physical principles of classical science can no longer accommodate the dynamic of the complex 21st century. His view is that the mass political parties that dominated politics during the cold war must give way to multiple parties whose voices will be broadly heard through the new information age. New rules for "inclusive participation" are needed to guide a process of global integration that operates on a transnational basis "so that the democratic world does not fall back into the disintegration of racism, ethnic hatred and tribalism." Gianni De Michelis, \textit{Reinventing Democracy}, \textit{Miami Herald}, July 26, 1992, at 1C, 5C.

\textsuperscript{166} Wilson, \textit{supra} note 21.
Professor Joe Holland suggests that the destructive tendencies of the individual in a technologically dominated society may be averted by the re-emergence of the family and community as suppliers of social needs made possible by the information age. For example, he visualizes the computer as enabling traditional household functions, such as religion, health care, and education, to return to the family.

Bellah seeks a solution in a renewal of the American myth of covenant. Bellah states:

As a first step, I would argue, we must reaffirm the outward or external covenant and that includes the civil religion in its most classical form. The Declaration of Independence, the Bill of Rights, and the Fourteenth Amendment to the Constitution have never been fully implemented. . . . I would . . . insist that they be fulfilled.

Taking this step will lead to revolution in the society, and a move away from the current worship of materialism and into a new era. According to Bellah:

Culture is the key to revolution; religion is the key to culture. If we win the political struggle, we will not even know what we want unless we have a new vision of man, a new conception of the ordering of liberty, the constitution of freedom. Without that, political victory, even were it attainable, could have no lasting result.

Professor Berman posits yet another solution. His solution recognizes a need for synthesis in which the common elements of law and religion are brought together. Rather than talk of law and other fields of study as either/or propositions, it is necessary to look at them as both/and propositions - for example, "law and religion." From a First Amendment standpoint, he poses the following challenge to the religious community:

If religious communities can, in fact, show that not only private belief but also social commitment is an integral

---

168. Id. at 9.
169. Id. at 10.
170. BELLAH, supra note 40, at 151.
171. Id. at 162.
172. INTERACTION, supra note 62, at 115.
part of what they mean by "religion," then the courts should begin to expand the "free exercise" clause of the [F]irst [A]mendment. If the social commitment of various religious groups is exercised in cooperation with government programs in ways that do not adversely affect other religious or not-religious groups, then the courts should begin to contract the "establishment" clause, thus reconciling the two clauses. 173

6. A Proposal

As suggested throughout this Article, religious values dominated America's past and the future may be dependent on the re-emergence of those values. The paradox is that Supreme Court Religion Clause jurisprudence, barely fifty years old, has built walls that effectively prevent meaningful, parentally supervised religious training as part of the child's twelve to fifteen years of public school education. At the same time, the legislative and executive branches have become preoccupied with economic goals which, arguably, can only be achieved after widespread agreement on values and ultimate goals. This Article does not recommend that public schools be established specifically to teach religion or conduct prayer; nevertheless, a far greater accommodation than is presently tolerated is possible. The practice of allowing parent-approved religious instruction by local churches on school premises should be re-examined, although this practice was held unconstitutional in the 1948 decision, McCollum v. Board of Education.174 Despite parental approval prior to any religious instruction, the McCollum Court objected to such instruction because of compulsory school attendance laws and the use of school premises. While the McCollum Court did not view parental consent as sufficient to protect the child from uninvited religious ideas, today's school children are introduced to the mechanics of sex and other value training contrary to the wishes of their parents.

A re-examination of McCollum and other such precedent is appropriate. The need for re-examination is particularly acute in light of


In the words of the Williamsburg Charter, "In light of the First Amendment, the government should stand in relation to the churches, synagogues and other communities of faith as the guarantor of freedom." That freedom should include not only the freedom to exercise inner belief but also the freedom to exercise social commitments intrinsically involved in such belief.

Id. (footnote omitted).

dramatic changes in education since 1948, \(^{175}\) including the isolation of schools from the families served by them, and the continued emphasis on national educational standards. Schools have become less and less responsive to the values of the people. For these reasons, permitting voluntary, parentally controlled religious education to be a part of the school routine is but a modest step toward realizing the diversity needed to effectively educate a child. Sufficient and efficient safeguards can be instituted within the schools to prevent any suggestion of state endorsement of religion. Indeed, the danger of state endorsement of a particular religion would be less if a large number of religious groups participated in the program.

Such a solution, which will be examined in greater detail in Part B, might not prevent the further decline and privatization of religion in America, but it might stem the call for a constitutional prayer amendment for schools, as well as the growing exodus of students now leaving for home-based education and religious schools. These results would eventually strengthen the public schools.

**PART B: Legal Structure of Religion in Public Schools**

1. *Introduction to Part B.*

Having established the interdependence of law, culture, and religion, it is easy to see why many people are willing to amend the Constitution to allow greater recognition of religion in public schools. Amending the Constitution is a drastic remedy; before resorting to the amendment process, society should explore less extreme measures. The solution proposed in this Article is far less drastic than an amendment, particularly in light of the recent case of *Board of Education of Kiryas Joel Village School District v. Grumet*,\(^ {176}\) in which the Court split in several directions in reaching the decision. In that case, five justices expressed a willingness to re-examine two 1985 cases that built on *McCollum*. Should those two cases be reversed as was suggested, it would be but a small step to review and reverse *McCollum*, which is at the root of the current problem. This part will first look at the premises underlying the

\(^{175}\) A comparison can also be made with the educational views of 1791, when the First Amendment was adopted. At that time the government was relatively ineffective, and the church and home dominated and supplied religious, health care, and educational needs. Today, government monopolizes health care and educational services. It seems appropriate that such a dramatic role reversal would demand opening of educational establishments to appropriate mechanisms for parentally approved and provided religious education. Certainly religious health care establishments have facilitated religious exercises without objection.

\(^{176}\) 114 S. Ct. 2481 (1994).
Establishment Clause as applied in the elementary and secondary school cases. Second, it will review the standard for reversal set forth in *Casey v. Planned Parenthood of Southeastern Pennsylvania* and third, it will demonstrate that the justification for each such premises no longer exists and that, under *Casey*, reversal of *McCollum* is required.

2. The First Amendment and the Doctrine of Incorporation

The First Amendment to the Constitution prohibits the government from involving itself in religious matters. The First Amendment originally applied to the federal government, not to the states. It reads, in pertinent part, as follows: "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; . . . "

Few cases arose under this clause since its adoption in 1791 until the 1940s, probably because it was generally viewed as applying only against the federal government. However, the First Amendment was made applicable to the states indirectly through the Fourteenth Amendment; the Supreme Court has determined that the First Amendment is incorporated into the Fourteenth Amendment by the concept of "liberty" under the due process provision of the Fourteenth Amendment. The process of absorption of the religious guarantees of the First Amendment as protections against the actions of the states under the Fourteenth Amendment began with the incorporation of the Free Exercise Clause in 1923. *Everson v. Board of Education* marked the completion of

---

178. See U.S. CONST. amend. I.
179. See Kurland, supra note 106, at 843-45. See also supra note 109.
180. U.S. CONST. amend. I.
183. Justice Brennan cited Meyer v. Nebraska, 262 U.S. 390, 399 (1923), as holding that the protections of the Fourteenth Amendment include at least a person's freedom "to worship God according to the dictates of his own conscience." See Abington. 374 U.S. at 253. The Court first applied the free exercise clause against the states to invalidate state action in Cantwell v. Connecticut, 310 U.S. 296 (1940). There the Court stated that the fundamental concept of liberty embodied in the Fourteenth Amendment embraces the liberties guaranteed by the First Amendment, with the result that state legislatures were subject to the same restrictions under the First Amendment as the federal government. The Court continued:

The constitutional inhibition of legislation on the subject of religion has a double aspect. On the one hand, it forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship. Freedom of conscience and freedom to
this process when the Court incorporated the Establishment Clause into the Fourteenth Amendment.

*Everson* involved an Establishment Clause challenge to a state plan to reimburse school children for the cost of transportation to and from public as well as religious schools. Although it acknowledged that the First Amendment is applicable to the states through the Fourteenth Amendment, the Court held that the reimbursement plan did not violate the Establishment Clause.185 Nevertheless, the opinion in *Everson* endorsed a Jeffersonian metaphor (e.g. that the First Amendment erects a "wall of separation" between the church and the state) that had appeared in a letter from Thomas Jefferson to the Danbury Baptist Association dated January 1, 1802.186 The metaphor formed the basic principle for interpreting the Establishment Clause.187 The *Everson* Court concluded that the First Amendment had erected a wall between church and state, a wall that must be kept high and impregnable.188 The Court could not approve the "slightest breach."189

A year after *Everson*, construction of Jefferson's wall began with *McCollum v. Board of Education*.190 *McCollum* held that permitting

---

adhere to such religious organization or form of worship as the individual may choose cannot be restricted by law. On the other hand, it safeguards the free exercise of the chosen form of religion. Thus the Amendment embraces two concepts, -- freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society.

*Cantwell*, 310 U.S. at 303-04 (footnote omitted).

184. 330 U.S. 1 (1947). The Court merely stated, without comment, that "the First Amendment, as made applicable to the states by the Fourteenth ... commands that a state 'shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." *Id.* at 8 (citation omitted).

That the absorption was accomplished so quickly and without dissent is amazing. In the 1870s, James G. Blaine proposed a Constitutional Amendment applying the religion clauses against the states. Apparently the incorporation doctrine was not obvious at the time. *See Abington*, 374 U.S. at 256-57. It is also amazing that Establishment Clause analysis focuses on what the "founders" thought, since the founders the states free to experiment with religion and education. *See supra* note 109.


186. *FOUNDERS' CONSTITUTION*, *supra* note 87, at 96.

187. Chief Justice Rehnquist asserted that the use of this metaphor as a guiding principle for the Establishment Clause interpretation distorts not only the Constitutional history of the clause but also the Court's Establishment Clause jurisprudence. In particular, he would reject the "Virginia Experience" as the guiding principle of the Establishment Clause. *Wallace v. Jaffree*, 472 U.S. 38, 91-114 (1985).


189. *Id.*

190. 333 U.S. 203 (1948).
clergymen to conduct parentally approved religion classes during school hours was an "establishment of religion." 191

3. McCollum v. Board of Education192 and Its Progeny

In McCollum, decided in 1948, the Supreme Court took the first step toward eliminating any vestiges of religious culture from the public school classroom. McCollum involved an Illinois program under which public school classrooms were opened during regular school hours once a week for religious instruction of fourth to ninth grade students whose parents signed a consent for such instruction. Teachers kept track of the attendance at these religion classes; students not wishing to participate in the classes pursued secular studies during that period. Rejecting requests to limit the Establishment Clause to situations involving a preference of one religion over another and to repudiate the incorporation doctrine, the Court held:

This is beyond all question a utilization of the tax-established and tax-supported public school system to aid religious groups to spread their faith. And it falls squarely under the ban of the First Amendment .... There [in Everson] we said:

"Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force or influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance...." 193

The Court, denying that its action manifested a hostility to religion, defended its position by stating that "[t]he First Amendment rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere." 194 The violation in McCollum consisted of two elements.

---

191. Id.
193. Id. at 210 (citations and footnote omitted).
194. 333 U.S. at 212. It may be questioned whether the First Amendment rests on such a premise. Government may not be able to restrain criminal activity in society from becoming overwhelming without religion doing its job. As Professor Berman suggests, government loses its ability to govern unless it reflects, to some extent, the deep seated religious views of the society.
First, tax-supported public school buildings were used for the dissemination of religious doctrines. Second, the State afforded sectarian groups an invaluable aid in that it helped to provide pupils for religious classes through use of compulsory public school laws.¹⁹⁵

In a lengthy concurring opinion, Justice Frankfurter chronicled the development of public education in the United States during the nineteenth century.¹⁹⁶ He concluded that "long before the Fourteenth Amendment subjected the States to new limitations, the prohibition of furtherance by the State of religious instruction became the guiding principle, in law and feeling, of the American people."¹⁹⁷ He then traced the history of efforts during the twentieth century to reintroduce religious training into the public school curriculum. Justice Frankfurter suggested that churches were unable, financially and otherwise, to obtain their sectarian objectives outside the public school system.¹⁹⁸ From these frustrations the week-day church school developed, and from 1914 to 1947, the number of affected pupils grew from 619 in a single community to over 2,000,000 in some 2,200 communities.¹⁹⁹

In evaluating the effects of the program in McCollum, Frankfurter expressed concern that the child who did not attend the religious classes would feel the pressure of exclusion and feel compelled to participate.²⁰⁰ Frankfurter also noted that "to speak of 'released time' as being only half or three quarters of an hour is to draw a thread from a fabric."²⁰¹ He then concluded that the McCollum program effectively furthered religious beliefs and stated:

INTERACTION, supra note 60, at 39. Thus, the effectiveness of government may be dependent on religion's effectiveness in imparting respect for the legal system.

195. 333 U.S. at 212.
196. Id. at 215 (Frankfurter, J., concurring).
197. Id.
198. Id. at 222-24. Justice Frankfurter stated as follows:
    A religious people was naturally concerned about the part of the child's education entrusted "to the family altar, the church, and the private school." . . . Laboring under financial difficulties and exercising only persuasive authority, various denominations felt handicapped in their task of religious education. Abortive attempts were . . . made to obtain public funds for religious schools . . . . There were experiments with vacation schools, with Saturday as well as Sunday schools. They all fell short of their purpose. It was urged that by appearing to make religion a one-day-a-week matter, the Sunday school . . . tended to relegate the child's religious education, and thereby his religion, to a minor role not unlike the enforced piano lesson.

199. 333 U.S. at 224-25.
200. Id. at 227.
201. Id. at 231.
COMETH THE REVOLUTION

Separation means separation, not something less. Jefferson's metaphor in describing the relation between Church and State speaks of a "wall of separation," not of a fine line easily overstepped. The public school is at once the symbol of our democracy and the most pervasive means for promoting our common destiny.202

Thus, Frankfurter found Illinois' modest efforts at accommodation constitutionally defective.

Justice Jackson, in a concurring opinion, wrestled with how to separate the secular from the religious and still maintain an educational system.203 While he concluded that the program in Illinois went too far by actually proselyting students, he also stated:

The fact is that, for good or for ill, nearly everything in our culture worth transmitting, everything which gives meaning to life, is saturated with religious influences, derived from paganism, Judaism, Christianity -- both Catholic and Protestant -- and other faiths accepted by a large part of the world's peoples. One can hardly respect a system of education that would leave the student wholly ignorant of the currents of religious thought that move the world society for a part in which he is being prepared.204

Dissenting, Justice Reed had great difficulty determining exactly what the Court found to be an establishment of religion.205 He suggested that this was the first time the Court had gone so far in its application of the Establishment Clause. According to Reed:

The phrase "an establishment of religion" may have been intended by Congress to be aimed only at a state church. . . . Passing years, however, have brought about acceptance of a broader meaning, although never until today, I believe, has this Court widened its interpretation to any such degree as holding that recognition of the interest of our nation in religion, through the granting, to qualified representatives of the principal faiths, of opportunity to present religion as an optional, extracurricular subject during released school time in public school buildings, was equivalent to an establishment of religion.206

202. Id.
203. Id. at 232-38 (Jackson, J., concurring).
204. 333 U.S. at 236.
205. Id. at 238-56 (Reed, J., dissenting).
206. Id. at 244. Justice Reed went on to quote Thomas Jefferson's support of religious education being a part of the required activities at the University of Virginia which Jefferson had founded. Reed suggested that it is improper to build constitutional doctrine on a casual general statement, noting that "[A] rule of Law should not be drawn from a figure of speech." Id. at 247.
The next case to come before the Court concerning religion and public schools was *Zorach v. Clausen*, which involved children being released from public schools during regular school hours to attend privately sponsored religion classes held off school premises. The practice was challenged on the basis that the influence of the public school supported religion, that teachers policed attendance, that the education process stopped while the students participated in the released time program, and that the church was aided in its efforts to indoctrinate children. Finding essentially that neither coercion nor pressure was exerted by state authorities to force the children to participate in the program, Justice Douglas rendered an expansive view of government's ability to accommodate religion, asserting, "[W]e are a religious people whose institutions presuppose a Supreme Being." In distinguishing *McCollum*, Douglas noted that in *Zorach* the state did not incur costs for the program, that no classrooms were used, and that the force of the public school was not used to promote religion. However, he limited his expansive language by his statement that government may not "blend" secular and sectarian education. Justices Black, Frankfurter, and Jackson issued strong dissents, arguing that *Zorach* was inconsistent with *McCollum*, and that the essence of the released time program, whether on or off premises, was coercive.

Following *McCollum* and *Zorach*, Establishment Clause jurisprudence developed on the framework of Jefferson's metaphor. The principles that evolved were finally enunciated as a coherent whole in

---

208. *Id.* at 309-10.
209. *Id.* at 313. The often quoted statement is as follows:
We are a religious people whose institutions presuppose a Supreme Being. We guarantee the freedom to worship as one chooses. We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary. We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma. When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions.
*Id.* at 313-14.
210. *Id.* at 315.
211. Justice Douglas has been criticized for expressing concepts in universal terms because he is led into inevitable contradictions. See Bernard Wolfman et al., *Dissent Without Opinion* 132 & n.461 (1975), in which it is pointed out the *Zorach* language, "We are a religious people whose institutions presuppose a Supreme being," conflicts with Douglas' statement in *U.S. v. Ballard*, 322 U.S. 78, 87 (1944), "Man's relation to this God was made no concern of the state."
212. 343 U.S. at 315 (Black, J., dissenting).
213. *Id.* at 320 (Frankfurter, J., dissenting).
214. *Id.* at 323 (Jackson, J., dissenting).
1971, in *Lemon v. Kurtzman*. The so-called "Lemon" test is a three-part Establishment Clause test under which a governmental practice is evaluated. To satisfy the Establishment Clause, the proposed action of the state or federal government must:

1. reflect a clearly secular purpose;
2. have a primary effect that neither advances nor inhibits religion; and,
3. avoid excessive government entanglement with religion.

The Lemon test has been the subject of scathing criticism from commentators, as well as from the Supreme Court Justices themselves. Nevertheless, the Establishment Clause decisions in the area of elementary and secondary schools have been built on several clear premises which focus on the following: the importance of education to the child, the ability to separate secular and religious education, the symbolic union between church and state when secular and religious education are interrelated, the special vulnerability of children to influences within the school, the feelings of inferiority experienced by children not participating in majority exercises, the importance of parental choice over the child, the potential for divisiveness when religion and secular education are combined, and the fear of entangling secular and religious institutions. These premises essentially address the second and third prong of the Lemon test. Most general welfare programs involve an easily definable secular purpose, thus satisfying the first prong.

---

216. See id. at 612-13.

As to the Court's invocation of the Lemon test: Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, Lemon stalks our Establishment Clause jurisprudence once again, frightening the little children and school attorneys of Center Moriches Union Free School District.

Id. at 2149-50.
219. Essentially, the purpose would not be to advance religion, but to facilitate needed moral training, which is viewed as built on a religious foundation. In addition, it could be seen as an extension of accommodation to facilitate the free exercise of religion, which is also seen as a valid purpose, in which case the second prong becomes the focus of inquiry.
Therefore, much of the discussion addresses whether general welfare programs have the effect of promoting religion and whether the constitutional requirements can be realized without unduly entangling the state in religious affairs.

4. Educational Premises Used by Courts

a. Importance of Education

During the nineteenth century, the concept of universal public education provided by the government gained wide public acceptance. In 1994, Justice Souter confirmed that providing public schools is at the apex of governmental functions. Additionally, the Court had stated previously that:

education is perhaps the most important function of state and local governments. . . . It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment.

Moreover, Justice Frankfurter, in 1948, claimed that public education is "the symbol of our democracy and the most pervasive means for promoting our common destiny." He also claimed that it is the symbol of our secular unity.

In response to the importance of the free public schools, the Supreme Court has raised a wall against the religious encroachment into the public educational system. In doing so, the Court has eliminated any cultural reflection of religion in the public schools. After deciding in McCollum v. Board of Education that programs permitting religious organizations to conduct classes on public school premises are unconstitutional, the Court went further to hold that the daily reading of state-composed prayers is unconstitutional. The Court also held that state-required prayer and Bible reading are unconstitutional. The

220. McCollum, 333 U.S. at 213-16 (Frankfurter, J., concurring).
223. McCollum, 333 U.S. at 231 (Frankfurter, J., concurring). Justice Frankfurter further stated that "[i]n no activity of the State is it more vital to keep out divisive forces than in its schools." Id. at 217.
Court’s rejection of the posting of the Ten Commandments and the teaching of creation science followed. Considering the strategic importance of the public school system and the successful effort to eliminate all sectarian influence, it must be concluded that it is the Supreme Court’s view that the future of the country and the achievement of national objectives can be secured without reliance on religious input. In other words, the rise or fall of the nation is independent of religion. Absent such a conclusion, the Court would not have sought so diligently to remove religion in *McCollum* and the cases that followed.

*b. Separation of Secular Education*

Another premise which was ruled on in *McCollum* and which was developed during the nineteenth century is that education can be divided into secular and religious subjects, with religious subjects banned from the classroom and left to other sources. In *McCollum*, Justice Frankfurter acknowledged that colonial education was provided largely.

---

227. Stone v. Graham, 449 U.S. 39 (1980). The Court rejected the posting of the Ten Commandments because of the obvious religious overtones of the first four Commandments. However, the Court could have recognized that the Ten Commandments reflect the very separation of religious and secular duties that divide the duties of government and the church. Roger Williams recognized just such a distinction in developing his doctrine of religious liberty for the Rhode Island colony. Little, *supra* note 80, at 7. In *Lynch v. Donnelly*, 465 U.S. 668 (1984), Chief Justice Rehnquist observed that "The very chamber in which oral arguments on this case were heard is decorated with a notable and permanent-not seasonal-symbol of religion: Moses with the Ten Commandments." *Id.* at 677.


229. Justice Jackson, in his *Everson* dissent, stated:

[T]he whole historic conflict . . . between the Catholic Church and non-Catholics comes to a focus in their respective school policies. The Roman Catholic Church . . . does not leave the individual to pick up religion by chance. It relies on early and indelible indoctrination in the faith and order of the Church by the work and example of persons consecrated to the task.

Our public school, if not a product of Protestantism, at least is more consistent with it than with the Catholic culture and scheme of values. It is a relatively recent development dating from about 1840. It is organized on the premise that secular education can be isolated from all religious teaching so that the school can inculcate all needed temporal knowledge and also maintain a strict and lofty neutrality as to religion. The assumption is that after the individual has been instructed in worldly wisdom he will be better fitted to choose his religion. Whether such a disjunction is possible . . . I need not try to answer.

[T]he Roman Catholic Church . . . would forego its whole service for mature persons before it would give up education of the young . . . . Catholic education is the rock on which the whole structure rests, and to render tax aid to its Church school is indistinguishable to me from rendering the same aid to the Church itself. *Everson*, 300 U.S. at 23-24. A Catholic maxim attributed to the Jesuits states: "Give me a child for the first seven years, and you may do what you like with him afterwards. 3 LEAN'S *COLLECTANEA* at 472 (1903).
by religious institutions. He then credited the efforts of Horace Mann for the removal of sectarian teaching from the public schools in nineteenth century Boston in response to conflicts that developed over the religious instruction in schools. Justice Frankfurter argued that "long before the Fourteenth Amendment the prohibition of furtherance by the State of religious instruction became the guiding principle, in law and feeling, of the American people." Frankfurter, in fact, called the public school the "symbol of our secular unity."

When such assertions are combined with the belief that religion should be kept out of public schools, the implicit assumption is that religion is unnecessary to the achievement of educational goals. A further assumption is that religion is not a necessary element in "awakening the child to cultural values, in preparing him for later professional training, [or] in helping him to adjust normally to his

231. Id. at 215.
232. Id. (emphasis added). The context of the quotation is as follows: The evolution of colonial education, largely in the service of religion, into the public school system of today is the story of changing conceptions regarding the American democratic society, of the functions of State-maintained education in such a society, and of the role therein of the free exercise of religion by the people. The modern public school derived from a philosophy of freedom reflected in the First Amendment. In Massachusetts, largely through the efforts of Horace Mann, all sectarian teachings were barred from the common school to save it from being rent by denominational conflict. The upshot is that long before the Fourteenth Amendment subjected the States to new limitations, the prohibition of furtherance by the State of religious instruction became the guiding principle, in law and feeling, of the American people.

Separation in the field of education was not imposed upon unwilling States... The Fourth Amendment merely reflected a principle then dominant in our national life. To the extent that the Constitution thus made it binding upon the States, the basis of the restriction is the whole experience of our people.

233. Id. at 217. The context of the quotation is as follows: The non-sectarian or secular public school was the means of reconciling freedom in general with religious freedom. Designed to serve as perhaps the most powerful agency for promoting cohesion among a heterogeneous democratic people, the public school must keep scrupulously free from entanglement in the strife of sects. The preservation of the community from divisive conflicts, of Government from irreconcilable pressures by religious groups, of religion from censorship and coercion however subtly exercised, requires strict confinement of the State to instruction other than religious, leaving to the individual's church and home, indoctrination in the faith of his choice.

This development of the public school as a symbol of our secular unity was not a sudden achievement nor attained without violent conflict... (emphasis added). Frankfurter also referred to President Grant's 1876 speech calling for the states to "[l]eave the matter of religion to the family altar, the church, and the private school, supported entirely by private contributions." Id. at 218.
In arriving at such conclusions, the Court has not embraced legal theories but theories of sociology, education, and psychology— theories which are not necessarily demanded by the Constitution.

c. The Symbolic Union of Church and State

In applying the second prong of the "Lemon" test, the effects prong, the Court has been concerned with governmental acts that create an impression that government has endorsed religion. The Court fears that if a group received the governmental endorsement on religion, then that group could use the endorsement to persecute non-adherents or, at a minimum, to create peer pressure on those who do not affiliate themselves with the dominant religion.

The symbolic union is described in *School District of the City of Grand Rapids v. Ball*, a 1985 case holding that the primary effect of a state sponsored program to provide teachers for secular subjects to parochial schools was the advancement of religion. In *Ball*, the Court determined that this prohibited effect is achieved whenever a close identification is fostered between government and religious organizations so that a message of either endorsement or disapproval is conveyed. Such a message is seen as a violative of the Establishment Clause.

The *Ball* Court found support for its symbolic union problem by comparing the earlier decisions in *McCollum* and *Zorach*. *McCollum*, which involved an on-premise program, was held to be unconstitutional, while *Zorach*, which involved an off-premise program, was held to be constitutional. The difference, according to the *Ball* Court, was that "the

---

235. See infra note 236-37 and accompanying text.
237. See *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 125-26 (1982). The Court in *Ball* elaborated on the "appearance" of endorsement in the context of public schools as follows:

It follows that an important concern of the effects test is whether the symbolic union of church and state effected by the challenged governmental action is sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by the non-adherents as a disapproval, of their individual religious choices. The inquiry into this kind of effect must be conducted with particular care when many of the citizens perceiving the governmental message are children in their formative years.

... The symbolism of a union between church and state is most likely to influence children of tender years, whose experience is limited and whose beliefs consequently are the function of environment as much as of free and voluntary choice.

*Ball*, 473 U.S. at 390 (emphasis added). *Ball* distinguished prayers opening the legislative session, which are Constitutional, with prayers opening the school day, which are unconstitutional. The court noted that the former do not violate the Establishment Clause because of "long historical usage and lack of particular sectarian content." *Id.* at 390 n.9.
symbolic connection of church and state in the *McCollum* program presented the students with a graphic symbol of the 'concert or union or dependency' of church and state... [which] was conspicuously absent in the *Zorach* program. In *Ball*, students in religious schools spent a typical school day moving between religious school and "public school" classes. Both types of classes took place in the same religious school building and both were largely composed of students who adhered to the same denomination. The Court determined that the students would "be unlikely to discern the crucial difference between the religious school classes and the 'public school' classes." Even if a conspicuous notice was placed at the door of the room, the student would "have before him a powerful symbol of state endorsement and encouragement of the religious beliefs taught in the same class at some other time during the day." In concluding, the Court found the symbolic union to be an

238. *Ball*, 473 U.S. at 391. In *Board of Educ. of the Westside Community Schools v. Mergens*, 496 U.S. 226 (1990), the Court described the result in *Ball* as follows:

[In *Ball*, we] invalidated the use of public funds to pay for teaching state-required subjects at parochial schools, in part because of the risk of creating "a crucial symbolic link between government and religion, thereby enlisting -- at least in the eyes of impressionable youngsters -- the powers of government to the support of the religious denomination operating the school"... *Id.* at 250. Compare Justice Brennan’s opinion in *Abington*, in which he stated:

[T]he *McCollum* program placed the religious instructor in the public school classroom in precisely the position of authority held by the regular teachers of secular subjects, while the *Zorach* program did not. The *McCollum* program, in lending to the support of sectarian instruction all the authority of the governmentally operated public school system, brought government and religion into that proximity which the Establishment Clause forbids. To be sure, a religious teacher presumably commands substantial respect... But the Constitution does not permit that prestige... to be augmented by investiture of all the symbols of authority at the command of the lay teacher for the enhancement of secular instruction.

*Abington Sch. Dist.*, 374 U.S. at 262-63 (Brennan, J., concurring). Justice Brennan noted similar cases that banned religious teachers from voluntarily teaching secular subjects in public schools, as well as the wearing of clerical garb and the distribution of Gideon Bibles, all of which have been held unconstitutional. *Id.* at 263.

239. *Ball*, 473 U.S. at 391. The Court quoted from Giannella, *Religious Liberty, Nonestablishment and Doctrinal Development: Part II. The Nonestablishment Principle*, 81 Harv. L. Rev. 513, 574 (1968), as follows:

This pervasive [religious] atmosphere makes on the young student’s mind a lasting imprint that the holy and transcendental should be central to all facets of life... In short, the parochial school’s total operation serves to fulfill both secular and religious functions concurrently, and the two cannot be completely separated. Support of any part of its activity entails some support of the disqualifying religious function of molding the religious personality of the young student.


Under the City’s plan public school teachers are, so far as appearance is concerned, a regular adjunct of the religious school. They pace the same halls, use classrooms in
impermissible effect under the Establishment Clause. As will be discussed further in the following section, courts have been generally reluctant to rely on efforts to dilute or counteract the impact of the symbolic union on children because the Court views children as too impressionable. 241

d. Children are Easily Influenced

The Supreme Court maintains that, because elementary and secondary school students are young and easily influenced, the school must protect them from religious expressions. This premise is illustrated by the Court's decision in Lee v. Weisman, which held that a nonsectarian prayer at graduation violated the Constitution. By contrast, in Marsh v. Chambers, 242 the Court upheld prayers opening sessions of the state legislatures. According to the Court, the difference is that invocations

the same building, teach the same students, and confer with the teachers hired by the religious schools, many of them members of religious orders. The religious school appears to the public as a joint enterprise staffed with some teachers paid by its religious sponsor and others by the public.

Id. at 392.


The entry of religious clubs into such a realm poses a real danger that those clubs will be viewed as part of the school's effort to inculcate fundamental values ... As the majority concedes, the program is part of the "district's commitment to teaching academic, physical, civic, and personal skills and values." But although a school may permissibly encourage its students to become well-rounded as student-athletes, student-musicians, and student-tutors, the Constitution forbids schools to encourage students to become well-rounded as student-worshippers. Neutrality toward religion ... is not advanced by requiring a school that endorses the goals of some noncontroversial secular organizations to endorse the goals of religious organizations as well.

Id. at 265-66 (emphasis added) (citations omitted).

Justice Marshall's statement contradicts Justice Douglas' sentiment that "When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs." Zorach v. Clauson, 343 U.S. 306, 313-14 (1952) (emphasis added).

See also amicus curai brief of the Archdiocese of New York in Village of Kiryas Joel, 114 S. Ct. 2481 (1994), which criticizes Marshall's statement as follows:

Given the multitude of pernicious and destructive encouragements our students receive today, surely it bespeaks a "callous indifference," indeed "hostility," to our students to bar encouragement to practice, and practice earnestly, whatever religion they have chosen. What the Constitution does prohibit, and all that it prohibits in this area, is state proselytization of students in favor of a particular religion.

opening legislative sessions involve adults who are free to enter and leave the session at will.\textsuperscript{243}

The special need to protect elementary school children was also illustrated in \textit{Board of Education of the Westside Community Schools v. Mergens}.\textsuperscript{244} In that case, the Court allowed formation of a Christian club with no faculty advisor to have equal footing with other clubs. In \textit{Mergens}, Justice O'Connor noted the ability of high school students to discern the difference between government endorsement and private endorsement.\textsuperscript{245} The Court decided that secondary school children were mature enough\textsuperscript{246} to discern that the school did not necessarily endorse all speech that the school permitted. The Court also noted that the Equal Access Act\textsuperscript{247} limited participation by school officials at meetings of student religious groups and that such meetings were held during noninstructional time.\textsuperscript{248} Finally, where there are numerous officially recognized student clubs and students have freedom to initiate additional clubs, the message of endorsement is counteracted. Hence, the Equal Access Act, as applied to Westside Community School, did not have a primary effect of advancing religion and did not violate the First Amendment.

\begin{itemize}
\item \textsuperscript{243} Id. at 792.
\item \textsuperscript{244} 496 U.S. 226 (1990)
\item \textsuperscript{245} Id. at 250 (O'Connor, J.) Justice O'Connor did not think a significant difference existed between the ability of college students and high school students to recognize that permitting language was not equivalent to endorsing language. \textit{Id. See also} \textit{Widmar v. Vincent}, 454 U.S. 263 (1981) (permitting religious groups on college campus).
\item \textsuperscript{246} Justice O'Connor noted "that Congress specifically rejected the argument that high school students are likely to confuse an equal access policy with state sponsorship of religion." 496 U.S. at 250.
\item \textsuperscript{247} \textit{See Equal Access Act}, 20 U.S.C. \textsection 4071(b), (c)(2), (c)(3) (1988).
\item \textsuperscript{248} Because of these features, the \textit{Mergens} court thought the Equal Access Act avoided the problems of mandatory attendance requirements that were of concern in \textit{Edwards v. Aguillard}, 482 U.S. 578, 584 (1987), and \textit{McCollum}. The Court viewed \textit{McCollum} as a case involving a release time program that conditioned the release from classes on the stipulation that students attend the religious classes. \textit{Edwards}, the Court noted, reflected on the school's responsibility to parents who had entrusted their children to the school. The Court stated:
\begin{quote}
The Court has been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools. Families entrust public schools with the education of their children, but condition their trust on the understanding that the classroom will not purposely be used to advance religious views that may conflict with the private beliefs of the student and his or her family. Students in such institutions are impressionable and their attendance is involuntary.
\end{quote}
\textit{Edwards}, 482 U.S. at 583-84. The Court concluded that, where formal classroom activities and official participation are not involved, there was "little if any risk of official state endorsement or coercion." \textit{Mergens}, 496 U.S. at 251.
\end{itemize}
COMETH THE REVOLUTION

e. Separation Produces Feelings of Inferiority

The Court has also held that allowing religious expression on a voluntary, non-compulsory basis produces feelings of inferiority in those not participating, even when they are excused and given other tasks. The fear is that persons so excluded while still young will carry the stigma with them throughout their lives. Justice Frankfurter pointed out, in his concurring opinion in *McCollum*, that the pressure on students to attend the religious classes is great.249

In the 1992 case of *Lee v. Weisman*,250 the Court addressed the issue of state-sponsored graduation prayers. It rejected outright the argument that junior high school students should be mature enough to sift through ideas and reject those with which they disagree.251 The Court recognized that a coercive element exists when a student is forced to listen to a prayer to which he objects. The Court reiterated its heightened concern for the subtle coercive pressure, easily exerted in the elementary and secondary school setting, which forces a choice between participation or protest and which could give the impression of state endorsement. The

---

249. Justice Frankfurter stated:

That a child is offered an alternative may reduce the constraint; it does not eliminate the operation of influence by the school in matters sacred to conscience and outside the school's domain. The law of imitation operates, and non-conformity is not an outstanding characteristic of children. The result is an obvious pressure upon children to attend. . . . The children belonging to these non-participating sects will thus have inculcated in them a feeling of separatism when the school should be the training ground for habits of community, or they will have religious instruction in a faith which is not that of their parents. . . . These are consequences not amenable to statistics. But they are precisely the consequences against which the Constitution was directed when it prohibited the Government common to all from becoming embroiled, however innocently, in the destructive religious conflicts of which the history of even this country records some dark pages.

*McCullum*, 333 U.S. at 227-28 (Frankfurter, J., concurring) (emphasis added).


251. In *Weisman*, the Court responded to the argument that the Constitution requires "confidence in our own ability to accept or reject ideas of which we do not approve." The Court stated:

The First Amendment protects speech and religion by quite different mechanisms. Speech is protected by insuring its full expression even when the government participates . . . . In religious debate or expression the government is not a prime participant, for the Framers deemed religious establishment antithetical to the freedom of all. The Free Exercise Clause embraces a freedom of conscience and worship that has close parallels in the speech provisions of the First Amendment, but the Establishment Clause is a specific prohibition on forms of state intervention in religious affairs with no precise counterpart in the speech provisions. . . . The explanation lies in the lesson of history that . . . in the hands of government what might begin as 'a tolerant expression of religious views may end in a policy to indoctrinate and coerce.

Court found that the graduation prayer in *Weisman* exerted a subtle pressure which the state had no right to force on non-adhering students, particularly adolescents who react to peer pressures most acutely.\(^{252}\) The Court confirmed its conclusions with psychological findings\(^{253}\) that the state caused the injury, in effect, by requiring participation in a religious exercise.\(^{254}\) In response to the opposing argument that attendance at the graduation ceremony was voluntary, the Court noted that high school graduation was "one of life's most significant occasions" and to require someone to miss it to avoid participation in a state sponsored religious exercise was too high a price to pay and one the Constitution did not require.\(^{255}\)

School desegregation cases, like *Brown v. Board of Education of Topeka*,\(^{256}\) present a parallel situation. Those cases were decided under the Equal Protection clause of the Fourteenth Amendment, which applied directly (and not via incorporation) to the states. In *Brown*, the Court examined the effects of separation of the races in elementary and secondary schools. The Court relied on psychological research as "modern authority"\(^{257}\) to support its finding that separating African

---

\(^{252}\) *Id.* at 2661.


\(^{254}\) See *Weisman*, 112 S. Ct. at 2658, stating that:

> there are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools. . . . What to most believers may seem nothing more than a reasonable request that the nonbeliever respect their religious practices, in a school context may appear to the nonbeliever or dissenter to be an attempt to employ the machinery of the State to enforce a religious orthodoxy.

\(^{255}\) *Weisman*, 112 S. Ct. at 2659. The Court rejected the argument, stating:

> [E]veryone knows that . . . high school graduation is one of life's most significant occasions . . . [and] absence would require forfeiture of those intangible benefits which have motivated the student . . . .

> [W]hile in some societies the wishes of the majority might prevail, the Establishment Clause of the First Amendment is addressed to this contingency and rejects the balance urged upon us. The Constitution forbids the State to exact religious conformity from a student as the price of attending her own high school graduation.

*Id.*

\(^{256}\) 347 U.S. 483 (1954).

\(^{257}\) The Court stated that "[w]hatever may have been the extent of psychological knowledge at the time of Plessy v. Ferguson, this finding is amply supported by modern authority. Any language in Plessy v. Ferguson contrary to this finding is rejected." *Brown*, 347 U.S. at 494-95. The Court cited a number of contemporary books and journal articles such as Witmer and Kotinsky, Personality in the Making (1952) and Deutscher and Chein, The Psychological Effects of Enforced Segregation: A Survey of Social Science Opinion, 26 J. PSYCHOL. 259 (1948). *Brown*, 347
American children from others of similar age because of their race "generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone." Segregation was found to result in a denial of the benefits of a racially integrated school system. These benefits being denied were intangible benefits, such as the reputation of the faculty.

*Brown* emphasized the importance of educational institutions as instruments to awaken values and, in particular, of integrated schools as a means to deliver the intangible benefits denied in segregated schools. It is, therefore, a strange result that integration of the school system to obtain intangible benefits and awaken cultural values occurred at the same time the Court was creating pressure to remove any semblance of a religious value system or any religious or cultural expression from the schools.

**f. Parental Choice**

The decision in *McCollum* hinged on the coercive nature of the state action. The Court was concerned that under the school district's scheme, compulsory education laws brought the children together while the school conditioned release of certain children, for a period of time, on the

---

258. *Brown*, 347 U.S. at 494. The Court stated:

[T]o separate [Negro children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone. The effect of this separation on their educational opportunities was well stated by a finding in the Kansas case by a court which nevertheless felt compelled to rule against the Negro plaintiffs:

Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of negro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system.

*Id.*

259. *Sweatt v. Painter*, 339 U.S. 629 (1950). Other intangible benefits included "experience of the administration, position and influence of the alumni, standing in the community, traditions and prestige. . . . [and] the interplay of ideas and the exchange of views with which the law is concerned." *Id.*

260. *Brown* identifies the importance of education in the life of the child and nation as follows:

Today, education is perhaps the most important function of state and local governments. . . . It is required in the performance of our most basic public responsibilities, . . . It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment.

*Brown*, 347 U.S. at 493 (emphasis added).
attendance at a religion class. In its analysis, the Court did not focus on the question of whether the intervention of parental choice in the process would mitigate the offensiveness of the coercive element created by compulsory education laws.

Parental choice is an important consideration, particularly since it is the parent who has been recognized as primarily responsible for the education of the child and for making decisions on behalf of the child. Subsequent to McCollum, funding cases have accepted the element of independent choice as a means of neutralizing a claim of establishment. In Witters v. Washington Department of Service for the Blind, Larry Witters received assistance under a state program providing funds for vocational training for the blind. Witters used the funds to study at a private religious school in order to train for the ministry. The Washington Supreme Court held that the program violated the second prong of the Lemon Test.

The United States Supreme Court reversed. It easily found a secular purpose in the promotion of the well-being of visually handicapped persons. With respect to the effect of the program, the support of any religious institution was not attributable to the state since the funds were mediated through the independent and private choice of the student. The program was generally available to all and did not favor religious schools. Finally, the Court did not view vocational assistance for the handicapped as a vehicle to subsidize nonpublic sectarian activities. Indeed, since only a single student used the funds for a religious education, the effect was minimal.


262. In Abington, Justice Brennan characterized the choice offered by the Constitution as one in which parents are free to choose between "public secular education with its uniquely democratic values, and some form of private sectarian education, which offers values of its own." Abington 374 U.S. at 242. In Brennan's view, it was not a function of government to diminish the attractiveness of either alternative. One wonders, however, how government can achieve neutrality in the decision so long as one alternative is free while the other is costly. Nevertheless, Brennan stated that "a system of free public education forfeits its unique contribution to the growth of democratic citizenship when that choice ceases to be freely available to each parent." Id.

263. 474 U. S. 481 (1986)

264. Id.

265. Witters, 414 U.S. at 488. The program was available "without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited." Id. (quoting Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 782-83, n. 38 (1973)).

266. Concurring Justices Powell, O'Connor, and Rehnquist emphasized that private choice under a neutral program is acceptable under the Constitution; these justices emphasized the continued validity of tax deductions under Mueller v. Allen, 463 U.S. 388 (1983). Justice O’Connor further noted that, "No reasonable observer is likely to draw from the facts before us an inference that the State itself is endorsing a religious practice or belief." Witters, 474 U.S. at 494 (O'Connor, J.,
g. Religion in Education is Divisive

Many argue that if religion is in any way allowed to permeate the educational system, communities will become divided and sectarian strife will develop. Such strife occurred in the nineteenth century between Catholics and Protestants over the school system and ravaged Europe and England from the time of the Reformation. As seen by the Court, whenever the state is perceived as supporting or favoring one religion over another, divisiveness and disrespect for government is likely to ensue. A "union of government and religion tends to destroy government and degrade religion" resulting in "hatred, disrespect, and even contempt of those with contrary beliefs."

h. No Institutional Entanglement

In its Establishment Clause cases, the Court has continually dealt with the concern that state and religious institutions will become entangled, allowing the state to exert an influence on the beliefs of the...
institution. The classic entanglement case was Walz v. Tax Commission of New York City,\textsuperscript{270} where the Court upheld tax exemptions for religious organizations. The decision was based in part on a recognition of the benefits to faculty created by religious institutions, and on the notion that taxing these institutions would involve the state in religious affairs.

The entanglement prong of the \textit{Lemon} Test was applied in \textit{Aguilar v. Felton},\textsuperscript{271} where public school teachers were providing remedial reading and other secular instruction in religious schools. In \textit{Aguilar}, the Court found three areas of entanglement. First, the aid was provided in a sectarian environment.\textsuperscript{272} Second, because teachers were working on an ongoing basis, a monitoring system would be necessary to ensure they did not succumb to the opportunity to inject religious teaching into the class.\textsuperscript{273} Finally, because the remedial classes provided by the public school teachers would have to be administratively coordinated with the religious classes, continued administrative interaction would create an entanglement.\textsuperscript{274} For these reasons, the Court found the entanglement prong of the \textit{Lemon} Test had been violated.

5. \textit{Reversal of McCollum} Under \textit{Casey}.

Having examined the premises underlying Establishment Clause jurisprudence as applied to elementary and secondary schools, this Article will consider the standard for reversal of \textit{McCollum} and will discuss the Court's latest decision in the area. Then, the Establishment Clause's premises will be reexamined to determine whether there is a basis for reversing the application of the Establishment Clause to the \textit{McCollum} situation.

\textbf{a. The \textit{Casey} Standard}

In \textit{Casey v. Planned Parenthood of Southeastern Pennsylvania},\textsuperscript{275} the Court, while refusing to overturn \textit{Roe v. Wade},\textsuperscript{276} discussed the need to overrule cases when the "facts, or an understanding of the facts, changed from those which furnished the claimed justifications for the earlier constitutional resolutions."\textsuperscript{277} While the Court found the basic

\begin{itemize}
\item \textsuperscript{270} 397 U.S. 664, 674 (1970).
\item \textsuperscript{271} 473 U.S. 412 (1985).
\item \textsuperscript{272} \textit{Id.} at 412.
\item \textsuperscript{273} \textit{Id.}
\item \textsuperscript{274} \textit{Id.} at 413.
\item \textsuperscript{275} 112 S. Ct. 2791 (1992).
\item \textsuperscript{276} 410 U.S. 110 (1973).
\item \textsuperscript{277} \textit{Casey}, 112 S. Ct. at 2812-13.
\end{itemize}
tests of *stare decisis* had been met,\(^{278}\) it nevertheless felt compelled to compare the requested overturning of *Roe* to other significant Court reversals in the twentieth century. The Court found that in the two most significant overrulings, *Lochner v. New York*,\(^{279}\) overruled by *West Coast Hotel Co. v. Parrish*,\(^{280}\) and *Plessy v. Ferguson*,\(^{281}\) overruled by *Brown v. Board of Education*,\(^{282}\) the overrulings resulted from a change in the understanding of factual situations. By 1937, the Depression had taught most people that *Lochner* and its progeny\(^ {283}\) had rested on false factual assumptions about the capacity of a relatively unregulated market to satisfy minimal levels of human welfare.\(^ {284}\) In the case of *Plessy*, the Court had mistakenly rejected "the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority."\(^ {285}\) By 1954, the Court, recognizing the changed perception of segregation,\(^ {286}\) reversed *Plessy*. In *Casey*, the Court found that no such change in perception or factual basis had occurred with respect to *Roe* and, accordingly, *Roe* was not overruled.\(^ {287}\)

\(^{278}\) The Court reviewed *Roe* to see if (1) it had proven unworkable, (2) citizens had come to rely on the original decision, (3) the evolution of legal principles had undermined the doctrinal footings of *Roe*, and (4) the facts supporting the decision regarding fetal viability and safety of abortions had undermined the holding. *Id.*

\(^{279}\) 198 U.S. 45 (1905).

\(^{280}\) 300 U.S. 379 (1937).

\(^{281}\) 163 U.S. 537 (1896).

\(^{282}\) 347 U.S. 483 (1954).

\(^{283}\) See e.g., *Adkins v. Children’s Hosp. of D.C.*, 261 U.S. 525 (1923).

\(^{284}\) *Casey*, 112 S. Ct. at 2812.

\(^{285}\) *Plessy*, 163 U.S. 537, 551, referred to in *Casey*, 112 S. Ct. at 2813.

\(^{286}\) The Court, relying on the findings of psychologists, stated: "Whatever may have been the extent of psychological knowledge at the time of *Plessy* v. Ferguson, this finding is amply supported by modern authority." *Brown*, 347 U.S. 483, 495 n.11. Any language in *Plessy* v. *Ferguson* contrary to this finding is rejected.

\(^{287}\) *Casey*, 112 S. Ct. at 2811-12. In *Casey* the Court suggested that the original decision in *Plessy* had been wrong at the time it was decided. *Id.* at 2813. For a discussion of the underlying moral questions raised by the Court’s analysis of the reasons *Plessy* was overruled in light of contemporary natural law theory, see *Morrissey*, *Moral Truth and the Law: A New Look at an Old Link*, 47 SMU L. REV. 61 (1993).
While *Casey* clearly upholds *Roe*, the opinion's authors, Justices O'Connor, Kennedy, and Souter, do not totally adhere to their own principles of *stare decisis* since they narrow the holding of *Roe* by permitting the imposition of an "undue burden" test on abortion decisions in the first trimester. They justify the limitation by claiming *Roe* contained an internal contradiction when it prohibited regulation during the first trimester while, at the same time, acknowledging the state's interest in preserving potential life and the health of the mother. Justice Blackmun objected to *Casey*'s retreat from *Roe* and Justice Rehnquist, in dissent, dubbed the Court's position as retaining the shell of *Roe* while retreating from its substance.

*Casey* is particularly important to this article for two reasons. First, it sets forth the standards to be used for reversing highly significant decisions, particularly those that are intensely divisive. Second, *McCollum* contains an internal contradiction, far more blatant than the one in *Casey*, that could allow the Court to uphold *McCollum*'s basic principle of separation while finding some latitude in permitting voluntarily parentally controlled religion classes in elementary and secondary public schools. That contradiction is that the public school system can be the chief instrument of passing the American culture to the next generation without any recognition of or assistance by religion. Third, Justices O'Connor and Kennedy, two of *Casey*'s authors, are those most likely to determine the outcome of future Establishment Clause cases. As will be shown, the continued validity of the premises derived from the cases is being questioned, and the premises used to support Establishment Clause jurisprudence in *McCollum*-type situations can no longer be defended.

### b. Changed Conditions in the Schools

In looking at the changed circumstances since 1948, one must keep in mind that the moral responses of the young have deteriorated dramatically and many people in society have no place to look for help except the public school system. Since 1960 there has been a dramatic increase in the rate of illegitimate births within the United States.

---

289. *Id.* at 2821.
290. *Id.* at 2844.
291. *Id.* at 2855. Chief Justice Rehnquist (joined by Justices White, Scalia, and Thomas) dissented and issued a strong attack on the standard of review using factual changes for reversing major decisions. Justice Rehnquist argued that no new facts had occurred in the case of either *Lochner* or *Plessy*, but that the overruling Court had merely recognized its prior error and reversed patently incorrect decisions. *Id.* Justices Rehnquist, Scalia and Thomas would probably join Justices O'Connor and Kennedy in any attempt to review the *Ball* and *Aguilar* decisions.
Between 1920 and 1960, the rate of illegitimate births rose from 3% to 5%.\textsuperscript{292} From 1960 to 1970 the rate grew to almost 11%\textsuperscript{,293} by 1980 the rate was over 18% and by 1991 the rate was 30%.\textsuperscript{294} The United States now ranks first in illegitimacy in the industrialized world.\textsuperscript{295} In 1970, 5% of fifteen year old girls had experienced sexual intercourse; by 1988 the rate was 25%.\textsuperscript{296}

The incidence of violent crime increased threefold from 1960 through 1991.\textsuperscript{297} In inner cities criminal activity is endemic. The term "criminogenic" describes this phenomenon:

In essence, the inner city has become a criminogenic community, a place where the social forces that create predatory criminals are far more numerous and overwhelmingly stronger than the social forces that create virtuous citizens. At core, the problem is that most inner city children grow up surrounded by teenagers and adults who are themselves deviant, delinquent, or criminal. At best, these teenagers and adults misshape the character and lives of the young in their midst. At worst, they abuse, neglect, or criminally prey upon the young.\textsuperscript{298}

The school is not immune from this aspect of society and has been seeking community help to stem the tide of crime within the educational setting.\textsuperscript{299} However, school philosophy focuses on the needs and rights of violent students to the detriment of other students.\textsuperscript{300}

Schools also lack an answer for the illegitimacy problem. Sex education, while widespread and even pressing into kindergarten, has not stemmed the tide of illegitimacy. Sex education is value-laden at the deepest level of human personality since it seeks to promote a concept of responsible exercise of human sexuality. However, the programs are not

\textsuperscript{292} Gertrude Himmelfarb, \textit{A De-Moralized Society: The British/American Experience}, AM. EDUC., Winter 1994-95, at 14. The article is an adaptation of a chapter in the author's book, \textit{THE DEMORALIZATION OF SOCIETY: FROM VICTORIAN VIRTUES TO MODERN VALUES} (1995). The article points out that England has been experiencing the same problems of illegitimacy since 1960. From the mid-sixteenth century until 1960 illegitimacy rarely exceeded 5%, with a maximum of 7% in 1845. During that period it was often less than 3%. Today it is 30%. \textit{Id.} at 15-16.

\textsuperscript{293} \textit{Id.}

\textsuperscript{294} \textit{Id.}

\textsuperscript{295} \textit{Id.}

\textsuperscript{296} \textit{Id.} at 16.

\textsuperscript{297} Himmelfarb, \textit{supra} note 292, at 16-17.

\textsuperscript{298} \textit{Id.} at 18.

\textsuperscript{299} See Robert O'Harrow, Jr., \textit{Schools Seek Help to Stop Violent Acts}, AM. EDUC., Winter 1994-95, at 18.

based on scientific research but reflect a political agenda. According to one commentator:

The unifying core of comprehensive sex education is not intellectual but ideological. Its mission is to defend and extend the freedoms of the sexual revolution, and its architects are called forth from a variety of pursuits to advance this cause. At least in New Jersey, the sex education leaders are not researchers or policy analysts or child-development experts but public-sector entrepreneurs; advocates, independent consultants, family planners, freelance curriculum writers, specialty publishers, and diversity educators. However dedicated and high-minded they may be, their principal task is not to serve the public or school children but to promote their ideology.

For better or worse, sex education advocacy is largely women’s work. And there is an unmistakably female bias in the advocates’ idea of what is sexually nice. It favors what thousands of Americans have told Ann Landers: In their sex lives women would like more talking, more hugging, more outercourse.\(^3\)

This breakdown of the family,\(^3\)02 which is the basic building block of society, is unlike anything imagined by the Supreme Court in 1948,

---


Another article suggests that what works in protecting teenage girls from pregnancy is a close relationship with a residential father or long-term stepfather. That article states,

> The ramifications of the rise of illegitimacy is disastrous for society as a whole. Both mother and child are likely to experience poverty and its predictable social consequence, chronic welfare dependence. If three risk factors for poverty are present - teenage childbearing, failure to complete high school, and non marriage--then it is all but inevitable that the mother and her child will live in poverty: 79 percent of all children born to mothers with those three risk factors are poor.


302. For many of the world’s religions, man’s vital community is the family and, next to his relationship to God, is the most crucial area of life. That concept of family being at the heart of man’s condition is recognized in Pope John Paul II’s 1991 encyclical, *Centesimus Annus*, where he states:

> The first and fundamental structure for "human ecology" is the family, in which man receives his first formative ideas about truth and goodness, and learns what it means to love and to be loved, and thus what it actually means to be a person. Here we mean the family founded on marriage, in which the mutual gift of self by husband and wife creates an environment in which children can be born and develop their potentialities, become aware of their dignity and prepare to face their unique and individual destiny.

*Centesimus Annus*, supra note 33, at 15.
when *McCulloch* was decided and religion classes were removed from the public school. Whether schools, even with the modest religion program proposed in this Article, will be able to stem the tide of problems faced by America's young cannot be predicted. Government has no answers.

c. The Court's Latest Decision.

Establishment Clause jurisprudence continues to defy definition. In the most recent Supreme Court Establishment Clause decision, *Board of Education of Kiryas Joel Village School District v. Grumet*, the various opinions express a sense of frustration, but also one of hope. While a six person majority pressed to achieve a result which intuitively seemed correct, two of the six expressed a willingness to review the two earlier Supreme Court cases, *Ball* and *Aguilar*, which created the problems addressed by the statute being challenged in *Kiryas Joel*. Three dissenters agreed that such a review was desirable. This sharp division in the Court demonstrates that the time may be right for change.

The *Kiryas Joel* case arose because handicapped Satmar children were only offered federal and state special education services at public school facilities with non-Satmar children, whose style of life was very different from that of the Satmar children. The handicapped Satmar children, because of their unusual mode of dress, language, and lifestyle, found it emotionally oppressive to attend programs with handicapped children of the larger non-Satmar community. The Satmar children allegedly experienced "panic, fear and trauma" from leaving their own community and being with people whose ways were so different from theirs. Eventually, the Satmar parents stopped sending their children

---

306. 114 S. Ct. at 2505 (Scalia, J., dissenting, joined by Rehnquist, J., and Thomas, J.).
308. *Kiryas Joel*, 114 S. Ct. at 2485. In the brief for Petitioner Board of Education of the Monroe-Woodbury Central School District, the effect on the children was described as follows:

> The District Committee on Special Education, recognizing its authority under... concept of "least restrictive environment", continued... to recommend public school placements for the handicapped students... The Satmarer... declined to accept such services in the regular classes of the public schools. They... indicated that such placements had proved inappropriate because of such nonreligious factors as the impact upon the children of travelling out of the sheltered environment of the Village; the psychological harm of being thrust into a strange environment; the fact that their physical appearance and language difficulties immediately set them apart from other students; and the necessity for bilingual, bicultural programs specially adapted to meet their social, psychological and cultural needs.
to programs offered at the public schools. The Satmars alleged that emotional trauma, not religious doctrine, prevented Satmar children from attending public schools with non-Satmar children.

Prior to 1985, the Monroe-Woodbury Central School District had provided special education classes for the handicapped Satmar children on the premises of the Satmar Hasidim religious school. However, this practice was abandoned after two 1985 U.S. Supreme Court decisions held that sending public school teachers into religious schools violated the Establishment Clause. As a result of the 1985 cases, the town of Monroe decided that all special educational classes would be offered in public school buildings. Initially the Satmar children attended the public school classes, but quickly found them unacceptable.

The Satmar community petitioned the New York legislature to grant union free school district status to the Village of Kiryas Joel, thereby qualifying the village for federal or state aid that could be used to provide special education services within the village for handicapped students. In response, the New York legislature enacted 1989 New York Laws Chapter 748 ("Chapter 748"), granting the Village of Kiryas Joel the status of a union-free school district. The Village established its own school that could accommodate the peculiarities of the community in which the children resided. The New York statute was facially neutral, was used to facilitate special education for handicapped members of the sect, and required that the school district be operated in a secular manner.

---

*Id.* at 4-5. Petitioner also alleged that the purpose clause is not usually decisive because a secular purpose for providing education can usually be found. "Here the purpose was facilitating... access to secular special education services by disabled students who would otherwise forbear from accepting such services (because of non-religious, cultural reasons) if offered only in the regular classes of the public schools of the Monroe-Woodbury Central School District." *Id.* at 16.


312. The Village of Kiryas Joel had been formed out of the town of Monroe under a New York law which enabled residents to form a political subdivision upon meeting certain procedural requirements. The *Kiryas Joel* opinion did not question the formation of the village. Because the village was created under legislation of general applicability, the Court seemed to accept the legitimacy of the village even though all the residents were Satmars.

313. The only services provided for non-handicapped children by the school district of the Village of Kiryas Joel were transportation, remedial education, and health and welfare services. Those non-handicapped students in the school district, for the most part, attended private schools.


316. *Id.*
Relying on *Ball*, the New York Court of Appeals held that, although the U.S. Supreme Court has not adopted Justice O'Connor's objective observer nuance for detecting an impermissible endorsement of religion, the statute creating the school district violated the "symbolic impact" test under the second prong of the *Lemon* test. The New York Court of Appeals concluded that because (1) the services were already available, (2) only Hasidic children would attend the newly established schools and (3) the school board would all be Hasidic, a symbolic union was sufficiently established so that an endorsement or disapproval of religious views could be perceived by the Satmar Hasidim sect.

Justice Souter, writing for a plurality of the Supreme Court, held that granting political power to a religious group violated the core rationale

---

318. *See* Wallace v. Jaffree, 472 U.S. 38 (1985) in which Justice O'Connor suggests that, when the government lifts a burden on free exercise, the "purpose clause" of the *Lemon* Test will not be given weight but will be modified because:

> It is disingenuous to look for a purely secular purpose when the manifest objective of a statute is to facilitate the free exercise of religion by lifting a government-imposed burden. Instead, the Court should simply acknowledge that the religious purpose of such a statute is legitimated by the Free Exercise Clause. I would also go further. In assessing the effect of such a statute -- that is ... whether the statute conveys the message of endorsement. ... -- courts should assume that the "objective observer," ... is acquainted with the Free Exercise Clause and the values it promotes. Thus individual perceptions, or resentment that a religious observer is exempted from a particular government requirement, would be entitled to little weight if the Free Exercise Clause strongly supported the exemption.

*Id.* at 82. Justice O'Connor also noted that free public schools supported by taxes were unforeseen by the Founders, did not arise until the late nineteenth century, and should not color an understanding of what the Founders intended. *Id.* at 71. In Allegheny v. ACLU, 492 U.S. 573 (1989), the Court acknowledged that the plurality of the prior *Lynch* case had been unified in its statement of the Constitutional principle that "the government's use of religious symbolism is unconstitutional if it has the effect of endorsing religious beliefs, and the effect of the government's use of religious symbolism depends upon its context." *Id.* at 597. Context is evaluated under the perception test of *Ball*. See *Ball*, 473 U.S. 373, 397.

319. Board of Education of Kiryas Joel Village School District v. Grumet, 618 N.E.2d 94 (N.Y. 1993). In dissent, Judge Bellacosa argued that the secular nature of the services should determine the constitutionality of the action and did not create a symbolic union and the ancillary message of endorsement. He put the issue in perspective, stating:

> The unmistakable reality of this case is that the stricken legislation tried to create a secular public school for pupils with special education needs. The Majority concludes that the effort fails. Yet, the new public school district offers programs and services at odds with many basic precepts of Satmar Hasidism, yet secularism is the *quid pro quo* imposed by the State for these Village residents to avail themselves in this way of State-regulated special educational services for their handicapped youngsters. Though the Legislature bent over backwards ... to address the ... needs of the Satmar Hasidim, it did not bend to the theology of their families or community.

*Id.* at 115-16 (Bellacosa, J., dissenting).
underlying the Establishment Clause.\textsuperscript{320} Looking to the context of the legislation, the plurality concluded that "doctrinal adherence" was essentially the reference criteria for the legislation in its delegation of governmental powers.\textsuperscript{321} Such delegation was unusual and went counter to New York's recent practice of consolidating school districts to make larger districts; the Village of Kiryas Joel was not a natural boundary for creating a school district.\textsuperscript{322} Further, because Chapter 748 was special legislation, it would be impossible for the Court to monitor the activities of future legislatures so that other groups would receive the same consideration received by the Village of Kiryas Joel.\textsuperscript{323}

The Court recognized that the Free Exercise Clause requires an accommodation of religion, but held that Chapter 748 was impermissible because it was not neutral.\textsuperscript{324} Additionally, the Court noted alternative ways to accommodate the Satmars, such as structuring the public school program to avoid the types of conflict that had been faced by the Satmar children. In summary, Justice Souter stated:

\begin{quote}
In this case we are clearly constrained to conclude that the statute before us fails the test of neutrality. It delegates a power this Court has said "ranks at the very apex of the function of a State," \ldots to an electorate defined by common religious belief and practice, in a manner that fails to foreclose religious favoritism. It therefore crosses the line from permissible accommodation to impermissible establishment.\textsuperscript{325}
\end{quote}

The problem with Chapter 748, therefore, is that the children and the community in which they live have a common religion. Presumably, a group not identified by religion would not have posed a problem. Thus, only religious groups face this problem. The Court viewed the problem as a fusion of important, discretionary, governmental power with a religious body.\textsuperscript{326} That the grant was to individuals who share common religious doctrine as opposed to a religious organization or its leaders was a distinction of form and not of substance.\textsuperscript{327}

\begin{footnotes}
\item[320] Kiryas Joel, 114 S. Ct. at 2492.
\item[321] Id. at 2489.
\item[322] Id.
\item[323] Id. at 2491. The Court could not directly review a denial of discretionary legislative power.
\item[324] Id.
\item[325] Kiryas Joel, 114 S. Ct. at 2494 (citations omitted).
\item[326] Id. at 2488.
\item[327] Id. Justice Stevens, concurring, suggests that the school district could find ways to teach the non-Satmar children to be "tolerant and respectful of Satmar customs." Such action would
\end{footnotes}
Justice O'Connor, concurring, stated that Chapter 748 is likely to reflect a religious based classification although it may not reflect legislative favoritism toward the Satmars.\footnote{328} The Court, in her opinion, could not easily review future denials of similar requests by other groups.\footnote{329} Therefore, she deemed it appropriate to find a violation.\footnote{330}

Justice O'Connor suggested that in order to accommodate the Satmars in a neutral manner, New York could allow all villages to operate their own school districts.\footnote{331} She also thought that if government provides school programs on the premises of public and private schools it should do so at sectarian schools as well. On this basis, O'Connor called for a reconsideration of \textit{Aguilar v. Felton},\footnote{332} because she believed it resulted in a disfavoring of religion beyond the impartiality required by the Constitution.\footnote{333} Finally, O'Connor suggested abandoning the \textit{Lemon} test and advised considering future cases based on the relevant concerns of each case rather than attempting to apply a single theory to all cases.\footnote{334}

Justice Kennedy, concurring, found that Chapter 748 violated the Establishment Clause only to the extent that it created a special school district.\footnote{335} He recognized that the effort was to lift a specific burden on the Satmars' religious practice while creating no burden on non-adherents, and that Chapter 748 did not seek to favor the Satmar religion.\footnote{336} He found the essence of the Establishment Clause violation in the creation of political boundaries along religious lines.\footnote{337} But for

"further the strong public interest in promoting diversity . . . in the public schools." He questions the effect of any legislation which shields the children from contact with others having different ways. Such legislation would assist the Satmars in furthering their goal of segregation and assist in providing official support for the cementing of children to the particular faith. \cite{328,329,330,331,332,333,334,335,336,337}
this violation, Kennedy would have found Chapter 748 to be a legitimate accommodation of religion. He recognized that the need for accommodation arose out of the Ball and Aguilar decisions, which prohibited public school teachers from teaching secular classes at religious facilities, and suggested that these earlier decisions may be "erroneous" and should be revisited at some point.

Justice Scalia, in dissent, joined by Chief Justice Rehnquist and Justice Thomas, attacked the plurality opinion of Justice Souter on the grounds:

(1) that it is improper to overturn a statute merely on the basis that it reposes political power in citizens who happen to be of the same religion, and

(2) that there is insufficient evidence the New York legislature was religiously motivated in enacting Chapter 748.

On the first point, Justice Scalia noted that there is no basis for holding the conferral of political power unconstitutional merely because the recipients are of the same religion. Scalia also criticized Justice Souter for disregarding the distinction between conferral of political power on a religious institution and conferral on its members. Specifically, Scalia disagreed with Justice Souter's suggestions that drawing political boundaries to coincide with the village is wholly religious, that Chapter 748 is special rather than general legislation, and that Chapter 748 is counter to the trend in New York to consolidate school districts. Scalia believed that these are not sufficient reasons to conclude that conferral of political power on a group of citizens is equivalent to conferral on an institution. Such reasons go to the second point, legislative intention.

On the second point, Justice Scalia would place the burden of proving the legislature's alleged religious motivations on the objector.

338. Justice Kennedy found justification for accommodation in the Court's precedents where (1) government seeks to lift a burden on religious practice, (2) the action does not impose a burden on non-adherents, and (3) the action cannot be said to favor one religion to the exclusion of others. Id. at 2505 (Kennedy, J., concurring).
339. Kiryas Joel, 114 S. Ct. at 2505 (Kennedy, J., concurring).
340. Id. at 2506 (Scalia, J., dissenting).
341. Id.
342. Id. at 2507 (Scalia, J., dissenting).
343. Id.
344. Kiryas Joel, 114 S. Ct. at 2509 (Scalia, J., dissenting).
Scalia argued that accommodation of cultural characteristics does not prove a desire to prefer a religious belief. He would place a strong burden on the objector to show impermissible motivation even if the cultural accommodations were religiously determined. Scalia believed that the Village of Kiryas Joel was comprised solely of Satmars because the village had high-density zoning, which is undesirable to most non-Satmars. He viewed the village lines as reflecting a community of secular governmental desires, not religious desires, and that this same pattern was reflected in the creation of the school district. On the question of accommodation, Scalia criticized Justice Souter's argument that Chapter 748 was unconstitutional because other religious groups would not be guaranteed the same treatment as the Satmar Hasidim. Scalia referred to Souter's argument as a "novel Establishment principal to the effect that no secular objective may be pursued by a means that might also be used for religious favoritism if some other means is available."

Justice Scalia responded to Justice Kennedy's objection to political-line-drawing by noting that Kennedy was inconsistent to accept the establishment of the village based on general laws even though it is a religious community. Scalia agreed with Justice O'Connor's suggestion that Lemon should be abandoned, however he did not agree that it should be replaced with a case by case method but, instead, would use the following formula:

The foremost principle I would apply is fidelity to the longstanding traditions of our people, which surely provide the diversity of treatment that Justice O'Connor seeks, but do not leave us to our own devices.

Finally, Justice Scalia stated that he would reconsider Grand Rapids v. Ball and Aguilar v. Felton, the cases which prompted the Monroe-Woodbury School District to discontinue providing services on the premises of the Satmar Hasidim private school. Scalia agreed that the

345. Id. at 2509 (Scalia, J. dissenting).
346. Id. at 2511 (Scalia, J., dissenting).
347. Id.
348. Id. at 2510 (Scalia, J., dissenting).
350. Id. at 2514 (Scalia, J., dissenting).
351. Id. at 2515 (Scalia, J., dissenting).
cases should be overruled, stating that such cases were hostile to "our national tradition of accommodation."\textsuperscript{354}

Though straining to articulate why conferring political power on a community violated the Constitution merely because the members of the community happened to have a common religion, the Court held Chapter 748 unconstitutional, in part because of the uniqueness of the situation and in part because of the manner in which the statute was enacted.\textsuperscript{355} The irony of the case is that when the New York Legislature enacted Chapter 748, it was attempting to provide services to handicapped children after the \textit{Bell} and \textit{Aguilar} cases had held that providing educational services on the premises of sectarian schools had the effect of creating a symbolic union between the church and the state and, therefore, the primary effect was to advance religion in violation of the Constitution. The \textit{Kiryas Joel} decision was described in a recent publication as follows: "The high Court's decision . . . denies some religious citizens accommodation by their elected representatives and neutral government benefits solely because they live in a religious community."\textsuperscript{356}

6. Reexamination of Premises

\textit{a. Public Education's Changing Purposes}

Education is important, but the reasons why education is important today differ even from such a short time ago as 1948, when \textit{McCollum}\textsuperscript{357} was decided. Universal public education is not a uniquely American tradition.\textsuperscript{358} The Protestant state of Geneva established universal primary education between 1528 and 1536.\textsuperscript{359} Later, university education was added as a necessary support for both church and state under Calvin's concept of the state.\textsuperscript{360} Following Geneva's example, the American colonies, with their Calvinistic heritage, sought

\begin{itemize}
\item \textsuperscript{354} \textit{Kiryas Joel}, 114 S. Ct. at 2515 (Scalia, J., dissenting).
\item \textsuperscript{355} \textit{Id.} at 2488.
\item \textsuperscript{357} 333 U.S. 203 (1948).
\item \textsuperscript{358} Aristotle's famous quote is of interest: "All who have meditated on the art of governing mankind are convinced that the fate of empires depends on the education of Youth."
\item \textsuperscript{359} See Herbert Foster, \textit{Geneva Before Calvin} (1387-1536). \textit{The Antecedents of a Puritan State}, \textit{AM. HIST. REV.} (1903), reprinted in \textit{COLLECTED PAPERS OF HERBERT D. FOSTER} 1, 23 (privately printed, 1929). [hereinafter \textit{Geneva Before Calvin}]. See also Calvin's Programme, supra note 85, at 74-76.
\item \textsuperscript{360} \textit{Geneva Before Calvin}, supra note 359, at 23.
\end{itemize}
education as a means of developing a godly character. The Supreme Court dates the public school in the United States from 1840.

Philip C. Schlechty, author of *Schools for the 21st Century*, identifies the original purposes of public education in the United States as promoting republican/protestant morality and civil literacy. Those early public schools faced a rural and agrarian environment dominated by white Anglo-Saxons. However, as people who did not fit this mold immigrated into the greater society (primarily Catholics from Ireland, Germany and Italy who flocked to industrial jobs in the cities), demand for a public school system was generated to assimilate the newcomers. Horace Mann, whom Frankfurter credits with promoting the secularization of education in Massachusetts in the 1800s, nevertheless believed that a major task of public schools was the moral education of youth. By the late 1800s, the purpose of education had shifted toward integrating immigrants into the general population and selecting appropriate workers for the new urban industrial economy. As the country moved into the twentieth century, Progressives in education began viewing schools as a vehicle to redress the evils of urban industrial society and ensure the ascendance of humanistic and democratic values in a world polarized by haves and have-nots.

Thus three purposes of public education are shown: first, to provide a common core of learning to Americanize students; second, to provide

---

361. Mr. Justice Frankfurter acknowledged the religious nature of education in the colonies. This nature was an outgrowth of Puritan religious thought which pervaded the colonies, but was also generally true of Protestant countries which believed in the right and obligation of all persons to read and understand the Scriptures.


364. *Id.* at 4-5.

365. *Id.* at 5. See also *BELLAH, supra* note 40, at 102.


367. John Dewey, perhaps the most prolific and influential educator of the 20th century, stated, "There is only one way out of the existing educational confusion and drift. That way is the definite substitution of a social purpose, controlling methods of teaching and discipline and materials of study, for the traditional individualistic aim." JOSEPH RATNER, *JOHN DEWEY'S PHILOSOPHY* 689 (1939). Dewey further stated, "Schools do have a role—and an important one—in production of social change" *Id.* at 688. Dewey thought that it was the duty of the school system to weed out undesirable elements of the culture and to pass on to the next generation only that which would make a better society. The school system was the chief element of such work. J. DEWEY, *DEMOCRACY AND EDUCATION* 24 (1916). See also D. BRUCE LOCKERBIE, *A PASSION FOR LEARNING: THE HISTORY OF CHRISTIAN THOUGHT ON EDUCATION* 326-32 (1994). Dewey was influenced by the romanticists theories of childhood innocence propagated by Rousseau, whose book, *EMILE*, is credited with undermining the foundations of the Christian theory of education. *Id.* at 328 (citing RIAN, *CHRISTIANITY AND AMERICAN EDUCATION* 30).
vocational training to support the economic community; and finally, to redress the inequities of the social order. By the 1970s and 1980s, schools were being paralyzed by forces calling for a stemming of the tide of poor performance. Some individuals, such as William Bennett, advocated "back to basics," while others demanded better testing and accountability. Still others pushed for enhanced research on effective teaching. Schlechty calls these three views of the school, respectively, the "tribal center" invoking cultural values, the "factory" supporting the industrial state, and the "hospital" calling for a core of professional experts in the knowledge of healing the ills of our children. Schlechty subscribes to a combination of all three. He views leadership from the school board, teacher unions, and business community as essential for the restructuring of schools. Schlechty suggests boards of education have broad authority to "assert what the next generation should know, understand, and believe." To move forward, however, a purpose for education must be established. He states: "Schools cannot . . . provide students with supportive parents. But schools can be organized to provide significant adult support to children who do not have supportive parents." In sum, what we need is a formulation of schools that honors the cultural and civic purposes suggested by the tribal center image of schools, the purposeful activity and economic link suggested by the factory metaphor, and the nurturing and child-centered emphasis suggested by the concept of the school as hospital.

Schlechty also states, "What is wanted is a school system that can ensure that all children will learn to read, write, and cipher, while at the same time ensuring that all children will learn how to think. This is a challenge that has never before faced public education in America. Moreover, the "information" society of the future will require workers who are able to pay attention to and work with cultural elements that

370. Id. at 7 citing, among others HOLMES GROUP, TOMORROW'S TEACHERS: A REPORT OF THE HOLMES GROUP (1986).
371. Id. at 17-18.
372. SCHLECHTY, supra note 363, at 8-15.
373. Id. at 12-13.
374. Id.
375. Id. at 32.
376. Id. at 40.
Schlechty defines as ideas, propositions, beliefs, symbols, and modes of explanation.\textsuperscript{377}

Schlechty’s proposal, referred to as "outcome based education," is being implemented in many school districts but has been sharply criticized for reducing standards by eliminating objective testing of

\textit{Id.} at 114-15. Student testing under Schlechty’s approach ceases to be an objective measure of performance but is only conducted "when a teacher . . . indicates a child is capable of doing well on the assessment. The purpose of the assessment should be to validate the teacher’s judgment rather than to test the child’s ability to read." \textit{Id.} at 118. Schlechty believes that moral authority resides with the superintendent of schools who ultimately will determine the values which are manifested throughout the school system. \textit{Id.} at 128. Finally, Schlechty’s belief statement places ultimate responsibility for the success of the student on the teacher, rather than on the student. Note the following belief statement:

\begin{enumerate}
  \item Every student can learn, and every student will learn, if presented with the right opportunity to do so. It is the purpose of the school to invent learning opportunities for each student each day.
  \item Learning opportunities are determined by the nature of the schoolwork (knowledge work) students are assigned or encouraged to undertake. It is the responsibility of teachers and administrators to ensure that students are provided with those forms of schoolwork at which they experience success and from which they learn those things of most value to them, to the community, and to the society at large.
  \item All school activity should be focused on the creation and delivery of schoolwork at which students are successful and from which they gain skills and develop understanding that will equip them to participate fully in an information-based, knowledge-work society.
\end{enumerate}

\textit{Schlechty, supra} note 363, at 128.
achievement and by forcing conformity among all students. The important point, however, is to recognize that education is value-laden. It is an effort to structure society in accordance with the ideals of educators such as Schlechty. Since religion and religious training are totally excluded, parents who believe a religious value system is necessary for normal growth of a child have their efforts thwarted.

Eliminating religion may have been acceptable in schools of the 1940s, when a high degree of local autonomy made the schools responsive to their local communities. However, with the massive federal intervention into education from the late 1950s through the present, parents are being forced to accept value-laden federal programs that are unacceptable to them. As government has come to monopolize the education of the young, the complete elimination of religious training to counterbalance the value structures of the curriculum is hard to justify. Today, the state goes even farther and seeks to intervene in the child's life prior to entering school. Through the Headstart Program, disadvantaged children are given training to prepare them to enter school on par with other students. Many people today are advocating the extension of state-provided care to all aspects of the prenatal child. But

---


379. That value may be economic. Noted educational consultant and writer, Myron Lieberman, states:

Schooling in the United States first emerged for religious objectives . . . . Subsequently, formal education was justified on political grounds, such as the importance of Americanizing the immigrants: or of developing an informed citizenry supposedly essential to democratic representative government.

In the future, however, economic considerations will be paramount. This is not to say that religious or political or sociocultural factors will no longer play a role, or that economic considerations were absent from educational policymaking in the past. The point is that economic considerations will overshadow others . . . . Issues pertaining to separation of church and state may be debated for centuries; survival in a competitive international economy does not allow for such a leisurely paced resolution.


380. The federal control of education at all levels began with the National Defense Education Act of 1958, passed as a response to the Soviet Union's threat of surpassing the United States in technology, and continued with the Elementary and Secondary Education Act of 1965, passed as a response to President Johnson's war on poverty. See Charlotte Twight, ORIGINS OF FEDERAL CONTROL OVER EDUCATION, THE FREEMAN, Dec. 1994, at 701-03. Federal dominance of education continues under these acts but is also seen in President Clinton's "Goals 2000," setting national standards for education and the Department of Education's funded project establishing national history standards. The effects of such uniformity were objected to as early as 1926, by Princeton Theological Seminary Professor J. Gresham Machen, testifying before the House and Senate Committees, February 25, 1926. See J. GRESHAM MACHE, EDUCATION, CHRISTIANITY, AND THE STATE 99 (1987).

381. It is difficult to understand why religion can be barred if one child may be offended, thereby frustrating the desires of millions of people who believe some accommodation is necessary.
if families are so devastated by poverty and raising children is a tremendous burden, how are those children going to receive the religious training needed for full development if that religious training is not received through public schools?

Many people, unable to provide material necessities for themselves or their children, can provide love and emotional support. However, people fighting poverty and lacking education will find it almost impossible, without help, to give their children a system of fundamental values that can counteract the combined forces of peer pressure and the entertainment media that are working to push the child to desire immediate gratification. Many are unable to equip their young for even limited upward mobility in the twenty-first century. If government does not provide help, who will do so? Can moral and ethical precepts be instilled without religion? If government is the only educational choice, then poor and disadvantaged children will not be able to receive a religious based education and value system - at least not through the public educational processes. Such a result prompted at least one commentator to reevaluate his position on school vouchers to include religious schools.

The foregoing demonstrates that there is no value-free education and that it is impossible for a school system to avoid reflecting some type of value system. This propositions will dominate the discussion of education. It leads to the conclusion that the majority of students will be indoctrinated into a government-dominated value system that is determined by persons remote to the community where the child lives and unknown to the child’s parents. The present separation of religious training from education will impede the efforts of parents and others to

382. All is not discouraging in our educational system. The Rand Corporation released a report on December 21, 1994, suggesting that progress had been made in improving the educational level of young Americans, particularly Black and Hispanic students. However, while children of single parent households do not automatically underperform simply because such households are likely to be poor and poor children do not perform as well as others, children of single parent homes did not score as high as children in two parent homes.

383. See comment of Sanford Levinson (Constitutional Law Scholar at the University of Texas Law School) in AMERICAN JEWS & THE SEPARATIONIST FAITH; THE NEW DEBATE ON RELIGION IN PUBLIC LIFE (David Dalin, ed., 1992). In this piece, Levinson acknowledges changing his mind on the question of funding religion-related schools. He accounts his change of mind to reading Michael McConnell, The Selective Funding Problem: Abortions in [sic] Religious Schools, 104 HARV. L. REV. 989 (1991), in which Professor Michael McConnell asked the question: "If we are so solicitous about ensuring the practical right of poor women to enjoy their right of reproductive choice, why not be equally concerned about the constitutionally protected right of less-well-off parents to choose religious education for their children?" LEVINSON, supra, at 75. See also Levinson, The Multicultures of Belief and Disbelief, 92 MICH. L.REV. 1873, 1881 & n.42 (1994).
instill a religious value system into a child’s life or even to transmit a value system consistent with a parent’s view of western civilization.

Whoever controls the education system will ultimately control the moral and ethical system of the future, perhaps not for those students rich enough to enter private schools or whose parents are sufficiently skilled, determined and devoted to instill a different value system, but for those millions who are dependent on the public system.

b. Secular Education a Myth

Justice Frankfurter, in his concurring opinion in *McCollum*, asserted that the concept of secular education separated from religion had become a widely held view and an accepted historic fact. While that premise may have been accepted by many people, others argued vigorously against the trend toward secular public education and even in favor of practical training as superior to formal education in the formative years. Many religious leaders totally reject the concept that any sort of secular education is appropriate for Christian children. These leaders believe Christian precepts and a standard of morality must be incorporated into every aspect of education. It is also argued that, by addressing metaphysical questions, there can be no such thing as a strictly neutral school, either in the public system or elsewhere.

Numerous programs are value-laden to the core. The result is that to delay religious training until adulthood puts parents at a disadvantage when trying to counteract the influence of value training already occurring in the public schools. Sex education involves all aspects of family relationships, including procreation, an area that has been the domain of religion from the earliest recorded history. What is important

---

385. See the comment of R. L. Dabney, a late nineteenth century educator and leader of the Southern Presbyterian Church, in *The State Free School System reprinted in ROBERT L. DABNEY, DISCUSSIONS, 200-06 (1979)*, reprinted from a 1876 article in the *Richmond Enquirer*, where Dabney argued in favor of apprentice training rather than the common school in New England.
386. In a 1934 essay, *The Necessity of the Christian School*, J. Gresham Machen argued that Christian schools, together with private schools, stand against collectivism in education. In doing so, such schools are not an enemy of public schools. In fact, the only way in which public schools can be kept even relatively healthy is through the absolutely free possibility of competition by private and church schools. If the public school becomes monopolistic, Gresham argued, it is the most effective engine of tyranny and intellectual stagnation that has yet been devised. J. Gresham Macher, *The Necessity of the Christian School* (1934), reprinted in *EDUCATION, CHRISTIANITY, AND THE STATE* 75 (1987). The same thesis (i.e. the need for competition from private and religious schools) is the main theme of educator Myron Lieberman’s controversial book on education. LIEBERMAN, *supra* note 379.
here is not what view of the family is preferable, but that, by addressing these subjects in a way which affects lives, the school has entered the domain of religion. It should not be allowed to expel different views held by parents.

Government has acknowledged that adolescent sexual relations and pregnancy problems can be addressed by religious institutions. The Adolescent Family Life Act (AFLA) provided federal grants to public or nonprofit private organizations or agencies for services and research in these areas. Because the AFLA permitted participation by religious organizations, it was challenged under the Establishment Clause. In upholding the AFLA against a challenge of facial invalidity, the Court held that under the Lemon Test, the Act had a secular purpose, its effect of advancing religion was incidental and remote, and the possibility of participation by "pervasively sectarian" institutions was insufficient to hold it unconstitutional. Finally, the entanglement prong was not violated because the monitoring necessary to determine if the funds were used properly would not be conducted in a pervasively sectarian atmosphere and, therefore, any entanglement was not excessive. The Court acknowledged the ability of religious groups to participate in programs involving family planning so long as the religious institution did not promote religious doctrines or provide the services in a pervasively sectarian environment.

c. Symbolic Union Can be Neutralized

When public schools accommodate religion, a possibility exists that some people will perceive this as a government endorsement of religion.

388. 42 U.S.C. § 300z(a)(5) (1982 & Supp. IV). The purpose of the AFLA could be accomplished through a variety of private organizations, including religious groups. Congress found that "[s]uch problems are best approached through a variety of integrated and essential services provided to adolescents and their families by other family members, religious and charitable organizations, voluntary associations, and other groups in the private sector as well as services provided by publicly sponsored initiatives." Id. at § 300z(a)(8)(B).

389. Religious organizations have participated in other general federal programs. Roe v. Maryland Bd. of Public Works, 426 U.S. 736 (1976) (involving a state statute that provided subsidies to qualifying colleges and universities, including religiously affiliated institutions); Tilton v. Richardson, 403 U.S. 672 (1971) (approving the Higher Educational Facilities Act, which provided federal construction grants to colleges and universities regardless of any affiliation with or sponsorship by a religious body); Hunt v. McNair, 413 U.S. 734 (1973) (approving South Carolina statute making certain benefits available to all institutions of higher education, whether or not having a religious affiliation).


391. Id.

392. Id.

393. Id.
In *Ball*\(^{394}\) and *Aguilar*\(^{395}\) the Court held such an impression of endorsement was enough to bar public school teachers from performing remedial reading on the premises of religious schools. As a result, public schools have sought to provide the instruction off-premises, in mobile units parked close to the religious school.\(^{396}\) The cost to provide the mobile units has been enormous and the inconvenience generated has greatly reduced the effectiveness of the programs. That handicapped children in religious schools have not participated in programs to the same extent as children in public schools led Justices O'Connor and Kennedy to express a willingness to review those cases. Three other justices expressed a similar willingness.

Is the "symbolic union" approach justified? Two recent Supreme Court decisions are of importance: *Lamb's Chapel v. Center Moriches School District*,\(^{397}\) which permitted religious groups to use public school facilities on a basis equal with other community groups, and *Board of Education of the Westside Community Schools v. Mergens*,\(^{398}\) which applied the Equal Access Act of 1984\(^{399}\) to prohibit a public high school from discriminating against student initiated religious groups on the basis of religious content since the school already maintained a "limited open forum."

By applying free speech concepts to religious speech and asserting that religion should not be treated differently, the Court has brought religion to the door of the school house. Students are permitted to teach religion to other students on the premises of secondary schools as part of extracurricular activities, and parents can use the premises for religious purposes if other members of the community may use them for other purposes. It could be argued that to allow religion to go a step further by permitting voluntary parent-controlled religious instruction during the school day would create a perception that religion is being endorsed. That is, a "symbolic union" between church and school would be created that would possibly enhance the prestige of religion because of approval from a government-controlled school. While this argument may have

\(^{396}\) Since 1988 Congress has appropriated over $200 million to support the off-premise delivery of remedial programs. M. BRUCE HASLAM & DANIEL C. HUMPHREY Chapter 1 SERVICES TO PRIVATE RELIGIOUS-SCHOOL STUDENTS 41 (Dept. Educ. 1993) (approximately $161 million was appropriated for capital expenses for fiscal years 1988-93). For a discussion of the costs incurred as a result of *Ball* and *Aguilar*, see amicus curai brief of Mark E. Chopko and Phillip H. Harris on behalf of the U.S. Catholic Conference in Village of Kiryas Joel, 114 S. Ct. 2481 (1994).
\(^{399}\) 20 U.S.C. §§ 4071-4074.
been tenable in 1948, pluralism and multiculturalism have changed the nature of the public school of the 1990s. Today, a voluntary program similar to that in *McCollum* would likely have a greater number of smaller classes than those encountered in *McCollum*. A program today would, therefore, be unlikely to create the symbolic union found objectionable in Establishment Clause cases.

Analyzing the symbolic union question in one case involving a seasonal display, Justices Blackmun and O'Connor sympathized with the notion that a display presenting a message of pluralism diminished the perception of governmental endorsement of religion. Justice O'Connor believed that the second prong may be considered under a test of whether, from the standpoint of an objective observer, government would

---

400. These subtle changes were only becoming apparent in 1948. In a 1967 speech to the managing editors of the Associated Press, scholar and historian Daniel J. Boorstin noted:

But in the last few decades we have had a movement from "assimilation" to "integration." And this is an important distinction. In about the 1930s Louis Adamic began writing, and, in his book *A Nation of Nations* in 1945, he began an emphasis which has been often repeated. It was no longer the right of the immigrant to be Americanized, to be assimilated; it was now the right of the immigrant to remain different. The ideal ceased to be that of fitting into the total society and instead became the right to retain your differences. Symptoms of this were such phenomena in politics as the rise of the balanced ticket, a ticket which consists of outspoken and obvious representatives of different minorities.


401. Allegheny County v. ACLU, 492 U.S. 573, 610-11, 617-18, 635-36 (1989). Justice Brennan felt the justices' statements suggest a "more is better" approach. *Id.* at 644. Justice Kennedy, in dissent, would go further and allow the display as a reasonable exercise of judgment by local officials where "our Nation's historic traditions of diversity and pluralism" can be expressed by "accommodation or acknowledgment of holidays with both cultural and religious aspects." *Id.* at 679.
be viewed as endorsing a practice. Her view has been criticized, and such a test has not been adopted.

d. Moral Influence on Children Crucial

The fact that children are easily influenced can be used to support two contradictory conclusions. First, such vulnerability requires that children be protected from religion in the public schools until they are mature enough to understand such matters for themselves. This is the reasoning of the Court. Second, because children are easily influenced, it is necessary to inculcate them with basic ideals and learning at the earliest time possible. This is the reasoning in the world of religion and education. For example, a well known Jewish and Christian proverb states, "Train up a child in the way he should go: and when he is old, he will not depart from it." In the field of education there is an increasing awareness that if the cycle of poverty is going to be broken, programs interacting with a

---


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

Allegheny, 492 U.S. at 659. Justice O'Connor's endorsement test is stated in her concurring opinion in Jaffree:

The endorsement test is useful because of the analytic content it gives to the Lemon-mandated inquiry into legislative purpose and effect. In this country, church and state must necessarily operate within the same community. Because of this coexistence, it is inevitable that the secular interests of government and the religious interests of various sects and their adherents will frequently intersect, conflict, and combine. . . .

The endorsement test does not preclude government from acknowledging religion or from taking religion into account in making law and policy. It does preclude government from conveying or attempting to convey a message that religion or a particular religious belief is favored or preferred.

Jaffree, 472 U.S. at 69-70.

403. Id.

404. Proverbs 22:6 (King James). The classic instruction linking education to godliness provides:

Hear, O Israel: The Lord our God is one Lord: And thou shalt love the Lord thy God with all thine heart, and with all thy soul, and with all thy might. And these words, which I command thee this day, shall be in thine heart: And thou shalt teach them diligently unto thy children, . . . .

Deuteronomy 6:4-6 (King James).
child’s life must be implemented at the earliest age.\textsuperscript{405} It is almost
axiomatic that children who do not receive training in the early stages of
life will have difficulty adjusting later. For example, sex education is
commenced in kindergarten. How, then, is it possible that religion,
traditionally the means used for teaching values and conduct, can be
banned from public schools, yet public schools can still be considered
adequate to prepare children for success in life? The simple answer is
that public education cannot fulfill its purpose, and the child whose parent
cannot fulfill the function of moral trainer will be locked into a set of
haphazard and unfocused values and conduct established as an infant.
That child’s moral choice as an adult, therefore, will be limited.

In today’s environment, where a child encounters 5,000 hours of
commercial television\textsuperscript{406} prior to attending school, it becomes
impossible to counter the moral misinformation fed into the child by such
powerful programming. The fact that advertisers spend enormous
amounts of money on advertisements directed at children strongly
suggests that children have the ability to respond to influences designed
to elicit a response.

It is not disputed that children must be trained to behave correctly
and to accept responsibility. While such training may have come from
the home in the 1940s, in the 1990s, when two wage earner families is
the rule rather than the exception, the pressures on parents to earn an
adequate living leave millions of children in situations without constant,
relaxed, parental nurturing. Religious training, even when desired by the
parents, becomes increasingly difficult. The changing needs of society
could best be accommodated by reviewing \textit{McCollum} and allowing
voluntary, parent-controlled religion classes in public elementary schools.

\textbf{e. Celebrating Diversity Counters Inferiority}

Much of education today is involved with creating a positive self-
image. Outcome-based education, for example, is primarily concerned
with overcoming negative self-images. A recent study by the Public

\textsuperscript{405} It is claimed that $1 invested in preschool education saves as much as $6 in special
In,} \textit{FORTUNE,} Spring 1990, at 53 (referring to the Report of the House Select Committee on Children,
Youth, and Family).

\textsuperscript{406} While studies of the effects of television violence on children are debated, some studies
have indicated that the more television violence a child watches, the higher the likelihood the child
will commit violent acts. The intensity of those acts will also likely be greater. Moreover, the
effect of television violence may last throughout the child’s life. \textit{See} Elizabeth Kolbert, \textit{Television
Gets Closer Look As a Factor in to Real Violence, N.Y. TIMES, Dec. 14, 1994, at A1.}

929
Agenda, a nonpartisan research and education organization, sought to understand public concerns about education.\textsuperscript{407} Highest on the list of concerns were those of child safety, order in the classroom, and the teaching of basics. Next highest was the desire to teach values, especially those values that allow a diverse society to live together peacefully.\textsuperscript{408}

Today's emphasis on diversity is directed at establishing the same societal recognition of self-worth regardless of culture or race. It is inconsistent to totally exclude religious expression from a child's world and then expect that child to appreciate and respect religious diversity; therefore, it is necessary for religion to have a place in the school life of early childhood. Recognizing and appreciating differences increases self-respect and alleviates feelings of inferiority.\textsuperscript{409} Whereas separation created feelings of inferiority in 1948, today separateness has been turned into a positive experience.

\textit{\textit{f. Parental Choice Builds Respect}}

The Supreme Court recognized long ago that education of the child belongs in the realm and authority of the parents.\textsuperscript{410} The Court in McCollum did not address the important point that the parents were the

\textsuperscript{407} This description of the Public Agenda's report is taken from Jean Johnson and John Immerwahr, \textit{First Things First, What Americans Expect from the Public Schools}, AM. EDUC., Winter 1994-95, at 4.

\textsuperscript{408} \textit{Id.} Other core values included honesty and telling the truth; respecting others regardless of their racial or ethnic background; learning to solve problems without violence; having friends from different racial backgrounds and living in integrated neighborhoods; teaching children that girls can succeed at anything boys can; teaching about the struggle for black civil rights in the 1950s and 1960s. \textit{Id.} at 44.

\textsuperscript{409} See note 397-98 and accompanying text (discussing the opinions of Justices Blackmun and O'Connor in Allegheny).

\textsuperscript{410} \textit{See Wisconsin v. Yoder, 406 U.S. 205 (1972); Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923). In Yoder, the Court stated that "when the interests of parenthood are combined with a free exercise claim of the nature revealed by this record, more than merely a 'reasonable relation to some purpose within the competency of the State' is required to sustain the validity of the State's requirement under the First Amendment." 405 U.S. at 233.}

\textit{See Daniel R. Gordon, The Ugly Mirror: Bowers, Plessy and the Reemergence of Constitutionalism of Social Stratification and Historical Reinforcement, J. CONTEMP. L. 21, 36, 47-49 (1993).} Professor Gordon suggests that protection of a parent's right over the education of their child could be eroded under the Court's analysis in Bowers v. Hardwick, 478 U.S. 186 (1986). In Bowers, the Court held that a state could criminalize homosexual activity. In its decision, the Court allowed legislative decisions to take precedence over Constitutional principles of personal rights. Such a position ignores the impact of historical justifications and social and moral attitudes which must be considered in deciding any case. Professor Gordon suggests the reasoning could support a governmental decision to impose uniform educational standards over the objections of parents. The case of compulsory sex education is instructive; students are forced to attend even when parents object because the program is viewed as undermined if full participation is not mandated. \textit{Id.} at 47-49.
ones who made the decision as to whether the child attended a religion class. By focusing on the state compulsory education laws, the Court concluded that state power was brought to bear to aid religions, which had failed in their attempts to win children's interest outside of school. We see in the funding cases that mediating funds through parental choice has the effect of insulating the government's act from Establishment Clause objection. The same should be true of attendance at voluntary, parentally controlled religious classes.

411. Chief Justice Warren, in McGowan v. Maryland, 366 U.S. 420 (1961), noted that the program in McCollum could be distinguished from Sunday closing laws on the basis that the latter did not compel religious participation. See McConnell, Coercion: The Lost Element of Establishment, 27 WM. & MARY L. REV. 933, 937 (1986) (arguing that Madison's view was that coercion was at the essence of an establishment of religion). Even Jefferson, in his "Virginia Bill for Religious Liberty," which the Court found to express the intent of the Founders, made explicit references to coercion. Indeed, Jefferson seemed to abhor any attempt to use tax money to influence "opinion," which, broadly construed, could even be used to suggest that the public school system itself is an establishment of religion. The preamble of the statute provided:

Almighty God hath created the mind free; that all attempts to influence it by temporal punishments or burdens, or by civil incapacitations, tend only to beget habits of hypocrisy and meanness, and are a departure from the plan of the Holy author of our religion, who being Lord both of body and mind, yet chose not to propagate it by coercions on either...; that to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical; that even forcing him to support this or that teacher of his own religious persuasion, is depriving him of the comfortable liberty of giving his contributions to the particular pastor, whose morals he would make his pattern....

And the statute itself enacted:

That no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested, or burthened in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief


412. McCollum, 333 U.S. at 231.

413. In the school funding area, the fact that funds are transmitted through the individual free choices of parents apparently avoids the Establishment Clause problem. See Witters v. Washington Dept. of Services for Blind, 474 U.S. 481 (1986), and Mueller v. Allen, 463 U.S. 388 (1983). These two cases deal specifically with government programs offering general educational assistance. Mueller dealt with permitting taxpayers to deduct certain educational expenses from their state income taxes; Witters dealt with a program of vocational assistance provided by the state to a blind person studying to become a religious worker and attending a private religious college. Based on these cases, the Court in Zobrest v. Catalina Foothills School Dist., 113 S. Ct. 2462 (1993), upheld the provision of a sign language interpreter to a high school student in a Catholic high school. The Zobrest Court distinguished the case from Ball and Aguilar on the grounds that those cases involved sending teachers into religious schools to teach secular subjects, while Zobrest involved no indirect subsidy to a religious school and the work of an interpreter differed from that of a teacher. The Court held that, "[b]y 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." Zobrest, 113 S. Ct. at 2467. Justice Blackmun, in dissent, asserted that Ball rejected the idea that aid to parochial schools could be disguised as aid to individual students. Id. at 2469.
Additionally, it is worth noting that the movement toward school vouchers may reflect that parents feel best qualified to determine the educational setting for their children.

The crux of the problem in *McCollum* was the force used by the state to assemble the children at the school and then turn them over to a religious instructor.\(^4\) It is clear under *Zorach*\(^5\) that parents (or anyone else) could purchase a building across the street from a school and children could walk across the street on released time to receive religious instruction. Where force is not used, there seems no reason the class could not be in the school building itself. The proposal herein is that parents would be responsible for deciding whether a child participated in the religion class, determining the content of the instruction, and securing the instructor. Such a program, mediated through the parents, would alleviate the concerns of *McCollum*. Students not participating should be provided with stimulating and useful educational activities and not merely set aside to await the return of those attending the religion classes.\(^6\)

An objection might be that the state would use force if the child refused to obey the parent's decision to attend the religion class. However, the religion class could be viewed as an extracurricular activity and treated no differently than any other such activity. Generally, younger students are required to participate in all activities; with regard to the religion class, a child who refused to participate could be released to the parent directly.\(^7\)

By respecting parental choice, the school teaches the child respect for parents and other appropriate authorities. By interacting with the school, the parent demonstrates to the child appropriate respect for authorities. Respect for parents, if effectively reinforced in the

\(4\) Justice Douglas noted the distinction between *McCollum* and *Zorach*: "In the *McCollum* case the classrooms were used for religious instruction and the force of the public school was used to promote that instruction." *Zorach v. Clauson*, 343 U.S. 306, 315 (1952).


\(6\) Such activities are important as a means of mitigating the effects of any sense of being separated or mistreated and to meet Justice Jackson's complaint that: schooling is more or less suspended during the "released time" so the nonreligious attendants will not forge ahead of the churchgoing absentees. But it serves as a temporary jail for a pupil who will not go to Church. It takes more subtlety of mind than I possess to deny that this is governmental constraint in support of religion. *Zorach*, 343 U.S. at 324 (Jackson, J., dissenting).

\(7\) The religious rights of children is an area which has received little attention. Wisconsin v. Yoder, 406 U.S. 205 (1972), dealt with the parent's right to withdraw the child from a public school, not the child's right to participate in public school contrary to the religious-based wishes of his parents or the right of a child to receive religious training when his parents refused to provide that training.
classroom, is the foundation in the child’s life for learning to respect other authorities.\textsuperscript{418} Thus, reinforcing parental choices builds character in the child.

Peer pressure, whether encouraging constructive or destructive conduct, is strong within the school setting. It is the school’s function to provide guidance to enable the child to discriminate between, and to resist, peer pressures while respecting the rights of others. Peer pressure to participate in religious classes is no different, and successful instruction in mutual respect will reduce that pressure. Today the peer pressure would probably be mixed, with many students advocating attendance and others the opposite. But here, the decision to respond to any peer pressure is in the hands of the parent, who is chiefly responsible for the education and well being of the child.

Finally, as noted earlier, the independent choices of individuals has insulated government payments supporting education from Establishment Clause challenges even when government funds are used to obtain a religious education. Similarly, independent choices of individuals can protect the constitutionality of voluntary, parentally controlled religion classes in public schools.

\textit{g. Divisiveness Can be Countered}

Divisiveness, rather than being an independent ground for invalidating governmental action, has been seen as evidence of excessive entanglement. Such divisiveness, however, has not occurred in the many encounters between religion and education over the years.\textsuperscript{419} In fact, Justice Reed, in his dissent in \textit{McCollum}, \textit{specifically found} that the religion classes fostered tolerance rather then intolerance.\textsuperscript{420}

Justice O’Connor, in her dissent in \textit{Aguilar}, made it clear that there was no evidence that the public school teachers had sought to indoctrinate students or that their presence in parochial school classrooms resulted in

\textsuperscript{418} This principle is embodied in the Ten Commandments. The fifth commandment admonishes children to honor their parents. See \textit{Deuteronomy} 5:16 (King James). It thereby teaches respect for God as well as other authorities (e.g. employers and governments). In Roman myth the word \textit{pietas}, which denoted duties to gods and parents, was personified as a goddess. Acilius Glabrio reared a temple to her honor, on the spot where a woman had nursed with her own milk her aged father, whom the senate had ordered to be imprisoned and starved. The goddess is represented on Roman coins as a matron, throwing incense upon an alter, and her attributes are a stork and children. \textbf{BOARDMAN}, \textit{supra} note 123, at 150.

\textsuperscript{419} In \textit{Lee v. Weisman}, 112 S. Ct. 2649 (1992), Justice Kennedy acknowledged that neither the existence nor the potential for divisiveness necessarily invalidates a state’s attempt to accommodate religion. \textit{Id.} at 2655-56.

\textsuperscript{420} \textit{McCollum}, 333 U.S. at 244 (Reed, J., dissenting).
political divisiveness. Government has sponsored numerous programs that have involved religious institutions without any evidence of sectarian strife. The massive education aid funneled through the G.I. Bill following World War II was a great boon to Catholic higher education and put many Catholic institutions on a sound financial basis. The program did not engender great political divisiveness. Handicapped students have been given assistance to enable them to attend religious educational institutions, scholarships have been given and loans guaranteed to enable students to attend religious educational institutions, buildings for use in nonsectarian courses at religious colleges have been allowed, child care facilities on religious premises received federal funds, and religiously operated hospitals have participated in the enormous government support for medical services.

With regard to the proposed voluntary, parentally controlled religion classes, the risk of divisiveness will be slight since such classes will likely be small and equally available to all desiring to participate. In the event a particular religion dominates a situation, the school administrators can take action to diffuse any perception of endorsement. If the prevalence of Zorach-type released time programs is any indication, the magnitude of on-premise programs would likely be seen as a minority effort.

h. Entanglement is Minimal

In Aguilar, the Court adopted Judge Friendly’s formulation of the entanglement prong of the Lemon test, thereby creating a catch-22

421. *Aguilar*, 473 U.S. at 427-28 (O’Connor, J., dissenting). O’Connor pointed out that the programs challenged in *Aguilar* had operated without incident for over nineteen years. See also Chopko & Harris, supra note 397.


425. See Chopko & Harris, supra note 397.

426. See *County of Allegheny v. ACLU*, 492 U.S. 573, 617-21 (1989) (allowing governmental officials to minimize the possibility of creating a perception of endorsement in order to satisfy the Constitutional standard). See also *Felton v. Secretary*, 739 F.2d 48, 56-57 (2nd Cir. Crt. App. 1984) (Judge Friendly, in *Tilton v. Richardson*, 403 U.S. 672 (1972), discussed the reduced potential for divisiveness on college campuses where the student constituency is diverse). Such diversity would of course be the case in many elementary and secondary schools today.

427. Judge Friendly stated:

The Supreme Court’s Establishment Clause jurisprudence from Everson to Wolman has been entirely consistent on the point that whatever forms of state aid may be given to religious elementary and secondary schools, these must not create a risk, sufficiently
where monitoring to avoid the advancement of religion created its own violation of the Lemon test. In his dissent in Aguilar, Justice Rehnquist responded to the Court's use of the entanglement prong by emphasizing the catch-22: aid must be supervised to ensure that no entanglement occurs, but that supervision is itself an entanglement. Justice O'Connor, in her Aguilar dissent, objected to the use of the entanglement prong. She acknowledged that an earlier case had asserted that the Court could not rely "on the good faith and professionalism of the secular teachers and counselors functioning in church-related schools to ensure that a strictly nonideological posture is maintained," but O'Connor found such analysis flawed since there was no evidence in Aguilar that the public school teachers would violate the trust. The contrary finding, in her opinion, is exaggerated. As for the need of coordination between the institutions, Justice O'Connor would find that the institutions interact and cooperate on numerous levels, including such things as attendance requirements and fire and safety regulations.

significant to require policing, that public school personnel will act, even unwittingly, to foster religion. Felton v. Secretary, 739 F.2d at 64.

428. Aguilar requires the government to show that a violation of the Establishment Clause will not occur. This burden has been criticized by commentators. See Glendon and Yanes, Structural Free Exercise, 90 MICH. L. REV. 477, 514 (1991), where the authors state:

Aguilar deployed abstract separationist logic and baseless evocations of sectarian strife to strike down a benign legislative program worked out by Congress after extensive cooperative effort with and testimony from a wide variety of religious organizations. Moreover, the decision seemed to place religion, alone among human activities, in a suspect category. Normally, a litigant challenging a governmental action would have the burden of showing that the activity in question violated the Constitution. But Aguilar inverted the usual presumption, by striking down the remedial program because the government could not prove there would never be unconstitutional advancement of religion by public school teachers.

429. See Justice Rehnquist's dissents in Wallace v. Jaffree, 472 U.S. 38, 91 (1985) and Aguilar v. Felton, 473 U.S. 402, 421 (1984), in which he describes the "catch-22" created by the entanglement prong of the Lemon test. Professor Douglas Laycock refers to Aguilar as an extreme case since it resulted from looking at only the "advancing" side of the "effects" prong. He argues for a substantive neutrality that seeks to minimize the extent government encourages or discourages religious belief or disbelief. The result in Aguilar was to greatly increase the cost of providing remedial classes to students in religious institutions and to reduce the number of children receiving the benefits of the program. The inhibiting effect overwhelms the possible effect of proselytization by the public school teachers. Laycock concludes that the Court lost sight of its original objective. Laycock, supra note 120, at 1008.


431. Id. at 427 (O'Connor, J., dissenting), (citing Meek v. Pittenger, 421 U.S. 349, 369 (1975)).


433. Id. at 430. Justice O'Connor would limit the entanglement inquiry in school aid cases where the issue is whether the aid is used according to the legal requirements. Id. She would also
In a *McCollum* type situation, entanglement would be minimal since all that would be required is the coordination of attendance and some intervention if religious instructors create a disturbance or advocate doctrines contrary to established public policy. Monitoring in this sense would be minimal, much like the Internal Revenue Service’s monitoring of religious institutions. A case in point is *Bob Jones University v. United States*, where the Internal Revenue Service revoked a religious university’s tax exemption on the ground that the university promoted a policy of racial discrimination contrary to established public policy. Protecting against similar violations by religious instructors would involve minimal entanglement among the school, the parents desiring to provide religion classes, and the persons making the presentations.

7. *McCollum*: A Better Solution Than *Zorach*

*McCollum* and *Zorach* are often seen as the bedrock of stable church-state relations in the area of education. Cases generally limit the use of entanglement arguments without the showing of divisiveness as follows:

The Court’s reliance on the potential for political divisiveness as evidence of undue entanglement is also unpersuasive. There is little record support for the proposition that New York City’s admirable Title I program has ignited any controversy other than this litigation. In *Mueller v. Allen*, 463 U.S. 388, 403-404, n.11 (1983), the Court cautioned that the "elusive inquiry" into political divisiveness should be confined to a narrow category of parochial aid cases. The concurring opinion in *Lynch v. Donnelly*, 465 U.S. 668, 687 (1984), went further, suggesting that Establishment Clause analysis should focus solely on the character of the government activity that might cause political divisiveness, and that "the entanglement prong of the Lemon test is properly limited to institutional entanglement."

*Agüilar*, 473 U.S. at 429.

434. This is particularly true since the monitoring would not take place in a pervasively sectarian environment. See *Bowen v. Kendrick*, 487 U.S. 589, 615-17 (1988).


436. *Id*.

437. Commenting on the remarkable stability of church-state relations since 1947, former Congressman and law school dean Robert Drinan, S.J., states:

The relationship between government and religion ... has been similarly stable since the Supreme Court in 1952 held that released-time religious education could be held off the school premises but not on school property. Over the past two generations there has been a remarkably firm consensus with respect to the traditional arrangement of church and state--no aid to church-related schools and no sectarian religion in the public schools. The country ... has more or less agreed with the Supreme Court’s repeated insistence that no substantial aid go to religiously affiliated schools and that no sectarian practices be introduced into the public schools.

*R. Drinan, Religion and Politics in the United States in the Next Fifteen Years*, in *Religion & Pol.* 17-18 (Fred Baumann & Kenneth Jensen eds., 1989). Drinan is concerned about the effect of fundamentalist Protestants and Catholics finding a common cause during the next 15 years. *Id.* at
assume that off-premise, released-time programs of religious instruction (approved in Zorach) constitute a reasonable accommodation of religion and are less offensive constitutionally\footnote{38} than released-time programs conducted on-premise (prohibited by McCollum). However, with respect to Lemon's entanglement prong, this assumption may not be accurate. Entanglement can occur through purely administrative functions, such as when public officials keep track of attendance at the released-time programs. McCollum implied that keeping attendance reports would violate the Constitution.\footnote{39} Zorach reached the opposite conclusion.\footnote{40} In this respect, an on-premise program, that merely directs the child to a classroom within the same building would involve less entanglement than an off-premise program that allows children to leave school premises, during which time the school has no knowledge of the child's movements.

A second way in which the McCollum solution is preferable to the Zorach solution is in providing equal opportunity for poor and minority students. The financial burden on religious groups caused by implementing off-premise programs would be similar to the enormous expenses experienced by federal and state governments after the Court's decisions in Ball and Felton prohibited public school personnel from providing remedial education at religious schools. Off-premise instruction is extremely expensive because it requires mobile units or other structures.\footnote{41} If the burden is heavy for governments, it is oppressive for religious organizations that are dependent on voluntary contributions.

Wealthy groups may be able to fund the cost of off-campus religious instruction. Lanner v. Wimmer\footnote{42} involved an off-premise released-time program conducted by the Church of Jesus Christ of Latter Day Saints (L.D.S. Church) in secondary schools in Logan, Utah. The L.D.S.

\footnotesize{18. Off-premise, released-time programs are less coercive and involve less risk of entanglement, thereby satisfying the requirements of the second and third prong, respectively, of the Lemon Test.

\footnotesize{439. McCollum, 333 U.S. at 208, 227 (Frankfurter, J., concurring).

\footnotesize{440. Zorach, 343 U.S. at 308 n.1, 312 n.6.

\footnotesize{441. Costs to taxpayers have exceeded $200 million and have prevented many otherwise eligible children from benefitting from the remedial education services. See HASLAM supra note 397, at 40-46. (discussing increased costs (called "Felton" costs) incurred as a result of constitutional restrictions on placing public school teachers in religious schools). The report states that in 1990-91, the most frequently used service delivery options were mobile vans parked near religious-school premises or at a public school; portable classrooms on religiously neutral sites; religiously-neutral facilities on or off the religious school premises; and public schools. Id. at iii.

\footnotesize{442. 662 F.2d 1349 (10th Cir. 1981).}
Church constructed buildings called "seminaries", adjacent to the public school buildings. Students, with parental approval, attended the seminaries one hour a day, five days a week. Acknowledging the need for religious accommodation by public schools, the Tenth Circuit upheld the program while enjoining, as unconstitutional, the practice of having public school students pick up attendance slips at the seminaries. Keeping records of attendance, however, was not objectionable. The court also enjoined the schools from giving students "elective credit" for religion courses to the extent schools were required to determine whether the seminary courses were "mainly denominational" in content. However, seminary attendance could be counted for state hours-per-day requirements, participation in extra curricular activities, and state funding.

Lanner demonstrates that wealthy religious denominations can afford the costs associated with off-premise released-time programs. However, poor and minority religious groups will not be able to take advantage of their constitutional rights.

8. Advantages of On-Premise Religious Training

The advantages of reversing McCollum to permit voluntary, parentally controlled religious training in the schools is that this does not implicate the Court's holdings in its prayer and Bible reading cases. Indeed, the proposal may alleviate the pressure for a constitutional

443. The court reasoned that:

No comprehensive school curriculum worthy of public support can be developed without broaching subjects and questions concerning morality and the origin, meaning, and destiny of humanity. Teachings concerning these same topics have been central to the role of religion from time immemorial. No matter how public school teachers treat such subjects as history, literature, psychology, biology, anthropology, and geology, their concepts ostensibly approved and even imposed by state authority will inevitably offend the deeply held religious beliefs of some students and parents. Children are and will be compelled, on pain of reduced grades, to give answers which both directly and by implication lead to the conclusion that their religious beliefs are false. So long as the state engages in the widespread business of molding the belief structure of children, the often recited metaphor of a "wall of separation" between church and state is unavoidably illusory.

Id. at 1352.

444. Id. at 1362.

445. Id.

446. Id. at 1362-63.

447. There are several organizations promoting released-time programs. An example is The National Association for Released Time Christian Education, P.O. Box K. Elizay, Georgia 30540 (Tel. 706/ 276-7900).

amendment overruling those cases. Permitting religious training within the public school may eliminate the pressure for school voucher programs, programs that address parents' perceived choice between their religion and a free education, and that educators see as a threat to public education. On-premise religious instruction would also relieve public schools, at least in part, from responsibility they are ill-equipped to handle, namely the moral training of the young.

Such programs would also involve parents in decision-making processes concerning their child's moral and religious training and would offset the forced uniformity of standardized state or nationally approved criteria. The training would be entirely non-coercive, non-preferential, non-state structured or determined and would acknowledge the diversity that the Founders' respected and that exists within our society.

On-premise programs would also help establish the mutual respect between religion and law that is necessary for both to grow and thrive, as pointed out in Part A. Four elements through which law and religion interact - ritual, authority, tradition, and universality - generate dignity and respect in children. The process of releasing children to religious classes coupled with religious teachers coming on to the school premises would provide a ritual through which religion and law each acknowledge the authority and separateness of the other. Such a practice would provide a sense of tradition that religion has, from the beginning of this country, been considered a part of education. Recognition that the future is a shared interest of the state or community, the family, religion (if any), and the child furthers the sense of education as an ongoing process that carries the tradition to the next generation. To the extent that religion imparts a sense of importance and relevance to the educational function of government, government receives an acknowledgment of universal worth and purpose, namely, that governmental action can embody an all embracing truth.449

Leo Pfeffer, an honored warrior for total separation, has argued that schools should not undertake responsibility for religious education because it is inconsistent with the separation of church and state; that religion is a private matter; that intrusion inevitably leads to divisiveness; that there is no proof that public schools are not doing an adequate job in character training or inculcation of morals; and that leaning on school cooperation implies a lack of ability in the churches to fulfil their purpose.450 The positions set forth herein answer these arguments by

449. See INTERACTION, supra note 62, at 31-39.
suggesting that the state is not assuming responsibility for religion but merely accommodating those who have responsibility for religious training. Additionally, this Article asserts that religion never has been and, indeed, can never be strictly a private matter because it is an intrinsic part of human nature. It is part of the responsibility of the schools to instill a sense of respect for differences, particularly since American society has grown more diverse with time, with numerous groups semanding recognition. A resulting divisiveness would be a further acknowledgement that schools are not capable of training in character. The tide of family breakdown and illegitimacy suggests that schools are able to instill character and morals in spite of enormous funding and freedom to experiment broadly over the past forty years. Finally, seeking to be involved in the training of the young is not a sign of church failure, but is a recognition that education, particularly of the very young, is a function that is essentially religious since it involves creating in the child a sense of who he is in the world and what the essential values and realities are that will form his destiny. The state can never accomplish this and must rely on family choices, including religious choices.

Conclusion

America's legal system is in crisis. Christianity, which shaped and justified the culture, traditions, law, and institutions of the Western World for a thousand years, is being rejected. It no longer energizes the public discussion or those who shape public opinion. It is true that a formal acknowledgement of Christianity is often present, but with a wink of the eye, signaling obvious disdain for those holding views of Christianity that were developed and formulated over two thousand years through the sacrifice of innumerable witnesses. Such witnesses not only provided the intellectual foundations for government and its concepts of equality, 451

451. This argument was stressed by Justice Frankfurter in his dissent in Zorach where he stated, "The unwillingness of the promoters of this movement to dispense with such use of the public schools betrays a surprising want of confidence in the inherent power of the various faiths to draw children to outside sectarian classes -- an attitude that hardly reflects the faith of the greatest religious spirits." Zorach, 343 U.S. at 323. At best, Frankfurter was being condescending to religion, a topic with which he was admittedly uncomfortable. See FELIX FRANKFURTER, FELIX FRANKFURTER REMINISCES 289-91 (1960).

452. See Dallin Oaks, Separation, Accommodation and the Future of Church and State, 35 DEPAUL L. REV. 1 (1985) (recognizing that the Court, by limiting the definition of religion for Establishment Clause purposes, has effectively banished theistic religion from the public square "notwithstanding the comprehensive belief systems and the religious fervor of those who have promoted secular humanism, environmentalism, behaviorism, or other theories of value or human behavior").
fairness, and justice, but also nurtured in the hearts of people a love for such foundations because they reflected the design of the Creator.

In his letter to the Christians at Rome, the apostle Paul admonished them to be subject to the government, not only out of fear of punishment, but also as a matter of conscience. He thereby elevated civil obedience to the level of a sacred duty. Without this religious foundation, obedience to governmental edicts will occur only to the extent each person reasonably believes obedience is necessary to avoid punishment or promote order. In any event, obedience will be voluntary on the part of each person. Whether such a concept of voluntarism can sustain a democratic society is an experiment the United States is in the process of testing. In rejecting its religious heritage, American culture has rejected its historic foundation and must create its myth and future aspirations anew. Sooner or later the Constitution will cease to hold the peoples' respect.

Religion, particularly Biblical religion, has played an integral part in the development of a free society in the United States. Religion provides a vital ingredient to law, without which law stagnates. This society is bound together by a common set of religious understandings that must be passed on to our children if our society is to maintain continuity with its past. The public school system is the vital link in passing on the national values and heritage to the next generation. The current Supreme Court decisions make it impossible to use the school system to pass on the religious aspect of this country's heritage. A solution is needed that permits the majority culture to transmit its values without offending cultural minorities or discouraging those minorities from propagating their beliefs. One answer, proposed in this article, lies in a school system which fosters understanding and respect for diversity in religion by accommodating parentally controlled and authorized religious classes during the school day. This answer requires a school system that teaches respect for the differing views of others, including religious views, instead of hiding behind the fiction that differing views do not exist or cannot be expressed without offending others or dividing the population.

When Rabbi Gutterman uttered the words, "We must each strive to fulfill what You require of us all: To do justly, to love mercy, to walk humbly" at a middle school graduation, he tripped over the Establishment Clause. Justice Blackmun quickly saw the reference to the

---

453. See chapter Thirteen of St. Paul's Epistle to the Romans, in which he details the duties of Christians to the government and suggests the parameters within which good government, from a Christian perspective, operates. Romans 13:5-10 (King James).

454. Wiesman, 112 S. Ct. at 2653 (quoting Micah 6:8 (King James)).
Biblical prophet Micah and concluded that the government was promoting religion.\footnote{Id. at 2664 n.5 (Blackmun, J., concurring).} Ironically, in 1630, while on board a ship en route to the New World, John Winthrop, the leader of the Massachusetts Bay Colony, admonished the people with the following words:

Now the only way to . . . provide for our posterity is to follow the Counsel of Micah, to doe Justly, to love mercy, to walk humbly with our God. For this end, wee must be knit together in this work as one man, wee must entertain each other in brotherly Affection, wee must be willing to abridge our selves of our superfluities, for the supply of others necessities, . . . make others Condicions our owne, . . . \footnote{Id.}

Now, 350 years later, the teachings of Micah are banned from public schools except as an example of literature. Micah’s words must now be treated like the inscriptions on an Egyptian pyramid rather than as an instruction on how such words could create a great nation.