Does God Belong in Public Schools?

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PRINCETON UNIVERSITY PRESS

PRINCETON AND OXFORD

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In the course of more extensive studies about religious liberty, both the free exercise of religion and the rule against establishing any religion, I became interested in the various ways in which issues about religion concern American public schools. After delving into topics such as school prayer, religious clubs, teaching about religion, and special treatment of students whose parents have religious objections to the curriculum, I concluded that most of the law about religion in schools could be explained by a principle that public schools should not sponsor religion; but that this principle, standing alone, fails to resolve many intricate issues of constitutional law and educational policy. This book explains and analyzes these problems.

My understanding of aspects of the subject increased greatly at presentations and conferences at the University of Virginia, the University of Colorado, the University of Notre Dame Law School, the University of Texas Law School, at Columbia University (at the "Fifteen Minute Paper Group" in the law school and at a meeting of the Center of Science and Religion). At the conference "Teaching about Religion in Public Schools," sponsored in May 2003 by the First Amendment Center and the Pew Forum on Religion and Public Life, organized by Charles C. Haynes and Melissa Rogers, I was able to talk to many of those who have been most active in trying to introduce more teaching about religion into public schools. Students participating in a seminar in the law of church and state that I have taught over the years have been a continuing source of insight.

I have benefited a great deal from the comments of many colleagues, including Barbara Armacost, Vincent Blasi, Michael Dorf, Melvin Eisenberg, David Mapel, Henry Monaghan, James Nickel, Lawrence Sager, Peter Strauss, Jeremy Waldron, and Jay Wexler. Philip Kitcher's help on the three chapters about science and religion was indispensable. He suggested research sources, and his critique of various drafts saved me from a good deal of imprecision and error. My brother Kim, a public high school teacher, provided an extremely valuable perspective. As readers of the manuscript for Princeton University Press, Christopher

Eisgruber and Stephen Macedo offered perceptive criticisms that allowed me to make the book clearer and more coherent. I also benefited from the comments of an anonymous reviewer of the chapters on science.

Darrell Cafasso, Michael Dowdle, Gregory Fayer, Mark Hulbert, Paul Horwitz, Kenneth Levy, Nancy Clare Morgan, Derrick Toddy, and Bethany Alsup contributed very useful and timely research assistance, and in the summer in which I was completing the manuscript, Rima Al-Mokarrab gave precise and very helpful assistance on virtually every chapter.

Before her death in the autumn of 2001, Sally Wrigley typed numerous drafts of chapters on free exercise and nonestablishment. Katherine Bobbitt and Jinah Paek carried the chapters of this book through to a conclusion; Ms. Bobbitt also did considerable research and made editorial improvements in every part of the book. She, Young Lee, and Sachin Pandya did a thoughtful and careful preparation of the index.

I have been fortunate indeed in having Ian Malcolm undertake substantive editing of the manuscript. He raised important questions I had not considered and identified many potential points of misunderstanding, as well as offering fruitful suggestions about how to deal with problems. Richard Isomaki copy-edited the manuscript very carefully, eliminating numerous errors and obscurities in presentation. Ellen Foos graciously shepherded the book through production.

My wife Elaine has been a source of great support throughout the project. More directly, she significantly improved the writing in parts of the book and came up with the idea for its title.

Some of the material in the chapters on teaching about religion appeared in "Teaching about Religion in the Public Schools," 18 *Journal of Law and Politics* 329 (2002); "Establishing Religious Ideas: Evolution, Creationism, and Intelligent Design," 17 *Notre Dame Journal of Law, Ethics, and Public Policy* 321 (2003); and "Intelligent Design: Scientific Theory or Religious Conviction?" 45 *Journal of Church and State* 237 (2003).

✳ *Introduction* ✳

Controversial Circumstances

1. On March 11, 2002, the Ohio school board heard conflicting testimony over what the state should teach about the history of life on earth. Parents had objected to their children being taught that Darwinian evolutionary theory is true. Believing that the theory is not only false but undermines sound religion and morality, the parents wanted teachers to present an account of life that recognizes God's creative hand. Two scientists testified that standard evolutionary theory cannot explain the complexity of organs like the eye and of many individual cells, which reveal an intelligent design. Unlike many so-called creationists, who claim that the earth is less than ten thousand years old and that all basic kinds of plants and animals were created at the same time, these scientists did not dispute that the earth is billions of years old, that single-cell life-forms were the ancestors of all life on earth, or that natural selection of organisms best suited for survival accounts for much of the development of life. Unlike Darwinians, however, they argued that natural selection cannot explain nearly as much as most modern biologists assume, and suggested instead that the history of life on earth demonstrates the activity of an intelligent designer. Opponents of teaching intelligent design claimed that teaching it, no less than teaching creationism according to the Genesis account, is teaching religion, not science. Should the board have directed its schools to teach intelligent design?

2. A junior high school course on sex education includes information about the use of condoms. Faced with extensive parental complaints that artificial contraception violates God's law and that schools should not teach it, should the school board direct that teaching about condoms stop?

3. The Edgemont public school long celebrated the Christmas season by having students gather in the central hall before classes and sing Christmas carols. All students attended a Christmas pageant put on by ninth and tenth graders, under the

music teacher's direction, involving Christmas music and dialogue about the birth of Jesus. Should the school have continued its caroling and pageant?

4. A ninth-grade English teacher assigned her students a research paper, for which they were to use at least four separate sources. Students picked their own topics. The teacher rejected as unsuitable one student's proposal to write on the life of Jesus. Was she mistaken?

5. Parents of fifth and sixth graders who have created a Christian club for their children apply to use an empty classroom during the lunch hour, when the students, with parents supervising, will engage in religious worship. Should the school provide the classroom?

6. An eleventh-grade civics teacher wishes to supplement the standard text with essays exploring religious perspectives on American society. She wants her students to consider claims that Americans are a "chosen people" and that the only firm basis for a belief in human equality rests on God's equal loving concern for all people. In her proposal to the principal, the teacher indicates that, beyond presenting these views, she will argue that both are valid, though leaving students free to believe otherwise. Should the principal approve her plan?

7. Educators in the New York City school system proposed a "Rainbow Curriculum" for elementary schools that emphasized broad tolerance for individuals and groups. Parents in some districts objected to teaching respect for gays and lesbians and appreciation for family structures involving homosexual parents. The basis for their objections was largely religious. Should the schools have refrained from teaching this aspect of the "Rainbow Curriculum"?

8. High school seniors choose a classmate to speak at their graduation. During a rehearsal two days before graduation, the principal learns that the speaker will urge her audience to turn their lives over to Jesus. Should the principal intervene?

9. Ten of the twenty-two books on the shelf of a fifth-grade classroom are religious, and the teacher keeps a Bible on his desk. During the daily period of "free reading," he always reads

silently from his Bible. After a few parents complain, should the principal tell the teacher to change the selections in his little "library" or his reading habits?

10. Having reviewed the district's literature texts for elementary school, fundamentalist Christian parents discover that both in specific aspects and overall impression, the readings deeply offend their religious convictions. When they ask to withdraw their children from class use of the texts, should the district accede?

Religion, Educational Purposes, and Constitutional Law

These ten problems all involve judgments about how public schools should respect religious freedom, and all of them reach beyond sound educational decisions to constitutional interpretation. Officials must determine the meaning and application of language forbidding the government from establishing religion and protecting the free exercise of religion and freedom of speech. Within our political system, constitutional questions involve judges: how often should they constrain the educational choices of legislators, school boards, administrators, and teachers?

Our ten problems implicate fundamental controversies over the purposes of public education. How should schools aim to educate our children? What should they take on; what should they leave to parents and private groups?

Most of the critical questions arise out of an assumption that the government, and its schools, should be neutral about religion. According to the Supreme Court, American states may not prefer one religion over others and may not prefer religion over nonreligion. Some Supreme Court justices and critics believe government should be able to prefer religion in general; a smaller number of people (not including any Supreme Court justices) think states should be able to prefer Christianity. Almost no one believes the Constitution allows officials to prefer one version of Christianity over all others. Thus, virtually everyone agrees that certain preferences or endorsements in respect to religion are forbidden. It follows that public schools may not teach that particu-

lar religious doctrines, such as the virgin birth and transubstantiation, are true; nor may they endorse particular religious practices, such as Communion with wine or infant baptism.

Aiming to inculcate various moral and political virtues, public schools teach students that they should respect their fellows, tolerate diverse views, and deliberate about alternatives. This instruction may affect the attractiveness of various religions. Most obviously, students may be discouraged from accepting religious views directly opposed to what they are taught in school. For example, a white supremacist religion that advocates depriving minorities of all political rights will find few recruits among students taught to believe in racial equality.

Although tracing the connections between the teaching of civic virtues and the appeal of various religions may be hazardous, we can imagine that the influences reach beyond instances of direct opposition. A teacher recommending tolerance and reasoned consideration for political life may emphasize that he is not addressing how people should develop religious beliefs and practices; a church that demands strict adherence to higher religious authority and takes a harsh view of other religious perspectives may say little about politics. Hierarchical, intolerant religion is not opposed in strict logic to participatory, deliberative, tolerant politics. But there is a tension. Unable to compartmentalize, or to perceive why attitudes appropriate for religious understanding are inapt for politics, a student might be drawn to a religion that fits her ideas of desirable political life, and vice versa. Thus, what schools teach apart from religion can have spillover effects for the ways students approach religion.

About these possible spillover effects, educators might adopt a range of attitudes. They could regard the effects as beyond their mandate; unintended influences on religious beliefs and practices would not be their concern.

Alternatively, educators could welcome certain of these effects. Although schools cannot teach against hierarchical, intolerant religion, educators might recognize that the civil life of liberal democracies will fare better if fewer people adhere to such religious faiths. So long as they assume that schools should not *aim*, even indirectly, to promote or discourage religious views, educators who welcome various spillover effects will *act* like those who disregard them.

Finally, educators might regard spillover effects as a cause for regret, drawing schools away from a neutrality about religion they might otherwise achieve. On this view, perhaps schools should try to counter spillover effects in various ways—much as we might hope that officials planning a new highway would not stick with an otherwise appealing route that would require the destruction of six Roman Catholic churches and no other houses of worship. One way to minimize spillovers would be to show believers in a hierarchical, intolerant religion how they can harmonize their views with democratic politics.

A related concern about spillover involves religion more broadly. Education that disregards religion may implicitly communicate its unimportance. Do public schools need to try counter this possible effect by presenting religious perspectives as options for students to consider? This troubling question about public school curriculums easily outranks in practical significance more confrontational issues about practices such as prayer and Bible reading.

In the pages that follow, we will examine these ten problems and others like them, analyzing ways in which religion touches the public school system, and exploring what courts have said about constitutional limits. The book is not restricted to discerning what public schools *may* do, given prevailing constitutional law; it also considers the exercise of educational judgment and the range of choice that judges should allow. Judicial decisions and opinions serve as subjects for critical examination, as well as setting the parameters for what now counts as constitutionally permissible. Avoiding the oversimplifications and automatic dismissals of opposing arguments that one finds at all points along the religious and political spectrums, the book aims to provide readers with bases on which to make judgments of their own that go deeper than visceral like or dislike of competing positions or groups. These bases are not easy formulas but a range of normative principles and practical considerations that should inform educational and constitutional choices.

Public school systems surely rank among the most important of American social institutions. According to tradition, they are our primary vehicle for forging a unified civic identity and for creating opportunities for children to transcend their parents' economic and social status. Yet we all know that, nationwide,

public schools suffer grave problems. Inner-city schools, beset by budgetary constraints and acute disciplinary difficulties, are failing miserably in the endeavor to afford fair opportunities for many of their students. Some critics level the further charge that even schools in favored geographical locations do not provide students a coherent moral structure, and they attribute this failure to the absence of religion.

One proposed "remedy" for religionless public schools is public financing of private education, dominantly education under religious auspices. Although arguments about such aid connect to debates about what public schools should undertake, we can quickly see that neither "vouchers," approved by the Supreme Court in the summer of 2002, nor other assistance to private education will "solve" issues about public school religion.

At present, few legislators are willing to vote in favor of vouchers for all students that approximate the costs of public education. Even if they did so, many parents would not find within easy reach private schools that offer a religious education they approve. For the foreseeable future, most American children will be educated in public schools. The proper place of religion and religious judgment in those schools will remain a central political and constitutional issue for a long, long time.

To explore these issues, we begin by sketching briefly the historical development of public schools as it relates to religion, and constitutional doctrines that apply to religion in the schools. Next we turn to modern controversies over the proper purposes of public schools that bear significantly on the place of religion.

These initial chapters set the stage for the more detailed treatments that follow. Each of the remaining chapters discusses a set of specific problems, such as school prayer or teaching science, providing an analysis that takes into account constitutional law and educational policy in our liberal democratic political order. All our subjects can be loosely categorized under four major questions: (1) Do devotional practices belong in public schools? (2) When should the religious convictions and interests of students be treated like their nonreligious interests and convictions? (3) What should schools teach about religion and about topics, such as evolution or use of condoms, whose content conflicts with widespread religious views? (4) When should stu-

dents, and teachers, be exempted from ordinary educational requirements because of their religious convictions?

By way of brief summary, the United States Supreme Court, in its exercises of constitutional interpretation, has said that officially sponsored devotional practices do not belong in public schools; that, in general, voluntary student groups devoted to religion should be treated like other student groups; that schools should not teach particular religious propositions as true but may teach about religion; that government should not, in short, sponsor particular religious views or engage in religious practices. I shall suggest that these positions represent an approach to the place of religion in public schools that is coherent and reflective of the fundamental values of a diverse liberal democracy. These are values that I embrace. The positions also represent sound constitutional doctrine. But these positions alone, at this level of generality, leave many sensitive issues unresolved. Much of the book is taken up with addressing these issues from the standpoint of educational choice and constitutional doctrine.

In part II, we inquire mainly about religious practices, reviewing general devotional exercises such as prayer and Bible reading and use of school facilities by religious clubs. We also address the bar on teaching religious propositions as true.

We concentrate in part III primarily on the subtle problems of teaching *about* religion, something allowed, and even encouraged, by the language of Supreme Court opinions. Individual chapters address different branches of learning and forms of teacher expression that do not directly involve the curriculum.

In part IV, we consider students' expressions of religious perspectives within the context of public education and claims by parents to have their children opt out of education that offends their religious sensibilities.

Running through these chapters is a story of a changing relationship between religion and public education, in which the courts have played a role, but only a modest one.

The schooling of children became mainly public in the first half of the nineteenth century. Although church membership was then lower than it is now, writers widely supposed that religious conviction was the key to personal morality and good citizenship; a nondenominational Protestantism was taught and

practiced within the schools. By the end of the nineteenth century, texts and educators were treating their subject matters as essentially secular; religion was no longer a significant aspect of what students were taught. But in a great many schools, morning prayers and brief devotional Bible reading continued, the husks of a once serious effort to instruct students in the Christian religion.

During the late nineteenth and early twentieth centuries, some state courts reviewed whether prayer and Bible reading in public schools violated clauses forbidding establishments of religion in their own state constitutions. Most, but not all, concluded that these devotions were all right. When the United States Supreme Court finally addressed the practices in 1962 and 1963, it decisively ruled that they violated the Establishment Clause in the First Amendment of the federal Constitution. The Court indicated that schools could teach *about* religion but not attempt to indoctrinate.

The legal history of the last four decades has involved a working out of many of the implications of this basic principle. The Supreme Court itself has considered moments of silence, prayer at graduations and football games, posting of the Ten Commandments, the status of student groups that engage in religious worship, and the teaching of evolution and creationism. Lower courts have inquired about rights of teachers to express religious views, and rights of students to fulfill assignments with religious topics and to withdraw from parts of courses that offend their religious convictions.

During the past two decades, the Supreme Court has revamped the law of free exercise and establishment to an extraordinary degree. One component of this restructuring has been a reliance on a concept of equality, drawn from the Free Speech Clause, to require that, among voluntary student groups, religious groups be treated no less favorably than other groups. But the main engines of reform have been a sharp cutting back of both free exercise and establishment restrictions. The consequence is that other branches of government now have much broader discretion to decide how to treat religious claims and religious groups than they once did. But in this era of striking change, most of the standards relating to public school education have proved remarkably stable.

They have done so despite the fact that public schools have been a major battleground in what some have described as the country's "culture wars." A large segment of the American populace persists in condemning the Supreme Court for taking religion out of schools and thus contributing to a secular, immoral, materialist cultural ethos. Others insist that religion has no place within public schools. Within recent years, a third approach has attracted the support of a surprisingly diverse range of groups: public schools should make a much more serious effort to teach about religion but without engaging in devotional practices or teaching the truth of particular religious views. Everything the courts have said so far leaves wide room for debate about the constitutional limits of teaching about religion and about how a program conceived in those terms can best be carried forward.

Although the chapters that follow provide an account of "where we are now" and "how we got there," their main focus is analytical and normative. They undertake to examine the decisions and doctrines of the courts from a critical perspective, explaining their bases and evaluating their strengths and weaknesses. They focus on the central principle that public schools should not teach religious views as true, exploring what that principle entails and whether it is a solid basis for the aspirations of public schools. Most of the chapters involve a mixture of constitutional law and educational judgment. What is the range of approaches that schools may undertake? Within that range, which approaches make the most sense in terms of educational objectives and the values of the religion clauses? In no small part, the normative analysis of the book can be seen as a reflection on the constitutional "specialness" of religion. A pervasive question in modern law about the religion clauses is how far religion should be treated differently from other subjects of human understanding. A foundational assumption about religion and public schools is that religion is not the same as other subjects; this study helps show why that assumption has arisen and why it should continue.

CHAPTER 1

A Brief History of American Public Schools and Religion

As we have seen, although American public schools have continually aimed to educate children to be moral persons and good citizens, the place of religion has undergone a fundamental shift: from colonial times to the mid–twentieth century, primary and secondary education became increasingly public, universal, and secular.

Here we consider the growth of public education in the United States, looking at the complex motivations of the innovators of the public school movement, at the "nonsectarian" religious teaching and devotions in which those schools engaged, and at the schools' growing secularity in the late nineteenth century. History cannot solve our present problems, but it offers a context in which to understand them.

This chapter also traces major Supreme Court cases and doctrines, which later chapters analyze more closely. Since 1947, Supreme Court interpretations of the Constitution's religion clauses have set sharp limits on religious teaching and practice within public schools; but these decisions leave open crucial issues of educational policy and constitutional judgment.

The Development of Public Schools

Education in the early American colonies was almost entirely private and substantially religious. In 1647 Massachusetts adopted an "Old Deluder Satan" act requiring tax-supported town schools, but throughout the other colonies "formal schooling was typically a mix of private academies and local denominational religious schools."[1] By the latter stage of the eighteenth century, Stephen Macedo writes, the "profound democratic currents that fed the American Revolution greatly increased the concern with popular enlightenment."[2] Noah Webster urged that

all citizens should be fitted for "places of trust" and that education should be a legislature's "first care."[3] As legislatures abandoned property qualifications for voting, as immigrants poured into cities, as fathers increasingly toiled in industries rather than at home, reformers conceived general education as a means to prevent disorder and to promote progress and civic virtue.[4]

In the early nineteenth century, states and cities often subsidized charity schools and religious schools on a per pupil basis.[5] Most of these schools complemented the values of families in the community, although urban charity schools self-consciously intervened against what their organizers perceived as the alien cultures of parents.[6] Between 1830 and 1860, many cities instituted their own schools and terminated support of private schools.[7]

Free public schools, drawing students from all social classes and national and religious heritages, aimed to create a "common republican culture."[8] Although reformers believed that public schools would increase academic effectiveness, for Horace Mann, the leader of the common school movement, "schooling was necessary to preserve republican institutions and to create a political community."[9]

Anti-Catholic attitudes undoubtedly affected the growth of public schools, as the number of American Catholics increased from thirty-five thousand in 1790 to over three million in 1860.[10] Not only the importance but the quality of those attitudes varied; unthinking bias against the Roman Catholic religion and the peoples of Catholic lands[11] combined with apprehension about the church's teachings, which not only defended a powerful form of hierarchical religious authority, but also stridently opposed religious liberty as an ideal.[12]

Whatever the precise effect of anti-Catholicism on their development, the character of the original public schools was indisputably a broad nondenominational Protestantism.[13] Although schools were "nonsectarian," their teaching and practice were significantly religious. Americans then believed, as some still do, that moral education could not be sundered from belief in God and an afterlife. Horace Mann wrote that "religious instruction in our schools, to the extent which the constitution and the laws of the State allowed and prescribed, was indispensable to the students' highest welfare, and essential to the vitality of moral

education."[14] Filled with biblical stories, the commonly used McGuffey readers conveyed the message, in the words of Henry Steele Commager, that "God was omnipresent. He had His eye on every child for every moment. . . . He was a just God, but a stern one, and would not hesitate to punish even the smallest children who broke his commandments."[15] Popular nineteenth-century texts for the first eight grades "accepted without question the biblical account of the world, Adam and Eve included."[16] Nature was ordered by God, and so was history, including instances of God's frequent interposition that showed "that Americans are the people chosen by God in the modern world for a special destiny."[17] Prior to 1870, many texts denounced the Catholic religion as false and dangerous.[18] Although emphasizing religion less, secondary-school texts also "were laced with Christian, Protestant beliefs."[19]

The primary devotional practice was reading the Bible without commentary.[20] Mann remarked, "Our system earnestly inculcates all Christian morals; . . . in receiving the Bible, it allows it to do what is allowed to do in no other system,—*to speak for itself*. But here it stops."[21] The Bible used was the King James Version, acceptable to Protestants but not Catholics; and the very practice of reading without commentary was antithetical to Catholic teaching that Scripture should be understood as interpreted by the church. When Philadelphia school officials, having declined to let Catholic children read their Douay Bible, released them from classrooms during Bible reading, riots between nativist and Catholic mobs cost twelve lives.[22] Although American Roman Catholic leaders complained that public schools should be fairer to their faith, they increasingly insisted that the only remedy for the nonsectarian Protestant character of the schools was Catholic children attending Catholic schools and being assisted by state funds.[23]

One lesson from the Bible-reading conflicts is that no form of devotional practice is universally acceptable. If devotions are watered down not to conflict with anyone's beliefs about straightforwardly religious topics, such as the nature of God, they will offend those who reject watered-down religion.[24]

As the nineteenth century progressed, the religious content of public school teaching decreased dramatically, to such an extent that Warren Nord can write, "[B]y the year 1900 . . . there was lit-

tle religion left in schools or universities. True, some prayer and Bible reading took place in many schools. But [religion] was no longer to be found in the heart of education, in the curriculum or in textbooks. The governing purposes of education had changed."[25] This dramatic shift was not mainly in response to the relatively few state judicial decisions restricting religious exercises within public schools.[26] The fundamental underlying causes had to do with the disintegration of a unified religious culture in Western civilization,[27] a consequence of complex influences including the Renaissance revival of classical studies, with their focus on human perspectives, the Reformation's elevation of individual thought and conscience, the breakdown of traditional structures wrought by the market economy and Industrial Revolution, and the growth of empirical natural sciences freed from religious premises. Nord remarks, "The secularization of the modern world is not the work of secularists."[28]

Devotional practices continued in many schools; they came increasingly to be justified in civil rather than religious terms. One 1870 defender of Bible reading urged that religion is taught so "that pupils may become intelligent and virtuous citizens."[29]

Although the idea that public schools should educate children to become moral citizens never disappeared, an ideal of liberal education gave way to a view that instruction should be practically useful, helping students to make their way in the world.[30] Nord writes that this utilitarian approach to education was part of the general Progressive movement, which, in "contrast to traditional religions and classical education," "placed a powerful emphasis on personal experience, on openness, on nonauthoritarian teaching, and on the uniqueness of the individual child."[31]

John Dewey, the most influential educational theorist of the twentieth century, emphasized learning by doing; his notion of community recognized cultural difference to a far greater degree than had the early school reformers.[32] During the latter part of the twentieth century, progressive education competed with more traditional approaches for dominance.[33] According to one account, from 1900 to 1925, educators primarily emphasized assimilation of a large immigrant population; from 1925 to 1954, they aimed largely to help children "adjust to life" (the progressive education approach); from 1954 to 1983, they responded to public demands that minorities, the poor, and the handicapped

acquire educational opportunities; from 1983, after publication of the report *A Nation at Risk*, which warned of a rising tide of educational mediocrity, they focused on academic skills that workers need in a modern economy.[34]

We shall leave our historical sketch of public school philosophies at this point, relying on the subsequent discussions of educational purposes and specific subjects of educational policy to highlight major perspectives of the recent past.

Central Constitutional Decisions

Not until the mid–twentieth century did the United States Supreme Court develop constitutional doctrines that constrained public schools, well after their essentially secular character was already entrenched. The Court's decisions, some highly controversial, set certain clear boundaries; they leave unresolved other troubling problems we shall explore.

The Court's late entry is largely explained by the Constitution's distribution of state and federal powers. The First Amendment, which provides that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof," originally applied only against the national government. States remained free to establish their own religions and to inhibit religious exercise as they saw fit. After the Civil War, the Fourteenth Amendment significantly restricted state power: states cannot "abridge the privileges or immunities of citizens," nor deprive persons "of life, liberty, or property without due process of law," nor deny them "the equal protection of the laws." Over time, judicial doctrine has settled that the Fourteenth Amendment makes the fundamental protections of the Bill of Rights applicable against the states, but this occurred with respect to the religion clauses only in 1940, and not until 1947 did the Supreme Court render its first significant Establishment Clause decision.

In two 1920s decisions that preceded this development, the Court determined that a state may not prohibit the teaching of foreign languages prior to ninth grade,[35] and may not bar children from attending private schools, including parochial schools.[36] Neither case concerned religion in public schools, but

each reflects a kind of constitutional protection of pluralism in education; and their reliance on the liberty of parents to determine children's education bears obliquely on how public schools should treat religious topics and respond to parental complaints that the curriculum offends their religious convictions.

The 1947 case of *Everson v. Board of Education*[37] adopted an expansive view of what the Establishment Clause forbids. By a bare five-to-four margin, the justices allowed localities to provide free bus transportation for children attending nonprofit schools, including parochial schools. Justice Black regarded this assistance as a peripheral service, like fire and police protection, not a subsidy to the schools themselves. He penned more general language about the Establishment Clause that many jurists have quoted subsequently:

> Neither a state nor the Federal Government . . . can pass laws which aid one religion, aid all religions, or prefer one religion over another. . . . No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. . . . [T]he clause . . . was intended to erect "a wall of separation" between church and state.[38]

More remarkable than the Court's division over bus transportation was its unanimous adoption of this highly separationist account of nonestablishment. All the justices relied heavily on the views of Jefferson and Madison and the movement toward nonestablishment in Virginia. This approach was dubious from a historical point of view, given that the amendment actually protected existing state establishments from federal interference. Those inclined to political interpretations of Supreme Court doctrine have noted that in the mid–twentieth century the overriding issue about establishment was public aid to Roman Catholic parochial schools and that the great majority of Protestants united with Jews and secularists in opposing it.[39]

One year after *Everson* construed the Establishment Clause to forbid government promotion of religion, the Court first considered a public school program. During each week schools in Champaign, Illinois, set aside a period for religious instruction, which was offered by teachers of various faiths who were subject to approval and supervision by the school superintendent. Not-

ing that students released for religious instruction had to attend those classes, Justice Black wrote that the use of school property for teaching religion and the close cooperation of school authorities and the private Council for Religious Education constituted an impermissible support of religious groups in spreading their faiths.[40]

The Court followed this controversial ruling four years later by upholding a similar plan, under which the religious classes were taught off school property.[41] Justice Douglas wrote that New York had made a wholesome accommodation of the public service to the spiritual needs of its people. The opinion's broad language about accommodation gave hope to those who opposed strict separation that government might support religion to a degree that far exceeded what *Everson* foretold.

In 1962 and 1963 the Court declared that schools could not begin their days with a school-sponsored class prayer[42] or devotional Bible reading,[43] thus rejecting a characteristic feature of public education from its inception. These decisions were so unpopular that many school districts simply have disregarded them. Nonetheless, during a later period when the Court was retreating from its hostile attitude toward aid to private religious education, it extended its bar on prayers to graduation ceremonies and football games.[44]

The Bible-reading opinion, *Abington Township v. Schempp*, contains comment of much wider significance: the Court's most definitive statement on teaching *about* religion:

> [I]t might well be said that one's education is not complete without a study of comparative religion or the history of religion and its relationship to the advancement of civilization. It certainly may be said that the Bible is worthy of study for its literary and historic qualities. Nothing we have said here indicates that such study of the Bible or of religion, when presented objectively as part of a secular program of education, may not be effected consistently with the First Amendment.[45]

What exactly is an appropriate teaching about religion as part of secular education is the central question about religion and the public schools; our examination of how to implement the Court's proposal occupies much of this book.

Beyond its specific ruling, the *Schempp* case is also significant

in the general doctrinal test the Court employed: to be acceptable, a law or practice must have a "secular legislative purpose and a primary effect that neither advances nor inhibits religion."[46] Courts applying general constitutional language usually develop intermediate "tests" through which they strain the facts. Here, the Court indicated that if Bible reading was instituted for the purpose of promoting religion or if it has that effect, it is a forbidden establishment.[47] This inquiry about purpose and effect became the core of the Court's standard test in reviewing all varieties of Establishment Clause challenges for four decades.

The full test, developed eight years later in *Lemon v. Kurtzman*,[48] a case striking down aid to parochial schools, joined the elements of purpose and effect to an examination of excessive entanglement. If the government and religious authority were unduly intertwined, that constituted an establishment.[49] A 1997 opinion characterized all entanglement as an aspect of effect rather than an analytically separate element.[50]

By now, most of the justices sitting on the Court have either rejected the *Lemon* test outright or have remarked that it should not be applied in its full form in every establishment case. But a majority opinion of the Court has yet to abandon that test. This posture leaves lower-court judges in a bind, having been instructed by the Supreme Court *not* to abandon a prevailing standard before the Supreme Court itself does.[51] These judges must apply the *Lemon* test *and* be sensitive to other approaches that might command a Supreme Court majority or persuade individual justices. The major alternatives at this stage are (1) endorsement: does a law (or practice) endorse a particular religion or religion in general? (2) coercion: is a law coercive? (3) history: would a law have been regarded as an establishment of religion when the First or Fourteenth Amendments were adopted? Subsequent chapters say more about these approaches.

For preferences or burdens that government directs toward one religion in comparison with others, the Court has employed the same test it uses for racial classifications. The preference or burden is acceptable only if it is a necessary means to accomplish a compelling government interest that cannot be achieved by less restrictive means. The government can rarely make this showing; patent discrimination among religions is doomed to failure.

One vital issue about religion and public schools is whether children whose parents object to what is going on—say, instruction in the use of contraceptives or the teaching of Darwinian evolutionary theory—may be excused from ordinary requirements.[52] Three Supreme Court cases stand out as critical. In *West Virginia Board of Education v. Barnette*,[53] the Court held that students who were Jehovah's Witnesses did not have to salute the flag. Although relying on the First Amendment as a whole, not just the Free Exercise Clause, *Barnette* definitively settled that persons who object out of religious conscience may not be compelled to comply with every standard practice of public schools.

Wisconsin v. Yoder[54] decided that the Amish had a free exercise right to withdraw their children from regular school at the end of the eighth grade. The Court said that, without a compelling interest, the state could not interfere with the Amish practice of community vocational education for teenagers.[55] The state failed to demonstrate that sending Amish children to school until they were sixteen, as the law required, served such an interest. *Yoder* is significant partly for its treatment of parental claims and the purposes of public education, a subject we take up in the next chapter.

In cases in which individuals sought exemptions from otherwise valid laws, states consistently had more success satisfying the compelling interest test than when they classified people by race or religion. Most claims by religious persons to be excused from standard legal requirements failed. Nonetheless, in *Employment Division v. Smith*,[56] in 1990, the Court abandoned that approach altogether for claims of special treatment. Native Americans who ingested peyote as the center of their worship services had no more basis than anyone else to violate antidrug laws. As far as federal constitutional law is concerned, *Smith* creates doubt whether parents possess *any* free exercise right to have children excused from school practices.[57] But Justice Scalia's opinion in *Smith* makes clear that legislatures and administrators may choose to provide exemptions much more broadly than the Constitution requires.[58]

Whether schools will respond favorably when parents voice religious objections to aspects of public education depends partly on how broadly *Barnette*'s right of conscience is construed, partly on how state courts interpret their own free exercise pro-

visions and statutes (some of which explicitly grant greater protection than does *Smith*), and partly on their own educational judgments.

A person making a free exercise claim is usually asserting that a law or practice violates his exercise of religion; but free exercise can also function as a shield used by a state against an argument that it has violated the Establishment Clause. The state may argue that a challenged law relieves a burden on religious people and thus is justified as assisting free exercise. The Supreme Court has consistently refused to accept devotional exercises in schools or religious teaching on that basis. However, free exercise considerations *would* help sustain administrative choices to excuse religious objectors from practices in public schools.

An important free speech argument has proved effective in the last two decades in defeating various arguments that the Establishment Clause bars any assistance to religious associations. The basic theory is that the government cannot treat religious speech more restrictively than other speech. If a school allows use of its premises for all sorts of clubs but *not* religious clubs, it is engaging in "content regulation," and also, the Court has said, "viewpoint discrimination," a practice that is particularly hard to defend. The government cannot justify this discrimination as carrying forward a policy of nonestablishment. Thus, when school sponsorship of the ideas is absent, public schools may not (usually) differentiate between religious and nonreligious activities.[59]