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The Law of Public Education

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UNIVERSITY CASEBOOK SERIES®

THE LAW OF PUBLIC EDUCATION

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by

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CHAPTER 2

CHURCH-STATE RELATIONS IN EDUCATION

I. INTRODUCTION

The First Amendment was added to the United States Constitution in 1791 as part of the Bill of Rights. Yet, the Supreme Court did not address a case involving religion and public education on the merits of a First Amendment claim until 1947 in *Everson v. Board of Education* (*Everson*).¹ In the years since *Everson*, the Court has resolved more cases dealing with the religion clauses of the First Amendment than any other subject in Education Law. Further, the Justices refused to review or summarily affirmed many lower court cases and resolved disputes in other realms of church-state relations with implications for public² and non-public³ schools.

According to the sixteen words of the religion clauses of the First Amendment, “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.” Insofar as the First Amendment explicitly prohibits only Congress from making laws establishing religion, in 1940, the Supreme Court applied the First Amendment to the states through the Fourteenth Amendment in *Cantwell v. Connecticut* (*Cantwell*).⁴ The *Cantwell* Court invalidated the convictions of Jehovah’s Witnesses for violating a statute against the solicitation of funds for religious, charitable, or philanthropic purposes without prior approval of public officials. Consequently, individuals have the same rights in suits against the federal and state governments over the establishment of religion.

In reviewing First Amendment religion cases, the Supreme Court created confusion over the appropriate judicial standard.⁵ Initially, the

¹ 330 U.S. 1, 67 S. Ct. 504, 91 L.Ed. 711 (1947), *reh’g denied*, 330 U.S. 855, 67 S. Ct. 962, 91 L.Ed. 1297 (1947). [Case No. 1]

² See, e.g., *Employment Div., Dep’t of Human Res. of Or. v. Smith* (*Smith*), 494 U.S. 872, 886, 110 S. Ct. 1595, 1600, 108 L.Ed.2d 876 (1990), *reh’g denied*, 496 U.S. 913, 110 S. Ct. 2605, 110 L.Ed.2d 285 (1990); *on remand*, 799 P.2d 148 (Or. 1990) (upholding the dismissal of drug counselors who ingested peyote as part of a sacramental ritual in the Native American Church, a legally organized religious movement recognized by the federal government, ruling that generally applicable, religion-neutral laws with the effect of burdening a particular religious practice need not be justified by a compelling government interest); *City of Boerne v. Flores*, 521 U.S. 507, 117 S. Ct. 2157, 138 L.Ed.2d 624 (1997) (invalidating the Religious Freedom Restoration Act because, in creating a statutory remedy based on the free exercise test that was essentially eliminated in *Smith*, Congress exceeded the enforcement provision of Section 5 of the Fourteenth Amendment).

³ See, e.g., *National Labor Relations Bd. v. Catholic Bishop of Chicago*, 440 U.S. 490, 99 S. Ct. 1313, 59 L.Ed. 533 (1979) (affirming that the Board lacked the jurisdiction to mandate bargaining between teachers in Roman Catholic secondary schools and their employers).

⁴ 310 U.S. 296, 60 S. Ct. 900, 84 L.Ed. 1213 (1940) *But see* *Barron v. Mayor and City Council of Baltimore*, 32 U.S. 243, 8 L.Ed. 672 (1833) (refusing to apply the Bill of Rights to the states because its history indicated that it was limited to the federal government).

⁵ As evidence of the lack of judicial clarity, the Fifth Circuit described its task as having “to find our way in the vast, perplexing desert of Establishment Clause jurisprudence.” *Helms*

Justices created a two-part test in *School District of Abington Township v. Schempp* and *Murray v. Curlett*⁶ to review the constitutionality of prayer and Bible reading in public schools. The Court expanded this test into the tripartite Establishment Clause standard in *Lemon v. Kurtzman (Lemon)*,⁷ a dispute over governmental aid to religiously affiliated non-public schools.

When the Supreme Court applies the *Lemon* test in disputes over aid and religious activity, its failure to explain how, or why, it has become a kind of “one-size fits all” measure often leaves lower courts, lawyers, commentators, and educators seeking greater clarity. This test requires governmental actions to have secular legislative purposes, principle or primary effects neither advance nor inhibit religion, and to not foster excessive entanglement between religion and the state. Confusion emerges because the Justices failed to offer cogent explanations of how the tripartite test, the first two prongs of which originated in companion cases on prayer and Bible reading while the third emerged in a dispute over tax exemptions for churches, fit together.

Confusion over the meaning of the Establishment Clause is exacerbated because as membership on the Supreme Court changes, its jurisprudence on the status of state aid to non-public schools and religious activity in public schools, however broadly these terms are construed, is subject to modification. For example, in *Agostini v. Felton*,⁸ a case permitting the on-site delivery of educational services for poor students who attended religiously affiliated non-public schools, the Court modified the *Lemon* test by reviewing only its first two parts, purpose and effect, while recasting entanglement as one criterion in evaluating a statute’s effect when the state provides aid to students who attend religiously affiliated non-public schools.

At the same time, the Supreme Court occasionally relies on two other tests involving religion and public education. In *Lee v. Weisman*,⁹ Justice Kennedy enunciated the psychological coercion test in forbidding prayer at public school graduation ceremonies. Earlier, in *Lynch v. Donnelly*,¹⁰ a non-school case on the inclusion of a Nativity scene in a Christmas display on public property, Justice O’Connor’s plurality opinion created the endorsement test for addressing religious activity in public settings.

Appeals to history over the original intent of the Establishment Clause fail to provide clear answers, stemming largely from the close

v. Picard, 151 F.3d 347, 350 [128 Educ. L. Rep. 593] (5th Cir. 1998). This dispute made its way to the Supreme Court as *Mitchell v. Helms*, 530 U.S. 793, 120 S. Ct. 2530, 147 L.Ed.2d 660 [145 Educ. L. Rep. 44] (2000), *reh’g denied*, 530 U.S. 1296, 121 S. Ct. 15, 147 L.Ed.2d 1039 (2000), *on remand sub nom. Helms v. Picard*, 229 F.3d 467 [148 Educ. L. Rep. 32] (5th Cir. 2000). For a discussion of this case, see notes 71–72 *supra* and accompanying text.

⁶ 374 U.S. 203, 83 S. Ct. 1560, 10 L.Ed.2d 844 (1963). [Case No. 4]

⁷ 403 U.S. 602, 91 S. Ct. 2105, 29 L.Ed.2d 745 (1971). [Case No. 7]

⁸ 521 U.S. 203, 117 S. Ct. 1997, 138 L.Ed.2d 391 [119 Educ. L. Rep. 29] (1997). [Case No. 11]

⁹ 505 U.S. 577, 112 S. Ct. 2649, 120 L.Ed.2d 467 [75 Educ. L. Rep. 43] (1992). [Case No. 10]

¹⁰ 465 U.S. 668, 687, 104 S. Ct. 1355, 1366, 79 L.Ed.2d 604 (1984).

ties between religion and government present during the colonial period. In fact, up until the Revolutionary War, there "... were established churches in at least eight of the thirteen former colonies and established religions in at least four of the other five."¹¹

Rather than engage in a lengthy discussion of the different approaches to interpreting the Establishment Clause, suffice it to say that two major camps emerged at the Supreme Court and throughout the judiciary: separationists and accommodationists. On the one hand are supporters of the Jeffersonian¹² metaphor calling for erecting a "wall of separation" between church and state,¹³ language that does not appear in the Constitution; this is the perspective most often associated with the Supreme Court since *Everson*, particularly with regard to prayer and religious activity in public schools. On the other hand, accommodationists maintain that the government is not prohibited from permitting some aid or serving the needs of children under the Child Benefit Test or from accommodating the religious preferences of parents who send their children to public schools.

This book focuses on federal, not state, law. Even so, it is important to recognize how developments at both levels often overlap. In other words, while many cases arise under state law, such as vouchers in Cleveland, Ohio,¹⁴ they are often ultimately resolved on the basis of the Federal Constitution. It is thus worth noting that the Federal Constitution is more open to some forms of aid to religious schools than its state counterparts, a distinction that emerged during the latter part of the Nineteenth Century.

The push for separation between church and state was highlighted on December 7, 1875, in President Grant's final State of the Union address. In his speech Grant called for a constitutional amendment "forbidding the teaching [of religion in public schools] ... and prohibiting the granting of any school funds, or school taxes or any part thereof, either by legislative, municipal, or other authority, for the

¹¹ *Engel v. Vitale*, 370 U.S. 421, 428 n. 5, 82 S. Ct. 1261, 8 L.Ed.2d 601 (1962).

¹² The metaphor of the "wall of separation" was popularized by Thomas Jefferson's letter of January 1, 1802, to Nehemiah Dodge, Ephraim Robbins, and Stephen S. Nelson, A Committee of the Danbury Baptist Association. 16 WRITINGS OF THOMAS JEFFERSON 281 (Andrew Adgate Lipscomb & Albert Ellery Bergh, eds. 1903). Jefferson wrote:

Believing with you that religion is a matter which lies solely between man and his God ... I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should "make no law respecting an establishment of religion, or prohibiting the free exercise thereof," thus building a wall of separation between church and state.

The Supreme Court first used the term in *Reynolds v. United States*, 98 U.S. 145, 164, 25 L.Ed. 244 (1878) (rejecting a Free Exercise Clause challenge to a federal polygamy statute).

¹³ The metaphor of the "wall of separation" traces its origins to Roger Williams who coined the term more than 150 years before Jefferson used it in his letter to the Danbury Baptist Convention. Roger Williams, Mr. Cotton's Letter Lately Printed, Examined and Answered (1644), reprinted in 1 THE COMPLETE WRITINGS OF ROGER WILLIAMS 392 (1963) ("and when they have opened a gap in the hedge or wall of Separation between the Garden of the Church and the Wilderness of the world. ...").

¹⁴ See *Zelman v. Simmons-Harris*, 536 U.S. 639, 649, 122 S. Ct. 2460, 153 L.Ed.2d 604 [166 Educ. L. Rep. 30] (2002). [Case No. 14]

benefit or in aid, directly or indirectly, of any religious sect or denomination. . . .”¹⁵

Following President Grant’s lead, former Congressman, Senator, and later unsuccessful Presidential candidate, James K. Blaine of Maine introduced a constitutional amendment in 1875 designed to have prevented aid from going to schools “under the control of any religious sect,”¹⁶ code for Roman Catholic schools. Congress rejected the Amendment in 1876, but most states adopted Blaine-type constitutional provisions designed to place substantial limits on the relationship between religious institutions and state governments.¹⁷ This early concern over the interplay between religion and education notwithstanding, almost three-quarters of a century would pass before the Supreme Court addressed a case on the merits of a First Amendment claim until *Everson* in 1947.

II. PRE-HISTORY

Prior to the emergence of its modern Establishment Clause jurisprudence in *Everson*, the Supreme Court examined two cases significantly impacting religiously affiliated non-public schools and their students. In both cases, the Court relied on the Due Process Clause of the Fourteenth Amendment rather than the Establishment Clause.

A. *PIERCE V. SOCIETY OF SISTERS*

The first, and more far-reaching, of the Supreme Court’s two early cases involving religion and education was *Pierce v. Society of Sisters of the Holy Names of Jesus and Mary (Pierce)*.¹⁸ In *Pierce*, the proprietors of a Roman Catholic school and the secular Hill Military Academy challenged a voter-approved initiative in Oregon mandating the enactment of a new compulsory attendance law. The law required the

¹⁵ 4 CONG. REC. 175 (1875) (annual message of the President of the United States). Near the end of his address Grant reiterated that “[n]o sectarian tenets shall ever be taught in any school supported in whole or in part by the State, nation, or by the proceeds of any tax levied upon any community.” *Id.* at 181.

¹⁶ The entire proposed Amendment read:

No State shall make any law respecting an establishment of religion or prohibiting the free exercise thereof; and no money raised by taxation in any State for the support of public schools, or derived from any public fund therefore, nor any public lands devoted thereto, shall ever be under the control of any religious sect, nor shall any money so raised or lands so devoted be divided between religious sects or denominations.

4 CONG. REC. 205 (1875) (Blaine’s statement submitting a proposed constitutional amendment to Congress).

¹⁷ Thirty seven states, plus the Commonwealth of Puerto Rico, have Blaine-type language in their constitutions. *See, e.g.*, ALASKA CONST. ART. VII, § 1; CAL. CONST. ART. XVI, § 5; COLO. CONST. ART. IX, § 7; FLA. CONST. ART. I, § 3; HAW. CONST. ART. X, § 1; MICH. CONST. ART. I, § 4; MO. CONST. ART. IX, § 8; NEB. CONST. ART. VII, § 11; N.Y. CONST. ART. XI, § 3; OKLA. CONST. ART. II, § 5; PA. CONST. ART. III, § 29; TEX. CONST. ART. I, § 7; VA. CONST. ART. IV, § 16; WIS. CONST. ART. I, § 18. For a discussion of the Blaine Amendment, see *Mitchell v. Helms*, 530 U.S. 793, 828–29, 120 S. Ct. 2530, 147 L.Ed.2d 660 [145 Educ. L. Rep. 44] (2000), *reh’g denied*, 530 U.S. 1296, 121 S. Ct. 15, 147 L.Ed.2d 1039 (2000), *on remand sub nom. Helms v. Picard*, 229 F.3d 467 [148 Educ. L. Rep. 32] (5th Cir. 2000).

¹⁸ 268 U.S. 510, 45 S. Ct. 571, 69 L.Ed. 1070 (1925). [Case No. 81]

parents of all “normal” students, meaning those who did not need what would today be described as special education, between the ages of eight and sixteen who had not completed the eighth grade, to send their children to public schools. After a federal trial court enjoined enforcement of the statute, the Court affirmed in favor of the schools.

In its unanimous opinion, the Supreme Court agreed that enforcement of the statute would have seriously impaired, if not destroyed, the profitable features of the schools’ businesses while greatly diminishing the value of their property. Even conceding the power of the state “reasonably to regulate all schools, to inspect, supervise, and examine them, their teachers and pupils . . .,”¹⁹ the Court focused on the schools’ property rights under the Fourteenth Amendment. The Justices grounded their judgment on the realization that the owners of the schools sought protection from unreasonable interference with their students as well as the destruction of their business and property. The Court also decided that while states may oversee such important features as health, safety, and teacher qualifications relating to the operation of non-public schools, they could not do so to an extent greater than they did for public schools. In this way, *Pierce* served as a kind of Magna Carta protecting the right of non-public schools to operate.

In another important aspect of its judgment, the *Pierce* Court included important language about parental rights, acknowledging that “[t]he child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.”²⁰ In so writing, the Justices affirmed the unconstitutionality of the compulsory attendance law because it “unreasonably interfere[d] with the liberty of parents and guardians to direct the upbringing and education of children under their control.”²¹

B. *COCHRAN V. LOUISIANA STATE BOARD OF EDUCATION*

*Cochran v. Louisiana State Board of Education (Cochran)*²² involved a statute under which all students received free textbooks regardless of where they attended school. A taxpayer unsuccessfully challenged the law as a violation of the Fourteenth Amendment as a taking of private property through taxation for a non-public purpose. As in *Pierce*, the Supreme Court resolved the dispute under the Due Process Clause of the Fourteenth Amendment rather than the First Amendment’s Establishment Clause.

Unanimously affirming the judgment of the Supreme Court of Louisiana because the students, rather than their schools, were the beneficiaries of the law, the Justices agreed that the statute served a valid secular purpose. In so ruling, the Supreme Court presaged the Child Benefit Test that would emerge in *Everson v. Board of*

¹⁹ *Id.* at 534.

²⁰ *Id.* at 535.

²¹ *Id.* at 534–535.

²² 281 U.S. 370, 50 S. Ct. 335, 74 L.Ed. 913 (1930).

Education.²³ As discussed below, while the Court has consistently upheld similar textbook provisions, state courts have struck them down under their own constitutions.²⁴

III. THE SUPREME COURT'S MODERN ESTABLISHMENT CLAUSE JURISPRUDENCE: STATE AID TO STUDENTS WHO ATTEND RELIGIOUSLY AFFILIATED NON-PUBLIC SCHOOLS

As reviewed in the following sections, the Supreme Court's modern Establishment Clause jurisprudence with regard to state aid in the context of K–12 education, sometimes referred to as *parochiaid*, evolved through three phases. During the first phase, which began in 1947 with *Everson v. Board of Education*,²⁵ and ended in 1968 with *Board of Education of Central School District No. 1 v. Allen*,²⁶ the Justices enunciated the Child Benefit Test, a legal construct permitting publicly funded aid because it assists children rather than their religiously affiliated non-public schools. The years between the Court's 1971 judgment in *Lemon v. Kurtzman*²⁷ and *Aguilar v. Felton*²⁸ in 1985, the second phase, were static with regard to the Child Benefit Test as the Justices largely refused to move beyond the limits it created in *Everson* and *Allen*. The Court's 1993 ruling in *Zobrest v. Catalina Foothills School District*²⁹ breathed new life into the Child Benefit Test, allowing it to enter a phase that extends to the present.

A. TRANSPORTATION

*Everson v. Board of Education (Everson)*³⁰ stands out as the first Supreme Court case on the merits of the Establishment Clause and education. At issue in *Everson* was a statute from New Jersey permitting local school boards to make rules and enter into contracts for student transportation. After a local board, acting pursuant to the statute, authorized reimbursement to parents for the money they spent on bus fares sending their children to Catholic schools, a taxpayer challenged the law as unconstitutional in two respects: first, in an approach not unlike the plaintiff's unsuccessful argument in *Cochran*,

²³ 330 U.S. 1, 67 S. Ct. 504, 91 L.Ed. 711 (1947), *reh'g denied*, 330 U.S. 855, 67 S. Ct. 962, 91 L.Ed. 1297 (1947). [Case No. 1]

²⁴ See, e.g., *People ex rel. Klinger v. Howlett*, 305 N.E.2d 129 (Ill. 1973); *Gaffney v. State Dep't of Educ.*, 220 N.W.2d 550 (Neb. 1974); *Paster v. Tussey*, 512 S.W.2d 97 (Mo. 1974), *cert. denied*, 419 U.S. 1111, 95 S. Ct. 785, 42 L.Ed.2d 807 (1975); *Bloom v. School Comm. of Springfield*, 379 N.E.2d 578 (Mass. 1978); *California Teachers Ass'n v. Riles*, 176 Cal.Rptr. 300 (Cal. 1981); *In re Advisory Opinion*, 228 N.W.2d 772 (Mich. 1975); *Fannin v. Williams*, 655 S.W.2d 480 (Ky. 1983); *Matter of Certification of a Question of Law from U.S. Dist. Ct., Dist. of S.D.*, 372 N.W.2d 113 [26 Educ. L. Rep. 1232] (S.D. 1985).

²⁵ 330 U.S. 1, 67 S. Ct. 504, 91 L.Ed. 711 (1947), *reh'g denied*, 330 U.S. 855, 67 S. Ct. 962, 91 L.Ed. 1297 (1947). [Case No. 1]

²⁶ 392 U.S. 236, 88 S. Ct. 1923, 20 L.Ed.2d 1060 (1968). [Case. No. 5]

²⁷ 403 U.S. 602, 91 S. Ct. 2105, 29 L.Ed.2d 745 (1971). [Case No. 7]

²⁸ 473 U.S. 402, 105 S. Ct. 3232, 87 L.Ed.2d 290 [25 Educ. L. Rep. 1022] (1985).

²⁹ 509 U.S. 1, 113 S. Ct. 2462, 125 L.Ed.2d 1 [83 Educ. L. Rep. 930] (1993).

³⁰ 330 U.S. 1, 67 S. Ct. 504, 91 L.Ed. 711 (1947), *reh'g denied*, 330 U.S. 855, 67 S. Ct. 962, 91 L.Ed. 1297 (1947). [Case No. 1]

he alleged that the law authorized the state to tax some citizens and bestow their money on others for the private purpose of supporting non-public schools in contravention of the Fourteenth Amendment; second, he charged that the statute was one “respecting an establishment of religion” because it forced him to contribute to support church schools in violation of the First Amendment.

In *Everson* a divided Supreme Court affirmed the statute’s constitutionality. The Justices rejected the plaintiff’s Fourteenth Amendment argument, finding that facilitating secular education is clearly a public purpose. As to the First Amendment, the Court declared that neither a state nor the federal government could aid one religion, all religions, or prefer one religion over another. The Justices added that no tax, large or small, could be levied to support religious activities or institutions. The Court reasoned that the First Amendment did not prohibit states from extending general benefits to all of their citizens without regard to their religious beliefs because it viewed student transportation as being in the same category of other public services such as police, fire, and health protection.

Justice Black’s majority opinion in *Everson* introduced the Jeffersonian metaphor into the lexicon of the Supreme Court’s modern First Amendment jurisprudence. He wrote that: “[t]he First Amendment has erected a wall between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach.”³¹

Following *Everson*, states are free to choose whether to provide publicly funded transportation to students who attend religiously affiliated non-public schools. As might have been anticipated, lower courts, relying on state constitutional provisions, reached mixed results on this issue. Some cases prohibited states from providing transportation to students in religious schools in determining that doing so violated their constitutions.³² For instance, a federal trial court in Iowa,³³ relying on the state constitution, prohibited a board from offering transportation to a student who attended a religious school outside of district boundaries. Further, the Supreme Court of North Dakota, without reaching the constitutional question, decided that state law did not entitle local boards to be reimbursed for transporting “pupils” to non-public schools.³⁴ The court interpreted “pupil” as meaning a “public school enrollee” and “school” as a “public school.”

The Eighth Circuit, in a case from South Dakota, affirmed that a local board could discontinue providing transportation to students who attended a religiously affiliated non-public school within its boundaries

³¹ *Id.* at 18.

³² See, e.g. *Visser v. Nooksack Valley School Dist. No. 506*, 207 P.2d 198 (Wash. 1949). *McVey v. Hawkins*, 258 S.W.2d 927 (Mo. 1953); *Matthews v. Quinton*, 362 P.2d 932 (Alaska 1961), *cert. denied*, 368 U.S. 517, 82 S. Ct. 530, 7 L.Ed.2d 522 (1962); *Board of Educ. for Indep. School Dist. No. 52 v. Antone*, 384 P.2d 911 (Okla. 1963); *Epeldi v. Engelking*, 488 P.2d 860 (Idaho 1971), *cert. denied*, 406 U.S. 957, 92 S. Ct. 2058, 32 L.Ed.2d 343 (1972); *Luethkemeyer v. Kaufmann*, 364 F. Supp. 376 (W.D. Mo. 1973), *aff’d*, 419 U.S. 888, 95 S. Ct. 167, 42 L.Ed.2d 134 (1974).

³³ *Americans United for Separation of Church and State v. Benton*, 413 F. Supp. 955 (S.D. Iowa 1975).

³⁴ *Dickinson Pub. School Dist. No. 1 v. Scott*, 252 N.W.2d 216 (N.D. 1977).

unless the children were traveling to athletic, musical, speech, or other interscholastic contests because state law did not obligate it to do so.³⁵ The court posited that the students and their parents lacked standing because they failed to ask school officials to reinstate bus service or to show that their doing so would have been futile insofar as the board indicated that it would provide busing again when it clarified an issue dealing with insurance. Also, a trial court in New York confirmed that the State Commissioner of Education did not exceed his authority in prohibiting a local board from providing free transportation to children who attended private pre-kindergarten classes.³⁶ The court agreed with the commissioner that the statute addressing student transportation did not authorize local boards to provide it to children in private pre-kindergarten classes.

Conversely, the federal trial court in Connecticut³⁷ and the First Circuit, in a dispute from Rhode Island,³⁸ both of which explicitly rejected the case from Iowa, along with the Supreme Court of Pennsylvania³⁹ permitted students from religiously affiliated non-schools to receive transportation beyond district lines. In addition, the Supreme Court of Kentucky affirmed the constitutionality of a statute allocating funding for students who attended non-public elementary schools because the plan did not impermissibly aid religiously affiliated and other non-public schools.⁴⁰

In *Wolman v. Walter (Wolman)*,⁴¹ the Supreme Court resolved the related question of transportation for field trips. At issue was a statute from Ohio permitting the use of public funds to provide transportation for field trips for children who attended religiously affiliated non-public schools. The Court invalidated the law because insofar as field trips were oriented to the curriculum, they were in the category of instruction rather than non-ideological secular services such as transportation to and from school.

An appellate court in Indiana affirmed that a state statute did not obligate local boards to provide free shuttle service from public middle schools to the non-public schools children attended.⁴² The court interpreted the law as only requiring boards to have drivers pick the students up from the non-public schools near the district's regular bus routes and drop them off at public middle schools nearest to their non-public schools.

³⁵ *Pucket v. Hot Springs School Dist. No. 23-2*, 526 F.3d 1151 [232 Educ. L. Rep. 628] (8th Cir. 2008).

³⁶ *Board of Educ. of Lawrence Union Free School Dist. No. 15 v. McColgan*, 846 N.Y.S.2d 889 [226 Educ. L. Rep. 993] (2007).

³⁷ *Cromwell Prop. Owners Ass'n v. Toffolon*, 495 F. Supp. 915 (D. Conn. 1979).

³⁸ *Members of Jamestown School Comm. v. Schmidt*, 699 F.2d 1 [9 Educ. L. Rep. 70] (1st Cir. 1983), *cert. denied*, 464 U.S. 851, 104 S. Ct. 162, 78 L.Ed.2d 148 (1983).

³⁹ *Pequea Valley School Dist. v. Commonwealth of Pa. Dep't of Educ.*, 397 A.2d 1154 (Pa. 1979), *appeal dismissed for want of a substantial federal question*, 443 U.S. 901, 99 S. Ct. 3091, 61 L.Ed.2d 869 (1979).

⁴⁰ *Neal v. Fiscal Court, Jefferson Cnty.*, 986 S.W.2d 907 [133 Educ. L. Rep. 624] (Ky. 1999).

⁴¹ 433 U.S. 229, 97 S. Ct. 2593, 53 L.Ed.2d 714 (1977).

⁴² *Roman Catholic Archdiocese of Indianapolis v. Metropolitan School Dist. of Lawrence Twp.*, 945 N.E.2d 757 [266 Educ. L. Rep. 469] (Ind. Ct. App. 2011).

Similarly, an appellate court in Illinois affirmed that a local board was not obligated to provide transportation to students who attended a religiously affiliated non-public school on days when public schools were not in session.⁴³ The court explained that state law only required the board to provide students in the non-public school with transportation on the same basis as it was available to children who attended local public schools.

B. TEXTBOOKS

Following the lead of *Cochran*, albeit under the First, rather than the Fourteenth, Amendment, in *Board of Education of Central School District No. 1 v. Allen* (*Allen*),⁴⁴ the Supreme Court upheld the constitutionality of a statute from New York directing local school boards to loan textbooks to children in grades seven to twelve who attended non-public schools.⁴⁵

Rather than mandate that the books had to be the same as those used in the public schools, the law required local board officials to approve titles prior to their adoption.⁴⁶ The *Allen* Court observed that the law's purpose was not to aid religion or non-public schools and that its primary effect was to improve the quality of education for all children.⁴⁷ The Justices upheld like textbook provisions in *Meek v. Pittenger*⁴⁸ and *Wolman*, both of which are examined in more detail below. Subject to the delivery of services to individual students as in *Zobrest v. Catalina Foothills School District*,⁴⁹ *Allen* represented the outer limit of the Child Benefit Test prior to *Agostini v. Felton*,⁵⁰ also discussed later in this chapter.

C. SECULAR SERVICES AND SALARY SUPPLEMENTS

Lemon v. Kurtzman (*Lemon*)⁵¹ is the Supreme Court's most significant case involving the Establishment Clause and education. The *Lemon* Court struck down a statute from Pennsylvania calling for the

⁴³ *C.E. v. Board of Educ. of E. St. Louis School Dist. No. 189*, 970 N.E.2d 1287 [281 Educ. L. Rep 1209] (Ill. App. Ct. 2012).

⁴⁴ 392 U.S. 236, 88 S. Ct. 1923, 20 L.Ed.2d 1060 (1968). [Case No. 5]

⁴⁵ *Board of Educ. of Cent. School Dist. No. 1, Towns of E. Greenbush v. Allen*, 273 N.Y.S.2d 239 (N.Y. Sup. Ct. 1966), *rev'd*, 276 N.Y.S.2d 234 (N.Y. App. Div. 1966), *aff'd*, 281 N.Y.S.2d 799 (N.Y. 1967), *probable jurisdiction noted*, 389 U.S. 1031, 88 S. Ct. 767, 19 L.Ed.2d 819 (1968).

⁴⁶ The Supreme Court refused to hear an appeal in a case invalidating a state law authorizing educational officials to provide free textbooks for students in a religiously affiliated non-public school because it violated the state constitution. *Dickman v. School Dist. No. 62C, Oregon City, Clackamas Cnty.*, 366 P.2d 533 (Or. 1961), *cert. denied sub nom. Carlson v. Dickman*, 371 U.S. 823, 83 S. Ct. 41, 9 L.Ed.2d 62 (1962).

⁴⁷ *But see Public Funds for Pub. School v. Marburger*, 358 F. Supp. 29 (D.N.J. 1973), *aff'd*, 417 U.S. 961, 94 S. Ct. 3163, 41 L.Ed.2d 1134 (1974) (summarily affirming an order invalidating a plan which allowed parents whose children attended non-public schools to be reimbursed for purchasing secular textbooks).

⁴⁸ 421 U.S. 349, 95 S. Ct. 1753, 44 L.Ed.2d 217 (1975).

⁴⁹ 509 U.S. 1, 113 S. Ct. 2462, 125 L.Ed.2d 1 [83 Educ. L. Rep. 930] (1993).

⁵⁰ 521 U.S. 203, 117 S. Ct. 1997, 138 L.Ed.2d 391 [119 Educ. L. Rep. 29] (1997). [Case No. 11]

⁵¹ 403 U.S. 602, 91 S. Ct. 2105, 29 L.Ed.2d 745 (1971). [Case No. 7]

purchase of secular services and a law from Rhode Island designed to provide salary supplements for teachers in non-public schools.

The statute from Pennsylvania authorized the superintendent of education to purchase specified secular educational services from non-public schools. Officials directly reimbursed the non-public schools for their actual expenditures for teacher salaries, textbooks, and instructional materials. The superintendent had to approve the textbooks and materials, all of which were restricted to the areas of mathematics, modern foreign languages, physical science, and physical education.

Rhode Island officials had the authority to supplement the salaries of certificated teachers of secular subjects in non-public elementary schools by directly paying them amounts not in excess of fifteen percent of their current annual salaries; their salaries could not exceed the maximum paid to public school teachers. The supplements were available to teachers in non-public schools where average per pupil expenditures on secular education were less than in public schools. In addition, the teachers had to use the same materials as their public school colleagues.

At the heart of its rationale, the Supreme Court enunciated the tripartite standard now known as the *Lemon* test. In creating this measure, the Justices added a third prong, dealing with excessive entanglement, from *Walz v. Tax Commission of New York City*,⁵² which upheld New York State's practice of providing state property tax exemptions for church property used in worship services,⁵³ to the two-part test it created in *Abington v. Schempp*. According to the Court:

Every analysis in this area must begin with consideration of the cumulative criteria developed by the Court over many years. Three such tests may be gleaned from our cases. 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."⁵⁴

Addressing entanglement and state aid to religiously affiliated institutions, the Court noted that three further factors came into consideration: "we must examine the character and purposes of the institutions that are benefitted, the nature of the aid that the State provides, and the resulting relationship between the government and religious authority."⁵⁵

As part of its analysis, the Supreme Court reviewed its prior cases on the relationship between church and state in education, concluding

⁵² 397 U.S. 664, 90 S. Ct. 1409, 25 L.Ed.2d 697 (1970).

⁵³ For cases with differing results over whether religious institutions were entitled to tax exemptions, compare *Episcopal School of Cincinnati v. Levin*, 884 N.E.2d 561 [231 Educ. L. Rep. 452] (Ohio 2008) (affirming that the planned use of real property as a school qualified for a tax exemption) with *Faith Builders Church v. Department of Revenue of State*, 882 N.E.2d 1256 [230 Educ. L. Rep. 355] (Ill. App. Ct. 2008), *appeal denied*, 889 N.E.2d 1115 (Ill. 2008) (denying a tax exemption to a church where its operation of a preschool was more characteristic of a commercial day care center than a facility used primarily for religious purposes).

⁵⁴ *Lemon*, 403 U.S. at 612–613.

⁵⁵ *Id.* at 615.

that total separation was unnecessary. The Justices were concerned that the relationship in *Lemon* was too close because the religious schools, which constituted an integral part of the mission of the Catholic Church, involved substantial religious activities. Catholic schools were the sole beneficiaries in Rhode Island and were largely so in Pennsylvania.

The *Lemon* Court distinguished aid for teachers' salaries from secular, neutral, or non-ideological services, facilities, or materials. Recalling *Allen*, the Court remarked that teachers have a substantially different ideological character than books. In terms of potential for involving faith or morals in secular subjects, the Justices feared that while the content of a textbook is ascertainable, a teacher's handling of a subject matter is not. The Court also noted the inherent conflict when teachers who work under the direction of religious officials face having to separate religious and secular aspects of education. The majority decided that the restrictions and oversight necessary to ensure that teachers avoid non-ideological perspectives give rise to impermissible entanglement. The Justices contended that an ongoing history of government grants to non-public schools suggests that these programs were almost always accompanied by varying measures of control. The Court concluded that weighing which expenditures of church-related schools were religious and which were secular created an impermissible intimate relationship between church and state.

In what has developed into a "catch-22" situation, programs typically passed *Lemon*'s first two prongs only to have had excessive entanglement serve as the basis for invalidating various forms of aid to students in religiously affiliated non-public schools. The difficulty was exacerbated because even though the first two parts of the *Lemon* test were developed in the context of prayer cases and the third in a non-educational context, the Supreme Court applied its tripartite standard widely in disputes involving aid to non-public schools and their students.

D. TUITION REIMBURSEMENTS TO PARENTS

Two months after *Lemon*, the Pennsylvania legislature enacted a law permitting parents whose children attended non-public schools to request tuition reimbursement. The same parent as in *Lemon* challenged the new statute as having the primary effect of advancing religion.⁵⁶

In *Sloan v. Lemon* (*Sloan*)⁵⁷ the Supreme Court affirmed that the law impermissibly singled out a class of citizens for special economic benefits. The Justices thought that this was unlike the "indirect" and "incidental" benefits flowing to religious schools from programs aiding all parents by supplying bus transportation and secular textbooks. The Court commented that transportation and textbooks were carefully restricted to the secular side of faith-based schools and did not provide special aid to their students.

⁵⁶ *Lemon v. Sloan*, 340 F. Supp. 1356 (E.D. Pa. 1972).

⁵⁷ 413 U.S. 825, 93 S. Ct. 2982, 37 L.Ed.2d 939 (1973).

The Supreme Court expanded *Sloan's* rationale in a case from New York, *Committee for Public Education and Religious Liberty v. Nyquist* (*Nyquist*).⁵⁸ The Justices decreed that even though the grants went to parents rather than to school officials, this did not necessitate a different result. The Court was of the view that insofar as parents would have used the money to pay for tuition and the law failed to separate secular from religious uses, the effect of the aid would have provided the desired financial support for faith-based schools. The majority rejected the state's argument that parents were not simply conduits because they were free to spend the money in any manner they chose because they paid the tuition and the law merely provided for reimbursements. The Court ascertained that even if the grants were offered as incentives to have parents send their children to religious schools, the law violated the Establishment Clause regardless of whether the money was paid to the religious institutions.

E. INCOME TAX BENEFITS

Another section of the same New York statute in *Nyquist* aided parents via income tax benefits. Under the law, parents of children who attended non-public schools were entitled to income tax deductions as long as they did not receive tuition reimbursements under the other part of the statute. The Supreme Court, invalidating this provision, pointed out that in practice there was little difference, for purposes of evaluating whether the aid had the effect of advancing religion, between a tax benefit and a tuition grant. The Justices noted that under both programs qualifying parents received the same form of reward for sending their children to non-public schools.

In *Mueller v. Allen* (*Mueller*),⁵⁹ the Supreme Court upheld a law from Minnesota granting all parents state income tax deductions for the actual costs of tuition, textbooks, and transportation associated with sending their children to K–12 schools. The statute afforded parents deductions of \$500 for children in grades K–6 and \$700 for those in grades seven to twelve. The Justices distinguished *Mueller* from *Nyquist* primarily because the tax benefit was available to all parents, not only those whose children were in non-public schools, and the deduction was one among many rather than a single taxpayer expense. Conceding the legislature's latitude in creating classifications and distinctions in tax statutes, and that the state could have been considered as gaining a benefit from the plan because it promoted an educated citizenry while reducing the costs of public education, the Court was convinced that the law satisfied all three of *Lemon's* prongs. The Justices were not swayed by the fact that while the public schools were essentially free, the expenses of parents whose children attended them were at most minimal and about ninety-six percent of the taxpayers who benefitted had children enrolled in religious schools.

The first of four cases dealing with the procedural aspects of tax credits arose in Arizona where a statute authorizing a tuition tax credit which allowed state income taxpayers who voluntarily contributed

⁵⁸ 413 U.S. 756, 93 S. Ct. 2955, 37 L.Ed.2d 948 (1973).

⁵⁹ 463 U.S. 388, 103 S. Ct. 3062, 77 L.Ed.2d 721 [11 Educ. L. Rep. 763] (1983). [Case No. 8]

money to a “student tuition organizations (STOs)” to receive dollar-for-dollar tax credits of up to \$500 of their annual tax liability. In turn, the STOs create voucher programs granting scholarships to students who attend primarily non-public schools.

In *Arizona Christian School Tuition Organization v. Winn*,⁶⁰ a divided Supreme Court rejected a challenge to the constitutionality of the tax credit program. Without addressing the merits of the tax credits, the Court rejected the claim of taxpayers that the program violated the Establishment Clause. The Justices upheld the constitutionality of the program because the taxpayers lacked standing insofar as any financial benefit to religion was due to private choices rather than governmental action as to how the funds were spent.

In the second case, the Supreme Court of Oregon determined that insofar as a draft title of a ballot initiative designed to grant state income tax credits to parents of children in grades K–12 was inadequate because it failed to address its goal adequately, it had to be modified before it could be submitted to voters.⁶¹ Next, the Sixth Circuit affirmed a grant of summary judgment in favor of a school board in Kentucky in a dispute over whether a resident could gain access to its Web site in an attempt to gather information while seeking to garner support for a pending law designed to institute tax credits for students in non-public schools, regardless of whether they were religiously affiliated or home schooled.⁶² The court agreed that the taxpayer lacked the right to access the information because the board’s advocacy of defeating the pending bill was government speech not creating a limited open forum requiring it to include opposing points of view.

The Supreme Court of New Hampshire rejected a challenge to the state’s Education Tax Credit program that was created to assist business organizations which contributed to organizations offering scholarships to students to attend non-public schools or public schools outside of their home districts.⁶³ The court found that insofar as the plaintiffs failed to demonstrate that the program harmed their personal rights, they lacked standing.

F. REIMBURSEMENTS TO RELIGIOUSLY AFFILIATED NON-PUBLIC SCHOOLS

In another aspect of *Nyquist*, the Supreme Court invalidated the law’s maintenance and repair provision for non-public schools in light of the lack of meaningful restrictions on how funds were used.⁶⁴ The Justices wrote that insofar as the government is forbidden from erecting buildings in which religious activities are conducted, it may not pay to renovate them when they fall into disrepair.

⁶⁰ ___ U.S. ___, 131 S. Ct. 1436, 179 L.Ed.2d 523 [265 Educ. L. Rep. 855] (2011), *on remand*, 658 F.3d 889 (9th Cir. 2011).

⁶¹ *Terhune v. Myers*, 154 P.3d 1284 [217 Educ. L. Rep. 964] (Or. 2007).

⁶² *Page v. Lexington Cnty. School Dist. No. 1*, 531 F.3d 275 [234 Educ. L. Rep. 538] (4th Cir. 2008).

⁶³ *Duncan v. State of New Hampshire*, 102 A.3d 913 (N.H. 2014).

⁶⁴ 413 U.S. 756, 93 S. Ct. 2955, 37 L.Ed.2d 948 (1973).

On the same day it handed down *Nyquist*, in another case from New York, the Supreme Court applied essentially the same rationale in *Levitt v. Committee for Public Education and Religious Liberty (Levitt)*,⁶⁵ invalidating a statute allowing the state to reimburse non-public schools for expenses incurred while administering and reporting test results as well as other records. Because there were no restrictions on the use of the funds, such that teacher-prepared tests on religious subject matter may have been reimbursable, the Justices agreed that the aid had the primary effect of advancing religious education because there were insufficient safeguards in place to regulate how the monies were spent.⁶⁶

In *Wolman v. Walter*,⁶⁷ the Supreme Court upheld a law from Ohio permitting reimbursements for religious schools in which educators used standardized tests and scoring services. The Justices distinguished these tests from the ones in *Levitt* because the latter were neither drafted nor scored by non-public school personnel. The Court reasoned that the law did not authorize payments to church-sponsored schools for costs associated with administering the tests.

The Supreme Court revisited *Levitt v. Committee for Public Education and Religious Liberty v. Regan*⁶⁸ after the New York State legislature modified the law. Under its new provisions, the statute provided reimbursements to non-public schools for the actual costs of complying with state requirements for reporting on students along with administering mandatory and optional state-prepared examinations. Unlike the statute in Ohio, this law called for the tests to be graded by personnel in the non-public schools that were, in turn, reimbursed for these services. In addition, the law created accounting procedures to monitor reimbursements. The Justices recognized that the differences between the statutes were permissible because scoring essentially objective tests and recording their results along with attendance data offered no significant opportunity for religious indoctrination while serving secular state educational purposes. The Court added that the accounting method did not create excessive entanglement insofar as the reimbursements were equal to the actual costs.

G. INSTRUCTIONAL MATERIALS AND EQUIPMENT

In *Meek v. Pittenger (Meek)*,⁶⁹ the Supreme Court reviewed the constitutionality of loans of instructional materials, including textbooks and equipment, to religiously affiliated non-public schools in Pennsylvania. The Court upheld the loans of textbooks but invalidated the loans of periodicals, films, recordings, and laboratory equipment as well as equipment for recording and projecting in interpreting the statute as having the primary effect of advancing religion due to the predominantly religious character of participating schools. The Justices

⁶⁵ 413 U.S. 472, 93 S. Ct. 2814, 37 L.Ed.2d 736 (1973).

⁶⁶ See also *New York v. Cathedral Acad.*, 434 U.S. 125, 98 S. Ct. 340, 54 L.Ed.2d 346 (1977), *on remand*, 403 N.Y.S.2d 895 (N.Y. 1978) (striking down a successor law providing reimbursements to religious schools for record keeping and testing).

⁶⁷ 433 U.S. 229, 97 S. Ct. 2593, 53 L.Ed.2d 714 (1977).

⁶⁸ 444 U.S. 646, 100 S. Ct. 840, 63 L.Ed.2d 94 (1980).

⁶⁹ 421 U.S. 349, 95 S. Ct. 1753, 44 L.Ed.2d 217 (1975).

were troubled because the only statutory requirement imposed on the schools to qualify for the loans was that their curricula had to offer the subjects and activities mandated by the commonwealth's board of education. The Court stated that insofar as the church-related schools were the primary beneficiaries, the massive aid to their educational function resulted in aid to their sectarian enterprises as a whole.

The Supreme Court reached similar results in *Wolman v. Walter* (*Wolman*),⁷⁰ upholding a statute from Ohio which specified that textbook loans were to be made to students or their parents, rather than directly to their non-public schools. The Justices struck down a provision designed to allow loans of instructional equipment including projectors, tape recorders, record players, maps and globes, and science kits. Echoing *Meek*, the Court invalidated the statute's authorizing the loans based on its fear that insofar as it would have been impossible to separate the secular and sectarian functions for which these items were being used, the aid supported the religious roles of the schools.

In *Mitchell v. Helms*,⁷¹ a case from Louisiana, the Supreme Court expanded the boundaries of permissible aid to religiously affiliated non-public schools. A plurality upheld the constitutionality of Chapter 2 of Title I, now Title VI, of the Elementary and Secondary Education Act (Chapter 2),⁷² a federal law permitting the loans of instructional materials such as library books, computers, television sets, tape recorders, and maps to non-public schools. The Court relied on *Agostini v. Felton*'s modification of the *Lemon* test, discussed below, by reviewing only its first two parts while recasting entanglement as one criterion in evaluating a statute's effect. Insofar as the purpose part of the test was not at issue, the plurality believed it necessary only to consider Chapter 2's effect, concluding that it did not foster impermissible indoctrination because aid was allocated pursuant to neutral secular criteria that neither favored nor disfavored religion and was available to all schools based on secular, nondiscriminatory grounds. The plurality explicitly reversed those parts of *Meek* and *Wolman* inconsistent with its analysis on loans of instructional materials.

H. AUXILIARY SERVICES

In *Meek v. Pittenger*,⁷³ the Supreme Court struck down a statute from Pennsylvania designed to allow public school personnel to provide auxiliary services on-site in religiously affiliated non-public schools. In addition, the Justices banned the delivery of remedial and accelerated instructional programs, guidance counseling and testing, and services for children who were educationally disadvantaged. The Court asserted that it was immaterial that the students would have received remedial, rather than advanced, programming where the required surveillance to ensure the absence of ideology would have given rise to excessive entanglement between church and state.

⁷⁰ 433 U.S. 229, 97 S. Ct. 2593, 53 L.Ed.2d 714 (1977).

⁷¹ 530 U.S. 793, 120 S. Ct. 2530, 147 L.Ed.2d 660 [145 Educ. L. Rep. 44] (2000), *reh'g denied*, 530 U.S. 1296, 121 S. Ct. 15, 147 L.Ed.2d 1039 (2000), *on remand sub nom. Helms v. Picard*, 229 F.3d 467 [148 Educ. L. Rep. 32] (5th Cir. 2000).

⁷² 20 U.S.C.A. §§ 7301–73.

⁷³ 421 U.S. 349, 95 S. Ct. 1753, 44 L.Ed.2d 217 (1975).

The Supreme Court reached a variety of results in *Wolman v. Walter*.⁷⁴ Along with upholding the textbook loan program, the Court permitted officials in Ohio to supply non-public schools with state-mandated tests while allowing public school employees to go on-site to perform diagnostic tests to evaluate whether students needed speech, hearing, and psychological services. The Justices also permitted public funds to be spent providing therapeutic services to students from non-public schools as long as they were delivered off-site. The Court prohibited the state from loaning instructional materials and equipment to schools or from using funds to pay for field trips for students in non-public schools.

*Zobrest v. Catalina Foothills School District*⁷⁵ signaled a shift in the Supreme Court's Establishment Clause jurisprudence. At issue was a school board in Arizona's refusal to provide a sign-language interpreter, under the Individuals with Disabilities Education Act,⁷⁶ for a deaf student who transferred to a Catholic high school. After the Ninth Circuit affirmed that this arrangement would have violated the Establishment Clause,⁷⁷ the Court disagreed.

In *Zobrest*, the Justices viewed the interpreter as providing neutral aid to the student without offering financial benefits to his parents or school because there was no governmental participation in the instruction and was only a conduit effectuating the child's communications. The Court relied in part on *Witters v. Washington Department of Services for the Blind*,⁷⁸ wherein it upheld the constitutionality of extending a general vocational assistance program to a man who is blind as he studied to become a clergyman at a religiously affiliated college.⁷⁹ The Supreme Court of Washington later interpreted its constitution as forbidding such use of public funds and the Supreme Court refused to hear an appeal.⁸⁰

The next year the Supreme Court considered a case where the New York State legislature created a school district which had the same boundaries as those of a religious community. The legislature created the district in an attempt to accommodate the needs of parents who wished to send their children with disabilities to a nearby school with programs designed to honor their religious practices. After all three levels of the state court system struck the statute down as violating the Establishment Clause, in *Board of Education of Kiryas Joel Village*

⁷⁴ 433 U.S. 229, 97 S. Ct. 2593, 53 L.Ed.2d 714 (1977).

⁷⁵ 509 U.S. 1, 113 S. Ct. 2462, 125 L.Ed.2d 1 [83 Educ. L. Rep. 930] (1993).

⁷⁶ 20 U.S.C.A. §§ 1400 *et seq.*

⁷⁷ 963 F.2d 1190 [75 Educ. L. Rep. 178] (9th Cir. 1992).

⁷⁸ 474 U.S. 481, 106 S. Ct. 748, 88 L.Ed.2d 846 [29 Educ. L. Rep. 496] (1986).

⁷⁹ *But see Locke v. Davey*, 540 U.S. 712, 124 S. Ct. 1307, 158 L.Ed.2d 1 [185 Educ. L. Rep. 30] (2004) (invalidating a program from Washington designed to provide a scholarship for a student who pursued a degree in pastoral theology where program rules prohibited the release of funds to pay for individuals who wished to study for the ministry). *But see Colorado Christian Univ. v. Weaver*, 534 F.3d 1245 [235 Educ. L. Rep. 68] (10th Cir. 2008) (striking down a scholarship program for students in higher education who attended in-state non-public institutions for violating both the Establishment and Free Exercise Clauses by excluding "pervasively sectarian" schools).

⁸⁰ *Witters v. State Comm'n for the Blind*, 771 P.2d 1119 [53 Educ. L. Rep. 278] (Wash. 1989), *cert. denied*, 493 U.S. 850, 110 S. Ct. 147, 107 L.Ed.2d 106 (1989).

School District v. Grumet,⁸¹ the Court affirmed that the law was unconstitutional. The Justices agreed that the creation of the district deprived it of a means to review such state action for the purpose of safeguarding the principle that the government should not prefer one religion to another or religion to no religion. The Court explained that while a state may accommodate a group's religious needs by alleviating special burdens, it stepped over the line, especially because the board could have offered an appropriate program at one of its public schools or at a neutral site near one of the village's religious schools.

Days after the Supreme Court vitiated the statute, the New York State legislature amended the law in an attempt to eliminate the Establishment Clause problem. Even so, the Court of Appeals of New York⁸² struck down the revised statute because it violated the Establishment Clause by having the effect of advancing one religion.⁸³

The Eighth Circuit, in a case from Minnesota, accommodated the religious beliefs of parents who objected to the use of technology in public education. The court permitted what was essentially a special public school to operate without the use of technology because it was satisfied that the local board did not improperly endorse religion.⁸⁴

I. SHARED FACILITIES AND SHARED TIME

Conflicts have arisen when officials in public and faith-based schools entered into cooperative arrangements. The extent to which these arrangements are permissible is an unresolved question in light of judicial disagreement about whether public and non-public schools can share facilities and/or operate dual enrollment programs. The key issues in these disputes are whether public funds are used for religious purposes and whether religious influences are present in public schools.

When dealing with the use of public funds in religious schools, disputes occur after local school boards lease part or all of church-owned buildings or other property.⁸⁵ In the first of a pair of cases separated by forty years, the Supreme Court of Nebraska invalidated a leasing program where part of a building was used by a religious school in light of the garb and devotional attitude of the sisters who taught there, the instructions and services that a local priest offered in classrooms and

⁸¹ 512 U.S. 687, 114 S. Ct. 2481, 129 L.Ed.2d 546 [91 Educ. L. Rep. 810] (1994).

⁸² *Grumet v. Cuomo*, 659 N.Y.S.2d 173, 681 N.E.2d 340 [119 Educ. L. Rep. 603] (1997); *Grumet v. Pataki*, 697 N.Y.S.2d 846 [139 Educ. L. Rep. 986] (1999), *cert. denied*, 528 U.S. 946, 120 S. Ct. 363, 145 L.Ed.2d 284 (1999).

⁸³ For a related dispute, see *J.G. and R.G. ex rel. N.G. v. Kiryas Joel Union Free School Dist.*, 777 F. Supp. 2d 606 [270 Educ. L. Rep. 135] (S.D.N.Y. 2011) (denying reimbursement to parents who unilaterally placed their son in a religious school which lacked the capacity to educate children with disabilities).

⁸⁴ *Stark v. Independent School Dist., No. 640*, 123 F.3d 1068 [121 Educ. L. Rep. 41] (8th Cir. 1997), *reh'g and suggestion for reh'g en banc denied* (1997), *cert. denied*, 523 U.S. 1094, 118 S. Ct. 1560, 140 L.Ed.2d 792 (1998).

⁸⁵ See *Rogers v. Mulholland*, 858 F. Supp. 213 [284 Educ. L. Rep. 213 (D.R.I. 2012)] (rejecting a challenge to a policy which allowed religiously affiliated non-public schools to use public athletic facilities for games because doing so did not violate the *Lemon* or endorsement tests). But see *Wirtz v. City of S. Bend, Ind.*, 813 F. Supp.2d 1051 [276 Educ. L. Rep. 718] (N.D. Ind. 2011), *appeal dismissed as moot*, 669 F.3d 860 [277 Educ. L. Rep. 104] (7th Cir. 2012) (enjoining a city from completing a below-market sale of a parcel of land to a religiously affiliated non-public school as an endorsement of religion).

the chapel, and insignia in the building created an environment reflecting Catholic beliefs.⁸⁶ In the second case, the court observed that a public board may use or lease classrooms in a church or other building affiliated with a religious organization for public school purposes if the property is under the control of public school officials and the instruction is secular.⁸⁷

Citing the latter case from Nebraska, the Supreme Court of Georgia affirmed that an arms-length commercial contract under which a public school system leased classroom space from a church did not violate the Establishment Clause of the state constitution.⁸⁸ The court pointed out that insofar as the purpose of the lease was to permit the public school system to establish and operate a kindergarten in a non-sectarian environment, the payments were not an unconstitutional form of monetary aid to the church.

Questions involving shared time or dual enrollment depend largely on the wording of compulsory education laws relating to religion and education. In an early case, the Supreme Court of Pennsylvania posited that a student who attended a religious school could not be denied the chance to enroll in a manual training course in a local public school.⁸⁹

More than fifty years later, an appellate court in Illinois upheld an experimental program which allowed students who otherwise would have been eligible for full-time enrollment in public high schools to attend classes there on a part-time basis and take other courses in a religious school.⁹⁰ Rather than rely on the First Amendment, the court acknowledged that the power of local boards to experiment with educational program applied to all non-public schools, not just ones that were religiously affiliated. The court was of the opinion that the state's compulsory education law did not specify that all classes had to take place in one location.

Soon thereafter, the Supreme Court of Missouri reached the opposite outcome.⁹¹ The court questioned procedures whereby public funds were used to send teachers into religious schools to provide speech therapy and to allow some students to go to public schools to receive speech therapy during regular class days. The court prohibited public school personnel from working in religious schools while invalidating the practice of permitting their students to travel to public schools. The court interpreted the state's compulsory education law as requiring the class day to be of a set length spent entirely in one type of school.

The Supreme Court of Michigan reviewed shared time in relation to a state constitutional amendment prohibiting financial aid to students or their non-public schools. The court upheld the program in

⁸⁶ *State ex rel. Pub. School Dist. No. 6, Cedar Cnty. v. Taylor*, 240 N.W. 573 (Neb. 1932). See also *Zellers v. Huff*, 236 P.2d 949 (N.M. 1951) (prohibiting the use of facilities where many direct and indirect religious influences were present in schools).

⁸⁷ *State ex rel. School Dist. of Hartington v. Nebraska State Bd. of Educ.*, 195 N.W.2d 161 (Neb. 1972), cert. denied, 409 U.S. 921, 93 S. Ct. 220, 34 L.Ed.2d 182 (1972).

⁸⁸ *Taetle v. Atlanta Indep. School Sys.*, 625 S.E.2d 770 (Ga. 2006).

⁸⁹ *Commonwealth ex rel. Wehrle v. School Dist.*, 88 A. 481 (Pa. 1913).

⁹⁰ *Morton v. Board of Educ.*, 216 N.E.2d 305 (Ill. App. Ct. 1966).

⁹¹ *Special Dist. for Educ. and Training of Handicapped Children v. Wheeler*, 408 S.W.2d 60 (Mo. 1966).

clarifying that if teaching took place on leased premises or in non-public schools, services had to be provided only under conditions appropriate for public schools.⁹² The court maintained that ultimate and immediate control of subject matter, personnel, and premises had to be under the direction of public school officials, and the courses had to be open to all eligible students.

In a case from Rhode Island, the First Circuit reached a like outcome in summarily upholding an order refusing to invalidate a leasing agreement because it did not violate the *Lemon* test.⁹³ Federal trial courts in New Hampshire⁹⁴ and Kentucky⁹⁵ successively struck down dual-enrollment plans intended to have permitted boards to lease space in faith-based schools and have teachers selected by public school officials teach secular subjects in the non-public schools.

More than a decade after the Supreme Court of Michigan upheld the state constitutional amendment on shared time officials in Grand Rapids created an extensive program. The program increased to the point where publicly paid teachers conducted ten percent of classes in religious schools and a substantial number of them had worked in the faith-based schools. The Sixth Circuit invalidated the plan for violating the Establishment Clause.⁹⁶ On further review, in *School District of City of Grand Rapids v. Ball (Ball)*,⁹⁷ the Supreme Court affirmed that the program failed all three prongs of the *Lemon* test. Moreover, the Court struck down an after school community education program in which teachers from religious schools worked part-time for the local public school board, instructing students in their own buildings.

On the same day it resolved *Ball*, the Supreme Court addressed a case involving the New York City Board of Education (NYCBOE) over the constitutionality of permitting public school teachers to provide remedial instruction under Title I of the Elementary and Secondary Education Act of 1965 (Title I)⁹⁸ for specifically targeted children, who were educationally disadvantaged, on-site in their religiously affiliated schools. After a federal trial court refused to enjoin the program but the Second Circuit invalidated it, a divided Supreme Court, in *Aguilar v. Felton (Aguilar)*,⁹⁹ agreed. Even though the NYCBOE developed safeguards to ensure that public funds were not spent for religious purposes, the Court struck the program down based solely on the fear that a monitoring system might have created excessive entanglement of church and state.

⁹² *In re Proposal C.*, 185 N.W.2d 9 (Mich. 1971).

⁹³ *Thomas v. Schmidt*, 397 F. Supp. 203 (D.R.I. 1975), *aff'd*, 539 F.2d 701 (1st Cir. 1976).

⁹⁴ *Americans United for Separation of Church and State v. Paire*, 359 F. Supp. 505 (D.N.H. 1973).

⁹⁵ *Americans United for Separation of Church and State v. Board of Educ.*, 369 F. Supp. 1059 (E.D. Ky. 1974).

⁹⁶ *Americans United for Separation of Church and State v. School Dist. of City of Grand Rapids*, 718 F.2d 1389 [14 Educ. L. Rep. 40] (6th Cir. 1983).

⁹⁷ 473 U.S. 373, 105 S. Ct. 3216, 87 L.Ed.2d 267 [25 Educ. L. Rep. 1006] (1985).

⁹⁸ For an earlier case involving the Elementary and Secondary Education Act, see *Wheeler v. Barrera*, 417 U.S. 402, 94 S. Ct. 2274, 41 L.Ed.2d 159 (1974) (interpreting the law as not requiring public school officials to use federal funds to provide on-site instruction for children who were educationally deprived in their religiously affiliated non-public schools).

⁹⁹ 473 U.S. 402, 105 S. Ct. 3232, 87 L.Ed.2d 290 [25 Educ. L. Rep. 1022] (1985).

Twelve years later, in *Agostini v. Felton (Agostini)*,¹⁰⁰ the Supreme Court took the unusual step of dissolving the injunction it upheld in *Aguilar*. In a major shift in its jurisprudence, the Court reasoned that the Title I program did not violate any of the three standards it used to consider whether state aid advanced religion absent governmental indoctrination, there were no distinctions between recipients based on religion, and there was no excessive entanglement. The Justices ruled that a federal program designed to provide supplemental, remedial instruction and counseling services to disadvantaged children on a neutral basis is not invalid under the Establishment Clause when the assistance is provided on-site in religiously affiliated non-public schools pursuant to a program containing safeguards such as those that the NYCBOE implemented. Perhaps the most significant development in *Agostini* was the Court's modification of the *Lemon* test by reviewing only its first two parts, purpose and effect, while recasting entanglement as one criterion in reviewing a law's effect.

The Circuit Court for the District of Columbia, in a case with a broad resemblance to *Agostini*, found that the federally chartered AmeriCorps Education Awards Program (EAP), a nationwide community service program, did not violate the Establishment Clause even though some participants taught religion and secular subjects in religious schools.¹⁰¹ The court pointed out that the EAP was permissible because it was a government program neutral toward religion while providing aid directly to a broad class of citizens who, in turn, directed government assistance to faith-based schools entirely on their own genuine and independent private choices. The court added that the program was constitutional because no objective observer who was familiar with the full history and context of the EAP would have viewed the aid that the religious institutions received as carrying the imprimatur of governmental endorsement.

J. VOUCHERS

Vouchers have generated controversy with courts reaching mixed results in disputes over their constitutionality. The Supreme Court of Wisconsin upheld a program to offer vouchers to students who attended religiously affiliated non-public schools.¹⁰² At the same time, state¹⁰³ and federal¹⁰⁴ appellate courts in Maine upheld laws including non-sectarian schools but specifically excluding religiously affiliated non-public schools from taking part in tuition vouchers programs. Subsequently, Maine's highest court upheld a statute prohibiting the

¹⁰⁰ 521 U.S. 203, 117 S. Ct. 1997, 138 L.Ed.2d 391 [119 Educ. L. Rep. 29] (1997). [Case No. 11]

¹⁰¹ *American Jewish Cong. v. Corporation for Nat'l and Cmty. Serv.*, 399 F.3d 351 [195 Educ. L. Rep. 733] (D.C. Cir. 2005), *cert. denied*, 546 U.S. 1130, 126 S. Ct. 1132, 163 L.Ed.2d 927 [205 Educ. L. Rep. 573] (2006).

¹⁰² *Jackson v. Benson*, 578 N.W.2d 602 [126 Educ. L. Rep. 399] (Wis. 1998), *cert. denied*, 525 U.S. 997, 119 S. Ct. 466, 142 L.Ed.2d 419 (1998). *See also Thomas More High School v. Burmaster*, 704 N.W.2d 349 [202 Educ. L. Rep. 793] (Wis. Ct. App. 2005), *review denied* (2005) (affirming that the program applied only to non-public schools in Milwaukee).

¹⁰³ *Bagley v. Raymond School Dep't*, 728 A.2d 127 [134 Educ. L. Rep. 226] (Me. 1999), *cert. denied*, 528 U.S. 947, 120 S. Ct. 364, 145 L.Ed.2d 285 (1999).

¹⁰⁴ *Strout v. Albanese*, 178 F.3d 57 [135 Educ. L. Rep. 398] (1st Cir. 1999), *cert. denied*, 528 U.S. 931, 120 S. Ct. 329, 145 L.Ed.2d 256 (1999).

use of either state¹⁰⁵ or municipal¹⁰⁶ general funds to pay tuition for children who attended religiously affiliated non-public schools. Earlier, the Supreme Court of Vermont affirmed the unconstitutionality of a state law intended to provide reimbursements to parents for tuition for religiously affiliated non-public schools.¹⁰⁷ Still, it was not until a dispute from Ohio made its way to the Supreme Court that vouchers assumed center stage.

The Ohio General Assembly, acting pursuant to a desegregation order, enacted the Ohio Pilot Project Scholarship Program (OPPSP) to assist children in Cleveland's failing public schools.¹⁰⁸ The main goal of the OPPSP, which contains significant anti-discrimination provisions, was to permit an equal number of students to receive vouchers and tutorial assistance grants while attending regular public schools. Another part of the law provided greater choices to parents and children via the creation of community (known as charter schools elsewhere) and magnet schools while a third section featured tutorial assistance for children.

In an initial challenge, the Supreme Court of Ohio upheld the OPPSP¹⁰⁹ but severed the part of the law affording priority to parents who belonged to religious groups supporting sectarian institutions. In interpreting the OPPSP as having violated the state constitutional requirement that every statute have only one subject, the court struck it down. The court stayed enforcement of its order to avoid disrupting the then current school year. The General Assembly of Ohio quickly re-enacted a revised statute.

A federal trial court in Ohio, relying largely on *Nyquist*,¹¹⁰ enjoined the operation of the revised statute as a violation of the Establishment Clause.¹¹¹ A divided Sixth Circuit, also applying *Nyquist*, affirmed that the OPPSP had the impermissible effect of advancing religion.¹¹²

In *Zelman v. Simmons-Harris* (*Zelman*), the Supreme Court reversed the judgment of the Sixth Circuit and upheld the constitutionality of the OPPSP. Relying on *Agostini*, the Court began by considering "whether the government acted with the purpose of advancing or inhibiting religions [and] whether the aid has the 'effect' of advancing or inhibiting religion."¹¹³ Conceding the lack of a dispute over the program's valid secular purpose in providing programming for poor children in a failing school system, the Justices examined whether doing so had the forbidden effect of advancing or inhibiting religion.

¹⁰⁵ *Anderson v. Town of Durham*, 895 A.2d 944 [207 Educ. L. Rep. 978] (Me. 2006), cert. denied, 549 U.S. 1051, 127 S. Ct. 661, 166 L.Ed.2d 512 (2006).

¹⁰⁶ *Joyce v. State of Maine*, 951 A.2d 69 [234 Educ. L. Rep. 175] (Me. 2008).

¹⁰⁷ *Chittenden Town School Dist. v. Department of Educ.*, 738 A.2d 539 [138 Educ. L. Rep. 858] (Vt. 1999).

¹⁰⁸ OHIO REV. CODE ANN. §§ 3313.974 et seq.

¹⁰⁹ *Simmons-Harris v. Goff*, 711 N.E.2d 203 [135 Educ. L. Rep. 596] (Ohio 1999).

¹¹⁰ 413 U.S. 756, 93 S. Ct. 2955, 37 L.Ed.2d 948 (1973).

¹¹¹ *Simmons-Harris v. Zelman*, 72 F. Supp.2d 834 [140 Educ. L. Rep. 243] (N.D. Ohio 1999).

¹¹² *Simmons-Harris v. Zelman*, 234 F.3d 945 [149 Educ. L. Rep. 691] (6th Cir. 2000).

¹¹³ 536 U.S. 639, 649, 122 S. Ct. 2460, 153 L.Ed.2d 604 [166 Educ. L. Rep. 30] (2002). [Case No. 14]

The *Zelman* Court was satisfied that the voucher program was constitutional because, as part of the state's far-reaching attempt to provide greater educational opportunities in a failing school system, it allocated aid on the basis of neutral secular criteria that neither favored nor disfavored religion, was made available to both religious and secular beneficiaries on a nondiscriminatory basis, and offered assistance directly to a broad class of citizens who directed the aid to religious schools based entirely on their own genuine and independent private choices.

The Justices were untroubled by the fact that most of the participating schools in *Zelman* were religiously affiliated because parents chose to send their children to them insofar as officials in the surrounding public schools refused to participate in the program. The Court recognized that most of the students went to religiously affiliated schools not as a matter of law but because they were unwelcomed in the public schools. The majority also indicated that insofar as the OPPSP differed greatly from the program in *Nyquist*, the lower courts misplaced their reliance on its holding. The Court concluded that in light of an unbroken line of cases supporting true private choice to provide benefits directly to a wide range of needy private individuals, its only choice was to uphold the voucher program.

Litigation after *Zelman* challenging vouchers has focused on state constitutional grounds because they are typically more stringent than their federal counterpart. In a case that began before *Zelman* reached the Supreme Court, an appellate court in Florida¹¹⁴ initially upheld vouchers for students who attended religious schools. In the aftermath of *Zelman*, the Supreme Court of Florida declared that the voucher system violated the state constitution's requirement of a uniform system of free public schools.¹¹⁵ In a related claim, the Eleventh Circuit affirmed that under a voucher program available only to children who attended failing schools, the state of Florida had no duty to pay for students to attend non-public schools.¹¹⁶

In other cases, the Supreme Court of Colorado affirmed that a program requiring boards to pay a portion of locally raised tax revenues to parents with children who performed unsatisfactorily in public schools, which in turn required the parents to pay those funds to non-public schools with special programs designed for those students, violated the local control provisions of the state constitution.¹¹⁷ Further, the First Circuit affirmed that a law in Maine allowing only non-sectarian non-public schools to participate in a program permitting students to receive public funds to attend K–8 schools, did not violate equal protection because a rational relationship existed between the statute and the state's legitimate interests.¹¹⁸ The court rejected the

¹¹⁴ *Bush v. Holmes*, 767 So. 2d 668 [147 Educ. L. Rep. 1125] (Fla. Dist. Ct. App. 2000), review denied, 790 So. 2d 1104 (Fla. 2001).

¹¹⁵ *Bush v. Holmes*, 919 So. 2d 392 [206 Educ. L. Rep. 756] (Fla. 2006).

¹¹⁶ *Children A & B ex rel. Cooper v. Florida*, 355 F. Supp.2d 1298 [195 Educ. L. Rep. 889] (N.D. Fla. 2004), *aff'd sub nom. Cooper v. Florida*, 140 Fed.Appx. 845 [201 Educ. L. Rep. 111] (11th Cir. 2005).

¹¹⁷ *Owens v. Colorado Cong. of Parents, Teachers and Students*, 92 P.3d 933 [189 Educ. L. Rep. 395] (Colo. 2004).

¹¹⁸ *Eulitt ex rel. Eulitt v. Maine, Dep't of Educ.*, 386 F.3d 344 [192 Educ. L. Rep. 651] (1st Cir. 2004).

parental claim that this law infringed on their free exercise of religion by impermissibly interfering with their fundamental right to choose religious education for their children.

The Supreme Court of Utah, in a case not reaching the merits of the claim, refused to grant a writ to sponsors of both a voucher law and a referendum on the statute challenging the ballot title of the referendum.¹¹⁹ In denying a request to treat the referendum ballot title as neither patently false nor biased, the court refused to modify its wording.

On the other hand, the Supreme Court of Arizona upheld a voucher program for children with disabilities who were in foster care where the funds were earmarked for students making them the true beneficiaries of the law.¹²⁰ Later, the Supreme Court of Indiana upheld a voucher program designed to allow parents to send their children to non-public schools.¹²¹ The court affirmed that the state constitution did not exclude religious teachings in publicly financed schools coupled with the fact that the program's direct beneficiaries were lower-income families with school-aged children rather than the schools that the students attended. The court added that parents were not restricted to selecting religious schools for their children. Conversely, the Supreme Court of Louisiana,¹²² without addressing religion, invalidated a voucher program because it diverted public funds to non-public schools.¹²³

IV. THE SUPREME COURT'S MODERN ESTABLISHMENT CLAUSE JURISPRUDENCE: RELIGIOUS ACTIVITIES AND PUBLIC SCHOOLS

A. IN GENERAL

Unlike its evolving jurisprudence with regard to aid to students and their religiously affiliated non-public schools, the Supreme Court's attitude toward school-sponsored prayer and religious activity in public education has remained constant. Starting with *Engel v. Vitale*,¹²⁴ the Court has had an essentially unbroken line of cases prohibiting school-sponsored prayer and religious activities in public schools.

B. RELEASE TIME

Permitting public school officials to release children during the class day to allow them to receive religious instruction reached the

¹¹⁹ *Snow v. Office of Legislative Research and Gen. Counsel*, 167 P.3d 1051 [224 Educ. L. Rep. 447] (Utah 2007).

¹²⁰ *Cain v. Horne*, 202 P.3d 1178 [242 Educ. L. Rep. 435] (Ariz. 2009). See also *Niehaus v. Huppenthal*, 310 P.3d 983 (Ariz. Ct. App. 2013), rev. denied (2014) (upholding a similar program for students with disabilities).

¹²¹ *Meredith v. Pence*, 984 N.E.2d 1213 [290 Educ. L. Rep. 998] (Ind. 2013).

¹²² *Louisiana Fed'n of Teachers v. State*, 118 So. 3d 1033 [296 Educ. L. Rep. 666 (La. 2013)].

¹²³ For a related case, see *Brumfield v. Dodd*, 749 F.3d 339 [304 Educ. L. Rep. 687] (5th Cir. 2014) (allowing parents to intervene as a matter of right in a dispute wherein the United States challenged the program pursuant to a desegregation decree).

¹²⁴ 370 U.S. 421, 82 S. Ct. 1261, 8 L.Ed.2d 601 (1962).

Supreme Court twice. The first challenge arose as a result of a dispute in Illinois where members of the Jewish, Roman Catholic, and Protestant faiths formed a voluntary association and obtained approval from the local board for a cooperative plan to offer religion classes to children whose parents agreed to have them take part in the program. The students were released from their classes and their religion instructors notified their regular teachers if they were absent. The courses were taught in regular classrooms, in three separate groups, by a Jewish rabbi, Catholic priests, and Protestant teachers. Students who did not attend religious instruction went to other rooms to pursue their secular studies.

In *People of State of Illinois ex rel. McCollum v. Board of Education of School District No. 71, Champaign County (McCollum)*,¹²⁵ the Supreme Court invalidated the program. The Justices pointed out not only that tax-supported buildings were being used to disseminate religious doctrine but also that school officials gave religious groups invaluable, impermissible, aid in helping them by providing students for the classes via the state's compulsory education machinery.

The Supreme Court next considered the constitutionality of another type of release time program. A statute from New York allowed officials to release students from their public schools so that they could attend religious classes elsewhere. Opponents of this practice viewed it as basically no different from the one in *McCollum*. The opponents argued that the weight and influence of public schools was used to support a program of religious instruction because officials kept records of which children were released while those who remained had to stay in school even though regular classes were halted so that their peers could attend released time programs.

In *Zorach v. Clauson (Zorach)*,¹²⁶ the Supreme Court upheld the constitutionality of the program, affirming that public officials can accommodate the religious wishes of parents by releasing their children at their request. Unlike *McCollum*, the Justices agreed that the practice was permissible because public schools were not used for religious instruction. The Court categorized this disagreement as one of the degrees of separation of government and religion, analogizing that release time was not unlike acceptable arrangements and excuses for students who were absent for religious reasons.¹²⁷

Almost fifty years after *Zorach*, the Second Circuit rejected a challenge to another release time program from New York that a mother filed on behalf of her children, neither of whom took part in the activity.¹²⁸ Under the program, parents who wished to have their

¹²⁵ 333 U.S. 203, 68 S. Ct. 461, 92 L.Ed. 649 (1948). [Case No. 2]

¹²⁶ 343 U.S. 306, 72 S. Ct. 679, 96 L.Ed. 954 (1952). [Case No. 3]

¹²⁷ New York City's Public Schools continue to permit released time. See *Regulation of the Chancellor, A-630, Religious Accommodation of Students*, available at <http://docs.nycenet.edu/docushare/dsweb/Get/Document-27/A-630.pdf>.

¹²⁸ Earlier, the Supreme Court of Wisconsin, in a case involving an amendment to the state constitution permitting release time, rejected a claim that later Supreme Court cases superseded *Zorach*. *State ex rel. Holt v. Thompson*, 225 N.W.2d 678 (Wis. 1975). Also, the Fourth, *Smith v. Smith*, 523 F.2d 121 (4th Cir. 1975), cert. denied, 423 U.S. 1073, 96 S. Ct. 856, 47 L.Ed.2d 83 (1976) and Ninth, *Lanner v. Wimmer*, 662 F.2d 1349 [1 Educ. L. Rep. 138] (10th Cir. 1981), Circuits rebuffed similar challenges to *Zorach*'s viability.

children participate were released from classes early so that they could receive instruction at nearby religiously affiliated non-public schools. Students who did not take part in the program remained in classrooms but did not engage in organized activities until their peers returned. Affirming a grant of summary judgment in favor of the school board, the court determined that the program passed Establishment Clause analysis because it did not use public funds or on-site religious instruction, was purely voluntary, and educators did not bring any specific coercion or pressure to bear on non-participants.¹²⁹

In a dispute from South Carolina, the Fourth Circuit affirmed the rejection of a challenge to a release time program that granted academic credit to students who took part in religious studies.¹³⁰ Citing *Zorach* and *Lemon*, the court upheld the program because it did not have an impermissible religious motive, its principal effect did not advance religion, and it did not create excessive entanglement insofar as students could earn credit without regard to particular religions or denominations.¹³¹

C. USE OF THE BIBLE

Long a staple resource in American education,¹³² the landscape with regard to the use of the Bible in public schools shifted dramatically in the wake of the companion cases of *School District of Abington Township v. Schempp* and *Murray v. Curlett (Abington)*,¹³³ suits originating in Pennsylvania and Maryland respectively.

In *Abington*, the Supreme Court found that prayer and Bible reading, as part of the opening of a school day, violated the Establishment Clause. The Justices indicated that insofar as the Bible was a sectarian document, the First Amendment dictated governmental neutrality with regard to religious matters based on the premises that the state could not aid any or all religions and that all have the right to choose personal courses with reference to religion, free of any state compulsion. The Court posited that it consistently recognized that the First Amendment withdrew all legislative power from the government respecting religious beliefs or their expression.

Creating a measure to evaluate the constitutionality of prayer and Bible reading in public schools, the Supreme Court declared that “[t]he test may be stated as follows: what are the purpose and the primary effect of the [legislative] enactment? . . . [T]o withstand the strictures of the Establishment Clause there must be a secular legislative purpose

¹²⁹ *Pierce ex rel. Pierce v. Sullivan W. Cent. School Dist.*, 379 F.3d 56 [191 Educ. L. Rep. 36] (2d Cir. 2004).

¹³⁰ *Moss v. Spartanburg Cnty. School Dist. No. 7*, 683 F.3d 599 [281 Educ. L. Rep. 791] (4th Cir. 2012), ___ U.S. ___, 133 S. Ct. 623, 184 L.Ed.2d 396 (2012).

¹³¹ Ohio has since enacted a statute allowing students to earn academic credit for classes taken during release time. OH REV. CODE ANN. § 3313.6022.

¹³² Apparently the first case involving the Bible in public schools was *Board of Educ. of Cincinnati v. Minor*, 23 Ohio St. 211 (Ohio 1872) (upholding a board’s vote to discontinue Bible reading in public schools). But see, e.g., *Wilkerson v. City of Rome*, 110 S.E. 895 (Ga. 1922) (refusing to invalidate an ordinance calling for a board to have school days start with readings from the King James Version of the Bible).

¹³³ 374 U.S. 203, 83 S. Ct. 1560, 10 L.Ed.2d 844 (1963). [Case No. 4]

and a primary effect that neither advances nor inhibits religion.”¹³⁴ Perhaps in an attempt to allay concerns that it was anti-religious, the Justices added that nothing in their opinion forbade the secular study of the Bible in public schools in appropriate contexts such as literature or history. The Court wrote:

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.¹³⁵

Following *Abington*, controversies continue over the place, if any, of the Bible in public school curricula.¹³⁶ For instance, the Fifth Circuit disapproved a “Bible as Literature” course taught essentially from a Christian perspective as part of fundamentalist and/or evangelical doctrine.¹³⁷ The court also noted that the state-approved textbook did not contain a discussion of the Bible’s literary qualities. Other courts suggested guidelines under which the Bible could have been studied, including using fully certificated teachers who are employed in the same manner as other staff, vesting complete control of course content and materials in school boards, supervising courses to assure objectivity in teaching, and forbidding such classes from being mandatory.¹³⁸

The Eighth Circuit affirmed the unconstitutionality of a program in Arkansas under which students left their regular classrooms to learn about the Bible in voluntary sessions during school hours.¹³⁹ The classes were taught by volunteers who did not act on behalf of any church and students did not receive course credit for participating. Sidestepping whether the classes were primarily religious or secular, the court viewed the program as having had the principal effect of advancing Christianity.

A federal trial court in Mississippi forbade a school board from offering a Bible-study class taught in a rotation with music, physical education, and library classes or one purportedly to teaching the history of the Middle East as violating the Establishment Clause.¹⁴⁰ Similarly, opponents challenged a board’s adoption of a two-semester Bible history course, with time equally divided between the Old and New Testaments, even though it already had a comparative religion class. A federal trial court in Florida permitted the Old Testament class to proceed but enjoined the course on the New Testament based on its

¹³⁴ *Id.* at 222.

¹³⁵ *Id.* at 225. Justice Brennan’s concurrence added that “[t]he holding of the Court today plainly does not foreclose teaching about the Holy Scriptures or about the differences between religious sects in classes in literature or history . . .” *Id.* at 300.

¹³⁶ See, e.g., *Roberts v. Madigan*, 921 F.2d 1047 [64 Educ. L. Rep. 1038] (10th Cir. 1990), *cert. denied*, 505 U.S. 1218, 112 S. Ct. 3025, 120 L.Ed.2d 896 (1992) (preventing a teacher from silently reading a Bible during class time).

¹³⁷ *Hall v. Board of School Comm’rs of Conecuh Cnty.*, 656 F.2d 999 (5th Cir. 1981).

¹³⁸ *Wiley v. Franklin*, 497 F. Supp. 390 (E.D. Tenn. 1980); *Crockett v. Sorenson*, 568 F. Supp. 1422 [13 Educ. L. Rep. 290] (W.D. Va. 1983).

¹³⁹ *Doe v. Human*, 725 F. Supp. 1503 [57 Educ. L. Rep. 888] (W.D. Ark. 1989), *aff’d*, 923 F.2d 857 [65 Educ. L. Rep. 714] (8th Cir. 1990), *cert. denied*, 499 U.S. 922, 111 S. Ct. 1315, 113 L.Ed.2d 248 (1991).

¹⁴⁰ *Herdahl v. Pontotoc Cnty. School Dist.*, 933 F. Supp. 582 [112 Educ. L. Rep. 131] (N.D. Miss. 1996).

belief that the plaintiffs were likely to prevail on the merits of their claim that it violated the Establishment Clause.¹⁴¹ The Sixth Circuit affirmed that a board in Tennessee's fifty-one-year practice of permitting students from a local Christian college to teach weekly religion classes presenting the Bible as religious truth during the regular school day for children in grades K–5 violated the Establishment Clause because it failed all three parts of the *Lemon* test as an unconstitutional establishment of religion.¹⁴²

D. PRAYER IN SCHOOL

1. IN GENERAL

In *Engel v. Vitale*,¹⁴³ the Supreme Court accepted its first case on school prayer. At issue was a prayer composed by the New York State Board of Regents for suggested use in public schools to inculcate moral and spiritual values in students. When a local board adopted the prayer as part of a policy mandating its daily recitation in class, parents challenged this action even though the policy included a provision permitting parents to request written exemptions for their children. The prayer was: "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our country."¹⁴⁴

Reversing earlier judgments in favor of the school board, the Supreme Court invalidated the daily recitation of prayer as a religious activity inconsistent with the Establishment Clause. The Justices reviewed the history of state-sponsored prayer in the Anglo-American system of government from Sixteenth Century England through the Colonial Period, ruling that "[t]here can be no doubt that New York State's prayer program officially establishes the religious beliefs embodied in the Regents' prayer."¹⁴⁵

The Supreme Court observed that the First Amendment's Establishment and Free Exercise Clauses forbid different types of governmental encroachment against religion. The Justices maintained that insofar as the Establishment Clause, unlike the Free Exercise Clause, does not depend on direct government compulsion, public officials violate it by enacting laws establishing an official religion regardless of whether their actions coerce non-believers. The Court feared that even absent overt pressure, placing the power, privilege, and support of the government behind a particular religious belief ran the risk of asserting indirect coercion on others, especially minorities, to conform to the officially approved religion. The Justices decided that insofar as the Founders considered religion to be "too personal, too sacred, too holy, to permit its 'unhallowed perversion' by a civil

¹⁴¹ *Gibson v. Lee Cnty. School Bd.*, 1 F. Supp.2d 1426 [127 Educ. L. Rep. 85] (M.D. Fla. 1998).

¹⁴² *Doe v. Porter*, 370 F.3d 558 [188 Educ. L. Rep. 100] (6th Cir. 2004).

¹⁴³ 370 U.S. 421, 82 S. Ct. 1261, 8 L.Ed.2d 601 (1962).

¹⁴⁴ *Id.* at 422.

¹⁴⁵ *Id.* at 430.

magistrate,”¹⁴⁶ state-sponsored prayer was contrary to their original intent in drafting the First Amendment.

A year later, the Supreme Court barred the use of prayer and Bible reading as part of opening exercises in public schools in *Abington*, discussed in the previous section. Twenty years would pass before the Court returned to the question of prayer in public schools on the merits.

In the interim, lower courts addressed prayer in a variety of circumstances. The Second Circuit upheld an order forbidding students in New York from reciting prayers before eating mid-morning snacks.¹⁴⁷ The Seventh Circuit barred the use of a prayer in Illinois that did not include the word “God”¹⁴⁸ even though school assemblies were voluntary and leaders of the student council had requested permission to begin them with a prayer. Also, the Supreme Court of New Jersey invalidated a board policy intended to allow students, immediately prior to the formal opening of school, to join in a voluntary religious exercise in a gymnasium where a student volunteer would select, and read, the remarks of the chaplain of the Congressional Record to the gathered assembly.¹⁴⁹ The court interpreted this approach as being no different from reading prayers directly from a religious source.

As to voluntary school prayer, the Supreme Judicial Court of Massachusetts ordered an end to a local school committee’s plan for voluntary prayer instituted in accord with a statute permitting students to take part in such activities before the beginning of the school day if their parents approved.¹⁵⁰ During that same year, the Third Circuit struck down a program, supported by students and parents in Pennsylvania, to permit voluntary nondenominational prayer and Bible reading because it was state action.¹⁵¹ A decade later, the Fifth Circuit invalidated the same kind of statute from Louisiana¹⁵² while the Eleventh Circuit argued that it was unconstitutional for teachers in Alabama to engage in prayer absent a board policy or state statute motivating their activities.¹⁵³ The court wrote that insofar as board officials were aware of the activities but did not stop them, they, in effect, ratified the conduct of the teachers.

When a board in Arkansas allowed a band teacher to conduct prayer and religious activities at school functions, the Eighth Circuit rendered it liable for attorney fees incurred in obtaining an injunction

¹⁴⁶ *Id.* at 432.

¹⁴⁷ *Stein v. Oshinsky*, 348 F.2d 999 (2d Cir. 1965), *cert. denied*, 382 U.S. 957, 86 S. Ct. 435, 15 L.Ed.2d 361 (1965).

¹⁴⁸ *DeSpain v. DeKalb Cnty. Cmty. School Dist.*, 384 F.2d 836 (7th Cir. 1967), *cert. denied*, 390 U.S. 906, 88 S. Ct. 815, 19 L.Ed.2d 873 (1968).

¹⁴⁹ *State Bd. of Educ. v. Board of Educ. of Netcong*, 270 A.2d 412 (N.J. 1970), *cert. denied*, 401 U.S. 1013, 91 S. Ct. 1253, 28 L.Ed.2d 550 (1971).

¹⁵⁰ *Commissioner of Educ. v. School Comm. of Leyden*, 267 N.E.2d 226 (Mass. 1971), *cert. denied*, 404 U.S. 849, 92 S. Ct. 85, 30 L.Ed.2d 88 (1971). *See also* *Kent v. Commissioner of Educ.*, 402 N.E.2d 1340 (Mass. 1980).

¹⁵¹ *Mangold v. Albert Gallatin Area School Dist.*, 438 F.2d 1194 (3d Cir. 1971).

¹⁵² *Karen B. v. Treen*, 653 F.2d 897 (5th Cir. 1981), *aff’d without written opinion*, 455 U.S. 913, 102 S. Ct. 1267, 71 L.Ed.2d 455 (1982).

¹⁵³ *Jaffree v. Wallace*, 705 F.2d 1526 [11 Educ. L. Rep. 51] (11th Cir. 1983), *aff’d as to this issue*, 466 U.S. 924, 104 S. Ct. 1704, 80 L.Ed.2d 178 (1984).

to stop the practice.¹⁵⁴ The Eleventh Circuit barred a plan designed to have allowed representatives of the student government in a school in Georgia to make a random selection of invocation speakers from non-clergy volunteers and permitted ministers to offer invocations prior to the start of high school football games.¹⁵⁵ In like manner, the Fifth Circuit affirmed that school employees in Texas could neither initiate nor lead students in prayer before and after athletic practices and competitions.¹⁵⁶

2. PRAYER AT GRADUATION AND OTHER ACTIVITIES

The Supreme Court examined school-sponsored prayers in public schools in a dispute from Rhode Island. At issue was whether a religious leader, here a rabbi, could offer prayers as part of an official school graduation ceremony incident to a board policy permitting principals to invite members of the clergy to offer non-sectarian prayers. In addition, the principals gave speakers guidelines for prayers on civic occasions prepared by an inter-faith organization. Students were not required to attend the graduation ceremony in order to receive their diplomas.¹⁵⁷

In *Lee v. Weisman (Lee)*,¹⁵⁸ a divided Supreme Court affirmed the unconstitutionality of school-sponsored graduation prayer. Sidestepping the *Lemon* test, the Justices based their judgment on two points. First, the Court rejected prayer as unacceptable because the state, through school officials, played a pervasive role in the process both by selecting who would pray and by directing its content. Second, the Justices feared that such governmental activity could result in psychological coercion of students. The Court was of the opinion that insofar as the students were a captive audience who may have been forced, against their wishes, to participate in ceremonies, they were not genuinely free to be excused from attending.

On the same day that the Supreme Court struck down *Lee*, it vacated and remanded without comment a graduation prayer case from Texas that reached the Fifth Circuit.¹⁵⁹ The primary difference between the cases was that in the one from Texas, members of a high school's senior class, not educational officials, selected volunteers to deliver non-sectarian, non-proselytizing prayers. On remand, the Fifth Circuit

¹⁵⁴ *Steele v. Van Buren Pub. School Dist.*, 845 F.2d 1492 [46 Educ. L. Rep. 572] (8th Cir. 1988).

¹⁵⁵ *Jager v. Douglas Cnty. School Dist.*, 862 F.2d 824 [50 Educ. L. Rep. 694] (11th Cir. 1989), *cert. denied*, 490 U.S. 1090, 109 S. Ct. 2431, 104 L.Ed.2d 988 (1989).

¹⁵⁶ *Doe v. Duncanville Indep. School Dist.*, 70 F.3d 402 [104 Educ. L. Rep. 1032] (5th Cir. 1995).

¹⁵⁷ For a case with a twist concerning graduation ceremonies, see *Doe 3 ex rel. Doe 2 v. Elmbrook School Dist.*, 687 F.3d 840 [282 Educ. L. Rep. 829] (7th Cir. 2012), *cert. denied*, ___ U.S. ___, 134 S. Ct. 2283, 189 L.Ed.2d 795 (2014) (refusing to allow a school board to conduct graduation ceremonies and related events in a rented Christian church because doing so violated the Establishment Clause by sending a message of religious endorsement coupled with an aspect of coercion).

¹⁵⁸ 505 U.S. 577, 112 S. Ct. 2649, 120 L.Ed.2d 467 [75 Educ. L. Rep. 43] (1992). [Case No. 10]

¹⁵⁹ *Jones v. Clear Creek Indep. School Dist.*, 930 F.2d 416 [67 Educ. L. Rep. 89] (5th Cir. 1991), *cert. granted, vacated, and remanded*, 505 U.S. 1215, 112 S. Ct. 3020, 120 L.Ed.2d 892 [75 Educ. L. Rep. 108] (1992).

followed the dissent in *Lee*, narrowly interpreting it as precluding only school-sponsored prayers.¹⁶⁰ The Court's refusal to hear an appeal left the door open to additional controversy.

Following *Lee*, the circuit courts remained divided over student-sponsored prayer at graduation ceremonies. The Third and Ninth Circuits struck down student-sponsored prayer while the Fifth and Eleventh Circuits upheld its use. The Ninth Circuit initially invalidated student-sponsored prayer in Idaho on the ground that insofar as school officials ultimately controlled the ceremony, they could not permit students to choose whether to pray at graduation.¹⁶¹ The Supreme Court avoided the controversy by vacating the judgment as moot and remanding with instructions to dismiss, apparently because the students had graduated.¹⁶² Shortly thereafter, the Fifth Circuit allowed part of a statute from Mississippi permitting student-sponsored prayer at graduation to remain in effect but struck down portions of it allowing students to initiate non-sectarian, non-proselytizing prayer at compulsory and non-compulsory events.¹⁶³ The same court eventually invalidated a law from Louisiana granting officials the authority to allow an opportunity, at the start of each day, for students and teachers desiring to do so to observe a brief time in prayer or meditation as a violation of the Establishment Clause.¹⁶⁴

The Third Circuit affirmed that a policy of permitting student-led prayer at a public high school graduation ceremony in New Jersey violated the Establishment Clause.¹⁶⁵ The court viewed the board's having retained significant authority over the ceremony as meaning that prayer could not have been treated as promoting the free speech rights of students. After first upholding a board policy from Idaho designed to allow a minimum of four graduating students to offer an address, poem, reading, song, musical presentation, prayer, or other presentation at their commencement based on neutral secular criteria,¹⁶⁶ the Ninth Circuit vacated its earlier judgment because a parent lacked standing to challenge the policy because the students graduated.¹⁶⁷

In two cases from California, the Ninth Circuit affirmed that school officials could refuse to allow students to deliver sectarian prayers or

¹⁶⁰ *Jones v. Clear Creek Indep. School Dist.*, 977 F.2d 963 [78 Educ. L. Rep. 42] (5th Cir. 1992), *reh'g denied*, 983 F.2d 234 (5th Cir. 1992), *cert. denied*, 508 U.S. 967, 113 S. Ct. 2950, 124 L.Ed.2d 697 (1993).

¹⁶¹ *Harris v. Joint School Dist. No. 241*, 41 F.3d 447 [95 Educ. L. Rep. 892] (9th Cir. 1994).

¹⁶² *Cert. granted, judgment vacated with directions to dismiss as moot*, 515 U.S. 1154, 115 S. Ct. 2604, 132 L.Ed.2d 849 [102 Educ. L. Rep. 34] (1995).

¹⁶³ *Ingebretsen v. Jackson Pub. School Dist.*, 88 F.3d 274 [110 Educ. L. Rep. 942] (5th Cir. 1996), *cert. denied sub nom. Moore v. Ingebretsen*, 519 U.S. 965, 117 S. Ct. 388, 136 L.Ed.2d 304 (1996).

¹⁶⁴ The Fifth Circuit affirmed that a statute permitting verbal prayer in school was unconstitutional. *Doe v. School Bd. of Ouachita Parish*, 274 F.3d 289 [160 Educ. L. Rep. 17] (5th Cir. 2001).

¹⁶⁵ *American Civil Liberties Union of N.J. v. Black Horse Pike Reg'l Bd. of Educ.*, 84 F.3d 1471 [109 Educ. L. Rep. 1118] (3d Cir. 1996).

¹⁶⁶ *Doe v. Madison School Dist. No. 321*, 147 F.3d 832 [127 Educ. L. Rep. 607] (9th Cir. 1998).

¹⁶⁷ *Doe v. Madison School Dist. No. 321*, *reh'g granted, opinion withdrawn*, 165 F.3d 1265 [132 Educ. L. Rep. 67] (9th Cir. 1999), *vacated*, 177 F.3d 789 [135 Educ. L. Rep. 387] (9th Cir. 1999).

proselytizing graduation speeches. In the first, the court noted that the prohibition did not violate the students' free speech rights.¹⁶⁸ In the second, the court agreed that when officials denied a student's request to include religious proselytizing comments in his salutatorian address, they did not violate his rights to freedom of religion, speech, or equal protection.¹⁶⁹

The status of prayers at high school football games re-emerged in Texas where parents and students challenged two board policies permitting student volunteers to pray at graduations and football games. A federal trial court upheld both policies as long as the prayers were non-sectarian and non-proselytizing. The Fifth Circuit affirmed that prayer at graduation had to be non-sectarian and non-proselytizing but reversed in striking down the policy permitting prayers at football games.¹⁷⁰ Even though the board appealed on both forms of prayer, the Supreme Court opted to address its use only at football games,¹⁷¹ thereby leaving the split between the circuits over student-led graduation prayer in place.

In *Santa Fe Independent School District v. Doe (Santa Fe)*,¹⁷² a divided Supreme Court affirmed that the policy permitting student-led prayers prior to the start of high school football games violated the Establishment Clause. The Justices primarily relied on the endorsement test¹⁷³ rather than the psychological coercion test. Put another way, the Court examined whether permitting prayer at football games was an impermissible governmental approval or endorsement of religion rather than a form of psychological coercion. In striking the policy down, the Justices rebuffed the board's three main claims. First, the Court rejected the board's contention that the policy enhanced the free speech rights of students. Second, the Justices disagreed with the board's stance that the policy was neutral on its face. Third, the majority disagreed with the board's defense that a legal challenge was premature because prayer had yet to be offered at a game under the policy. In a related dispute from Texas, the Fifth Circuit affirmed that a high school student and her parents lacked standing to challenge a board policy prohibiting religious references in public address system messages broadcast prior to football games because they could not demonstrate any adverse effect from the judgment.¹⁷⁴

Controversy remains after *Santa Fe*. In another case from Texas, a federal trial court decided that a recent high school graduate had

¹⁶⁸ *Cole v. Oroville Union High School Dist.*, 228 F.3d 1092 [147 Educ. L. Rep. 878] (9th Cir. 2000), cert. denied sub nom. *Niemeyer v. Oroville Union High School Dist.*, 532 U.S. 905, 121 S. Ct. 1228, 149 L.Ed.2d 138 (2001).

¹⁶⁹ *Lassonde v. Pleasanton Unified School Dist.*, 320 F.3d 979 [173 Educ. L. Rep. 778] (9th Cir. 2003), cert. denied, 540 U.S. 817, 124 S. Ct. 78, 157 L.Ed.2d 34 (2003).

¹⁷⁰ *Doe v. Santa Fe Indep. School Dist.*, 168 F.3d 806 [132 Educ. L. Rep. 687] (5th Cir. 1999).

¹⁷¹ 528 U.S. 1002, 120 S. Ct. 494, 145 L.Ed.2d 381 [140 Educ. L. Rep. 21] (1999).

¹⁷² 530 U.S. 290, 120 S. Ct. 2266, 147 L.Ed.2d 295 [145 Educ. L. Rep. 21] (2000). [Case No. 12]

¹⁷³ The endorsement test, which asks whether the purpose of a governmental action is to endorse or approve of a religion or religious activity, was enunciated in *Lynch v. Donnelly*, 465 U.S. 668, 687, 104 S. Ct. 1355, 1366, 79 L.Ed.2d 604 (1984) (O'Connor, J., concurring).

¹⁷⁴ *Ward v. Santa Fe Indep. School Dist.*, 393 F.3d 599 [194 Educ. L. Rep. 488] (5th Cir. 2004).

standing to challenge a board's policy of allowing the graduating classes at its high schools to vote on whether to permit students to recite a prayer at commencement ceremonies in light of his allegation that he was forced to vote on whether to have an invocation.¹⁷⁵ The court also thought that parents who claimed direct injuries on behalf of themselves and their minor children who attended the older siblings' graduation had standing in light of the direct harm they suffered. The court rejected the claim of parents acting on behalf of their children who merely attended school in the district and might someday graduate from one of the high schools because they lacked standing. The court maintained that mere abstract knowledge of the existence of the policy was insufficient to confer standing absent evidence that the parents or students participated in or were directly exposed to the voting and invocations.

In two earlier cases, the Eleventh Circuit upheld student-initiated prayer in school settings. In Alabama, parents questioned a statute permitting non-sectarian, non-proselytizing student-initiated prayer at school-related assemblies, sporting events, graduation ceremonies, and other school events. According to the court, the board's allowing genuinely student-initiated religious speech in school and at school-related events did not violate the Establishment Clause and had to be permitted as a form of free speech. The court acknowledged that while the students' religious speech could not be state supervised, it was subject to time, manner, and place restrictions.¹⁷⁶ On remand after the Supreme Court summarily vacated its judgment, the Eleventh Circuit responded that the injunction, which prevented the board from permitting any prayer in a public context at school functions, was overbroad because it equated all student religious speech in public contexts at schools with speech supported by the state.¹⁷⁷ The court was of the view that officials cannot prohibit genuine student-initiated religious speech nor apply restrictions, on its time, place, and manner, which exceed those on secular speech.¹⁷⁸

A superintendent in Florida issued a memorandum for high school graduation ceremonies in response to a request from students who wished to have some type of brief opening and/or closing messages by classmates. The guidelines afforded students the chance to direct their own messages without being monitored or reviewed by school officials. When speakers at ten of seventeen high school graduation ceremonies delivered some form of religious message, other students unsuccessfully challenged the practice as an establishment of religion and an infringement on their free exercise of religion. A federal trial court entered a judgment in favor of the board. On appeal, the Eleventh

¹⁷⁵ *Does 1–7 v. Round Rock Indep. School Dist.*, 540 F. Supp.2d 735 [231 Educ. L. Rep. 235] (W.D. Tex. 2007).

¹⁷⁶ *Chandler v. James*, 180 F.3d 1254 [136 Educ. L. Rep. 201] (11th Cir. 1999), request for en banc reh'g denied, 198 F.3d 265 (11th Cir. 1999), cert. granted, judgment vacated and remanded sub nom. *Chandler v. Siegelman*, 530 U.S. 1256, 120 S. Ct. 2714, 147 L.Ed.2d 979 [146 Educ. L. Rep. 622] (2000).

¹⁷⁷ *Chandler v. Siegelman*, 230 F.3d 1313 [148 Educ. L. Rep. 138] (11th Cir. 2000), suggestion for reh'g en banc denied, *Chandler v. Siegelman*, 248 F.3d 1032 [153 Educ. L. Rep. 528] (11th Cir. 2001).

¹⁷⁸ Cert. denied sub nom. *Chandler ex rel. Chandler v. Siegelman*, 533 U.S. 916, 121 S. Ct. 2521, 150 L.Ed.2d 694 (2001).

Circuit initially reversed in favor of the students¹⁷⁹ but was overruled by an en banc panel.¹⁸⁰ The Supreme Court vacated and remanded¹⁸¹ for further consideration in light of *Santa Fe*.

On further review, the Eleventh Circuit reinstated its original order because it was satisfied that the policy did not facially violate the Establishment Clause insofar as it had the secular purposes of not only affording graduating students the opportunity to direct their graduation ceremonies but also of permitting students the opportunity to exercise their freedom of expression.¹⁸² In a case with the opposite result, the Ninth Circuit affirmed that educators did not violate a student's right to the free exercise of religion in requiring him to delete religious proselytizing comments from a commencement address.¹⁸³

The Tenth Circuit affirmed that school officials in Colorado did not violate the First Amendment rights of a student by requiring her to make an e-mail apology to attendees at her graduation ceremony.¹⁸⁴ Officials disciplined the student for ignoring the principal's instructions by delivering a speech during the ceremony mentioning her Christian faith and encouraging listeners to explore Christianity before she could receive her diploma. The court held that educators did not impinge or burden the student's right to free exercise of religion because they had the authority to regulate school sponsored speech. The court also rejected the student's claim that her having had to apologize was compelled speech because their actions were related to the legitimate pedagogical concern of learning to respect school rules, courtesy, and discipline.¹⁸⁵

On the other hand, a divided Supreme Court of Montana ruled that educational officials violated the First Amendment free speech, but not religious, rights of a former student when they sought to limit the content of her proposed valedictory address because they opposed her references to religion in her prepared remarks.¹⁸⁶ Reversing an earlier judgment to the contrary, the court found both that the student's appeal

¹⁷⁹ *Adler v. Duval Cnty. School Bd.*, 174 F.3d 1236 [134 Educ. L. Rep. 790] (11th Cir. 1999).

¹⁸⁰ *Adler v. Duval Cnty. School Bd.*, 206 F.3d 1070 [142 Educ. L. Rep. 773] (11th Cir. 2000).

¹⁸¹ *Adler v. Duval Cnty. School Bd.*, 531 U.S. 801, 121 S. Ct. 31, 148 L.Ed.2d 3 [148 Educ. L. Rep. 31] (2000).

¹⁸² *On remand, opinion reinstated, Adler v. Duval Cnty. School Bd.*, 250 F.3d 1330 [154 Educ. L. Rep. 80] (11th Cir. 2001), *cert. denied*, 534 U.S. 1065, 122 S. Ct. 664, 151 L.Ed.2d 579 (2001).

¹⁸³ *Lassonde v. Pleasanton Unified School Dist.*, 320 F.3d 979 [173 Educ. L. Rep. 778] (9th Cir. 2003).

¹⁸⁴ *Corder v. Lewis Palmer School Dist. No. 38*, 566 F.3d 1219 [244 Educ. L. Rep. 994] (10th Cir. 2009), *cert. denied*, 558 U.S. 1048, 130 S. Ct. 742, 175 L.Ed.2d 515 [252 Educ. L. Rep. 26] (2009).

¹⁸⁵ *See also A.M. v. Taconic Hills Cent. School Dist.*, 510 Fed.Appx. 3 [293 Educ. L. Rep. 751] (2d Cir. 2013), *cert. denied*, ___ U.S. ___, 134 S. Ct. 196, 187 L.Ed.2d 44 (2013) (affirming that where officials ordered a student to remove a sentence from her middle school graduation ceremony because it was a direct quotation from the Hebrew Scriptures calling for a divine blessing for the audience, thereby constituting purely religious speech rather than offering a religiously-informed point of view, their actions were justifiable as reasonably related to legitimate pedagogical concerns).

¹⁸⁶ *Griffith v. Butte School Dist. No. 1*, 244 P.3d 321 [262 Educ. L. Rep. 1019] (Mont. 2010).

was not moot even though she graduated and her passing references to God and Christ could not reasonably have interpreted as the school board's having endorsed her beliefs.

3. EMPLOYEE AND BOARD PRAYER

In a variation on the prayer at football games theme, the Third Circuit decided that a school board policy prohibiting a coach in New Jersey from participating in student-initiated team prayer was not constitutionally vague or over-broad and that his bowing his head and kneeling with his team while the athletes prayed violated the Establishment Clause.¹⁸⁷ The court decreed that insofar as the coach's actions during the prayers did not address a matter of public concern, they failed to trigger his rights to freedom of speech, academic freedom, freedom of association, or due process.

A second case involving employee prayer was litigated in Michigan with the Seventh Circuit affirming that a school board did not violate the First Amendment rights of a guidance counselor who prayed with students, advocated abstinence, and disapproved of contraception when it chose not to renew her contract.¹⁸⁸ The court explained that in not renewing the counselor's employment contract due to her behavior, rather than her Christian beliefs, the board had the authority to limit her actions because she lacked the right to offer uncontrolled expressions at variance from established curricular content.

In an older case from Indiana, the Seventh Circuit affirmed that under a board policy officials consistently applied to prohibit the use of school facilities for religious activity, teachers lacked a right to conduct regularly scheduled prayer meetings for themselves before students arrived.¹⁸⁹ The court emphasized the board's concern that permitting such meetings to take place could have caused controversies unrelated to work.

Three federal circuits agreed that prayer at school board meetings is unconstitutional. The Third Circuit struck down board prayer in Delaware on the basis that the legislative prayer exception enunciated by the Supreme Court in *Marsh v. Chambers* (*Marsh*)¹⁹⁰ had the primary effect of advancing religion and the underlying policy excessively entangled the board with religion.¹⁹¹ Earlier, a teacher in Ohio sued his board for opening its sessions in such a manner. The Sixth Circuit invalidated the practice as unconstitutional because students were often involved in the meetings.¹⁹² The court refused to

¹⁸⁷ *Borden v. School Dist. of Twp. of E. Brunswick*, 523 F.3d 153 [231 Educ. L. Rep. 583] (3d Cir. 2008), cert. denied, 555 U.S. 1212, 129 S. Ct. 1524, 173 L.Ed.2d 656 [242 Educ. L. Rep. 21] (2009).

¹⁸⁸ *Grossman v. South Shore Pub. School Dist.*, 507 F.3d 1097 [227 Educ. L. Rep. 109] (7th Cir. 2007).

¹⁸⁹ *May v. Evansville-Vanderburgh School Corp.*, 787 F.2d 1105 [31 Educ. L. Rep. 727] (7th Cir. 1986).

¹⁹⁰ 463 U.S. 783, 103 S. Ct. 3330, 77 L.Ed.2d 1019 (1983) (permitting prayer at the start of legislative sessions in Nebraska).

¹⁹¹ *Doe v. Indian River School Dist.*, 653 F.3d 256 [272 Educ. L. Rep. 44] (3d Cir. 2011), cert. denied, ___ U.S. ___, 132 S. Ct. 1097, 181 L.Ed.2d 978 (2012).

¹⁹² *Coles ex rel. Coles v. Cleveland Bd. of Educ.*, 171 F.3d 369 [133 Educ. L. Rep. 392] (6th Cir. 1999), petition for reh'g en banc denied, 183 F.3d 538 (6th Cir. 1999).

treat the meetings as subject to *Marsh's* legislative prayer exception because they were an integral component of the public school system. In a similar dispute from California, the Ninth Circuit acknowledged that teachers had standing to sue and that their board violated the Establishment Clause by allowing prayers “in the name of Jesus” at its meetings.¹⁹³ However, in a long running case from Louisiana, a federal trial court denied cross-motions for summary judgment on the status of board prayer where issues of fact remained over whether the underlying policy was valid under the legislative exemption.¹⁹⁴

Town of Greece, New York v. Galloway,¹⁹⁵ a non-school case, addressed prayer at town board meetings. A divided Supreme Court upheld a board’s practice of opening its monthly meetings with prayer even if they are explicitly religious as long as they do not praise one faith while denigrating others. Relying on the coercion test and treating prayer as a form of ceremonial deism, the Court avoided both the endorsement and *Lemon* tests it often relied on in such disputes.

A novel question arose in Nebraska where a school board member recited the Lord’s Prayer at a commencement ceremony. Under the threat of litigation, the board dropped the proposed invocation and benediction from the ceremony. Even so, the board member, acting on his own initiative, included the prayer as part of his remarks. The Eighth Circuit affirmed that the board was not liable because the individual who recited the prayer acted on his own accord in opposition to the board’s collectively refusing to include it in the ceremony.¹⁹⁶

A case in Arkansas focused on whether school officials could start mandatory in-service training sessions and faculty meetings with prayer. In response to a challenge by a teacher and a part-time bus driver who objected, the Eighth Circuit invalidated the use of prayer as a violation of the Establishment Clause because it represented governmental endorsement of religion.¹⁹⁷

E. PERIODS OF SILENCE

Lower federal courts disagreed on whether brief periods of silence before the start of school involve religion. The federal trial court in Massachusetts dismissed a challenge to such a law, interpreting it as neither having violated the First Amendment nor the students’ right to free exercise of religion.¹⁹⁸ The court thought that the law did not prohibit or inhibit the parental right to guide and instruct their

¹⁹³ *Bacus v. Palo Verde Unified School Dist. Bd. of Educ.*, 52 Fed.Appx. 355 [172 Educ. L. Rep. 24] (9th Cir. 2002).

¹⁹⁴ *Doe v. Tangipahoa Parish School Bd.*, 631 F. Supp.2d 823 [248 Educ. L. Rep. 151] (E.D. La. 2009). For the earlier litigation, see *Doe v. Tangipahoa Parish School Bd.*, 473 F.3d 188 [215 Educ. L. Rep. 539] (5th Cir. 2006).

¹⁹⁵ ___ U.S. ___, 134 S. Ct. 1811, 188 L.Ed.2d 835 (2014).

¹⁹⁶ *Doe ex rel. Doe v. School Dist. of the City of Norfolk*, 340 F.3d 605 [180 Educ. L. Rep. 39] (8th Cir. 2003).

¹⁹⁷ *Warnock v. Archer*, 380 F.3d 1076 [191 Educ. L. Rep. 620] (8th Cir. 2004), *reh’g and reh’g en banc denied, on remand*, 397 F.3d 1024 (8th Cir. 2005) (also refusing to order the superintendent to remove a framed display of a Biblical quote from his wall).

¹⁹⁸ *Gaines v. Anderson*, 421 F. Supp. 337 (D. Mass. 1976). See also *Opinion of the Justices*, 228 A.2d 161 (N.H. 1967) (upholding a law requiring a period of silence for meditation as not violating the First Amendment).

children about religion. Moreover, after a federal trial court in Tennessee struck down such a statute, the Sixth Circuit vacated and remanded its judgment.¹⁹⁹ Shortly thereafter, the federal trial court in New Mexico invalidated a law authorizing local boards to permit a moment of silence because it lacked a secular purpose.²⁰⁰

In its first case on the merits of such a dispute, the Supreme Court reviewed a law from Alabama authorizing a period of silence at the start of the school day for “meditation or voluntary prayer.” In *Wallace v. Jaffree*²⁰¹ the Court examined the bill’s legislative history, including the purpose of the sponsors to return voluntary prayer to the public schools and its preamble, concluding that it was unconstitutional because it lacked a secular purpose. Subsequently, after lower federal courts struck down a statute from New Jersey as unconstitutional, the Court dismissed an appeal without reaching the issue on the merits.²⁰² The Court observed that the former speaker of the state general assembly and former president of the state senate who intervened in and took part in the litigation to uphold the law’s constitutionality could no longer participate in the suit because they lacked standing by virtue of having lost their leadership positions.

Four circuit courts have since upheld statutes permitting silence in schools. The Eleventh Circuit affirmed that a law from Georgia allowing a moment of silent reflection in school was constitutional because it passed all three prongs of the *Lemon* test.²⁰³ The Fourth Circuit upheld a law from Virginia mandating a minute of silence in schools including the word “pray” in listing an unlimited range of permissible mental activities.²⁰⁴ The court affirmed that the statute did not violate the Establishment Clause because even though it had two purposes, one clearly secular and the other an accommodation of religion, it did not run afoul of the *Lemon* test’s requirement of only a secular purpose. The court reasoned that the statute neither advanced nor hindered religion and did not result in the state’s becoming excessively entangled with religion.

The Fifth Circuit reached a like result in a case from Texas, affirming that a law calling for a minute of silence following the recitation of the Pledge of Allegiance during which students may, if they choose, reflect, pray, meditate, or engage in any other silent activity that is unlikely to interfere with or distract others was constitutional because it satisfied all three prongs of the *Lemon* test.²⁰⁵ Later, the Seventh Circuit reversed an earlier order to the contrary in upholding

¹⁹⁹ *Beck v. McElrath*, 548 F. Supp. 1161 [7 Educ. L. Rep. 156] (M.D. Tenn. 1982), judgment vacated, appeal dismissed *sub nom.* *Beck v. Alexander*, 718 F.2d 1098 (6th Cir. 1983).

²⁰⁰ *Duffy v. Las Cruces Pub. Schools*, 557 F. Supp. 1013 [9 Educ. L. Rep. 1206] (D.N.M. 1983).

²⁰¹ 472 U.S. 38, 105 S. Ct. 2479, 86 L.Ed.2d 29 [25 Educ. L. Rep. 39] (1985).

²⁰² *Jurisdiction dismissed sub nom. Karcher v. May*, 479 U.S. 1062, 107 S. Ct. 946, 93 L.Ed.2d 995 [38 Educ. L. Rep. 416] (1987), appeal dismissed, 484 U.S. 72, 108 S. Ct. 388, 98 L.Ed.2d 327 [42 Educ. L. Rep. 1062] (1987).

²⁰³ *Bown v. Gwinnett Cnty. School Dist.*, 112 F.3d 1464 [118 Educ. L. Rep. 28] (11th Cir. 1997).

²⁰⁴ *Brown v. Gilmore*, 258 F.3d 265 [155 Educ. L. Rep. 1031] (4th Cir. 2001), cert. denied, 533 U.S. 1301, 122 S. Ct. 1, 150 L.Ed.2d 782 (2001).

²⁰⁵ *Croft v. Governor of Texas*, 562 F.3d 735 [243 Educ. L. Rep. 550] (5th Cir. 2009).

the Illinois Silent Reflection and Student Prayer Act.²⁰⁶ The court noted both that the law was neither unconstitutionally vague nor did it advance or inhibit religion.²⁰⁷

F. STUDENT-INITIATED RELIGIOUS ACTIVITY

The Supreme Court chose not to review a case from New York upholding a board's refusal to allow students to conduct voluntary communal prayer meetings in school immediately before the start of the academic day.²⁰⁸ The Second Circuit had affirmed that the board did not infringe on students' rights to the free exercise of religion, speech, or equal protection insofar as officials had a compelling interest to remove any indication of their sponsoring religious activities in public schools.²⁰⁹

In *Widmar v. Vincent (Widmar)*,²¹⁰ the Supreme Court ushered in a new era when dealing with access to educational facilities. The Justices determined that when officials at a state university in Missouri made facilities generally available for activities of registered student groups, they could not deny the same to other organizations based on the religious content of their speech. Relying on the framework of freedom of speech, the Justices recognized that insofar as more than one hundred registered student groups used the facilities, officials created a forum for the exchange of ideas such that they could not bar access to it solely because of the content of the speech. The Court distinguished the case from those involving religious activities in public grade schools, observing that facilities in those settings are usually not used as open fora while university students are less impressionable than young children.

In the first post-*Widmar* case, the federal trial court in Kansas entered a judgment in favor of a church that was denied occasional use of school facilities for religious services. Pursuant to the policy, facilities were available for recognized community organizations whose activities were of general interest and used the building for community purposes. Where the facilities were used by an array of groups, and there were no guidelines to distinguish between religious and non-religious meetings, the court reasoned that “[h]aving created a public forum, [the board] cannot exclude [the church group] from the forum because of the

²⁰⁶ *Sherman ex rel. Sherman v. Koch*, 623 F.3d 501 [261 Educ. L. Rep. 527] (7th Cir. 2010), *cert. denied*, 132 U.S. 92, 132 S. Ct. 92, 181 L.Ed.2d 22 (2011).

²⁰⁷ See also 20 U.S.C.A. § 6061 (a section in the No Child Left Behind Act under which “[n]o funds authorized to be appropriated under this chapter may be used by any State or local educational agency to adopt policies that prevent voluntary prayer and meditation in public schools.”).

²⁰⁸ *Brandon v. Board of Educ. of Guilderland Cent. School Dist.*, 635 F.2d 971 (2d Cir. 1980), *cert. denied*, 454 U.S. 1123, 102 S. Ct. 970, 71 L.Ed.2d 109 (1981).

²⁰⁹ For a non-school case, see *Heffron v. International Soc’y for Krishna Consciousness*, 452 U.S. 640, 652–53, 101 S. Ct. 2559, 69 L.Ed.2d 298 (1981) (refusing to grant religious organizations “rights to communicate . . . superior to those of other organizations having social, political, or other ideological messages to proselytize,” rejecting the group’s challenge to a regulation of a state fair in Minnesota requiring solicitations, sales, and/or distributions of material to be from fixed locations). For a later case reaching the same outcome at an airport, see *International Soc’y for Krishna Consciousness of Cal. v. City of Los Angeles*, 764 F.3d 1044 (9th Cir. 2014).

²¹⁰ 454 U.S. 263, 102 S. Ct. 269, 70 L.Ed.2d 440 [1 Educ. L. Rep. 13] (1981).

religious content of [the church group's] intended speech unless such exclusion is justified under applicable constitutional case law."²¹¹

The Supreme Court next refused to review a case from Texas wherein the Fifth Circuit invalidated a board policy of permitting students to gather at a school with supervision for voluntary religious meetings close to the beginning or end of the day.²¹² The court rejected the policy as an implied recognition of religious activities and meetings as an integral part of the school's extracurricular program with implicit approval of educators.

Spurred on in large part by *Widmar*, in 1984 Congress enacted the Equal Access Act.²¹³ In relevant part, the Act stipulates that "[i]t shall be unlawful for any public secondary school which . . . has a limited open forum to deny equal access or a fair opportunity to, or discriminate against, any students who wish to conduct a meeting [of a non-curriculum related organization] . . . on the basis of the religious, political, philosophical, or other content of the speech at such meetings."²¹⁴

As to any student gathering, the Act mandates that

- (1) the meeting is voluntary and student-initiated;
- (2) there is no sponsorship of the meeting by the school, the government, or its agents or employees;
- (3) employees or agents of the school or government are present at religious meetings only in a nonparticipatory capacity;
- (4) nonschool persons may not direct, conduct, control, or regularly attend activities of student groups.²¹⁵

The Act does allow officials to exclude groups if their meetings "materially and substantially interfere with the orderly conduct of educational activities within the school."²¹⁶

The Supreme Court upheld the Equal Access Act in *Board of Education of Westside Community Schools v. Mergens (Mergens)*.²¹⁷ Relying on statutory interpretation, the Court decided that Congress was convinced that most high school students²¹⁸ could recognize that allowing a religious club to function in school does not imply the

²¹¹ *Country Hills Christian Church v. Unified School Dist. No. 512, Johnson Cnty., State of Ks.*, 560 F. Supp. 1207, 1219 [10 Educ. L. Rep. 1006] (D. Kan. 1983). For a later case reaching the same result, see *Grace Bible Fellowship v. Maine School Admin. Dist. No. 5*, 941 F.2d 45 [69 Educ. L. Rep. 210] (1st Cir. 1991).

²¹² *Lubbock Civil Liberties Union v. Lubbock Indep. School Dist.*, 669 F.2d 1038 [2 Educ. L. Rep. 961] (5th Cir. 1982), *cert. denied*, 459 U.S. 1155, 103 S. Ct. 800, 74 L.Ed.2d 1003 (1983).

²¹³ 20 U.S.C.A. §§ 4071 *et seq.* This statute is in the Appendix.

²¹⁴ 20 U.S.C.A. § 4071(a). Portions of this statute are in the Appendix.

²¹⁵ 20 U.S.C.A. §§ 4071(c)(1)–(3), (5).

²¹⁶ 20 U.S.C.A. § 4071(c)(4).

²¹⁷ 496 U.S. 226, 110 S. Ct. 2356, 110 L.Ed.2d 191 [60 Educ. L. Rep. 320] (1990). [Case No. 9]

²¹⁸ A federal trial court in Florida refused to extend the Act to a middle school in *Carver Middle School Gay-Straight Alliance v. School Bd. of Lake Cnty, Fla.*, 2 F. Supp.3d 1277 [308 Educ. L. Rep. 275] (M.D. Fla. 2014) because its organizers failed to meet the statutory requirement of being students in a public secondary school.

endorsement of religion. Insofar as Congress did not define “non-curriculum related,” the Court thought it necessary to do so in order to evaluate the status of some student groups. The Court observed that insofar as a variety of existing clubs failed to satisfy the criteria, the religious group was entitled to meet in school. Insofar as only four Justices agreed that the Equal Access Act passed Establishment Clause analysis, the Court left the door open to more litigation in a line of cases that treat religious expression as a hybrid that protects the rights of religious groups to express their²¹⁹ opinions as a form of free speech.²²⁰

Circuit courts have extended the scope of the Equal Access Act to allow students to select leaders who comply with a club’s religious standards;²²¹ to meet during lunch time²²² and during a school’s morning activity period at which attendance was taken;²²³ to have access to funding and fund-raising activities, a school yearbook, public address system, bulletin board, school supplies, school vehicles, and audio-visual equipment;²²⁴ and to broadcast a video promoting the club during morning announcements.²²⁵

At least one court rejected the claim that a board created a limited open forum designed to permit members of a religious club to make announcements involving prayers and Bible readings before classes on a school’s public address system.²²⁶ A federal trial court in Mississippi did permit voluntary student prayer before school to continue.

After the Ninth Circuit initially upheld a school board in California’s refusal to recognize a club in light of its proposed requirement that voting members express their faith in the Bible and in Jesus Christ because officials feared that this condition violated the district’s non-discrimination policies,²²⁷ an en banc panel reversed in favor of the organizers.²²⁸ The court found that although the board did not violate either the Equal Access Act or the club’s First Amendment rights by applying its non-discrimination policy to the disputed

²¹⁹ For a case with a lengthy history initially litigated before *Mergens* but ultimately resolved in favor of students who wished to form a club four years after the Supreme Court handed down its order, see *Garnett v. Renton School Dist. No. 403*, 21 F.3d 1113 [91 Educ. L. Rep. 31] (9th Cir. 1994), *on remand*, 1994 WL 555397 (W.D. Wash. 1994) (granting a declaratory judgment and awarding attorney fees to the plaintiffs).

²²⁰ See, e.g., *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 115 S. Ct. 2510, 132 L.Ed.2d 700 [101 Educ. L. Rep. 552] (1995). See also *Travis v. Owego-Apalachin School Dist.*, 927 F.2d 688, 690 [66 Educ. L. Rep. 75] (2d Cir. 1991) (affirming that once a board opened its facilities, it could not deny access to “Birthright of Owego, Inc. . . . a non-profit ‘pro-life’ pregnancy counseling organization.”).

²²¹ *Hsu v. Roslyn Union Free School Dist.*, 85 F.3d 839 [109 Educ. L. Rep. 1145] (2d Cir. 1996), *cert. denied*, 519 U.S. 1040, 117 S. Ct. 608, 136 L.Ed.2d 534 (1996).

²²² *Caniceros v. Board of Trs. of the San Diego Unified School Dist.*, 106 F.3d 878 [116 Educ. L. Rep. 82] (9th Cir. 1997).

²²³ *Donovan ex rel. Donovan v. Punxsutawney Area School Bd.*, 336 F.3d 211 [179 Educ. L. Rep. 48] (3d Cir. 2003).

²²⁴ *Prince v. Jacoby*, 303 F.3d 1074 [169 Educ. L. Rep. 85] (9th Cir. 2002), *cert. denied*, 540 U.S. 813, 124 S. Ct. 62, 157 L.Ed.2d 27 (2003).

²²⁵ *Krestan v. Deer Valley Unified School District No. 97, of Maricopa Cnty.*, 561 F. Supp.2d 1078 [235 Educ. L. Rep. 361] (D. Ariz. 2008).

²²⁶ *Herdahl v. Pontotoc Cnty. School Dist.*, 933 F. Supp. 582 [112 Educ. L. Rep. 131] (N.D. Miss. 1996).

²²⁷ *Truth v. Kent School Dist.*, 499 F.3d 999 [224 Educ. L. Rep. 652] (9th Cir. 2007).

²²⁸ *Truth v. Kent School Dist.*, 524 F.3d 957 [232 Educ. L. Rep. 70] (9th Cir. 2008).

provision, a question of fact was present as to whether educators acted appropriately in refusing to grant the club an exemption from the policy based on its Christian character or the content of the speech of its members.

In an unanticipated application of the Equal Access Act, the Eighth Circuit,²²⁹ along with federal trial courts in California,²³⁰ Indiana,²³¹ Florida,²³² and Kentucky,²³³ agreed that educational officials could not deny Gay/Straight Alliance clubs the opportunity to use school facilities. Federal trial courts in Texas²³⁴ and Colorado²³⁵ reached the opposite result. Insofar as these cases did not involve religion, they are discussed in Chapter 14.

The status of the Equal Access Act may be in some doubt in light of the Supreme Court's analysis in *Christian Legal Society v. Martinez*.²³⁶ The Court affirmed that officials at a public law school in California had the authority to implement a policy requiring an on-campus religious group to admit all-comers from the student body, including those who disagree with its beliefs, as a condition of becoming a recognized student organization. On remand, the Ninth Circuit rejected the group's remaining claim on the basis that organizational leaders failed to preserve their argument that law school officials selectively applied the policy for appeal.²³⁷

In a case from Michigan not involving the Equal Access Act, an appellate court affirmed the rejection of a challenge filed by an atheist father and his son who objected to their board's permitting the Boy Scouts to use school facilities.²³⁸ The court ruled that the board's allowing the Scouts to distribute their literature, collect their communications during class hours, and hang posters in school hallways, did not implicate the state constitution's Establishment Clause because a wide array of groups were allowed to display posters and distribute literature as long as they met neutral qualifying criteria.

²²⁹ *Straights and Gays for Equality v. Osseo Area Schools-Dist. No. 279*, 540 F.3d 911 [236 Educ. L. Rep. 173] (8th Cir. 2008).

²³⁰ *Colin ex rel. Colin v. Orange Unified School Dist.*, 83 F. Supp.2d 1135 [142 Educ. L. Rep. 138] (C.D. Cal. 2004).

²³¹ *Franklin Cent. Gay/Straight Alliance v. Franklin Twp. Cmty. School Corp.*, 2002 WL 32097530 (S.D. Ind. 2002), *reconsideration denied*, 2002 WL 31921332 (S.D. Ind. 2002).

²³² *Gay-Straight Alliance of Yulee High School v. School Bd. of Nassau Cnty.*, 602 F. Supp.2d 1233 [243 Educ. L. Rep.301] (M.D. Fla. 2009); *Gonzalez v. School Bd. of Okeechobee Cnty.*, 571 F. Supp.2d 1257 [237 Educ. L. Rep. 291] (S.D. Fla. 2008).

²³³ *Boyd Cnty. High School Gay Straight Alliance v. Board of Educ. of Boyd Cnty., Ky.*, 258 F. Supp.2d 667 [177 Educ. L. Rep. 211] (E.D. Ky. 2003). This case spawned litigation in which a student unsuccessfully sought to be excluded from training sessions focusing on diversity and equity issues which included a discussion on anti-gay harassment. See *Morrison v. Board of Educ. of Boyd Cnty.*, 521 F.3d 602 [231 Educ. L. Rep. 527] (6th Cir. 2008), *cert. denied*, 555 U.S. 1171, 129 S. Ct. 1318, 173 L.Ed.2d 586 [242 Educ. L. Rep. 20] (2009).

²³⁴ *Caudillo v. Lubbock Indep. School Dist.*, 311 F. Supp.2d 550 [187 Educ. L. Rep. 564] (N.D. Tex. 2004).

²³⁵ *Palmer High School Gay/Straight Alliance v. Colorado Springs School Dist. No. 11*, 2005 WL 3244049 (D. Colo. 2005).

²³⁶ 561 U.S. 661, 130 S. Ct. 2971, 177 L.Ed.2d 838 (2010).

²³⁷ *Christian Legal Soc'y v. Wu*, 626 F.3d 483 [262 Educ. L. Rep. 398] (9th Cir. 2010).

²³⁸ *Scalise v. Boy Scouts of Am.*, 692 N.W.2d 858 [195 Educ. L. Rep. 961] (Mich. Ct. App. 2005), *appeal denied*, 700 N.W.2d 360 (Mich. 2005), *reconsideration denied*, 713 N.W.2d 252 (Mich. 2006), *cert. denied*, 547 U.S. 1163, 126 S. Ct. 2330, 164 L.Ed.2d 840 (2006).

The court rebuffed the claims that the board's actions denoted the group's religious aspect and neither educational officials nor the board compelled students to take literature or incorporated it into the curriculum.

G. ACCESS TO SCHOOL FACILITIES BY NON-SCHOOL RELIGIOUS GROUPS

The Supreme Court of Pennsylvania resolved apparently the earliest case involving a request for access by a non-school religious group. The court affirmed that the group could not use school facilities for religious or sectarian purposes.²³⁹ The court rejected the group's claim that a board's refusal to rent it an auditorium to conduct religious services violated its right to equal protection because it had not permitted other religious organizations opportunities to use its facilities.

A controversy in New York arose when a school board, acting pursuant to a state statute, enacted a policy permitting it to make its facilities available to an array of social and civic groups. When the board refused to rent a facility to a religious group which sought to show a film series on child-rearing, lower courts entered judgments in its favor.²⁴⁰

On appeal, in a rare unanimous judgment in *Lamb's Chapel v. Center Moriches Union Free School District*,²⁴¹ the Supreme Court reversed in favor of the religious group. In treating religious speech as a form of free speech, the Justices essentially extended *Mergens'* rationale. The Court pointed out that insofar as the board created a limited open forum, it violated the group's free speech rights by engaging in viewpoint discrimination.

Eight years later, a dispute erupted when officials in another district in New York refused to permit a non-school-sponsored club to meet during non-class hours so that members and moderators could discuss child-rearing along with character and moral development from a religious perspective. While forbidding the religious club from meeting, officials allowed three other groups to gather because although they addressed related topics, they did so from secular perspectives. On further review of orders in favor of the board,²⁴² the Supreme Court agreed to hear an appeal to resolve a split below because the Eighth

²³⁹ *McKnight v. Board of Pub. Educ.*, 76 A.2d 207 (Pa. 1950), *appeal dismissed*, 341 U.S. 913, 71 S. Ct. 737, 95 L.Ed. 1349 (1951).

²⁴⁰ *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 770 F. Supp. 91 [69 Educ. L. Rep. 787] (E.D.N.Y. 1991), *aff'd*, 959 F.2d 381 [73 Educ. L. Rep. 915] (2d Cir. 1992).

²⁴¹ 508 U.S. 384, 113 S. Ct. 2141, 124 L.Ed.2d 352 [83 Educ. L. Rep. 30] (1993), *on remand*, 17 F.3d 1425 [89 Educ. L. Rep. 783] (2d Cir. 1994). [Case No. 37]

²⁴² 21 F. Supp.2d 147 [130 Educ. L. Rep. 678] (N.D.N.Y. 1998), *aff'd*, 202 F.3d 502 [141 Educ. L. Rep. 475] (2d Cir. 2000).

Circuit²⁴³ had upheld the right of such a club in Missouri to use school facilities for its meetings.²⁴⁴

In *Good News Club v. Milford Central School (Milford)*,²⁴⁵ the Supreme Court reversed in favor of the club. The Justices reasoned that the board violated the club's rights to free speech by engaging in impermissible viewpoint discrimination when it refused to permit it to use school facilities for its meetings, which were not worship services. The Court added that such a restriction was not justified by fears of violating the Establishment Clause.

A like case arose in Minnesota when officials excluded a religious club from the list of organizations qualified to offer after-school enrichment programs. The Eighth Circuit maintained that insofar as the religious group's activities occurred after the end of the school day, officials engaged in impermissible viewpoint discrimination because they lacked a compelling interest in avoiding a purported Establishment Clause violation.²⁴⁶

On a different issue involving access, the Second Circuit, in the latest iteration of a long-running dispute from New York City,²⁴⁷ upheld a board policy forbidding religious worship services from taking place in public school facilities.²⁴⁸ The court noted that the policy did not violate the Free Exercise Clause because the board was under no obligation to provide the church with a subsidized facility in which to gather.

In a similar type of dispute, the Fourth Circuit affirmed the rejection of a church in Virginia's request for a special use permit to operate a school for children with disabilities.²⁴⁹ The court agreed that the original suit was properly dismissed for failure to state a claim and that church officials failed a request to amend only after the original complaint was denied.

A case involving a teacher and a Good News Club arose in South Dakota. The Eighth Circuit affirmed that school officials violated the teacher's free speech rights by refusing to allow her to join after school meetings of a Good News Club.²⁵⁰ The court reversed part of an earlier

²⁴³ *Good News/Good Sports Club v. School Dist. of the City of Ladue*, 28 F.3d 1501 [92 Educ. L. Rep. 1148] (8th Cir. 1994), *cert. denied*, 515 U.S. 1173, 115 S. Ct. 2640, 132 L.Ed.2d 878 (1995).

²⁴⁴ See also *Daugherty v. Vanguard Charter School Acad.*, 116 F. Supp.2d 897 [148 Educ. L. Rep. 208] (W.D. Mich. 2000) (permitting a "Moms' Prayer Group" to use a Parents' Room for ninety minutes once a week because other groups were allowed to do so).

²⁴⁵ 533 U.S. 98, 121 S. Ct. 2093, 150 L.Ed.2d 151 [154 Educ. L. Rep. 45] (2001). [Case No. 13]

²⁴⁶ *Child Evangelism Fellowship of Minn. v. Minneapolis Special School Dist.*, 690 F.3d 996 [283 Educ. L. Rep. 695] (8th Cir. 2012).

²⁴⁷ For the first reported case in this litigation, see *Bronx Household of Faith v. Cmty. School Dist. No. 10*, 127 F.3d 207 [121 Educ. L. Rep. 892] (2d Cir. 1997), *cert. denied sub nom. Bronx Household of Faith v. Board of Educ. of City of N.Y.*, 523 U.S. 1074, 118 S. Ct. 1517, 140 L.Ed.2d 670 (1998), *leave to file for reh'g denied*, 524 U.S. 934, 118 S. Ct. 2337, 141 L.Ed.2d 708 (1998), 650 F.3d 30 (2d Cir. 2011), *cert. denied*, ___ U.S. ___, 132 S. Ct. 816, 181 L.Ed.2d 541 (2011).

²⁴⁸ *Bronx Household of Faith v. Board of Educ. of City of N.Y.*, 750 F.3d 184 [304 Educ. L. Rep. 705] (2d Cir. 2014).

²⁴⁹ *Calvary Christian Ctr. v. City of Fredericksburg*, 710 F.3d 536 [290 Educ. L. Rep. 468] (4th Cir. 2103).

²⁵⁰ *Wigg v. Sioux Falls School Dist.*, 49–5, 382 F.3d 807 [192 Educ. L. Rep. 15] (8th Cir. 2004), *reh'g and reh'g en banc denied* (2004).

order allowing the teacher to meet with the club only at schools other than where she taught. Viewing the teacher's after school activity as private speech, the court explained that her involvement did not put the board at risk of violating the Establishment Clause.

In a case with a different take on the issue of access, an atheist mother unsuccessfully challenged a school board's policy of allowing the Boy Scouts to make in-school membership presentations during lunch breaks pursuant to a community access policy. The mother alleged that permitting the Scouts to seek members violated a state law against discrimination based on religion in public schools in light of their belief in a deity. The Supreme Court of Oregon, in finding that the policy allowing the Scouts to make the presentations did not violate the law because they neither differentiated among students nor mentioned religion in their talks, remanded for further consideration in light of its analysis.²⁵¹

On a related topic, courts agree that if school boards permit their facilities to be made available to non-profit organizations, they may not charge higher fees to religious groups. The Fourth Circuit agreed that a board regulation in Virginia, which allowed officials to charge churches an escalating rate for the use of facilities, discriminated both against religious speech and interfered with or burdened the church's right to speak and practice its religion.²⁵²

Another aspect of access emerged in Tennessee when a federal trial court invalidated the practice of allowing a group called "Praying Parents" to use a school's newsletter to engage in such practices as communicating with teachers and other parents, gathering to pray around the school's flagpole, and having a National Day of Prayer in the cafeteria.²⁵³ In response to a claim from objecting parents, the court was satisfied both that they had standing and that issues of fact existed as to whether officials violated the Establishment Clause.²⁵⁴ The same court later invalidated a board policy designed to limit the parent group from placing religious posters in the school lobby and hallway leading to the cafeteria.²⁵⁵ The court remarked that once the board created a limited open forum, it could not restrict the content of parental speech.

²⁵¹ *Powell v. Bunn*, 142 P.3d 1054 [212 Educ. L. Rep. 893] (Or. 2006).

²⁵² *Fairfax Covenant Church v. Fairfax Cnty. School Bd.*, 17 F.3d 703 [89 Educ. L. Rep. 763] (4th Cir. 1994), cert. denied, 511 U.S. 1143, 114 S. Ct. 2166, 128 L.Ed.2d 888 (1994). See also *Shumway v. Albany Cnty. School Dist. No. One Bd. of Educ.*, 826 F. Supp. 1320 [84 Educ. L. Rep. 989] (D. Wyo. 1993).

²⁵³ *Doe v. Wilson Cnty. School Sys.*, 524 F. Supp.2d 964 [228 Educ. L. Rep. 231] (M.D. Tenn. 2007). See also *Doe v. Wilson Cnty. School Sys.*, 564 F. Supp.2d 766 [236 Educ. L. Rep. 306] (M.D. Tenn. 2008) (recognizing that while the activities of the parental group violated all three prongs of the *Lemon* test, the board was not liable because it was unaware of the constitutional violations insofar as the parents and principal failed to follow the policies as written).

²⁵⁴ See also *Doe v. Wilson Cnty. School Sys.*, 2008 WL 4372959 (M.D. Tenn. 2008) (although conceding that the plaintiffs were the prevailing party, the court reduced their award for attorney fees to \$100,221.24 because they did not succeed on all of their claims).

²⁵⁵ *Gold v. Wilson Cnty. School Bd. of Educ.*, 632 F. Supp. 771 [248 Educ. L. Rep. 190] (M.D. Tenn. 2009).

H. OTHER RELIGIOUS INFLUENCES

1. RELIGIOUS MUSIC

Disputes have been litigated over the use of religious music, especially at graduation ceremonies. In a case from Utah, the Tenth Circuit affirmed the dismissal of a student's complaint that officials violated her rights under the Establishment and Free Exercise Clauses by permitting her school's choir to sing Christian religious music, including the song, "The Lord Bless You and Keep You."²⁵⁶ Previously, the Fifth Circuit ruled that permitting a school choir to adopt the same song as its theme song did not violate the Establishment Clause.²⁵⁷ The court thought that there were legitimate secular reasons for allowing the choir to do so because it was useful to teach students to sight read and sing a cappella; the practice did not advance or endorse religion; and not permitting the choir to adopt the song would have demonstrated hostility rather than neutrality toward religion.

On the other hand, the Ninth Circuit affirmed that a superintendent in Washington did not violate a high school student's rights to freedom of religion or speech in prohibiting her wind ensemble from performing an instrumental version of *Ave Maria* at her graduation due to concerns that it could have been interpreted as endorsing religion.²⁵⁸ Similarly, the Third Circuit affirmed the rejection of a father's claim that a board policy in New Jersey forbidding the use of religious music in holiday celebrations was unconstitutionally reflected the impermissible message of governmental disapproval of and hostility toward religion.²⁵⁹ Earlier, a federal trial court in Florida enjoined the playing of a country music song about God in America where doing so would have violated the Establishment Clause.²⁶⁰

2. FLAG SALUTE—PLEDGE OF ALLEGIANCE

Amid controversy over the constitutionality of requiring students to salute the American flag and recite the Pledge of Allegiance, a practice tracing its origins to 1892, the Supreme Court initially chose not to address the question on its merits in *Johnson v. Town of Deerfield*,²⁶¹ summarily affirming an order refusing to enjoin a statute from Massachusetts directing students to recite the pledge. A year later, in

²⁵⁶ *Bauchman v. West High School*, 132 F.3d 542 [122 Educ. L. Rep. 1133] (10th Cir. 1997), cert. denied, 524 U.S. 953, 118 S. Ct. 2370, 141 L.Ed.2d 738 (1998).

²⁵⁷ *Doe v. Duncanville Indep. School Dist.*, 70 F.3d 402 [104 Educ. L. Rep. 1032] (5th Cir. 1995).

²⁵⁸ *Nurre v. Whitehead*, 580 F.3d 1087 [249 Educ. L. Rep. 76] (9th Cir. 2009), cert. denied, 559 U.S. 1025, 130 S. Ct. 1937, 176 L.Ed.2d 399 (2010).

²⁵⁹ *Stratechuk v. Board of Educ., S. Orange-Maplewood School Dist.*, 587 F.3d 597 [250 Educ. L. Rep. 907] (3d Cir. 2009), cert. denied, 131 U.S. 72, 131 S. Ct. 72, 178 L.Ed.2d 24 (2010).

²⁶⁰ *S.D. v. St. Johns Cnty. School Dist.*, 632 F. Supp.2d 1085 [248 Educ. L. Rep. 215] (M.D. Fla. 2009).

²⁶¹ 25 F. Supp. 918 (D. Mass. 1939) (refusing to enjoin a statute requiring students to recite the pledge), *aff'd*, 306 U.S. 621, 59 S. Ct. 791, 83 L.Ed. 1027 (1939), *reh'g denied*, 307 U.S. 650, 59 S. Ct. 832, 83 L.Ed. 1529 (1939). See also *Leoles v. Landers*, 192 S.E. 218 (Ga. 1937), *appeal dismissed*, 302 U.S. 656, 58 S. Ct. 364, 82 L.Ed. 507 (1937); *Gabrielli v. Knickerbocker*, 82 P.2d 391 (Cal. 1938), *appeal dismissed*, cert. denied, 306 U.S. 621, 59 S. Ct. 786, 83 L.Ed. 1026 (1939).

Minersville School District v. Gobitis (Gobitis),²⁶² the Justices rejected the claim of Jehovah's Witnesses in Pennsylvania who argued that requiring their young to salute the flag was equivalent to forcing them to worship an image contrary to their core religious beliefs. The Court concluded that the students had to participate in the pledge.

In the face of significant criticism of *Gobitis*, the Supreme Court revisited the question of the pledge when Jehovah's Witnesses and others challenged the constitutionality of a state regulation requiring students to participate or risk being charged with insubordination and expulsion. As in *Gobitis*, the Jehovah's Witnesses argued that the pledge violated their rights to religious freedom. In *West Virginia State Board of Education v. Barnette (Barnette)*,²⁶³ the Justices, torn between the conflict over the limits of state power and individual rights, ruled that students could not be compelled to salute the flag. The Court affirmed an earlier order that requiring children to salute the flag exceeded constitutional limits on governmental power because doing so invaded the individual's sphere of intellect and spirit protected by the First Amendment.

Almost a quarter of a century later, the Supreme Court of New Jersey addressed whether Black Muslim children who refused to participate in the pledge could be excluded from public school when they claimed that doing so violated their religious beliefs.²⁶⁴ Educators excluded the students in light of their contention that the beliefs were motivated as much by politics as by religion, rejecting their claim of "conscientious scruples" insofar as the two were closely intertwined with their racial aspirations. While not resolving whether their refusal to salute the flag was religious or political, the court ordered the reinstatement of the students because they respectfully, and non-disruptively, stood at attention during the pledge.

Maryland's high court²⁶⁵ and the Fifth Circuit,²⁶⁶ in a case from Florida, struck down requirements that would have had students who objected to the flag salute stand while their classmates recited the pledge. In neither of these cases had school officials offered students the option of leaving their rooms. Even where students had the option of leaving rooms or standing silently during the pledge, the Second Circuit held that officials in New York could not discipline a child who remained quietly seated.²⁶⁷ The court declared that forcing students to stand could no more be required than the pledge and that having individuals leave during its recitation might have been viewed as a punishment for not participating absent evidence that the student was disruptive or interfered with the rights of others.

Another dispute from New York involved a nine-year-old who refused to stand during the pledge. While not reaching the merits of the claim, a federal trial court refused to grant the board's motion for

²⁶² 310 U.S. 586, 60 S. Ct. 1010, 84 L.Ed. 1375 (1940).

²⁶³ 319 U.S. 624, 63 S. Ct. 1178, 87 L.Ed. 1628 (1943).

²⁶⁴ *Holden v. Board of Educ., Elizabeth*, 216 A.2d 387 (N.J. 1966).

²⁶⁵ *State v. Lundquist*, 278 A.2d 263 (Md. 1971).

²⁶⁶ *Banks v. Board of Pub. Instruction of Dade Cnty.*, 314 F. Supp. 285 (S.D. Fla. 1970), *aff'd*, 450 F.2d 1103 (5th Cir. 1971).

²⁶⁷ *Goetz v. Ansell*, 477 F.2d 636 (2d Cir. 1973).

summary judgment over whether the child was punished for refusing to participate in the pledge.²⁶⁸ Moreover, a former high school student in Alabama sued his principal and others for violating his rights to free speech after punishing him for raising his fist during the recitation of the pledge. Officials gave the student the choice of a paddling or a detention which would have delayed his receiving his diploma at graduation. On further review of a grant of summary judgment in favor of officials, the Eleventh Circuit reversed and remanded.²⁶⁹ According to the court, insofar as genuine issues of material fact remained over whether the student was punished for failing to say the pledge, in violation of his established right to be free from compelled speech, his case should not have been dismissed.

In a controversy over the inclusion of the words “under God” in the pledge, which were added in 1954 when President Eisenhower signed a law making the addition official,²⁷⁰ the Seventh Circuit affirmed that school officials in Illinois could lead the pledge, including the contested phrase, as long as students were free not to participate.²⁷¹ The court interpreted the use of the phrase in the context of the secular vow of allegiance as patriotic or ceremonial expression rather than religious speech.

Conversely, after the Ninth Circuit affirmed that a school board in California violated the Establishment Clause by having students recite the words “under God” in the pledge,²⁷² the Supreme Court intervened. In *Elk Grove School District v. Newdow* (*Newdow*),²⁷³ the Justices sidestepped the merits of the constitutionality of the words “under God,” resolving the dispute on the ground that the non-custodial father lacked standing to challenge the policy, thereby leaving the door open for future litigation.

The Third Circuit, in the first post-*Newdow* appellate case involving the pledge, affirmed that a statute from Pennsylvania, directing officials to provide for its recitation or the singing of the national anthem each morning and to notify the parents of students who declined or refrained from doing so, constituted viewpoint discrimination in violation of the First Amendment.²⁷⁴ The court also indicated that requiring officials in non-public schools to provide for the recitation of the pledge or national anthem at the beginning of each school day violated their First Amendment right to freedom of expressive association.

²⁶⁸ *Rabideau v. Beekmantown Cent. School Dist.*, 89 F. Supp.2d 263 [143 Educ. L. Rep. 202] (N.D.N.Y. 2000).

²⁶⁹ *Holloman ex rel. Holloman v. Harland*, 370 F.3d 1252 [188 Educ. L. Rep. 620] (11th Cir. 2004).

²⁷⁰ 4 U.S.C.A. § 4.

²⁷¹ *Sherman v. Community Consol. School Dist. 21 of Wheeling Twp.*, 980 F.2d 437 [79 Educ. L. Rep. 396] (7th Cir. 1992), *cert. denied*, 508 U.S. 950, 113 S. Ct. 2439, 124 L.Ed.2d 658 (1993).

²⁷² *Newdow v. United States Cong.*, 292 F.3d 597 [166 Educ. L. Rep. 108] (9th Cir. 2002), 328 F.3d 466 [176 Educ. L. Rep. 44] (9th Cir. 2003), *cert. granted sub nom. Elk Grove Unified School Dist. v. Newdow*, 540 U.S. 945, 124 S. Ct. 384, 157 L.Ed.2d 274 [182 Educ. L. Rep. 34] (2003).

²⁷³ 542 U.S. 1, 124 S. Ct. 2301, 159 L.Ed.2d 98 [188 Educ. L. Rep. 17] (2004), [Case No. 15] *reh'g denied*, 542 U.S. 961, 125 S. Ct. 21, 159 L.Ed.2d 851 (2004).

²⁷⁴ *Circle Schools v. Pappert*, 381 F.3d 172 [191 Educ. L. Rep. 629] (3d Cir. 2004).

In a dispute from Virginia put on hold in light of *Newdow*, the Fourth Circuit rejected the claim of a father who alleged that the daily recital of the pledge in school forced his children to worship a secular state. The court was satisfied that the voluntary daily recitation of the pledge did not violate the Establishment Clause because it lacked a religious purpose or effect and did not create excessive government entanglement with religion insofar as even though it is a religious statement, it is largely a patriotic expression.²⁷⁵ At the same time, the court ruled that the non-attorney father could not litigate his *pro se* claim.²⁷⁶

A federal trial court in California, relying on the case from the Ninth Circuit that the Supreme Court vacated as moot in *Newdow*, granted the plaintiffs' request to prevent students from reciting the words "under God" in the pledge as a violation of the Establishment Clause.²⁷⁷ On appeal, the dispute was apparently laid to rest²⁷⁸ when a divided Ninth Circuit upheld the pledge insofar as neither state law nor the board policy required students to participate in its recitation.²⁷⁹

At issue in Florida was a local board policy, enacted pursuant to a state law, requiring students to recite the pledge unless they were excused from doing so by the written consent of their parents. Even if students were excused, the law and policy required them to stand at attention during the recitation of the pledge.²⁸⁰ The court invalidated the statute both on its face and as applied. On further review, in distinguishing the case at bar from *Barnette*, the Eleventh Circuit reversed and upheld the law, describing it as "largely a parental-rights statute."²⁸¹ The court determined that requiring parental notification if their children do not participate in the pledge, effectuated their constitutional right to control the education of their young. The court did invalidate the part of the law requiring students to stand during the pledge.

The Supreme Judicial Court of Massachusetts affirmed that a statute requiring the daily recitation of the pledge did not violate the equal protection rights clause of the commonwealth constitution.²⁸² The

²⁷⁵ *Myers v. Loudoun Cnty. Pub. Schools*, 418 F.3d 395 [200 Educ. L. Rep. 581] (4th Cir. 2005).

²⁷⁶ In another dispute involving the same father, a federal trial court in Virginia granted the board's motion for summary judgment when officials refused to print an advertisement that he sought to include in an athletic program. The court agreed that the board could exclude the advertisement because the names of the Web sites he sought to include in it in opposition to what he described as "civil religion" could be rejected as vulgar. *Myers v. Loudoun Cnty. School Bd.*, 500 F. Supp.2d 539 [223 Educ. L. Rep. 786] (E.D. Va. 2007).

²⁷⁷ *Newdow v. Congress of U.S.*, 383 F. Supp.2d 1229 [201 Educ. L. Rep. 915] (E.D. Cal. 2005).

²⁷⁸ For another such case, see *Freedom from Religion Found. v. Hanover School Dist.*, 665 F. Supp.2d 58 [252 Educ. L. Rep. 779] (D.N.H. 2009) (applying the *Lemon* and coercion tests in upholding a law requiring local boards to set aside time for the daily recitation of the pledge).

²⁷⁹ *Newdow v. Rio Linda Union School Dist.*, 597 F.3d 1007 [254 Educ. L. Rep. 544] (9th Cir. 2010).

²⁸⁰ *Frazier v. Alexandre*, 434 F. Supp.2d 1350 [210 Educ. L. Rep. 1123] (S.D. Fla. 2006).

²⁸¹ *Frazier v. Winn*, 535 F.3d 1279 [235 Educ. L. Rep. 737] (11th Cir. 2008), *reh'g en banc denied*, 555 F.3d 1292 (11th Cir. 2009), *cert. denied sub nom. Frazier v. Smith*, 558 U.S. 818, 130 S. Ct. 69, 175 L.Ed.2d 25 (2009).

²⁸² *Doe v. Acton-Boxborough Reg'l School Dist.*, 8 N.E.3d 737 [304 Educ. L. Rep. 586] (Mass. 2014).

court rejected the claims of students who were atheists and humanists that the inclusion of the words “under God” were unconstitutional, noting that insofar as those who exercised their right to opt out of participating in the recitation of the pledge were not punished, their claim was without merit.

3. STUDENT BELIEFS

In the nexus between student beliefs and curricular control, the courts ordinarily upheld the actions of school officials if they are able to demonstrate their reliance on legitimate pedagogical reasons. For example, the Sixth Circuit affirmed that a student in Tennessee could not write a biography about Jesus as a historical figure because she failed to follow her teacher’s directions in completing the assignment.²⁸³ Previously, the same court agreed that officials in Michigan did not violate a second-grader’s First Amendment rights to freedom of religion when they prevented her from showing a videotape of herself singing a proselytizing religious song to classmates during show-and-tell.²⁸⁴ The court maintained that educators had the legitimate pedagogical purpose of avoiding a situation where other children or their parents would have been offended by the song’s content.

The Eleventh Circuit affirmed that a high school principal in Florida did not violate a student’s First Amendment rights to free speech or free exercise of religion by requiring her to remove religious messages from a mural she painted as part of a school-wide beautification project.²⁸⁵ The court ruled that insofar as the project was under the direction of a teacher, and officials had no intention of creating a public forum, they could regulate the content of the student’s speech because it was part of a school-sponsored activity.

In a dispute from Michigan, a student sued school officials who refused to permit her to participate in a panel discussion involving clergy and religious leaders on homosexuality and religion because they disagreed with her message and sought to ensure that only one point of view was presented. The court found that educators violated the student’s rights because creating the panel failed all three parts of the *Lemon* test.²⁸⁶ The court decided that the panel lacked a secular purpose because it had an overtly religious character by virtue of its being made up of clergy and religious leaders, some of whom wore religious garb. The court wrote that insofar as the panel was created to communicate a religious perspective on homosexuality, it had the primary effect of advancing religion. The court concluded that the board’s allowing the panel to form violated the Establishment Clause because officials became excessively entangled with religion insofar as

²⁸³ *Settle v. Dickson Cnty. School Bd.*, 53 F.3d 152 [100 Educ. L. Rep. 32] (6th Cir. 1995), cert. denied, 516 U.S. 989, 116 S. Ct. 518, 133 L.Ed.2d 426 (1995).

²⁸⁴ *DeNooyer v. Livonia Pub. Schools*, 799 F. Supp. 744 [77 Educ. L. Rep. 1182] (E.D. Mich. 1992), *aff’d sub nom. Denooyer v. Merinelli*, 1 F.3d 1240 [85 Educ. L. Rep. 39] (6th Cir. 1993), *reh’g denied, opinion superseded without published opinion*, 12 F.3d 211 [88 Educ. L. Rep. 551] (6th Cir. 1993), cert. denied, 511 U.S. 1031, 114 S. Ct. 1540, 128 L.Ed.2d 193 (1994).

²⁸⁵ *Bannon v. School Dist. of Palm Beach Cnty.*, 387 F.3d 1208 [193 Educ. L. Rep. 78] (11th Cir. 2004), *reh’g and reh’g en banc denied*, 125 Fed.Appx. 984 (11th Cir. 2004), cert. denied, 546 U.S. 811, 126 S. Ct. 330, 163 L.Ed.2d 43 [202 Educ. L. Rep. 26] (2005).

²⁸⁶ *Hansen v. Ann Arbor Pub. Schools*, 293 F. Supp.2d 780 [183 Educ. L. Rep. 825] (E.D. Mich. 2003).

they selected the clergy participants, vetted their views, afforded them the use of school facilities along with a captive student audience, and censored the plaintiff's speech based on her religious beliefs.

Two federal appellate courts considered the religious expression rights of younger students. The Third Circuit affirmed that school officials in New Jersey could prohibit a first-grader from reading a religious story to classmates and from placing a religious poster on a school wall.²⁸⁷ Still, the court permitted the plaintiffs to amend their complaint about the poster.

In the second case, parents of a kindergarten child in New York filed suit after a teacher refused to display their son's entire poster. When directed to illustrate ways to save the environment, the child selected and cut out pictures from a magazine with the help of his mother, arranging them on a poster. In response to the teacher's question about who the man with outstretched arms was, he responded that it was Jesus, "the only way to save the world."²⁸⁸ On being told that the poster was unacceptable due to "religious" reasons, the child and his mother created a second poster also depicting a robed man but including people picking up and recycling trash along with children holding hands encircling the world. After a federal trial court granted the educators' motions for summary judgment, the Second Circuit reached mixed results. The court affirmed that insofar as the assignment was curriculum related, the teacher could reject the child's work as unresponsive to the assignment. Even so, the court reversed in favor of the parents on the free speech claim where genuine issues of fact remained as to whether the reasons educators proffered for rejecting the poster constituted viewpoint discrimination because they may not have excluded equally non-responsive secular images. The court agreed that when officials folded the child's allegedly unresponsive poster before displaying it so as to not make the robed religious figure visible, they did not violate the Establishment Clause.

On a related issue, the Third Circuit affirmed that school officials in New Jersey did not violate the Establishment Clause rights, among others, of a mother by prohibiting her from reading selections from the Bible to her son's kindergarten class as part of a "show and tell" activity.²⁸⁹ The court pointed out that in light of the age and impressionability of the children, coupled with the possibility the students might have viewed her as an authority figure, officials voiced a legitimate concern over the perception of endorsement of religion in violation of the Establishment Clause.

As to extracurricular activities such as sports practices²⁹⁰ and graduation ceremonies,²⁹¹ the few courts addressing the issue agreed

²⁸⁷ *C.H. ex rel. Z.H. v. Oliva*, 226 F.3d 198 [148 Educ. L. Rep. 585] (3d Cir. 2000), *cert. denied sub nom. Hood v. Medford Twp. Bd. of Educ.*, 533 U.S. 915, 121 S. Ct. 2519, 150 L.Ed.2d 692 (2001).

²⁸⁸ *Peck ex rel. Peck v. Baldwinville Cent. School Dist.*, 426 F.3d 617, 621 [202 Educ. L. Rep. 512] (2d Cir. 2005).

²⁸⁹ *Busch v. Marple Newton School Dist.*, 567 F.3d 89 [244 Educ. L. Rep. 1023] (3d Cir. 2009), *cert. denied*, 558 U.S. 1158, 130 S. Ct. 1137, 175 L.Ed.2d 991 (2010).

²⁹⁰ *Keller v. Gardner Cmty. Consol. Grade School Dist. 72C*, 552 F. Supp. 512 [8 Educ. L. Rep. 271] (N.D. Ill. 1982).

that school officials did not have to reschedule events in order to accommodate the religious beliefs of students. However, the Supreme Court of Oregon affirmed that granting the request of parents and student-athletes who attended a religiously affiliated secondary school to adjust the schedule of a basketball tournament so that they would be excused from playing on their Sabbath would not have violated the Establishment Clause.²⁹² If anything, the court explained that modifying the schedule to accommodate those with differing religious beliefs would have advanced the values served by the Establishment Clause while any burdens that the change may have imposed on others such as increased ticket prices and inconvenience did not entail government sponsorship or entanglement with religion.

In what can only be described as an unusual case involving religion and extracurricular activities, the Sixth Circuit rejected a parental claim that the use of the “Blue Devil” as a school mascot violated the Establishment Clause.²⁹³ The court affirmed that the charge lacked merit because no reasonable observer would have agreed that the “Blue Devil’s” principal or primary effect was to advance or inhibit religion or that its use was meant to endorse or disapprove a religious choice.

4. RELIGIOUS HARASSMENT

Two cases from New York involving student-on-student religious harassment applied language from the standards applied in Title IX sexual harassment claims. In the first, a federal trial court rejected the defendants’ motion essentially to dismiss the suit a high school student and his father filed alleging that their board and various officials violated his right to equal protection under section 1983.²⁹⁴ In light of the defendants’ deliberate indifference to anti-Semitic student-on-student religious harassment that was so severe, pervasive, and objectively offensive as to have deprived the plaintiff of access to educational opportunities or benefits provided by the school, coupled with the fact that officials allegedly had actual knowledge of the actions of peers, the court allowed the claim to proceed.

In the second case, another federal trial court in New York denied a board’s motion for summary judgments where officials did not even dispute the allegations of harassment five students were subjected to on account of their faith.²⁹⁵ The court was convinced that school officials were deliberately indifferent to the plight of the students who were subjected to severe and discriminatory harassment based on religion.

²⁹¹ *Smith by Smith v. Board of Educ., N. Babylon Union Free School Dist.*, 844 F.2d 90 [46 Educ. L. Rep. 518] (2d Cir. 1988).

²⁹² *Nakashima v. Oregon State Bd. of Educ.*, 185 P.3d 429 [232 Educ. L. Rep. 944] (Or. 2008).

²⁹³ *Kunselman v. Western Reserve Local School Dist.*, 70 F.3d 931 [105 Educ. L. Rep. 43] (6th Cir. 1995).

²⁹⁴ *G.D.S. ex rel. Slade v. Northport-E. Northport Union Free School Dist.*, 915 F. Supp.2d 268 [294 Educ. L. Rep. 124] (E.D.N.Y. 2012).

²⁹⁵ *T.E., O.C., and D.C., v. Pine Bush Cent. School Dist.*, ___ F. Supp.3d ___, 2014 WL 5591066 [___ Educ. L. Rep. ___] (S.D.N.Y. 2014).

5. RELIGIOUS GARB

a. Students

The courts seem to agree that educators must devise less restrictive alternatives to preventing students from wearing religious garb to schools.²⁹⁶ The Ninth Circuit affirmed that officials violated the rights of Sikh students in California by trying to prevent them from wearing ceremonial daggers under their clothes.²⁹⁷ The court decided that officials overstepped their authority absent a showing that a total ban on weapons was the least restrictive alternative to promote campus safety.

In a case from Texas overlapping with issues of grooming, the Fifth Circuit invalidated a board policy which forbade male students from having their hair touch their ears. The policy would have required a student who is a Native American to wear his long hair in a bun on top of his head or in a braid tucked into his shirt. Affirming an order in favor of the student, the court held that in light of his sincere religious belief in wearing his hair visibly long, the policy would have imposed a substantial burden on his right to the free exercise of religion.²⁹⁸ Earlier, when students wore rosaries to school as necklaces, a federal trial court in Texas ruled that educators violated their First Amendment right to pure speech because rosaries are a form of religious expression.²⁹⁹

b. Teachers

Older cases addressed whether teachers in public schools could wear distinctive religious garb. The disputes often arose over whether Roman Catholic nuns could wear their habits while teaching in public schools.³⁰⁰ In an early case, the Supreme Court of Pennsylvania affirmed the authority of a local school board to hire Catholic nuns as teachers and to permit them to teach in their habits.³⁰¹ Shortly thereafter, the legislature enacted a law specifically designed to prevent teachers in Pennsylvania from wearing dress or insignia indicating membership in religious orders while at work. In deferring to legislative

²⁹⁶ See also *Isaacs v. Board of Educ. of Howard Cnty., Md.*, 40 F. Supp.2d 335 [134 Educ. L. Rep. 166] (D. Md. 1999) (granting a board's motion for summary judgment when a student relied on the First Amendment right to free speech in seeking to wear a head wrap to school to celebrate her cultural heritage).

²⁹⁷ *Cheema v. Thompson*, 67 F.3d 883 [104 Educ. L. Rep. 57] (9th Cir. 1995).

²⁹⁸ *A.A. ex rel. Betenbaugh v. Needville Indep. School Dist.*, 611 F.3d 248 [258 Educ. L. Rep. 955] (5th Cir. 2010). For an earlier case reaching the same result, see *Alabama and Coushatta Tribes of Tex. v. Trustees of the Big Sandy Indep. School Dist.*, 817 F. Supp. 1319 [82 Educ. L. Rep. 442] (E.D. Tex. 1993), remanded by 20 F.3d 469 [90 Educ. L. Rep. 579] (5th Cir. 1994).

²⁹⁹ *Chalifoux v. New Caney Indep. School Dist.*, 976 F. Supp. 659 [121 Educ. L. Rep. 751] (S.D. Tex. 1997).

³⁰⁰ In a related matter, at least one court affirmed that where nuns turned their earnings over to their religious superiors, this did not provide justification for barring them from serving as public school teachers. See *Gerhardt v. Heid*, 267 N.W. 127 (N.D. 1936).

³⁰¹ *Hysong v. School Dist. of Gallitzin Borough*, 30 A. 482 (Pa. 1894). See also *Rawlings v. Butler*, 290 S.W.2d 801 (Ky. 1956).

authority, the same court also upheld a law banning nuns from teaching in their habits.³⁰²

The Supreme Court of Oregon, in a case involving a teacher who, on becoming a Sikh, wore white clothes and a white turban while teaching, posited that she was subject to a state legislative ban on religious dress while performing her teaching duties.³⁰³ The court acknowledged in dicta that such a prohibition would not have applied to incidental elements such as a cross or Star of David or to ethnic or cultural dress.

Two other cases reached mixed results. The Supreme Court of Mississippi ascertained that officials could not dismiss a teacher who was a member of the African Hebrew Israelites out of Ethiopia faith for insubordination when she wore a religious head wrap to school.³⁰⁴ Yet, the Third Circuit, relying on the statute discussed two paragraphs earlier, rejected the claim of a female Muslim teacher in Pennsylvania who adhered to the religious conviction that she should, when in public, cover her entire body except her face and hands.³⁰⁵

Whether educators can wear religious symbols seems to depend largely on their size and obviousness. The federal trial court in Connecticut granted a school board's motion for summary judgment in a dispute where officials directed a substitute teacher either to cover a t-shirt with the message "Jesus 2000" on it or to go home and change into other clothes.³⁰⁶ The court was of the opinion that administrators did not violate the teacher's First Amendment rights to the free exercise of religion or free speech.

Conversely, a federal trial court in Pennsylvania granted an instructional assistant's motion for a preliminary injunction after she was suspended for refusing to remove or conceal a small cross she regularly wore on a necklace, the approach required by her board's religious affiliations policy.³⁰⁷ The court agreed that the policy violated the Free Exercise Clause because its being directed only at religious exercise and symbolic expression made it impermissibly content and viewpoint based.

³⁰² *Commonwealth v. Herr*, 78 A. 68 (Pa. 1910). See also *O'Connor v. Hendrick*, 77 N.E. 612 (N.Y. 1906); *Zellers v. Huff*, 236 P.2d 949 (N.M. 1951).

³⁰³ *Cooper v. Eugene School Dist. No. 4J*, 723 P.2d 298 [34 Educ. L. Rep. 614] (Or. 1986), appeal dismissed, 480 U.S. 942, 107 S. Ct. 1597, 94 L.Ed.2d 784 (1987).

³⁰⁴ *Mississippi Employment Securities Comm'n v. McGlothlin*, 556 So. 2d 324 [58 Educ. L. Rep. 859] (Miss. 1990), cert. denied, 498 U.S. 879, 111 S. Ct. 211, 112 L.Ed.2d 171 (1990). See also *McGlothlin v. Jackson Mun. Separate School Dist.*, 829 F. Supp. 853 (85 Educ. L. Rep. 864 (S.D. Miss. 1992) (rejecting First Amendment and Title VII religious discrimination claims because the plaintiff failed to notify board officials of her needed accommodations before her employment was terminated).

³⁰⁵ *United States v. Board of Educ. for School Dist. of Philadelphia*, 911 F.2d 882 [62 Educ. L. Rep. 460] (3d Cir. 1990).

³⁰⁶ *Downing v. West Haven Bd. of Educ.*, 162 F. Supp.2d 19 [157 Educ. L. Rep. 112] (D. Conn. 2001).

³⁰⁷ *Nichol v. ARIN Intermediate Unit 28*, 268 F. Supp.2d 536 [179 Educ. L. Rep. 315] (W.D. Pa. 2003).

6. DISTRIBUTION OF PROSELYTIZING MATERIALS/RELIGIOUS LITERATURE IN SCHOOLS

In an early case, the Supreme Court of New Jersey was of the view that where school officials enacted a policy for all student groups, they could impose reasonable time, manner, and place restrictions on the ability of students to distribute religious literature such as Gideon Bibles³⁰⁸ or proselytize in schools. Amid considerable controversy over the distribution of religious materials and literature in schools, courts, even within the same jurisdiction, have reached conflicting results.

The Third,³⁰⁹ Seventh,³¹⁰ and Eighth³¹¹ Circuits, along with federal trial courts, agreed that students cannot hand out religious newspapers,³¹² advertisements about activities,³¹³ or invitations to such events as alternatives to Halloween parties³¹⁴ or religious meetings³¹⁵ where the activities were motivated by religious objections as long as officials enunciated appropriate time, manner, and place restrictions about the distribution or sale of non-school materials at school.³¹⁶

The Sixth Circuit affirmed that a fifth-grader in Michigan could not sell pipe-cleaner candy cane Christmas tree ornaments he made as part of a school project if they were attached to religious cards promoting Jesus.³¹⁷ The court observed that the principal did not violate the student's free speech rights because insofar as the activity was school-

³⁰⁸ *Tudor v. Board of Educ. of Borough of Rutherford*, 100 A.2d 857 (N.J. 1953), *cert. denied*, 348 U.S. 816, 75 S. Ct. 25, 99 L.Ed. 644 (1954).

³⁰⁹ *Walz ex rel. Walz v. Egg Harbor Twp. Bd. of Educ.*, 342 F.3d 271 [180 Educ. L. Rep. 115] (3d Cir. 2003), *cert. denied*, 541 U.S. 936, 124 S. Ct. 1658, 158 L.Ed.2d 356 (2004) (forbidding the distribution of pencils with religious messages attached to them).

³¹⁰ *Berger v. Rensselaer Cent. School Corp.*, 982 F.2d 1160 [80 Educ. L. Rep. 68] (7th Cir. 1993), *cert. denied*, 508 U.S. 911, 113 S. Ct. 2344, 124 L.Ed.2d 254 (1993); *Muller by Muller v. Jefferson Lighthouse School*, 98 F.3d 1530 [113 Educ. L. Rep. 1085] (7th Cir. 1996), *cert. denied*, 520 U.S. 1156, 117 S. Ct. 1335, 137 L.Ed.2d 495 (1997) (prohibiting the distribution of Bibles).

³¹¹ *Victory Through Jesus Sports Ministry Found. v. Lee's Summit R-7 School Dist.*, 640 F.3d 329 [267 Educ. L. Rep. 466] (8th Cir. 2011), *reh'g and reh'g en banc denied* (2011), *cert. denied*, ___ U.S. ___, 132 S. Ct. 592, 181 L.Ed. 424 (2012); *Roark v. South Iron R-1 School Dist.*, 573 F.3d 556 [246 Educ. L. Rep. 723] (8th Cir. 2009).

³¹² *Thompson v. Waynesboro Area School Dist.*, 673 F. Supp. 1379 [43 Educ. L. Rep. 138] (M.D. Pa. 1987); *Hemry v. School Bd. of Colorado Springs School Dist. No. 11*, 760 F. Supp. 856 [67 Educ. L. Rep. 142] (D. Colo. 1991). *But see Rivera v. East Otero School Dist. R-1*, 721 F. Supp. 1189 [56 Educ. L. Rep. 861] (D. Colo. 1989) (permitting a student to distribute a religious newsletter).

³¹³ *Krestan v. Deer Valley Unified School Dist. No. 97, of Maricopa Cnty.*, 561 F. Supp.2d 1078 [235 Educ. L. Rep. 361] (D. Ariz. 2008).

³¹⁴ *See, e.g., Guyer v. School Bd. of Alachua Cnty.*, 634 So. 2d 806 [90 Educ. L. Rep. 961] (Fla. Dist. Ct. App. 1994), *review denied without published opinion*, 641 So. 2d 1345 (Fla. 1994), *cert. denied*, 513 U.S. 1044, 115 S. Ct. 638, 130 L.Ed.2d 544 (1994); *Johnston-Loehner v. O'Brien*, 859 F. Supp. 575 [94 Educ. L. Rep. 167] (M.D. Fla. 1994).

³¹⁵ *Muller by Muller v. Jefferson Lighthouse School*, 98 F.3d 1530 [113 Educ. L. Rep. 1085] (7th Cir. 1996), *cert. denied*, 520 U.S. 1156, 117 S. Ct. 1335, 137 L.Ed.2d 495 (1997).

³¹⁶ *Pounds v. Katy Indep. School Dist.*, 517 F. Supp.2d 901 [226 Educ. L. Rep. 829] (S.D. Tex. 2007). *See also Pounds v. Katy Indep. School Dist.*, 730 F. Supp.2d 636, 262 Educ. L. Rep. 872 (S.D. Tex. 2010) (allowing students to sell "holiday" cards with Biblical messages because doing so was not disruptive to school activities).

³¹⁷ *Curry ex rel. Curry v. Hensiner*, 513 F.3d 570 [229 Educ. L. Rep. 30] (6th Cir. 2008), *reh'g and reh'g en banc denied* (2008).

sponsored, he had greater latitude to restrict the child's behavior.³¹⁸ The court interpreted the principal's action as being reasonably related to legitimate pedagogical concerns of neither offending other students nor their parents while not subjecting young children to unsolicited religious promotional messages that might have conflicted with what they were taught at home.

The Third,³¹⁹ Fourth,³²⁰ Fifth,³²¹ Sixth,³²² Seventh,³²³ and Ninth³²⁴ Circuits, plus federal trial courts in Arkansas,³²⁵ New York,³²⁶ and Washington,³²⁷ permitted groups and/or single students to distribute religious materials, including invitations to events at churches such as a Christmas party³²⁸ and an Easter egg hunt to learn the "true meaning of Easter"³²⁹ in schools because doing so did not violate the Establishment Clause. These courts allowed the practices to continue because there were safeguards in place such as having educators review materials to ensure they were not proselytizing and having information sent home to parents who could choose whether their children would participate in the activities.

³¹⁸ See also *Edwards v. United States*, 249 F.R.D. 25 (D. Conn. 2008) (dismissing a mother's *pro se* challenge to her being prevented from distributing candy canes to her oldest child's class while talking about the Bible during regular school hours).

³¹⁹ *K.A. ex rel. Ayers v. Pocono Mountain School Dist.*, 710 F.3d 99 [290 Educ. L. Rep. 446] (3d Cir. 2013); *Child Evangelism Fellowship of N.J. v. Stafford Twp. School Dist.*, 386 F.3d 514 [192 Educ. L. Rep. 670] (3d Cir. 2004).

³²⁰ *Child Evangelism Fellowship v. Montgomery Cnty. Pub. Schools*, 457 F.3d 376 [211 Educ. L. Rep. 591] (4th Cir. 2006). See also *Peck v. Upshur Cnty. Bd. of Educ.*, 155 F.3d 274 [129 Educ. L. Rep. 77] (4th Cir. 1998) (declaring that a neutral board policy permitting non-students to disseminate Bibles and other religious materials in school during class hours did not violate the Establishment Clause, but striking it down as applied to elementary school students).

³²¹ *Doe v. Duncanville Indep. School Dist.*, 70 F.3d 402 [104 Educ. L. Rep. 1032] (5th Cir. 1995) (ruling that a student and her father lacked standing to challenge the distribution of Bibles in school because she was not in a class where they were given out and the board did not expend its funds in the process).

³²² *Rusk v. Crestview Local School Dist.*, 379 F.3d 418 [191 Educ. L. Rep. 84] (6th Cir. 2004).

³²³ *Sherman v. Community Consol. School Dist. 21*, 8 F.3d 1160 [87 Educ. L. Rep. 57] (7th Cir. 1993), *cert. denied*, 511 U.S. 1110, 114 S. Ct. 2109, 128 L.Ed.2d 669 (1994) (affirming that the distribution of Boy Scout materials did not violate the Establishment Clause).

³²⁴ *Hills v. Scottsdale Unified School Dist. No. 48*, 329 F.3d 1044 [176 Educ. L. Rep. 557] (9th Cir. 2003), *cert. denied*, 540 U.S. 1149, 124 S. Ct. 1146, 157 L.Ed.2d 1042, 184 Educ. L. Rep. 23 (2004). *But see Culbertson v. Oakridge School Dist.*, 258 F.3d 1061 [155 Educ. L. Rep. 1085] (9th Cir. 2001) (rejecting the claim that distribution of Good News Club permission slips would have violated the Establishment Clause).

³²⁵ *Wright ex rel. A.W. v. Pulaski Cnty. Special School Dist.*, 803 F. Supp.2d 980 [274 Educ. L. Rep. 944] (E.D. Ark. 2011).

³²⁶ *M.B. ex rel. Martin v. Liverpool Cent. School Dist.*, 487 F. Supp.2d 117 [221 Educ. L. Rep. 79] (N.D.N.Y. 2007).

³²⁷ See also *Daugherty v. Vanguard Charter School Acad.*, 116 F. Supp.2d 897 [148 Educ. L. Rep. 208] (W.D. Mich. 2000).

³²⁸ *K.A. ex rel. Ayers v. Pocono Mountain School Dist.*, 710 F.3d 446 [290 Educ. L. Rep. 446] (3d Cir. 2013) (rejecting the board's claim that distributing invitations to a Christmas party would have been disruptive).

³²⁹ *Gilio ex rel. J.G. v. School Bd. of Hillsborough Cnty., Fla.*, 905 F. Supp.2d 1262, 1267, [292 Educ. L. Rep. 321] (M.D. Fla. 2012) (enjoining a board policy where officials were unable to prove that the distribution of invitations would have materially and substantially interfered with school discipline).

In a long-running dispute from Texas, the Fifth Circuit held that school principals who searched the bags of students, confiscating pencils with religious messages on them that the children intended to distribute, had not waived their immunity under state law. The court decided that the principals were entitled to immunity under state law due to faulty service when they were first sued.³³⁰ In a related action, the court affirmed that the principal who refused to allow a mother to distribute religious materials to other adults had qualified immunity because the plaintiff's right to do so was not clearly established.³³¹

The federal trial court in Massachusetts, in a similar kind of dispute, granted a Bible study club's request to enjoin a policy against distributing items at school including candy canes with religious messages attached to them because the group's private expressive religious actions were not disruptive.³³² The court suggested that students who might have been offended by the candy canes with religious messages were free to decline them because they were not coerced into accepting the gifts.³³³

7. PUBLIC RELIGIOUS DISPLAYS ON SCHOOL GROUNDS

In its only case directly involving schools, *Stone v. Graham*,³³⁴ the Supreme Court rejected the posting of the Ten Commandments in classrooms, even if they were purchased with private funds, as a violation of the Establishment Clause. The Court's brief per curiam opinion described Kentucky's statute requiring the posting as lacking a secular purpose, emphasizing that the Ten Commandments were not integrated into the school curriculum. The Justices were not swayed by a small notation on the postings identifying the Commandments as part of the fundamental legal code of Western Civilization and the common law of the United States.

Debate continues over the place, if any, of the Ten Commandments in school settings. A federal trial court in Kentucky granted a student's request to enjoin officials from displaying the Ten Commandments and other religious documents, pointing out that she had a strong likelihood of success on the merits of her claim.³³⁵

Two cases from the Sixth Circuit reached results consistent with non-school cases.³³⁶ In the first, the court affirmed an injunction against

³³⁰ *Morgan v. Plano Indep. School Dist.*, 724 F.3d 579 (5th Cir. 2013).

³³¹ *Morgan v. Swanson*, 755 F.3d 757 [306 Educ. L. Rep. 642] (5th Cir. 2014).

³³² *Westfield High School L.I.F.E. Club v. City of Westfield*, 249 F. Supp.2d 98 [175 Educ. L. Rep. 506] (D. Mass. 2003).

³³³ For a case not involving literature per se, see *Taylor v. Roswell Indep. School Dist.*, 713 F.3d 25 [292 Educ. L. Rep. 22] (10th Cir. 2013) (affirming that forbidding students from handing out rubber fetus dolls expressing their opposition to abortion did not violate their First Amendment Free Exercise or Speech Clause rights in light of a board policy prohibiting the distribution of non-school material without prior approval).

³³⁴ 449 U.S. 39, 101 S. Ct. 192, 66 L.Ed.2d 199 (1980), *reh'g denied*, 449 U.S. 1104, 101 S. Ct. 904, 66 L.Ed.2d 832 (1981), *on remand*, 612 S.W.2d 133 (Ky. 1981).

³³⁵ *Doe v. Harlan Cnty. School Dist.*, 96 F. Supp.2d 667 [144 Educ. L. Rep. 503] (E.D. Ky. 2000).

³³⁶ See, e.g., *Indiana Civil Liberties Union v. O'Bannon*, 259 F.3d 766 (7th Cir. 2001), *cert. denied*, 532 U.S. 1058, 121 S. Ct. 2209, 149 L.Ed.2d 1036 (2001) (prohibiting a monument on the grounds of the statehouse including the Ten Commandments); *Books v. City of Elkhart*, 235 F.3d 292 (7th Cir. 2000), *cert. denied*, 532 U.S. 1058, 121 S. Ct. 2209, 149 L.Ed.2d 1036

a board in Ohio's displaying stone monuments inscribed with the Ten Commandments at a high school because the plaintiffs had standing to file suit and the board failed to establish a secular purpose for the display.³³⁷ In the second case, the Sixth Circuit rejected modifications to displays in a county courthouse and public school in Kentucky including a variety of documents along with the Ten Commandments such as the full text of the Magna Carta, the Declaration of Independence, and a Biblical citation. The court decided that the display violated the Establishment Clause because it had the effect of advancing religion.³³⁸ This latter case ultimately made its way to the Supreme Court but was limited to a review of the dispute involving the courthouse.

In two non-school cases, the Supreme Court reached mixed results. In *McCreary County, Kentucky v. American Civil Liberties Union of Kentucky*,³³⁹ the Justices, focusing on the fact that officials erected, and modified, the display at the county courthouse three times after putting it up in 1999, affirmed that it violated the Establishment Clause largely because it failed *Lemon's* secular purpose test.

Conversely, in *Van Orden v. Perry*,³⁴⁰ a plurality of the Supreme Court affirmed that a display of the Ten Commandments including seventeen monuments and twenty-one historical markers commemorating the state's history spread out over the twenty-two acres of the Texas State Capitol was constitutional. Eschewing the *Lemon* test, the plurality essentially accepted the inclusion of the Ten Commandments in the display as constitutional because even though they continue to have religious significance, the monument was a far more passive display than in *Stone*.

Shortly after the Supreme Court resolved its cases on the Ten Commandments, the Eighth Circuit rejected a challenge to the presence of a long-standing granite monument in a city park that was donated by a civic organization and had been displayed without objection for decades.³⁴¹ Explaining that the words on the monument faced away from the park and that the Ten Commandments had undeniable historic meaning along with their religious significance, the court ruled that its simply having religious content or promoting a message consistent with a religious doctrine did not run afoul of the Establishment Clause.

The Tenth Circuit subsequently reversed an injunction denying a religious group's request to erect a monument in a public park where

(2001) (forbidding a monument from being erected on the lawn of a city's municipal building because it was inscribed with the Ten Commandments); *Suhre v. Haywood Cnty.*, 131 F.3d 1083 (4th Cir. 1997) (banning a display of the Ten Commandments in a county courtroom); *Glassroth v. Moore*, 229 F. Supp.2d 1290 (N.D. Ala. 2002) (proscribing a monument engraved with the Ten Commandments in a courthouse).

³³⁷ *Baker v. Adams Cnty./Ohio Valley School*, 86 Fed.Appx. 104 [184 Educ. L. Rep. 745] (6th Cir. 2004), cert. denied, 545 U.S. 1152, 125 S. Ct. 2989, 162 L.Ed. 910 (2005).

³³⁸ *American Civil Liberties Union v. McCreary Cnty., Ky.*, 354 F.3d 438 [184 Educ. L. Rep. 67] (6th Cir. 2003), cert. granted, 543 U.S. 924, 125 S. Ct. 310, 160 L.Ed.2d 221 [192 Educ. L. Rep. 631] (2004) (also forbidding the posting of the Ten Commandments in a county courthouse).

³³⁹ 545 U.S. 844, 125 S. Ct. 2722, 162 L.Ed.2d 729 (2005).

³⁴⁰ 545 U.S. 677, 125 S. Ct. 2854, 162 L.Ed.2d 607 (2005).

³⁴¹ *ACLU Neb. Found. v. City of Plattsmouth*, 419 F.3d 772 (8th Cir. 2005).

the Ten Commandments were already displayed in asserting that this amounted to an infringement on its right to free speech.³⁴² On appeal in *Pleasant Grove City v. Summum*,³⁴³ the Supreme Court unanimously reversed, declaring that insofar as the group's desire to place a permanent monument in a public park was a form of governmental speech, officials could deny the request without having to have their action subjected to strict scrutiny review.³⁴⁴

When dealing with other kinds of displays at schools, the Sixth Circuit³⁴⁵ and the federal trial court in Rhode Island³⁴⁶ agreed that long-hanging depictions drawn by former students could not remain in schools because they displayed religious messages.

In a case involving the school from the tragic shootings in Columbine, Colorado, the Tenth Circuit held that a board-sponsored tile painting/installation project as part of the building's reconstruction was school-sponsored speech.³⁴⁷ The court allowed officials to exercise editorial control under the First Amendment because their actions were reasonably related to legitimate pedagogical concerns. The court added that officials could exclude bricks from a walkway in front of the school bearing inscriptions containing Christian messages and/or referring to Jesus.³⁴⁸

On the other hand, a federal trial court in Virginia granted a parental motion for summary judgment where a board ordered the removal of bricks decorated with Latin crosses while allowing those with secular symbols to remain in place in a school's walkway of fame.³⁴⁹ The court treated the actions of school officials who removed only bricks with religious symbols as constituting impermissible viewpoint discrimination.³⁵⁰ The Tenth Circuit later rejected a

³⁴² *Summum v. Pleasant Grove City*, 499 F.3d 1170 (10th Cir. 2007).

³⁴³ 555 U.S. 460, 129 S. Ct. 1125, 172 L.Ed.2d 853 (2009).

³⁴⁴ See also *Freedom from Religion Found. v. New Kensington-Arnold School Dist.*, 919 F. Supp. 2d 648 [294 Educ. L. Rep. 708] (W.D. Pa. 2013) (rejecting a board's motion to dismiss a challenge to a stone monument near the front of a high school bearing a variety of inscriptions including the Ten Commandments).

³⁴⁵ *Washegesic v. Bloomington Pub. Schools*, 33 F.3d 679 [94 Educ. L. Rep. 32] (6th Cir. 1994), *reh'g and suggestion for reh'g en banc denied* (1994), *cert. denied*, 514 U.S. 1095, 115 S. Ct. 1822, 131 L.Ed.2d 744 (1995) (involving a portrait of Jesus).

³⁴⁶ *Ahlquist v. City of Cranston ex rel. Strom*, 840 F. Supp.2d 507 [281 Educ. L. Rep. 831] (D.R.I. 2012), *reconsideration denied* (2012) (displaying the school prayer).

³⁴⁷ *Fleming v. Jefferson Cnty. School Dist. R-1*, 298 F.3d 918 [167 Educ. L. Rep. 649] (10th Cir. 2002), *as amended on denial of reh'g and reh'g en banc* (2002), *cert. denied*, 537 U.S. 1110, 123 S. Ct. 893, 154 L.Ed.2d 783 (2003).

³⁴⁸ See also *Seidman v. Paradise Valley Unified School Dist. No. 69*, 327 F. Supp.2d 1098 [191 Educ. L. Rep. 175] (D. Ariz. 2004) (rejecting parents' motion for summary judgment in a suit against their board for violations of their First and Fourteenth Amendment rights over their having to remove the word "God" from the proposed inscription "God Bless Quinn We Love You Mom and Dad," and a similar inscription for their daughter that would have appeared on wall tiles on an interior school wall).

³⁴⁹ *Demmon v. Loudoun Cnty. Pub. Schools*, 342 F. Supp.2d 474 [193 Educ. L. Rep. 497] (E.D. Va. 2004).

³⁵⁰ See also *Anderson v. Mexico Acad. and Cent. School*, 186 F. Supp.2d 193 [162 Educ. L. Rep. 262] (N.D.N.Y. 2002), *remanded sub nom. Kiesinger v. Mexico Acad. & Cent. School*, 56 Fed.Appx. 549 [173 Educ. L. Rep. 709] (2d Cir. 2003) (remanding for a review of the entire record where the trial court decided that a board's exclusion of the plaintiffs' bricks from the walkway in front of school because their inscriptions contained Christian messages and/or

challenge to a board's display of the official city seal which included three crosses.³⁵¹ Noting that the name of the city, "Las Cruces," translates into "the crosses," the court affirmed that the postings satisfied what it described as the *Lemon*-endorsement test.

A case involving a teacher raised a related concern. The Ninth Circuit affirmed that officials in California could order a high school teacher to remove two large banners from a wall in his classroom. The first proclaimed "In God We Trust," "One Nation Under God," and "God Bless America" while the second read "All men are created equal, they are endowed by their Creator."³⁵² The court affirmed that the teacher could not post the banner because doing so violated all three prongs of the *Lemon* test.

8. CURRICULAR ELEMENTS

a. *In General*

Consistent with dicta in *Abington v. Schempp* that "[t]he holding of the Court today plainly does not foreclose teaching about the Holy Scriptures or about the differences between religious sects in classes in literature or history . . .,"³⁵³ the judiciary has reached mixed results over the place of religion in public school curricula. Courts have yet to devise a test to evaluate the balance between teaching about religion and the teaching of religion in public schools.

The Supreme Court of New Hampshire upheld the display of plaques, containing the words "In God We Trust,"³⁵⁴ to be visible classrooms. The court treated the display as acceptable because it was the national motto as it appears on coins and currency,³⁵⁵ on public buildings,³⁵⁶ and in the national anthem.

In a dispute from California, the Ninth Circuit affirmed the dismissal of the claim filed by parents over the use of curricular materials on Islam.³⁵⁷ The materials included a simulation unit on

referred to "Jesus" violated their right to free speech by engaging in viewpoint discrimination but did not violate the Establishment Clause).

³⁵¹ *Weinbaum v. City of Las Cruces, N.M.*, 541 F.3d 1017 [236 Educ. L. Rep. 575] (10th Cir. 2008).

³⁵² *Johnson v. Poway Unified School Dist.*, 658 F.3d 954, 958 [273 Educ. L. Rep. 110] (9th Cir. 2011), *cert. denied*, ___ U.S. ___, 132 S. Ct. 1807, 182 L.Ed.2d 619 (2012).

³⁵³ *School District of Abington Twp. v. Schempp and Murray v. Curlett*, 374 U.S. 203, 300, 83 S. Ct. 1560, 10 L.Ed.2d 844 (1963). [Case No. 4]

³⁵⁴ *Opinion of the Justices*, 228 A.2d 161 (N.H. 1967).

³⁵⁵ See also *Aronow v. United States*, 432 F.2d 242 (9th Cir. 1970) (affirming "In God We Trust" on American currency and coins as well as in the national anthem had nothing to do with the establishment of religion). For cases rejecting similar challenges, see, e.g., *O'Hair v. Murray*, 588 F.2d 1144 (5th Cir. 1979), *cert. denied sub nom. O'Hair v. Blumenthal*, 442 U.S. 930, 99 S. Ct. 2862, 61 L.Ed.2d 298 (1979); *Newdow v. Lefevre*, 598 F.3d 638 (9th Cir. 2010), *cert. denied*, ___ U.S. ___, 131 S. Ct. 1612, 179 L.Ed.2d 501 (2011).

³⁵⁶ See also *Lambeth v. Board of Comm'rs of Davidson Cnty.*, 407 F.3d 266 (4th Cir. 2005), *cert. denied*, 546 U.S. 1015, 126 S. Ct. 647, 163 L.Ed.2d 525 (2005) (affirming that the inscription "In God We Trust" on a county government center did not violate the Establishment Clause).

³⁵⁷ *Eklund v. Byron Union School Dist.*, 154 Fed.Appx. 648 (9th Cir. 2005), *cert. denied*, 549 U.S. 942, 127 S. Ct. 86, 166 L.Ed.2d 252 (2006).

Islamic culture in a social studies course that, among other things, required students to wear identification tags displaying their new Islamic names, dress as Muslims, memorize and recite an Islamic prayer with the status of the Lord's Prayer in Christianity as well as verses from the Uur'an, recite the Five Pillars of Faith, and engage in fasting and acts of self-denial.³⁵⁸ Without addressing the merits of the claims, the court determined that the activities "were not . . . 'overt religious exercises' that raise[d] Establishment Clause concerns."³⁵⁹

On a different issue, courts are reluctant to allow teachers to use supplemental materials with religious content. A federal trial court in California largely rejected the claims of an elementary school teacher that officials violated his rights by prohibiting him from using religious materials in class and talking about religion with his students.³⁶⁰ The court added that if the plaintiff could prove that officials permitted other similarly situated teachers to include religious expression in their lessons and supplemental handouts but prevented him from doing so, he would have had evidence to present a case that they violated his right to equal protection.

The federal trial court in Maine reached a different outcome in denying a school board's motion for summary judgment where a history teacher filed suit claiming officials forbade him from providing instruction about non-Christian religions and directed him to include only references to Christianity.³⁶¹ The court was convinced that in light of remaining material issues of fact as to whether officials yielded to pressure from parents who did not want the teacher to offer information about religions other than Christianity, the case should have proceeded to trial.

A federal trial court in California rejected the claim of an organization which disagreed with the manner in which state curricular standards addressed Hinduism.³⁶² Granting the state's motion for summary judgment, the court noted both that the group lacked standing and that the standards passed Establishment Clause analysis because the process under which they were developed satisfied all three parts of the *Lemon* test.

In Delaware, a case overlapping with religious celebrations arose when the mother of a Muslim elementary school child raised a variety of claims. The federal trial court rejected the school board's motion for summary judgment because genuine issue of fact remained as to whether a fourth-grade teacher's use of Christmas readings violated the student's rights under the State Constitution's Preference Clause,

³⁵⁸ *Eklund v. Byron Union School Dist.*, 2006 WL 1519184 (Appellate Petition, Motion and Filing) (U.S. 2006). *Petition for a Writ of Certiorari* (No. 05-1539) at 3-13.

³⁵⁹ *Eklund v. Byron Union School Dist.*, 154 Fed.Appx. 648 (9th Cir. 2005) (internal citations omitted), quoting *Brown v. Woodland Joint Unified School Dist.*, 27 F.3d 1373, 1382 [92 Educ. L. Rep. 828] (9th Cir. 1994) (affirming that a curricular program which asked children to discuss witches or create poetic chants and pretend they were witches or sorcerers did not require them to practice the "religion" of witchcraft in violation of Establishment Clause or California Constitution).

³⁶⁰ *Williams v. Vidmar*, 367 F. Supp.2d 1265 [198 Educ. L. Rep. 292] (N.D. Cal. 2005).

³⁶¹ *Cole v. Maine School Admin. Dist. No. 1*, 350 F. Supp.2d 143 [195 Educ. L. Rep. 130] (D. Me. 2004).

³⁶² *California Parents for the Equalization of Educ. Materials v. Noonan*, 600 F. Supp.2d 1088 [243 Educ. L. Rep. 96] (E.D. Cal. 2009).

essentially the equivalent of the Federal Free Exercise Clause, or Equal Protection Clause of the Fourteenth Amendment and whether school officials were entitled to qualified immunity for the alleged violations of the child's rights.³⁶³ The court granted the board's motion for summary judgment on the claim about the teacher's reading from a textbook that brought up religion in discussing events of 9/11. The court rejected the claim that the teacher's actions violated the child's rights under the State Constitution's Preference Clause.

b. Religious Celebrations

Considering the vast amount of litigation dealing with religion in public schools, it is surprising that the Supreme Court has yet to address a case directly on the status of religious celebrations in schools. The closest the Justices came to reviewing a case on this contentious topic was when they twice addressed public displays involving Christmas in non-school cases.

In *Lynch v. Donnelly*,³⁶⁴ a plurality of the Supreme Court upheld the inclusion of a Nativity scene in a Christmas display on public property relying largely on the endorsement test. *County of Allegheny v. American Civil Liberties Union*,³⁶⁵ the second case, involved two displays. The first display was of a creche in a county courthouse including an angel bearing a banner with the message *Gloria in Excelsis Deo*, literally, "Glory to God in the Highest," plus a sign stating that the scene was donated by a private religious organization. The second display, which was located outside of an office building owned by the city and county, consisted of a forty-five-foot Christmas tree, an eighteen-foot menorah, and a sign proclaiming the city's salute to liberty during the holiday season. The Justices affirmed that the first display had the impermissible effect of endorsing religion.³⁶⁶ As to the second display, the Court asserted that insofar as the Christmas tree and menorah were placed in the broader context of the season and did not endorse a particular religious faith, it passed constitutional muster.

Turning to religious celebrations in schools, the Eighth Circuit upheld guidelines that a board in South Dakota developed for use in connection with religious observances, most notably Christmas and other holidays.³⁶⁷ The guidelines permitted objective discussions of religious and secular holidays. The court suggested that explanations of historical and contemporary values relating to holidays; short-term use of religious symbols as examples of religious heritages; and integration

³⁶³ *Doe v. Cape Henlopen School Dist.*, 759 F. Supp.2d 522 [266 Educ. L. Rep. 812] (D. Del. 2011).

³⁶⁴ 465 U.S. 668, 104 S. Ct. 1355, 79 L.Ed.2d 604 (1984).

³⁶⁵ 492 U.S. 573, 109 S. Ct. 3086, 106 L.Ed.2d 472 (1989).

³⁶⁶ See also *American Civil Liberties Union of New Jersey v. Schundler*, 168 F.3d 92 (3d Cir. 1999) (affirming that a display of a menorah and a Christmas tree in front of a city hall violated the Establishment Clause; also allowing a display consisting of a creche, a menorah, and a Christmas tree, along with plastic figures of Santa Claus, Frosty the Snowman, a red sled, Kwanzaa symbols, and two signs explaining that the exhibit was part of a series of displays that the city erected throughout the year to celebrate the cultural and ethnic diversity of its residents, to remain because it was virtually indistinguishable from the ones in *Lynch* and *ACLU* cited in the two previous footnotes).

³⁶⁷ *Florety v. Sioux Falls School Dist.*, 49–5, 619 F.2d 1311 (8th Cir. 1980), cert. denied, 449 U.S. 987, 101 S. Ct. 409, 66 L.Ed.2d 251 (1980).

of music, art, literature, and drama with religious themes could be included in curricula as long as they were presented objectively as a traditional part of the cultural and religious heritages of holidays.

The Ninth Circuit affirmed that curricular material asking children to discuss witches or create poetic chants and directing them to pretend they were witches or sorcerers did not require students to practice the religion of witchcraft in violation of the Establishment Clause or the California Constitution. In dicta the court went so far as to suggest that “a reenactment of the Last Supper or a Passover dinner might be permissible if presented for historical or cultural purposes.”³⁶⁸

A federal trial court in Pennsylvania addressed the status of a “Winter Holiday” display including information on Chanukah and Kwanzaa, but nothing on Christmas other than a parody of a traditional Christmas hymn that the plaintiff, a youth minister, found offensive.³⁶⁹ The court rejected the plaintiff’s challenge, responding that the display did not offend the Establishment Clause by favoring one religion over another.

The Second Circuit upheld a policy of the New York City Board of Education permitting seasonal displays of a menorah along with a star and crescent but not a manger scene or creche.³⁷⁰ The court maintained that insofar as the policy had the perceived secular purpose of promoting pluralism and respect for diversity, did not have the principle or primary effect of advancing or inhibiting religion, and did not excessively entangle church and state, it passed Establishment Clause muster.

Courts reached mixed results with regard to Good Friday, the day commemorating the death of Christ. The Seventh Circuit affirmed that a law from Illinois making Good Friday a paid holiday for teachers and closing schools violated the Establishment Clause because it was a purely sectarian holiday unaccompanied by any secular rituals.³⁷¹

In the first of three cases reaching the opposite result, the Seventh Circuit later affirmed that Indiana’s recognition of Good Friday as a legal holiday for state employees did not violate the Establishment Clause because its doing so was based on secular justifications including the provision of a spring holiday that were supported by evidence and did not constitute a sham.³⁷² The court reasoned that the state’s actions were justified because Good Friday occurred during a time period in which there would be over four months without a holiday and over thirty percent of schools in the state were closed on that day. The court noted that the recognition of Good Friday neither had the

³⁶⁸ *Brown v. Woodland Joint Unified School Dist.*, 27 F.3d 1373, 1380, n.6 [92 Educ. L. Rep. 828] (9th Cir. 1994).

³⁶⁹ *Sechler v. State College Area School Dist.*, 121 F. Supp.2d 439 [149 Educ. L. Rep. 141] (M.D. Pa. 2000). For a case in a non-school setting, see *Spohn v. West*, 2000 WL 1459981 (S.D.N.Y. 2000) (dismissing the claim of a Christian worker in a public hospital that a display of Jewish, but not Christian, religious symbols during the December holiday season violated his First Amendment rights under the Establishment Clause).

³⁷⁰ *Skoros v. City of N.Y.*, 437 F.3d 1 [206 Educ. L. Rep. 525] (2d Cir. 2006), cert. denied, 549 U.S. 1205, 127 S. Ct. 1245, 167 L.Ed.2d 74 (2007).

³⁷¹ *Metzl v. Leininger*, 57 F.3d 618 [101 Educ. L. Rep. 112] (7th Cir. 1995).

³⁷² *Bridenbaugh v. O’Bannon*, 185 F.3d 796 (7th Cir. 1999), cert. denied, 529 U.S. 1003, 120 S. Ct. 1267, 146 L.Ed.2d 217 (2000).

principal effect of advancing religion nor represented an endorsement of religion. The Fourth³⁷³ and Sixth³⁷⁴ Circuits also upheld the status of Good Friday as a legal holiday.

c. *Evolution*

Judicial controversy over the study of the origins of humankind in public schools first arose in the so-called “Scopes Monkey Trial.” The case involved a challenge to a state law forbidding the teaching of evolution because doing so contradicted the literalist Biblical interpretation of creation in Genesis. After a substitute science teacher agreed to confess to having violated the law even though post-trial evidence suggests he did not do so, he was fined \$100 as part of a plan to get the case to a higher court. While leaving the statute that made teaching evolution a crime in place, in *Scopes v. State*,³⁷⁵ the Supreme Court of Tennessee reversed the teacher’s conviction because the judge improperly assessed a fine that could only have been imposed by a jury. Officials followed the court’s advice and did not take further action in light of its comment that there was “nothing to be gained by prolonging the life of this bizarre case.”³⁷⁶

The Supreme Court reviewed a challenge to a 1928 law which forbade the teaching of evolution in state-supported schools in *Epperson v. Arkansas*.³⁷⁷ The Justices invalidated the statute for failing to comply with the recently created judicial test from *Abington*. The Court held that the statute was unconstitutional insofar as it attempted to prevent teaching Darwin’s theory of evolution based on a supposed conflict with the Biblical account of creation. A federal trial court then struck down another law from Arkansas intended to require providing balanced treatment for instruction on Biblical notions of creation if evolution was included in curricula.³⁷⁸

A second Supreme Court case on the origins of humankind arose in Louisiana where a statute forbade the teaching of “evolution-science” in public elementary and secondary schools unless accompanied by instruction on “creation-science.” In *Edwards v. Aguillard*,³⁷⁹ the Court invalidated the law because it violated the first prong of the *Lemon* test insofar as it lacked a secular purpose. The Justices noted that the legislation impacted the science curriculum by reflecting a religion-based view that either banished the theory of evolution from classrooms or added the presentation of a religious viewpoint that rejected evolution entirely.

³⁷³ *Koenick v. Felton*, 190 F.3d 259 [138 Educ. L. Rep. 100] (4th Cir. 1999), cert. denied, 528 U.S. 1118, 120 S. Ct. 938, 145 L.Ed.2d 816 (2000) (affirming the rejection of a retired teacher’s claim that a Maryland statute providing for public school holidays on the Friday before Easter through the Monday after Easter violated the Establishment Clause).

³⁷⁴ *Granzeier v. Middleton*, 173 F.3d 568 (6th Cir. 1999) (affirming that closing courts and offices in a county courthouse and administration building in Kentucky on Good Friday along with posting a sign on the courthouse door containing a picture of a four-inch high crucifix with the image of Christ did not violate the Establishment Clause).

³⁷⁵ *Scopes v. State*, 289 S.W. 363 (Tenn. 1927).

³⁷⁶ *Id.* at 367.

³⁷⁷ 393 U.S. 97, 89 S. Ct. 266, 21 L.Ed.2d 228 (1968). [Case No. 6]

³⁷⁸ *McLean v. Arkansas Bd. of Educ.*, 529 F. Supp. 1255 [2 Educ. L. Rep. 685] (E.D. Ark. 1982).

³⁷⁹ 482 U.S. 578, 107 S. Ct. 2573, 96 L.Ed.2d 510 [39 Educ. L. Rep. 958] (1987).

In another case from Louisiana, a school board adopted a resolution disclaiming the endorsement of evolution after it failed to introduce “creation-science” into its curriculum as a legitimate scientific alternative to evolution. Parents challenged the disclaimer under the Establishment Clause in both the federal and state constitutions.³⁸⁰ The Fifth Circuit affirmed that the disclaimer was unacceptable because it did not promote the articulated objective of encouraging informed freedom of belief or critical thinking while advancing the purposes of disclaiming orthodoxy of belief and of reducing offense to the sensibilities of any student or parent.

In like fashion, a federal trial court in Georgia held that a board’s ordering officials to place stickers on biology textbooks, proclaiming that evolution was a theory, not fact, and inviting students to approach material in their books with open minds, study it carefully, and give it critical consideration, violated the Establishment Clause by impermissibly favoring religion. On appeal, the Eleventh Circuit vacated and remanded in favor of the board on the basis that it needed additional evidentiary inquiries and new findings of fact before proceeding.³⁸¹

As a newer battleground in disputes over the origins of humankind, a federal trial court in Pennsylvania invalidated a school board policy on the teaching of intelligent design in a high school biology class. The policy would have required students to hear a statement mentioning intelligent design as an alternative to Darwin’s theory of evolution. The court invalidated the policy as unconstitutional because it both amounted to an endorsement of religion in violation of the Establishment Clause and violated the *Lemon* test because its primary purpose was to change the biology curriculum to advance religion along with having the primary effect of imposing a religious view perspective into the biology course.³⁸²

Litigation has also addressed whether educators can be required to teach about evolution. An appellate court in California rejected the claim of a teacher that officials violated his right to free speech in directing him not to talk about religion during the school day because he refused to teach about evolution.³⁸³

The Supreme Court of South Dakota upheld a school board’s refusal to renew the contract of a biology teacher who spent too much time on creationism in class while failing to cover basic course material.³⁸⁴ The court agreed that the board’s action was not arbitrary, capricious, or an abuse of discretion because officials warned the teacher not to spend excessive amounts of class time on creationism.

³⁸⁰ *Freiler v. Tangipahoa Parish Bd. of Educ.*, 185 F.3d 337 [137 Educ. L. Rep. 195] (5th Cir. 1999), *reh’g en banc denied*, 201 F.3d 602 [141 Educ. L. Rep. 458] (5th Cir. 2000), *cert. denied*, 530 U.S. 1251, 120 S. Ct. 2706, 147 L.Ed.2d 974 (2000).

³⁸¹ *Selman v. Cobb Cnty. School Dist.*, 449 F.3d 1320 [210 Educ. L. Rep. 51] (11th Cir. 2006).

³⁸² *Kitzmiller v. Dover Area School Dist.*, 400 F. Supp.2d 707 [205 Educ. L. Rep. 250] (M.D. Pa. 2005).

³⁸³ *Peloza v. Capistrano Unified School Dist.*, 37 F.3d 517 [94 Educ. L. Rep. 1159] (9th Cir. 1994), *cert. denied*, 515 U.S. 1173, 115 S. Ct. 2640, 132 L.Ed.2d 878 (1995).

³⁸⁴ *Dale v. Board of Educ., Lemmon Indep. School Dist.* 52–2, 316 N.W.2d 108 [2 Educ. L. Rep. 865] (S.D. 1982).

More recently, the Supreme Court of Ohio upheld the dismissal of a tenured teacher for an array of reasons, including charges of surreptitiously supplementing his eighth-grade science curriculum with religious handouts, showing videos on creationism and intelligent design, displaying religious materials in his classroom, and making statements in class referring to the Bible.³⁸⁵ The court agreed that when officials ordered the teacher to stop talking about creationism and intelligent design along with telling him to remove conspicuously-displayed Christian-themed materials, they did not violate his Free Exercise rights. The court concluded that the teacher's having ignoring valid directives constituted willful disobedience of amounting to "insubordination" supporting his dismissal.³⁸⁶ Earlier, an appellate court in Minnesota upheld a board's reassigning a teacher to a different biology course when he refused to teach about evolution.³⁸⁷

As to student beliefs, an appellate court in Georgia rejected a pupil's claim that the biology textbook her board used did not denigrate her belief in creationism in violation of the Establishment Clause.³⁸⁸ The court affirmed that the board did not sponsor religious actions or beliefs in serving the secular purpose of educating biology students about both the nature of the scientific method and the most widely accepted explanations for the origins of life. The court remarked that insofar as the use of the book did not require the student to refrain from practicing her religious beliefs, it did not violate the Free Exercise Clause.

Another case focused on a teacher's criticism of a high school student in California's belief in creationism. The Ninth Circuit affirmed the denial of the student's claims against the teacher who described religion as "superstitious nonsense"³⁸⁹ along with demonstrating hostility to religion in general and Christianity in particular. The court granted the teacher's motion for qualified immunity because the law was not clearly established while rejecting the student's request for declaratory and injunctive relief as moot insofar as he had graduated. The court denied the plaintiff's plea for judicial intervention as inappropriate, rationalizing that educators need "leeway to challenge students to foster critical thinking skills and develop their analytical abilities."³⁹⁰

³⁸⁵ *Freshwater v. Mt. Vernon City School Dist. Bd. of Educ.*, 1 N.E.3d 335 [300 Educ. L. Rep. 452] (Ohio 2013).

³⁸⁶ See also *Comer v. Scott*, 610 F.3d 929, [258 Educ. L. Rep. 521] (5th Cir. 2010) (affirming the dismissal of the Director of Science of the Texas Education Agency for forwarding an e-mail promoting an event critical of creationism).

³⁸⁷ *LeVake v. Independent School Dist. No. 656*, 625 N.W.2d 502 [153 Educ. L. Rep. 356] (Minn. Ct. App. 2001), review denied (2001), cert. denied, 534 U.S. 1081, 122 S. Ct. 814, 151 L.Ed.2d 698 (2002).

³⁸⁸ *Moeller v. Schrenko*, 554 S.E.2d 198 [158 Educ. L. Rep. 850] (Ga. Ct. App. 2001).

³⁸⁹ *C.F. v. Capistrano Unified School Dist.*, 654 F.3d 975, 982 [272 Educ. L. Rep. 169] (9th Cir. 2011).

³⁹⁰ *Id.* at 988.

[Case No. 1] Constitutionality of Providing Transportation to
 Students who Attend Non-Public Schools

Everson v. Board of Education of Ewing Township

Supreme Court of the United States, 1947.

330 U.S. 1, 67 S. Ct. 504, 91 L.Ed. 711.

■ MR. JUSTICE BLACK delivered the opinion of the Court.

A New Jersey statute authorizes its local school districts to make rules and contracts for the transportation of children to and from schools. The appellee, a township board of education, acting pursuant to this statute authorized reimbursement to parents of money expended by them for the bus transportation of their children on regular busses operated by the public transportation system. Part of this money was for the payment of transportation of some children in the community to Catholic parochial schools. These church schools give their students, in addition to secular education, regular religious instruction conforming to the religious tenets and modes of worship of the Catholic Faith. The superintendent of these schools is a Catholic priest.

...

The only contention here is that the State statute and the resolution, in so far as they authorized reimbursement to parents of children attending parochial schools, violate the Federal Constitution in these two respects, which to some extent, overlap. First. They authorize the State to take by taxation the private property of some and bestow it upon others, to be used for their own private purposes. This, it is alleged, violates the due process clause of the Fourteenth Amendment. Second. The statute and the resolution forced inhabitants to pay taxes to help support and maintain schools which are dedicated to, and which regularly teach, the Catholic Faith. This is alleged to be a use of State power to support church schools contrary to the prohibition of the First Amendment which the Fourteenth Amendment made applicable to the states.

First. The due process argument that the State law taxes some people to help others carry out their private purposes is framed in two phases. The first phase is that a state cannot tax A to reimburse B for the cost of transporting his children to church schools. This is said to violate the due process clause because the children are sent to these church schools to satisfy the personal desires of their parents, rather than the public's interest in the general education of all children. This argument, if valid, would apply equally to prohibit state payment for the transportation of children to any non-public school, whether operated by a church, or any other non-government individual or group. But, the New Jersey legislature has decided that a public purpose will be served by using tax-raised funds to pay the bus fares of all school children, including those who attend parochial schools. The New Jersey Court of Errors and Appeals has reached the same conclusion. The fact that a state law, passed to satisfy a public need, coincides with the personal desires of the individuals most directly affected is certainly an inadequate reason for us to say that a legislature has erroneously appraised the public need.

...

It is much too late to argue that legislation intended to facilitate the opportunity of children to get a secular education serves no public purpose. The same thing is no less true of legislation to reimburse needy parents, or all parents, for payment of the fares of their children so that they can ride in public busses to and from schools rather than run the risk of traffic and other hazards incident to walking or "hitchhiking." Nor does it follow that a law has a private rather than a public purpose because it provides that tax-raised funds will be paid to reimburse individuals on account of money spent by them in a way which furthers a public program. Subsidies and loans to individuals such as farmers and home owners, and to privately owned transportation systems, as well as many other kinds of businesses, have been commonplace practices in our state and national history.

...

Second. The New Jersey statute is challenged as a "law respecting an establishment of religion." The First Amendment, as made applicable to the states by the Fourteenth, commands that a state "shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." These words of the First Amendment reflected in the minds of early Americans a vivid mental picture of conditions and practices which they fervently wished to stamp out in order to preserve liberty for themselves and for their posterity. Doubtless their goal has not been entirely reached; but so far has the Nation moved toward it that the expression "law respecting an establishment of religion," probably does not so vividly remind present-day Americans of the evils, fears, and political problems that caused that expression to be written into our Bill of Rights. Whether this New Jersey law is one respecting the "establishment of religion" requires an understanding of the meaning of that language, particularly with respect to the imposition of taxes. Once again, therefore, it is not inappropriate briefly to review the background and environment of the period in which that constitutional language was fashioned and adopted.

...

The "establishment of religion" clause of the First Amendment means at least this: 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. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between Church and State."

... New Jersey cannot consistently with the "establishment of religion" clause of the First Amendment contribute tax-raised funds to the support of an institution which teaches the tenets and faith of any church. On the other hand, other language of the amendment commands that New Jersey cannot hamper its citizens in the free exercise of their own religion. Consequently, it cannot exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Nonbelievers, Presbyterians, or the members of any other faith, *because of their faith, or lack of it*, from receiving the benefits of public welfare legislation. While we do not mean to intimate that a state could not provide transportation only to children attending public schools, we must be careful, in protecting the citizens of New Jersey against state-established churches, to be sure that we do not inadvertently prohibit New Jersey from extending its general State law benefits to all its citizens without regard to their religious belief.

Measured by these standards, we cannot say that the First Amendment prohibits New Jersey from spending tax-raised funds to pay the bus fares of parochial school pupils as a part of a general program under which it pays the fares of pupils attending public and other schools. It is undoubtedly true that children are helped to get to church schools. There is even a possibility that some of the children might not be sent to the church schools if the parents were compelled to pay their children's bus fares out of their own pockets when transportation to a public school would have been paid for by the State. . . . Similarly, parents might be reluctant to permit their children to attend schools which the state had cut off from such general government services as ordinary police and fire protection, connections for sewage disposal, public highways and sidewalks. Of course, cutting off church schools from these services, so separate and so indisputably marked off from the religious function, would make it far more difficult for the schools to operate. But such is obviously not the purpose of the First Amendment. That Amendment requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions, than it is to favor them.

This Court has said that parents may, in the discharge of their duty under state compulsory education laws, send their children to a religious rather than a public school if the school meets the secular educational requirements which the state has power to impose. It appears that these parochial schools meet New Jersey's requirements. The State contributes no money to the schools. It does not support them. Its legislation, as applied, does no more than provide a general program to help parents get their children, regardless of their religion, safely and expeditiously to and from accredited schools.

The First Amendment has erected a wall between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach. New Jersey has not breached it here.

Affirmed.

NOTES

1. The dissent argued that it was impossible to separate the cost of transportation from among other expenses associated with education and characterizing it as not aiding non-public schools because, where needed, it is “as essential to education as any other element” of the total cost. Did the majority respond to this point? If so, how did it respond? What do you think?

2. In concurring opinions in *Engel v. Vitale* and *School Dist. of Abington Twp. v. Schempp*, Justice Douglas wrote that in retrospect he agreed with the dissent. Had he voted with the dissent, how might this have changed the face of church-state relations?

[Case No. 2] Constitutionality of Voluntary Religious Instruction in Public Schools

**People of the State of Illinois ex rel. McCollum v.
Board of Education of School District 71,
Champaign County**

Supreme Court of the United States, 1948.
333 U.S. 203, 68 S. Ct. 461, 92 L.Ed. 649.

■ MR. JUSTICE BLACK delivered the opinion of the Court.

. . .

. . . In 1940 interested members of the Jewish, Roman Catholic, and a few of the Protestant faiths formed a voluntary association called the Champaign Council on Religious Education. They obtained permission from the Board of Education to offer classes in religious instruction to public school pupils in grades four to nine inclusive. Classes were made up of pupils whose parents signed printed cards requesting that their children be permitted to attend; they were held weekly, thirty minutes for the lower grades, forty-five minutes for the higher. The council employed the religious teachers at no expense to the school authorities, but the instructors were subject to the approval and supervision of the superintendent of schools. The classes were taught in three separate religious groups by Protestant teachers, Catholic priests, and a Jewish rabbi, although for the past several years there have apparently been no classes instructed in the Jewish religion. Classes were conducted in the regular classrooms of the school building. Students who did not choose to take the religious instruction were not released from public school duties; they were required to leave their classrooms and go to some other place in the school building for pursuit of their secular studies. On the other hand, students who were released from secular study for the religious instructions were required to be present at the religious classes. Reports of their presence or absence were to be made to their secular teachers.

The foregoing facts, without reference to others that appear in the record, show the use of tax-supported property for religious instruction and the close cooperation between the school authorities and the religious council in promoting religious education. The operation of the state's compulsory education system thus assists and is integrated with

the program of religious instruction carried on by separate religious sects. Pupils compelled by law to go to school for secular education are released in part from their legal duty upon the condition that they attend the religious classes. This is beyond all question a utilization of the tax-established and tax-supported public school system to aid religious groups to spread their faith. And it falls squarely under the ban of the First Amendment (made applicable to the States by the Fourteenth) as we interpreted it in *Everson v. Board of Education*. There we said: "Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force or influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or nonattendance. 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. In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between Church and State.'" The majority in the *Everson* case, and the minority as shown by quotations from the dissenting views, . . . agreed that the First Amendment's language, properly interpreted, had erected a wall of separation between Church and State. They disagreed as to the facts shown by the record and as to the proper application of the First Amendment's language to those facts. . . .

To hold that a state cannot consistently with the First and Fourteenth Amendments utilize its public school system to aid any or all religious faiths or sects in the dissemination of their doctrines and ideals does not, as counsel urge, manifest a governmental hostility to religion or religious teachings. A manifestation of such hostility would be at war with our national tradition as embodied in the First Amendment's guaranty of the free exercise of religion. For the First Amendment rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere. Or, as we said in the *Everson* case, the First Amendment has erected a wall between Church and State which must be kept high and impregnable.

Here not only are the state's tax-supported public school buildings used for the dissemination of religious doctrines. The State also affords sectarian groups an invaluable aid in that it helps to provide pupils for their religious classes through use of the state's compulsory public school machinery. This is not separation of Church and State.

The cause is reversed and remanded to the State Supreme Court for proceedings not inconsistent with this opinion.

Reversed and remanded.

NOTES

1. Do you think the Court would have reached the same result if the children who attended religion classes were dismissed from school?

2. On remand from the Fifth Circuit's having vitiated a volunteer school counseling program involving the use of clergy for violating the Establishment Clause by advancing religion and by creating excessive entanglement, a federal trial court in Texas agreed that the program failed the neutrality test of *Lemon v. Kurtzman*. *Oxford v. Beaumont Indep. School Dist.*, 224 F. Supp.2d 1099 [171 Educ. L. Rep. 182] (E.D. Tex. 2002).

[Case No. 3] Constitutionality of "Released Time" for Religious Instruction

Zorach v. Clauson

Supreme Court of the United States, 1952.
343 U.S. 306, 72 S. Ct. 679, 96 L.Ed. 954.

■ MR. JUSTICE DOUGLAS delivered the opinion of the Court.

New York City has a program which permits its public schools to release students during the school day so that they may leave the school buildings and school grounds and go to religious centers for religious instruction or devotional exercises. A student is released on written request of his parents. Those not released stay in the classrooms. The churches make weekly reports to the schools, sending a list of children who have been released from public school but who have not reported for religious instruction.

This "released time" program involves neither religious instruction in public school classrooms nor the expenditure of public funds. All costs, including the application blanks, are paid by the religious organizations. The case is therefore unlike *McCullum v. Board of Education*. . . .

It takes obtuse reasoning to inject any issue of the "free exercise" of religion into the present case. No one is forced to go to the religious classroom and no religious exercise or instruction is brought to the classrooms of the public schools. A student need not take religious instruction. He is left to his own desires as to the manner or time of his religious devotions, if any.

There is a suggestion that the system involves the use of coercion to get public school students into religious classrooms. There is no evidence in the record before us that supports that conclusion. The present record indeed tells us that the school authorities are neutral in this regard and do no more than release students whose parents so request. If in fact coercion were used, if it were established that any one or more teachers were using their office to persuade or force students to take the religious instruction, a wholly different case would be presented. . . .

Moreover, apart from that claim of coercion, we do not see how New York by this type of "released time" program has made a law respecting an establishment of religion within the meaning of the First Amendment. There is much talk of the separation of Church and State

in the history of the Bill of Rights and in the decisions clustering around the First Amendment. There cannot be the slightest doubt that the First Amendment reflects the philosophy that Church and State should be separated. And so far as interference with the "free exercise" of religion and an "establishment" of religion are concerned, the separation must be complete and unequivocal. The First Amendment within the scope of its coverage permits no exception; the prohibition is absolute. The First Amendment, however, does not say that in every and all respects there shall be a separation of Church and State. Rather, it studiously defines the manner, the specific ways, in which there shall be no concert or union or dependency one on the other. That is the common sense of the matter. Otherwise the state and religion would be aliens to each other—hostile, suspicious, and even unfriendly. Churches could not be required to pay even property taxes. Municipalities would not be permitted to render police or fire protection to religious groups. . . .

We would have to press the concept of separation of Church and State to these extremes to condemn the present law on constitutional grounds. 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, 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.

We are a religious people whose institutions presuppose a Supreme Being. We guarantee the freedom to worship as one chooses. We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary. We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma. When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe. Government may not finance religious groups nor undertake religious instruction nor blend secular and sectarian education nor use secular institutions to force one or some religion on any person. But we find no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence. The government must be neutral when it comes to competition between sects. It may not thrust any sect on any

person. It may not make a religious observance compulsory. It may not coerce anyone to attend church, to observe a religious holiday, or to take religious instruction. But it can close its doors or suspend its operations as to those who want to repair to their religious sanctuary for worship or instruction. No more than that is undertaken here.

This program may be unwise and improvident from an educational or a community viewpoint. That appeal is made to us on a theory, previously advanced, that each case must be decided on the basis of “our own prepossessions.” Our individual preferences, however, are not the constitutional standard. The constitutional standard is the separation of Church and State. The problem, like many problems in constitutional law, is one of degree.

In the *McCullum* case the classrooms were used for religious instruction and the force of the public school was used to promote that instruction. Here, as we have said, the public schools do no more than accommodate their schedules to a program of outside religious instruction. We follow the *McCullum* case. But we cannot expand it to cover the present released program unless separation of Church and State means that public institutions can make no adjustments of their schedules to accommodate the religious needs of the people. We cannot read into the Bill of Rights such a philosophy of hostility to religion.

Affirmed.

NOTES

1. Do you think that release time is a sound pedagogical practice?
2. In light of the principles of negligence presented in Chapter 7, does release time raise concerns for student safety?

[Case No. 4] Constitutionality of the Bible and the Lord’s Prayer in Public Schools

School District of Abington Township v. Schempp, Murray v. Curlett

Supreme Court of the United States, 1963.
[374 U.S. 203](#), [83 S. Ct. 1560](#), [10 L.Ed.2d 844](#).

■ MR. JUSTICE CLARK delivered the opinion of the Court.

. . . These companion cases present the issues in the context of state action requiring that schools begin each day with readings from the Bible. While raising the basic questions under slightly different factual situations, the cases permit of joint treatment. In light of the history of the First Amendment and of our cases interpreting and applying its requirements, we hold that the practices at issue and the laws requiring them are unconstitutional under the Establishment Clause, as applied to the States through the Fourteenth Amendment.

. . . The Commonwealth of Pennsylvania by law, . . . requires that “At least ten verses from the Holy Bible shall be read, without comment, at the opening of each public school on each school day. Any child shall be excused from such Bible reading, or attending such Bible reading, upon the written request of his parent or guardian.” The

Schempp family, husband and wife and two of their three children, brought suit to enjoin enforcement of the statute. . . .

The appellees Edward Lewis Schempp, his wife Sidney, and their children, Roger and Donna, are of the Unitarian faith and are members of the Unitarian Church in Germantown, Philadelphia, Pennsylvania, where they . . . regularly attend religious services. . . .

On each school day at the Abington Senior High School between 8:15 and 8:30 a.m., while the pupils are attending their home rooms or advisory sections, opening exercises are conducted pursuant to the statute. The exercises are broadcast into each room in the school building through an intercommunications system and are conducted under the supervision of a teacher by students attending the school's radio and television workshop. Selected students from this course gather each morning in the school's workshop studio for the exercises, which include readings by one of the students of 10 verses of the Holy Bible, broadcast to each room in the building. This is followed by the recitation of the Lord's Prayer, likewise over the intercommunications system, but also by the students in the various classrooms, who are asked to stand and join in repeating the prayer in unison. The exercises are closed with the flag salute and such pertinent announcements as are of interest to the students. Participation in the opening exercises, as directed by the statute, is voluntary. The student reading the verses from the Bible may select the passages and read from any version he chooses, although the only copies furnished by the school are the King James version, copies of which were circulated to each teacher by the school district. During the period in which the exercises have been conducted the King James, the Douay and the Revised Standard versions of the Bible have been used, as well as the Jewish Holy Scriptures. There are no prefatory statements, no questions asked or solicited, no comments or explanations made and no interpretations given at or during the exercises. The students and parents are advised that the student may absent himself from the classroom or, should he elect to remain, not participate in the exercises. . . .

At the first trial Edward Schempp and the children testified as to specific religious doctrines purveyed by a literal reading of the Bible "which were contrary to the religious beliefs which they held and to their familial teaching." The children testified that all of the doctrines to which they referred were read to them at various times as part of the exercises. Edward Schempp testified at the second trial that he had considered having Roger and Donna excused from attendance at the exercises but decided against it for several reasons, including his belief that the children's relationships with their teachers and classmates would be adversely affected. . . .

. . .

The wholesome "neutrality" of which this Court's cases speak . . . stems from a recognition of the teachings of history that powerful sects or groups might bring about a fusion of governmental and religious functions or a concert or dependency of one upon the other to the end that official support of the State or Federal Government would be placed behind the tenets of one or of all orthodoxies. This the Establishment Clause prohibits. And a further reason for neutrality is

found in the Free Exercise Clause, which recognizes the value of religious training, teaching and observance and, more particularly, the right of every person to freely choose his own course with reference thereto, free of any compulsion from the state. This the Free Exercise Clause guarantees. Thus, as we have seen, the two clauses may overlap. As we have indicated, the Establishment Clause has been directly considered by this Court eight times in the past score of years and, with only one Justice dissenting on the point, it has consistently held that the clause withdrew all legislative power respecting religious belief or the expression thereof. 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. . . .

Applying the Establishment Clause principles to the cases at bar we find that the States are requiring the selection and reading at the opening of the school day of verses from the Holy Bible and the recitation of the Lord's Prayer by the students in unison. These exercises are prescribed as part of the curricular activities of students who are required by law to attend school. They are held in the school buildings under the supervision and with the participation of teachers employed in those schools. . . .

. . . Nor are these required exercises mitigated by the fact that individual students may absent themselves upon parental request, for that fact furnishes no defense to a claim of unconstitutionality under the Establishment Clause. Further, it is no defense to urge that the religious practices here may be relatively minor encroachments on the First Amendment. . . .

It is insisted that unless these religious exercises are permitted a "religion of secularism" is established in the schools. We agree of course that the State may not establish a "religion of secularism" in the sense of affirmatively opposing or showing hostility to religion, thus "preferring those who believe in no religion over those who do believe." We do not agree, however, that this decision in any sense has that effect. In addition, it 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 consistent with the First Amendment. But the exercises here do not fall into those categories. They are religious exercises, required by the States in violation of the command of the First Amendment that the Government maintain strict neutrality, neither aiding nor opposing religion. . . .

The place of religion in our society is an exalted one, achieved through a long tradition of reliance on the home, the church and the inviolable citadel of the individual heart and mind. We have come to recognize through bitter experience that it is not within the power of government to invade that citadel, whether its purpose or effect be to

aid or oppose, to advance or retard. In the relationship between man and religion, the State is firmly committed to a position of neutrality. Though the application of that rule requires interpretation of a delicate sort, the rule itself is clearly and concisely stated in the words of the First Amendment. . . .

It is so ordered.

NOTES

1. At trial, the father of the Schempp family testified that he refused to request that his children be excused from the morning exercises because he thought they would have been labeled “odd.” Was the father’s concern justified?

2. In *Engel v. Vitale*, the Supreme Court struck down a policy calling for the recitation of a “non-denominational” prayer at the beginning of each school day. Is there a different constitutional issue raised when a prayer is formulated by school officials rather than their requiring the Lord’s Prayer?

[Case No. 5] Constitutionality of Providing Textbooks to Students
in Non-Public Schools

Board of Education of Central School District No. 1 v. Allen

Supreme Court of the United States, 1968.
392 U.S. 236, 88 S. Ct. 1923, 20 L.Ed.2d 1060.

■ MR. JUSTICE WHITE delivered the opinion of the Court.

A law of the State of New York requires local public school authorities to lend textbooks free of charge to all students in grades seven through 12; students attending private schools are included. This case presents the question whether this statute is a “law respecting the establishment of religion or prohibiting the free exercise thereof,” and so in conflict with the First and Fourteenth Amendments to the Constitution, because it authorizes the loan of textbooks to students attending parochial schools. We hold that the law is not in violation of the Constitution.

Until 1965, § 701 of the Education Law of the State of New York, McKinney’s Consol. Laws, c. 16, authorized public school boards to designate textbooks for use in the public schools, to purchase such books with public funds, and to rent or sell the books to public school students. In 1965 the Legislature amended § 701, basing the amendments on findings that the “public welfare and safety require that the state and local communities give assistance to educational programs which are important to our national defense and the general welfare of the state.” Beginning with the 1966–1967 school year, local school boards were required to purchase textbooks and lend them without charge “to all children residing in such district who are enrolled in grades seven to twelve of a public or private school which complies with the compulsory education law.” The books now loaned are “textbooks which are designated for use in any public, elementary or secondary schools of the state or are approved by any boards of education,” and which—according to a 1966 amendment—“a pupil is

required to use as a text for a semester or more in a particular class in the school he legally attends.” . . .

Everson v. Board of Education is the case decided by this Court that is most nearly in point for today’s problem. . . .

Of course books are different from buses. Most bus rides have no inherent religious significance, while religious books are common. However, the language of § 701 does not authorize the loan of religious books, and the State claims no right to distribute religious literature. Although the books loaned are those required by the parochial school for use in specific courses, each book loaned must be approved by the public school authorities; only secular books may receive approval. The law was construed by the Court of Appeals of New York as “merely making available secular textbooks at the request of the individual student,” *supra*, and the record contains no suggestion that religious books have been loaned. Absent evidence we cannot assume that school authorities, who constantly face the same problem in selecting textbooks for use in the public schools, are unable to distinguish between secular and religious books or that they will not honestly discharge their duties under the law. In judging the validity of the statute on this record we must proceed on the assumption that books loaned to students are books that are not unsuitable for use in the public schools because of religious content.

The major reason offered by appellants for distinguishing free textbooks from free bus fares is that books, but not buses, are critical to the teaching process, and in a sectarian school that process is employed to teach religion. However, this Court has long recognized that religious schools pursue two goals, religious instruction and secular education. In the leading case of *Pierce v. Society of Sisters*, the Court held that although it would not question Oregon’s power to compel school attendance or require that the attendance be at an institution meeting State-imposed requirements as to quality and nature of curriculum, Oregon had not shown that its interest in secular education required that all children attend publicly operated schools. A premise of this holding was the view that the State’s interest in education would be served sufficiently by reliance on the secular teaching that accompanied religious training in the schools maintained by the Society of Sisters. Since *Pierce*, a substantial body of case law has confirmed the power of the States to insist that attendance at private schools, if it is to satisfy state compulsory-attendance laws, be at institutions which provide minimum hours of instruction, employ teachers of specified training, and cover prescribed subjects of instruction. Indeed, the State’s interest in assuring that these standards are being met has been considered a sufficient reason for refusing to accept instruction at home as compliance with compulsory education statutes. . . .

Underlying these cases, and underlying also the legislative judgments that have preceded the court decisions, has been a recognition that private education has played and is playing a significant and valuable role in raising national levels of knowledge, competence, and experience. Americans care about the quality of the secular education available to their children. They have considered high quality education to be an indispensable ingredient for achieving the kind of nation, and the kind of citizenry, that they have desired to

create. Considering this attitude, the continued willingness to rely on private school systems, including parochial systems, strongly suggests that a wide segment of informed opinion, legislative and otherwise, has found that those schools do an acceptable job of providing secular education to their students. This judgment is further evidence that parochial schools are performing, in addition to their sectarian function, the task of secular education.

Against this background of judgment and experience, unchallenged in the meager record before us in this case, we cannot agree with appellants either that all teaching in a sectarian school is religious or that the processes of secular and religious training are so intertwined that secular textbooks furnished to students by the public are in fact instrumental in the teaching of religion. This case comes to us after summary judgment entered on the pleadings. Nothing in this record supports the proposition that all textbooks, whether they deal with mathematics, physics, foreign languages, history, or literature, are used by the parochial schools to teach religion. No evidence has been offered about particular schools, particular courses, particular teachers, or particular books. We are unable to hold, based solely on judicial notice, that this statute results in unconstitutional involvement of the State with religious instruction or that § 701, for this or the other reasons urged, is a law respecting the establishment of religion within the meaning of the First Amendment. . . .

The judgment is affirmed.

NOTES

1. Justice Douglas' dissent declared that there is nothing ideological about a bus, school lunch, public nurse, or scholarship. However, he viewed textbooks as going to the very heart of education in non-public schools. Is this a valid distinction?

2. The Supreme Court struck down a program that would have furnished textbooks to students who attended non-public schools that had racially discriminatory policies. *Norwood v. Harrison*, 413 U.S. 455, 93 S. Ct. 2804, 37 L.Ed.2d 723 (1973).

[Case No. 6] Constitutionality of Statute Forbidding Teaching of Evolution

Epperson v. State of Arkansas

Supreme Court of the United States, 1968.
393 U.S. 97, 89 S. Ct. 266, 21 L.Ed.2d 228.

■ MR. JUSTICE FORTAS delivered the opinion of the Court.

I

This appeal challenges the constitutionality of the “anti-evolution” statute which the State of Arkansas adopted in 1928 to prohibit the teaching in its public schools and universities of the theory that man evolved from other species of life. . . .

The Arkansas law makes it unlawful for a teacher in any state-supported school or university “to teach the theory or doctrine that

mankind ascended or descended from a lower order of animals,” or “to adopt or use in any such institution a textbook that teaches” this theory. Violation is a misdemeanor and subjects the violator to dismissal from his position.

The present case concerns the teaching of biology in a high school in Little Rock. According to the testimony, until the events here in litigation, the official textbook furnished for the high school biology course “did not have a section on the Darwinian Theory.” Then, for the academic year 1965–1966, the school administration, on recommendation of the teachers of biology in the school system, adopted and prescribed a textbook which contained a chapter setting forth “the theory about the origin . . . of man from a lower form of animal.”

Susan Epperson, a young woman who graduated from Arkansas’ school system and then obtained her master’s degree in zoology at the University of Illinois, was employed by the Little Rock school system in the fall of 1964 to teach 10th grade biology at Central High School. At the start of the next academic year, 1965, she was confronted by the new textbook (which one surmises from the record was not unwelcome to her). She faced at least a literal dilemma because she was supposed to use the new textbook for classroom instruction and presumably to teach the statutorily condemned chapter; but to do so would be a criminal offense and subject her to dismissal. . . .

. . . Only Arkansas, Mississippi, and Tennessee have such “anti-evolution” or “monkey” laws on their books. There is no record of any prosecutions in Arkansas under its statute. It is possible that the statute is presently more of a curiosity than a vital fact of life in these States. Nevertheless, the present case was brought, the appeal as of right is properly here, and it is our duty to decide the issues presented.

II

At the outset, it is urged upon us that the challenged statute is vague and uncertain and therefore within the condemnation of the Due Process Clause of the Fourteenth Amendment. The contention that the Act is vague and uncertain is supported by language in the brief opinion of Arkansas’ Supreme Court. That court, perhaps reflecting the discomfort which the statute’s quixotic prohibition necessarily engenders in the modern mind, stated that it “expresses no opinion” as to whether the Act prohibits “explanation” of the theory of evolution or merely forbids “teaching that the theory is true.” Regardless of this uncertainty, the court held that the statute is constitutional.

. . .

In any event, we do not rest our decision upon the asserted vagueness of the statute. On either interpretation of its language, Arkansas’ statute cannot stand. It is of no moment whether the law is deemed to prohibit mention of Darwin’s theory, or to forbid any or all of the infinite varieties of communication embraced within the term “teaching.” Under either interpretation, the law must be stricken because of its conflict with the constitutional prohibition of state laws respecting an establishment of religion or prohibiting the free exercise thereof. The overriding fact is that Arkansas’ law selects from the body of knowledge a particular segment which it proscribes for the sole

reason that it is deemed to conflict with a particular religious doctrine; that is, with a particular interpretation of the Book of Genesis by a particular religious group. . . .

Judicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraint. Our courts, however, have not failed to apply the First Amendment's mandate in our educational system where essential to safeguard the fundamental values of freedom of speech and inquiry and of belief. By and large, public education in our Nation is committed to the control of state and local authorities. Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values. On the other hand, "The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools," and "This Court will be alert against invasions of academic freedom. . . ." As this Court said in *Keyishian v. Board of Regents*, the First Amendment "does not tolerate laws that cast a pall of orthodoxy over the classroom."

. . .

There is and can be no doubt that the First Amendment does not permit the State to require that teaching and learning must be tailored to the principles or prohibitions of any religious sect or dogma. In *Everson v. Board of Education*, this Court, in upholding a state law to provide free bus service to school children, including those attending parochial schools, said: "Neither [a State nor the Federal Government] can pass laws which aid one religion, aid all religions, or prefer one religion over another." . . .

In the present case, there can be no doubt that Arkansas has sought to prevent its teachers from discussing the theory of evolution because it is contrary to the belief of some that the Book of Genesis must be the exclusive source of doctrine as to the origin of man. No suggestion has been made that Arkansas' law may be justified by considerations of state policy other than the religious views of some of its citizens. It is clear that fundamentalist sectarian conviction was and is the law's reason for existence. Its antecedent, Tennessee's "monkey law," candidly stated its purpose: to make it unlawful "to teach any theory that denies the story of the Divine Creation of man, as taught in the Bible, and to teach instead, that man has descended from a lower order of animals." Perhaps the sensational publicity attendant upon the *Scopes* trial induced Arkansas to adopt less explicit language. It eliminated Tennessee's reference to "the story of the Divine Creation of man" as taught in the Bible, but there is no doubt that the motivation for the law was the same: to suppress the teaching of a theory which, it was thought, "denied" the divine creation of man. . . .

The judgment of the Supreme Court of Arkansas is reversed.

NOTES

1. The Supreme Court of Mississippi struck down the last anti-evolution statute in *Smith v. State*, 242 So. 2d 692 (Miss. 1970). Subsequently, Tennessee enacted a law prohibiting the use of textbooks discussing evolution unless they included disclaimers identifying it as only a theory and not scientific fact as to the origins of mankind. The statute

required the inclusion of the creation account from the book of Genesis, if any version at all was included, while permitting it alone to be printed without the disclaimer. Also, the law declared “the Holy Bible shall not be defined as a textbook, but is hereby declared to be a reference work, and shall not be required to carry the disclaimer.” The Sixth Circuit vitiated the statute for giving a preferential position to the Biblical version of creation. *Daniel v. Waters*, 515 F.2d 485, 487 (6th Cir. 1975).

2. State legislatures have started discussing the inclusion of intelligent design in public school curricula. What do you think about this approach?

[Case No. 7] Constitutionality of Reimbursements to Non-Public Schools

Lemon v. Kurtzman, Earley v. DiCenso

Supreme Court of the United States, 1971.
403 U.S. 602, 91 S. Ct. 2105, 29 L.Ed.2d 745.

■ MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

These two appeals raise questions as to Pennsylvania and Rhode Island statutes providing state aid to church-related elementary and secondary schools. Both statutes are challenged as violative of the Establishment and Free Exercise Clauses of the First Amendment and the Due Process Clause of the Fourteenth Amendment.

Pennsylvania has adopted a statutory program that provides financial support to non-public elementary and secondary schools by way of reimbursement for the cost of teachers’ salaries, textbooks, and instructional materials in specified secular subjects. Rhode Island has adopted a statute under which the State pays directly to teachers in non-public elementary schools a supplement of 15% of their annual salary. Under each statute state aid has been given to church-related educational institutions as well as other private schools. We hold that both statutes are unconstitutional.

I

The Rhode Island Statute

The Rhode Island Salary Supplement Act was enacted in 1969. It rests on the legislative finding that the quality of education available in non-public elementary schools has been jeopardized by the rapidly rising salaries needed to attract competent and dedicated teachers. The Act authorizes state officials to supplement the salaries of teachers of secular subjects in non-public elementary schools by paying directly to a teacher an amount not in excess of 15% of his current annual salary. As supplemented, however, a non-public school teacher’s salary cannot exceed the maximum paid to teachers in the State’s public schools, and the recipient must be certified by the state board of education in substantially the same manner as public school teachers.

In order to be eligible for the Rhode Island salary supplement, the recipient must teach in a non-public school at which the average per-pupil expenditure on secular education is less than the average in the State’s public schools during a specified period. Appellant state Commissioner of Education also requires eligible schools to submit

financial data. If this information indicates a per-pupil expenditure in excess of the statutory limitation, the records of the school in question must be examined in order to assess how much of the expenditure is attributable to secular education and how much to religious activity.

The Act also requires that teachers eligible for salary supplement must teach only those subjects that are offered in the State's public schools. They must use "only teaching materials which are used in the public schools." Finally, any teacher applying for a salary supplement must first agree in writing "not to teach a course in religion for so long as or during such time as he or she receives any salary supplements" under the Act. . . .

The District Court concluded that the Act violated the Establishment Clause, holding that it fostered "excessive entanglement" between government and religion. In addition two judges thought that the Act had the impermissible effect of giving "significant aid to a religious enterprise." We affirm.

The Pennsylvania Statute

. . .

The statute authorizes appellee state Superintendent of Public Instruction to "purchase" specified "secular educational services" from non-public schools. Under the "contracts" authorized by the statute, the State directly reimburses non-public schools solely for their actual expenditures for teachers' salaries, textbooks, and instructional materials. A school seeking reimbursement must maintain prescribed accounting procedures that identify the "separate" cost of the "secular educational service." These accounts are subject to state audit. The funds for this program were originally derived from a new tax on horse and harness racing, but the Act is now financed by a portion of the state tax on cigarettes.

There are several significant statutory restrictions on state aid. Reimbursement is limited to courses "presented in the curricula of the public schools." It is further limited "solely" to courses in the following "secular" subjects: mathematics, modern foreign languages, physical science, and physical education. Textbooks and instructional materials included in the program must be approved by the state Superintendent of Public Instruction. Finally, the statute prohibits reimbursement for any course that contains "any subject matter expressing religious teaching, or the morals or forms of worship of any sect."

. . .

The court granted [Pennsylvania's] motion to dismiss the complaint for failure to state a claim for relief. It held that the Act violated neither the Establishment nor the Free Exercise Clauses, Chief Judge Hastie dissenting. We reverse.

II

In *Everson v. Board of Education* this Court upheld a state statute which reimbursed the parents of parochial school children for bus transportation expenses. There Mr. Justice Black, writing for the majority, suggested that the decision carried to "the verge" of forbidden territory under the Religion Clauses. Candor compels

acknowledgement, moreover, that we can only dimly perceive the lines of demarcation in this extraordinarily sensitive area of constitutional law.

The language of the Religion Clauses of the First Amendment is at best opaque, particularly when compared with other portions of the Amendment. Its authors did not simply prohibit the establishment of a state church or a state religion, an area history shows they regarded as very important and fraught with great dangers. Instead they commanded that there should be “no law *respecting* an establishment of religion.” A law may be one “respecting” the forbidden objective while falling short of its total realization. A law “respecting” the proscribed result, that is, the establishment of religion, is not always easily identifiable as one violative of the Clause. A given law might not *establish* a state religion but nevertheless be one “respecting” that end in the sense of being a step that could lead to such establishment and hence offend the First Amendment.

In the absence of precisely stated constitutional prohibitions, we must draw lines with reference to the three main evils against which the Establishment Clause was intended to afford protection: “sponsorship, financial support, and active involvement of the sovereign in religious activity.”

Every analysis in this area must begin with consideration of the cumulative criteria developed by the Court over many years. Three such tests may be gleaned from our cases. 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.”

III

...

Our prior holdings do not call for total separation between church and state; total separation is not possible in an absolute sense. Some relationship between government and religious organizations is inevitable. Fire inspections, building and zoning regulations, and state requirements under compulsory school attendance laws are examples of necessary and permissible contacts. . . .

In order to determine whether the government entanglement with religion is excessive, we must examine the character and purposes of the institutions which are benefitted, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority. . . . Here we find that both statutes foster an impermissible degree of entanglement.

(a) Rhode Island program

...

The church schools involved in the program are located close to parish churches. This understandably permits convenient access for religious exercises since instruction in faith and morals is part of the total educational process. The school buildings contain identifying religious symbols such as crosses on the exterior and crucifixes, religious paintings and statues either in the classrooms or hallways.

Although only approximately 30 minutes a day are devoted to direct religious instruction, there are religiously oriented extracurricular activities. Approximately two-thirds of the teachers in these schools are nuns of various religious orders. Their dedicated efforts provide an atmosphere in which religious instruction and religious vocations are natural and proper parts of life in such schools. Indeed, as the District Court found, the role of teaching nuns in enhancing the religious atmosphere has led the parochial school authorities to attempt to maintain a one-to-one ratio between nuns and lay teachers in all schools rather than permitting some to be staffed almost entirely by lay teachers.

On the basis of these findings the District Court concluded that the parochial schools constituted “an integral part of the religious mission of the Catholic Church.” The various characteristics of the schools make them “a powerful vehicle for transmitting the Catholic faith to the next generation.” This process of inculcating religious doctrine is, of course, enhanced by the impressionable age of the pupils, in primary schools particularly. In short, parochial schools involve substantial religious activity and purpose.

The substantial religious character of these church-related schools gives rise to entangling church-state relationships of the kind the Religion Clauses sought to avoid. Although the District Court found that concern for religious values did not inevitably or necessarily intrude into the content of secular subjects, the considerable religious activities of these schools led the legislature to provide for careful governmental controls and surveillance by state authorities in order to ensure that state aid supports only secular education.

The dangers and corresponding entanglements are enhanced by the particular form of aid that the Rhode Island Act provides. Our decisions from *Everson* to *Allen* have permitted the States to provide church-related schools with secular, neutral, or non-ideological services, facilities, or materials. But transportation, school lunches, public health services, and secular textbooks supplied in common to all students were not thought to offend the Establishment Clause. We note that the dissenters in *Allen* seemed chiefly concerned with the pragmatic difficulties involved in ensuring the truly secular content of the textbooks provided at state expense.

In *Allen* the Court refused to make assumptions, on a meager record, about the religious content of the textbooks that the State would be asked to provide. We cannot, however, refuse here to recognize that teachers have a substantially different ideological character than books. In terms of potential for involving some aspect of faith or morals in secular subjects, a textbook’s content is ascertainable, but a teacher’s handling of a subject is not. We cannot ignore the dangers that a teacher under religious control and discipline poses to the separation of the religious from the purely secular aspects of precollege education. The conflict of functions inheres in the situation. . . .

We do not assume, however, that parochial school teachers will be unsuccessful in their attempts to segregate their religious beliefs from their secular educational responsibilities. But the potential for impermissible fostering of religion is present. The Rhode Island Legislature has not, and could not, provide state aid on the basis of a

mere assumption that secular teachers under religious discipline can avoid conflicts. The State must be certain, given the Religion Clauses, that subsidized teachers do not inculcate religion—indeed the State here has undertaken to do so. To ensure that no trespass occurs, the State has therefore carefully conditioned its aid with pervasive restrictions. An eligible recipient must teach only those courses that are offered in the public schools and use only those texts and materials that are found in the public schools. In addition the teacher must not engage in teaching any course in religion.

A comprehensive, discriminating, and continuing state surveillance will inevitably be required to ensure that these restrictions are obeyed and the First Amendment otherwise respected. Unlike a book, a teacher cannot be inspected once so as to determine the extent and intent of his or her personal beliefs and subjective acceptance of the limitations imposed by the First Amendment. These prophylactic contacts will involve excessive and enduring entanglement between state and church.

...

(b) Pennsylvania program

The Pennsylvania statute also provides state aid to church-related schools for teachers' salaries. The complaint describes an educational system that is very similar to the one existing in Rhode Island. According to the allegations, the church-related elementary and secondary schools are controlled by religious organizations, have the purpose of propagating and promoting a particular religious faith, and conduct their operations to fulfill that purpose. Since this complaint was dismissed for failure to state a claim for relief, we must accept these allegations as true for purposes of our review.

As we noted earlier, the very restrictions and surveillance necessary to ensure that teachers play a strictly non-ideological role give rise to entanglements between church and state. The Pennsylvania statute, like that of Rhode Island, fosters this kind of relationship. Reimbursement is not only limited to courses offered in the public schools and materials approved by state officials, but the statute excludes "any subject matter expressing religious teaching, or the morals or forms of worship of any sect." In addition schools seeking reimbursement must maintain accounting procedures that require the State to establish the cost of the secular as distinguished from the religious instruction.

The Pennsylvania statute, moreover, has the further defect of providing state financial aid directly to the church-related schools. This factor distinguishes both *Everson* and *Allen*, for in both those cases the Court was careful to point out that state aid was provided to the student and his parents—not to the church-related school.... The history of government grants of a continuing cash subsidy indicates that such programs have almost always been accompanied by varying measures of control and surveillance. The government cash grants before us now provide no basis for predicting that comprehensive measures of surveillance and controls will not follow. In particular the government's post-audit power to inspect and evaluate a church-related school's financial records and to determine which expenditures are

religious and which are secular creates an intimate and continuing relationship between church and state.

IV

A broader base of entanglement of yet a different character is presented by the divisive political potential of these state programs. In a community where such a large number of pupils are served by church-related schools, it can be assumed that state assistance will entail considerable political activity. Partisans of parochial schools, understandably concerned with rising costs and sincerely dedicated to both the religious and secular educational missions of their schools, will inevitably champion this cause and promote political action to achieve their goals. Those who oppose state aid, whether for constitutional, religious, or fiscal reasons, will inevitably respond and employ all of the usual political campaign techniques to prevail. Candidates will be forced to declare and voters to choose. It would be unrealistic to ignore the fact that many people confronted with issues of this kind will find their votes aligned with their faith.

Ordinarily political debate and division, however vigorous or even partisan, are normal and healthy manifestations of our democratic system of government, but political division along religious lines was one of the principal evils against which the First Amendment was intended to protect. The potential divisiveness of such conflict is a threat to the normal political process. To have States or communities divide on the issues presented by state aid to parochial schools would tend to confuse and obscure other issues of great urgency. We have an expanding array of vexing issues, local and national, domestic and international, to debate and divide on. It conflicts with our whole history and tradition to permit questions of the Religion Clauses to assume such importance in our legislatures and in our elections that they could divert attention from the myriad issues and problems which confront every level of government. The highways of church and state relationships are not likely to be one-way streets, and the Constitution's authors sought to protect religious worship from the pervasive power of government. The history of many countries attests to the hazards of religion intruding into the political arena or of political power intruding into the legitimate and free exercise of religious belief. . . .

The potential for political divisiveness related to religious belief and practice is aggravated in these two statutory programs by the need for continuing annual appropriations and the likelihood of larger and larger demands as costs and populations grow. . . .

V

. . .

Finally, nothing we have said can be construed to disparage the role of church-related elementary and secondary schools in our national life. Their contribution has been and is enormous. Nor do we ignore their economic plight in a period of rising costs and expanding need. Taxpayers generally have been spared vast sums by the maintenance of these educational institutions by religious organizations, largely by the gifts of faithful adherents.

The merit and benefits of these schools, however, are not the issue before us in these cases. The sole question is whether state aid to these schools can be squared with the dictates of the Religion Clauses. Under our system the choice has been made that government is to be entirely excluded from the area of religious instruction and churches excluded from the affairs of government. The Constitution decrees that religion must be a private matter for the individual, the family, and the institutions of private choice, and that while some involvement and entanglement is inevitable, lines must be drawn. . . .

The judgment of the Rhode Island District Court in No. 569 and No. 570 is affirmed. The judgment of the Pennsylvania District Court in No. 89 is reversed, and the case is remanded for further proceedings consistent with this opinion.

NOTES

1. On the same day it ruled in *Lemon*, the Supreme Court upheld the constitutionality of the Higher Education Facilities Act of 1963 which made construction grants available to institutions of higher education, including church related colleges and universities. In *Tilton v. Richardson* (*Tilton*), 403 U.S. 672, 91 S. Ct. 2091, 29 L.Ed.2d 790 (1971), the Justices reasoned that while the section of the law that limited recipients' obligation not to use federally-financed facilities for sectarian instruction or religious worship to twenty years unconstitutionally allowed a contribution of property of substantial value to religious bodies, that section was severable. However, the Court was satisfied that the remainder of the statute did not violate the First Amendment. Upholding the rest of the law, the Court distinguished *Tilton* from *Lemon* insofar as in *Tilton*, indoctrination was not a substantial purpose or activity of church-related colleges because the student body was not composed of impressionable children, the aid was non-ideological, and there was no excessive entanglement since the grants were one-time and single-purpose. Two years later, in *Hunt v. McNair*, 413 U.S. 734, 93 S. Ct. 2868, 37 L.Ed.2d 923 (1973), the Justices decided that insofar as religion was not pervasive in the institution, South Carolina was free to issue revenue bonds to benefit the church-related college because it did not guarantee them with public funds. Later, the Supreme Court of California ruled that agreements facilitating the issuance of tax-exempt bonds to finance the construction of a conduit that would benefit a private Christian school and two Christian universities did not violate the Establishment Clause because all of the institutions offered broad curricula in secular subjects and the secular classes consisted of information and course work neutral with respect to religion. *California Statewide Communities Development Auth. v. All Persons Interested in Matter of Purchase Agreement*, 152 P.3d 1070 [216 Educ. L. Rep. 895] (Cal. 2007).

2. In his concurrence in *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384, 398, 113 S. Ct. 2141, 124 L.Ed.2d 352 [83 Educ. L. Rep. 30] (1993), *on remand*, 17 F.3d 1425 [89 Educ. L. Rep. 783] (2d Cir. 1994). [Case No. 37], Justice Scalia penned a caustic description of the *Lemon* test: "Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence once again, frightening the little children and school attorneys of Center

Moriches Union Free School District.” What do you think of this characterization?

[Case No. 8] Constitutionality of Income Tax Deduction for
Educational Expenses

Mueller v. Allen

Supreme Court of the United States, 1983.
463 U.S. 388, 103 S. Ct. 3062, 77 L.Ed.2d 721 [11 Educ. L. Rep. 763].

■ JUSTICE REHNQUIST delivered the opinion of the Court.

...

Minnesota, by a law originally enacted in 1955 and revised in 1976 and again in 1978, permits state taxpayers to claim a deduction from gross income for certain expenses incurred in educating their children. The deduction is limited to actual expenses incurred for the “tuition, textbooks and transportation” of dependents attending elementary or secondary schools. A deduction may not exceed \$500 per dependent in grades K through six and \$700 per dependent in grades seven through twelve.

Today’s case is no exception to our oft-repeated statement that the Establishment Clause presents especially difficult questions of interpretation and application. . . .

One fixed principle in this field is our consistent rejection of the argument that “any program which in some manner aids an institution with a religious affiliation” violates the Establishment Clause. For example, it is now well-established that a state may reimburse parents for expenses incurred in transporting their children to school, *Everson v. Board of Education*, and that it may loan secular textbooks to all schoolchildren within the state, *Board of Education v. Allen*.

Notwithstanding the repeated approval given programs such as those in *Allen* and *Everson*, our decisions also have struck down arrangements resembling, in many respects, these forms of assistance. In this case we are asked to decide whether Minnesota’s tax deduction bears greater resemblance to those types of assistance to parochial schools we have approved, or to those we have struck down. Petitioners place particular reliance on our decision in *Committee for Public Education v. Nyquist*, where we held invalid a New York statute providing public funds for the maintenance and repair of the physical facilities of private schools and granting thinly disguised “tax benefits,” actually amounting to tuition grants, to the parents of children attending private schools. As explained below, we conclude that § 290.09(22) bears less resemblance to the arrangement struck down in *Nyquist* than it does to assistance programs upheld in our prior decisions and those discussed with approval in *Nyquist*.

The general nature of our inquiry in this area has been guided, since the decision in *Lemon v. Kurtzman*, by the “three-part” test laid down in that case:

“First, the statute must have a secular legislative purpose;
second, its principle or primary effect must be one that neither

advances nor inhibits religion . . . ; finally, the statute must not foster ‘an excessive government entanglement with religion.’”

While this principle is well settled, our cases have also emphasized that it provides “no more than [a] helpful signpost” in dealing with Establishment Clause challenges. With this *caveat* in mind, we turn to the specific challenges raised against § 290.09(22) under the *Lemon* framework.

Little time need be spent on the question of whether the Minnesota tax deduction has a secular purpose. Under our prior decisions, governmental assistance programs have consistently survived this inquiry even when they have run afoul of other aspects of the *Lemon* framework. This reflects, at least in part, our reluctance to attribute unconstitutional motives to the states, particularly when a plausible secular purpose for the state’s program may be discerned from the face of the statute.

A state’s decision to defray the cost of educational expenses incurred by parents—regardless of the type of schools their children attend—evidences a purpose that is both secular and understandable. An educated populace is essential to the political and economic health of any community, and a state’s efforts to assist parents in meeting the rising cost of educational expenses plainly serves this secular purpose of ensuring that the state’s citizenry is well-educated. Similarly, Minnesota, like other states, could conclude that there is a strong public interest in assuring the continued financial health of private schools, both sectarian and non-sectarian. By educating a substantial number of students such schools relieve public schools of a correspondingly great burden—to the benefit of all taxpayers. . . . All these justifications are readily available to support § 290.09(22), and each is sufficient to satisfy the secular purpose inquiry of *Lemon*.

We turn therefore to the more difficult but related question whether the Minnesota statute has “the primary effect of advancing the sectarian aims of the non-public schools.” In concluding that it does not, we find several features of the Minnesota tax deduction particularly significant. First, an essential feature of Minnesota’s arrangement is the fact that § 290.09(22) is only one among many deductions—such as those for medical expenses and charitable contributions—available under the Minnesota tax laws. Our decisions consistently have recognized that traditionally “[l]egislatures have especially broad latitude in creating classifications and distinctions in tax statutes,” in part because the “familiarity with local conditions” enjoyed by legislators especially enables them to “achieve an equitable distribution of the tax burden.” . . .

Other characteristics of § 290.09(22) argue equally strongly for the provision’s constitutionality. Most importantly, the deduction is available for educational expenses incurred by *all* parents, including those whose children attend public schools and those whose children attend non-sectarian private schools or sectarian private schools. . . . “[T]he provision of benefits to so broad a spectrum of groups is an important index of secular effect.”

In this respect, as well as others, this case is vitally different from the scheme struck down in *Nyquist*. There, public assistance amounting

to tuition grants, was provided only to parents of children in *non-public* schools. This fact had considerable bearing on our decision striking down the New York statute at issue; we explicitly distinguished both *Allen* and *Everson* on the grounds that “In both cases the class of beneficiaries included *all* schoolchildren, those in public as well as those in private schools.” Moreover, we intimated that “public assistance (*e.g.*, scholarships) made available generally without regard to the sectarian-non-sectarian or public-non-public nature of the institution benefited,” might not offend the Establishment Clause. We think the tax deduction adopted by Minnesota is more similar to this latter type of program than it is to the arrangement struck down in *Nyquist*. Unlike the assistance at issue in *Nyquist*, § 290.09(22) permits *all* parents—whether their children attend public school or private—to deduct their children’s educational expenses. . . . [A] program, like § 290.09(22), that neutrally provides state assistance to a broad spectrum of citizens is not readily subject to challenge under the Establishment Clause.

We also agree with the Court of Appeals that, by channeling whatever assistance it may provide to parochial schools through individual parents, Minnesota has reduced the Establishment Clause objections to which its action is subject. It is true, of course, that financial assistance provided to parents ultimately has an economic effect comparable to that of aid given directly to the schools attended by their children. It is also true, however, that under Minnesota’s arrangement public funds become available only as a result of numerous, private choices of individual parents of school-age children. For these reasons, we recognized in *Nyquist* that the means by which state assistance flows to private schools is of some importance: we said that “the fact that aid is disbursed to parents rather than to . . . schools” is a material consideration in Establishment Clause analysis, albeit “only one among many to be considered.” It is noteworthy that all but one of our recent cases invalidating state aid to parochial schools have involved the direct transmission of assistance from the state to the schools themselves. The exception, of course, was *Nyquist*, which, as discussed previously, is distinguishable from this case on other grounds. Where, as here, aid to parochial schools is available only as a result of decisions of individual parents no “imprimatur of State approval” can be deemed to have been conferred on any particular religion, or on religion generally.

. . . The Establishment Clause of course extends beyond prohibition of a state church or payment of state funds to one or more churches. We do not think, however, that its prohibition extends to the type of tax deduction established by Minnesota. The historic purposes of the clause simply do not encompass the sort of attenuated financial benefit, ultimately controlled by the private choices of individual parents, that eventually flows to parochial schools from the neutrally available tax benefit at issue in this case.

Petitioners argue that, notwithstanding the facial neutrality of § 290.09(22), in application the statute primarily benefits religious institutions. Petitioners rely . . . on a statistical analysis of the type of persons claiming the tax deduction. They contend that most parents of public school children incur no tuition expenses, and that other expenses deductible under § 290.09(22) are negligible in value;

moreover, they claim that 96% of the children in private schools in 1978–1979 attended religiously affiliated institutions. Because of all this, they reason, the bulk of deductions taken under § 290.09(22) will be claimed by parents of children in sectarian schools. Respondents reply that petitioners have failed to consider the impact of deductions for items such as transportation, summer school tuition, tuition paid by parents whose children attended schools outside the school districts in which they resided, rental or purchase costs for a variety of equipment, and tuition for certain types of instruction not ordinarily provided in public schools.

We need not consider these contentions in detail. We would be loath to adopt a rule grounding the constitutionality of a facially neutral law on annual reports reciting the extent to which various classes of private citizens claimed benefits under the law. Such an approach would scarcely provide the certainty that this field stands in need of, nor can we perceive principled standards by which such statistical evidence might be evaluated. . . .

Thus, we hold that the Minnesota tax deduction for educational expenses satisfies the primary effect inquiry of our Establishment Clause cases.

Turning to the third part of the *Lemon* inquiry, we have no difficulty in concluding that the Minnesota statute does not “excessively entangle” the state in religion. The only plausible source of the “comprehensive, discriminating, and continuing state surveillance” necessary to run afoul of this standard would lie in the fact that state officials must determine whether particular textbooks qualify for a deduction. Making decisions such as this does not differ substantially from making the types of decisions approved in earlier opinions of this Court. In *Board of Education v. Allen*, for example, the Court upheld the loan of secular textbooks to parents or children attending non-public schools; though state officials were required to determine whether particular books were or were not secular, the system was held not to violate the Establishment Clause. . . .

For the foregoing reasons, the judgment of the Court of Appeals is Affirmed.

NOTES

1. Should it have mattered that ninety-six percent of the children in non-public schools in Minnesota attended religious schools?

2. An appellate court in Illinois upheld a tax credit of up to \$500 for educational expenses incurred on behalf of a qualifying pupil in grades K–12 at any state public or non-public school that complies with various state laws. The court rejected arguments that the credit had the effect of advancing religion not only because the majority of non-public schools are religiously affiliated but also because eighty-two out of the state’s 102 counties do not have any non-sectarian schools. Should these two facts have made a difference? *Griffith v. Bower*, 747 N.E.2d 423 [153 Educ. L. Rep. 938] (Ill. App. Ct. 2001), *appeal denied*, 755 N.E.2d 477 (Ill. 2001).

[Case No. 9] The Equal Access Act and Student Groups

Board of Education of Westside Community Schools v. Mergens

Supreme Court of the United States, 1990.

496 U.S. 226, 110 S. Ct. 2356, 110 L.Ed.2d 191 [60 Educ. L. Rep. 320].

■ JUSTICE O'CONNOR delivered the opinion of the Court, except as to Part III.

This case requires us to decide whether the Equal Access Act, 20 U.S.C.[A.] §§ 4071–4074, prohibits Westside High School from denying a student religious group permission to meet on school premises during noninstructional time, and if so, whether the Act, so construed, violates the Establishment Clause of the First Amendment.

I

...

Students at Westside High School are permitted to join various student groups and clubs, all of which meet after school hours on school premises. The students may choose from approximately 30 recognized groups on a voluntary basis. . . .

There is no written school board policy concerning the formation of student clubs. Rather, students wishing to form a club present their request to a school official who determines whether the proposed club's goals and objectives are consistent with school board policies and with the school district's "Mission and Goals"—a broadly worded "blueprint" that expresses the district's commitment to teaching academic, physical, civic, and personal skills and values.

In January 1985, respondent Bridget Mergens . . . requested permission to form a Christian club at the school. The proposed club would have the same privileges and meet on the same terms and conditions as other Westside student groups, except that the proposed club would not have a faculty sponsor. According to the students' testimony at trial, the club's purpose would have been, among other things, to permit the students to read and discuss the Bible, to have fellowship, and to pray together. Membership would have been voluntary and open to all students regardless of religious affiliation.

. . . The school officials explained that school policy required all student clubs to have a faculty sponsor, which the proposed religious club would not or could not have, and that a religious club at the school would violate the Establishment Clause. In March 1985, Mergens appealed the denial of her request to the Board of Education, but the Board voted to uphold the denial. . . .

II

A

In *Widmar v. Vincent*, we invalidated, on free speech grounds, a state university regulation that prohibited student use of school facilities "for purposes of religious worship or religious teaching." In doing so, we held that an "equal access" policy would not violate the Establishment Clause under our decision in *Lemon v. Kurtzman*. In

particular, we held that such a policy would have a secular purpose, would not have the primary effect of advancing religion, and would not result in excessive entanglement between government and religion. We noted, however, that “[u]niversity students are, of course, young adults. They are less impressionable than younger students and should be able to appreciate that the University’s policy is one of neutrality toward religion.”

In 1984, Congress extended the reasoning of *Widmar* to public secondary schools. Under the Equal Access Act, a public secondary school with a “limited open forum” is prohibited from discriminating against students who wish to conduct a meeting within that forum on the basis of the “religious, political, philosophical, or other content of the speech at such meetings.” Specifically, the Act provides:

“It shall be unlawful for any public secondary school which receives Federal financial assistance and which has a limited open forum to deny equal access or a fair opportunity to, or discriminate against, any students who wish to conduct a meeting within that limited open forum on the basis of the religious, political, philosophical, or other content of the speech at such meetings.”

A “limited open forum” exists whenever a public secondary school “grants an offering to or opportunity for one or more non-curriculum related student groups to meet on school premises during non-instructional time.” “Meeting” is defined to include “those activities of student groups which are permitted under a school’s limited open forum and are not directly related to the school curriculum.” “Non-instructional time” is defined to mean “time set aside by the school before actual classroom instruction begins or after actual classroom instruction ends.” Thus, even if a public secondary school allows only one “non-curriculum related student group” to meet, the Act’s obligations are triggered and the school may not deny other clubs, on the basis of the content of their speech, equal access to meet on school premises during non-instructional time.

The Act further specifies that “[s]chools shall be deemed to offer a fair opportunity to students who wish to conduct a meeting within its limited open forum” if the school uniformly provides that the meetings are voluntary and student-initiated; are not sponsored by the school, the government, or its agents or employees; do not materially and substantially interfere with the orderly conduct of educational activities within the school; and are not directed, controlled, conducted, or regularly attended by “non-school persons.” “Sponsorship” is defined to mean “the act of promoting, leading, or participating in a meeting. The assignment of a teacher, administrator, or other school employee to a meeting for custodial purposes does not constitute sponsorship of the meeting.” If the meetings are religious, employees or agents of the school or government may attend only in a “non-participatory capacity.” Moreover, a State may not influence the form of any religious activity, require any person to participate in such activity, or compel any school agent or employee to attend a meeting if the content of the speech at the meeting is contrary to that person’s beliefs.

Finally, the Act does not “authorize the United States to deny or withhold Federal financial assistance to any school” or “limit the

authority of the school, its agents or employees, to maintain order and discipline on school premises, to protect the well-being of students and faculty, and to assure that attendance of students at the meetings is voluntary.”

B

The parties agree that Westside High School receives federal financial assistance and is a public secondary school within the meaning of the Act. The Act’s obligation to grant equal access to student groups is therefore triggered if Westside maintains a “limited open forum”—*i.e.*, if it permits one or more “non-curriculum related student groups” to meet on campus before or after classes.

Unfortunately, the Act does not define the crucial phrase “non-curriculum related student group.” Our immediate task is therefore one of statutory interpretation. We begin, of course, with the language of the statute. The common meaning of the term “curriculum” is “the whole body of courses offered by an educational institution or one of its branches.” . . . Any sensible interpretation of “non-curriculum related student group” must therefore be anchored in the notion that such student groups are those that are not related to the body of courses offered by the school. The difficult question is the degree of “unrelatedness to the curriculum” required for a group to be considered “non-curriculum related.”

The Act’s definition of the sort of “meeting[s]” that must be accommodated under the statute sheds some light on this question. “[T]he term ‘meeting’ includes those activities of student groups which are . . . not *directly related* to the school curriculum.” (emphasis added). Congress’ use of the phrase “directly related” implies that student groups directly related to the subject matter of courses offered by the school do not fall within the “non-curriculum related” category and would therefore be considered “curriculum related.”

The logic of the Act also supports this view, namely, that a curriculum-related student group is one that has more than just a tangential or attenuated relationship to courses offered by the school. Because the purpose of granting equal access is to prohibit discrimination between religious or political clubs on the one hand and other non-curriculum-related student groups on the other, the Act is premised on the notion that a religious or political club is itself likely to be a non-curriculum-related student group. It follows, then, that a student group that is “curriculum related” must at least have a more direct relationship to the curriculum than a religious or political club would have.

Although the phrase “non-curriculum related student group” nevertheless remains sufficiently ambiguous that we might normally resort to legislative history, we find the legislative history on this issue less than helpful. . . .

We think it significant, however, that the Act, which was passed by wide, bipartisan majorities in both the House and the Senate, reflects at least some consensus on a broad legislative purpose. The committee reports indicate that the Act was intended to address perceived widespread discrimination against religious speech in public schools, and, as the language of the Act indicates, its sponsors contemplated

that the Act would do more than merely validate the status quo. The committee reports also show that the Act was enacted in part in response to two federal appellate court decisions holding that student religious groups could not, consistent with the Establishment Clause, meet on school premises during noninstructional time. A broad reading of the Act would be consistent with the views of those who sought to end discrimination by allowing students to meet and discuss religion before and after classes.

In light of this legislative purpose, we think that the term “non-curriculum related student group” is best interpreted broadly to mean any student group that does not *directly* relate to the body of courses offered by the school. In our view, a student group directly relates to a school’s curriculum if the subject matter of the group is actually taught, or will soon be taught, in a regularly offered course; if the subject matter of the group concerns the body of courses as a whole; if participation in the group is required for a particular course; or if participation in the group results in academic credit. We think this limited definition of groups that directly relate to the curriculum is a commonsense interpretation of the Act that is consistent with Congress’ intent to provide a low threshold for triggering the Act’s requirements.

For example, a French club would directly relate to the curriculum if a school taught French in a regularly offered course or planned to teach the subject in the near future. A school’s student government would generally relate directly to the curriculum to the extent that it addresses concerns, solicits opinions, and formulates proposals pertaining to the body of courses offered by the school. If participation in a school’s band or orchestra were required for the band or orchestra classes, or resulted in academic credit, then those groups would also directly relate to the curriculum. The existence of such groups at a school would not trigger the Act’s obligations.

On the other hand, unless a school could show that groups such as a chess club, a stamp collecting club, or a community service club fell within our description of groups that directly relate to the curriculum, such groups would be “non-curriculum related student groups” for purposes of the Act. The existence of such groups would create a “limited open forum” under the Act and would prohibit the school from denying equal access to any other student group on the basis of the content of that group’s speech. Whether a specific student group is a “non-curriculum related student group” will therefore depend on a particular school’s curriculum, but such determinations would be subject to factual findings well within the competence of trial courts to make.

Petitioners contend that our reading of the Act unduly hinders local control over schools and school activities, but we think that schools and school districts nevertheless retain a significant measure of authority over the type of officially recognized activities in which their students participate. First, schools and school districts maintain their traditional latitude to determine appropriate subjects of instruction. To the extent that a school chooses to structure its course offerings and existing student groups to avoid the Act’s obligations, that result is not prohibited by the Act. On matters of statutory interpretation, “[o]ur task is to apply the text, not to improve on it.” Second, the Act expressly

does not limit a school's authority to prohibit meetings that would "materially and substantially interfere with the orderly conduct of educational activities within the school." The Act also preserves "the authority of the school, its agents or employees, to maintain order and discipline on school premises, to protect the well-being of students and faculty, and to assure that attendance of students at meetings is voluntary." Finally, because the Act applies only to public secondary schools that receive federal financial assistance, a school district seeking to escape the statute's obligations could simply forego federal funding. Although we do not doubt that in some cases this may be an unrealistic option, Congress clearly sought to prohibit schools from discriminating on the basis of the content of a student group's speech, and that obligation is the price a federally funded school must pay if it opens its facilities to non-curriculum-related student groups. . . .

C

. . . Petitioners contend that all of these student activities [cited as being non-curriculum-related] are curriculum-related because they further the goals of particular aspects of the school's curriculum. . . . Subsurfers [scuba diving] furthers "one of the essential goals of the Physical Education Department—enabling students to develop lifelong recreational interests." Chess "supplement[s] math and science courses because it enhances students' ability to engage in critical thought processes." . . .

To the extent that petitioners contend that "curriculum related" means anything remotely related to abstract educational goals, however, we reject that argument. To define "curriculum related" in a way that results in almost no schools having limited open fora, or in a way that permits schools to evade the Act by strategically describing existing student groups, would render the Act merely hortatory. . . .

Rather, we think it clear that Westside's existing student groups include one or more "non-curriculum related student groups." Although Westside's physical education classes apparently include swimming, counsel stated at oral argument that scuba diving is not taught in any regularly offered course at the school. Based on Westside's own description of the group, Subsurfers does not directly relate to the curriculum as a whole in the same way that a student government or similar group might. Moreover, participation in Subsurfers is not required by any course at the school and does not result in extra academic credit. Thus, Subsurfers is a "non-curriculum related student group" for purposes of the Act. . . . The record therefore supports a finding that Westside has maintained a limited open forum under the Act. . . .

The remaining statutory question is whether petitioners' denial of respondents' request to form a religious group constitutes a denial of "equal access" to the school's limited open forum. Although the school apparently permits respondents to meet informally after school, respondents seek equal access in the form of official recognition by the school. Official recognition allows student clubs to be part of the student activities program and carries with it access to the school newspaper, bulletin boards, the public address system, and the annual Club Fair. Given that the Act explicitly prohibits denial of "equal access . . . to . . . any students who wish to conduct a meeting within [the school's]

limited open forum” on the basis of the religious content of the speech at such meetings, we hold that Westside’s denial of respondents’ request to form a Christian club denies them “equal access” under the Act.

Because we rest our conclusion on statutory grounds, we need not decide—and therefore express no opinion on—whether the First Amendment requires the same result.

III

Petitioners contend that even if Westside has created a limited open forum within the meaning of the Act, its denial of official recognition to the proposed Christian club must nevertheless stand because the Act violates the Establishment Clause of the First Amendment, as applied to the States through the Fourteenth Amendment. Specifically, petitioners maintain that because the school’s recognized student activities are an integral part of its educational mission, official recognition of respondents’ proposed club would effectively incorporate religious activities into the school’s official program, endorse participation in the religious club, and provide the club with an official platform to proselytize other students.

...

Accordingly, we hold that the Equal Access Act does not on its face contravene the Establishment Clause. Because we hold that petitioners have violated the Act, we do not decide respondents’ claims under the Free Speech and Free Exercise Clauses. For the foregoing reasons, the judgment of the Court of Appeals is affirmed.

It is so ordered.

NOTES

1. Eight Justices agreed that the Equal Access Act did not violate the Establishment Clause but the plurality could not render a majority opinion on this point.

2. In the plurality, four Justices agreed that it was rational for Congress to make the determination left open by the Court in *Widmar v. Vincent*, namely that secondary school students are capable of distinguishing between State-initiated, school-sponsored, or teacher-led religious speech and student-initiated and led religious speech. What do you think?

3. If the Equal Access Act were repealed, could school boards prevent students from organizing religious clubs? Would boards be obliged to recognize religious clubs?

[Case No. 10] Prayer at a Public School Graduation Ceremony

Lee v. Weisman

Supreme Court of the United States, 1992.

505 U.S. 577, 112 S. Ct. 2649, 120 L.Ed.2d 467 [75 Educ. L. Rep. 43].

■ JUSTICE KENNEDY delivered the opinion of the Court.

School principals in the public school system of the city of Providence, Rhode Island, are permitted to invite members of the clergy

to offer invocation and benediction prayers as part of the formal graduation ceremonies for middle schools and for high schools. The question before us is whether including clerical members who offer prayers as part of the official school graduation ceremony is consistent with the Religion Clauses of the First Amendment, provisions the Fourteenth Amendment makes applicable with full force to the States and their school districts.

I

A

Deborah Weisman graduated from Nathan Bishop Middle School, a public school in Providence, at a formal ceremony in June 1989. She was about 14 years old. . . . Acting for himself and his daughter, Deborah's father, Daniel Weisman, objected to any prayers at Deborah's middle school graduation, but to no avail. The school principal, petitioner Robert E. Lee, invited a rabbi to deliver prayers at the graduation exercises for Deborah's class. . . .

It has been the custom of Providence school officials to provide invited clergy with a pamphlet entitled "Guidelines for Civic Occasions," prepared by the National Conference of Christians and Jews. The Guidelines recommend that public prayers at non-sectarian civic ceremonies be composed with "inclusiveness and sensitivity," though they acknowledge that "[p]rayer of any kind may be inappropriate on some civic occasions." The principal gave Rabbi Gutterman the pamphlet before the graduation and advised him the invocation and benediction should be non-sectarian.

. . .

The school board (and the United States, which supports it as *amicus curiae*) argued that these short prayers and others like them at graduation exercises are of profound meaning to many students and parents throughout this country who consider that due respect and acknowledgment for divine guidance and for the deepest spiritual aspirations of our people ought to be expressed at an event as important in life as a graduation. We assume this to be so in addressing the difficult case now before us, for the significance of the prayers lies also at the heart of Daniel and Deborah Weisman's case. . . .

II

These dominant facts mark and control the confines of our decision: State officials direct the performance of a formal religious exercise at promotional and graduation ceremonies for secondary schools. Even for those students who object to the religious exercise, their attendance and participation in the state-sponsored religious activity are in a fair and real sense obligatory, though the school district does not require attendance as a condition for receipt of the diploma.

This case does not require us to revisit the difficult questions dividing us in recent cases, questions of the definition and full scope of the principles governing the extent of permitted accommodation by the State for the religious beliefs and practices of many of its citizens. For without reference to those principles in other contexts, the controlling precedents as they relate to prayer and religious exercise in primary and secondary public schools compel the holding here that the policy of

the city of Providence is an unconstitutional one. We can decide the case without reconsidering the general constitutional framework by which public schools' efforts to accommodate religion are measured. Thus we do not accept the invitation of petitioners and *amicus* the United States to reconsider our decision in *Lemon v. Kurtzman*. The government involvement with religious activity in this case is pervasive, to the point of creating a state-sponsored and state-directed religious exercise in a public school. Conducting this formal religious observance conflicts with settled rules pertaining to prayer exercises for students, and that suffices to determine the question before us.

The principle that government may accommodate the free exercise of religion does not supersede the fundamental limitations imposed by the Establishment Clause. It is beyond dispute that, at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which "establishes a [state] religion or religious faith, or tends to do so." The State's involvement in the school prayers challenged today violates these central principles.

That involvement is as troubling as it is undenied. A school official, the principal, decided that an invocation and a benediction should be given; this is a choice attributable to the State, and from a constitutional perspective it is as if a state statute decreed that the prayers must occur. The principal chose the religious participant, here a rabbi, and that choice is also attributable to the State. The reason for the choice of a rabbi is not disclosed by the record, but the potential for divisiveness over the choice of a particular member of the clergy to conduct the ceremony is apparent.

Divisiveness, of course, can attend any state decision respecting religions, and neither its existence nor its potential necessarily invalidates the State's attempts to accommodate religion in all cases. The potential for divisiveness is of particular relevance here though, because it centers around an overt religious exercise in a secondary school environment where, as we discuss below, subtle coercive pressures exist and where the student had no real alternative which would have allowed her to avoid the fact or appearance of participation.

The State's role did not end with the decision to include a prayer and with the choice of clergyman. Principal Lee provided Rabbi Gutterman with a copy of the "Guidelines for Civic Occasions," and advised him that his prayers should be non-sectarian. Through these means the principal directed and controlled the content of the prayer. Even if the only sanction for ignoring the instructions were that the rabbi would not be invited back, we think no religious representative who valued his or her continued reputation and effectiveness in the community would incur the State's displeasure in this regard. It is a cornerstone principle of our Establishment Clause jurisprudence that "it is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by government," and that is what the school officials attempted to do.

Petitioners argue, and we find nothing in the case to refute it, that the directions for the content of the prayers were a good-faith attempt by the school to ensure that the sectarianism which is so often the

flashpoint for religious animosity be removed from the graduation ceremony. The concern is understandable, as a prayer which uses ideas or images identified with a particular religion may foster a different sort of sectarian rivalry than an invocation or benediction in terms more neutral. The school's explanation, however, does not resolve the dilemma caused by its participation. The question is not the good faith of the school in attempting to make the prayer acceptable to most persons, but the legitimacy of its undertaking that enterprise at all when the object is to produce a prayer to be used in a formal religious exercise which students, for all practical purposes, are obliged to attend. . . .

The First Amendment's Religion Clauses mean that religious beliefs and religious expression are too precious to be either proscribed or prescribed by the State. The design of the Constitution is that preservation and transmission of religious beliefs and worship is a responsibility and a choice committed to the private sphere, which itself is promised freedom to pursue that mission. . . .

These concerns have particular application in the case of school officials, whose effort to monitor prayer will be perceived by the students as inducing a participation they might otherwise reject. Though the efforts of the school officials in this case to find common ground appear to have been a good-faith attempt to recognize the common aspects of religions and not the divisive ones, our precedents do not permit school officials to assist in composing prayers as an incident to a formal exercise for their students. And these same precedents caution us to measure the idea of a civic religion against the central meaning of the Religion Clauses of the First Amendment, which is that all creeds must be tolerated and none favored. The suggestion that government may establish an official or civic religion as a means of avoiding the establishment of a religion with more specific creeds strikes us as a contradiction that cannot be accepted.

The degree of school involvement here made it clear that the graduation prayers bore the imprint of the State and thus put school-age children who objected in an untenable position. We turn our attention now to consider the position of the students, both those who desired the prayer and she who did not.

To endure the speech of false ideas or offensive content and then to counter it is part of learning how to live in a pluralistic society, a society which insists upon open discourse towards the end of a tolerant citizenry. And tolerance presupposes some mutuality of obligation. It is argued that our constitutional vision of a free society requires confidence in our own ability to accept or reject ideas of which we do not approve, and that prayer at a high school graduation does nothing more than offer a choice. . . . This argument cannot prevail, however. It overlooks a fundamental dynamic of the Constitution.

The First Amendment protects speech and religion by quite different mechanisms. Speech is protected by insuring its full expression even when the government participates, for the very object of some of our most important speech is to persuade the government to adopt an idea as its own. The method for protecting freedom of worship and freedom of conscience in religious matters is quite the reverse. In religious debate or expression the government is not a prime

participant, for the Framers deemed religious establishment antithetical to the freedom of all. The Free Exercise Clause embraces a freedom of conscience and worship that has close parallels in the speech provisions of the First Amendment, but the Establishment Clause is a specific prohibition on forms of state intervention in religious affairs with no precise counterpart in the speech provisions. The explanation lies in the lesson of history that was and is the inspiration for the Establishment Clause, the lesson that in the hands of government what might begin as a tolerant expression of religious views may end in a policy to indoctrinate and coerce. A state-created orthodoxy puts at grave risk that freedom of belief and conscience which are the sole assurance that religious faith is real, not imposed.

...

As we have observed before, there are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools. Our decisions in *Engel v. Vitale* and *School District of Abington Tp. v. Schempp* recognize, among other things, that prayer exercises in public schools carry a particular risk of indirect coercion. . . . What to most believers may seem nothing more than a reasonable request that the nonbeliever respect their religious practices, in a school context may appear to the nonbeliever or dissenter to be an attempt to employ the machinery of the State to enforce a religious orthodoxy. . . .

. . . Research in psychology supports the common assumption that adolescents are often susceptible to pressure from their peers towards conformity, and that the influence is strongest in matters of social convention. . . . [T]he government may no more use social pressure to enforce orthodoxy than it may use more direct means. . . .

There was a stipulation in the District Court that attendance at graduation and promotional ceremonies is voluntary. Petitioners and the United States, as *amicus*, made this a center point of the case, arguing that the option of not attending the graduation excuses any inducement or coercion in the ceremony itself. The argument lacks all persuasion. Law reaches past formalism. And to say a teenage student has a real choice not to attend her high school graduation is formalistic in the extreme. True, Deborah could elect not to attend commencement without renouncing her diploma; but we shall not allow the case to turn on this point. Everyone knows that in our society and in our culture high school graduation is one of life's most significant occasions. A school rule which excuses attendance is beside the point. Attendance may not be required by official decree, yet it is apparent that a student is not free to absent herself from the graduation exercise in any real sense of the term "voluntary," for absence would require forfeiture of those intangible benefits which have motivated the student through youth and all her high school years. Graduation is a time for family and those closest to the student to celebrate success and express mutual wishes of gratitude and respect, all to the end of impressing upon the young person the role that it is his or her right and duty to assume in the community and all of its diverse parts.

The importance of the event is the point the school district and the United States rely upon to argue that a formal prayer ought to be permitted, but it becomes one of the principal reasons why their

argument must fail. Their contention, one of considerable force were it not for the constitutional constraints applied to state action, is that the prayers are an essential part of these ceremonies because for many persons an occasion of this significance lacks meaning if there is no recognition, however brief, that human achievements cannot be understood apart from their spiritual essence. We think the Government's position that this interest suffices to force students to choose between compliance or forfeiture demonstrates fundamental inconsistency in its argumentation. It fails to acknowledge that what for many of Deborah's classmates and their parents was a spiritual imperative was for Daniel and Deborah Weisman religious conformance compelled by the State. While in some societies the wishes of the majority might prevail, the Establishment Clause of the First Amendment is addressed to this contingency and rejects the balance urged upon us. The Constitution forbids the State to exact religious conformity from a student as the price of attending her own high school graduation. This is the calculus the Constitution commands.

The Government's argument gives insufficient recognition to the real conflict of conscience faced by the young student. The essence of the Government's position is that with regard to a civic, social occasion of this importance it is the objector, not the majority, who must take unilateral and private action to avoid compromising religious scruples, here by electing to miss the graduation exercise. This turns conventional First Amendment analysis on its head. It is a tenet of the First Amendment that the State cannot require one of its citizens to forfeit his or her rights and benefits as the price of resisting conformance to state-sponsored religious practice. To say that a student must remain apart from the ceremony at the opening invocation and closing benediction is to risk compelling conformity in an environment analogous to the classroom setting, where we have said the risk of compulsion is especially high. Just as in *Engel v. Vitale* and *School District of Abington Township v. Schempp*, we found that provisions within the challenged legislation permitting a student to be voluntarily excused from attendance or participation in the daily prayers did not shield those practices from invalidation, the fact that attendance at the graduation ceremonies is voluntary in a legal sense does not save the religious exercise. . . .

We do not hold that every state action implicating religion is invalid if one or a few citizens find it offensive. People may take offense at all manner of religious as well as nonreligious messages, but offense alone does not in every case show a violation. We know too that sometimes to endure social isolation or even anger may be the price of conscience or non-conformity. But, by any reading of our cases, the conformity required of the student in this case was too high an exaction to withstand the test of the Establishment Clause. The prayer exercises in this case are especially improper because the State has in every practical sense compelled attendance and participation in an explicit religious exercise at an event of singular importance to every student, one the objecting student had no real alternative to avoid. . . .

For the reasons we have stated, the judgment of the Court of Appeals is

Affirmed.

NOTES

1. Rabbi Gutterman's prayers were:

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

BENEDICTION: "O God, we are grateful to You for having endowed us with the capacity for learning which we have celebrated on this joyous commencement. Happy families give thanks for seeing their children achieve an important milestone. Send Your blessings upon the teachers and administrators who helped prepare them. The graduates now need strength and guidance for the future, help them to understand that we are not complete with academic knowledge alone. We must each strive to fulfill what You require of us all: To do justly, to love mercy, to walk humbly. We give thanks to You, Lord, for keeping us alive, sustaining us and allowing us to reach this special, happy occasion. AMEN." *Lee* at 581–582.

"God" appears twice and "lord" once in the 252 words of prayer. Justice Blackmun's concurrence noted that the phrase in the Benediction, "We must each strive to fulfill what you require of us all, to do justly, to love mercy, to walk humbly" conveys a Judeo-Christian message clearly borrowed from the Prophet Micah at Chapter 6, verse 8. (Blackmun, J., concurring), at 604, note 5. Similarly, Justice Souter's concurrence feared that the reference from Micah "embodies a straightforwardly theistic premise" (Souter, J., concurring), at 617.

What do you think about these prayers?

2. In a caustic dissent, Justice Scalia, joined by Chief Justice Rehnquist and Justices White and Thomas, wrote:

I find it a sufficient embarrassment that our Establishment Clause jurisprudence regarding holiday displays has come to "requir[e] scrutiny more commonly associated with interior decorators than with the judiciary." But interior decorating is a rock-hard science compared to psychology practiced by amateurs. A few citations of "[r]esearch in psychology" that have no particular bearing upon the precise issue here, cannot disguise the fact that the Court has gone beyond the realm where judges know what they are doing. The Court's argument that state officials have "coerced" students to take part in the invocation and benediction at graduation ceremonies is, not to put too fine a point

on it, incoherent. *Lee v. Weisman*, 505 U.S. 577, 636, 112 S. Ct. 2649, 120 L.Ed.2d 467, 75 Educ. L. Rep. 43 (1990), (Scalia, J., dissenting).

3. The Sixth and Seventh Circuits, in cases involving public universities in Tennessee and Indiana, respectively, upheld prayer at graduation ceremonies. The courts essentially agreed that the prayers did not violate the Establishment Clause because they did not involve young students and attendance was voluntary. *Tanford v. Brand*, 104 F.3d 982 [115 Educ. L. Rep. 339] (7th Cir. 1997), *cert. denied*, 522 U.S. 814, 118 S. Ct. 60, 139 L.Ed.2d 23 (1997); *Chaudhuri v. State of Tenn.*, 130 F.3d 232 [122 Educ. L. Rep. 573] (6th Cir. 1997), *cert. denied*, 523 U.S. 1024, 118 S. Ct. 1308, 140 L.Ed.2d 473 (1998). Are these fair distinctions?

[Case No. 11] Title I Services and Students in Religiously Affiliated Non-Public Schools

Agostini v. Felton

Supreme Court of the United States, 1997.

521 U.S. 203, 117 S. Ct. 1997, 138 L.Ed.2d 391 [119 Educ. L. Rep. 29].

■ JUSTICE O'CONNOR delivered the opinion of the Court.

In *Aguilar v. Felton* this Court held that the Establishment Clause of the First Amendment barred the city of New York from sending public school teachers into parochial schools to provide remedial education to disadvantaged children pursuant to a congressionally mandated program. On remand, the District Court for the Eastern District of New York entered a permanent injunction reflecting our ruling. Twelve years later, petitioners—the parties bound by that injunction—seek relief from its operation. Petitioners maintain that *Aguilar* cannot be squared with our intervening Establishment Clause jurisprudence and ask that we explicitly recognize what our more recent cases already dictate: *Aguilar* is no longer good law. We agree with petitioners that *Aguilar* is not consistent with our subsequent Establishment Clause decisions and further conclude that, on the facts presented here, petitioners are entitled under Federal Rule of Civil Procedure 60(b)(5) to relief from the operation of the District Court's prospective injunction.

I

In 1965, Congress enacted Title I of the Elementary and Secondary Education Act of 1965 to “provid[e] full educational opportunity to every child regardless of economic background” (hereinafter Title I). Toward that end, Title I channels federal funds, through the States, to “local educational agencies” (LEA’s). The LEA’s spend these funds to provide remedial education, guidance, and job counseling to eligible students. An eligible student is one (i) who resides within the attendance boundaries of a public school located in a low-income area and (ii) who is failing, or is at risk of failing, the State’s student performance standards. Title I funds must be made available to all eligible children, regardless of whether they attend public schools, and the services provided to children attending private schools must be “equitable in comparison to services and other benefits for public school children.”

An LEA providing services to children enrolled in private schools is subject to a number of constraints that are not imposed when it provides aid to public schools. Title I services may be provided only to those private school students eligible for aid, and cannot be used to provide services on a “school-wide” basis. In addition, the LEA must retain complete control over Title I funds; retain title to all materials used to provide Title I services; and provide those services through public employees or other persons independent of the private school and any religious institution. The Title I services themselves must be “secular, neutral, and non-ideological” and must “supplement, and in no case supplant, the level of services” already provided by the private school.

Petitioner Board of Education of the City of New York (hereinafter Board), an LEA, first applied for Title I funds in 1966 and has grappled ever since with how to provide Title I services to the private school students within its jurisdiction. Approximately 10% of the total number of students eligible for Title I services are private school students. Recognizing that more than 90% of the private schools within the Board’s jurisdiction are sectarian, the Board initially arranged to transport children to public schools for after-school Title I instruction. But this enterprise was largely unsuccessful. Attendance was poor, teachers and children were tired, and parents were concerned for the safety of their children. The Board then moved the after-school instruction onto private school campuses, as Congress had contemplated when it enacted Title I. After this program also yielded mixed results, the Board implemented the plan we evaluated in *Aguilar v. Felton*.

That plan called for the provision of Title I services on private school premises during school hours. Under the plan, only public employees could serve as Title I instructors and counselors. Assignments to private schools were made on a voluntary basis and without regard to the religious affiliation of the employee or the wishes of the private school. As the Court of Appeals in *Aguilar* observed, a large majority of Title I teachers worked in non-public schools with religious affiliations different from their own. The vast majority of Title I teachers also moved among the private schools, spending fewer than five days a week at the same school.

Before any public employee could provide Title I instruction at a private school, she would be given a detailed set of written and oral instructions emphasizing the secular purpose of Title I and setting out the rules to be followed to ensure that this purpose was not compromised. Specifically, employees would be told that (i) they were employees of the Board and accountable only to their public school supervisors; (ii) they had exclusive responsibility for selecting students for the Title I program and could teach only those children who met the eligibility criteria for Title I; (iii) their materials and equipment would be used only in the Title I program; (iv) they could not engage in team teaching or other cooperative instructional activities with private school teachers; and (v) they could not introduce any religious matter into their teaching or become involved in any way with the religious activities of the private schools. All religious symbols were to be removed from classrooms used for Title I services. The rules

acknowledged that it might be necessary for Title I teachers to consult with a student's regular classroom teacher to assess the student's particular needs and progress, but admonished instructors to limit those consultations to mutual professional concerns regarding the student's education. To ensure compliance with these rules, a publicly employed field supervisor was to attempt to make at least one unannounced visit to each teacher's classroom every month.

In 1978, six federal taxpayers—respondents here—sued the Board in the District Court for the Eastern District of New York. Respondents sought declaratory and injunctive relief, claiming that the Board's Title I program violated the Establishment Clause. The District Court permitted the parents of a number of parochial school students who were receiving Title I services to intervene as codefendants. The District Court granted summary judgment for the Board, but the Court of Appeals for the Second Circuit reversed. . . . In a 5-to-4 decision, this Court affirmed on the ground that the Board's Title I program necessitated an "excessive entanglement of church and state in the administration of [Title I] benefits." On remand, the District Court permanently enjoined the Board "from using public funds for any plan or program under [Title I] to the extent that it requires, authorizes or permits public school teachers and guidance counselors to provide teaching and counseling services on the premises of sectarian schools within New York City."

The Board, like other LEA's across the United States, modified its Title I program so it could continue serving those students who attended private religious schools. Rather than offer Title I instruction to parochial school students at their schools, the Board reverted to its prior practice of providing instruction at public school sites, at leased sites, and in mobile instructional units (essentially vans converted into classrooms) parked near the sectarian school. The Board also offered computer-aided instruction, which could be provided "on premises" because it did not require public employees to be physically present on the premises of a religious school.

It is not disputed that the additional costs of complying with *Aguilar's* mandate are significant. Since the 1986–1987 school year, the Board has spent over \$100 million providing computer-aided instruction, leasing sites and mobile instructional units, and transporting students to those sites. Under the Secretary of Education's regulations, those costs "incurred as a result of implementing alternative delivery systems to comply with the requirements of *Aguilar v. Felton*" and not paid for with other state or federal funds are to be deducted from the federal grant before the Title I funds are distributed to any student. These "*Aguilar* costs" thus reduce the amount of Title I money an LEA has available for remedial education, and LEA's have had to cut back on the number of students who receive Title I benefits. From Title I funds available for New York City children between the 1986–1987 and the 1993–1994 school years, the Board had to deduct \$7.9 million "off-the-top" for compliance with *Aguilar*. When *Aguilar* was handed down, it was estimated that some 20,000 economically disadvantaged children in the city of New York and some 183,000 children nationwide would experience a decline in Title I services.

In October and December of 1995, petitioners—the Board and a new group of parents of parochial school students entitled to Title I services—filed motions in the District Court seeking relief under Federal Rule of Civil Procedure 60(b) from the permanent injunction entered by the District Court on remand from our decision in *Aguilar*. Petitioners argued that relief was proper . . . because the “decisional law [had] changed to make legal what the [injunction] was designed to prevent.” Specifically, petitioners pointed to the statements of five Justices in *Board of Education of Kiryas Joel Village School District v. Grumet* calling for the overruling of *Aguilar*. The District Court denied the motion. . . . The Court of Appeals for the Second Circuit affirmed. . . . We granted certiorari and now reverse.

II

The question we must answer is a simple one: Are petitioners entitled to relief from the District Court’s permanent injunction under Rule 60(b)? Rule 60(b)(5), the subsection under which petitioners proceeded below, states:

“On motion and upon such terms as are just, the court may relieve a party . . . from a final judgment [or] order . . . [when] it is no longer equitable that the judgment should have prospective application.”

In *Rufo v. Inmates of Suffolk County Jail*, we held that it is appropriate to grant a Rule 60(b)(5) motion when the party seeking relief from an injunction or consent decree can show “a significant change either in factual conditions or in law.” A court may recognize subsequent changes in either statutory or decisional law. A court errs when it refuses to modify an injunction or consent decree in light of such changes.

Petitioners point to three changes in the factual and legal landscape that they believe justify their claim for relief under Rule 60(b)(5). They first contend that the exorbitant costs of complying with the District Court’s injunction constitute a significant factual development warranting modification of the injunction. Petitioners also argue that there have been two significant legal developments since *Aguilar* was decided: a majority of Justices have expressed their views that *Aguilar* should be reconsidered or overruled; and *Aguilar* has in any event been undermined by subsequent Establishment Clause decisions. . . .

Respondents counter that, because the costs of providing Title I services off site were known at the time *Aguilar* was decided, and because the relevant case law has not changed, the District Court did not err in denying petitioners’ motions. Obviously, if neither the law supporting our original decision in this litigation nor the facts have changed, there would be no need to decide the propriety of a Rule 60(b)(5) motion. Accordingly, we turn to the threshold issue whether the factual or legal landscape has changed since we decided *Aguilar*.

We agree with respondents that petitioners have failed to establish the significant change in factual conditions required by *Rufo*. Both petitioners and this Court were, at the time *Aguilar* was decided, aware that additional costs would be incurred if Title I services could not be provided in parochial school classrooms. . . .

We also agree with respondents that the statements made by five Justices in *Kiryas Joel* do not, in themselves, furnish a basis for concluding that our Establishment Clause jurisprudence has changed. . . . The views of five Justices that the case should be reconsidered or overruled cannot be said to have effected a change in Establishment Clause law.

In light of these conclusions, petitioners' ability to satisfy the prerequisites of Rule 60(b)(5) hinges on whether our later Establishment Clause cases have so undermined *Aguilar* that it is no longer good law. We now turn to that inquiry.

III

A

In order to evaluate whether *Aguilar* has been eroded by our subsequent Establishment Clause cases, it is necessary to understand the rationale upon which *Aguilar*, as well as its companion case, *School District of Grand Rapids v. Ball* rested.

In *Ball*, the Court evaluated two programs implemented by the School District of Grand Rapids, Michigan. The district's Shared Time program, the one most analogous to Title I, provided remedial and "enrichment" classes, at public expense, to students attending non-public schools. The classes were taught during regular school hours by publicly employed teachers, using materials purchased with public funds, on the premises of non-public schools. The Shared Time courses were in subjects designed to supplement the "core curriculum" of the non-public schools. Of the 41 non-public schools eligible for the program, 40 were "pervasively sectarian" in character—that is, "the purpos[e] of [those] schools [was] to advance their particular religions."

The Court conducted its analysis by applying the three-part test set forth in *Lemon*. . . . The Court acknowledged that the Shared Time program served a purely secular purpose, thereby satisfying the first part of the so-called *Lemon* test. Nevertheless, it ultimately concluded that the program had the impermissible effect of advancing religion.

The Court found that the program violated the Establishment Clause's prohibition against "government-financed or government-sponsored indoctrination into the beliefs of a particular religious faith" in at least three ways. First, drawing upon the analysis in *Meek v. Pittenger*, the Court observed that "the teachers participating in the programs may become involved in intentionally or inadvertently inculcating particular religious tenets or beliefs." . . .

The presence of public teachers on parochial school grounds had a second, related impermissible effect: It created a "graphic symbol of the 'concert or union or dependency' of church and state," especially when perceived by "children in their formative years." . . .

Third, the Court found that the Shared Time program impermissibly financed religious indoctrination by subsidizing "the primary religious mission of the institutions affected." . . .

The New York City Title I program challenged in *Aguilar* closely resembled the Shared Time program struck down in *Ball*, but the Court found fault with an aspect of the Title I program not present in *Ball*: The Board had "adopted a system for monitoring the religious content of

publicly funded Title I classes in the religious schools.” Even though this monitoring system might prevent the Title I program from being used to inculcate religion, the Court concluded, as it had in *Lemon* and *Meek*, that the level of monitoring necessary to be “certain” that the program had an exclusively secular effect would “inevitably resul[t] in the excessive entanglement of church and state,” thereby running afoul of *Lemon’s* third prong. In the majority’s view, New York City’s Title I program suffered from the “same critical elements of entanglement” present in *Lemon* and *Meek*: the aid was provided “in a pervasively sectarian environment . . . in the form of teachers,” requiring “ongoing inspection . . . to ensure the absence of a religious message.” Such “pervasive monitoring by public authorities in the sectarian schools infringes precisely those Establishment Clause values at the root of the prohibition of excessive entanglement.” The Court noted two further forms of entanglement inherent in New York City’s Title I program: the “administrative cooperation” required to implement Title I services and the “dangers of political divisiveness” that might grow out of the day-to-day decisions public officials would have to make in order to provide Title I services.

Distilled to essentials, the Court’s conclusion that the Shared Time program in *Ball* had the impermissible effect of advancing religion rested on three assumptions: (i) any public employee who works on the premises of a religious school is presumed to inculcate religion in her work; (ii) the presence of public employees on private school premises creates a symbolic union between church and state; and (iii) any and all public aid that directly aids the educational function of religious schools impermissibly finances religious indoctrination, even if the aid reaches such schools as a consequence of private decisionmaking. Additionally, in *Aguilar* there was a fourth assumption: that New York City’s Title I program necessitated an excessive government entanglement with religion because public employees who teach on the premises of religious schools must be closely monitored to ensure that they do not inculcate religion.

B

Our more recent cases have undermined the assumptions upon which *Ball* and *Aguilar* relied. To be sure, the general principles we use to evaluate whether government aid violates the Establishment Clause have not changed since *Aguilar* was decided. For example, we continue to ask whether the government acted with the purpose of advancing or inhibiting religion, and the nature of that inquiry has remained largely unchanged. Likewise, we continue to explore whether the aid has the “effect” of advancing or inhibiting religion. What has changed since we decided *Ball* and *Aguilar* is our understanding of the criteria used to assess whether aid to religion has an impermissible effect.

1

As we have repeatedly recognized, government inculcation of religious beliefs has the impermissible effect of advancing religion. Our cases subsequent to *Aguilar* have, however, modified in two significant respects the approach we use to assess indoctrination. First, we have abandoned the presumption erected in *Meek* and *Ball* that the placement of public employees on parochial school grounds inevitably

results in the impermissible effect of state-sponsored indoctrination or constitutes a symbolic union between government and religion. . . .

Second, we have departed from the rule relied on in *Ball* that all government aid that directly assists the educational function of religious schools is invalid. . . .

. . . [U]nder current law, the Shared Time program in *Ball* and New York City's Title I program in *Aguilar* will not, as a matter of law, be deemed to have the effect of advancing religion through indoctrination. Indeed, each of the premises upon which we relied in *Ball* to reach a contrary conclusion is no longer valid. First, there is no reason to presume that, simply because she enters a parochial school classroom, a full-time public employee such as a Title I teacher will depart from her assigned duties and instructions and embark on religious indoctrination, any more than there was a reason in *Zobrest* to think an interpreter would inculcate religion by altering her translation of classroom lectures. Certainly, no evidence has ever shown that any New York City Title I instructor teaching on parochial school premises attempted to inculcate religion in students. . . .

As discussed above, *Zobrest* also repudiates *Ball's* assumption that the presence of Title I teachers in parochial school classrooms will, without more, create the impression of a "symbolic union" between church and state. . . . We do not see any perceptible (let alone dispositive) difference in the degree of symbolic union between a student receiving remedial instruction in a classroom on his sectarian school's campus and one receiving instruction in a van parked just at the school's curbside. To draw this line based solely on the location of the public employee is neither "sensible" nor "sound" and the Court in *Zobrest* rejected it.

Nor under current law can we conclude that a program placing full-time public employees on parochial campuses to provide Title I instruction would impermissibly finance religious indoctrination. In all relevant respects, the provision of instructional services under Title I is indistinguishable from the provision of sign-language interpreters under the IDEA. Both programs make aid available only to eligible recipients. That aid is provided to students at whatever school they choose to attend. Although Title I instruction is provided to several students at once, whereas an interpreter provides translation to a single student, this distinction is not constitutionally significant. Moreover, as in *Zobrest*, Title I services are by law supplemental to the regular curricula. These services do not, therefore, "reliev[e] sectarian schools of costs they otherwise would have borne in educating their students."

. . .

We are also not persuaded that Title I services supplant the remedial instruction and guidance counseling already provided in New York City's sectarian schools. Although Justice SOUTER maintains that the sectarian schools provide such services and that those schools reduce those services once their students begin to receive Title I instruction, his claims rest on speculation about the impossibility of drawing any line between supplemental and general education, and not

on any evidence in the record that the Board is in fact violating Title I regulations by providing services that supplant those offered in the sectarian schools. We are unwilling to speculate that all sectarian schools provide remedial instruction and guidance counseling to their students, and are unwilling to presume that the Board would violate Title I regulations by continuing to provide Title I services to students who attend a sectarian school that has curtailed its remedial instruction program in response to Title I. Nor are we willing to conclude that the constitutionality of an aid program depends on the number of sectarian school students who happen to receive the otherwise neutral aid. *Zobrest* did not turn on the fact that James Zobrest had, at the time of litigation, been the only child using a publicly funded sign-language interpreter to attend a parochial school.

What is most fatal to the argument that New York City's Title I program directly subsidizes religion is that it applies with equal force when those services are provided off campus, and *Aguilar* implied that providing the services off campus is entirely consistent with the Establishment Clause. . . .

2

Although we examined in *Witters* and *Zobrest* the criteria by which an aid program identifies its beneficiaries, we did so solely to assess whether any use of that aid to indoctrinate religion could be attributed to the State. A number of our Establishment Clause cases have found that the criteria used for identifying beneficiaries are relevant in a second respect, apart from enabling a court to evaluate whether the program subsidizes religion. Specifically, the criteria might themselves have the effect of advancing religion by creating a financial incentive to undertake religious indoctrination. This incentive is not present, however, where the aid is allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and is made available to both religious and secular beneficiaries on a nondiscriminatory basis. Under such circumstances, the aid is less likely to have the effect of advancing religion.

In *Ball* and *Aguilar*, the Court gave this consideration no weight. Before and since those decisions, we have sustained programs that provided aid to all eligible children regardless of where they attended school. . . .

Applying this reasoning to New York City's Title I program, it is clear that Title I services are allocated on the basis of criteria that neither favor nor disfavor religion. The services are available to all children who meet the Act's eligibility requirements, no matter what their religious beliefs or where they go to school. The Board's program does not, therefore, give aid recipients any incentive to modify their religious beliefs or practices in order to obtain those services.

3

We turn now to *Aguilar's* conclusion that New York City's Title I program resulted in an excessive entanglement between church and state. Whether a government aid program results in such an entanglement has consistently been an aspect of our Establishment Clause analysis. We have considered entanglement both in the course of assessing whether an aid program has an impermissible effect of

advancing religion and as a factor separate and apart from “effect.” Regardless of how we have characterized the issue, however, the factors we use to assess whether an entanglement is “excessive” are similar to the factors we use to examine “effect.” That is, to assess entanglement, we have looked to “the character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and religious authority.” Similarly, we have assessed a law’s “effect” by examining the character of the institutions benefited and the nature of the aid that the State provided. Indeed, in *Lemon* itself, the entanglement that the Court found “independently” to necessitate the program’s invalidation also was found to have the effect of inhibiting religion. Thus, it is simplest to recognize why entanglement is significant and treat it—as we did in *Walz*—as an aspect of the inquiry into a statute’s effect.

Not all entanglements, of course, have the effect of advancing or inhibiting religion. Interaction between church and state is inevitable and we have always tolerated some level of involvement between the two. Entanglement must be “excessive” before it runs afoul of the Establishment Clause. . . .

The pre-*Aguilar* Title I program does not result in an “excessive” entanglement that advances or inhibits religion. As discussed previously, the Court’s finding of “excessive” entanglement in *Aguilar* rested on three grounds: (i) the program would require “pervasive monitoring by public authorities” to ensure that Title I employees did not inculcate religion; (ii) the program required “administrative cooperation” between the Board and parochial schools; and (iii) the program might increase the dangers of “political divisiveness.” Under our current understanding of the Establishment Clause, the last two considerations are insufficient by themselves to create an “excessive” entanglement. They are present no matter where Title I services are offered, and no court has held that Title I services cannot be offered off campus. Further, the assumption underlying the first consideration has been undermined. In *Aguilar*, the Court presumed that full-time public employees on parochial school grounds would be tempted to inculcate religion, despite the ethical standards they were required to uphold. Because of this risk pervasive monitoring would be required. But after *Zobrest* we no longer presume that public employees will inculcate religion simply because they happen to be in a sectarian environment. Since we have abandoned the assumption that properly instructed public employees will fail to discharge their duties faithfully, we must also discard the assumption that pervasive monitoring of Title I teachers is required. There is no suggestion in the record before us that unannounced monthly visits of public supervisors are insufficient to prevent or to detect inculcation of religion by public employees. Moreover, we have not found excessive entanglement in cases in which States imposed far more onerous burdens on religious institutions than the monitoring system at issue here.

To summarize, New York City’s Title I program does not run afoul of any of three primary criteria we currently use to evaluate whether government aid has the effect of advancing religion: It does not result in governmental indoctrination; define its recipients by reference to religion; or create an excessive entanglement. We therefore hold that a

federally funded program providing supplemental, remedial instruction to disadvantaged children on a neutral basis is not invalid under the Establishment Clause when such instruction is given on the premises of sectarian schools by government employees pursuant to a program containing safeguards such as those present here. The same considerations that justify this holding require us to conclude that this carefully constrained program also cannot reasonably be viewed as an endorsement of religion. Accordingly, we must acknowledge that *Aguilar*, as well as the portion of *Ball* addressing Grand Rapids' Shared Time program, are no longer good law.

C

The doctrine of stare decisis does not preclude us from recognizing the change in our law and overruling *Aguilar* and those portions of *Ball* inconsistent with our more recent decisions. . . . As discussed above, our Establishment Clause jurisprudence has changed significantly since we decided *Ball* and *Aguilar*, so our decision to overturn those cases rests on far more than "a present doctrinal disposition to come out differently from the Court of [1985]." We therefore overrule *Ball* and *Aguilar* to the extent those decisions are inconsistent with our current understanding of the Establishment Clause.

Nor does the "law of the case" doctrine place any additional constraints on our ability to overturn *Aguilar*. Under this doctrine, a court should not reopen issues decided in earlier stages of the same litigation. The doctrine does not apply if the court is "convinced that [its prior decision] is clearly erroneous and would work a manifest injustice." In light of our conclusion that *Aguilar* would be decided differently under our current Establishment Clause law, we think adherence to that decision would undoubtedly work a "manifest injustice," such that the law of the case doctrine does not apply.

IV

We therefore conclude that our Establishment Clause law has "significant[ly] change[d]" since we decided *Aguilar*. We are only left to decide whether this change in law entitles petitioners to relief under Rule 60(b)(5). We conclude that it does. Our general practice is to apply the rule of law we announce in a case to the parties before us. We adhere to this practice even when we overrule a case. . . .

. . . we see no reason to wait for a "better vehicle" in which to evaluate the impact of subsequent cases on *Aguilar's* continued vitality. To evaluate the Rule 60(b)(5) motion properly before us today in no way undermines "integrity in the interpretation of procedural rules" or signals any departure from "the responsive, non-agenda-setting character of this Court." Indeed, under these circumstances, it would be particularly inequitable for us to bide our time waiting for another case to arise while the city of New York labors under a continuing injunction forcing it to spend millions of dollars on mobile instructional units and leased sites when it could instead be spending that money to give economically disadvantaged children a better chance at success in life by means of a program that is perfectly consistent with the Establishment Clause.

For these reasons, we reverse the judgment of the Court of Appeals and remand the cases to the District Court with instructions to vacate its September 26, 1985, order.

It is so ordered.

NOTES

1. Note how the composition of the Supreme Court can affect the outcome of a case. In *Aguilar*, Justice O'Connor dissented in favor of permitting the on-site delivery of aid. In *Agostini* she authored the majority opinion.

2. In *Aguilar* the Justices modified the *Lemon* test, at least as it applies to state-aid to students in religiously affiliated non-public schools, reviewing only its first two parts, purpose and effect, while recasting entanglement as one criterion in evaluating a statute's effect. Does this make sense?

[Case No. 12] Prayer at Public School Sporting Events

Santa Fe Independent School District v. Doe

Supreme Court of the United States, 2000.

530 U.S. 290, 120 S. Ct. 2266, 147 L.Ed.2d 295 [145 Educ. L. Rep. 21].

■ JUSTICE STEVENS delivered the opinion of the Court.

Prior to 1995, the Santa Fe High School student who occupied the school's elective office of student council chaplain delivered a prayer over the public address system before each varsity football game for the entire season. This practice, along with others, was challenged in District Court as a violation of the Establishment Clause of the First Amendment. While these proceedings were pending in the District Court, the school district adopted a different policy that permits, but does not require, prayer initiated and led by a student at all home games. The District Court entered an order modifying that policy to permit only non-sectarian, non-proselytizing prayer. The Court of Appeals held that, even as modified that . . . the football prayer policy was invalid. We granted the school district's petition for certiorari to review that holding.

I

The Santa Fe Independent School District (District) is a political subdivision of the State of Texas, responsible for the education of more than 4,000 students. . . . The District includes the Santa Fe High School, two primary schools, an intermediate school and the junior high school. Respondents are two sets of current or former students and their respective mothers. One family is Mormon and the other is Catholic. The District Court permitted respondents (Does) to litigate anonymously to protect them from intimidation or harassment.

Respondents commenced this action in April 1995 and moved for a temporary restraining order to prevent the District from violating the Establishment Clause at the imminent graduation exercises. In their complaint the Does alleged that the District had engaged in several proselytizing practices, such as promoting attendance at a Baptist

revival meeting, encouraging membership in religious clubs, chastising children who held minority religious beliefs, and distributing Gideon Bibles on school premises. They also alleged that the District allowed students to read Christian invocations and benedictions from the stage at graduation ceremonies, and to deliver overtly Christian prayers over the public address system at home football games.

On May 10, 1995, the District Court entered an interim order addressing a number of different issues. With respect to the impending graduation, the order provided that “non-denominational prayer” consisting of “an invocation and/or benediction” could be presented by a senior student or students selected by members of the graduating class. The text of the prayer was to be determined by the students, without scrutiny or preapproval by school officials. References to particular religious figures “such as Mohammed, Jesus, Buddha, or the like” would be permitted “as long as the general thrust of the prayer is non-proselytizing.”

In response to that portion of the order, the District adopted a series of policies over several months dealing with prayer at school functions. The policies enacted in May and July for graduation ceremonies provided the format for the August and October policies for football games. The May policy provided: “The board has chosen to permit the graduating senior class, with the advice and counsel of the senior class principal or designee, to elect by secret ballot to choose whether an invocation and benediction shall be part of the graduation exercise. If so chosen the class shall elect by secret ballot, from a list of student volunteers, students to deliver non-sectarian, non-proselytizing invocations and benedictions for the purpose of solemnizing their graduation ceremonies.” The parties stipulated that after this policy was adopted, “the senior class held an election to determine whether to have an invocation and benediction at the commencement [and] the class voted, by secret ballot, to include prayer at the high school graduation.” In a second vote the class elected two seniors to deliver the invocation and benediction.

In July, the District enacted another policy eliminating the requirement that invocations and benedictions be “non-sectarian and non-proselytizing,” but also providing that if the District were to be enjoined from enforcing that policy, the May policy would automatically become effective. The August policy, which was titled “Prayer at Football Games,” was similar to the July policy for graduations. It also authorized two student elections, the first to determine whether “invocations” should be delivered, and the second to select the spokesperson to deliver them. Like the July policy, it contained two parts, an initial statement that omitted any requirement that the content of the invocation be “non-sectarian and non-proselytizing,” and a fallback provision that automatically added that limitation if the preferred policy should be enjoined. On August 31, 1995, according to the parties’ stipulation, “the district’s high school students voted to determine whether a student would deliver prayer at varsity football games. . . . The students chose to allow a student to say a prayer at football games.” A week later, in a separate election, they selected a student “to deliver the prayer at varsity football games.”

The final policy (October policy) is essentially the same as the August policy, though it omits the word “prayer” from its title, and refers to “messages” and “statements” as well as “invocations.” It is the validity of that policy that is before us.

The District Court did enter an order precluding enforcement of the first, open-ended policy. . . . Both parties appealed. . . . The Court of Appeals majority agreed with the Does.

We granted the District’s petition for certiorari, limited to the following question: “Whether petitioner’s policy permitting student-led, student-initiated prayer at football games violates the Establishment Clause.” We conclude, as did the Court of Appeals, that it does.

II

The first Clause in the First Amendment to the Federal Constitution provides that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.” The Fourteenth Amendment imposes those substantive limitations on the legislative power of the States and their political subdivisions. In *Lee v. Weisman* we held that a prayer delivered by a rabbi at a middle school graduation ceremony violated that Clause. Although this case involves student prayer at a different type of school function, our analysis is properly guided by the principles that we endorsed in *Lee*. . . .

In this case the District first argues that this principle is inapplicable to its October policy because the messages are private student speech, not public speech. It reminds us that “there is a crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect.” We certainly agree with that distinction, but we are not persuaded that the pregame invocations should be regarded as “private speech.”

These invocations are authorized by a government policy and take place on government property at government-sponsored school-related events. Of course, not every message delivered under such circumstances is the government’s own. We have held, for example, that an individual’s contribution to a government-created forum was not government speech. Although the District relies heavily on *Rosenberger* and similar cases involving such forums, it is clear that the pregame ceremony is not the type of forum discussed in those cases. The Santa Fe school officials simply do not “evinced either ‘by policy or by practice,’ any intent to open the [pregame ceremony] to ‘indiscriminate use,’ . . . by the student body generally.” Rather, the school allows only one student, the same student for the entire season, to give the invocation. The statement or invocation, moreover, is subject to particular regulations that confine the content and topic of the student’s message. . . .

Granting only one student access to the stage at a time does not, of course, necessarily preclude a finding that a school has created a limited public forum. Here, however, Santa Fe’s student election system ensures that only those messages deemed “appropriate” under the District’s policy may be delivered. That is, the majoritarian process implemented by the District guarantees, by definition, that minority

candidates will never prevail and that their views will be effectively silenced.

Recently, in *Board of Regents of University of Wisconsin System v. Southworth*, we explained why student elections that determine, by majority vote, which expressive activities shall receive or not receive school benefits are constitutionally problematic: “To the extent the referendum substitutes majority determinations for viewpoint neutrality it would undermine the constitutional protection the program requires. The whole theory of viewpoint neutrality is that minority views are treated with the same respect as are majority views. Access to a public forum, for instance, does not depend upon majoritarian consent. That principle is controlling here.” Like the student referendum for funding in *Southworth*, this student election does nothing to protect minority views but rather places the students who hold such views at the mercy of the majority. Because “fundamental rights may not be submitted to vote; they depend on the outcome of no elections,” the District’s elections are insufficient safeguards of diverse student speech.

In *Lee*, the school district made the related argument that its policy of endorsing only “civic or non-sectarian” prayer was acceptable because it minimized the intrusion on the audience as a whole. We rejected that claim by explaining that such a majoritarian policy “does not lessen the offense or isolation to the objectors. At best it narrows their number, at worst increases their sense of isolation and affront.” Similarly, while Santa Fe’s majoritarian election might ensure that most of the students are represented, it does nothing to protect the minority; indeed, it likely serves to intensify their offense. Moreover, the District has failed to divorce itself from the religious content in the invocations. It has not succeeded in doing so, either by claiming that its policy is “one of neutrality rather than endorsement” or by characterizing the individual student as the “circuit-breaker” in the process. Contrary to the District’s repeated assertions that it has adopted a “hands-off” approach to the pregame invocation, the realities of the situation plainly reveal that its policy involves both perceived and actual endorsement of religion. In this case, as we found in *Lee*, the “degree of school involvement” makes it clear that the pregame prayers bear “the imprint of the State and thus put school-age children who objected in an untenable position.”

The District has attempted to disentangle itself from the religious messages by developing the two-step student election process. The text of the October policy, however, exposes the extent of the school’s entanglement. The elections take place at all only because the school “board has chosen to permit students to deliver a brief invocation and/or message.” The elections thus “shall” be conducted “by the high school student council” and “[u]pon advice and direction of the high school principal.” The decision whether to deliver a message is first made by majority vote of the entire student body, followed by a choice of the speaker in a separate, similar majority election. Even though the particular words used by the speaker are not determined by those votes, the policy mandates that the “statement or invocation” be “consistent with the goals and purposes of this policy,” which are “to solemnize the

event, to promote good sportsmanship and student safety, and to establish the appropriate environment for the competition.”

In addition to involving the school in the selection of the speaker, the policy, by its terms, invites and encourages religious messages. The policy itself states that the purpose of the message is “to solemnize the event.” A religious message is the most obvious method of solemnizing an event. Moreover, the requirements that the message “promote good citizenship” and “establish the appropriate environment for competition” further narrow the types of message deemed appropriate, suggesting that a solemn, yet nonreligious, message, such as commentary on United States foreign policy, would be prohibited. Indeed, the only type of message that is expressly endorsed in the text is an “invocation”—a term that primarily describes an appeal for divine assistance. In fact, as used in the past at Santa Fe High School, an “invocation” has always entailed a focused religious message. Thus, the expressed purposes of the policy encourage the selection of a religious message, and that is precisely how the students understand the policy. The results of the elections described in the parties’ stipulation make it clear that the students understood that the central question before them was whether prayer should be a part of the pregame ceremony. We recognize the important role that public worship plays in many communities, as well as the sincere desire to include public prayer as a part of various occasions so as to mark those occasions’ significance. But such religious activity in public schools, as elsewhere, must comport with the First Amendment.

The actual or perceived endorsement of the message, moreover, is established by factors beyond just the text of the policy. Once the student speaker is selected and the message composed, the invocation is then delivered to a large audience assembled as part of a regularly scheduled, school-sponsored function conducted on school property. The message is broadcast over the school’s public address system, which remains subject to the control of school officials. It is fair to assume that the pregame ceremony is clothed in the traditional indicia of school sporting events, which generally include not just the team, but also cheerleaders and band members dressed in uniforms sporting the school name and mascot. The school’s name is likely written in large print across the field and on banners and flags. The crowd will certainly include many who display the school colors and insignia on their school T-shirts, jackets, or hats and who may also be waving signs displaying the school name. It is in a setting such as this that “[t]he board has chosen to permit” the elected student to rise and give the “statement or invocation.”

In this context the members of the listening audience must perceive the pregame message as a public expression of the views of the majority of the student body delivered with the approval of the school administration. In cases involving state participation in a religious activity, one of the relevant questions is “whether an objective observer, acquainted with the text, legislative history, and implementation of the statute, would perceive it as a state endorsement of prayer in public schools.” Regardless of the listener’s support for, or objection to, the message, an objective Santa Fe High School student will

unquestionably perceive the inevitable pregame prayer as stamped with her school's seal of approval.

The text and history of this policy, moreover, reinforce our objective student's perception that the prayer is, in actuality, encouraged by the school. When a governmental entity professes a secular purpose for an arguably religious policy, the government's characterization is, of course, entitled to some deference. But it is nonetheless the duty of the courts to "distinguish[h] a sham secular purpose from a sincere one."

According to the District, the secular purposes of the policy are to "foste[r] free expression of private persons . . . as well [as to] solemniz[e] sporting events, promot[e] good sportsmanship and student safety, and establis[h] an appropriate environment for competition." We note, however, that the District's approval of only one specific kind of message, an "invocation," is not necessary to further any of these purposes. Additionally, the fact that only one student is permitted to give a content-limited message suggests that this policy does little to "foste[r] free expression." Furthermore, regardless of whether one considers a sporting event an appropriate occasion for solemnity, the use of an invocation to foster such solemnity is impermissible when, in actuality, it constitutes prayer sponsored by the school. And it is unclear what type of message would be both appropriately "solemnizing" under the District's policy and yet non-religious.

Most striking to us is the evolution of the current policy from the long-sanctioned office of "Student Chaplain" to the candidly titled "Prayer at Football Games" regulation. This history indicates that the District intended to preserve the practice of prayer before football games. The conclusion that the District viewed the October policy simply as a continuation of the previous policies is dramatically illustrated by the fact that the school did not conduct a new election, pursuant to the current policy, to replace the results of the previous election, which occurred under the former policy. Given these observations, and in light of the school's history of regular delivery of a student-led prayer at athletic events, it is reasonable to infer that the specific purpose of the policy was to preserve a popular "state-sponsored religious practice."

School sponsorship of a religious message is impermissible because it sends the ancillary message to members of the audience who are 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." The delivery of such a message—over the school's public address system, by a speaker representing the student body, under the supervision of school faculty, and pursuant to a school policy that explicitly and implicitly encourages public prayer—is not properly characterized as "private" speech.

III

The District next argues that its football policy is distinguishable from the graduation prayer in *Lee* because it does not coerce students to participate in religious observances. Its argument has two parts: first, that there is no impermissible government coercion because the pregame messages are the product of student choices; and second, that

there is really no coercion at all because attendance at an extracurricular event, unlike a graduation ceremony, is voluntary.

The reasons just discussed explaining why the alleged “circuit-breaker” mechanism of the dual elections and student speaker do not turn public speech into private speech also demonstrate why these mechanisms do not insulate the school from the coercive element of the final message. In fact, this aspect of the District’s argument exposes anew the concerns that are created by the majoritarian election system. The parties’ stipulation clearly states that the issue resolved in the first election was “whether a student would deliver prayer at varsity football games,” and the controversy in this case demonstrates that the views of the students are not unanimous on that issue.

One of the purposes served by the Establishment Clause is to remove debate over this kind of issue from governmental supervision or control. We explained in *Lee* that the “preservation and transmission of religious beliefs and worship is a responsibility and a choice committed to the private sphere.” The two student elections authorized by the policy, coupled with the debates that presumably must precede each, impermissibly invade that private sphere. The election mechanism, when considered in light of the history in which the policy in question evolved, reflects a device the District put in place that determines whether religious messages will be delivered at home football games. The mechanism encourages divisiveness along religious lines in a public school setting, a result at odds with the Establishment Clause. Although it is true that the ultimate choice of student speaker is “attributable to the students,” the District’s decision to hold the constitutionally problematic election is clearly “a choice attributable to the State.”

The District further argues that attendance at the commencement ceremonies at issue in *Lee* “differs dramatically” from attendance at high school football games, which it contends “are of no more than passing interest to many students” and are “decidedly extracurricular,” thus dissipating any coercion. Attendance at a high school football game, unlike showing up for class, is certainly not required in order to receive a diploma. Moreover, we may assume that the District is correct in arguing that the informal pressure to attend an athletic event is not as strong as a senior’s desire to attend her own graduation ceremony.

There are some students, however, such as cheerleaders, members of the band, and, of course, the team members themselves, for whom seasonal commitments mandate their attendance, sometimes for class credit. The District also minimizes the importance to many students of attending and participating in extracurricular activities as part of a complete educational experience. As we noted in *Lee*, “[l]aw reaches past formalism.” To assert that high school students do not feel immense social pressure, or have a truly genuine desire, to be involved in the extracurricular event that is American high school football is “formalistic in the extreme.” We stressed in *Lee* the obvious observation that “adolescents are often susceptible to pressure from their peers towards conformity, and that the influence is strongest in matters of social convention.” High school home football games are traditional gatherings of a school community; they bring together students and faculty as well as friends and family from years present and past to root

for a common cause. Undoubtedly, the games are not important to some students, and they voluntarily choose not to attend. For many others, however, the choice between whether to attend these games or to risk facing a personally offensive religious ritual is in no practical sense an easy one. The Constitution, moreover, demands that the school may not force this difficult choice upon these students for “[i]t is a tenet of the First Amendment that the State cannot require one of its citizens to forfeit his or her rights and benefits as the price of resisting conformance to state-sponsored religious practice.”

Even if we regard every high school student’s decision to attend a home football game as purely voluntary, we are nevertheless persuaded that the delivery of a pregame prayer has the improper effect of coercing those present to participate in an act of religious worship. For “the government may no more use social pressure to enforce orthodoxy than it may use more direct means.” As in *Lee*, “[w]hat to most believers may seem nothing more than a reasonable request that the nonbeliever respect their religious practices, in a school context may appear to the nonbeliever or dissenter to be an attempt to employ the machinery of the State to enforce a religious orthodoxy.” The constitutional command will not permit the District “to exact religious conformity from a student as the price” of joining her classmates at a varsity football game.

The Religion Clauses of the First Amendment prevent the government from making any law respecting the establishment of religion or prohibiting the free exercise thereof. By no means do these commands impose a prohibition on all religious activity in our public schools. Indeed, the common purpose of the Religion Clauses “is to secure religious liberty.” Thus, nothing in the Constitution as interpreted by this Court prohibits any public school student from voluntarily praying at any time before, during, or after the school day. But the religious liberty protected by the Constitution is abridged when the State affirmatively sponsors the particular religious practice of prayer.

IV

Finally, the District argues repeatedly that the Does have made a premature facial challenge to the October policy that necessarily must fail. The District emphasizes, quite correctly, that until a student actually delivers a solemnizing message under the latest version of the policy, there can be no certainty that any of the statements or invocations will be religious. Thus, it concludes, the October policy necessarily survives a facial challenge.

This argument, however, assumes that we are concerned only with the serious constitutional injury that occurs when a student is forced to participate in an act of religious worship because she chooses to attend a school event. But the Constitution also requires that we keep in mind “the myriad, subtle ways in which Establishment Clause values can be eroded,” *Lynch*, and that we guard against other different, yet equally important, constitutional injuries. One is the mere passage by the District of a policy that has the purpose and perception of government establishment of religion. Another is the implementation of a governmental electoral process that subjects the issue of prayer to a majoritarian vote.

The District argues that the facial challenge must fail because “Santa Fe’s Football Policy cannot be invalidated on the basis of some ‘possibility or even likelihood’ of an unconstitutional application.” Our Establishment Clause cases involving facial challenges, however, have not focused solely on the possible applications of the statute, but rather have considered whether the statute has an unconstitutional purpose. Writing for the Court in *Bowen*, the Chief Justice concluded that “[a]s in previous cases involving facial challenges on Establishment Clause grounds, we assess the constitutionality of an enactment by reference to the three factors first articulated in *Lemon v. Kurtzman*. . . . which guides ‘[t]he general nature of our inquiry in this area.’ Under the *Lemon* standard, a court must invalidate a statute if it lacks ‘a secular legislative purpose.’” It is therefore proper, as part of this facial challenge, for us to examine the purpose of the October policy.

. . . [T]he text of the October policy alone reveals that it has an unconstitutional purpose. The plain language of the policy clearly spells out the extent of school involvement in both the election of the speaker and the content of the message. Additionally, the text of the October policy specifies only one, clearly preferred message—that of Santa Fe’s traditional religious “invocation.” Finally, the extremely selective access of the policy and other content restrictions confirm that it is not a content-neutral regulation that creates a limited public forum for the expression of student speech. Our examination, however, need not stop at an analysis of the text of the policy.

This case comes to us as the latest step in developing litigation brought as a challenge to institutional practices that unquestionably violated the Establishment Clause. One of those practices was the District’s long-established tradition of sanctioning student-led prayer at varsity football games. The narrow question before us is whether implementation of the October policy insulates the continuation of such prayers from constitutional scrutiny. It does not. Our inquiry into this question not only can, but must, include an examination of the circumstances surrounding its enactment. Whether a government activity violates the Establishment Clause is “in large part a legal question to be answered on the basis of judicial interpretation of social facts. . . . Every government practice must be judged in its unique circumstances. . . .” Our discussion in the previous sections demonstrates that in this case the District’s direct involvement with school prayer exceeds constitutional limits.

The District, nevertheless, asks us to pretend that we do not recognize what every Santa Fe High School student understands clearly—that this policy is about prayer. The District further asks us to accept what is obviously untrue: that these messages are necessary to “solemnize” a football game and that this single-student, year-long position is essential to the protection of student speech. We refuse to turn a blind eye to the context in which this policy arose, and that context quells any doubt that this policy was implemented with the purpose of endorsing school prayer.

Therefore, the simple enactment of this policy, with the purpose and perception of school endorsement of student prayer, was a constitutional violation. We need not wait for the inevitable to confirm and magnify the constitutional injury. In *Wallace*, for example, we

invalidated Alabama's as yet unimplemented and voluntary "moment of silence" statute based on our conclusion that it was enacted "for the sole purpose of expressing the State's endorsement of prayer activities for one minute at the beginning of each school day." Therefore, even if no Santa Fe High School student were ever to offer a religious message, the October policy fails a facial challenge because the attempt by the District to encourage prayer is also at issue. Government efforts to endorse religion cannot evade constitutional reproach based solely on the remote possibility that those attempts may fail.

This policy likewise does not survive a facial challenge because it impermissibly imposes upon the student body a majoritarian election on the issue of prayer. Through its election scheme, the District has established a governmental electoral mechanism that turns the school into a forum for religious debate. It further empowers the student body majority with the authority to subject students of minority views to constitutionally improper messages. The award of that power alone, regardless of the students' ultimate use of it, is not acceptable. Like the referendum in *Board of Regents of University of Wisconsin System v. Southworth*, the election mechanism established by the District undermines the essential protection of minority viewpoints. Such a system encourages divisiveness along religious lines and threatens the imposition of coercion upon those students not desiring to participate in a religious exercise. Simply by establishing this school-related procedure, which entrusts the inherently nongovernmental subject of religion to a majoritarian vote, a constitutional violation has occurred. No further injury is required for the policy to fail a facial challenge.

. . . To properly examine this policy on its face, we "must be deemed aware of the history and context of the community and forum." Our examination of those circumstances above leads to the conclusion that this policy does not provide the District with the constitutional safe harbor it sought. The policy is invalid on its face because it establishes an improper majoritarian election on religion, and unquestionably has the purpose and creates the perception of encouraging the delivery of prayer at a series of important school events.

The judgment of the Court of Appeals is, accordingly, affirmed.

It is so ordered.

NOTES

1. In granting *certiorari*, the Supreme Court sidestepped the status of prayer at public school graduation ceremonies. Should the Court have accepted this question in light of the conflicting results in the circuit courts?

2. In a scathing dissent, in *Santa Fe* at 318, Chief Justice Rehnquist, joined by Justices Scalia and Thomas, accused the Court of "bristl[ing] with hostility to all things religious in public life." The dissent viewed the issue in *Santa Fe* as student, not government, speech where, unlike *Lee's* having a prayer delivered by a rabbi under the direction of a school official, the policy allowed students to select or create prayers. The dissent added that if students had been selected on wholly secular criteria, such as public speaking skills or social popularity, they could have delivered religious

messages that would likely have passed constitutional muster. What do you think?

[Case No. 13] Access Rights of Religious Groups to Use Public School Facilities

Good News Club v. Milford Central School

Supreme Court of the United States, 2001.

533 U.S. 98, 121 S. Ct. 2093, 150 L.Ed.2d 151 [154 Educ. L. Rep. 45].

■ JUSTICE THOMAS delivered the opinion of the Court.

This case presents two questions. The first question is whether Milford Central School violated the free speech rights of the Good News Club when it excluded the Club from meeting after hours at the school. The second question is whether any such violation is justified by Milford's concern that permitting the Club's activities would violate the Establishment Clause. We conclude that Milford's restriction violates the Club's free speech rights and that no Establishment Clause concern justifies that violation.

I

The State of New York authorizes local school boards to adopt regulations governing the use of their school facilities. In particular, N.Y. Educ. Law § 414 enumerates several purposes for which local boards may open their schools to public use. In 1992, respondent Milford Central School (Milford) enacted a community use policy adopting seven of § 414's purposes for which its building could be used after school. Two of the stated purposes are relevant here. First, district residents may use the school for "instruction in any branch of education, learning or the arts." Second, the school is available for "social, civic and recreational meetings and entertainment events, and other uses pertaining to the welfare of the community, provided that such uses shall be nonexclusive and shall be opened to the general public."

Stephen and Darleen Fournier reside within Milford's district and therefore are eligible to use the school's facilities as long as their proposed use is approved by the school. Together they are sponsors of the local Good News Club, a private Christian organization for children ages 6 to 12. Pursuant to Milford's policy, in September 1996 the Fourniers submitted a request to Dr. Robert McGruder, interim superintendent of the district. . . . The next month, McGruder formally denied the Fourniers' request on the ground that the proposed use—to have "a fun time of singing songs, hearing a Bible lesson and memorizing scripture,"—was "the equivalent of religious worship." According to McGruder, the community use policy, which prohibits use "by any individual or organization for religious purposes," foreclosed the Club's activities.

In response to a letter submitted by the Club's counsel, Milford's attorney requested information to clarify the nature of the Club's activities. The Club sent a set of materials used or distributed at the meetings and the following description of its meeting:

The Club opens its session with Ms. Fournier taking attendance. As she calls a child's name, if the child recites a Bible verse the child receives a treat. After attendance, the Club sings songs. Next Club members engage in games that involve, *inter alia*, learning Bible verses. Ms. Fournier then relates a Bible story and explains how it applies to Club members' lives. The Club closes with prayer. Finally, Ms. Fournier distributes treats and the Bible verses for memorization.

McGruder and Milford's attorney reviewed the materials and concluded that "the kinds of activities proposed to be engaged in by the Good News Club were not a discussion of secular subjects such as child rearing, development of character and development of morals from a religious perspective, but were in fact the equivalent of religious instruction itself." In February 1997, the Milford Board of Education adopted a resolution rejecting the Club's request to use Milford's facilities "for the purpose of conducting religious instruction and Bible study."

In March 1997, petitioners, the Good News Club, Ms. Fournier, and her daughter Andrea Fournier (collectively, the Club), filed an action under 42 U.S.C.[A.] § 1983 against Milford. . . . The Club alleged that Milford's denial of its application violated its free speech rights under the First and Fourteenth Amendments, its right to equal protection under the Fourteenth Amendment, and its right to religious freedom under the Religious Freedom Restoration Act of 1993.

The Club moved for a preliminary injunction to prevent the school from enforcing its religious exclusion policy against the Club and thereby to permit the Club's use of the school facilities. On April 14, 1997, the District Court granted the injunction. The Club then held its weekly after school meetings from April 1997 until June 1998 in a high school resource and middle school special education room. In August 1998, the District Court vacated the preliminary injunction and granted Milford's motion for summary judgment. . . . The Club appealed, and a divided panel of the . . . Second Circuit affirmed. . . . There is a conflict among the Courts of Appeals on the question whether speech can be excluded from a limited public forum on the basis of the religious nature of the speech. . . . We granted certiorari to resolve this conflict.

II

The standards that we apply to determine whether a State has unconstitutionally excluded a private speaker from use of a public forum depend on the nature of the forum. If the forum is a traditional or open public forum, the State's restrictions on speech are subject to stricter scrutiny than are restrictions in a limited public forum. We have previously declined to decide whether a school district's opening of its facilities pursuant to N.Y. Educ. Law § 414 creates a limited or a traditional public forum. Because the parties have agreed that Milford created a limited public forum when it opened its facilities in 1992 we need not resolve the issue here. Instead, we simply will assume that Milford operates a limited public forum.

When the State establishes a limited public forum, the State is not required to and does not allow persons to engage in every type of

speech. The State may be justified “in reserving [its forum] for certain groups or for the discussion of certain topics.” The State’s power to restrict speech, however, is not without limits. The restriction must not discriminate against speech on the basis of viewpoint, and the restriction must be “reasonable in light of the purpose served by the forum.”

III

Applying this test, we first address whether the exclusion constituted viewpoint discrimination. We are guided in our analysis by two of our prior opinions, *Lamb’s Chapel* and *Rosenberger*. In *Lamb’s Chapel*, we held that a school district violated the Free Speech Clause of the First Amendment when it excluded a private group from presenting films at the school based solely on the films’ discussions of family values from a religious perspective. Likewise, in *Rosenberger*, we held that a university’s refusal to fund a student publication because the publication addressed issues from a religious perspective violated the Free Speech Clause. Concluding that Milford’s exclusion of the Good News Club based on its religious nature is indistinguishable from the exclusions in these cases, we hold that the exclusion constitutes viewpoint discrimination. Because the restriction is viewpoint discriminatory, we need not decide whether it is unreasonable in light of the purposes served by the forum. . . .

Milford has opened its limited public forum to activities that serve a variety of purposes, including events “pertaining to the welfare of the community.” Milford interprets its policy to permit discussions of subjects such as child rearing, and of “the development of character and morals from a religious perspective.” For example, this policy would allow someone to use Aesop’s Fables to teach children moral values. Additionally, a group could sponsor a debate on whether there should be a constitutional amendment to permit prayer in public schools and the Boy Scouts could meet “to influence a boy’s character, development and spiritual growth.” In short, any group that “promote[s] the moral and character development of children” is eligible to use the school building.

Just as there is no question that teaching morals and character development to children is a permissible purpose under Milford’s policy, it is clear that the Club teaches morals and character development to children. For example, no one disputes that the Club instructs children to overcome feelings of jealousy, to treat others well regardless of how they treat the children, and to be obedient, even if it does so in a non-secular way. Nonetheless, because Milford found the Club’s activities to be religious in nature—“the equivalent of religious instruction itself,” it excluded the Club from use of its facilities.

Applying *Lamb’s Chapel*, we find it quite clear that Milford engaged in viewpoint discrimination when it excluded the Club from the after school forum. In *Lamb’s Chapel*, the local New York school district similarly had adopted § 414’s “social, civic or recreational use” category as a permitted use in its limited public forum. The district also prohibited use “by any group for religious purposes. . . .”

Like the church in *Lamb’s Chapel*, the Club seeks to address a subject otherwise permitted under the rule, the teaching of morals and

character, from a religious standpoint. Certainly, one could have characterized the film presentations in *Lamb's Chapel* as a religious use, as the Court of Appeals did. And one easily could conclude that the films' purpose to instruct that "society's slide toward humanism . . . can only be counterbalanced by a loving home where Christian values are instilled from an early age" was "quintessentially religious." The only apparent difference between the activity of *Lamb's Chapel* and the activities of the Good News Club is that the Club chooses to teach moral lessons from a Christian perspective through live storytelling and prayer, whereas *Lamb's Chapel* taught lessons through films. This distinction is inconsequential. Both modes of speech use a religious viewpoint. Thus, the exclusion of the Good News Club's activities, like the exclusion of *Lamb's Chapel's* films, constitutes unconstitutional viewpoint discrimination.

Our opinion in *Rosenberger* also is dispositive. In *Rosenberger*, a student organization at the University of Virginia was denied funding for printing expenses because its publication, *Wide Awake*, offered a Christian viewpoint. Just as the Club emphasizes the role of Christianity in students' morals and character, *Wide Awake* "challenge[d] Christians to live, in word and deed, according to the faith they proclaim and . . . encourage[d] students to consider what a personal relationship with Jesus Christ means." Because the university "select[ed] for disfavored treatment those student journalistic efforts with religious editorial viewpoints," we held that the denial of funding was unconstitutional. . . .

Despite our holdings in *Lamb's Chapel* and *Rosenberger*, the Court of Appeals, like Milford, believed that its characterization of the Club's activities as religious in nature warranted treating the Club's activities as different in kind from the other activities permitted by the school. The "Christian viewpoint" is unique, according to the court, because it contains an "additional layer" that other kinds of viewpoints do not. That is, the Club "is focused on teaching children how to cultivate their relationship with God through Jesus Christ," which it characterized as "quintessentially religious." With these observations, the court concluded that, because the Club's activities "fall outside the bounds of pure 'moral and character development,'" the exclusion did not constitute viewpoint discrimination.

We disagree that something that is "quintessentially religious" or "decidedly religious in nature" cannot also be characterized properly as the teaching of morals and character development from a particular viewpoint. What matters for purposes of the Free Speech Clause is that we can see no logical difference in kind between the invocation of Christianity by the Club and the invocation of teamwork, loyalty, or patriotism by other associations to provide a foundation for their lessons. It is apparent that the unstated principle of the Court of Appeals' reasoning is its conclusion that any time religious instruction and prayer are used to discuss morals and character, the discussion is simply not a "pure" discussion of those issues. According to the Court of Appeals, reliance on Christian principles taints moral and character instruction in a way that other foundations for thought or viewpoints do not. We, however, have never reached such a conclusion. Instead, we reaffirm our holdings in *Lamb's Chapel* and *Rosenberger* that speech

discussing otherwise permissible subjects cannot be excluded from a limited public forum on the ground that the subject is discussed from a religious viewpoint. Thus, we conclude that Milford's exclusion of the Club from use of the school, pursuant to its community use policy, constitutes impermissible viewpoint discrimination.

...

IV

Milford argues that, even if its restriction constitutes viewpoint discrimination, its interest in not violating the Establishment Clause outweighs the Club's interest in gaining equal access to the school's facilities. In other words, according to Milford, its restriction was required to avoid violating the Establishment Clause. We disagree. We have said that a state interest in avoiding an Establishment Clause violation "may be characterized as compelling," and therefore may justify content-based discrimination. However, it is not clear whether a State's interest in avoiding an Establishment Clause violation would justify viewpoint discrimination. We need not, however, confront the issue in this case, because we conclude that the school has no valid Establishment Clause interest.

We rejected Establishment Clause defenses similar to Milford's in two previous free speech cases, *Lamb's Chapel* and *Widmar*. In particular, in *Lamb's Chapel*, we explained that "[t]he showing of th[e] film series would not have been during school hours, would not have been sponsored by the school, and would have been open to the public, not just to church members." Accordingly, we found that "there would have been no realistic danger that the community would think that the District was endorsing religion or any particular creed." Likewise, in *Widmar*, where the university's forum was already available to other groups, this Court concluded that there was no Establishment Clause problem.

The Establishment Clause defense fares no better in this case. As in *Lamb's Chapel*, the Club's meetings were held after school hours, not sponsored by the school, and open to any student who obtained parental consent, not just to Club members. As in *Widmar*, Milford made its forum available to other organizations. The Club's activities are materially indistinguishable from those in *Lamb's Chapel* and *Widmar*. Thus, Milford's reliance on the Establishment Clause is unavailing.

Milford attempts to distinguish *Lamb's Chapel* and *Widmar* by emphasizing that Milford's policy involves elementary school children. According to Milford, children will perceive that the school is endorsing the Club and will feel coercive pressure to participate, because the Club's activities take place on school grounds, even though they occur during non-school hours. This argument is unpersuasive.

First, we have held that "a significant factor in upholding governmental programs in the face of Establishment Clause attack is their neutrality towards religion." Milford's implication that granting access to the Club would do damage to the neutrality principle defies logic. For the "guarantee of neutrality is respected, not offended, when the government, following neutral criteria and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints,

including religious ones, are broad and diverse.” The Good News Club seeks nothing more than to be treated neutrally and given access to speak about the same topics as are other groups. Because allowing the Club to speak on school grounds would ensure neutrality, not threaten it, Milford faces an uphill battle in arguing that the Establishment Clause compels it to exclude the Good News Club.

Second, to the extent we consider whether the community would feel coercive pressure to engage in the Club’s activities, the relevant community would be the parents, not the elementary school children. It is the parents who choose whether their children will attend the Good News Club meetings. Because the children cannot attend without their parents’ permission, they cannot be coerced into engaging in the Good News Club’s religious activities. Milford does not suggest that the parents of elementary school children would be confused about whether the school was endorsing religion. Nor do we believe that such an argument could be reasonably advanced.

Third, whatever significance we may have assigned in the Establishment Clause context to the suggestion that elementary school children are more impressionable than adults, we have never extended our Establishment Clause jurisprudence to foreclose private religious conduct during non-school hours merely because it takes place on school premises where elementary school children may be present.

None of the cases discussed by Milford persuades us that our Establishment Clause jurisprudence has gone this far. . . .

Fourth, even if we were to consider the possible misperceptions by schoolchildren in deciding whether Milford’s permitting the Club’s activities would violate the Establishment Clause, the facts of this case simply do not support Milford’s conclusion. There is no evidence that young children are permitted to loiter outside classrooms after the school day has ended. Surely even young children are aware of events for which their parents must sign permission forms. The meetings were held in a combined high school resource room and middle school special education room, not in an elementary school classroom. The instructors are not schoolteachers. And the children in the group are not all the same age as in the normal classroom setting; their ages range from 6 to 12. In sum, these circumstances simply do not support the theory that small children would perceive endorsement here.

Finally, even if we were to inquire into the minds of schoolchildren in this case, we cannot say the danger that children would misperceive the endorsement of religion is any greater than the danger that they would perceive a hostility toward the religious viewpoint if the Club were excluded from the public forum. This concern is particularly acute given the reality that Milford’s building is not used only for elementary school children. Students, from kindergarten through the 12th grade, all attend school in the same building. There may be as many, if not more, upperclassmen than elementary school children who occupy the school after hours. . . .

We cannot operate, as Milford would have us do, under the assumption that any risk that small children would perceive endorsement should counsel in favor of excluding the Club’s religious activity. We decline to employ Establishment Clause jurisprudence

using a modified heckler's veto, in which a group's religious activity can be proscribed on the basis of what the youngest members of the audience might misperceive. . . . There are countervailing constitutional concerns related to rights of other individuals in the community. In this case, those countervailing concerns are the free speech rights of the Club and its members. . . . And, we have already found that those rights have been violated, not merely perceived to have been violated, by the school's actions toward the Club.

We are not convinced that there is any significance in this case to the possibility that elementary school children may witness the Good News Club's activities on school premises, and therefore we can find no reason to depart from our holdings in *Lamb's Chapel* and *Widmar*. Accordingly, we conclude that permitting the Club to meet on the school's premises would not have violated the Establishment Clause.

V

When Milford denied the Good News Club access to the school's limited public forum on the ground that the Club was religious in nature, it discriminated against the Club because of its religious viewpoint in violation of the Free Speech Clause of the First Amendment. Because Milford has not raised a valid Establishment Clause claim, we do not address the question whether such a claim could excuse Milford's viewpoint discrimination.

The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

NOTE

In a similar case from Louisiana, wherein the Supreme Court vacated and remanded the Fifth Circuit's order in light of *Milford*, *Campbell v. St. Tammany's School Bd.*, 533 U.S. 913, 121 S. Ct. 2518, 150 L.Ed.2d 691 [154 Educ. L. Rep. 73] (2001), *on remand*, 300 F.3d 526 [168 Educ. L. Rep. 128] (5th Cir. 2002), a federal trial court granted the group's request to use school facilities. *Campbell v. St. Tammany Parish School Bd.*, 2003 WL 21783317 (E.D. La. 2003).

[Case No. 14] Public Funds for Vouchers to Religiously Affiliated
Non-Public Schools

Zelman v. Simmons-Harris

Supreme Court of the United States, 2002.

536 U.S. 639, 122 S. Ct. 2460, 153 L.Ed.2d 604 [166 Educ. L. Rep. 30].

■ CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

The State of Ohio has established a pilot program designed to provide educational choices to families with children who reside in the Cleveland City School District. The question presented is whether this program offends the Establishment Clause of the United States Constitution. We hold that it does not.

There are more than 75,000 children enrolled in the Cleveland City School District. The majority of these children are from low-income and minority families. Few of these families enjoy the means to send their

children to any school other than an inner-city public school. For more than a generation, however, Cleveland's public schools have been among the worst performing public schools in the Nation. In 1995, a Federal District Court declared a "crisis of magnitude" and placed the entire Cleveland school district under state control. Shortly thereafter, the state auditor found that Cleveland's public schools were in the midst of a "crisis that is perhaps unprecedented in the history of American education." The district had failed to meet any of the 18 state standards for minimal acceptable performance. Only 1 in 10 ninth graders could pass a basic proficiency examination, and students at all levels performed at a dismal rate compared with students in other Ohio public schools. More than two-thirds of high school students either dropped out before graduation. Of those students who managed to reach their senior year, one of every four still failed to graduate. Of those students who did graduate, few could read, write, or compute at levels comparable to their counterparts in other cities.

It is against this backdrop that Ohio enacted, among other initiatives, its Pilot Project Scholarship Program. The program provides financial assistance to families in any Ohio school district that is or has been "under federal court order requiring supervision and operational management of the district by the state superintendent." Cleveland is the only Ohio school district to fall within that category.

The program provides two basic kinds of assistance to parents of children in a covered district. First, the program provides tuition aid for students in kindergarten through third grade, expanding each year through eighth grade, to attend a participating public or private school of their parent's choosing. Second, the program provides tutorial aid for students who choose to remain enrolled in public school.

The tuition aid portion of the program is designed to provide educational choices to parents who reside in a covered district. Any private school, whether religious or nonreligious, may participate in the program and accept program students so long as the school is located within the boundaries of a covered district and meets statewide educational standards. Participating private schools must agree not to discriminate on the basis of race, religion, or ethnic background, or to "advocate or foster unlawful behavior or teach hatred of any person or group on the basis of race, ethnicity, national origin, or religion." Any public school located in a school district adjacent to the covered district may also participate in the program. Adjacent public schools are eligible to receive a \$2,250 tuition grant for each program student accepted in addition to the full amount of per-pupil state funding attributable to each additional student. All participating schools, whether public or private, are required to accept students in accordance with rules and procedures established by the state superintendent.

Tuition aid is distributed to parents according to financial need. Families with incomes below 200% of the poverty line are given priority and are eligible to receive 90% of private school tuition up to \$2,250. For these lowest-income families, participating private schools may not charge a parental co-payment greater than \$250. For all other families, the program pays 75% of tuition costs, up to \$1,875, with no co-payment cap. These families receive tuition aid only if the number of available scholarships exceeds the number of low-income children who choose to

participate. Where tuition aid is spent depends solely upon where parents who receive tuition aid choose to enroll their child. If parents choose a private school, checks are made payable to the parents who then endorse the checks over to the chosen school.

The tutorial aid portion of the program provides tutorial assistance through grants to any student in a covered district who chooses to remain in public school . . . The number of tutorial assistance grants offered to students in a covered district must equal the number of tuition aid scholarships provided to students enrolled at participating private or adjacent public schools.

The program has been in operation within the Cleveland City School District since the 1996–1997 school year. In the 1999–2000 school year, 56 private schools participated in the program, 46 (or 82%) of which had a religious affiliation. None of the public schools in districts adjacent to Cleveland have elected to participate. More than 3,700 students participated in the scholarship program, most of whom (96%) enrolled in religiously affiliated schools. Sixty percent of these students were from families at or below the poverty line. In the 1998–1999 school year, approximately 1,400 Cleveland public school students received tutorial aid. This number was expected to double during the 1999–2000 school year.

The program is part of a broader undertaking by the State to enhance the educational options of Cleveland's schoolchildren in response to the 1995 takeover [t]hat includes programs governing community and magnet schools. Community schools are funded under state law but are run by their own school boards, not by local school districts. These schools enjoy academic independence to hire their own teachers and to determine their own curriculum. They can have no religious affiliation and are required to accept students by lottery. During the 1999–2000 school year, there were 10 start-up community schools in the Cleveland City School District with more than 1,900 students enrolled. For each child enrolled in a community school, the school receives state funding of \$4,518, twice the funding a participating program school may receive.

Magnet schools are public schools operated by a local school board that emphasize a particular subject area, teaching method, or service to students. For each student enrolled in a magnet school, the school district receives \$7,746, including state funding of \$4,167, the same amount received per student enrolled at a traditional public school. As of 1999, parents in Cleveland were able to choose from among 23 magnet schools, which together enrolled more than 13,000 students in kindergarten through eighth grade. . . .

In 1996, respondents, a group of Ohio taxpayers, challenged the Ohio program. . . . The Ohio Supreme Court rejected respondents' federal claims, but held that the enactment of the program violated certain procedural requirements of the Ohio Constitution. The state legislature immediately cured this defect, leaving the basic provisions discussed above intact.

In July 1999, respondents filed this action . . . seeking to enjoin the reenacted program on the ground that it violated the Establishment Clause. . . . In August 1999, the District Court issued a preliminary

injunction barring further implementation of the program, which we stayed pending review by the Court of Appeals. In December 1999, the District Court granted summary judgment for respondents. In December 2000, a divided panel of the Court of Appeals affirmed . . . finding that the program had the “primary effect” of advancing religion in violation of the Establishment Clause. The Court of Appeals stayed its mandate pending disposition in this Court. We granted certiorari, and now reverse the Court of Appeals.

The Establishment Clause of the First Amendment . . . prevents a State from enacting laws that have the “purpose” or “effect” of advancing or inhibiting religion. . . . There is no dispute that the program challenged here was enacted for the valid secular purpose of providing educational assistance to poor children in a demonstrably failing public school system. Thus, the question presented is whether the Ohio program nonetheless has the forbidden “effect” of advancing or inhibiting religion.

To answer that question, our decisions have drawn a consistent distinction between government programs that provide aid directly to religious schools and programs of true private choice, in which government aid reaches religious schools only as a result of the genuine and independent choices of private individuals. While our jurisprudence with respect to the constitutionality of direct aid programs has “changed significantly” over the past two decades, our jurisprudence with respect to true private choice programs has remained consistent and unbroken. Three times we have confronted Establishment Clause challenges to neutral government programs that provide aid directly to a broad class of individuals, who, in turn, direct the aid to religious schools or institutions of their own choosing. Three times we have rejected such challenges.

In *Mueller*, we rejected an Establishment Clause challenge to a Minnesota program authorizing tax deductions for various educational expenses, including private school tuition costs, even though the great majority of the program’s beneficiaries (96%) were parents of children in religious schools. We began by focusing on the class of beneficiaries, finding that because the class included “all parents,” including parents with “children [who] attend non-sectarian private schools or sectarian private schools,” the program was “not readily subject to challenge under the Establishment Clause.” Then, viewing the program as a whole, we emphasized the principle of private choice, noting that public funds were made available to religious schools “only as a result of numerous, private choices of individual parents of school-age children.” This, we said, ensured that “‘no imprimatur of state approval’ can be deemed to have been conferred on any particular religion, or on religion generally.” We thus found it irrelevant to the constitutional inquiry that the vast majority of beneficiaries were parents of children in religious schools. . . .

In *Witters*, we used identical reasoning to reject an Establishment Clause challenge to a vocational scholarship program that provided tuition aid to a student studying at a religious institution to become a pastor. Looking at the program as a whole, we observed that “[a]ny aid . . . that ultimately flows to religious institutions does so only as a result of the genuinely independent and private choices of aid recipients. . . .”

Five Members of the Court, in separate opinions, emphasized the general rule from *Mueller* that the amount of government aid channeled to religious institutions by individual aid recipients was not relevant to the constitutional inquiry. Our holding thus rested not on whether few or many recipients chose to expend government aid at a religious school but, rather, on whether recipients generally were empowered to direct the aid to schools or institutions of their own choosing.

Finally, in *Zobrest*, we applied *Mueller* and *Witters* to reject an Establishment Clause challenge to a federal program that permitted sign-language interpreters to assist deaf children enrolled in religious schools . . . we stated that “government programs that neutrally provide benefits to a broad class of citizens defined without reference to religion are not readily subject to an Establishment Clause challenge. . . .” we observed that the program “distributes benefits neutrally to any child qualifying as ‘disabled.’” Its “primary beneficiaries,” we said, were “disabled children, not sectarian schools.”

We further observed that “[b]y according parents freedom to select a school of their choice, the statute ensures that a government-paid interpreter will be present in a sectarian school only as a result of the private decision of individual parents.” Our focus again was on neutrality and the principle of private choice, not on the number of program beneficiaries attending religious schools. . . .

Mueller, *Witters*, and *Zobrest* thus make clear that where a government aid program is neutral with respect to religion, and provides assistance directly to a broad class of citizens who, in turn, direct government aid to religious schools wholly as a result of their own genuine and independent private choice, the program is not readily subject to challenge under the Establishment Clause. A program that shares these features permits government aid to reach religious institutions only by way of the deliberate choices of numerous individual recipients. The incidental advancement of a religious mission, or the perceived endorsement of a religious message, is reasonably attributable to the individual recipient, not to the government. . . .

We believe that the program challenged here is a program of true private choice, consistent with *Mueller*, *Witters*, and *Zobrest*, and thus constitutional. As was true in those cases, the Ohio program is neutral in all respects toward religion. It is part of a general and multifaceted undertaking by the State of Ohio to provide educational opportunities to the children of a failed school district. It confers educational assistance directly to a broad class of individuals defined without reference to religion, *i.e.*, any parent of a school-age child who resides in the Cleveland City School District. The program permits the participation of all schools within the district, religious or nonreligious. Adjacent public schools also may participate and have a financial incentive to do so. Program benefits are available to participating families on neutral terms, with no reference to religion. The only . . . preference [is] for low-income families, who receive greater assistance and are given priority for admission. . . .

There are no “financial incentive[s]” that “ske[w]” the program toward religious schools. Such incentives “[are] not present . . . where the aid is allocated on the basis of neutral, secular criteria that neither

favor nor disfavor religion, and is made available to both religious and secular beneficiaries on a nondiscriminatory basis.” The program here in fact creates financial disincentives for religious schools, with private schools receiving only half the government assistance given to community schools and one-third the assistance given to magnet schools. Adjacent public schools, should any choose to accept program students, are also eligible to receive two to three times the state funding of a private religious school. Families too have a financial disincentive to choose a private religious school over other schools. Parents that choose to participate in the scholarship program and then to enroll their children in a private school (religious or nonreligious) must copay a portion of the school’s tuition. Families that choose a community school, magnet school, or traditional public school pay nothing. . . .

Respondents suggest that even without a financial incentive for parents to choose a religious school, the program creates a “public perception that the State is endorsing religious practices and beliefs.” But we have repeatedly recognized that no reasonable observer would think a neutral program of private choice, where state aid reaches religious schools solely as a result of the numerous independent decisions of private individuals, carries with it the *imprimatur* of government endorsement. The argument is particularly misplaced here since “the reasonable observer in the endorsement inquiry must be deemed aware” of the “history and context” underlying a challenged program. Any objective observer familiar with the full history and context of the Ohio program would reasonably view it as one aspect of a broader undertaking to assist poor children in failed schools, not as an endorsement of religious schooling in general.

There also is no evidence that the program fails to provide genuine opportunities for Cleveland parents to select secular educational options for their school-age children. Cleveland schoolchildren enjoy a range of educational choices: They may remain in public school as before, remain in public school with publicly funded tutoring aid, obtain a scholarship and choose a religious school, obtain a scholarship and choose a nonreligious private school, enroll in a community school, or enroll in a magnet school. That 46 of the 56 private schools now participating in the program are religious schools does not condemn it as a violation of the Establishment Clause. The Establishment Clause question is whether Ohio is coercing parents into sending their children to religious schools, and that question must be answered by evaluating all options Ohio provides Cleveland schoolchildren, only one of which is to obtain a program scholarship and then choose a religious school.

Justice SOUTER speculates that because more private religious schools currently participate in the program, the program itself must somehow discourage the participation of private nonreligious schools. But Cleveland’s preponderance of religiously affiliated private schools certainly did not arise as a result of the program; it is a phenomenon common to many American cities. Indeed, by all accounts the program has captured a remarkable cross-section of private schools, religious and nonreligious. It is true that 82% of Cleveland’s participating private schools are religious schools, but it is also true that 81% of private schools in Ohio are religious schools. To attribute constitutional significance to this figure, moreover, would lead to the absurd result

that a neutral school-choice program might be permissible in some parts of Ohio, such as Columbus, where a lower percentage of private schools are religious schools, but not in inner-city Cleveland, where Ohio has deemed such programs most sorely needed, but where the preponderance of religious schools happens to be greater. . . .

Respondents and Justice SOUTER claim that even if we do not focus on the number of participating schools that are religious schools, we should attach constitutional significance to the fact that 96% of scholarship recipients have enrolled in religious schools. They claim that this alone proves parents lack genuine choice, even if no parent has ever said so. We need not consider this argument in detail, since it was flatly rejected in *Mueller*, where we found it irrelevant that 96% of parents taking deductions for tuition expenses paid tuition at religious schools. Indeed, we have recently found it irrelevant even to the constitutionality of a direct aid program that a vast majority of program benefits went to religious schools. The constitutionality of a neutral educational aid program simply does not turn on whether and why, in a particular area, at a particular time, most private schools are run by religious organizations, or most recipients choose to use the aid at a religious school. . . .

This point is aptly illustrated here. The 96% figure upon which respondents and Justice SOUTER rely discounts entirely (1) the more than 1,900 Cleveland children enrolled in alternative community schools, (2) the more than 13,000 children enrolled in alternative magnet schools, and (3) the more than 1,400 children enrolled in traditional public schools with tutorial assistance. Including some or all of these children in the denominator of children enrolled in nontraditional schools during the 1999–2000 school year drops the percentage enrolled in religious schools from 96% to under 20%. The 96% figure also represents but a snapshot of one particular school year. In the 1997–1998 school year, by contrast, only 78% of scholarship recipients attended religious schools. The difference was attributable to two private nonreligious schools that had accepted 15% of all scholarship students electing instead to register as community schools, in light of larger per-pupil funding for community schools and the uncertain future of the scholarship program generated by this litigation. Many of the students enrolled in these schools as scholarship students remained enrolled as community school students, thus demonstrating the arbitrariness of counting one type of school but not the other to assess primary effect. . . .

Respondents finally claim that we should look to *Committee for Public Ed. & Religious Liberty v. Nyquist* to decide these cases. We disagree for two reasons. First, the program in *Nyquist* was quite different from the program challenged here. *Nyquist* involved a New York program that gave a package of benefits exclusively to private schools and the parents of private school enrollees. Although the program was enacted for ostensibly secular purposes, we found that its “function” was “unmistakably to provide desired financial support for non-public, sectarian institutions. . . .” The program thus provided direct money grants to religious schools. It provided tax benefits “unrelated to the amount of money actually expended by any parent on tuition,” ensuring a windfall to parents of children in religious schools.

It similarly provided tuition reimbursements designed explicitly to “offe[r] . . . an incentive to parents to send their children to sectarian schools.” Indeed, the program flatly prohibited the participation of any public school, or parent of any public school enrollee. Ohio’s program shares none of these features.

Second, were there any doubt that the program challenged in *Nyquist* is far removed from the program challenged here, we expressly reserved judgment with respect to “a case involving some form of public assistance (e.g., scholarships) made available generally without regard to the sectarian-non-sectarian, or public-non-public nature of the institution benefited.” That, of course, is the very question now before us, and it has since been answered, first in *Mueller*, then in *Witters*, and again in *Zobrest*. To the extent the scope of *Nyquist* has remained an open question in light of these later decisions, we now hold that *Nyquist* does not govern neutral educational assistance programs that, like the program here, offer aid directly to a broad class of individual recipients defined without regard to religion.

In sum, the Ohio program is entirely neutral with respect to religion. It provides benefits directly to a wide spectrum of individuals, defined only by financial need and residence in a particular school district. It permits such individuals to exercise genuine choice among options public and private, secular and religious. The program is therefore a program of true private choice. In keeping with an unbroken line of decisions rejecting challenges to similar programs, we hold that the program does not offend the Establishment Clause.

The judgment of the Court of Appeals is reversed.

It is so ordered.

NOTES

1. The dissenters, led by Justice Stevens’ raising the specters of “the Balkans, Northern Ireland, and the Middle East,” *Zelman v. Simmons-Harris*, at 686, voiced concerns about divisiveness and religious strife based on the upholding of the voucher program. Is Justice Stevens’ fear well-founded? Can you distinguish the situation in the United States and the three other countries?

2. Given the narrowness of the vouchers statute at issue, which was developed exclusively for Cleveland as part of a school desegregation suit, are similar programs likely to withstand constitutional challenges? Are constitutional challenges more likely to succeed in federal or state courts?

[Case No. 15] The Constitutionality of the Words “Under God” in the Pledge

Elk Grove Unified School District v. Newdow

Supreme Court of the United States, 2004.

542 U.S. 1, 124 S. Ct. 2301, 159 L.Ed.2d 98 [188 Educ. L. Rep. 17].

■ JUSTICE STEVENS delivered the opinion of the Court.

Each day elementary school teachers in the Elk Grove Unified School District (School District) lead their classes in a group recitation

of the Pledge of Allegiance. Respondent, Michael A. Newdow, is an atheist whose daughter participates in that daily exercise. Because the Pledge contains the words “under God,” he views the School District’s policy as a religious indoctrination of his child that violates the First Amendment. A divided panel of the Court of Appeals for the Ninth Circuit agreed with Newdow. In light of the obvious importance of that decision, we granted certiorari to review the First Amendment issue and, preliminarily, the question whether Newdow has standing to invoke the jurisdiction of the federal courts. We conclude that Newdow lacks standing and therefore reverse the Court of Appeals’ decision.

I

“The very purpose of a national flag is to serve as a symbol of our country,” and of its proud traditions “of freedom, of equal opportunity, of religious tolerance, and of good will for other peoples who share our aspirations.” As its history illustrates, the Pledge of Allegiance evolved as a common public acknowledgement of the ideals that our flag symbolizes. Its recitation is a patriotic exercise designed to foster national unity and pride in those principles. The Pledge of Allegiance was initially conceived more than a century ago. As part of the nationwide interest in commemorating the 400th anniversary of Christopher Columbus’ discovery of America, a widely circulated national magazine for youth proposed in 1892 that pupils recite the following affirmation: “I pledge allegiance to my Flag and the Republic for which it stands: one Nation indivisible, with Liberty and Justice for all.” In the 1920’s, the National Flag Conferences replaced the phrase “my Flag” with “the flag of the United States of America.”

In 1942, in the midst of World War II, Congress adopted, and the President signed, a Joint Resolution codifying a detailed set of “rules and customs pertaining to the display and use of the flag of the United States of America.” . . . This resolution, which marked the first appearance of the Pledge of Allegiance in positive law, confirmed the importance of the flag as a symbol of our Nation’s indivisibility and commitment to the concept of liberty.

Congress revisited the Pledge of Allegiance 12 years later when it amended the text to add the words “under God.” The House Report that accompanied the [1954] legislation observed that, “[f]rom the time of our earliest history our peoples and our institutions have reflected the traditional concept that our Nation was founded on a fundamental belief in God.” The resulting text is the Pledge as we know it today: “I pledge allegiance to the Flag of the United States of America, and to the Republic for which it stands, one Nation under God, indivisible, with liberty and justice for all.”

II

Under California law, “every public elementary school” must begin each day with “appropriate patriotic exercises.” The statute provides that “[t]he giving of the Pledge of Allegiance to the Flag of the United States of America shall satisfy” this requirement. The Elk Grove Unified School District has implemented the state law by requiring that “[e]ach elementary school class recite the pledge of allegiance to the flag once each day.” Consistent with our case law, the School District

permits students who object on religious grounds to abstain from the recitation.

In March 2000, Newdow filed suit in the United States District Court for the Eastern District of California against the United States Congress, the President of the United States, the State of California, and the Elk Grove Unified School District and its superintendent. At the time of filing, Newdow's daughter was enrolled in kindergarten in the Elk Grove Unified School District and participated in the daily recitation of the Pledge. Styled as a mandamus action, the complaint explains that Newdow is an atheist who was ordained more than 20 years ago in a ministry that "espouses the religious philosophy that the true and eternal bonds of righteousness and virtue stem from reason rather than mythology." The complaint seeks a declaration that the 1954 Act's addition of the words "under God" violated the Establishment and Free Exercise Clauses of the United States Constitution, as well as an injunction against the School District's policy requiring daily recitation of the Pledge. It alleges that Newdow has standing to sue on his own behalf and on behalf of his daughter as "next friend."

The case was referred to a Magistrate Judge, whose brief findings and recommendation concluded, "the Pledge does not violate the Establishment Clause." The District Court adopted that recommendation and dismissed the complaint on July 21, 2000. The Court of Appeals reversed and issued three separate decisions discussing the merits and Newdow's standing.

In its first opinion the appeals court unanimously held that Newdow has standing "as a parent to challenge a practice that interferes with his right to direct the religious education of his daughter." . . . On the merits, over the dissent of one judge, the court held that both the 1954 Act and the School District's policy violate the Establishment Clause of the First Amendment.

After the Court of Appeals' initial opinion was announced, Sandra Banning, the mother of Newdow's daughter, filed a motion for leave to intervene, or alternatively to dismiss the complaint. She declared that although she and Newdow shared "physical custody" of their daughter, a state-court order granted her "exclusive legal custody" of the child, "including the sole right to represent [the daughter's] legal interests and make all decision[s] about her education" and welfare. Banning further stated that her daughter is a Christian who believes in God and has no objection either to reciting or hearing others recite the Pledge of Allegiance, or to its reference to God. Banning expressed the belief that her daughter would be harmed if the litigation were permitted to proceed, because others might incorrectly perceive the child as sharing her father's atheist views. Banning accordingly concluded, as her daughter's sole legal custodian, that it was not in the child's interest to be a party to Newdow's lawsuit. On September 25, 2002, the California Superior Court entered an order enjoining Newdow from including his daughter as an unnamed party or suing as her "next friend." That order did not purport to answer the question of Newdow's Article III standing.

In a second published opinion, the Court of Appeals reconsidered Newdow's standing. . . . The court noted that Newdow no longer claimed

to represent his daughter, but unanimously concluded that “the grant of sole legal custody to Banning” did not deprive Newdow, “as a non-custodial parent, of Article III standing to object to unconstitutional government action affecting his child.” The court held that under California law Newdow retains the right to expose his child to his particular religious views even if those views contradict the mother’s, and that Banning’s objections as sole legal custodian do not defeat Newdow’s right to seek redress for an alleged injury to his own parental interests.

On February 28, 2003, the Court of Appeals issued an order amending its first opinion and denying rehearing en banc. The amended opinion omitted the initial opinion’s discussion of Newdow’s standing to challenge the 1954 Act and declined to determine whether Newdow was entitled to declaratory relief regarding the constitutionality of that Act. Nine judges dissented. . . . We granted the School District’s petition for a writ of certiorari to consider two questions: (1) whether Newdow has standing as a non-custodial parent to challenge the School District’s policy, and (2) if so, whether the policy offends the First Amendment.

III

In every federal case, the party bringing the suit must establish standing to prosecute the action. “In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues.” The standing requirement is born partly of “an idea, which is more than an intuition but less than a rigorous and explicit theory, about the constitutional and prudential limits to the powers of an unelected, unrepresentative judiciary in our kind of government.”

The command to guard jealously and exercise rarely our power to make constitutional pronouncements requires strictest adherence when matters of great national significance are at stake. Even in cases concededly within our jurisdiction under Article III, we abide by “a series of rules under which [we have] avoided passing upon a large part of all the constitutional questions pressed upon [us] for decision.” Always we must balance “the heavy obligation to exercise jurisdiction,” against the “deeply rooted” commitment “not to pass on questions of constitutionality” unless adjudication of the constitutional issue is necessary.

Consistent with these principles, our standing jurisprudence contains two strands: Article III standing, which enforces the Constitution’s case or controversy requirement; and prudential standing, which embodies “judicially self-imposed limits on the exercise of federal jurisdiction.” The Article III limitations are familiar: The plaintiff must show that the conduct of which he complains has caused him to suffer an “injury in fact” that a favorable judgment will redress. Although we have not exhaustively defined the prudential dimensions of the standing doctrine, we have explained that prudential standing encompasses “the general prohibition on a litigant’s raising another person’s legal rights, the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches, and the requirement that a plaintiff’s complaint fall within the zone of interests protected by the law invoked.” . . .

One of the principal areas in which this Court has customarily declined to intervene is the realm of domestic relations. Long ago we observed that “[t]he whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States.” So strong is our deference to state law in this area that we have recognized a “domestic relations exception” that “divests the federal courts of power to issue divorce, alimony, and child custody decrees.” We have also acknowledged that it might be appropriate for the federal courts to decline to hear a case involving “elements of the domestic relationship,” even when divorce, alimony, or child custody is not strictly at issue . . . Thus, while rare instances arise in which it is necessary to answer a substantial federal question that transcends or exists apart from the family law issue, in general it is appropriate for the federal courts to leave delicate issues of domestic relations to the state courts.

As explained briefly above, the extent of the standing problem raised by the domestic relations issues in this case was not apparent until August 5, 2002, when Banning filed her motion for leave to intervene or dismiss the complaint following the Court of Appeals’ initial decision. At that time, the child’s custody was governed by a February 6, 2002, order of the California Superior Court. That order provided that Banning had “sole legal custody as to the rights and responsibilities to make decisions relating to the health, education and welfare of” her daughter. The order stated that the two parents should “consult with one another on substantial decisions relating to” the child’s “psychological and educational needs,” but it authorized Banning to “exercise legal control” if the parents could not reach “mutual agreement.”

That family court order was the controlling document at the time of the Court of Appeals’ standing decision. After the Court of Appeals ruled, however, the Superior Court held another conference regarding the child’s custody. At a hearing on September 11, 2003, the Superior Court announced that the parents have “joint legal custody,” but that Banning “makes the final decisions if the two . . . disagree.”

Newdow contends that despite Banning’s final authority, he retains “an unrestricted right to inculcate in his daughter—free from governmental interference—the atheistic beliefs he finds persuasive.” The difficulty with that argument is that Newdow’s rights, as in many cases touching upon family relations, cannot be viewed in isolation. This case concerns not merely Newdow’s interest in inculcating his child with his views on religion, but also the rights of the child’s mother as a parent generally and under the Superior Court orders specifically. And most important, it implicates the interests of a young child who finds herself at the center of a highly public debate over her custody, the propriety of a widespread national ritual, and the meaning of our Constitution.

The interests of the affected persons in this case are in many respects antagonistic. Of course, legal disharmony in family relations is not uncommon, and in many instances that disharmony poses no bar to federal-court adjudication of proper federal questions. What makes this case different is that Newdow’s standing derives entirely from his

relationship with his daughter, but he lacks the right to litigate as her next friend. . . .

Newdow's parental status is defined by California's domestic relations law. Our custom on questions of state law ordinarily is to defer to the interpretation of the Court of Appeals for the Circuit in which the State is located. In this case, the Court of Appeals, which possesses greater familiarity with California law, concluded that state law vests in Newdow a cognizable right to influence his daughter's religious upbringing. The court based its ruling on two intermediate state appellate cases holding that "while the custodial parent undoubtedly has the right to make ultimate decisions concerning the child's religious upbringing, a court will not enjoin the non-custodial parent from discussing religion with the child or involving the child in his or her religious activities in the absence of a showing that the child will be thereby harmed." Animated by a conception of "family privacy" that includes "not simply a policy of minimum state intervention but also a presumption of parental autonomy," the state cases create a zone of private authority within which each parent, whether custodial or non-custodial, remains free to impart to the child his or her religious perspective.

Nothing that either Banning or the School Board has done, however, impairs Newdow's right to instruct his daughter in his religious views. Instead, Newdow . . . wishes to forestall his daughter's exposure to religious ideas that her mother, who wields a form of veto power, endorses, and to use his parental status to challenge the influences to which his daughter may be exposed in school when he and Banning disagree. The California cases simply do not stand for the proposition that Newdow has a right to dictate to others what they may and may not say to his child respecting religion. [The California cases] . . . are concerned with protecting "the fragile, complex interpersonal bonds between child and parent," and with permitting divorced parents to expose their children to the "diversity of religious experiences [that] is itself a sound stimulant for a child." The cases speak not at all to the problem of a parent seeking to reach outside the private parent-child sphere to restrain the acts of a third party. A next friend surely could exercise such a right, but the Superior Court's order has deprived Newdow of that status.

In our view, it is improper for the federal courts to entertain a claim by a plaintiff whose standing to sue is founded on family law rights that are in dispute when prosecution of the lawsuit may have an adverse effect on the person who is the source of the plaintiff's claimed standing. When hard questions of domestic relations are sure to affect the outcome, the prudent course is for the federal court to stay its hand rather than reach out to resolve a weighty question of federal constitutional law. There is a vast difference between Newdow's right to communicate with his child—which both California law and the First Amendment recognize—and his claimed right to shield his daughter from influences to which she is exposed in school despite the terms of the custody order. We conclude that, having been deprived under California law of the right to sue as next friend, Newdow lacks prudential standing to bring this suit in federal court.

The judgment of the Court of Appeals is reversed.
It is so ordered.

NOTES

1. Justices Kennedy, Souter, Ginsburg, and Breyer joined Justice Stevens' opinion as to standing. Three members of the Supreme Court concurred separately. Chief Justice Rehnquist's concurrence was joined by Justice O'Connor and in part by Justice Thomas. Justice O'Connor and Justice Thomas wrote separate concurrences in which they would have both granted the father standing and upheld the Pledge. Given his critical comments about this case as it was pending, Justice Scalia did not take part in its consideration or decision.

2. In limiting its decision to standing, the Court avoided the issue of whether the words "under God" are ceremonial (or civic) deism, representing the place that religion has played in American history or a form of impermissible establishment of religion. What do you think?