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Introduction

The public school has long been a battleground in American church-state relations. Battles involving the free exercise and establishment clauses of the first amendment have been repeatedly waged over religion and the public school. These church-state conflicts have been primarily the result of persistent and zealous efforts, even when not acknowledged, aimed at Christianizing the public schools and eliminating the secular character guaranteed them and this republic by the first amendment.

The relation of the state to religious schools and the role of religion in state schools are crucial to American church-state relations. During the past four decades no other church-state issues have provoked as much discussion or prompted as much litigation. In large measure, religion and education have constituted the primary basis upon which the establishment clause has been adjudicated.

Religion and education form a continuing dilemma in American church-state relations. On the one hand, the role of religion in the public schools has been adjudicated on the basis that the public schools are necessarily subject to public policy by virtue of the fact that they are tax supported, and, therefore, must be governed by the establishment clause even if a given program of religion is maintained on a "voluntary" basis. On the other hand, the use of public funds for religious schools has been repeatedly ruled unconstitutional under the establishment clause, since the use of such funds constitutes aid to religion and results

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in the entanglement of church and state in a program of education.

That the United States Supreme Court's most far-reaching decisions on church and state should have to do with public schools has been noted as both historically significant and judicially appropriate, since the role played by public schools is crucial to this nation's being a secular state and a free and pluralistic society. The public school is called upon not only to teach the Constitution, but also to embody its principles and precepts. As Justice Felix Frankfurter declared more than thirty-eight years ago in *McCollum v. Board of Education*, "The public school is at once the symbol of our democracy and the most pervasive means of promoting our common destiny."[1]

I. History of Public Schools

The American public school is as historically unique as the American tradition of church and state. Together, they represent two distinct contributions of the United States to the world. Founded as a secular state, the United States was the first nation in history to prohibit constitutionally the establishment of religion and to guarantee free exercise of religion. While this view of church and state has been frequently referred to as the greatest single concept America has contributed to civilization, the public school has been called by many the supreme achievement of American democracy.

"The origin of public education in the United States not merely antedates separation of Church and State," as Leo Pfeffer perceptively observed, "to a considerable extent, it owes its existence to the fact that it antedated separation."[2] For in education, as in church-state relations, the European pattern prevailed in colonial America. Here the first schools were avowedly religious, not secular. America's first education laws, enacted in Massachusetts in 1642 and 1647, explicitly acknowledged that common schools were to be organized to teach children "to read and understand the principle of religion and the capitall lawes [sic] of this country."[3] Not only New England colonies but also Southern colonies emphasized the central role of religion in edu-

1. 333 U.S. 203, 231 (1948).

2. Pfeffer, *Religion, Education and the Constitution*, 8 Law. Guild Rev. 387, 391 (1948).

3. D. Boles, The Bible, Religion, and the Public Schools 6 (1961).

cation. As late as 1766, for example, the North Carolina Constitution affirmed "the great necessity of having a proper school . . . of learning established whereby the rising generation may be brought up and instructed in the principles of the Christian religion . . . ."[4]

As the pattern of the state church gave way to disestablishment and pluralism in the New World, so the free, secular public school gradually emerged and in time supplanted the sectarian school that dominated the colonial era and early decades of the new Republic. With the growth of experimental science, international trade, and religious diversity of the population, the religious character of America's schools was increasingly a source of conflict that resulted in an increased demand for secular subjects without ecclesiastical or sectarian control.

It was Thomas Jefferson who first conceived of public schools—free, secular, and tax-supported—as the basis of an informed, democratic citizenry. According to Jefferson, these public schools were not necessarily to replace private schools, but to provide free education for all. In his *Report of the Revisors of Virginia*, 1770, Jefferson proposed that "[a]t these schools all . . . children, male and female . . . shall be intitled [sic] to receive tuition gratis."[5] In 1817, Jefferson specifically advocated that free common schools be nonsectarian in advocating that "no religious reading, instruction or exercise, shall be prescribed or practiced inconsistent with the tenets of any religious sect or denomination."[6] Jefferson's opposition to state support of religion in education extended even to the College of William and Mary and the University of Virginia, because he thought it proper "to leave every sect to provide, as they think fittest, the means of further instruction in their own peculiar tenets."[7]

By the 1830s Jefferson's concept of nonsectarian public schools began to take root in one state after another. Horace Mann exerted particular influence on the State legislatures to pass laws prohibiting all sectarian practices, including the use of sectarian textbooks, in tax-supported schools. Mann contended for free public schools, tax supported and without sectarian con-

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4. C. MOEHLMAN, SCHOOL AND CHURCH: THE AMERICAN WAY 28 (2d ed. 1944). Similarly, a South Carolina statute required that the free public school instruct its pupils "in the principles of the Christian religion." *Id.*

5. R. HONEYWELL, THE EDUCATIONAL WORK OF THOMAS JEFFERSON 201 (1931).

6. *Id.* at 235.

7. *Id.* app. at 256.

trol, on the principle of religious liberty and separation of church and state. In his *Final Report to the Massachusetts Board of Education* in 1848, he wrote:

> [I]f a man is taxed to support a school, where religious doctrines are inculcated which he believes to be false, and which he believes that God condemns, then he is excluded from the school by divine law, at the same time that he is compelled to support it by human law. This is a double wrong.[8]

Nevertheless, sectarian influences and teachings in the public schools continued until the latter half of the nineteenth century and compelled some, especially Roman Catholics, to emphasize parochial schools to escape sectarian teachings in conflict with their own. While Catholics vigorously objected to the broadly Protestant influences on tax-supported schools, Protestants just as vigorously objected to tax support for Catholic parochial schools.

Gradually, the vision of Jefferson and Mann for free and secular public schools, tax supported and without sectarian control, took root, and public schools came to be separated from church control and sectarian purposes. Meanwhile, during the latter decades of the nineteenth century, waves of immigrants, particularly from Ireland and southern, eastern, and southeastern Europe, greatly increased the multifaith character of American society by bringing to the nation increasingly large numbers of Roman Catholics, Eastern Orthodox, and Jews. These immigrant groups, as they integrated into American life, understandably challenged any form of religious establishment, especially when manifested in public schools. There was now less and less of a religious consensus to support either religious instruction or religious exercises in the public schools. In time, the states led the way in removing sectarian influences from the public schools and in denying public funds to parochial schools.

Connecticut, in 1818, the first state to specifically outlaw the use of public funds for church schools, set the pattern for the constitutions of the states. Finally, in every state without exception, it became unlawful to grant tax-raised funds for the support of church schools. Except for a statute passed in Massachusetts in 1826 requiring Bible reading, no statutory authorization for Bible reading appeared until 1913, when Pennsylvania

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8. 2 A. STOKES, CHURCH AND STATE IN THE UNITED STATES 57 (1950).

passed the first law requiring Bible reading in the public schools.[9] "Few verdicts of history," Murray A. Gordon noted, "are clearer than the purposeful determination of the states to bar the church from public schools and the church schools from public funds."[10] With the high watermark of separation of church and state reached in the waning decades of the nineteenth century, the distinctly secular character of the public schools seemed assured.

II. The Notion of America as a Christian State

As has been indicated, by the late 1870s, almost all state constitutions expressly divorced religion from public education and state courts widely espoused church-state separation for the public schools. Meanwhile, phenomenal gains in church membership in the first half of this century, accompanied by renewed demands for devotional Bible reading and school prayers, accounted in no small way for the waning of church-state separation in the public schools. The percentage of church membership to the population more than tripled in the nineteenth century, and rose from 35 percent of the total population of approximatley 75 million to slightly more than 50 percent in 1940 out of a total population of more than 150 million. The first released time program of religious education in public schools began in 1913 in Gary, Indiana. By the time of the *McCollum* decision in 1948 all but two of the fifty states had released time programs for religious instruction.[11] Fifteen years later, at the time of the United States Supreme Court's decisions on devotional Bible reading and prescribed prayers in the public school, church membership in the United States had climbed to more than 63 percent of the total population.

To be sure, the view of America as a Christian state is not new. The notion of the Christian state was transplanted to the New World along with the pattern of an established religion. In New England, the Puritans sought to establish not a democracy or a secular state but a theocracy or "Bible Commonwealth," wherein the Bible was the basis of all law and the state was per-

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9. *See* R. Drinan, Religion, the Courts, and Public Policy 9 (1963); A. Johnson & F. Yost, Separation of Church and State 35 (1948).

10. Gordon, *The Unconstitutionality of Public Aid to Parochial Schools*, in The Wall Between Church and State 79 (D. Oaks ed. 1963).

11. 2 A. Stokes, *supra* note 8, at 525-35.

ceived as Christian both in principle and in practice. As John Cotton wrote, "It is better that the commonwealth be fashioned to the setting forth of Gods [sic] house, which is his church; than to accommodate the church frame to the civill [sic] state."[12] Nine of the thirteen colonies had established churches, and in New York various counties established churches in recognition of the colony's absence of one dominant church. Although the principle of separation of church and state gradually became acceptable to all the states, with Massachusetts finally adopting disestablishment in 1833, the notion of America as a Christian state has clearly persisted in the United States, even without establishment and in spite of constitutioanl provisions and Supreme Court decisions expressly against it.

It is rightly argued in light of American constitutional history and law that the concept of America as a Christian state is a false notion that should be struck down as incompatible with the first amendment. Nevertheless, the notion persists in the American ethos, today aided and abetted by both the political right and the New Religious Right. Most nineteenth and twentieth century theocrats accepted the wisdom of the separation of any *particular* church from the state, but repeatedly reaffirmed the view of America as a Christian state, with a "manifest destiny, divinely ordered."[13]

III. Secular Humanism and the Public Schools

Today, the notion of the Christian state, reinforced with its fusion of Americanism with Christianity, as in the case of the New Religious Right, threatens the status of America as a secular state and the public school as a secular institution. As a result, American public education is under frequent and serious attack by those who charge that the public schools are dominated by "secular humanism."[14] "The charge is increasingly

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12. T. Hutchinson, History of Massachusetts Bay app. III (1764) (reprinted in P. Miller and T. Johnson, The Puritans 209 (1938)) (quoting John Cotton's *Letters to Lord Say and Seal* (1636)).

13. *See* R. Handy, A Christian America: Protestant Hopes and Historical Realities (2d ed. 1984); J. King, Facing the Twentieth Century 1599 (1899) (Part VI, *Manifest Destiny,* is particularly relevant.); H. Niebuhr, The Kingdom of God in America (1935); A. Weinberg, Manifest Destiny (1935).

14. *See generally* H. Duncan, Secular Humanism: The Most Dangerous Religion in America (1984); H. Duncan, Secular Humanism: The Most Dangerous Religion in America (rev. ed. 1984); T. LaHaye, The Battle for the Public Schools (1983); Stuart, *Parents Back Christian Schools as Alternatives,* N.Y. Times, Oct. 21, 1976, at 41, col. 1.

made the basis of a wholesale indictment of American public education. While those who make this charge vigorously condemn "secular humanism" as incompatible with the guarantees of the first amendment, the charge is used at the same time to argue the case for the viability of parochial schools and to justify their right to public funds to ensure Judeo-Christian values and pluralism in American education."

The charge of "secular humanism" in the public schools is deeply rooted in the notion that neutrality on religious questions in the public schools constitutes the teaching of "secular humanism" as a religious philosophy, which, in turn, is identified with secularism. This perjorative use of the term "secular humanism" is also offered by many as the explanation for any evidence of deterioration in academic achievement and moral values in the public schools. The alleged teaching of "secular humanism" in the public schools is being widely used as a rationale for parochial and Christian day schools. It is, in fact, frequently argued that the widespread teaching of "secular humanism" in tax-supported public schools has prompted many parents to send their children to parochial or religious schools.

This indictment of public education is dangerous because "secular humanism" remains largely undefined by those most prone to employ it against the public schools and because of the assumption that the term is somehow to be equated with secular*ism*, and, therefore, destructive of all traditional religious and moral values. The truth is that nonreligious or secular humanism does not mean, let alone require, the rejection of Judeo-Christian religious and moral values. To be sure, whenever and wherever Judeo-Christian religious and moral values are denigrated in the public schools it should be condemned as incompatible with the secular character of American public education and the guarantees of the first amendment.

Unfortunately, the attack on secular humanism in the public schools is all too often but a thinly veiled attack on the public schools themselves—both on their academic freedom and their academic integrity. Much of the myth of "secular humanism" has been perpetrated by those who seek to Christianize the public schools, to make them more responsive to their own particular religious views, rather than remain schools in which a secular or nonreligious approach to the study of history, science, government, and literature prevails. The study of man, his environment, and human values is quite properly the focus of public

education, just as the study of God and religious values is the natural focus of religious education in the home, church, and synagogue. Programs in religious education and parochial schools have their own reason for being and should not be defended by indicting public education, which must remain secular in the teaching of history, economics, biology, mathematics, and literature. America's public schools are necessarily committed to *human* values, *human* achievements, and *human* capabilities, in which the activities, interests, and historical development of man are made central in education. It is for this reason that public schools enjoy the support of public funds while parochial schools which are committed to a particular religious worldview are denied those public funds. While public schools are not committed to a particular worldview, the secular public school cannot fulfill its role without giving serious consideration to the place of religion in the life of man and society. As the United States Supreme Court has declared, "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."[15]

IV. Scientific Creationism and the Public Schools

The recent controversy over the problem of "scientific creationism" in the public schools is still another current church-state issue in public education. The crux of the controversy is not over the teaching of the Genesis account of creation in the public schools, which is clearly permissible and has never been seriously questioned in the courts, but rather over the demands of certain religious fundamentalists that creationism be taught as science and that it be given equal time with evolution. The enforcement of "creation-science" laws raises the serious questions relating to the impermissible entanglement of the state with religion. In a key case in 1982, *McLean v. Arkansas Board of Education*, the Arkansas "creation-science" law was struck down by United States District Judge William R. Overton, who ruled that it violated the establishment clause.[16]

The controversy over "scientific creationism" resulted from the Supreme Court's 1969 decision in *Epperson v. Arkansas*[17]

15. School Dist. v. Schempp, 374 U.S. 203, 225 (1963).
16. McLean v. Arkansas Bd. of Educ., 529 F. Supp. 1255, 1264-73 (E.D. Ark. 1982).
17. 393 U.S. 97 (1968).

which invalidated an Arkansas law prohibiting the teaching of evolution in public schools. The Court ruled that the law not only lacked religious neutrality, but was rooted in a fundamentalist view of Genesis and violated both the first and fourteenth amendments.[18] The Court declared:

> 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. . . . It is clear that fundamentalist sectarian conviction was and is the law's reason for existence.[19]

Faced with the Supreme Court's ruling that legislation aimed at prohibiting the federal courts from ruling on evolution being taught in the public schools is unconstitutional, anti-evolutionists adopted a new tactic in the 1970s. Their purpose was no longer to promote anti-evolution legislation but to argue for the teaching of creationism along with evolution. The strategy thus shifted from efforts aimed at prohibiting the teaching of evolution in the public schools to one of advocacy for the teaching of "scientific creationism" (in effect, the Genesis account of creation) in the public schools. Thus, for creationists, the strategy became one of demand for "equal time" rather than for substituting the Genesis account of creation for evolution.

In the decade and a half since the *Epperson* decision, legislation mandating the teaching of "scientific creationism" on an equal basis with evolution has been introduced in at least nineteen states, including Arkansas, California, Colorado, Florida, Georgia, Illinois, Indiana, Iowa, Louisiana, Maryland, Michigan, Minnesota, Mississippi, South Carolina, and Texas.[20] Encouraged by the national swing to the right in the 1980 elections and strongly supported by the New Religious Right, local school districts, as well as state legislatures, have been under considerable pressure to enforce the teaching of "scientific creationism" in public schools.

Arkansas became the first state, in March 1981, to enact an equal time bill into law,[21] followed four months later by Louisi-

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18. *Id.* at 109.

19. *Id.* at 107-08.

20. *See* Levit, *Creationism, Evolution and the First Amendment: The Limits of Constitutionally Permissible Scientific Inquiry*, 14 J.L. & EDUC. 211, 212 (1985).

21. ARK. STAT. ANN §§ 80-1663 to -1670 (1983 Supp.) (ruled unconstitutional in McLean v. Arkansas Bd. of Educ., 529 F. Supp 1255 (E.D. Ark. 1982)).

ana which enacted an almost identical law.[22] The Mississippi Senate, minutes after it convened, overwhelmingly voted to enact a similar law within hours of Judge Overton's decision. Through the strong endorsement of the New Religious Right, with a national media campaign led by Jerry Falwell, a growing number of successful efforts have been carried out among the states. At the local level, high schools particularly, have been under increasing pressure to include some commentary on creationism when evolution is brought up in science classes. Numerous school boards throughout the country have reportedly approved and demanded the teaching of creationism alongside evolution.

Despite well-organized local and state efforts and well-orchestrated legislative proposals, "scientific creationism" has met with resistance from some education agencies and particularly in the courts. In 1975, a Tennessee law mandating the inclusion of theories of creation in textbooks dealing with origins of man and the world was declared unconstitutional by the Court of Appeals Sixth Circuit.[23] Following the action in 1975 for the Indiana Commission on Textbook Adoption approving a creationist biology textbook, a state court ruled that the commission's action "both advanced particular religious preferences and entangled the state with religion" and therefore violated both the state and federal constitutions.[24] In California, a judge denied the claims of creationists that evolution was taught dogmatically and that its inclusion in the curriculum constituted an infringement of their free exercise of religion rights under the Constitution.[25]

Following passage of an equal time creation bill in Louisiana in 1981, the State Department of Education and the Board of Elementary and Secondary Education delayed implementation of the act until an appropriate court with jurisdiction could rule on its constitutionality, since the commission indicated that

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22. LA. REV. STAT. ANN. §§ 17:286.1-:286.7 (West 1982 & Supp. 1986) (ruled unconstitutional in Aguillard v. Edwards, 765 F.2d 1251 (5th Cir. 1985), *prob. juris. noted*, 106 S. Ct. 1946 (1986)).

23. Daniel v. Waters, 515 F.2d 485 (6th Cir. 1975).

24. Hendren v. Campbell, No. S577-0139 (Super. Ct. Ind. Apr. 14, 1977), *excerpted in* 45 U.S.L.W. 2530 (May 17, 1977); *see generally* Note, *Freedom of Religion and Science Instruction in Public Schools*, 87 YALE L.J. 515, 516 (1978).

25. Segraves v. State, No. 278,978 (Cal. Super. Ct. March 6, 1981); *see generally* Lines, *Scientific Creationism in the Classroom: A Constitutional Dilemma*, 28 LOY. L. REV. 35, 43 (1982).

it believed the act violated both the establishment and the free exercise clauses of the federal Constitution. The commission's action was later sustained by a federal district court's ruling.[26] In Maine, "scientific creationism" was ruled unconstitutional by the Commissioner of Education.[27] A Maryland House committee overwhelmingly defeated a bill requiring the teaching of "scientific creationism" in the public schools.[28] In Minnesota, a Senate bill requiring the teaching of creationism alongside the "theory" of evolution was defeated in the Committee on Education.[29] A resolution opposing the teaching of creationism in the public schools was also passed by the Michigan State Board of Education.[30]

By all odds, however, the creationist movement suffered its greatest set back in January 1982 when the Arkansas law on "creation-science" was struck down in Little Rock by Judge William R. Overton.[31] In a thirty-eight page opinion, Judge Overton declared that the law violated the establishment clause since it was "simply and purely an effort to introduce the Biblical version of creation into the public school curricula."[32] The constitutionality of the Arkansas law was challenged by the American Civil Liberties Union, but joining in the suit were twenty-three plaintiffs. Twelve of the twenty-three plaintiffs were clergymen and they included the resident bishops of the United Methodist, Episcopal, Roman Catholic, and African Methodist Episcopal churches, the principal official of the Presbyterian churches in Arkansas, and leading clergy from local Methodist, Presbyterian, and Southern Baptist churches.

Judge Overton found the Arkansas law failed all three tests of the establishment clause: secular purpose, primary effect, and excessive entanglement. The law, Judge Overton ruled, was "a religious crusade, coupled with a desire to conceal this fact,"[33]

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26. Aguillard v. Edwards, 756 F.2d 1251 (5th Cir. 1985).

27. *See Teaching of Creation Ruled Illegal in Maine,* The Baptist Standard, Dec. 9, 1981, at 20.

28. *Creation Bill Loses,* 37 REP. FROM CAPITAL, May 1982, at 9.

29. J. ZETTERBERG, EVOLUTION VERSUS CREATIONISM: THE PUBLIC EDUCATION CONTROVERSY 392-93 (1983).

30. *A.C.L.U. Sues to Stop Teaching of Creation Science in Michigan Schools,* NOLPE NOTES (National Organization on Legal Problems of Education), June 1982, at 3.

31. McLean v. Arkansas Board of Education, 529 F. Supp. 1255, 1264 (E.D. Ark. 1982).

32. *Id.* at 1257.

33. *Id.* at 1261.

and that it was an "unprecedented intrusion in the school curriculum . . . ."[34] "Since creation-science is not science," Judge Overton opined, "the conclusion is inescapable that the only real effect of Act 590 is the advancement of religion," the unconstitutionality of which there can be no doubt.[35] In light of the first amendment the principle upheld in this case is that the public school is not to be a vehicle for the advancement of religion, whether the religious views being advanced are narrowly sectarian, as in the case of "scientific creationism," or are widely held by the community at large.

V. State Sponsorship of Religion in the Public Schools

In seven major decisions, the United States Supreme Court has repeatedly denied the permissibility of state sponsorship of religion in the public school. In *McCollum v. Board of Education*, the Court declared by a vote of eight to one that "released time," i.e., setting aside a portion of each day for religious education by representatives of various faiths, is unconstitutional even though attendance in these classes might be on a purely voluntary basis.[36] The Court explicitly rejected the argument that the first amendment only meant nonpreferential treatment of one religion over another.

> [T]he 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 respected 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.[37]

The decision was a clearly controversial one.

Four years later in *Zorach v. Clausen*,[38] by a vote of six to three, the Court declared constitutional the practice of "dismissed time," which was essentially the same program of religious education considered in *McCollum* except that the program was maintained off the grounds of the public schools. Once again, the Court affirmed that the first amendment means the separation of church and state, of which "there cannot be the

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34. *Id.* at 1264.
35. *Id.* at 1272.
36. 333 U.S. 203, 211-12 (1948).
37. *Id.* at 212.
38. 343 U.S. 306 (1952).

slightest doubt." "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."[39]

In 1962, the Court ruled in *Engel v. Vitale*, by a vote of eight to one, that the state-sponsored prayer program of the schools of New York State was unconstitutional.[40] In *Engel*, the Court declared that government may not require prayer in the public schools even when it is conditioned on a "voluntary" basis for school pupils.[41] In effect, the Court said that whether such a prayer program is nondenominational, or optional, or involves the use of tax funds, is immaterial. Prayer is a religious act and therefore cannot be sponsored by the state without violating the establishment clause. As in *McCollum*, the Court disclaimed that its decision was in any way to be interpreted as one of government hostility to religion. "It is neither sacrilegious nor antireligious to say that each separate government in this country should stay out of the business of writing or sanctioning official prayers . . . ."[42]

The following year, the Court was inevitably faced with the widespread practice of Bible reading exercises in the public schools. Again, by an almost unanimous vote, eight to one, the Court ruled in *School District v. Schempp*[43] that the practices of devotional Bible reading and the recitation of the Lord's Prayer were unconstitutional. Once again the Court rejected "unequivocally" the reasoning that the establishment clause forbids "only governmental preference of one religion over another," but that the first amendment means nothing less than the separation of church and state.[44] Quoting *Everson v. Board of Education*,[45] the Court affirmed, "The [first] amendment's purpose was not to strike merely the official establishment of a single . . . religion . . . . It was to create a complete and permanent separation of the spheres of religious activity and civil authority by comprehensively forbidding every form of public aid or support for religion."[46]

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39. *Id.* at 314.
40. 370 U.S. 421 (1962).
41. *Id.* at 430.
42. *Id.* at 435.
43. 374 U.S. 203 (1963).
44. *Id.* at 216.
45. 330 U.S. 1, 31-32 (1947).
46. *School Dist.*, 374 U.S. at 217.

Once again the Court asserted that the decision outlawing religious exercises in the public school is not a manifestation of a hostility to religion, nor does it mean establishing a "religion of secularism." Neither the study of the Bible nor the study of religion, when made the object of academic inquiry and "presented objectively," is in conflict with this decision or the first amendment. Rather, as noted earlier, the Court said that "[o]ne's education is not complete without a study of . . . religion." Devotional Bible reading and prayer recitation, however, "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."[47] In no way did these decisions deny or prohibit the right of teachers and pupils to pray in public schools on an individual or voluntary basis, but such prayers were not to be a part of the public school as such. In 1980, in *Stone v. Graham*, the Court ruled that the Kentucky statute mandating the placing of the Ten Commandments in public school classrooms also violated the establishment clause.[48]

During the past twenty-five years, more than two hundred proposals have been introduced in the United States Congress to overturn the Supreme Court's decisions on public school-sponsored prayer. In the 1960s, the most serious efforts to accomplish this were led by Congressman Frank Becker of New York and later by Senator Everett Dirksen of Illinois. They found to their dismay that the strongest opposition to their proposals came from organized religion, namely Protestants and Jews, while Roman Catholicism maintained an unsympathetic neutrality. Both the "Becker Amendment" and the "Dirksen Amendment" were designed "to permit voluntary participation in prayer in public schools," although this was later broadened, as in the Dirksen Amendment, to include "any public building." A prayer amendment reached the floor of the House of Representatives on November 8, 1971, but was narrowly defeated, failing by twenty-eight votes to receive the two-thirds majority required. Interestingly enough, the opposition was led by Congressman Robert F. Drinan, S.J., the First Roman Catholic priest to be elected to Congress in this nation's history.

In recent years, efforts in Congress, led primarily by Senator

47. *Id.*
48. 449 U.S. 39 (1980).

Jesse Helms of North Carolina, have been directed toward limiting by congressional statute the United States Supreme Court and all federal district courts from hearing cases involving "voluntary prayers in the public schools and public buildings."[49] By removing public school-sponsored prayers and religious exercises from the jurisdiction of all federal courts, the place of prayer in the public schools would be determined by the state's local communities or local school authorities. With the political emergence of the New Religious Right in the election campaigns of 1980, an all-out effort was made to use the political New Right to restore "voluntary" prayer to the public schools, thus making prayer in the public schools a major political issue in the campaigns of 1980, and, again, in 1984. While the Reagan administration later modified its support by adding a sentence that prohibited the federal or any state government from composing an official prayer, it did not deny the right of school teachers, principals, school board members, or elected officials to read or compose prayer for the public schools.[50]

To date, no proposed constitutional amendment has gained the endorsement or support of America's mainline religious denominations despite pleas of legislators and the president. In a letter addressed to all members of the Senate in 1980, the Washington office of the National Council of Churches declared that "[t]he National Council of Churches, representing 32 major Protestant and Orthodox communions in this country, believe[s] that the religious experience of children is not the business of either the government or the public schools . . . rather a responsibility and a sacred trust of the family and church."[51] This posi-

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49. On April 5, 1979, Helms' unprinted amendment No. 69, 125 CONG. REC. 7577 (1979), proposing limitations on the jurisdiction of the Supreme Court with respect to cases related to voluntary prayer in public schools was attached by the Senate to the Department of Education Organization Act of 1979, S. 2830, 96th Cong., 1st Sess., 125 CONG. REC. 7581 (1979). On April 9, 1979, the identical amendment was attached to the Supreme Court Jurisdictional Act of 1979, S. 450, 96th Cong., 1st Sess., 125 CONG. REC. 7644 (1979). The Senate then in effect stripped the amendment from the Department of Education Act. 125 CONG. REC. 7657 (1979). Similar legislation was introduced by Helms in the Ninety-seventh Congress, S. 481, 97th Cong., 1st Sess. (1981), and again in the Ninety-eighth Congress. S. 784, 785, 98th Cong. 1st Sess. (1983).

50. See the author's articles *Religious Fundamentalism and the New Religious Right*, 22 J. CHURCH & ST. 409 (1980), and *Religion and Politics—1984*, 26 J. CHURCH & ST. 401 (1984) [hereinafter Wood, *Religion and Politics*]. *See also* Redlich, *Religion and Schools: The New Political Establishment*, in RELIGION AND THE STATE 288 (J. Wood ed. 1985) [hereinafter Redlich, *Religion and Schools*].

51. *See* 35 REP. FROM CAPITAL, March 1980, at 15.

tion was reiterated in the 1984 election year. Similar statements have been forthcoming from the vast majority of America's mainline denominations, both Christian and Jewish.[52]

Still another effort to overturn the Supreme Court's decisions on public school-sponsored prayer has been to legislate that public schools provide a daily period of silence or meditation. Legislative proposals in twenty-three states that have authorized or required a period of silence or meditation have varied, some calling for a period of silence, some for meditation, some for prayer, and still others for a combination of all three. "Regardless of the wording," as Norman Redlich, dean of the New York University School of Law, has recently written, "these laws should be viewed by the courts simply as substitutes for state-supported religion . . . . Were it not for the controversy over the unconstitutionality of state-sponsored prayer, there would be no pressure for a moment of silence or meditation."[53] During 1983 and 1984, United States district courts in New Jersey, New Mexico, and Tennessee ruled against legislation providing for either a period of prayer or a moment of silence.[54] A district court in New Mexico, held that the moment of silence was a "devotional exercise" that had the effect of "the advancement of relgion."[55]

In Alabama, the Eleventh Circuit Court of Appeals, in *Jaffree v. Wallace*, overturned a district court decision by finding the Alabama statute requiring a one-minute period of silence "for prayer or meditation" at the beginning of each school day to be a "quintessential religious practice" and therefore unconstitutional.[56] The United States Supreme Court agreed to review this case on appeal and on June 4, 1985 ruled the Alabama statute to be unconstitutional.[57] In voiding the Alabama law, the Court ruled six to three, that the state law violated the establishment clause because the statute had as its sole purpose the fostering of religious activity in the classroom. Writing for the six-member majority, Justice John Paul Stevens wrote that the Alabama law also failed the test that a law must have a secular

52. Wood, *Religion and Politics, supra* note 50, at 407-08.

53. Redlich, *Religion and Schools, supra* note 50, at 286.

54. May v. Cooperman, 572 F. Supp. 1561 (D.N.J. 1983); Duffy v. Las Cruces Public Schools, 557 F. Supp. 1013 (D.N.M. 1983).

55. *Duffy*, 557 F. Supp. at 1020.

56. 705 F.2d 1526, 1534 (11th Cir. 1983) (quoting Karen B. v. Treen, 653 F.2d 897, 901 (5th Cir. 1981)).

57. 105 S. Ct. 2479 (1985).

purpose. Justice Stevens noted that the Alabama legislature had passed the bill "for the sole purpose of expressing the State's endorsement of prayer activities . . . at the beginning of each school day." The Court declared that since the statute specifically allowed for meditation "or voluntary prayer," the state intended to characterize prayer as a favored practice. "Such an endorsement is not consistent," the Court said, "with the establishment principle that the government must pursue a course of complete neutrality toward religion."[58]

VI. Equal Access and the Public Schools

Of far greater consequence than any of the previous proposals calling for even a period of prayer in the public schools was the passage of the Equal Access Act by the United States Congress.[59] The legislation represented a major step toward legitimizing a new direction in American public education. For the first time in the history of American public education, the right of advocacy groups to meet in secondary public schools was not only given statutory endorsement by the federal government, but also specific steps were taken that would, in effect, ensure its implementation. The Act makes it "unlawful for any public secondary school which receives Federal financial assistance and which has a limited open forum to deny equal access . . . on the basis of the religious, political, [or] philosophical," or other speech content, to any students who wish to conduct a meeting on school premises.[60]

Sometimes referred to as the "son of school prayer," the Equal Access Act came after more than two decades of failure by proponents of public school-sponsored prayer to get legislation through Congress to ensure that some period of prayer be provided in the public schools. Unable to return prayer to the public schools through a constitutional amendment, the Equal Access Act was strongly supported by President Ronald Reagan

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58. *Id.* at 2497-98 (O'Connor, J., concurring).

59. 20 U.S.C. § 4071 (1982 & Supp. II 1984).

60. 20 U.S.C. § 4071(a). First introduced by Senator Mark Hatfield of Oregon, the legislation was later co-sponsored by Senator Jeremiah Denton of Alabama. S. 815, 98th Cong., 1st Sess. (1983). The Senate approved the modified version of the Denton-Hatfield Amendment. S. 3152, 98th Cong., 2d Sess., 130 Cong. Rec. S. 8370 (1984). The House approved the Equal Access Act as Title VIII of the Emergency and Science Education Act, Pub. L. No. 98-377, 1984 U.S. Code Cong. & Admin. News (98 Stat.) 1267, 1302 (codified at 20 U.S.C. § 4071).

and the New Religious Right as a political compromise, but a compromise that was seen as compatible with the President's repeatedly declared objective to "put God back into the public schools." In the words of Jerry Falwell, "We knew we couldn't win on school prayer [in Congress], but 'equal access' gets us what we wanted all along."[61]

The purpose and cumulative effect of such legislation, as with a period of silence, would be to mollify and nullify the Supreme Court's decisions on prayer and religious exercises in the public schools. Ironically, in view of the past record of mainline churches in opposing public school-sponsored prayer, the Equal Access Act was not only supported by the New Religious Right and the National Association of Evangelicals, but also by a wide range of mainline churches, including the National Council of Churches and the United States Catholic Conference. By contrast, the Act was uniformly opposed by all three branches of American Jewry and all the Jewish civil rights organizations, and by the Lutheran Council in the U.S.A.

Equal access brings a totally new concept to American public education, namely the permissibility of advocacy groups of whatever political, religious, philosophical, or social persuasion to operate in the public schols. Although student-initiated, participation by outside professional advocates, including the clergy, is expressly permitted as long as such persons do not direct or control the meetings or attend on a "regular" basis. The notion behind equal access, that the high school can or should be a public forum, is a radically new concept in American public education and one that is clearly alien to the long tradition that has denied the unrestricted access to all forms of speech content and group activity in American secondary schools. If the Equal Access Act is upheld as enacted, it would change substantially the character of secondary education. One scholar trenchantly remarked, "A high school is not London's Hyde Park."[62]

The Equal Access Act raises many constitutional questions with respect to the criteria formulated by the Supreme Court in its rulings on the establishment clause. With but one exception, all of the lower federal courts, both before and after *Widmar v. Vincent*,[63] have rejected the concept of equal access for the pub-

61. Interview with the author.
62. Redlich, *Religion and the Schools, supra* note 49, at 289.
63. 454 U.S. 263 (1981).

lic schools.[64] Similarly, two state courts have declared that meetings of religious clubs in the public schools is impermissible.[65] They have all done so because they found varying "equal access" plans to be violative of the establishment clause.

To educators and parents, the most disturbing feature of the legislation is the right guaranteed all forms of speech content and the statutory protection given the meeting of any student-initiated political, religious, or philosophical group no matter how ideologically radical or repugnant its views may be to parents of the children in the school or to the local public school officials themselves. In addition, there is the strong likelihood that the more aggressive and militant missionary and ideological groups will be among the first to enter the public schools under the protection of the Equal Access Act. Such groups would have little difficulty in meeting the requirement of being "student-initiated" or of finding some measure of legitimation as noncurriculum related groups meeting regularly in the public schools. For new religions, of whatever ilk, and of such groups as the Ku Klux Klan, the Communist League, or the Cult of Satan, the public school could become a battleground for the protection of their equal rights with more conventional and popular ideological groups. As Barry W. Lynn observed, many of those who voted for the act as a way of getting religious groups to meet and pray in the public schools "will climb the walls" at some of the bill's effects.[66]

On February 19, 1985, the United States Supreme Court accepted a petition for review of the equal access case, *Bender v. Williamsport* from the Court of Appeals for the Third Circuit in Pennsylvania.[67] The petition was filed by the Christian Legal Society. Oral arguments were heard October 15, 1985. The repeated use of the case of *Widmar v. Vincent* as an argument for equal access in the public schools raises many judicial questions

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64. Bender v. Williamsport Area School Dist., 741 F.2d 538 (3d Cir. 1984), *vacated*, 106 S. Ct. 1326 (1986); Nartowicz v. Clayton County School Dist., 736 F.2d 646 (11th Cir. 1984); Lubbock Civil Lib. Union v. Lubbock Indep. School Dist., 669 F.2d 1038 (5th Cir. 1982), *cert. denied*, 459 U.S. 1155 (1983); Brandon v. Board of Educ., 635 F.2d 971 (2d Cir. 1980), *cert. denied*, 454 U.S. 1123 (1981).

65. Trietley v. Board of Educ., 65 A.D.2d 1, 409 N.Y.S.2d 912 (N.Y. App. Div. 1978); Johnson v. Huntington Beach Union High School Dist., 68 Cal. App. 3d 1, 137 Cal. Rptr. 43, *cert. denied*, 434 U.S. 877 (1977)

66. N.Y. Times, July 27, 1984, at B11, col. 1.

67. Bender v. Williamsport Area School Dist., 741 F.2d 538 (3d Cir. 1984), *vacated*, 106 S. Ct. 1326 (1986).

that need to be addressed. The Supreme Court has for almost twenty-five years repeatedly made a distinction in its rulings on public education between elementary and secondary schools and state colleges and universities. As Leo Pfeffer has perceptively noted:

> What the [Equal Access] statute does is to sever secondary from elementary schools, thus creating a new class in determining constitutionality under the Establishment Clause. In all preceding situations, both the legislatures and the courts recognized a distinction between schools of higher education on the one hand and elementary and secondary on the other.[68]

In *Widmar*, the Supreme Court declared that public universities are open forums and, therefore, they cannot deny the right of religious groups to meet. There were approximately eight hundred student groups in the university involved. In adjudicating the establishment clause in *Widmar*, the Court made a distinction between younger students and older university students who are adults. In the words of the Court: "University 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."[69]

In the case of equal access, there is a presumed maturity of high school students and a belief in their right to organize and to join any political, religious, or philosophical group of their choice, no matter how alien the group's views may be to the traditions and beliefs of the student's family. This presumption becomes all the more disturbing because children as young as eleven or twelve are enrolled in public high schools, and high school students are especially susceptible to peer pressure and passing fads. For many parents, religious teaching and training are simply too sacred and too important to be removed from the direct supervision of parents and the church or synagogue. The Second Circuit Court of Appeals stated in *Brandon v. Board of Education* that, "To an impressionable student, even the mere appearance of secular invovlement in religious activities might indicate that the state has placed its imprimatur on a particular religious creed. This symbolic inference is too dangerous to permit."[70]

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68. L. PFEFFER, RELIGION, STATE AND THE BURGER COURT 102 (1984).
69. *Widmar*, 454 U.S. 263, 277 n.14.
70. Brandon v. Board of Educ., 635 F.2d 971, 978 (2d Cir. 1980).

Unfortunately, a policy of equal access reflects far too little concern with the establishment clause, which forbids government intrusion into religious affairs. Much attention is given in the legislation to the fact that the groups to meet in the public schools are "student-initiated" or voluntary, but, as the Supreme Court ruled in *School District v. Schempp*, in which it denied the permissibility of public school-sponsored prayer and devotional exercises even if participation was voluntary, violation of the establishment clause "does not depend upon the presence of actual government coercion."[71]

In the light of the Supreme Court's familiar three-pronged test in judging the constitutionality of any legislation with respect to the establishment clause—a "secular legislative purpose," a "primary effect that neither advances nor inhibits religion,"[72]—equal access should be viewed as highly suspect. From the beginning, the basic purpose of equal access was to require schools to permit students to hold religious meetings in public school facilities. The concept of equal access was seen as a secular means of accomplishing a religious purpose. There can be little question but that the desired and potential effect of equal access is seen by its proponents as the advancement of religion. The procedural requirements spelled out in the implementation of the Equal Access Act make excessive entanglement between the secondary public school and religion inevitable and unending. In *Brandon*, the Second Circuit declared that "if the state must engage in continuing administrative supervision of nonsecular activity, church and state are excessively entangled."[73]

Conclusion

For almost forty years the Supreme Court decisions on the role of religion in the public schools have been strongly denounced by both the political right and the religious right of

71. School Dist. v. Schempp, 374 U.S. 203, 227 (1963).

72. Legislation is constitutional if it has a "secular legislative purpose," a "primary effect that neither advances nor inhibits religion," and a policy which does not foster an excessive entanglement with religion. The three-prong test used by the Supreme Court is clearly set forth in Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971). In developing this test, the Court first dealt with "purpose" in Everson v. Board of Educ., 330 U.S. 1 (1947) and with "purpose" and "effect" in McGowan v. Maryland, 336 U.S. 420 (1961). The purpose and effect prongs were further developed in *Schempp*, 374 U.S. at 203. Finally, the third prong of excessive government entanglement was added by Walz v. Tax Comm., 397 U.S. 644 (1970).

73. *Brandon*, 635 F.2d at 979.

America. Admittedly, the persistent and growing efforts directed at the Christianization of the public schools are supported by millions of Americans, both within and without many of America's communities of faith. As a result, the public schools have become a battleground for key political issues, the resolutions of which are crucial not only to the public schools and to public policy, but also to this nation's future as a free and pluralistic society—one in which the integrity of the establishment clause is upheld and its application is neither eroded nor evaded either in public law or public policy.