

The Bible, the School, and the Constitution

*The Clash that Shaped Modern
Church-State Doctrine*

STEVEN K. GREEN

OXFORD
UNIVERSITY PRESS

CONTENTS

Preface vii

Introduction 3

1. The Rise of Nonsectarian Public Education 11
2. The Development of the “No-Funding Principle” 45
3. The Cincinnati “Bible War” of 1869–1873 93
4. “The Amendmentists” 137
5. The Blaine Amendment 179
6. The Legacy of the School Question 225

Notes 259

Index 291

Introduction

On June 17, 1963, the United States Supreme Court announced its decisions in *Abington School District v. Schempp* and *Murray v. Curlett*, companion cases involving the constitutionality of Bible reading in public schools. The outcomes of both cases were eagerly anticipated. Only a year earlier, the Court had struck down, 8-1, a New York law that had required the daily recitation of a prayer in public schools. Reaction to the “Regent’s Prayer” case (*Engel v. Vitale*) had been swift and decidedly negative. Religious leaders—ranging from Cardinal Francis Spellman and Episcopal Bishop James A. Pike to evangelist Billy Graham—had condemned the ruling. “God pity our country when we can no longer appeal to God for help,” Graham declared. Politicians joined in as well. North Carolina Senator Sam Ervin, a self-described constitutional expert who would later gain fame during the Watergate hearings, insisted that “the Supreme Court has made God unconstitutional.” Despite the widespread public condemnation of *Engel*, the justices did not retreat. By the same 8-1 margin, they found that readings from the Bible and recitations of the Lord’s Prayer, conducted as part of daily opening exercises, violated religious neutrality as required by the Establishment Clause of the Constitution.¹

The public outcry over the *Schempp* and *Murray* decisions was even louder than the one over *Engel*. Because *Engel* had involved a prayer drafted by a state agency, some religious leaders were ambivalent about the outcome. In contrast, *Schempp* and *Murray* involved informal practices of prayer and Bible reading that were common throughout the nation’s public schools. Politicians and religious conservatives roundly condemned the decisions, with South Carolina Senator Strom Thurmond calling the holdings “another major triumph of secularism and atheism which are bent on throwing God completely out of our national life.” Billy Graham claimed that the decisions outlawed practices that stretched back to the time of the Pilgrims, and Alabama Governor George Wallace, repeating an earlier act of defiance, challenged the justices to stop him from going into the schools and reading from the Bible to students.²

The public interest in the cases reached a magnitude rarely seen in American constitutional history. Only the desegregation holding in *Brown v. Board of*

Education (1954) had garnered similar media attention and engendered a public debate over the meaning of a constitutional principle. *Christianity Today* reported that while the cases were being decided the Supreme Court received as many as fifty letters a day in favor of prayer and Bible reading, and Congress twice held hearings on the issue. Newspapers, popular magazines, and religious and scholarly journals critiqued the controversy for weeks following the decisions, and the CBS television network produced a widely watched program: “Storm Over the Supreme Court.” Responding to the decisions, Congressman Frank Becker of New York introduced a proposed constitutional amendment to bar schools or other government institutions from prohibiting public prayers or Bible readings. When congressional hearings on the proposed amendment were held in the spring of 1964, more than one hundred people testified, most favoring the amendment. Overall, the Bible reading controversy “attracted the widest attention and the largest following,” asserted a religious magazine, and for many people it represented “America’s greatest battle.” But more was at stake than mere Bible reading; as one religious leader remarked, the controversy raised the “greater question” of “whether the United States will continue to give honor and respect to God in national life.” The fight dragged on until Congress narrowly voted down the proposed amendment in 1971. The high court would reaffirm the substance of the 1963 decisions in later rulings, but some would say the issue was never resolved, at least in the court of public opinion.³

The attention given to the 1962–1963 prayer and Bible reading decisions was not unprecedented, however. Little noticed in Justice Tom Clark’s majority opinion in *Schempp* and in Justice William Brennan’s lengthy concurrence were references to a similar controversy that had erupted following the Civil War. As precedent for their opinions, Clark and Brennan relied on an 1873 decision of the Ohio Supreme Court which had similarly ruled against Bible reading in the schools. That decision had been part of a much larger controversy over public school religious exercises and the funding of religious education, the justices noted, one that had also embroiled the nation. That controversy, too, had resulted in a proposal to amend the Constitution to resolve the interrelated religious issues. The parallels, while not exact, were striking. And as Justices Clark and Brennan surmised, the Court’s current foray into the thicket of religion and public education was unlikely to be any more successful in resolving the thorny issues than the earlier episode.⁴

The United States Supreme Court first asserted authority over these issues in the 1940s when it ruled that the Bill of Rights applied to the states. In 1947, a slim Court majority upheld minor forms of public financial assistance for children attending parochial schools, while suggesting that more significant aid would violate church-state separation. The following year the Court struck down a program of religious instruction in the public schools, declaring that “a state cannot consistently with the First [Amendment] utilize its public school system to aid any or all religious faiths or sects in the dissemination of their doctrines.” These rulings,

too, were highly controversial, not just because of the outcomes but because the Court was exercising jurisdiction over local school policies. Just as significant as the decisions themselves was their suggestion of a particular ordering of the nation's sacred and temporal realms, one, which many critics insisted, renounced the nation's religious heritage.⁵

These school decisions became the source of the Court's leading standards (or "tests") for adjudicating religion clause controversies generally.⁶ For much of the latter twentieth century, the Court applied what some termed a "strict separationist" approach to church-state issues, one that prohibited most forms of government support for religion, including both financial and symbolic support. Despite ongoing criticism from religious and political conservatives, the Court held its ground; in later holdings, the justices forbade the posting of the Ten Commandments in schoolrooms while they affirmed the teaching of evolution, to the exclusion of "creation science." On the funding side, the Court rejected most legislative efforts to provide financial assistance to religious schools. By the close of the century, few areas of constitutional law were more highly charged or socially divisive. The high court's rulings on religion and education became part of the nation's modern "culture wars."⁷

Critics of the Court's church-state jurisprudence have charged that the education decisions fail to respect the nation's religious heritage and long-held traditions, resulting in a "naked public square," if not a "culture of disbelief."⁸ More recently, criticism of the Court's Bible reading and funding decisions has come from within. In the early 1990s, the Court narrowed its earlier holdings prohibiting Bible reading in schools by allowing student-led devotional activities in extracurricular clubs. Then, in 2001, the Court opened the door to in-school religious instruction by holding that officials must allow religious groups access to school facilities—and to school children (with parental permission)—based on free speech grounds. All but reversing the Court's own 1948 decision prohibiting religious instruction in school buildings, Justice Clarence Thomas wrote that where "the school facilities are being used for a nonschool function and there is no government sponsorship of the [group's] activities, the impressionability of students would not be relevant to the Establishment Clause." To ban the religious group would constitute discrimination against its religious expression.⁹

The most significant criticism of the Court's own jurisprudence came in a 2000 case, *Mitchell v. Helms*, involving federal educational assistance (library books, instructional materials, computers, and multimedia equipment) provided to religious schools. Speaking again for a plurality of justices, Justice Thomas rejected the Court-created presumption that financial aid given directly to religious institutions necessarily advanced their religious missions and thus violated the Establishment Clause.¹⁰ Thomas also refuted the long-held assumption that some institutions were so religious—"pervasively sectarian" in character—that they were ineligible to receive (or appropriately use) public funds for instructional purposes. Not only was this exclusionary rule not required by the First

Amendment, Thomas argued, it undermined those very principles by forcing government to discriminate against religion. Delving into the same history Justices Clark and Brennan had explored in 1963, Thomas wrote that longstanding “hostility to [providing] aid to pervasively sectarian schools has a shameful pedigree.”

Opposition to aid to “sectarian” schools acquired prominence in the 1870s with Congress’s consideration (and near passage) of the Blaine Amendment, which would have amended the Constitution to bar any aid to sectarian institutions. Consideration of the amendment arose at a time of pervasive hostility to the Catholic Church and to Catholics in general, and it was an open secret that “Sectarian” was code for “Catholic.”

In short, Thomas concluded that nothing in the Establishment Clause required government to exclude religious schools from receiving public funds. The “no aid” principle and the pervasively sectarian doctrine were “born of bigotry, [and] should be buried now.”¹¹

Justice Thomas’s harsh condemnation of doctrine the Court had itself promulgated was remarkable, and it signaled that an important shift in perspective had taken place in church-state jurisprudence. Thomas’s opinions did not merely indicate that the Court plurality had changed its mind on whether religious activities in the public schools or discrete forms of public assistance to religious schooling violated the Establishment Clause. Nor did his opinions simply discount the concerns expressed by Thomas Jefferson and James Madison that public involvement in religion was a first step toward an oppressive religious establishment.¹² Rather, Thomas insisted that the rules against funding religious institutions generally, and parochial schools in particular—provisions that are contained in the majority of state constitutions—advance a corrupt constitutional principle. The claim, as was elaborated in Philip Hamburger’s influential book, *Separation of Church and State*, is that the no-funding rule of separation of church and state is an erroneous if not profane doctrine, one that is not based on broad-minded principles but rather on religious bigotry. In essence, to exclude religious groups from access to public benefits or public schools, even when the benefit or access is used for religious activity, is a form of religious discrimination.¹³

Whether or not one agrees with this assessment, this is a significant re-accounting of the development of separation of church and state in America. Essentially, this view declares that the ideological basis for fifty years of modern church-state doctrine was based not on noble principles espoused by Jefferson and Madison, but on bias and suspicion arising a half-century later by those who sought to maintain a Protestant stranglehold on the culture by subjugating all religious competition—particularly the Catholic Church. And it characterizes the nineteenth century debate over religious school funding—and the related

controversy over religious activities in the public schools—as being motivated primarily by anti-Catholic animus. It challenges standard interpretations of nineteenth century legal and educational history and calls for a reevaluation of those historical developments.

Since the 1940s the Court's holdings on religion and education have fit neatly into two distinct categories: religious activities in the public schools (e.g., prayer, Bible reading, posting of the Ten Commandments, the teaching of religious alternatives to evolution), and the public funding of religious (parochial) schools. But this categorization obscures the fact that these issues are, and have long been, interrelated. For the nation's first 150 years, controversies over school prayer and school funding were inseparable. Comprehensive public education arose in the early nineteenth century chiefly as an alternative to private religious schooling. Early reformers believed the new nation required a system of "common" schools to educate the great mass of American children in the rudiments of knowledge and the values of republicanism. To accomplish this goal, the common schools had to be controlled by public officials, not religious agencies. Another way early common schools distinguished themselves from the array of church-run schools was to assert their accessibility to children of all social classes and religious faiths. To further that distinctiveness and attract a broad array of children, common schools emphasized their own form of religious instruction: "nonsectarian" education. Though defying a single model, nonsectarian education involved instruction in widely held Protestant beliefs, in contrast to the more doctrinal instruction common in private religious schools. As the nineteenth century progressed, external and internal pressures forced the religious character of nonsectarian instruction to evolve, such that over time it became less devotional and more rote. Despite this gradual transformation, Catholics, Jews, and religious nonconformists still objected to the residual Protestant character of the public schools. At the same time, conservative Protestants complained that the public schools were becoming secularized and "godless," an assessment shared by Catholics. The controversy over whether schools should inculcate moral and/or religious values, and the content of that instruction, would embroil public schools throughout the century.

A chief hallmark of nonsectarian education was its purported appeal to children of all religious faiths. Public school funds could pay only for this "universal" nonsectarian education, not for the more sectarian education of private religious schools. This "no-funding" principle arose out of several reinforcing objectives: an effort to limit competition for common schooling; a belief in the indispensable assimilating role of a common "public" education, which must take place under the control of public officials; a concern for ensuring educational standards and public accountability; and a desire to avoid religious dissension, competition, and control over access to public monies. Protestant antipathy toward the Catholic Church was, indisputably, a factor as well. Public school educators, themselves overwhelmingly Protestant, associated Protestantism with republican values and

Catholicism with authoritarianism. At times, this last basis for prohibiting the funding of religious education overshadowed the other rationales.

Ironically, nonsectarianism and the no-funding principle worked at cross purposes. The Protestant character of nonsectarianism was a leading impetus for Catholics to create a system of parochial schooling, which in turn undermined claims about common school universality. The symbiotic tension between Bible reading and school funding only increased once Catholic officials began appealing to state officials for a share of the public school funds for their schools. The conflicts generated by these Janus-like issues evolved into the most contentious church-state controversy of the nineteenth century, the Mormon question notwithstanding. The controversy was so prominent that it acquired its own name: the "School Question."

One cannot appreciate the Supreme Court's modern church-state jurisprudence without understanding the development of the School Question during the nineteenth century. Although the controversy raged in towns and cities across America throughout the nineteenth century, it reached its zenith in the years immediately following the Civil War. For approximately a decade, the inter-related controversies over Bible reading in the schools and the funding of parochial schools captured public attention to a degree that had never happened before. As the *Schempp* justices noted, during this period a state supreme court struck down the practice of nonsectarian prayer and Bible reading in the public schools for the first time. At the same time, Protestant conservatives and religious skeptics proposed competing amendments to the United States Constitution to guarantee, respectively, that America was a Christian nation or a secular republic. Finally, leading politicians proposed their own amendments to the Constitution, putatively designed to resolve the School Question but chiefly for political gain. This latter amendment drive evolved into what became known as the "Blaine Amendment."

The issues of Bible reading and school funding engaged Protestants and Catholics, skeptics and theocrats, nativists and immigrants, educators and politicians. At times, the debate devolved into religious and ethnic dispersions designed to appeal to the baser fears and prejudices of people. At other times, the controversy engendered thoughtful discussion about the appropriate role of religion in public education. Most significant was that the debate was not restricted to the particulars of Bible reading or parochial school funding. The controversy subsumed issues of greater import: the promise of universal public education; the duty of government to promote religious values; the connection between moral virtue and civic participation; the role of religious institutions in civil society; and the compatibility of religious diversity with a republican system that had arisen in a nation with a relatively common Protestant stock. The School Question became a proxy for a debate over America's cultural and religious identity at a crucial time. Participants in the debate appreciated that larger issues were at stake. One contemporary remarked that although "the subject of Bible-reading and religious

worship [in the public schools was] one of the sharpest issues between the Catholic and the Protestant . . . it manifestly does not cover the whole question in controversy.” Rather, “the great principles involved” brought “to the surface the whole subject of Church and State, civil government and religion, in their relations to each other.”¹⁴

The events of the period thus provided Americans the opportunity to engage in a grand—and sometimes not so grand—public debate over the meaning of separation of church and state in a democratic society. Rarely in the nation’s history have people of different social standings and from various walks of life engaged in a national discussion over the meaning of a constitutional principle. This was one of those rare moments, though reasoned discussion was at times eclipsed by inflamed rhetoric. Yet modern critics of church-state separation have been quick to simplify the passions of the period and condemn the rhetoric while ignoring the substantive discussions that took place. Critics have also lost sight of the fact that hyperbole and impassioned argument are often part of democratic discourse. This public discussion on the meaning of Church and State, both base and profound, laid the foundation for future church-state controversies and the resulting decisions of the Supreme Court.

This book analyzes the events surrounding the School Question chiefly from 1869 through 1876. It examines the myriad factors that informed the controversy, including contemporary understandings of nonsectarianism and the no-funding rule. It places the school controversy within its context to see whether contemporary understandings of nonsectarianism and no-funding were based chiefly on religious bigotry. To be sure, this “decade” encompassed neither the beginning nor end of the School Question controversy. If rioting and arson are any indication, the decades preceding this period were more epic. The controversy also continued at a heightened level for at least a quarter century beyond 1876.¹⁵ But these years were the fulcrum of the controversy, setting out the constitutional arguments governing both school prayer and the public funding of religion, arguments that have remained relatively unchanged. The controversy laid the foundation for modern church-state doctrine.