# Church, State, and the Crisis in American Secularism

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INDIANA UNIVERSITY PRESS
*Bloomington & Indianapolis*

## CONTENTS

# INTRODUCTION

There are two church/state crises today in America. The first is a crisis in the law of the Establishment Clause, which states that "Congress shall make no law respecting an establishment of religion." Although the United States Supreme Court has promised government neutrality toward religion, America continues to have a very religiously oriented, indeed a monotheistically oriented, public square. In over a half century since *Everson v. Board of Education*[1] first introduced the norms of government neutrality and the wall of separation between church and state, there is still no broad consensus among the American people concerning the proper role of religion in the public square. Nor is there basic agreement among the justices on the United States Supreme Court as to the permissible role of religion. There are details that are shared, such as the anti-coercion principle, but there is not agreement as to foundations. The key question—whether we are to have a genuinely secular government—has not been answered. The gap between the Court's pronouncements, on the one hand, and social reality, on the other, is perhaps best symbolized by the words "under God" in the Pledge of Allegiance, which a lower federal court, in 2003, found to be an unconstitutional establishment of religion, before the United States Supreme Court reversed the decision on standing grounds. Many observers of the legal landscape expect a change either in what we do or in what we say about what we do. Most expect the Court to disclaim neutrality.

The second crisis is as yet barely visible to most people. Secularism is growing in America. Perhaps 15 percent of the population has no institutional religion and this number will likely increase. Secularism is now popular enough that one may consider it a social phenomenon in its own right. Secularism is no longer a simple description of the consequence of loss of belief; to many, it represents an alternative way of life that should be satisfying in its own right.

The crisis in secularism is in its relationship to religion. American secularism has been reflexively anti-religion. This distancing has cut secularism off from the sources of wisdom that religion has traditionally represented. New voices in secularism are calling for a reevaluation of the available sources of meaning for human life, which might lead to a rapprochement with religion. At this point, no one can foresee the direction in which secularism in America will go. Will it continue in its current direction toward relativism and postmodern humanism or will it seek common ground with our religious traditions?

These two crises—in the interpretation of the Establishment Clause and within secularism—are related. It is not too dramatic to say that strict separation of church and state is currently American secularism's official constitutional position. The concept of constitutionalized separation of church and state provides the normative foundation for secularism's general attempt to distance itself from religion and to treat religion as a merely personal and private matter. A movement in secularism toward engagement with religious sources is, therefore, almost inconceivable without an accompanying reconsideration of the meaning of the Establishment Clause.

What is needed to resolve both crises is a common ground between religion and secularism. If it could be shown that many believers and nonbelievers share certain commitments, those commitments could then be expressed in the public square, even by government, without any violation of the separation of church and state. And perhaps, although this is a more controversial assertion, religious imagery, language, and symbols could be used to illustrate these shared commitments.

I believe that the higher law tradition can represent just such common ground. Let me demonstrate in a story just how this common

ground might work. At a 2008 symposium entitled "Is There a Higher Law? Does it Matter?" Pepperdine law professor Robert Cochran discussed his law-student days at the University of Virginia. In the story, Cochran's professor of jurisprudence—Calvin Woodward—illustrated through the architecture of the University of Virginia a kind of moral thinking that was disappearing in the twentieth century:

> Above the columns at the entrance to Clark Hall . . . carved in stone was the statement: "That those alone may be servants of the law who labor with learning, courage, and devotion to preserve liberty and promote justice."
>
> From the front, we walked into a massive entry hall, adorned on either side with murals. On one side was Moses presenting the Ten Commandments to the Israelites. On the other was what appeared to be a debate in a Greek public square. As we gazed up at the larger-than-life figures, they seemed to represent the higher aspirations of the law.[2]

The key to the story for Professor Cochran was the word "justice" in the inscription. Once, all or most American lawyers would have agreed that justice is an objective value—something built into the fabric of existence. Thus assertions about justice could be regarded as true or false in some sense, and law could be measured against that objective standard as either just or unjust. One name for this understanding of reality is the doctrine of higher law, of which the best known exemplar is natural law. This was the point of the story in terms of the symposium topic. According to the jurisprudence professor, this kind of higher law thinking was in decline and was being replaced by various forms of moral and legal relativism. Cochran was taught that this trend toward relativism was the major jurisprudential shift of the twentieth century.

In terms of the Establishment Clause, there are two important implications of this story. First, the University of Virginia, a public university—hence the government—was supporting one side in this modern controversy over the nature of morality. The government, in the guise of the university, was asserting, symbolically but quite definitively, that justice is real. That was the government's message in the inscription and in the murals. Second, the government was using a traditional religious image—the giving of the Ten Commandments to Israel—along with a nonreligious image—Greek philosophers—to illustrate this govern-

ment message about the nature of morality. So, in essence, the government was taking a controversial metaphysical position and was using religion in part to support and represent it.

There would probably be widespread agreement that these murals displayed at a public university do not violate the constitutional prohibition against the establishment of religion. For some people, including Justice Stephen Breyer, the fact that the architecture had been there for a while, and without controversy, would itself eliminate any Establishment Clause problem.[3] But I think many people, including many nonbelievers, would feel that there was no violation even if the university were to put the images up anew.

The reason that this display of the Ten Commandments would probably not raise an establishment-of-religion objection is the presence of Greek philosophical debate as part of the display. That reference to Athens demonstrates that the government was using a religious symbol along with a nonreligious symbol to make a moral claim that transcends the particular message of either symbol. The government was asserting the importance of justice, not that God gave the law. The use of the murals suggests that both the Hebrews and the Greek philosophers believed that justice is real and that we observers should believe it, too.

The monotheistic religious believer—Christian, Jew, Muslim, or other—who encounters this architectural display would understand that it is asserting that justice is real. Such a believer agrees with that position. But she would also believe that the Greek philosophers were mistaken in imagining that human reason alone could reveal ultimate justice. In other words, the believer's acceptance of the government's nonreligious message is enhanced, but only to a degree, by the use of a traditional religious symbol.

A higher law secularist would have a different reaction to the display. This secularist would agree that justice is real, but would believe that religion is mistaken in promoting the notion of a supernatural revelation of justice. Instead, she holds that either reason, history, nature, or some combination thereof, are adequate explanations of the source of our concept of justice and of what justice ultimately requires. This nonreligious foundation for the government's message is represented by the Greek philosophers.

Thus, for both the religious and the nonreligious observer, the display may be understood to present a purportedly universal message transcending any one religious tradition, and, at the same time, to present religiously sectarian meanings, about which the observers would disagree. Both observers would understand the display along these lines.

Now imagine a skeptical secular observer. Many modern thinkers, especially among the nonreligious, dispute the assertion that justice is real as either a false, or even a meaningless, claim. Such a person, looking at this architectural display, would insist that both the Ten Commandments and the conclusions of Greek philosophy represent thought systems that were highly culturally conditioned (for example, in their view of women). None of the assertions in the Bible or in Greek philosophy are eternally and objectively valid. The government message in the display is thus false.

Yet, despite this profound disagreement with the message of the display, it would be difficult to argue that this secular relativist has a legal right to prevent the government from making the claim that justice is real. The government constantly makes assertions that many people dispute, but such assertions do not violate anyone's constitutional rights. That authority has a name in constitutional jurisprudence. It is called the doctrine of government speech.

This book suggests that there might be in Professor Cochran's simple story a resolution of both the Establishment Clause crisis and the crisis in secularism. The doctrine of government speech may justifiably permit many seemingly religious government messages. These religious messages might be constitutionally permitted as plausible assertions of the existence of higher law.

As we will see, justices on the United States Supreme Court have already suggested that when the government is using religious symbols in a way that can be understood as supporting interests that transcend religion, or is using public resources to promote such interests, the government is not violating the Establishment Clause. Thus, for example, the government was permitted in the *Everson* case to bus students to all schools, including religious ones, in the interests of the nonreligious value of public safety.

But the justices have not yet transferred this kind of government discretion to government assertions about the nature of reality. The unwillingness of the justices to engage with philosophical and religious ideas on a deeper level has led to an odd discrepancy. Public religious displays and imagery are routinely upheld by the courts, but without any convincing explanation. This book aims to provide that explanation and to do so through the concept of higher law.

Sometimes displays such as the one at the University of Virginia, public prayer, or other such forms of religious expression, are referred to dismissively as "ceremonial deism" or "civil religion." In effect, they are said not to be religious at all. But the claims that justice is real, that rights are inherent, that the universe is meaningful, or even that there is a desire among human beings for absolute meaning, are not banal or simplistic. They are at the heart of a fundamental cultural dispute in the early twenty-first century. We will return to this dispute in the chapters that follow.

Usually arguments like the one I am making, that welcome religion into the public square, would be made by a religious believer and would then be opposed by nonbelievers. But a change in the cultural status of secularism has occurred that has altered this context. I am proposing a new law of church and state as a secularist, in the interests of a healthy secularism.

Secularists I will discuss in this book, notably Austin Dacey, Chet Raymo, and André Comte-Sponville, among others, are thinking about secularism in a new way, including its commitments to truth and to spirituality. Although these thinkers disagree profoundly among themselves on many topics, they probably would all assent to the idea that it is not sufficient for secularism to just be anti-religion. A secular civilization needs to assert more than that to be healthy.

As a secularist myself, I have been part of this recent secular ferment. Assuming that one day there will be a genuinely autonomous secular culture in America, I have been wondering what that culture will be like. I have noticed that among some legal thinkers who champion the separation of church and state, there is an assumption that moral relativism is part and parcel of a secular public square. Steven Gey is a good example of this tendency because he is aware of, and open about, his assumptions.

I fear that the secular commitment to the separation of church and state will slide into other commitments, such as an instinctive rejection of the notion of the objective existence of values.

So what is at stake in reconceptualizing church and state in order to permit government to endorse a common core of values often associated with religion is to keep a cultural space open for perspectives other than relativism, materialism, and humanism. It is an attempt to simultaneously expand and sharpen the debate that is going on today within secularism. Without this cultural space, a secular society might find itself enmeshed in relativism and even nihilism without ever actually consciously choosing that path.

Pope Benedict XVI recently said something that is very close to the sentiment in this book. The Pope visited the United States in April 2008. Reflecting later on that visit, he was quoted as saying that "in its multicultural plurality . . . founded on the basis of a 'happy marriage' of religious principles [and] political rights" the United States "is an example of healthy secularism."[4]

These words by the Pope reflect an acknowledgment that America is secular now in important ways. The Pope was not criticizing that or seeking to change it. He was suggesting, however, that American life is currently as healthy as it is—as hopeful, as truthful, and as open—in part because of America's religious heritage. Unspoken by the Pope, but nevertheless to be feared, is the possibility that if that religious heritage fades from public consciousness, American life may come to express a different kind of secularism, one that is not so healthy. This book argues for a vibrant and religiously open secularism. It is an attempt to refute a narrow secular state position and to support instead a state supportive of deep and enriching spiritual life.

In addition to my fears for secularism, there is another reason to propose a new understanding of the relationship of church and state at this time. The current composition of the United States Supreme Court is quite supportive of the public expression of religion. The current Court is not going to remove the words "under God" from the Pledge of Allegiance or limit public subsidies for school voucher programs or do anything else along those lines. Litigants supporting religious expression in the public square do not need this book to succeed in the courts.

And that will remain true for a long time, even though the Democrats captured the White House and retained control of Congress in the 2008 election.

But, while it might appear that I agree with the Court majority in these areas, the reader will see that my understanding of religious imagery and its role in public life is much more inclusive than that of the current Court majority. That majority may be willing to embrace Jews, Christians, and, to a lesser extent, Muslims, but at the expense not only of nonbelievers, but of Buddhists, Hindus, and other minority religious believers. And that Court majority seems poised to do this in the name of a false and restrictive version of American history. The Court thus seems to be positioning itself to control matters that should be left open to further cultural and political development, and to be doing so on the basis of cultural winners and losers.

I would like to substitute a different understanding of the relationship among majority believers, minority believers, and nonbelievers. This book aims to free both secularism and religion from our current wooden categories so that transcendent reality, which is a part of higher law, broadly conceived, will no longer be used as a weapon in political and legal contests. I hope that we will soon be using the word "God," and other religious symbols, not to support a sectarian program, but to evoke commitments that are actually widely shared among believers and nonbelievers.

The legal theorist Ronald Dworkin observed in his book *Is Democracy Possible Here?*[5] that America is divided over the role religion should play in politics and public life. He suggests that debate about these matters must "end in a debate about competing ideals" rather than about particular practices.[6] Dworkin then offers two models to illustrate the choices before us:

> Americans agree on one crucially important principle: our government must be tolerant of all peaceful religious faiths and also of people of no faith. But from what base should our tolerance spring? Should we be a religious nation, collectively committed to values of faith and worship, but with tolerance for religious minorities including nonbelievers? Or should we be a nation committed to thoroughly secular government but with tolerance and accommodation for people of religious faith? A religious nation that tolerates nonbelief? Or a secular nation that tolerates religion?[7]

If I had to choose between these two models, I would choose the secular state, for reasons that Dworkin presents. But it is my hope that we can avoid this kind of either/or decision. If we have to choose between these models, the outcome of every election will be influenced by voting along the religion-or-secular-state line. Every election will be something of a referendum on God's role in the public square. This scenario would be unfortunate for America in many ways, and I notice that the Democratic Party seems anxious to avoid that kind of continuing electoral divide.

This book suggests instead that there can be a connection between religion and at least certain forms of secularism that blurs the distinction Dworkin is sharpening. This is not a matter of political compromise, but of seeing real connections. Religious imagery in the public square turns out to contain myriad meanings that transcend religion and may thus bridge the religious divisions that exist among us.

This book proceeds along a simple framework. Part 1 sets forth the Establishment Clause crisis and recounts how efforts to resolve it have failed. Part 2 proposes government speech endorsing higher law and using religious imagery to do so, at least in part, as a solution to the crisis. Part 3 argues that secularism itself is at a crossroads and that the acceptance of a higher law orientation would be the beginning of a reformation within secularism.

The relationship between parts 2 and 3 is key. As the third book in the trilogy, a higher law Establishment Clause is the constitutional theory behind a certain kind of secularism. That constitutional theory and that secularism must go together.

ONE

# What We Say: The Supreme Court's Promise of Government Neutrality toward Religion

The crisis in interpreting the Establishment Clause lies in the gap between what the United States Supreme Court has written that the Constitution demands—what we say—and what American society actually does. The Court has promised government neutrality toward religion; but our practices suggest something quite different. Neutrality has a variety of meanings, as we shall see, but all of its meanings require that the government not endorse religion as a preferred status for the citizenry. The endorsement of religion, however, is precisely what government does today in many ways. Indeed the majority of Americans may believe that government ought to endorse religion. Therein lies the crisis. In this chapter, I will set forth in broad outline the Court's promise of government neutrality. In the next chapter, I will discuss some of our non-neutral government practices.

In 1947, in *Everson v. Board of Education,*[1] the United States Supreme Court upheld, 5–4, the public reimbursement of parents for the cost of transporting children to any primary or secondary school, including private, religious schools. It was a subsidy meant to keep children from dangerous pedestrian routes. Justice Hugo Black wrote the majority opinion upholding the subsidy. Justice Wiley Rutledge wrote the principal dissent.

The *Everson* majority opinion is entitled to more weight in the movement toward establishing government neutrality toward religion than a close, 5–4 decision would normally be accorded. Despite upholding the

bus subsidy that was at issue in the case, Justice Black's majority opinion basically agreed with the dissenters about the constitutional values controlling the relationship between church and state. Insofar as the majority opinion limited the role of religion in public life, it spoke for the dissenters too, who wanted to go even further in separating church and state. Thus *Everson* represented, in effect, a manifesto by a unanimous Supreme Court on behalf of a neutral government that could not aid religion.

Justice Black's language of separation between government and religion was uncompromising. The people of the new American nation, he wrote, concluded that

> individual religious liberty could be achieved best under a government which was stripped of all power to tax, to support, or otherwise to assist any or all religions.[2]

Justice Black strongly identified Thomas Jefferson's and James Madison's opposition to a proposed Virginia tax in support "of the established church"—actually the proposal would have supported any Christian denomination—as the beginning of the anti-establishment tradition that culminated in the two religion clauses in the First Amendment: the prohibition against any law respecting an establishment of religion and the protection of the free exercise of religion. Although the Court had previously referred to the well-known letter by Jefferson to the Danbury Baptist Association,[3] it was in *Everson* that Jefferson became a pivotal figure in interpreting the Establishment Clause and in which his famous image of the "wall of separation" between church and state came to dominate all of the justices' views of the proper place of religion in American public life.

Justice Black's opinion included a well-known description of the reach of the Establishment Clause. This description probably represented the view of the entire Court:

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

The State was to be "neutral in its relations with groups of religious believers and non-believers. . . ."[4]

The disagreement between the majority and the dissenters in *Everson* was not about whether there was a wall of separation between church and state—Justice Black agreed with the dissenters that the "wall must be kept high and impregnable" and that there must not be "the slightest breach." The disagreement was only over whether a "general program" of transportation that did not exclude religious schools was constitutional. Five justices thought the program was constitutional; four thought not.

The basic, legally binding elements of government neutrality toward religion emerged full blown in the *Everson* opinion, even though there had been little litigation previously over such matters. The opinion rejected the approach of nonpreferentialism—that government might aid all religions on a nondiscriminatory basis. For Justice Black, it was not enough for government not to discriminate among religious groups. The government was not to be permitted to "aid all religions" either. Thus Justice Black anticipated the question that arises today: whether religion itself may be preferred by the government over irreligion. Black's answer, for the whole Court on this point, was that government must be neutral between believers and nonbelievers.

Yet *Everson* did not reach the issue of symbolic expression of belief in the public square. The case concerned government neutrality in terms of material aid to religious institutions, such as private religious schools. It was a case about tax money and subsidies. *Everson* might thus tell us nothing about symbolic government use of religion, such as the words "under God" in the Pledge of Allegiance or the presence of a Ten Commandments display in a county courthouse. For issues like that we must look elsewhere in the case law.

The non-material cases that really brought the Establishment Clause to the attention of the public—what we might call government religious expression cases—were *Engel v. Vitale*[5] in 1962 and *School District of Abington Township v. Schempp*[6] in 1963, which prohibited prayer and

Bible reading, respectively, in the public schools. These cases moved the wall of separation between church and state out of the musty realm of taxes and subsidies into the highly charged and emotional arena of prayer and confession. These cases are the ancestors of today's dispute about the words "under God" in the Pledge of Allegiance.

In *Engel,* Justice Black's majority opinion—7–1 on the main issue—struck down the New York State Board of Regents's nondenominational daily prayer, which was voluntary in the sense that no student was required to participate. The prayer itself was banal, having more to do with obedience to parents and teachers, it seemed, than with any genuine religious sentiment: "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers, and our Country."

Because the prayer had actually been written by government officials, the Court could strike down this practice of praying on the narrow ground that the government could not "compose official prayers." A practice like that was too close to what official establishments of religion in Europe had done. The narrowness of that ground meant that it might perhaps be constitutional for a public school, for example, to host different members of the clergy, each offering his or her own prayers for the students each day.

Notwithstanding the narrow ground of the holding, Justice Black's majority opinion reiterated his view in *Everson* that religion and government were constitutionally required to occupy separate and distinct realms. The opinion interpreted the purpose of the Establishment Clause to prevent a "union" of government and religion, and he attributed to the framers of the Constitution the view that "religion is too personal, too sacred, too holy, to permit its 'unhallowed perversion' by a civil magistrate."[7]

In contrast to the narrow context in *Engel, Schempp* raised the issue of the relationship of government and religious belief in a more general setting. As described in Justice Tom Clark's opinion for a 7–1 majority, every morning in senior high school, at the beginning of the school day, a student's reading of ten verses from any version of the Old or New Testament was broadcast into each homeroom. There was no preface to these readings, nor any discussion. After the reading, the students stood and

were led, similarly by student broadcast, in the recitation of the Lord's Prayer. Any student who wished to abstain could absent himself or herself from the classroom or simply refrain from the reading and recitation.

The Court struck down these practices. Justice Clark's opinion revisited Justice Rutledge's dissent in *Everson* and quoted its description of the reach and purpose of the Establishment Clause:

> The (First) Amendment's purpose was not to strike merely at the official establishment of a single sect, creed or religion, outlawing only a formal relation such as had prevailed in England and some of the colonies. Necessarily it was to uproot all such relationships. But the object was broader than separating church and state in this narrow sense. It was to create a complete and permanent separation of the spheres of religious activity and civil authority by comprehensively forbidding every form of public aid or support for religion.[8]

Justice Clark also quoted from Justice Robert Jackson's dissent in *Everson* concerning the nature of the relationship between religious and secular education in general. The public schools, Justice Clark quoted Jackson as having written, "are organized 'on the premise that secular education can be isolated from all religious teaching. . . .'"[9]

Justice Jackson's observation is obviously debatable. It is not clear that education can be easily divided into religious and secular components. Such a conclusion depends on what religion is taken to include. For example, in the *Schempp* case, the Pennsylvania Superintendent of Public Instruction testified that Bible reading constitutes "a strong contradiction to the materialistic trends of our time."[10] Already, therefore, in 1963, the question of the government's view of materialism was felt by some to be relevant to Establishment Clause analysis. Such attitudes toward materialism are a significant matter in terms of the higher law discussed later in this book. I'm not sure anyone can say how Justice Jackson might have responded to the question of whether anti-materialism is a "religious teaching."

Of course love of, and service to, others can be taught in ways other than reading the Bible. My point is that the education of the whole person necessarily involves matters that religion also addresses—for example, the meaning and purpose of life and the nature of a good life.

*Schempp* did more than outlaw Bible reading in the public schools. Justice Clark's opinion delineated a "test" to evaluate future Establish-

ment Clause challenges in the name of the "wholesome 'neutrality'" that government must evince toward religion. Such tests are important in constitutional law because they allow lower courts to act in an area with more confidence. Only when judges in the lower courts think they understand how the next case should be decided are constitutional provisions readily applied. Justice Clark even called his formulation a "test." Because the Establishment Clause "withdrew all legislative power respecting religious belief or the expression thereof," the test would require nonreligious grounds for government action:

> The test may be stated as follows: what are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion.[11]

Even under this formulation, the Court in *Schempp* could have concluded that Bible reading was a permissible religious means to a secular end—the goal of educating students to become decent people—but that would have contradicted the opinion's starting point. You could not separate church and state—religion and government—the way the Court wished to do if blatantly religious means were permitted in order to accomplish *any* governmental ends. Bible reading as a permitted means to good citizenship would have blurred the religious/secular boundary that Justice Clark meant to sharpen. As far as the majority was concerned, after *Schempp,* school authorities, and indeed all government officials, would be prohibited from concern about the religious or spiritual well being of the citizenry. Any such concern would be considered "religious" and hence unconstitutional.

The "test" described in *Schempp* was expanded in 1971 in *Lemon v. Kurtzman*.[12] The decision in *Lemon* struck down programs of aid to private schools, including religious schools, in Rhode Island and Pennsylvania. Under the Pennsylvania statute, tax money was paid for the cost of teachers' salaries, textbooks, and other material in certain specified secular subjects. In Rhode Island, the state paid a supplement—15 percent of the annual salaries—to teachers in private elementary schools who taught only certain secular subjects. Chief Justice Warren Burg-

er's majority opinion restated the purpose and effect categories of the Establishment Clause test, but added a prohibition on "entanglement" between government and religious institutions. To survive a challenge under the Establishment Clause, he held, government action must satisfy three criteria:

> First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster "an excessive government entanglement with religion."[13]

The entanglement criterion was taken from *Walz v. Tax Commission*.[14] In 1970, *Walz* had upheld state tax exemption for real property owned by religious institutions that was used for actual religious worship under a broad tax exemption covering property devoted to religious, educational, or charitable purposes. *Walz* illustrates that the neutrality principle was never absolute, a point I will return to below.

The Lemon test, as it came to be known, dominated constitutional decisions from its inception in 1971 into the 1980s. Even today it is the closest thing we have to a doctrine of the constitutional law of church and state. As originally intended and interpreted, the Lemon test represented a strong commitment to government neutrality and separation of church and state. A respected textbook states that the "high water mark" of the Lemon test interpreted to prohibit any government aid to religious institutions occurred in 1985,[15] in a pair of cases decided the same day—July 1—and both subsequently overruled, at least in part: *School District of Grand Rapids v. Ball*[16] and *Aguilar v. Felton*.[17]

*Ball* and *Aguilar* both involved material aid to religious institutions. In both cases, government employees provided services to school children on the grounds of religious schools. Probably not coincidentally, 1985 also witnessed the Court's strongest statement in favor of the required indifference by government to the religious interests and desires of the citizenry. That case was *Wallace v. Jaffree*.[18]

Alabama had enacted in 1978 a statute authorizing a one-minute period of silence in all public schools "for meditation." In 1981, Alabama enacted a successor statute that authorized a period of silence "for meditation or voluntary prayer." It was the successor statute that the Court struck down in *Jaffree*.

Justice John Paul Stevens's opinion for five justices—Justice Sandra Day O'Connor only concurred in the Court's result—found that the 1981 Alabama statute violated the first requirement of the Lemon test. The amendment adding the words "or voluntary prayer" represented an "effort to return voluntary prayer" to the public schools, in the plain words of the bill's sponsor. Justice Stevens read the record to show that Alabama's only purpose was to advance religion: "the statute had *no* secular purpose."[19] In Stevens's view, the promotion of prayer is not a secular goal.

One can quibble with Justice Stevens about whether the record in the case had to be read that way. The State had argued that it was merely protecting the right of students to pray if they wished to do so, as Justice Stevens's opinion affirmed students had a constitutional right to do.

But for our purposes, Justice Stevens's view represents a strong legal manifestation of the requirement of government neutrality toward religion. The Alabama statute was unconstitutional because the legislative majority that enacted it wanted school children to pray to God as a good thing in and of itself. They wanted to encourage children to be religious, and that is precisely why the statute failed the Lemon test. The government must be neutral about religion in the sense that government officials are expected to be indifferent about whether religion is practiced or not practiced among the citizenry. As Justice Stevens wrote, no doubt correctly describing the majority of the Alabama legislature, "the State intended to characterize prayer as a favored activity."[20]

As the context in *Jaffree* made clear, inquiry into religious purpose is not aimed at the private or subconscious hopes of individual legislators. Purpose in the case was manifest in a public sense by the addition of legislative language encouraging prayer.

Concurring in the result, rather than joining Justice Stevens's opinion, Justice O'Connor applied a differently phrased test for Establishment Clause cases—the endorsement test. Justice O'Connor had proposed this test the term before *Jaffree* was decided, in her concurrence in *Lynch v. Donnelly,*[21] a case that upheld inclusion of a nativity scene in a municipality's Christmas display. Endorsement was not intended by Justice O'Connor to replace the Lemon test, but to serve as a refinement of it. In a sense, Justice O'Connor amplified the Lemon test by giving it

context and by combining the inquiry into purpose and effect through examination of what message the government intended to convey and what it did convey. Justice O'Connor described the underlying rationale of the endorsement test as follows in *Lynch:*

> The Establishment Clause prohibits government from making adherence to a religion relevant in any way to a person's standing in the political community. Government can run afoul of that prohibition in two principal ways. One is excessive entanglement with religious institutions. . . . The second and more direct infringement is government endorsement or disapproval of religion. Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.[22]

For purposes of government neutrality, the endorsement test, like the Lemon test as originally interpreted, prohibits government officials from wanting schoolchildren or other citizens to be religious and from acting pursuant to such a goal. As Justice O'Connor wrote in *Jaffree,* the Establishment Clause prevents the government "from conveying or attempting to convey a message that religion . . . is favored or preferred."[23] Since the Alabama legislature plainly and publicly expressed their desire to encourage children to pray, the statute was unconstitutional. Thus, in *Jaffree,* the Lemon test by itself, and as supplemented by the endorsement test, prohibited government from sponsoring prayer. As recently as 2000, in *Santa Fe Independent School District v. Doe,*[24] the Court invoked the endorsement test along these same lines and struck down, 6–3, a public high school policy of student "invocation" at football games as a state purpose to preserve and promote a religious practice.

Although government neutrality was the dominant theme in Establishment Clause decisions through *Jaffree,* there were, of course, dissents from this approach as well. Justice William Rehnquist's dissent in *Jaffree,* for example (he was not chief justice at the time this case was decided) took issue with the majority at precisely this point—that it was unconstitutional for the government to encourage prayer and thus religion:

> It would come as much of a shock to those who drafted the Bill of Rights as it will to a large number of thoughtful Americans today to learn that the Constitution, as construed by the majority, prohibits the Alabama Legislature from "endorsing" prayer.[25]

In Rehnquist's view, James Madison proposed the Establishment Clause not to require government neutrality between religion and irreligion, but to prevent the creation of a national religion and, perhaps as well, to prevent discrimination among religious sects.[26]

We will return to Rehnquist's view in chapter 4, among the alternatives to government neutrality. I mention him here to show that the neutrality to which he objected was the dominant paradigm in 1985.

The Lemon test has had its ups and downs since 1985, both in terms of criticism of the test, including calls to overrule it, and in changing interpretations of the test. However in two recent well-known instances, the public display of the Ten Commandments in county courthouses and a statement in a Pennsylvania high school's biology curriculum, the Lemon test was used in something like its original meaning of ensuring government neutrality toward religion.

In 2005, the Supreme Court decided on the same day two cases challenging public settings for the Ten Commandments. The two cases split the Court essentially down the middle, 5–4 in one case to allow the display and 5–4 not to, in the other case. In *Van Orden v. Perry,*[27] the Court upheld the placement of a monument inscribed with the Ten Commandments on the grounds of the Texas state capital. In *McCreary County v. American Civil Liberties Union of Kentucky,*[28] the Court struck down Ten Commandment displays at two county courthouses. The differing outcomes turned on the changed vote of one justice, Stephen Breyer. In other words, eight of the nine justices thought the cases should be decided the same way.

In the case upholding the Ten Commandments display, *Van Orden,* Chief Justice Rehnquist, writing a plurality opinion for Justices Anthony Kennedy, Antonin Scalia, and Clarence Thomas, expressly avoided applying the Lemon test. Instead, he emphasized the history of official acknowledgment of the role of religion in America, a theme we will return to in chapter 3.

Justice Breyer contributed the necessary fifth vote to uphold the display—Justices O'Connor, Stevens, Souter, and Ginsburg dissented. Justice Breyer characterized the case as "borderline" and opined that there could be "no test-related substitute for the exercise of legal judgment."[29] Based on a variety of fact-specific evidence, Justice Breyer concluded

that prohibiting the display would lead to more religious divisiveness than permitting it.

Given his anguished indecision and refusal to apply any test in *Van Orden,* it is surprising that Justice Breyer rather easily joined Justice Souter's majority opinion in *McCreary County,* striking down the courthouse displays.[30] The majority in *McCreary County* was composed of the four dissenters in *Van Orden,* plus Justice Breyer. Justice Souter's opinion expressly reaffirmed the requirement under the Lemon test of a secular purpose in order to uphold governmental action challenged under the Establishment Clause, though he noted that an illegitimate government purpose had been dispositive in only four cases since *Lemon* itself was decided. The majority refused to abandon the purpose inquiry and found "a predominantly religious purpose" behind the display in *McCreary,* based largely upon the express religious intentions that had been manifest in earlier, but recent, Ten Commandments displays and legislative pronouncements. Justice Souter specifically noted that "at the ceremony for posting the framed Commandments in Pulaski County, the county executive was accompanied by his pastor, who testified to the certainty of the existence of God."[31]

Thus unconstitutionality was linked by the majority to the failure of the government to express neutrality toward religion. Souter was criticizing the government for being too closely associated with the claim that God exists. That was a violation of government neutrality.

The other recent religious purpose and endorsement inquiry to achieve national attention occurred in the Dover, Pennsylvania, litigation over a disclaimer the local school board required to be read to ninth-grade biology students before the beginning of the portion of the course teaching evolution. In *Kitzmiller v. Dover Area School District,*[32] Federal District Judge John E. Jones III held, after a highly publicized, five-week trial in fall 2005, that the statement violated the Establishment Clause and an analogous provision in the Pennsylvania Constitution.

The disclaimer that the School Board adopted did not mention religion per se:

> The Pennsylvania Academic Standards require students to learn about Darwin's Theory of Evolution and eventually to take a standardized test of which evolution is a part.

> Because Darwin's Theory is a theory, it continues to be tested as new evidence is discovered. The Theory is not a fact. Gaps in the Theory exist for which there is no evidence. A theory is defined as a well-tested explanation that unifies a broad range of observations.
>
> Intelligent Design is an explanation of the origin of life that differs from Darwin's view. The reference book, Of Pandas and People, is available for students who might be interested in gaining an understanding of what Intelligent Design actually involves.
>
> With respect to any theory, students are encouraged to keep an open mind. The school leaves the discussion of the Origins of Life to individual students and their families. As a Standards-driven district, class instruction focuses upon preparing students to achieve proficiency on Standards-based assessments.

Judge Jones held that a "reasonable, objective observer" would understand the religious foundations of the intelligent-design movement and that the corresponding objective student and Dover citizen, given the Board's public actions, would perceive the disclaimer as an endorsement of religion. In addition, Judge Jones found "outright lies under oath" by members of the school board and expressions of a desire to bring "faith and prayer back into the schools." The judge concluded that the school board members "consciously chose to change Dover's biology curriculum to advance religion."[33]

The voters in Dover were apparently unhappy with this controversy. Just a few days after the trial ended, and before the opinion was issued, all eight incumbent school board members on the ballot lost their bids for reelection. Consequently Judge Jones's decision was not appealed.

We can conclude from all of the above that the government neutrality principle has been the dominant interpretation of the Establishment Clause and continues to this day to be highly influential in constitutional law. In the next chapter, we will examine the growing challenge to neutrality.

Before proceeding, however, we must first look at approaches to church and state in the case law that might have raised a challenge to neutrality but for different reasons have not been viewed as doing so. One way that the courts have avoided direct challenge to the neutrality doctrine is by treating speech that might well be considered the responsibility of the government as if it were private speech. So, while speech by a student was found to constitute government action in the *Santa Fe* case, students have been treated as private speakers and have given graduation

speeches praising Jesus since *Lee v. Weisman*[34] invalidated official high school graduation prayers. If a school district allows student graduation speakers to invoke religious themes and images in the name of the rights of students to free speech, government neutrality toward religion is often held not to be violated.[35]

Another way that neutrality can be satisfied when the government is actually aiding religion is through the different meanings that neutrality can have. Depending on the definition of neutrality, there can be a great deal of government financial aid going to religion, and quite a lot of other types of government assistance to religion, without necessarily violating the concept.

Professor Douglas Laycock has delineated two important distinctions in Establishment Clause analysis: neutrality versus separation and formal neutrality versus substantive neutrality.[36] Although the justices tend to use the terms separation and neutrality interchangeably, the result in *Everson* itself, in which aid that benefited religious schools was permitted, demonstrates the difference between them. The program at issue in *Everson* was both formally and substantively neutral. Formal neutrality requires the absence of religious categories in public policy, while substantive neutrality refers to the tendency of the government policy at issue to encourage, whether by incentives or otherwise, religious belief and affiliation or nonbelief and nonaffiliation. Busing in *Everson* was available for any school and did not encourage parents to choose any particular kind of school. Thus the busing was neutral in both senses.

But the busing program did channel public support to religious schools. Thus the program, while perhaps manifesting neutrality, did not manifest strict separation between church and state.

The Cleveland school voucher program upheld in *Zelman v. Simmons-Harris*[37] is an even better example than *Everson* of the help that government can provide to religious institutions without violating neutrality, again, at least in the view of some. In *Zelman,* almost all the government voucher money ended up going to private religious schools. And there is no reason to doubt that the availability of the funding helped keep some of these religious schools afloat. Clearly the voucher program was formally neutral in the sense that it did not contain religious categories

and might be considered substantively neutral as well, as long as one viewed the voucher program against the ongoing subsidy for secular public education. As far as Chief Justice Rehnquist's majority opinion was concerned, the decision by parents to spend voucher money at a particular religious school was insulated from Establishment Clause challenge, much as was the GI Bill when government funds were used to prepare a veteran for the ministry. Rehnquist called the voucher program one of "true private choice."[38]

The point is not whether *Zelman* was properly decided, but that the majority in *Zelman* did not deepen the current crisis in neutrality doctrine and thus did not necessitate a new conceptual approach to the Establishment Clause. Chief Justice Rehnquist while not reaffirming government neutrality did not challenge it either. In fact, the opinion claimed that the voucher program was "neutral in all respects toward religion."[39]

A third way in which government assistance to religion has been permitted despite the concept of government neutrality is that the Supreme Court has always viewed accommodation of religion as a constitutionally permissible governmental goal. This was the reason why the original Alabama statute in *Jaffree* setting aside a "period of silence" "for meditation" was acknowledged by Justice Stevens to have been constitutional even though some students would use that moment for prayer: students had a right to engage in voluntary prayer, and a moment of silence during the school day was an appropriate means to protect that right.

But of course, as everyone knew, Alabama legislators did not care about meditation when they enacted the original moment-of-silence law. They obviously wanted students to pray, but feared expressly saying so in case of a lawsuit. Their purely religious motivation did not violate the Establishment Clause because this motivation was expressed in a way that allowed religion to flourish rather than be mandated. So the meditation law, notwithstanding the religious motivation behind it, was considered to be neutral toward religion.

Accommodation of religion is common in our society, but the concept is fraught with distinctions and perhaps even contradictions. The term "accommodation" is used very loosely in judicial opinions. It has been applied to religious displays on public property and access by be-

lievers and religious institutions to government resources on an equal basis with nonreligious entities. Such broad usage turns accommodation into a substitute for acknowledgment of religion and for fair treatment of religion. I am using the term, instead, in a narrower sense to refer to changes in law that are aimed at rendering religious practices less onerous than they would otherwise be.

There are two ways in which government accommodates religious practice in this narrow sense. In the first, a government policy, though not aimed at religion as such, creates a difficulty for religious practice, which is then lessened by exempting religion from the requirements of law in order to assuage that difficulty. The classic example of such accommodation was the exemption during Prohibition of wine for sacramental purposes from the general ban on intoxicating liquor. Another example was the World War II recognition of a draft exemption for individual, religiously based conscientious objection. More controversially, the Civil Rights Act of 1964 exempts religious organizations from the prohibition against discrimination in employment on the basis of religion. This exemption was upheld by the Court in 1987.[40]

In the second type of accommodation, government changes the law to ease religious practice, even though the government did not itself create any difficulty for religious believers in the first place. One of the early debates in American history, for example, was whether the mail would be delivered on Sundays. Undoubtedly, some opponents of Sunday delivery simply wanted to protect the Lord's Day—a purely religious motivation. Others, however, did not wish to force postal employees to work on a day that many of these workers wished to set aside for religious reasons. Accommodating that desire would today be regarded by the courts as a secular purpose.

Another example of this kind of accommodation is the creation of a national holiday for Christmas. Not making Christmas a national holiday would not itself have burdened believers. Without a national holiday, their celebration of Christmas would be hindered simply by having to work. It is obvious that most Christians would have to work if Christmas were not a national holiday because Christians make up such a large portion of the national workforce. But the economic realities that would create the problem for religious practice would not be the fault of

the government nor attributable to it. If Christmas were not a national holiday, its celebration would be a patchwork of legal statuses, as is the case today for the celebration of Yom Kippur in areas where Jews make up a significant portion of the population. Some cities or states would declare Christmas a holiday, many union contracts would recognize it, some public schools would close and so forth. Making Christmas a national holiday is a good idea, but it is an accommodation for religious believers in a situation in which government did not create the difficulty for religious practice.

Obviously the distinction between these two types of accommodations cannot be pushed very hard because it is, to a certain extent, arbitrary. Whether government would be considered to be imposing a burden by insisting on work on Sundays or Christmas, or would be considered not to be imposing a burden by simply treating these as normal workdays, is a matter of perspective. Fortunately the concept of neutrality can be applied however the distinction is worked out.

In terms of current law, the Supreme Court has tended to uphold accommodations for religious practice, especially when the accommodation is aimed at what the Court views as assuaging a government-imposed burden on religion. Thus the accommodation of wine during Prohibition would not be unconstitutional under Establishment Clause case law today. However when the exemption from law seems simply to favor religion over nonreligion, the results are more uncertain. So, in *Texas Monthly, Inc. v. Bullock,*[41] the Court, without a majority opinion, struck down a tax exemption that was limited to religious books. This decision would seem to be consistent with the general Establishment Clause principle of government neutrality between religion and nonreligion.

Accommodation that might be upheld if modest in scope can also be found unconstitutional if the benefit to religion is deemed to be onerous to some people. In *Thornton v. Caldor Inc.,*[42] the Court held that a Connecticut law granting what Chief Justice Warren Burger's majority opinion characterized as "an absolute and unqualified right not to work on their chosen Sabbath" violated the Establishment Clause. The statute provided that "No person who states that a particular day of the week is observed as his Sabbath may be required by his employer to work on

such day. An employee's refusal to work on his Sabbath shall not constitute grounds for his dismissal." Chief Justice Burger's opinion objected that the statute granted the right not to work "no matter what burden or inconvenience this imposes on the employer or fellow workers."[43] This constituted a primary effect that advanced a religious practice and thus violated the Establishment Clause as defined by the Lemon test. A more modest Sabbath exemption would certainly have been upheld.

Accommodation must also be neutral among different religions in order to be upheld. In *Board of Education of Kiryas Joel v. Grumet,*[44] the Supreme Court prohibited New York from constituting a village composed entirely of extremely Orthodox Jews—Satmar Hasidim—as a separate school district so that handicapped Orthodox Jewish children could receive special education without having to attend public schools in the larger school district outside the village. Not surprisingly, when the children from such a sheltered religious background had attended secular schools, the result had been panic, fear, and trauma.

Justice Souter's ground for striking down this new school district was not convincing. He wrote that this government action represented discrimination against some other, future religious group that might not receive the same treatment: "we have no assurance that the next similarly situated group seeking a school district of its own will receive one. . . ."[45] But there was no reason to think the legislature would not respond to some future religious need in a positive way. In addition, as Justice Anthony Kennedy observed, that future group, if refused relief, could go to court with precisely this argument of discrimination and presumably prevail. Though Justice Kennedy concurred in striking down the school district, he did so on the much more defensible ground that government should not be drawing jurisdictional boundaries based on religion.

While the Court views accommodation as generally constitutionally permissible, the question for our purposes is whether accommodation of religion is consistent with government neutrality toward religion. Accommodations like the religious exemption from Prohibition cannot be understood apart from an obvious positive government regard for religion. If the government really did not care whether or not people practiced their religions, why would the government create such exemptions? After all, the underlying government policy in regard to some-

thing like Prohibition was not adopted in order to harm religion. So the exemption was not undoing a harm to religion in that sense. A neutral government policy toward religion might be one that adopted policies without regard to their effects upon religious practice. That was true of Prohibition. Exempting religion from generally applicable law is thus not really neutral. It is intended to, and does, aid adherents to religion over and against everyone else, who must comply with the ban. This is why Chicago law professor Philip Kurland, in his classic 1961 article, "Of Church and State and the Supreme Court,"[46] opposed using religion as a standard in legislation or other government actions even "to confer a benefit" to religion.[47]

Nor can one any longer maintain that accommodation of religious practices is permissible under a regime of neutrality because such accommodation promotes an independent constitutional value, the free exercise of religion. Prior to 1990, the Supreme Court had permitted accommodation under the shadow, as it were, of the Free Exercise Clause: "[G]overnment may (and sometimes must) accommodate religious practices and . . . may do so without violating the Establishment Clause."[48] But just three years after Justice William Brennan wrote that defense of accommodation, the Court in *Employment Division v. Smith,*[49] refused to apply the compelling state interest test in a case in which claimants who were dismissed from employment by a drug rehabilitation organization were then denied unemployment benefits because their illegal use of peyote in a religious ceremony was the reason for their dismissal. Justice Antonin Scalia's 5–4 majority opinion used the occasion to reexamine the meaning of the Free Exercise Clause. The result was that the Free Exercise Clause was held to never protect a religious practice from the requirements of a generally applicable law. Therefore no religious exemption was required from the criminal prohibition against the use of peyote. The prior employment compensation cases were distinguished on the ground that unemployment compensation claims are usually evaluated individually in order to ascertain why employment was terminated. In the context of individual evaluation, in which many factors will be taken into account, religious motivations may not be disregarded. But, in a context in which government has determined that certain conduct is always unacceptable, the Free Exercise Clause never requires an accommodation for the burdened religious practice.

As Professor Laycock points out, Prohibition without a religious exemption satisfies formal neutrality even though it directly outlaws core religious practices. On the other hand, exempting religious practices from Prohibition without the justification of complying with the Free Exercise Clause violates formal neutrality. This hypothetical result is why he proposes substantive neutrality as an alternative to formal neutrality and why he opposes the result in *Smith.*

The accommodation experience shows why definitions of government neutrality toward religion are tricky. As we have seen, even apparent favoritism toward religion can be argued to be neutral. Yet there does appear to be a core meaning of neutrality. The government cannot take active steps that suggest that religion is better than irreligion.

That standard still allows favorable government treatment of religion. When the government recognizes that religion is important to many of its citizens and tries to minimize interference with that interest, the government is only doing what it does for many activities—for example, making the first day of hunting season a school holiday. Thus, when the government merely recognizes that some of the citizenry are already religious and tries to ensure that their interests are taken into account in government decision making, it does no more than accommodate religion in the same way it often accommodates other "private" interests. This is another sense of neutrality, one in which religious believers are treated as simply another important interest group.

Under neutrality, however, there must be a limit to permissible favoritism. The question in the next chapter concerns expressions of government approval for the underlying activity of religious belief and practice beyond recognition of the simple fact that some Americans engage in religious activities. When the government affirms that we are a "Nation under God," the government is not simply subsidizing an activity (like hunting) but is treating the activity as something positive, as something, so to speak, that the non-hunter should take up.

We can see the difference between acknowledgment and promotion, and the consequent challenge to the neutrality principle, in the released time cases. In 1948, just a year after the recognition of neutrality as the fundamental Establishment Clause value in *Everson,* Justice Black wrote the majority opinion in *McCollum v. Board of Education,*[50] striking down a released time program in which, for part of the school day, participating

students attended privately provided religious instruction in the public school building, while non-participating students pursued secular studies in another part of the school. Protestant, Catholic, and Jewish teachers taught religious classes in public school once a week at the end of the school day. The teachers were paid by the local ecumenical religious council. Parents either signed their children up for one of these classes, or the children attended what was effectively a study hall. Justice Black wrote the majority opinion and repeated his language from *Everson* concerning the wall of separation. Here, he wrote, the tax-supported public schools were aiding religious groups "to spread their faith."[51]

*McCollum* is not a surprising opinion from the perspective of neutrality. As Justice Black wrote, not only were the students being instructed in religion in "public school buildings," but also, the state was rounding the students up through its "compulsory public school machinery."[52] The state was not neutral toward religion.

The surprise came four years later, in *Zorach v. Clauson,*[53] in which a released time program was upheld, despite *McCollum,* on the ground that in *Zorach,* religious instruction during the school day took place in church buildings, while non-participating students stayed behind in the public school building. Justice Black dissented, pointing out that "the *McCollum* decision would have been the same if the religious classes had not been held in the school buildings."[54]

Justice William Douglas, who wrote the majority opinion in *Zorach,* had been on the Court in 1947, and had joined Justice Black's majority opinion in *Everson* with its separation and neutrality language, and had also joined the majority in *McCollum.* Thus Justice Douglas could not have been considered particularly pro-religion.

The *Zorach* opinion takes a very different view of the relationship between church and state, and it is not one that can be considered neutral:

> The nullification of this law would have wide and profound effects. A catholic student applies to his teacher for permission to leave the school during hours on a Holy Day of Obligation to attend a mass. A Jewish student asks his teacher for permission to be excused for Yom Kippur. A Protestant wants the afternoon off for a family baptismal ceremony. In each case the teacher requires parental consent in writing. In each case the teacher, in order to make sure the student is not a truant, goes further and requires a report from the priest, the rabbi, or the minister. The teacher in other words cooperates in a religious program to

> the extent of making it possible for her students to participate in it. Whether she does it occasionally for a few students, regularly for one, or pursuant to a systematized program designed to further the religious needs of all the students, does not alter the character of the act.

As we will see in the next chapter, Justice Douglas referred to the "religious nature of our people" as a justification for released time programs. This phrase suggests that the Court was taking a side between the two models that Professor Dworkin offers. America is not a secular nation that tolerates religion but a religious nation that tolerates nonbelief. And Justice Douglas seems to treat that choice as very much an either/or.

We have now come to the limit of the doctrine of government neutrality toward religion. At the crucial point in the opinion, Justice Douglas did not look at precedent but at social practice, at the central place of religion in our national life. He did not look at what we say, but at what we do. And, looking at what we do, he did not find neutrality. We now turn in the same direction as Justice Douglas, toward the American practice of public religious expression.