INTERNATIONAL DEVELOPMENTS

THE U.S. SUPREME COURT CONTINUES TO STRUGGLE WITH THE MEANING OF THE ESTABLISHMENT CLAUSE AND ITS ROLE IN ASSURING FAIR AND BALANCED TREATMENT OF RELIGION

RALPH D. MAWDSLEY†
CLEVELAND STATE UNIVERSITY, USA
JOHAN BECKMANN
UNIVERSITY OF PRETORIA, SOUTH AFRICA

I INTRODUCTION

The First Amendment of the U.S. Constitution provides that 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof ...' This prohibition of establishment applies to 'the States and their political subdivisions' through the Fourteenth Amendment.[1]

Ever since the Supreme Court, in the seminal Establishment Clause case *Everson v Board of Education of Ewing Township* (*Everson*),[2] held that the clause did not prohibit a state from using tax funds to pay bus fares for both parochial and public school students, the Court has increasingly been called upon to determine the appropriate relationship between government and religion. The Court's receptiveness to government assistance for religious schools has depended on the ebb and flow of the *Lemon v Kurtzman* (*Lemon*)[3] test as a useful instrument for assessing the constitutionality of government aid.[4] Despite the lamentation of some members of the Court that the *Lemon* test should long ago have been buried,[5] the test, although not buried,[6] has been supplanted by other ones more accommodating to government's assistance of religion.[7]

The year after Everson, the Supreme Court, in *People of the State of Illinois ex rel. McCollum v Board of Education* No. 71 of Champaign County (McCollum),[8] decided a different kind of government-religion case. In McCollum, the Court invalidated a school board policy that permitted religious instructors to teach religion courses in school buildings during the school day.[9] Thus, the Court, rather than determining how the Establishment Clause should be interpreted in addressing the use of public funds outside public schools (Everson), was now called upon to decide a quite different question - the Establishment Clause's interpretation when religion is present inside the public school. In asserting a 'high and impregnable ... wall of separation between Church and State', the McCollum Court reasoned that excluding from public schools 'all religious faiths

† *Address for correspondence*: Dr Ralph D. Mawdsley, College of Education & Human Services, Cleveland State University, 2121 Euclid Ave, Rhodes Tower 1419, Cleveland, Ohio, 44115 USA. Email: ralph_d_mawdsley@yahoo.com

1327-7634 VOL 10, NO 1, 2005, PP. 73-94
AUSTRALIA & NEW ZEALAND JOURNAL OF LAW & EDUCATION

or sects in the dissemination of their doctrines and ideals [would not] manifest a governmental hostility to religion or religious teachings'.[10]

However, the Establishment Clause hostility debate has been reframed now that the Supreme Court, in *Lamb's Chapel v Center Moriches Union Free School District* (*Lamb's Chapel*),[11] has determined that religious speech is a fully protected subset of free speech. Courts must decide whether public school accommodation of religious uses is required under the Free Speech Clause in order to avoid hostility toward religion under the Establishment Clause.[12]

This article will explore the role of the American Establishment Clause in shaping the exercise of religion in public institutions. Despite the somewhat dubious label, 'separation of church and state' that has been attached to the Establishment Clause in the United States, the purpose of this article will be to demonstrate how federal courts have distilled three functions from the Establishment Clause: prohibiting government support of religion; permitting government actions that support religion; and, mandating government action that supports religious activities in order to prohibit hostility toward religion. The starting point for the discussion will be an examination of two recent Supreme Court interpretations of the Establishment Clause (both decided on the same day), reaching differing results regarding the display of the Ten Commandments on public premises, *McCreary County v American Civil Liberties Union* (*McCreary*)[13] and *Van Orden v Perry* (*Van Orden*).[14] The two cases provide insight into two of the functions of the Establishment Clause to prohibit and permit religious activity.

II Facts and Judicial Decisions in McCreary County v American Civil Liberties Union

This case concerns two counties, McCreary and Pulaski, in the American state of Kentucky whose actions in posting a copy of the Ten Commandments in their respective county courthouses was challenged successfully as a violation of the Establishment Clause. The actions taken by each county were identical and involved three separate efforts at displaying the commandments.

The first effort occurred in summer 1999 when officials from each county, in response to their respective county legislative bodies, displayed in their courthouses large, gold-framed copies of an abridged text of the King James version of the Ten Commandments, including a citation to the Book of Exodus.[15] However, in response to respondent ACLU's motion for preliminary judgment in November 1999, the two counties authorised an second, expanded display that, in addition to the Ten Commandments, included a copy of each county's legislative body reciting that the Ten Commandments are 'the precedent legal code upon which the civil and criminal codes of ... Kentucky are founded', along with other recitals and eight other historical documents in smaller frames that excerpted messages of a religious theme. These documents were

> the 'endowed by their Creator' passage from the Declaration of Independence; the Preamble to the Constitution of Kentucky; the national motto, 'In God We Trust'; a page from the Congressional Record of February 2, 1983, proclaiming the Year of the Bible and including a statement of the Ten Commandments; a proclamation by President Abraham Lincoln designating April 30, 1863, a National Day of Prayer and Humiliation; an excerpt from President Lincoln's 'Reply to Loyal Colored People of Baltimore upon Presentation of a Bible,' reading that '[t]he Bible is the best gift God has ever given to man'; a proclamation by President Reagan marking 1983 the Year of the Bible; and the Mayflower Compact.[16]

In May, 2000 a federal district court issued a preliminary injunction finding that both displays had failed the secular purpose test of *Lemon v Kurtzman*,[17] as well as the objective-observer standard of the endorsement test.[18]

Rather than appeal the injunction, the counties installed yet another display (the third within a year) in their courthouses, this time comprising nine framed documents of equal size: a copy of the Ten Commandments explicitly identified as the 'King James Version' at Exodus 20:3-17, the Magna Carta, the Declaration of Independence, the Bill of Rights, the lyrics of the Star Spangled Banner, the Mayflower Compact, the National Motto, the Preamble to the Kentucky Constitution, and a picture of Lady Justice.[19] Despite the counties' effort to present the purposes for the display 'to demonstrate that the Ten Commandments were part of the foundation of American Law and Government' and 'to educate the citizens of the county regarding some of the documents that played a significant role in the foundation of our system of law and government', the district court enjoined the posting of the Ten Commandments, finding that the display had a religious not secular purpose under the Lemon test.[20] The district court also found an endorsement violation because a 'reasonable observer will see one religious code placed alongside eight political or patriotic documents, and will understand that the counties promote that one religious code as being on a par with our nation's most cherished secular symbols and documents' and because the 'reasonable observer [would know] something of the controversy surrounding these displays, which has focused on only one of the nine framed documents: the Ten Commandments'.[21]

A majority of the Sixth Circuit (two of the three justices) upheld the injunctions, finding insufficient 'analytical or historical connection [between the Commandments and] the other documents' so as to convey a secular message.[22] Because the history of the litigation itself with the three attempts at displaying the Ten Commandments was proof of the counties' religious purpose, the majority never addressed whether the displays also violated the second, 'effect', Lemon test. The dissenting Sixth Circuit justice, on the other hand, argued that the third display represented a secular purpose and vehemently rejected the majority's position that a 'history of unconstitutional displays can be used as a sword to strike down an otherwise constitutional display'.[23] More pointedly, the dissent lamented that 'the majority has dismissed out of hand the signs accompanying the displays, which, among other things explain that "[t]he Ten Commandments have profoundly influenced the formation of Western legal thought and the formation of our country,"' a statement 'more than sufficient' under the Supreme Court's precedents in *Lynch v Donnelly*[24] and *County of Allegheny v ACLU*[25] to describe a secular purpose.[26]

The U.S. Supreme Court, in a 5-4 decision,[27] upheld the district and court of appeals decisions. In only the fifth decision since creation of the Lemon tripartite test in 1971, the Supreme Court in McCreary invalidated a government action on the basis of an impermissible purpose. The four previous cases, *Stone v Graham (Stone)*,[28] *Wallace v Jaffree (Wallace)*,[29] *Edwards v Aguillard (Edwards)*,[30] and *Santa Fe Independent School District v Doe (Santa Fe)*,[31] had all involved education and, thus, McCreary became the first non-school case to fall prey to the Lemon purpose test.

Determining the purpose of government action with relationship to religion can be a elusive venture but must 'emerge[] from readily discoverable fact, without any judicial psychoanalysis of a drafter's heart of hearts'.[32] In rejecting what the Court majority saw as the counties' test as 'an absentminded objective observer, not one presumed to be familiar with the history of the government's actions and competent to learn what history has to show',[33] the Court found the posting of the Ten Commandments lacked a 'disclaimer [such as] that the Commandments were set out to show their effect on the civil law' and, thus, '[t]he reasonable observer could only think

that the Counties meant to emphasise and celebrate the Commandments' religious message'.[34] Although the counties' legislative bodies had not repudiated the first two displays before creating the third display nor adopted a separate resolution for the third display, such an effort would have made no difference here where the third display was imbued with 'the sectarian spirit of the common resolution'.[35] Thus, while the Court does not eliminate the possibility that a government entity could repudiate its past action and declare an acceptable secular purpose for incorporating the Ten Commandments into a secular display, 'that purpose needs to be taken seriously under the Establishment Clause and needs to be understood in light of context; an implausible claim that governmental purpose has changed should not carry the day in a court of law any more than in a head with common sense'.[36] The majority undoubtedly felt constrained to add this possibility of secular acceptability in light of the frieze in its courtroom of 'the figure of Moses holding tablets exhibiting a portion of the Hebrew text of the later, secularly phrased Commandments in the company of 17 other lawgivers, most of them secular figures', but of which the majority confidently asserted 'there is no risk that Moses would strike an observer as evidence that the National Government was violating neutrality in religion'.[37]

In a final salvo against the arguments of the dissent in the case, Justice Souter articulated his definition of government neutrality in opposition to the dissent's view that 'government may espouse a tenet of traditional monotheism', a view he asserted 'should trouble anyone who prizes religious liberty'.[38] Because, as Justice Souter observed, '[t]he First Amendment contains no textual definition of 'establishment', the only operational definition is one of neutrality whereby 'the government may not favor one religion over another, or religion over irreligion, religious choice being the prerogative of individuals under the Free Exercise Clause'.[39]

In a scathing dissent, Justice Scalia chronicled the references to God and support of religion by the first President (George Washington),[40] the first Congress,[41] and the Marshall Court,[42] views that not only 'reflected the beliefs of the period' but also the belief 'that morality was essential to the well-being of society and that encouragement of religion was the best way to foster morality'.[43] Indeed, as Justice Scalia observed, the Supreme Court, in *Zorach v Clauson*,[44] had declared that 'We are a religious people whose institutions presuppose a Supreme Being', a view that was repeated with approval in three separate Supreme Court decisions over the next three decades.[45] In a lengthy discursive, he excoriated the majority's failure to recognise that all that 'distinguishes the rule of law from the dictatorship of a shifting Supreme Court majority is the absolutely indispensable requirement that judicial opinions be grounded in consistently applied principle'[46] and one indisputable principle is that '[h]istorical practices ... demonstrate that there is a distance between the acknowledgment of a single Creator and the establishment of a religion'.[47] Indeed, the display of the Ten Commandments in this case passed constitutional muster for two reasons: (1) the Ten Commandments are 'recognised across such a broad and diverse range of the population—from Christians to Muslims—that they cannot be reasonably understood as a government endorsement of a particular religious viewpoint';[48] and, (2) 'the display of the Ten Commandments alongside eight secular documents, and the plaque's explanation for their inclusion, make clear that they were not posted to take sides in a theological dispute'.[49] Most telling though is his response to Justice Steven's dissenting opinion comment in *Van Orden* that Justice Scalia's perspective 'marginalis[es] the belief systems of more than 7 million Americans' who adhere to religions that are not monotheistic':[50]

> [t]he beliefs of those citizens are entirely protected by the Free Exercise Clause, and by those aspects of the Establishment Clause that do not relate to government acknowledgment of the Creator. Invocation of God despite their beliefs is permitted not because nonmonotheistic

> religions cease to be religions recognized by the religion clauses of the First Amendment, but because governmental invocation of God is not an establishment. [51]

The change in direction by the Court in *McCreary* Justice Scalia lay at the feet of the majority's having 'modifie[d] Lemon to ratchet up the Court's hostility to religion'.[52] First, the majority elevated the role of the 'objective observer' so that 'even if a government could show that its actual purpose was not to advance religion, it would presumably violate the Constitution as long as the Court's objective observer would think otherwise'.[53] Second, the *Lemon* purpose test of 'a secular purpose' has been replaced with a requirement that the secular purpose must '"predominate" over any purpose to advance religion' with the result that 'the religious values [the Religion] Clauses [were designed] to protect have now become so distasteful to this Court that if they constitute anything more than a subordinate motive for government action they will invalidate it'.[54]

III Facts and Judicial Decisions in *Van Orden*

The *Van Orden* decision, reached on the same day as *McCreary*, involved the Ten Commandments engraved on a stone monument located on the Texas state capitol grounds. However, contrary to the result in *McCreary*, the *Van Orden* Court in a set of severely fragmented decisions found the monument not to violate the Establishment Clause. The authors of opinions in *Van Orden* represent the same players as in *McCreary* but more or less in reverse. Chief Justice Rehnquist, joined by Justice Scalia, Justice Kennedy, and Justice Thomas, concluded that the Establishment Clause allowed the display of a monument inscribed with the Ten Commandments on the Texas State Capitol grounds. Justices Scalia[55] and Thomas[56] each also filed separate concurring opinions. Justice Breyer concurred in the judgment, although on the thinnest of rationales, concluding that this was a difficult borderline case where none of the Court's various tests for evaluating Establishment Clause questions could substitute for the exercise of legal judgment.[57] Justices Stevens, O'Connor, Souter, and Ginsberg dissented with Justices Stevens, O'Connor and Souter each filing separate dissenting opinions. However, because Justice Breyer's opinion refused to accept the reasoning of Chief Justice Rehnquist and, indeed, agreed with some of Justice O'Connor's dissenting opinion rationale,[58] this Van Orden decision lacked a majority and should, rather, be considered only a plurality decision.

The content of the 6 ½ foot high and 3 ½ wide monument in this case, similar to the one in *McCreary*, contained the following words:[59]

> I AM the LORD thy God.
>
> Thou shalt have no other gods before me.
> Thou shalt not make to thyself any graven images.
> Thou shalt not take the Name of the Lord thy God in vain.
> Remember the Sabbath day, to keep it holy.
> Honor thy father and thy mother, that thy days may be long upon the land which the Lord thy God giveth thee.
> Thou shalt not kill.
> Thou shalt not commit adultery.
> Thou shalt not steal.
> Thou shalt not bear false witness against thy neighbor.
> Thou shalt not covet thy neighbor's house.
> Thou shalt not covet thy neighbor's wife, nor his manservant, nor his maidservant, nor his cattle, nor anything that is thy neighbor's.

The bottom of the monument bore the inscription 'PRESENTED TO THE PEOPLE AND YOUTH OF TEXAS BY THE FRATERNAL ORDER OF EAGLES OF TEXAS 1961'.[60] In addition, on the 22 acre capitol building grounds were 16 other monuments and 21 historical markers commemorating the 'people, ideals, and events that compose Texan identity'.[61] Both the federal district court in Texas and the Fifth Circuit upheld the constitutionality of the Ten Commandments monument under the 'purpose' and 'effects' parts of the *Lemon* test.[62]

In his plurality opinion, Chief Justice Rehnquist represented an Establishment Clause analysis as one with a 'Januslike' face that, on one hand, 'looks toward the strong role played by religion and religious traditions throughout our Nation's history' and, on the other, 'looks toward the principle that governmental intervention in religious matters can itself endanger religious freedom'.[63] This case presented both faces and, as to the former face, Rehnquist, like Scalia in his *McCreary* dissenting opinion, referenced historical and judicial precedents chronicling 'the role of God in our Nation's heritage'.[64] In a remarkable tour of the federal buildings in the nation's capitol, Rehnquist referred to no fewer than 12 different appearances of the Ten Commandments, five of which occur on or within the Supreme Court building itself.[65] While recognising that the Ten Commandments have religious significance, the Chief Justice also observed that '[s]imply having religious content or promoting a message consistent with a religious doctrine does not run afoul of the Establishment Clause'.[66]

Rehnquist's analysis, 'driven both by the nature of the monument and by our Nation's history', reflected his view 'that in the larger scheme of Establishment Clause jurisprudence, ... [the *Lemon* test is] not useful in dealing with the sort of passive monument that Texas has erected on its Capitol grounds'.[67] As a result, the monument with the Ten Commandments represented 'the several strands in the State's political and legal history' and 'a far more passive use of those texts'[68] than the classroom postings of the Commandments in *Stone v Graham*[69] which the Court had invalidated 25 years earlier under the 'purpose' part of the *Lemon* test.[70]

The dissenting opinions in *Van Orden* represent a collage of Establishment Clause arguments, in essence a veritable historical time capsule of claims that have been raised over the years against government involvement with religion.[71] Justice Stevens rejected the plurality's 'simplistic commentary on the various ways in which religion has played a role in American life',[72] finding instead 'the plurality's wholehearted validation of an official state endorsement of the message that there is one, and only one, God' to be inconsistent with '[t]his Nation's resolute commitment to neutrality'.[73] He found the plurality's recitation of government proclamations regarding religion to present a 'misleading picture' since they failed to account for opposing views of the Founding Fathers.[74] Because the Ten Commandments are an 'inherently sectarian message' representing a particular version of the Decalogue, 'Texas tells the observer that the State supports this side of the doctrinal religious debate'.[75] However, even if the plurality opinion represented the views of the Founding Fathers, it is 'plainly not worthy of a society whose enviable hallmark over the course of two centuries has been the continuing expansion of religious pluralism and tolerance'.[76] Rising to a crescendo in his conclusion, Justice Stevens asserted his reliance on the 'principle [of neutrality] firmly rooted in our Nation's history and our Constitution's text', a 'principle that government must remain neutral between valid systems of belief' with the awareness that, '[a]s religious pluralism has expanded, so has our acceptance of what constitutes valid belief systems'.[77] Thus, the Establishment Clause forbids the display of the Ten Commandments monument because it represents 'a direct descendent of the evil of discriminating among Christian sects'.[78]

Justice Souter's dissent relied as well on the neutrality argument, his views encapsulated by the assertion that, '[i]f neutrality in religion means something, any citizen should be able to

visit [the Texas State Capitol] without having to confront religious expressions clearly meant to convey an official religious position that may be at odds with his own religion, or with rejection of religion'.[79] Contrary to the plurality opinion that had distinguished *Stone v Graham* as involving students in schools, Justice Souter saw the monument in *Van Orden* as no more passive than the Ten Commandments posted in classrooms.

IV Analysis and Implications

McCreary and *Van Orden*, concerning as they do two similar sets of facts with opposite results, dramatically represent the historical, social, and policy tensions surrounding interpretation of government involvement with religion in the United States. By the thinnest of margins, one display of a religious text was permitted on government grounds (*Van Orden*) while another was excluded from a government building (*McCreary*). While the cases are distinguishable on their facts, an analysis simply on difference in factual patterns does not do justice to the more systemic issue as to whether the U.S. Constitution is a 'living' document and, if so, whether the Establishment Clause as part of a 'living Constitution' must adjust with other changes in the fabric of American culture. Indeed, much of the discussion by the majority in *McCreary*, the plurality in *Van Orden*, and the dissents in both cases highlight the dual dilemma for modern day judicial interpreters: (1) what was the original intent of the drafters of the U.S. Constitution? and, (2) to what extent should that intent be relevant for current jurisprudence? In other words, while the intent of the Founding Fathers provides context regarding the purposes at work in the framing of the Constitution at the end of the Eighteenth Century, to what extent should those purposes be considered historical anachronisms if their application at the beginning of the Twenty First Century could be construed as expressing views considered by some persons unfair or even discriminatory?

Expounding the meaning of the relationship between government and religion under a Constitution that is over two centuries old has not been an easy task and persistent divisions within the Supreme Court have contributed to the difficulty in determining the method of construction to use. On one side has been the accommodationists represented by Chief Justice Rehnquist and Justices Scalia and Thomas, who, as reflected in *McCreary* and *Van Orden* have searched for the Constitution's meaning in original intent of the authors of the Constitution.[80] On the other hand, separationists represented by Justices Stevens, Souter and Ginsberg have 'expounded the meaning of constitutional provisions with one eye towards our Nation's history and the other fixed on its democratic aspirations'.[81] The remaining three Justices, O'Connor, Kennedy, and Breyer have represented swing votes depending on the issue before the Court.

The accommodationist view fits within what is sometimes referred to as strict construction which takes the position that 'the legislature [rather than the Supreme Court is] a much more appropriate expositor of social values'[82] and, thus, the purpose of the Supreme Court is to interpret generously the Constitution 'because the powers conferred upon Congress under it had to be broad enough to serve not only the needs of the federal government originally discerned but also the needs that might arise in the future'.[83] In large part, the strict constructionist view to judicial construction of the Constitution recognises the limitation of judicial authority because the judicial power to review federal statutes, while reasonably implicit in the Constitution, is nonetheless not explicitly granted.[84] As a result, the Constitution should be viewed as 'an enactment that has a fixed meaning ascertainable through the usual devices familiar to those learned in the law' as opposed to 'a novel invitation to apply current societal values'.[85] On the other hand, the separationist view reflects what is referred to as a liberal (or, nonoriginalist) constructionist

approach energising the Supreme Court in particular, and all federal courts in general, to engage in 'a collaborative inquiry, involving both the Court and the country, into the contemporary content of freedom, fairness, and fraternity'.[86] Relying on theories of 'public morality',[87] 'moral theory',[88] and 'relative equality, mobilisation of citizenry, and civic virtue',[89] the liberal construction interpretation of the Constitution directs an adjustment to changing circumstances. Thus, Justice Stevens, dissenting in *Van Orden*, captured the essence of this approach when he remarked that '[i]t is our duty, therefore, to interpret the First Amendment's command that 'Congress shall make no law respecting an establishment of religion' not by merely asking what those words meant to observers at the time of the founding, but instead by deriving from the Clause's text and history the broad principles that remain valid today'.[90]

The difficulty with the liberal constructionist approach is that while it invites judges to 'expand on fundamental values' and 'freedoms that are uniquely our heritage',[91] it also leaves unanswered the question whether, once the original import of the Constitution is cast aside to be replaced by the 'fundamental values' of the current society, to what extent must courts only 'expand on' freedoms, and not contract them as well?[92] One can argue that the Supreme Court's 5-4 decision in *Kelo v City of New London*[93] in its most recent term is just such an example of a restricted freedom, in this case private ownership of property. In this case, the majority (Justices Stevens, Kennedy, Souter, Ginsburg, and Breyer) interpreted a 'public taking' under the Fifth Amendment so that a city could condemn private property (well-maintained homes in a poor urban area) and turn it over to another private entity (a manufacturer in this case who proposed building a new plant) 'so long as [the property] might be upgraded' or as long as the condemnation might 'generate some secondary benefit for the public--such as increased tax revenue, more jobs, maybe even aesthetic pleasure'.[94] In this heavily contested, much publicised, and long awaited decision regarding the extension of the eminent domain power of government, Justice Stevens, writing for the majority, rationalised his diminution of private property ownership rights on the grounds that the 'needs of society have varied between different parts of the Nation, just as they have evolved over time in response to changed circumstances'.[95] With this departure from the historical protection of private property against public taking and the invocation of a 'changed circumstances' standard, Justice Stevens has, in effect, invited more litigation to determine whether future takings will satisfy this judicially-created guideline.[96] However, Justice Thomas, in his dissenting opinion in *Kelo* succinctly captured the concerns of the strict constructionist's concern about the erosion of constitutional rights, in this case the protection of private property ownership, when he pointedly observed, 'I do not believe that this Court can eliminate liberties expressly enumerated in the Constitution'.[97] Indeed, one can argue that departure by the *Kelo* majority from prior Supreme Court precedents that had restricted severely the taking of private property through eminent domain will result in future, protracted discussion as to how the Constitution can further be used as an instrument of judicial social engineering.[98]

The conflict among factions of the Supreme Court in interpreting protection of private property rights in *Kelo* mirrors the interpretive dilemma regarding the Establishment Clause. The disagreement among members of the Court in *McCreary* and *Van Orden* demonstrates not only differences in opinion regarding the role of original intent, but also the appropriate test to be used in assessing whether a violation of the Establishment Clause has occurred. In addition to the longstanding tripartite *Lemon* test, members of the Court in those two cases invoked the endorsement, divisiveness, and coercion tests, as well as what can be referred to as 'the historical intent test'. Indeed, one can argue that the interpretive lens through which a member of the Court chooses to view the Establishment Clause will influence that member's decision.

The absence of a single test for interpreting the Establishment Clause has meant that Supreme Court decisions have varied considerably in their outcomes and that government entities are frequently left confused about how much interplay is acceptable between government and religion.[99] The Supreme Court has interpreted the Establishment Clause for almost 60 years and over that time has produced three outcomes. In one, similar to *McCreary*, government is prohibited from engaging in certain activities that assist or promote religion. In a second, similar to *Van Orden*, government is permitted, although not required, to engage in certain activities that aid religion. In the third, government is required to provide certain activities that assist religion.

Much of the early litigation involving the Establishment Clause saw the prohibition of government support for religion framed in the context of state aid to religious schools. However, the line between prohibited and permitted government conduct quickly became blurred and, thus, while state legislatures could not supplement the salaries of religious school teachers who taught secular subjects[100] or pay for maintenance repairs at religious schools,[101] states were permitted to transport children to religious schools on publicly owned buses,[102] to loan textbooks to religious schools,[103] to reimburse religious schools for performing various testing and reporting services mandated by state law,[104] and to furnish standardised tests identical to those used in the public schools.[105] To add to the confusion, while states could loan textbooks they could not loan other kinds of supplementary materials or teaching aids[106] and, while states could provide public funds for diagnostic testing on-site in religious schools, those funds could be used to provide therapeutic services only if offered at a public site.[107] In these early cases, the Court agonised and disputed at length regarding the meaning of original intent. Discerning a bright line as to what government activities should be prohibited and which should be permitted under the Establishment Clause became extremely difficult. For those Justices arguing for a strict line of separation between government and religion, a backward look to the religious persecutions in Fifteenth and Sixteenth England became their reference point, while those Justices arguing for a less rigid separation between government and religion argued that the colonial experience augured for government prohibition of religious contact only where government chose to support a specific religion (a preferential as opposed to a nonpreferential view),[108] a dispute that has never been resolved and was revisited in *McCreary* and *Van Orden*.[109]

The early government aid to religious school cases, while demonstrating conflict regarding the meaning of establishing a religion, did not really strike at the core of the issue in *McCreary* and *Van Orden*, namely the place of religious values in American culture. After all, the aid cases had only concerned what government could do with relationship to religious activities outside government venues, not what government could do in its own venues. The prayer and Bible reading cases, *Engel v Vitale (Engel)* and *Abingdon School District v Schempp (Schempp)*,[110] were the first school cases to address the role of religion in public schools. Ten years prior to *Engel*, in 1952, the Supreme Court in upholding early dismissal of students from public schools to attend off-campus religious classes, had observed, 'We are a religious people whose institutions presuppose a Supreme Being',[111] but the Supreme Court, in striking down prayer and Bible reading as part of public school daily homeroom opening activities in *Engel* and *Schempp*, found religious tradition to be largely irrelevant.[112] Justice Black writing for the Court in *Engel* observed that the 'first and most immediate purpose [of the Establishment Clause] rested on the belief that a union of government and religion tends to destroy government and to degrade religion'.[113] Invoking a 'wholesome 'neutrality', Justice Clark writing for the majority in Schempp, referenced 'the teachings of history that powerful sects or groups might bring about a fusion of governmental and religious functions or a concert or dependency of one upon the other to the end that official

support of the State or Federal Government would be placed behind the tenets of one or of all orthodoxies'.[114] In the only dissent in both *Engel* and *Schempp*, Justice Stewart, similar to Justice Thomas in *McCreary*, opined that '[i]n the absence of coercion ... such [prayer and Bible reading] cannot ... be held to represent the type of support of religion barred by the Establishment Clause'.[115]

In many ways, *Engel* and *Schempp* became the exemplars for prohibiting government integration of religious values into public schools. While the Supreme Court went on in post-*Engel* and *Schempp* cases to uphold state and federal statutes permitting tax deductions for expenses at both public and nonpublic (including religious) schools,[116] the provision of on-site special education services at a religious school,[117] the provision of on-site Title I services in religious schools,[118] public vouchers for use by students in nonpublic (including religious) schools,[119] and loaning of equipment and instructional materials to religious schools,[120] a majority of the Court resisted the incursion of religious influence into the public schools themselves. In the wake of *Engel* and *Schempp*, the Court invalidated state statutes or school board rules that permitted cleric prayer at public school graduation,[121] that required the teaching of creation-science as an alternative to evolution,[122]that provided for a moment of silence that included prayer,[123] and that permitted student-initiated and student-led prayer at football games.[124]

Although, in all of these cases the Supreme Court overturned state legislative or local school board decisions reflecting support for a public school culture inclusive of religious values, the prime embodiment of this judicial approach occurred in *Lee v Wiesman*[125] where Justice Kennedy, writing for a majority of the Court (Justices Kennedy, Blackmun, Stevens, O'Connor, and Souter), invalidated the use of prayer at public school graduation, ending in many public schools what had become a 150 year-old tradition. By creating a hitherto unknown test of 'psychological coercion', the majority terminated this tradition of religious inclusion in favor of what it termed 'our own tradition [of not] subject[ing] [citizens] to state-sponsored religious exercises'.[126] Thus, in one sweep of the pen, five Justices brushed aside what had become a part of education culture in most American schools. While the two prayers at graduation in *Lee* were short and were not theological lessons,[127] they did reflect that religion underscores a value system that is important to many persons. The loss of even this minimal recognition of the importance of religion leaves only a secularised value system in its place, not unlike the result in *McCreary*, where citizens are expected to understand the difference between acceptable and unacceptable conduct (e.g., Thou shalt not kill) without benefit of the religious context in which these values have been framed (accountability to higher power than man).[128] As Justice Scalia observed in his *Lee v Weisman* dissent, eloquently excoriating the majority's fabrication of a psychological harm to disaffected persons who felt psychologically coerced into standing for a religious invocation and benediction:

> maintaining respect for the religious observances of others is a fundamental civic virtue that government (including the public schools) can and should cultivate .... The Baptist or Catholic who heard and joined in the simple and inspiring prayers of Rabbi Gutterman on this official and patriotic occasion was inoculated from religious bigotry and prejudice in a manner that cannot be replicated. To deprive our society of that important unifying mechanism, in order to spare the nonbeliever what seems to me the minimal inconvenience of standing or even sitting in respectful nonparticipation, is as senseless in policy as it is unsupported in law. To deprive our society of that important unifying mechanism, in order to spare the nonbeliever what seems to me the minimal inconvenience of standing or even sitting in respectful nonparticipation, is as senseless in policy as it is unsupported in law. [129]

It is little wonder, then, that all of these cases challenging government prohibition of, or permissive support for, religious activities and religious traditions have involved a Court deeply divided on the appropriate role of government involvement in religion.

However, all has not been hopeless and the Court has recognised that the Establishment Clause also has a function separate from prohibiting and permitting religious activity; in certain cases, government action can be viewed as hostile to religion, at which point the Establishment Clause, frequently in conjunction with the Free Speech Clause, requires government action favorable to religion. Although this mandatory function of the Establishment Clause has been overshadowed by the enormous litigation legacy involving prohibited or permitted religious activities under the Establishment Clause, it is important because the Free Exercise Clause has proven ineffective in protecting religious activities in public settings.[130] In *Locke v Davey*,[131] the Supreme Court upheld a state rule prohibiting the use of state scholarship funds to pursue a theological degree as not in violation of the Free Exercise Clause even though providing such assistance was permissible under the Establishment Clause.[132] Further, the Court has determined that Free Exercise protection does not apply where government action is neutral and generally applicable and, thus, a free exercise violation occurs only where a particular religion has been singled out for adverse treatment.[133] Consequently, the Establishment Clause requirement that government cannot demonstrate hostility toward religion has become important because Free Exercise no longer provides protection for certain religious activities.

The notion that the Establishment Clause prohibited government from displaying hostility toward religion has been part of constitutional dogma since the earliest cases decided by the Court under the First Amendment religion clauses.[134] The seminal case for public schools is *Lamb's Chapel v Center Moriches Union Free School District (Lamb's Chapel)*[135] where the Court, in a rare unanimous decision, found that a school district had violated the Free Speech Clause by opening its premises to a wide range of community groups but refused to permit a church to show a religious film series in the evenings. Since the Court found a free speech violation, it saw no reason to address 'the church's argument that categorical refusal to permit District property to be used for religious purposes demonstrate[d] hostility to religion',[136] but the refusal of the Court to dismiss the claim out-of-hand was at least tacit recognition that such a claim was possible. Two years later, in *Rosenberger v Rector and Visitors of University of Virginia (Rosenberger)*,[137] the Court, in finding that the university's refusal to fund a campus organisation publication written from a Christian viewpoint when other publications from other viewpoints were funded violated the Free Speech Clause, added that, '[the university's] course of action was a denial of the right of free speech and would risk fostering a pervasive bias or hostility to religion, which could undermine the very neutrality the Establishment Clause requires'.[138] Four years after *Rosenberger, the Court, in Good News Club v Milford Central School (Good News)*,[139] held that a public school that provided after-school access to certain youth-oriented groups (e.g., boy scouts) but denied access to a Christian youth group (Good News Club) violated the Free Speech Clause. Most telling though was how the Court handled the claim that admitting a religious group immediately after school would violate the Establishment Clause by creating the appearance of sponsorship of religion; 'even if we were to inquire into the minds of schoolchildren in this case, we cannot say the danger that children would misperceive the endorsement of religion is any greater than the danger that they would perceive a hostility toward the religious viewpoint if the Club were excluded from the public forum'.[140]

Federal courts have picked up on this theme that refusing to provide the same rights to those expressing their religious views could constitute hostility toward religion. For example, in *Rusk*

v Crestview School District (Rusk)[141], the Sixth Circuit upheld a school district rule that fliers from community religious groups be distributed to students on the same basis as fliers from other community groups, the court noting that, 'if Crestview were to refuse to distribute flyers advertising religious activities while continuing to distribute flyers advertising other kinds of activities, students might conclude that the school disapproves of religion'.[142]

While no case to date has held that the Establishment Clause by itself will support a hostility claim, the prohibition of free speech viewpoint discrimination in *Lamb's Chapel* and subsequent cases clearly has mirrored the Establishment Clause's prohibition on hostility. In effect, public schools and other government entities that have discriminated against religious expression have demonstrated hostility toward religion which, while not actionable under the Establishment Clause, nonetheless is reflected in the finding of a free speech violation. Whether a separate Establishment Clause claim will develop remains to be seen, but a finding of no viewpoint discrimination under free speech will probably be tantamount to a determination of neutrality for purposes of the Establishment Clause.[143] However, the determination as to whether an Establishment Clause hostility claim is possible seems to be a matter of proof, not a matter that the claim is not justiciable.[144]

V Conclusion

The Establishment Clause, despite being labeled as 'separation of church and state', has far more depth to it. Over its 60 years of litigation, the clause has taken on a variety of shades and hues of interpretations. The refusal of the Supreme Court to permit the Establishment Clause to become an instrument of hostility toward religion is reflected in the range of meanings given to the Clause.

However, the *McCreary* and *Van Orden* cases illustrate the confusion that exists under the Establishment Clause in determining the appropriate balance between religion and the public sector. More importantly, the cases reflect the wide range of opinions among the Supreme Court members and highlight the importance of philosophical views when persons are under consideration for appointment to the Court.

What the two cases also demonstrate is that fact patterns are critical for assessing whether religious contacts with the public sector will be upheld. The location of the Ten Commandments outside rather than inside a public building was sufficient to persuade a majority of the Court that members of the public have less likelihood to perceive government endorsement of religion and less reason to complain that they are being coerced in their beliefs. Would a Ten Commandment monument on the grounds of a public school be viewed favorably as in *Van Orden*? Public school grounds generally do not have other monuments (or at least as many other monuments) so the *Van Orden* analysis is probably not one that will apply to schools. The continuum of what public schools cannot do, what they are permitted to do, and what they must protect the right of students to do provide the ongoing grist for interpreting the Establishment Clause.

Endnotes

1. *Santa Fe Independent School Dist. v Doe*, 530 U.S. 290, 301 [145 *Ed. Law Rep*. 21] (2000).
2. 330 U.S. 1 (1947).
3. 403 U.S. 602 (1971) (Court struck down, as excessively entangling, Rhode Island statute that provided salary supplements for teachers in nonpublic schools teaching secular subjects and a Pennsylvania statute reimbursing nonpublic schools for teachers' salaries, textbooks, and instructional materials

used in the teaching of specific secular subjects.)

4. In *Lemon*, the Court formalised a three-part test for assessing whether government involvement with religion violated the Establishment Clause: (1) whether the government act had a secular purpose; (2) whether the government act advanced or inhibited religion; and, (3) whether the government act would result in excessive entanglement with religion. Id. at 612-13. For cases applying this test, see, e.g., *Meek v Pittinger*, 421 U.S. 349 (1975) (upholding loan of textbooks to religious schools but invalidating loan of equipment that could be diverted to religious use); *Wolman v Walter*, 433 U.S. 229 (1977) (upholding loan of textbooks and testing materials identical to those used in the public schools and the provision of on-site diagnostic services, but striking down use of public monies for purchases of instructional materials and equipment for the students and for transportation for field trips). But see, *Mitchell v Helms*, 530 U.S. 793, 808 [145 *Ed. Law Rep*. 44] (2000) overruling both cases using a different Establishment Clause test.

5. See *Lamb's Chapel v Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 [83 *Ed. Law Rep*. 30] (1993) where Justice Scalia, while concurring in Justice White's majority opinion, takes issue with his reference to *Lemon v Kurtzman*:

   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. Its most recent burial, only last Term, was, to be sure, not fully six feet under: Our decision in *Lee v Weisman*, 505 U.S. 577, 586-587 (1992), conspicuously avoided using the supposed 'test' but also declined the invitation to repudiate it.

   Id. at 398 (Scalia, J., concurring in the judgment).

6. See *Zelman v Simmons-Harris*, 536 U.S. 639, 668 [166 *Ed. Law Rep.* 30] (2002)(in upholding vouchers, the Court observed that 'nor does today's decision signal a major departure from this Court's prior Establishment Clause jurisprudence [whereby] [a] central tool in our analysis of cases in this area has been the *Lemon* test) (O'Connor, J., concurring); *Lee v Weisman*, 505 U.S. 577, 587 [75 *Ed. Law Rep.* 43] (1992) (in invalidating prayer at high school graduation, the Court refused to reconsider its decision in *Lemon*). But see, *Elk Grove Unified Sch. Dist. v Newdow*, 124 S.Ct. 2301 (2004) (in addressing the merits of the pledge case when the majority had remanded on standing, Justice Thomas lamented that using the *Lemon* test with its 'predictable outcome ... has led to results that can only be described as silly', referencing *County of Allegheny v American Civil Liberties Union*, 492 U.S. 573 (1989) where the Court invalidated a crèche on government property but upheld a 18-foot menorah) (Thomas, J., concurring in judgment), Newdow,124 S.Ct. at 2327.

7. The most prevalent test has been the endorsement test, replacing the three parts of the *Lemon* test with two parts: whether the purpose of the government's action was to endorse or sponsor religion; and, whether the effect of the action when viewed objectively by a reasonable person would be perceived as government endorsement or sponsorship. See *Lynch v Donnelly*, 465 U.S. 668, 690 (1984) (O'Connor, J, concurring) (finding that a crèche among other nonreligious symbols did not meet the test) and *Capitol Square Review and Advisory Bd. v Pinette*, 515 U.S. 753, 779 (1995) (O'Connor, J., concurring in part and concurring in judgment) (upholding KKK display of cross in public forum because 'our concern is with the political community writ large, the endorsement inquiry is not about the perceptions of particular individuals or perceptions of particular individuals ...') See the following state aid cases, *Mitchell v Helms*, 530 U.S. 793 (2000) (upholding loan of Chapter Two materials and equipment to religious schools); *Agostini v Felton*, 521 U.S. 203[119 *Ed. Law Rep*. 29] (1997) (upholding publicly paid Title I teachers on-site in religious schools); *Zobrest v Catalina Foothills Sch. Dist.*, 109 U.S. 1 [83 *Ed. Law Rep*. 930] (1993) (upholding IDEA sign language teacher in religious school); *Witters v Wash. Dep't of Servs. for the Blind,* 474 U.S. 481 [29 *Ed. Law Rep*. 496] (1986) (finding no Establishment Clause violation where state scholarship funds used by student enrolled in post-secondary program preparing for the ministry). The Court in all four cases found that aid does not violate the Establishment Clause where it is allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, is made available to both religious and secular beneficiaries on a nondiscriminatory basis, and results from individual choices by parents or recipients to participate in a

religious school or program.

8. 333 U.S. 203 (1948).
9. The school board's religious instruction program required that students have signed parent consent forms to be dismissed from class prior to the end of the school day to participate. In addition, instructors in the program had to be approved by the superintendent. In striking down the program, the Court found an Establishment Clause violation because,

> The operation of the state's compulsory education system thus assists and is integrated with the program of religious instruction carried on by separate religious sects. Pupils compelled by law to go to school for secular education are released in part from their legal duty upon the condition that they attend the religious classes. This is beyond all question a utilization of the tax-established and tax-supported public school system to aid religious groups to spread their faith. *Id*. at 209.

10. *Id*. at 211, 212.
11. 508 U.S. 384 [83 *Ed. Law Rep*. 30] (1993). The Court found that the school board had engaged in impermissible viewpoint discrimination by refusing to permit a church to use its facilities to present a religious view of a subject (child rearing) on which other views had been permitted. However, the Court avoided a direct conflict between free speech and the Establishment Clause because it found that '[t]he showing of this film series would not have been during school hours, would not have been sponsored by the school, and would have been open to the public, not just to church members'. Id. at 395.
12. See *Good News Club v Milford Cent. Sch.*, 533 U.S. 98 [154 *Ed. Law Rep*. 55] (2001). In holding, under free speech, that a public school district was required to open its elementary buildings after school to an evangelical religious group where other groups were permitted access to the school, the Court, in response to the school's claim that the appearance of the Club would be perceived by the students as an impermissible Establishment Clause endorsement of religion, observed that, 'we cannot say the danger that children would misperceive the endorsement of religion is any greater than the danger that they would perceive a hostility toward the religious viewpoint if the Club were excluded from the public forum'. Id. at 118.
13. 125 S.Ct. 2722 (2005).
14. 125 S.Ct. 2854 (2005).
15. The postings incorporated the full text of the words associated with the Ten Commandments:

> Thou shalt have no other gods before me.
> Thou shalt not make unto thee any graven images.
> Thou shalt not take the name of the Lord thy God in vain.
> Remember the sabbath day, to keep it holy.
> Honor thy father and thy mother.
> Thou shalt not kill.
> Thou shalt not commit adultery.
> Thou shalt not steal.
> Thou shalt not bear false witness.
> Thou shalt not covet.
> Exodus 20:3-17."

McCreary, 125 S.Ct. at 2728, note 1.

16. Id. at 2729-2730.
17. See *American Civil Liberties Union v McCreary County,* 96 F.Supp.2d 679, 686, 698-700 (E.D. Ky 2000). See also, *Lemon v Kurtzman*, 403 U.S. 602 (1971) (invalidating a state statute providing reimbursement for teacher salaries, textbooks, and instructional materials used in nonpublic, including religious, schools under a newly crafted tripartite test: state action involving religion must have a secular purpose, must neither advance nor inhibit religion, and not involve the state in excessive entanglement). Id. at 613.
18. The two-part endorsement test, first articulated by Justice O'Connor in *Lynch v Donnelly*, 465 U.S.

668, 690 (1984) (O'Connor, J., concurring) requires that courts determine whether government action has a secular purpose and whether, using an objective-observer test comparable to the reasonable person standard in tort law, a reasonably knowledgeable person would objectively perceive the government action as an endorsement of religion. The district court judge in *McCreary*, although relying on the *Lemon* test to analyze the Ten Commandment displays, used the endorsement test to determine whether the postings constituted an advancement of religion under the second of the Lemon tests, much as Justice O'Connor had developed the endorsement test. See *Lynch v Donnelly*, 465 U.S. at 690 ('The purpose prong of the Lemon test asks whether government's actual purpose is to endorse or disapprove of religion. The effect prong asks whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval'). See also, *ACLU*, 96 F.Supp.2d at 687.

19. *McCreary*, 125 S.Ct. at 2730, 2731. Prior to the district court's issuance of an injunction in this third display, the counties removed references to Exodus and the label, 'King James Version'. See *ACLU v McCreary County*, 145 F.Supp.2d 845, 847 (E.D.Ky 2001).
20. *ACLU*, 145 F.Supp.2d at 849-850.
21. Id. at 851, 852.
22. *American Civil Liberties Union v McCreary County*, 354 F.3d 438, 449 (6th Cir. 2003).
23. Id. at 478 (Ryan, J., dissenting).
24. 465 U.S. 668 (1984) (Court upheld a crèche in a city-owned display that included a Santa Claus house, reindeer pulling Santa's sleigh, candy-striped poles, a Christmas tree, carolers, cutout figures representing such characters as a clown, an elephant, and a teddy bear, hundreds of colored lights, a large banner that read 'SEASONS GREETINGS').
25. 492 U.S. 573 (1989) (a highly fractured Court invalidated a creche donated by a Catholic organisation located on the staircase inside a courthouse, finding that a sign held by an angel, 'Gloria in Excelsis Deo', to be impermissible endorsement of religion, but upheld a menorah donated by a Jewish organisation alongside a Christmas tree on the courthouse lawn where a sign at the foot of the tree proclaimed the city's 'salute to liberty').
26. Id. at 476.
27. Souter, J., delivered the opinion of the Court, in which Stevens, O'Connor, Ginsburg, and Breyer, JJ., joined. O'Connor, J., filed a concurring opinion. Scalia, J., filed a dissenting opinion, in which Rehnquist, C.J., and Thomas, J., joined, and in which Kennedy, J., joined as to Parts II and III.
28. 449 U.S. 39, 41 (1980) (per curiam) (invalidating Kentucky legislative requirement that Ten Commandments be posted on the walls of every public school classroom in the state because '[t]he Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths, and no legislative recitation of a supposed secular purpose can blind us to that fact'.)
29. 472 U.S. 38, 56 [25 *Ed. Law Rep.* 39] (1985) (invalidating Alabama statute authorising a 1-minute period of silence in all public schools 'for meditation or voluntary prayer' where motivation of the legislative sponsor was solely religious and 'had no secular purpose'.)
30. 482 U.S. 578, 591 [39 *Ed. Law Rep*. 958] (1987) (invalidating Louisiana's balanced treatment statute requiring teaching of creation science if evolution taught in public schools where, despite statute's avowed purpose of protecting academic freedom, '[t]he preeminent purpose of the Louisiana Legislature was clearly to advance the religious viewpoint that a supernatural being created humankind'.)
31. 530 U.S. 290 [145 *Ed. Law Rep*. 21] (2000) (invalidating Texas school district permitting student-initiated and student-led invocation prior to football games where the school was involved in the selection of the speaker and the school's policy 'by its terms, invite[d] and encourage[d] religious messages.')
32. *Wallace*, 472 U.S. at 74 (O'Connor, J, concurring in judgment).
33. *McCreary*, 125 S.Ct. at 2737.
34. Id. at 2738.
35. Id. at 2740.
36. Id. at 2741.
37. Id.

38. Id. at 2744, 2745.
39. Id. at 2742.
40. See id. at 2748 (George Washington added to the form of Presidential oath prescribed by Art. II, § 1, cl. 8, of the Constitution, the concluding words 'so help me God' and offered the first Thanksgiving Proclamation ... devoting November 26, 1789 on behalf of the American people 'to the service of that great and glorious Being who is the beneficent author of all the good that is, that was, or that will be').
41. See id. (In addition to the first Congress instituting a practice of opening each session with prayer, the same week that Congress submitted the Establishment Clause as part of the Bill of Rights for ratification by the States, it enacted legislation providing for paid chaplains in the House and Senate and the day after the First Amendment was proposed, the same Congress that had proposed it requested the President to proclaim ' a day of public thanksgiving and prayer, to be observed, by acknowledging, with grateful hearts, the many and signal favours of Almighty God').
42. See id. (The Supreme Court under John Marshall opened its sessions with the prayer, 'God save the United States and this Honorable Court').
43. Id. at 2749. For other references by other early Presidents and Congresses to public expressions of belief in, and dependence upon, God, see id.
44. 343 U.S. 306 (1952) (upholding constitutionality of public school release time program that permitted students to leave the public school during the last hour of the school day one day per week and attend religious meetings at religious institutions of their choice while students not participating in the released time program stayed in the school until the end of the school day; in effect, the Court rejected the argument that the success of released time depended on state compulsory attendance requirements in that students had to either attend a religious institution or stay in the school, the Court relying instead on the support of parent choice).
45. See *Lynch v Donnelly*, 465 U.S. 668, 675 (1984) (holding display of crèche in city park along with other secular items); *Marsh v Chambers*, 463 U.S. 783, 787 (1983) (upholding State of Nebraska's opening of each legislative session by chaplain paid with public funds, even though clergyman of only one denomination had been selected for 16 years and prayers were in the Judeo-Christian tradition); *School Dist. Of Abington Township v Schempp*, 374 U.S. 203, 213 (1963) (invalidating Pennsylvania statute requiring Bible reading at beginning of each school day in public schools).
46. *McCreary*, 125 S.Ct. at 2751.
47. Id. at 2753.
48. Id. see also Justice Scalia's observation that '[a]ll of the actions of Washington and the First Congress upon which I have relied, virtually all Thanksgiving Proclamations throughout our history, and all the other examples of our Government's favoring religion that I have cited, have invoked God, but not Jesus Christ'. Id. at 2753 (emphasis in original).
49. Id. note 4. See also, id. at 2758 - 2760 for lengthy discussion of the secular nature of the display because of the explanatory plaque stating that the display, 'contains documents that played a significant role in the foundation of our system of law and government'.
50. See *Van Orden v Perry*, 124 S.Ct. 2722, 2881, note 18 (2005) (Stevens, J., dissenting).
51. *McCreary*, 125 S.Ct. at 2757 (Scalia, J., dissenting).
52. Id. at 2757.
53. Id.
54. Id. (emphasis in original).
55. Justice Scalia's brief concurring opinion was essentially a replay of his dissenting comments in *McCreary*: 'I would prefer to reach the same result by adopting an Establishment Clause jurisprudence that is in accord with our Nation's past and present practices, and that can be consistently applied--the central relevant feature of which is that there is nothing unconstitutional in a State's favoring religion generally, honoring God through public prayer and acknowledgment, or, in a nonproselytizing manner, venerating the Ten Commandments'.) *Van Orden*, 125 S.Ct. at 2864 (Scalia, J., concurring).
56. Justice Thomas' opinion was more substantive than Scalia's and argued for a reworking of the Establishment Clause test, returning 'to the views of the Framers and adopt coercion as the touchstone

for our Establishment Clause inquiry' with the result that '[e]very acknowledgment of religion would not give rise to an Establishment Clause claim'. A coercion test would permit the Court to recognise the religious nature of words (e.g., 'In God We Trust', 'One Nation under God') and symbols (e.g., a cross) and 'capture completely the honest and deeply felt offense [the nonbeliever] takes from the government conduct [as well as the views of] the adherent [for whom] ... removal of the sign or display ... may well appear to him to be an act hostile to his religious faith'. This test would assure that '[t]he outcome of constitutional cases ... rest[ed] on firmer grounds than the personal preferences of judges' and would avoid the double dilemma of, on one hand, finding 'the slightest public recognition of religion to constitute an establishment of religion' or, on the other, 'conclude[ing] that the term or symbol at issue has no religious meaning by virtue of its ubiquity or rote ceremonial invocation'. Id. at 2866, 2877 (Thomas, J., dissenting).

57. Justice Breyer argued for a 'divisiveness' test for borderline cases like this to assure that 'the relation between government and religion is one of separation, ... not of mutual hostility and suspicion'. Because the monument was the product of several faiths, had been paid for by a nonreligious group, was located in a place not conducive for meditation, and represented the historical ideals of Texas, he concluded that the Ten Commandments monument 'convey[ed] a predominantly secular message'. Justice Breyer further observed that the 40 years the monument had stood without complaint reinforced the notion that it was not divisive and, indeed, a contrary conclusion 'based primarily upon on the religious nature of the tablets' text would ... lead the law to exhibit a hostility toward religion that has no place in our Establishment Clause traditions'. Id. at 2869, 2870, 2871 (Breyer, J., concurring in the judgment).
58. Justice Breyer disagreed with the plurality's analysis and, while agreeing with Justice O'Connor's statement of principles in her dissent, refused to concur with her evaluation of the evidence. Id. at 2871, 2872.
59. Id. at 2873-2874 (Stevens, J., dissenting).
60. Id. at 2857.
61. Id. The monuments are: Heroes of the Alamo, Hood's Brigade, Confederate Soldiers, Volunteer Fireman, Terry's Texas Rangers, Texas Cowboy, Spanish-American War, Texas National Guard, Ten Commandments, Tribute to Texas School Children, Texas Pioneer Woman, The Boy Scouts' Statue of Liberty Replica, Pearl Harbor Veterans, Korean War Veterans, Soldiers of World War I, Disabled Veterans, and Texas Peace Officers.
62. See *Van Orden v Perry*, 351 F.3d 373 (5th Cir. 2003).
63. *Van Orden*, 124 S.Ct. at 2859.
64. Id. at 2861.
65. Id. at 2862-2863.

> Since 1935, Moses has stood, holding two tablets that reveal portions of the Ten Commandments written in Hebrew, among other lawgivers in the south frieze. Representations of the Ten Commandments adorn the metal gates lining the north and south sides of the Courtroom as well as the doors leading into the Courtroom. Moses also sits on the exterior east facade of the building holding the Ten Commandments tablets.
>
> Similar acknowledgments can be seen throughout a visitor's tour of our Nation's Capital. For example, a large statue of Moses holding the Ten Commandments, alongside a statue of the Apostle Paul, has overlooked the rotunda of the Library of Congress' Jefferson Building since 1897. And the Jefferson Building's Great Reading Room contains a sculpture of a woman beside the Ten Commandments with a quote above her from the Old Testament (Micah 6:8). A medallion with two tablets depicting the Ten Commandments decorates the floor of the National Archives. Inside the Department of Justice, a statue entitled 'The Spirit of Law" has two tablets representing the Ten Commandments lying at its feet. In front of the Ronald Reagan Building is another sculpture that includes a depiction of the Ten Commandments. So too a 24-foot-tall sculpture, depicting, among other things, the Ten Commandments and a cross, stands outside the federal courthouse that houses both

the Court of Appeals and the District Court for the District of Columbia. Moses is also prominently featured in the Chamber of the United States House of Representatives.

See also, id. at 2863, note 9 for other examples of monuments and buildings reflecting the prominent role of religion.

66. Id. at 2863.
67. Id. at 2861.
68. Id. at 2864.
69. 449 U.S. 39 (1980) (per curiam).
70. Id. at 41 ('We conclude that Kentucky's statute requiring the posting of the Ten Commandments in public schoolrooms had no secular legislative purpose, and is therefore unconstitutional'.)
71. Justice O'Connor's dissenting opinion is omitted from discussion since it is only one sentence long and endorses the arguments of Justice Souter. See *Van Orden*, 125 S.Ct. at 2891 (O'Connor, J., dissenting).
72. Id. at 2876 (Stevens, J., dissenting).
73. Id. at 2877.
74. Id. at 2883, 2884 (in particular, Justice Stevens references to Thomas Jefferson who refused to issue a Thanksgiving proclamation and James Madison who repudiated religious views that had been attributed to him).
75. Id. at 2880. See id., note 16, for variations among different religions of the language of the Ten Commandments. See also, id. at 2881, note 18, for religions that reject the Ten Commandments.
76. Id. at 2887.
77. Id. at 2890.
78. Id.
79. Id. at 2897 (Souter, J., dissenting).
80. For a discussion of the acommodationist-separationist controversy, see Ralph Mawdsley, Access by Religious Community Organisations to Public Schools: A Degrees of Separation Analysis, 193 *Ed. Law Rep.* 633 (2005).
81. *Van Orden*, 125 S.Ct. at 2889 (Stevens, J., dissenting).
82. Antonin Scalia, Originalism: The Lesser Evil, 57 *U. Cin. L. Rev.* 849, 854 (1989)
83. Id. at 853. The watchword is reflected by Justice Marshall, the second Chief Justice of the Supreme Court, in McCulloch v Maryland where he declared that 'we must never forget it is a constitution we are expounding'. 17 U.S. 316, 407 (1819).
84. See *Marbury v Madison*, 5 U.S. 137, 177 (1803) (determining for the first time that the Supreme Court had the authority to review laws of Congress, in this case finding that a statute ordering the Secretary of State to deliver judicial appointments signed by the President violated the Constitution's separation of powers with the observations that: (1) '[i]t is emphatically the province and duty of the judicial department to say what the law is,' (2) '[i]f two laws conflict with each other, the courts must decide on the operation of each,"' and (3) 'the constitution is to be considered, in court, as a paramount law).
85. *Scalia*, 57 U. Cin. L. Rev. at 854.
86. Lawrence Tribe, *American Constitutional Law* 771 (2d ed. 1988).
87. Owen Fiss, The Supreme Court 1978 Term--Forward: The Forms of Justice, 93 *Harv. L. Rev*. 1, 9, 11 (1979).
88. Ronald Dworkin, *Taking Rights Seriously* 149 (1977).
89. Richard Parker, The Past of Constitutional Theory--And Its Future, 42 OHIO ST. L. J. 223, 258 n.146 (1981).
90. *Van Orden*, 125 S.Ct. at 2888 (Stevens, dissenting).
91. Lawrence Tribe, *God Save This Honorable Court* 45 (1985).
92. See Scalia, *U. Cin. L. Rev*. at 855.
93. 125 S.Ct. 2655 (2005) . This case arose under the Fifth Amendment's provision that 'private property [shall not] be taken for public use, without just compensation'.
94. Id. at 2675 (O'Connor, J., dissenting). As Justice O'Connor noted, 'Nothing is to prevent the State

from replacing any Motel 6 with a Ritz-Carlton, any home with a shopping mall, or any farm with a factory ... [T]he government now has license to transfer property from those with fewer resources to those with more. The Founders cannot have intended this perverse result'. Id. at 2676. 2677.

95. Id. at 2664.
96. See id. at 2667.
97 . Id. at 2678 (Thomas, J., dissenting). See also, id. at 2786-2687 where Justice Thomas injected another concern, 'Allowing the government to take property solely for public purposes is bad enough, but extending the concept of public purpose to encompass any economically beneficial goal guarantees that these losses will fall disproportionately on poor communities'.
98. The two leading Supreme Court cases upholding public taking of private property are *Hawaii Housing Authority v Midkiff*, 467 U.S. 229 (1984) and *Berman v Parker*, 348 U.S. 26 (1954). In *Berman*, the Court upheld condemnation of a blighted neighborhood of Washington D.C. where 64.3% or the buildings were beyond repair and the Court deferred to Congress' judgment to treat the entire neighborhood as a unit, even though Berman's store was not in need of repair. In *Midkiff* involved a Hawaii statutory condemnation scheme to condemn and resell property where only 22 landowners owned fee simple title to 72.5% of 47% of land in the state resulting in inflated real estate markets. However, the cases hewed to a bedrock principle that formed, up to Kelo, the basis for jurisprudence: 'A purely private taking could not withstand the scrutiny of the public use requirement; it would serve no legitimate purpose of government and would thus be void'. *Midkiff*, 467 U.S. at 245. *Kelo v City of New London*, Conn. 125 S.Ct. 2655, 2657 (U.S.Conn.,2005)
99. Based on past Supreme Court precedents, some school districts have acted to treat religious groups the same as other nonreligious groups, while other districts have sought to exclude religious groups, but federal circuits generally have determined that school districts cannot treat religious groups different from nonreligious groups. Cf. *Rusk v Crestview Local Sch. Dist.*, 379 F.3d 418 (6th Cir. 2004) with *Child Evangelism Fellowship of Maryland, Inc. v Montgomery County Pub. Schs*., 373 F.3d 589 (4th Cir. 2004). In Rusk, the Sixth Circuit upheld a school board policy to send home with children community organisation fliers which included fliers advertising CEF's Good News Club that met after school in elementary schools. In Montgomery County, the Fourth Circuit held that the County's refusal to send home the religious fliers with students, while sending home other community fliers, violated the Establishment Clause. In both cases, the courts reached similar results regarding quite opposite school board policies using the Lemon test.
100. *Lemon v Kurtzman*, 403 U.S. 602 (1971).
101. *Committee for Pub. Educ. and Religious Liberty v Nyquist*, 413 U.S. 756 (1973).
102. *Everson v Bd. of Educ*., 330 U.S. 1 (1947).
103. *Bd. of Cent. Sch. Dist. v Allen*, 392 U.S. 236 (1968); *Meek v Pittenger*, 421 U.S. U.S. 349 (1975); *Wolman v Walter,* 433 U.S. 247-248 (1977)
104. *Committee for Pub. Educ. v Regan*, 444 U.S. 646 (1980). But see, *Levitt v Comm. For Pub. Educ*., 413 U.S. 472 (1973) (invalidating New York statute authorising state to reimburse nonpublic schools for expenses of services for examination and inspection in connection with administration, grading and compiling and reporting the results of tests and examinations and the maintenance of certain records where they were prepared by religious schools and were an integral part of the teaching process).
105. *Wolman v Walter*, 433 U.S. 229, 237-238 (1977).
106. *Meek v Pittenger*, 421 U.S. U.S. 349 (1975) (invaliding Pennsylvania statute as to loan of instructional materials that could be diverted to religious uses but upholding loan of textbooks; *Wolman v Walter*, 433 U.S. 247-248 (1977) (upholding Ohio statute loaning textbooks to religious schools but invalidaing portion of statute loaning instructional materials).
107. *Wolman v Walter*, 433 U.S. 229, 246-248 (1977)
108. Cf. *Wallace v Jaffree*, 472 U.S. 38, 106 (1985) (Rehnquist, J., dissenting) (supporting nonpreferential view, '[t]he Establishment Clause did not require government neutrality between religion and irreligion nor did it prohibit the Federal Government from providing nondiscriminatory aid to religion') with *Lee v Weisman*, 505 U.S. 577, 612, 615 (1992) (Souter, J., concurring) (rejecting nonprererential approach, 'The Framers repeatedly considered and deliberately rejected such narrow language and instead

extended their prohibition to state support for "religion" in general'.)

109. For examples of judicial interpretations of the views of the Founding Fathers, see *Engel v Vitale*, 370 U.S. 421, 425-429 (1962) (striking down school board rule requiring recitation of the following prayer, 'Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country'.); *Abington Sch. Dist. v Schempp*, 374 U.S. 203, 232-240 (1963) (finding that the purpose of the Establishment Clause 'was designed comprehensively to prevent those official involvements of religion which would tend to foster or discourage religious worship or belief'.) Id. at 234 (Douglas, J., concurring).
110. 374 U.S. 203 (1963) (state statute required the reading of ten verses from the Bible over the school public address system and the recitation of the Lord's Prayer by students in their home rooms. Students who objected could absent themselves from the home room or simply not participate in the exercises. The parents challenging the statute in this case chose not to absent their children because they did not want them considered to be 'odd balls'). Id. at 207, note 3.
111. *Zorach v Clauson*, 343 U.S. 306, 313 (1952).
112. See *Schempp*, 374 U.S. at 213 where the Court, although striking down the school practice of Bible reading and recitation of the Lord's Prayer over the school address system, nonetheless observed that 'the fact that the Founding Fathers believed devotedly that there was a God and that the unalienable rights of man were rooted in Him is clearly evidenced in their writings'. In addition, the Court cited to Bureau of Census figures that only 3% of Americans in 1962 professed no religion whatsoever. In effect, these observations made no difference because the majority was persuaded that recitation of words with religious meanings participated in by a captive audience amounted to government indoctrination.
113. *Engel*, 370 U.S. at 431.
114. Id. at 221.
115. Id. at 316 (Stewart, J. dissenting). See also, *Engel*, 370 U.S. at 445 for a similar declaration (Stewart, J., dissenting).
116. See *Mueller v Allan*, 463 U.S. 388 [11 *Ed. Law Rep*. 763] (1983) (upholding Minnesota state tax deduction for tuition, books, and transportation expenses at both public and nonpublic, including religious, schools, and finding no Establishment Clause violation because statute was neutral in terms of those benefiting, even though only those in nonpublic schools were likely to be eligible for the deductions).
117. See *Zobrest v Catalina Foothills Sch. Dist.*, 509 U.S. 1[83 *Ed. Law Rep*. 930] (1993) (upholding against an Establishment Clause challenge a public school district providing a sign language interpreter to a student in a religious school). Under IDEA services can be provided on-site at private, including religious, schools 'to the extent consistent with law'. 34 C.F.R. § 300.456(a). IDEA has a proportionality requirement that funds must be provided on a proportionate basis between public and nopublic schools. 20 U.S.C. § 1412(a)(10)(A)(i)(I); 34 C.F.R. § 300.453. However, while providing IDEA services does not violate the Establishment Clause, no private school child with a disability 'has an individual right to receive some or all of the special education and related services the child would receive if enrolled in a public school'. 34 C.F.R. § 300.454(a).
118. See *Agostini v Felton*, 521 U.S. 203 [119 *Ed. Law Rep*. 29] (1997), overruling Aguilar v Felton, 473 U.S. 402 (1985). Title I has a proportionality requirement that federal funds must be allocated on a proportionate basis to students in nonpublic schools. 20 U.S.C.A. § 6301 et seq.
119. *Zelman v Simmons-Harris*, 536 U.S. 639 [166 *Ed. Law Rep*. 30] (2002) (upholding against Establishment Clause challenge the Cleveland, Ohio voucher program that provided up to 4000 vouchers with a maximum value of $2,250 to parents to place their children in nonpublic schools in Cleveland, or to purchase tutor services, or enroll in a neighboring public school district).
120. See *Mitchell v Helms*, 530 U.S. 793[145 *Ed. Law Rep*. 44] (2000) (holding that loaning instructional materials, including books, and electronic and AV equipment, to religious schools did not violate the Establishment Clause, overruling *Meek v Pittenger*, 421 U.S. 349 (1975) and *Wolman v Walters*, 433 U.S. 229 (1977).
121. *Lee v Weisman*, 505 U.S. 577 [75 *Ed. Law Rep*. 43] (1992).

122. See *Epperson v State of Ark*., 393 U.S. 97 (1968) (invalidating state statute prohibiting the teaching of theory of evolution in public schools or in higher educational institutions supported by state funds); *Edwards v Aguillard,* 482 U.S. 578 [39 *Ed. Law Rep*. 958] (1987) (invalidating Louisiana Balanced-Treatment statute requiring that creation science be taught if evolution was taught in public schools).
123. See *Wallace v Jaffree*, 472 U.S. 38 [25 *Ed. Law Rep.* 39] (1985) (invalidating an Alabama statute authorising that public schools could provide a moment of silence at the beginning of the school for mediation or voluntary prayer, finding that the addition of the word, 'prayer', constituted state support for a particular practice to use during the silence).
124. *Santa Fe. Indep. Sch. Dist. v Doe*, 530 U.S. 290 [145 *Ed. Law Rep*. 21] (2000) (holding that prayer before football games violated Establishment Clause, even though student-initiated and student-led, because: the school's public address system was used; cheerleaders, band members and athletes were present and did not have the option to leave; and, the decision to have a prayer represented a majority of students voting which meant that there was no provision for addressing the views of students who dissented).
125. 505 U.S. 577 (1992).
126. *Lee*, 505 U.S. at 592.
127. See id. at 582 for the two prayers by Rabbi Gutterman:

INVOCATION

God of the Free, Hope of the Brave:
For the legacy of America where diversity is celebrated and the rights of minorities are protected, we thank You. May these young men and women grow up to enrich it.
For the liberty of America, we thank You. May these new graduates grow up to guard it.
For the political process of America in which all its citizens may participate, for its court system where all may seek justice we thank You. May those we honor this morning always turn to it in trust.
For the destiny of America we thank You. May the graduates of Nathan Bishop Middle School so live that they might help to share it.
May our aspirations for our country and for these young people, who are our hope for the future, be richly fulfilled.

AMEN

BENEDICTION

O God, we are grateful to You for having endowed us with the capacity for learning which we have celebrated on this joyous commencement. Happy families give thanks for seeing their children achieve an important milestone. Send Your blessings upon the teachers and administrators who helped prepare them. The graduates now need strength and guidance for the future, help them to understand that we are not complete with academic knowledge alone. We must each strive to fulfill what You require of us all: To do justly, to love mercy, to walk humbly. We give thanks to You, Lord, for keeping us alive, sustaining us and allowing us to reach this special, happy occasion.

AMEN

128. See *McCreary*, 125 S.Ct. at 2749 (Scalia, J., dissenting) ('[The] actions of our First President and Congress and the Marshall Court were not idiosyncratic; they reflected the beliefs of the period. Those who wrote the Constitution believed that morality was essential to the well-being of society and that encouragement of religion was the best way to foster morality.
129. See *Lee v Weisman*, 505 U.S. 577, 638 (1992) (Scalia, J., dissenting).
130. The seminal case in the diminution of the importance of the Free Exercise Clause was *Employment Div., Dep't of Human Resources of Ore. v Smith*, 494 U.S. 872 (1990) (in a majority opinion by Justice Scalia, the Court reasoned that free exercise was no longer a defense to neutral, generally applicable

government actions; in this case, the state had denied unemployment compensation benefits to two discharged state employees for using peyote as part of Native American religious ceremony and such denial was not a violation of the Free Exercise Clause where state prohibition of the use of peyote was neutral, in the sense that it had been enacted without the purpose of penalising the religion). See generally, Ralph Mawdsley, 'Employment Division v Smith Revisited: The Constriction of Free Exercise Rights Under the United States Constitution', 76 *Ed. Law Rep*. 1 (1992)

131. See *Locke v Davey,* 540 U.S. 712 [185 *Ed. Law Rep.* 30] (2004) (holding that state could restrict allocation of its funds without violating the Free Exercise Clause, even though its constitutional prohibition on use of funds was more restrictive than the Establishment Clause. See Wash, Const., Art. I, § 11 'No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment'.)
132. Cf. *Witters v Washington Dep't of Servs. For the Blind,* 474 U.S. 481 (1986) (holding that a student using a state grant for ministerial training did not violate the Establishment Clause) with Witters v State Comm'n for the Blind, 112 Wash.2d 363, 369- 370, 771 P.2d 1119, 1122 (1989) (on remand, state supreme court upheld denial of grant under state constitution as not being a free exercise violation).
133. See *Church of Lukumi Babalu Aye, Inc. v Hialeah*, 508 U.S. 520 (1993) (invalidating four city ordinances enacted to prohibit the religious practice of animal sacrifice of the Santeria religion, even though the ordinances claiming to be neutral allowed for a wide range of other kinds of animal killings).
134. See, e.g., *McCollum v Bd. of Educ. of Sch. Dist*. No. 71, 333 U.S. 203, 211-212 (1948) (in invalidating religious classes taught by clerics in school buildings during school time, the Court observed that 'hostility [toward religion] would be at war with our national tradition as embodied in the First Amendment's guaranty of the free exercise of religion'); *Zorach v Clauson*, 343 U.S. 306, 315 (1952) (in refusing to apply *McCollum* to an off-campus released time program, the Court observed that 'separation of Church and State [does not] mean that public institutions can make no adjustments of their schedules to accommodate the religious needs of the people. We cannot read into the Bill of Rights such a philosophy of hostility to religion'); *Lynch v Donnelly*, 465 U.S. 668, 673 (1984) (in upholding a crèche in a town display, the Court observed that 'the Constitution [does not] require complete separation of church and state; it affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any'); *Wallace v Jaffree*, 472 U.S. 38, 85 (1985/ (O'Connor, J., concurring in judgment) (In invalidating statute providing for meditation or prayer, Jusice O'Connor observed, For decades our opinions have stated that hostility toward any religion or toward all religions is as much forbidden by the Constitution as is an official establishment of religion'); *Edwards v Aguillard*, 482 U.S. 578, 616 (1987) (in striking down a Balanced Treatment statute, the Court observed that 'we have consistently described the Establishment Clause as forbidding not only state action motivated by the desire to advance religion, but also that intended to 'disapprove,' 'inhibit,' or evince 'hostility' toward religion'); *Board of Educ. of Westside Community Schs. v Mergens*, 496 U.S. 226, 248 (1990) (in upholding constitutionality of Equal Access Act, the Court noted that 'if a State refused to let religious groups use facilities open to others, then it would demonstrate not neutrality but hostility toward religion').
135. 508 U.S. 384 [83 *Ed. Law Rep*. 30] (1993)
136. Id. at 390, note 4.
137. 515 U.S. 819 [101 *Ed. Law Rep.* 552] (1995).
138. Id. at 845-846.
139. 533 U.S. 98 [154 *Ed. Law Rep*. 45] (2001).
140. Id. at 118.
141. 379 F.3d 418 [191 *Ed. Law Rep.* 84] (6th Cir. 2004).
142. Id. at 423.
143. See e.g., *Seidman v Paradise Valley Unified Sch. Dist*. No. 69, 327 F.Supp.2d 1098, 1119 [191 *Ed. Law Rep.* 175] (D. Ariz. 2004) (upholding school district prohibition of use of 'God' on tile to be displayed in interior of school as being school-sponsored speech and rejecting Establishment Clause hostility claim where prohibition was considered neutral in the absence of 'evidence that the Defendants affirmatively opposed religion, were hostile to religion, or showed preference for those who do not believe in religion'.)
144. See id where the failure of a hostility claim was due to lack of evidence, not to the lack of such a claim.