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Restoring the Value(s) of Religion in American Public Education

John Witte Jr.[1]

Abstract

The United States today offers public state-run schools; private (religious) schools; and various forms of home schools and experimental charter and magnet schools. Until the 1940s, individual states largely governed American schooling, taking various approaches to the place of religion and morality in public schools and the role of government in religious schools. Since the 1940s, the U.S. Supreme Court has read the First Amendment Establishment Clause repeatedly to hold that religious teachers, prayers, texts, and symbols are not permitted in the public-school classroom and curriculum, or even at one-time public-school events like graduation ceremonies. Voluntary private religious expressions and associations may be allowed when there are equivalent voluntary private secular counterparts, and so long as no faculty participate. This deprecation of religion in public school education, however, has impoverished the moral values education and character formation of American public school students, and it has stunted some of the very democratic values and abilities that the country and Court are trying to instill and protect in each new generation. It has deprived students of their ability to develop healthy democratic habits of understanding and engaging a variety of forms of religious experience. It has fostered the false idea that religion and faith are only for the private and voluntary sphere, while value-free reason and morally neutral logic are the only valuable currency of public debate and political life. After surveying the Supreme Court’s case law on point, this chapter argues that American students need to witness and study religions and the moral and value systems that they offer, for better or worse.

[1] This chapter draws on and updates John Witte Jr. and Joel A. Nichols, *Religion and the American Constitutional Experiment,* 4th ed. (Oxford: Oxford University Press, 2016), 154–203, hereafter RCE.

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Introduction

This volume, along with others in this series, explores the role of sundry social systems, separately and together, in shaping individual character and collective values in late modern pluralistic societies. Here we focus on the shaping influence of schools and other forms of organized education. Like the family and the church, the school has long been viewed as a vital and perennial institution that incubates and inculcates morals and values in the next generation. The school's influence on character formation is more overt and visible than the more subtle but powerful influences of markets, laws, politics, the media, scientific research, health care, and the military that both cooperate with and often compete with the efforts of schools and, sometimes with churches and families, too.

Historically and still today, *religious* schools—elementary, secondary, and higher educational institutions chartered and led by churches, synagogues, mosques, and other faith communities—have been overt in shaping the hearts, souls, and minds of their students. They teach students the values, norms, and habits of faithful living within specific denominations. They often prepare students for initiation into the life and leadership of the religious community. And they equip students with the methods and learning needed for an independent life of faith and work in the adult world.

Religious schools—or at least religious schooling—have been part of Western civilization from the very beginning. In modern societies, religious schools have been critical to the preservation and perpetuation of minority faiths like Jews and Muslims. But they are now often a refuge for once-majority Christian faiths as well; think of the many Catholic and Protestant schools now on offer in Western lands. To be sure, religious schools today face frequent criticism in late modern Western cultures. They are blamed for fostering countercultural beliefs and practices that harm democracy and balkanize society. They are charged with siphoning off the best students, teachers, and resources from public schools. And lately, religious schools have been castigated as bastions of economic privilege, cultural segregation, and racial discrimination. Even so, most Western constitutional democracies still protect the basic rights of private religious schools to exist, and states sometimes provide these schools with direct

and indirect funding, so long as they meet the state's basic accreditation requirements.[2]

Until the later nineteenth century, *public* schools—K-12 institutions and public universities that are created, funded, and staffed by the state—had a comparable educational mission, albeit more religiously generic than overtly denominational schools. Many of the first public school systems in Europe and North America were established as parts and products of the sixteenth-century Reformation. Protestants emphasized that each citizen had to be literate enough to read the Bible in the vernacular at home, to understand Sunday sermons and catechisms, and to participate actively in church worship and liturgy. Each citizen had to prepare for the distinct vocation that matched their God-given talents. For Protestants, the clerical vocation was only one vocation to choose, and no better or more virtuous than any other purported secular vocation. The calling of the soldier, lawyer, housewife, or farmer was just as spiritual and conducive to salvation as the Christian vocation of the bishop, abbot, nun, or priest. The same devotion and disciplined learning and preparation that a cleric directed to spiritual and ecclesiastical ends could now be devoted to secular and material ends as well, with equal assurance of justification by faith.[3]

The Lutheran Reformation in Germany and Scandinavia established many of these premises and structures of Western state-run public education. In Lutheran lands, the magistrate was treated as the political "father of the community" (*paterpoliticus*) who created public schools that were built on state lands, funded by tax revenues, and regulated by detailed *Schulordnungen.* Education was mandatory for boys and girls alike and was to be fiscally and physically accessible to all. It was marked by both formal classroom instruction and civic education through community libraries, lectures, and other media. The curriculum was to combine biblical values and catechesis with humanistic and vocational training. Students were to be stratified into different classes according to age and ability, and were slowly selected for any number of vocations, with the most precocious tapped for university training. The public school was to be, in reformer Philip Melanchthon's famous phrase, the "civic seminary" of the commonwealth designed to combine deep faith and deep learning at once. This educational system, born of the Reformation and of comparable humanist movements in Europe, eventually became a model for public schools in many parts of the Christian world, both in Europe and in its far-flung colonies.[4]

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2 See American and European examples in John Witte, Jr., *The Blessings of Liberty: Human Rights and Religious Freedom in the Western Tradition* (Cambridge: Cambridge University Press, 2021).

3 See, for example, Frederick Eby, *Early Protestant Educators: The Educational Writings of Martin Luther, John Calvin, and Other Leaders of Protestant Thought* (New York: AMS Press, 1971).

4 John Witte Jr., *Law and Protestantism: The Legal Teachings of the Lutheran Reformation* (Cambridge: Cambridge University Press, 2002), 277–92.

This ideal—if not idealized[5]—early modern picture of the public school as the civic seminary of the established Christian community stands in marked contrast to the typical picture of state schools in many late modern Western societies today. In the five centuries since the Reformation, the West has seen massive changes to the conditions and culture of education—growing religious pluralism and often disestablishment of religion; strong new antireligious political movements from the French Revolution to the rise of communism; modern pressures on states, the media, and the academy to foster religious neutrality and laïcité, if not overt secularization; the rise of scientific and technical specialization in lower schools and universities alike; and the gradual decline of the clergy and the church in shaping and guiding modern life, law, and lore. Important, too, was the powerful rise of the Western welfare state in the aftermath of the Great Depression, World Wars I and II, and the ensuing Cold War. The modern welfare state has taken over much of the education of late modern citizens. All of these movements and many more have changed dramatically the nature and object of public education in Western lands. Several fellow contributors to this volume—Charles Glenn, Ashley Berner, and Margaret Jane Brinig most notably—have documented these changes brilliantly in a long series of writings.

This chapter lifts up one small piece of this much bigger story of the interaction of religion, state, education, and character formation. My focus is on the prominent role of modern American state-run public schools in educating modern citizens and the deprecated role of religion in the delivery of this public education. This diminished role of religion was a product not only of some individual state constitutional initiatives from 1850 on, but also of a U.S. Supreme Court that zealously applied the First Amendment prohibitions on state establishments of religion. From the 1940s to 1990s, I show below, the Court systematically expelled religious teachers, prayers, texts, readings, symbols, and even private religious devotions from the public-school classroom. Since 1990, the Court has permitted voluntary religious activities outside of the classroom, but only if comparable secular activities are equally on offer, and even then, some limits on religion remain. The consequence of these constitutional policies and cases is that public school students are effectively taught that religion, much like alcohol, is a dangerous thing, to be allowed only in the privacy of one's home, and ideally postponed until a child has reached the age of majority and discernment.

This deprecation of religion in public school education has impoverished the values education and character formation of American students in primary and secondary public schools, and sometimes in public universities, too. It has deprived students of their ability to develop healthy democratic habits of engaging the religious other and understanding their own belief system in comparison with other beliefs and practices. It has fostered the false idea that

[5] See critical comments in Gerald Strauss, *Luther's House of Learning: Indoctrination of the Young in the Lutheran Reformation* (Baltimore, MD: Johns Hopkins University Press, 1978).

religion and faith are only for the private and voluntary sphere, while reason and logic are the only valuable currency of public and political life. And it has hindered the ability of budding democratic citizens to engage responsibly the public and private roles of religion in modern life.

American Religion and Education in Cultural and Constitutional Context

American education is a massive social undertaking today. The United States has more than 130,000 lower schools (from kindergarten through twelfth grade), and more than 6,000 postsecondary schools. Nearly 100,000 lower schools are public or state-run institutions, with fifty-six million American children enrolled. Alongside these public schools are 33,000 private lower schools (two-thirds of them religious) with six million students. About 1.7 million American children are regularly homeschooled at least until high school—although that number temporarily approached forty million nationwide because of restrictions during the COVID-19 pandemic. The country is also home to some 1,650 state and 4,300 private colleges, universities, and academies enrolling nearly twenty million students. More than ten million employees work in these schools, and in 2019, education comprised 7.1 percent of America's GDP.[6]

American education is not only a massive industry but also a major battleground for constitutional struggles over religious freedom. While a complex scaffolding of federal, state, and local laws and regulations supports and governs education,[7] all schools are subject to the same First Amendment guarantee that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof." This constitutional guarantee of religious freedom has produced a substantial and shifting body of case law. Nearly one-third of the U.S. Supreme Court's cases on religious freedom—75 out of its nearly 250 cases issued through 2020[8]—have addressed issues of religion and education. All but six of these cases were decided after 1940, the year the Court first began to apply these guarantees to state and local governments as well as to Congress.[9] For each Supreme Court case, there are scores, sometimes

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6 National Center for Education Statistics, 2019 Tables and Figures, Table 105.20, 105.50, https://nces.ed.gov/programs/digest/2019menu_tables.asp; and ibid., "Private Schools and Enrollment," https://nces.ed.gov/programs/schoolchoice/ind_03.asp. In addition, there are some 7,200 lower charter schools, which are public/private partnerships featuring state charters and funding but active private administration, including sometimes religious leadership. See https://nces.ed.gov/fastfacts/display.asp?id=30.

7 See Michael I. Levin, *United States School Laws and Rules,* 3 vols. (St. Paul, MN: Thomson Reuter, 2020).

8 See tabular summary of all these Supreme Court cases in RCE, appendix 3, pp. 303–38.

9 See *Cantwell v. Connecticut*, 310 U.S. 296 (1940) and *Everson v. Board of Education*, 330 U.S. 1 (1947), which incorporated the Free Exercise and Establishment Clauses of the First Amendment into the Due Process Clause of the Fourteenth Amendment and applied these guarantees for the first time against state and local governments.

hundreds of lower federal court cases and sometimes many state-court cases, too, adding further nuance and amplification.

The Court's cases on religious freedom and education address three main questions: (1) What role may religion play in public education? (2) What role may government play in private religious education? (3) What religious rights do parents and students have in public and private schools (and in home schools as well)? The Court has worked out a set of rough answers to these questions, albeit with ample vacillation over the past century. While government has the power to mandate basic education for all children, parents have the right to choose public, private, or homeschool education for their minor children, and government may now facilitate that choice through vouchers and tax relief for private-school students. While the First Amendment forbids most forms of religion in public schools, it protects most forms of religion in private schools. While the First Amendment forbids government from funding the core religious activities of private schools, it permits delivery of general governmental services, subsidies, scholarships, and tax breaks to public and private schools, teachers, and students alike. While the First Amendment forbids public-school teachers and outsiders from offering religious instruction and expression in public-school classes and at formal school functions, it permits public-school students to engage in private religious expression and protects these students from coerced religious activities. The amendment further requires that religious parties have equal access to public facilities, forums, and funds that are open to their nonreligious peers.

The Supreme Court has developed these holdings in distinct lines of First Amendment cases on the place of religion in public schools and on the role of government in private religious schools. These cases, however, have left blurrier distinctions between religious freedom questions in lower education and higher education. Colleges and universities have thus often absorbed the Court's directives to primary and secondary schools, and vice versa. For example, many state universities adopted the Court's repeated mandating of strict separation of church and state in lower public schools, even though no Supreme Court case explicitly ordered the universities' application of the principle. In turn, the Court's more recent rulings about equal access and equal treatment were created for state universities but trickled down into public high schools and then public grade schools, and are now firmly rooted in the Free Speech and Free Exercise Clauses of the Constitution.

Telling this whole constitutional story could easily fill a five-foot shelf of books. Let me zero in on just the cases dealing with religion in public-school education, which affects the approximately seventy million students enrolled in these state-run lower and higher schools.

Separation of Church and State in Public Education

The Supreme Court's most famous First Amendment teaching is that the Constitution has "erected a wall of separation between church and state."[10] This teaching emerged most prominently in a series of cases from 1948 to 1987 that limited the place of religious teachers, prayers, texts, symbols, and teachings in public grade schools and high schools.

A common logic governed this forty-year run of cases. The public school is a government entity, often one of the most visible and well-known arms of the government in any community. The public school is furthermore a model of constitutional democracy and designed to communicate and facilitate core democratic norms and constitutional practices to students. The state mandates that all able students attend schools, at least until the age of sixteen. These students are young and impressionable. Given all these factors, the Court maintained, the public school must cling closely to core constitutional and democratic values, including the core value of separation of church and state. Some relaxation of constitutional values is possible in other public contexts, where adults can make informed assessments of the values being transmitted. But no such relaxation can occur in public schools, which youths are compelled to attend. In public schools, if nowhere else in public life, strict separation of church and state must be the norm.

The case that opened this series was *McCollum v. Board of Education* (1948). At issue was a release-time program adopted by a local public-school board for fourth- through ninth-grade students. Once a week, students were released from their regular classes to be able to participate in a religious class taught on the school campus. Three religious classes were offered—Protestant, Catholic, and Jewish—reflecting the religious makeup of the local community. These classes were voluntarily taught by qualified outside teachers approved by the principal. Students whose parents did not consent continued their secular studies during this release time. The *McCollum* Court held that this program violated the First Amendment Establishment Clause, for it constituted the use of "tax-supported property for religious instruction and the close cooperation between school authorities and the religious council in promoting religious education."[11]

In *Engel v. Vitale* (1962), the Court outlawed a nondenominational prayer recited by public-school teachers and their students at the commencement of each school day: "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers, and our Country." Students who did not wish to pray could remain silent or be excused from the

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[10] *McCollum v. Board of Education*, 333 U.S. 203, 209–211 (1948).
[11] Ibid.

room during this recitation. The *Engel* Court found this practice to be unconstitutional:

> It is no part of the business of government to compose official prayers for any group of the American people to recite as part of a religious program carried on by government. . . . When the power, prestige, and financial support of government [are] placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the - prevailing officially approved religion is plain.[12]

This prohibition on prayer in public schools was controversial in its day, but the Court has maintained and extended it. *Wallace v. Jaffree* (1985) struck down a state statute that authorized a moment of silence at the beginning of each school day for "meditation or voluntary prayer," because the legislature had betrayed its "intent to return prayer to the public schools."[13] *Lee v. Weisman* (1992) outlawed a local rabbi's prayer at a one-time public middle-school graduation ceremony on school premises, arguing that such prayers effectively coerced graduating students to participate in religion.[14] *Santa Fe Independent School District v. Doe* (2000) outlawed elected student invocations at public high-school football games, arguing that this policy not only coerced players, cheerleaders, and band members to participate in prayer but also constituted governmental endorsement of religion.[15]

Not only religious teachers and prayers but also "sectarian teachings" were forbidden in public schools. In *Abington Township School District v. Schempp* (1963), the Court outlawed the reading of ten Bible verses at the beginning of each school day. Either a teacher or a volunteer student would read a biblical text of their choice, with no commentary or discussion allowed. Students whose parents did not consent could refuse to listen or leave the room. After *Engel,* the *Schempp* Court found this an easy case. "[I]t is no defense that the religious practices here may be relatively minor encroachments on the First Amendment," Justice Clark wrote for the Court. "The breach of neutrality that is today a trickling stream may all too soon become a raging torrent." Responding to Justice Stewart's sharply worded dissent that the Court's purported neutrality toward religion effectively established secularism as the religion of the public school, the Court offered a conciliatory word about the objective value and use of religion as a topic of public education:

> [I]t might well be said that one's education is not complete without a study of comparative religion or the history of religion and its relationship to the advancement of civilization. It certainly may be said that the Bible is worthy of study for its literary and historic qualities. Nothing we have said here

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12 370 U.S. 421, 430–32 (1962).
13 472 U.S. 38, 57–60 (1985).
14 505 U.S. 577 (1992).
15 530 U.S. 290 (2000).

> 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.[16]

While *Schempp* permitted objective instruction of religious topics in appropriate public-school classes, *Edwards v. Aguillard* (1987) struck down a state law that required equal time for "evolution-science" and "creation-science" in science classrooms. This statute, the Court held, betrayed a "discriminatory preference . . . to advance the religious viewpoint that a supernatural being created humankind" and "to restructure the science curriculum to conform with a particular religious viewpoint." This was not a proper objective teaching of religion à la *Schempp*. Creation might be a good topic for a course in cosmology or ancient literature, but not for a science course. Separation of church and state also entailed separation of religion and science.[17] Lower courts have used this precedent to outlaw "intelligent design" teachings from public-school science curricula as well.

In *Stone v. Graham* (1980), the Court struck down a state statute that authorized the posting of a plaque bearing the Ten Commandments on the wall of each public-school classroom. The plaques were donated and hung by private groups in the community. There was no public reading of the commandments nor any evident mention or endorsement of them by teachers or school officials. Each plaque also bore a small inscription that sought to immunize it from charges of religious establishment: "The secular application of the Ten Commandments is clearly seen in its adoption as the fundamental legal code of Western Civilization and the Common Law of the United States." The Court struck down these displays as violations of the Establishment Clause. These displays were "plainly religious," in the Court's view. The Ten Commandments are sacred in Jewish and Christian circles, and they command "the religious duties of believers." It made no constitutional difference that they were passively displayed, rather than formally read aloud, or that they were privately donated rather than purchased with state money. The very display of the Decalogue in the public-school classroom served only a religious purpose and was thus inherently unconstitutional.[18]

These early Supreme Court separationist cases were focused on the place of religion in public grade schools and high schools. They were predicated on the reality that students were mandated to be in school until the age of sixteen and were young and impressionable. From the mid-1960s forward, however, many state universities adopted comparable policies that limited the place of religion in the university campus, curriculum, and activities—even though their students were voluntary, more mature, and able to make their own choices about religion. Some of these new university policies about strict separation of church

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16 374 U.S. 203, 221, 226 (1963).
17 482 U.S. 578, 591–93 (1987).
18 449 U.S. 39, 40–41 (1980) (per curiam).

and state on campus were adopted as self-protective measures against expensive lawsuits brought under the First Amendment, especially as some lower courts began to order state universities to follow the religion policies of state high schools. Universities in some states were also subject to state constitutions that mandated the separation of religion and education, and these policies were more aggressively enforced by state regulators and courts.

But legal considerations were only part of the motivation for these reforms of higher education. Pushing religion to the edge of the college campus and curriculum also reflected the growing antireligious movements and countercultural sentiments of the American academy in the mid-twentieth century. Included were the "death of God" theology taught in some religion departments and seminaries; Marxist and other critical and deconstructive attacks on traditional religion; and the strong rise of secularization theories of education and public life. It was significant, too, that many of the new cultural and educational leaders of the nation from the 1960s forward had been reared in public schools that taught them that separation of church and state was the distinct and proper American way of engaging religion. Small wonder, then, that, upon reaching adulthood, this generation adopted separation as a guiding maxim of American higher education as well as lower education.

The Rise of Equal-Access Cases

Criticisms of Separationist Cases

These Establishment Clause cases from 1948 to 1987 limiting religion in public-school classes and at official school events remain good law today.[19] But they have garnered significant criticism that has forced important limits on their logic and subsequent policy.[20] One set of critics has lamented the Court's removal of religion from public schools and has worked persistently to return prayer and other traditional religious activities to the classroom. These groups are often conservative Christians pressing the broader thesis that America was founded as a Christian nation and must democratically reflect this in its political institutions, including its state schools.

A second group of critics has charged the Court with establishing secularism in the public school under the guise of reason and neutrality. These critics argue that the purportedly secular and scientific instruction offered in the

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[19] See the new summary of the law on religious expression in the public schools in Department of Justice, Civil Rights Division, https://www2.ed.gov/policy/gen/guid/religionandschools/prayer_guidance.html.

[20] See analysis of the relevant literature and cases in Kent Greenawalt, *Does God Belong in Public Schools?* (Princeton, NJ: Princeton University Press, 2005); Michael D. Waggoner and Nathan C. Walker, eds., *The Oxford Handbook of Religion and American Education* (New York: Oxford Univeresity Press, 2016); Ashley Berner, *Pluralism and American Public Education: No One Way to School* (New York: Palgrave Macmillan, 2017); see also Ashley Berner's chapter in this volume.

public school is just as laden with subjective moral values and ideological beliefs as traditional religious instruction. Drawing a secular/sectarian dividing line in these cases is too simplistic, these critics argue.

A third group of critics, including some specialists in education and child development, have charged that the policy of quarantining public-school students from instruction and experience in religion harms rather than helps them in cultivating the very democratic values and abilities the Court and country are trying to instill and protect in each new generation. Religion, they argue, is not like alcohol, to be avoided until adulthood. Religion is a powerful and perennial force in society, whether for good or ill, and every budding democratic citizen needs to learn from the start to deal with it responsibly. Such education groups have thus developed a range of ambitious curricular forums that seek to introduce religion judiciously into the public-school curriculum in appropriate courses.

Finally, some critics have charged that the Court has used the Establishment Clause to quash rights of free exercise and free speech. Why should students be muzzled in their religious expression as a condition for participating in a school that the state conscripts them to attend at least until the age of sixteen? Why should religious parents be compelled to expose their children to a pervasive learning environment that views their faith and identity as suspect and dangerous. Some critics add an economic argument: that the religious rights of the poor suffer disproportionately, since only students of more well-to-do families can afford to attend private schools, where their religious expression is not so muzzled.

Equal-Access Logic

These last two arguments in particular—the need to educate students about religion and to protect the students' rights to religious expression—have helped to drive the development of a new line of what are called equal-access cases. The principal logic of these cases is that religious students and other parties must be given equal access to facilities, forums, and even funds that the public school makes available to similarly situated nonreligious parties. These cases have not changed the longstanding rule that religion is not allowed in the public classroom during instructional time or at official school events. But they have allowed for private religious exercises on school grounds outside of formal instructional time, and they have allowed for extracurricular education on school premises, even if it is religiously motivated and inspired.

These cases were, at first, grounded variously in the Free Speech, Free Exercise, and Equal Protection Clauses, but they are now largely a staple of First Amendment free-speech jurisprudence alone. Equal-access cases first began in the public university and then worked their way into the public high school and

eventually into the public grade school, though the most recent cases have imposed some limits on this equal-access logic in public schools.

Widmar v. Vincent (1981) was the opening case in this series. The University of Missouri at Kansas City, a state university, had a policy of opening its facilities for voluntary student groups to use outside of formal instructional time. More than a hundred student groups organized themselves in the year at issue, each paying a small registration fee each semester. One student group, called Cornerstone, met for private religious devotions and local charitable activities. They sought permission to use the university facilities but were denied access, given the university's written policy that the campus could not be used "for purposes of religious worship or religious teaching." Cornerstone appealed, arguing that this policy violated their First Amendment free exercise and free speech rights as well as their Fourteenth Amendment equal protection rights. The university countered that it had a compelling state interest to maintain a "strict separation of church and state," per the state constitution, especially in state schools.[21]

The *Widmar* Court found for the religious student group. When a state university creates a limited public forum open to voluntary student groups, the Court opined, religious groups must be given equal access to that forum. Here the university "has discriminated against student groups and speakers based on their desire to use a generally open forum to engage in religious worship and discussion." Religious speech and association are protected by the First Amendment and can be excluded only if the university can demonstrate that its prohibition serves a "compelling state interest and that it is narrowly drawn to achieve that end." But a general desire to keep a strict separation of church and state was not a sufficiently compelling state interest. The values of "equal treatment and access" outweighed the hypothetical dangers of a religious establishment.[22]

The *Widmar* Court explicitly limited its holding to the public university, arguing that university students, unlike public high-school and grade-school students, were more mature and discerning and, after the age of sixteen, were not required by school attendance laws to be there. The following week, the Court let stand a federal circuit court opinion that refused to extend the *Widmar* holding into public high schools.[23] In response, Congress passed the Equal Access Act of 1984, which extended *Widmar*'s principle to public high schools that received federal funding. The act provided that any such high school that opened its facilities to some students for voluntary after-school activities would

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[21] 454 U.S. 263, 270, 273 (1981). The Court later upheld the constitutionality of charging these flat fees, even to religious groups, finding no prior restraint on free exercise of religion. See *Board of Regents of University of Wisconsin System v. Southworth*, 529 U.S. 217 (2000).

[22] Ibid.

[23] *Brandon v. Bd. of Educ. of Guilderland Central School Dist.*, 635 F.2d 971 (2d Cir. 1980), *cert. denied*, 454 U.S. 1123 (1981).

have to give religious students equal access to these facilities. The religious students' activities, however, had to be completely voluntary and free from school endorsement or participation. In *Westside Community Schools v. Mergens* (1990), the Court upheld the Equal Access Act against an Establishment Clause challenge, holding that Congress had legitimately protected the rights of religious students to "equal treatment" and "equal protection."[24]

In subsequent cases involving lower schools, the Court rooted this equal access right more clearly in the First Amendment Free Speech Clause. *Lamb's Chapel v. Center Moriches Union Free School District* (1993) involved a public school that opened its facilities to various "social, civic, recreational, and political uses" organized by voluntary groups in the community and held after hours without student involvement. The school banned an otherwise qualified evangelical group because they wanted to show a film series on traditional family values. Citing *Widmar*, the *Lamb's Chapel* Court held that it was viewpoint discrimination to deny this group equal access to the facilities just because their film had a religious inspiration.[25] Similarly, *Good News Club v. Milford Central School* (2001) held that a public grade school that opened its facilities to licensed private groups to run after-school programs for students with parental permission could not exclude a group whose instruction came "from a religious viewpoint."[26]

In *Rosenberger v. Rector and Visitors of the University of Virginia* (1995), a sharply divided Court extended this equal-access principle to the distribution of state funds to religious students, one of the most controversial acts that two thirds of the individual state constitutions had overtly banned. The University of Virginia encouraged student groups to organize themselves for extracurricular activities and register with the university. Student groups were required to petition for the right to be recognized as such a registered group. Once registered, they could apply for monies from a general student activity fund to help defray costs of printing and activities. A Christian group sought reimbursement for the costs to print an overtly religious newspaper called *Wide Awake: A Christian Perspective at the University of Virginia*. The university denied their request since it violated the school's policy not to fund "any activity 'that primarily promotes or manifests a particular belief in or about a deity or an ultimate reality.'" The *Wide Awake* group appealed, claiming that this discriminatory treatment violated their free-speech rights.[27]

The *Rosenberger* Court held for the students. Writing for the Court, Justice Kennedy said that the state university policy improperly "selects for disfavored treatment those student journalistic efforts with religious editorial viewpoints." Denying funding to this otherwise qualified student group "is based upon viewpoint discrimination not unlike the discrimination the school district

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[24] 496 U.S. 226, 248–50 (1990).
[25] 508 U.S. 384, 387, 394 (1993).
[26] 533 U.S. 98, 112–14 (2001).
[27] 515 U.S. 819 (1995).

relied upon in *Lamb's Chapel* and that we found invalid." The constitutional principle of equal access applies as much to state university funding as to state university facilities, the Court held.

> Vital First Amendment speech principles are at stake here. The first danger to liberty lies in granting the State the power to examine publications to determine whether or not they are based on some ultimate idea and if so for the State to classify them [as religious]. The second, and corollary, danger is to speech from the chilling of individual thought and expression. That danger is especially real in the University setting, where the State acts against a background and tradition of thought and experiment that is at the center of our intellectual and philosophic tradition. . . . For the University, by regulation, to cast disapproval on particular viewpoints of its students risks the suppression of free speech and creative inquiry in one of the vital centers for the nation's intellectual life, its college and university campuses.[28]

New Limits on Equal-Access Rights for Religion

In its most recent cases, however, the Court made clear that this equal-access logic has limits in public schools and public university campuses alike. In *Morse v. Frederick* (2007), for example, the Court repeated its early 1980s cases that said that "the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings" and that the rights of public school students "must be applied in light of the special characteristics of the school environment."[29] In this case, a public high school in Alaska allowed students to watch the Olympic Torch Relay as it passed in front of the school. The event was televised and well attended. As the torchbearers came by, a group of students, led by Frederick, unfurled a fourteen-foot banner that read in large letters: "Bong Hits 4 Jesus." The principal confiscated the banner and suspended Frederick for promoting drug use in violation of school policy. Frederick sued, arguing that the school had violated his free speech rights and engaged in viewpoint discrimination against his offensive speech.

The *Morse* Court held for the school. The banner was perhaps a silly adolescent effort to gain attention and a spot on the evening news, Chief Justice John Roberts wrote for the Court. But the banner could not be reasonably read as anything but a pro-drug message—in direct violation of this school's clear, consistent, and "compelling" policy of deterring drug use by school children. School officials may suppress and sanction speech that will "materially and substantially disrupt the discipline of the school." Indeed, in an earlier case, the Court had allowed a public high school to sanction a student for using "lewd and indecent speech" at a school assembly, dismissing the student's free-speech

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[28] 515 U.S. at 831–32, 836–37.

[29] 551 U.S. 393 (2007), quoting *Bethel School District No. 403 v. Fraser*, 478 U.S. 675, 682 (1986) and *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 506 (1982).

claim. This case is of the same sort, the *Morse* Court concluded, notwithstanding the dissent's charge that the school had engaged in viewpoint discrimination against unpopular student speech with a religious reference.[30]

A few lower federal courts have used *Morse* to allow school officials to limit various forms of private religious expression in public schools, notably Christian messages, for fear of hostile reactions or eroding school policies.[31] It is easy to imagine how *Morse* could be used by a hostile or fearful public school official to prohibit the meetings or expressions of a religious student group—say, of devout Muslims, Jews, Catholics, evangelicals, or atheists—whose unpopular views are judged to "materially and substantially disrupt" the discipline or teaching of the school.

This scenario is what some observers have read into the Court's most recent case on point, *Christian Legal Society v. Martinez* (2010). This case involved Hastings College of Law, a state law school in California. The college officially recognizes all voluntary student groups through a formal registered student organization (RSO) program. Officially recognized student groups receive access to school funds and certain facilities and communication channels that are foreclosed to nonregistered groups. To qualify for RSO recognition, however, a group must comply with the school's nondiscrimination policy, based on state civil-rights laws, which bars discrimination on the basis of religion and sexual orientation, among other grounds. A group of law students sought to form a chapter of the Christian Legal Society (CLS) at the law school. Like all CLS groups in the country, this group required its members to sign a statement of faith and to live in accordance with prescribed principles; the group excluded anyone with religious beliefs contrary to the statement of faith and anyone who engaged in "unrepentant homosexual conduct." Hastings regarded this CLS policy as discrimination based on religion and sexual orientation and thus denied the group's application for official RSO status. CLS filed suit, claiming violations of their rights to free speech, expressive association, and the free exercise of religion.[32]

A 5-4 *Martinez* Court, led by Justice Ginsburg, held for Hastings. The Court combined the CLS's claims to free speech and free association into one and subjected them to "a less restrictive limited-public-forum analysis" than the stricter scrutiny regime of *Widmar* and its progeny. Here, the Court said, the law school was only "dangling the carrot of subsidy, not wielding the stick of

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30 551 U.S. 393, 394 (2007) (referring to *Tinker* as the earlier case).

31 See, for example, *Jacobs v. Clark County School District*, 526 F.3d 419 (9th Cir. 2008) (upholding school dress code as a neutral and generally applicable law whose breach by religious apparel raised security and fairness concerns); *Corder v. Lewis Palmer School District*, 566 F.3d 1219 (10th Cir. 2009) (upheld school's disciplining one of fifteen valedictorians whose thirty-second speech included brief endorsement of religion); *Busch v. Marple Newtown School District*, 567 F.3d 89 (3d Cir., 2009) (upholding school decision to ban mother from reading from Psalms during her child's show-and-tell, while allowing another mother to recite Jewish religious stories in the same setting).

32 561 U.S. 661 (2010).

prohibition." Unlike the *Widmar* students, the CLS students could certainly meet on the Hastings campus and could use the school's chalk boards and bulletin boards, as well as their own social media to communicate. Unlike the *Rosenberger* students, the CLS students were not singled out for special prohibitions because of their Christian perspective. They were denied RSO status, and its attendant special funds and other benefits, simply because they violated Hastings's general nondiscrimination policy. It is "hard to imagine a more viewpoint-neutral policy than one requiring *all* student groups to accept *all* comers."[33]

Summary and Conclusions

America operates with a basic three-tiered system of education: (1) public elementary schools, high schools, and state universities and other institutions of higher learning; (2) private (religious) lower schools, colleges, and universities; and (3) various forms of home schools. Cutting across these three tiers, a few states and cities have experimented with charter schools, magnet schools, and community schools that combine public and private funding and staffing to offer innovative forms of lower education. Some states offer vouchers and tax relief to enhance educational choice for parents and students in primary and secondary schools. Federal and state scholarship and loan programs are available to public and private university students.[34] But the three-tiered structure of American education has been largely constitutionally and culturally stable for the past two generations. The vast majority of government funds for education go to public schools and universities, and the vast majority of American students attend these public schools, even though students in private lower schools and some home schools do demonstrably better on various measures of academic performance and social well-being.

Before the twentieth century, individual states largely governed American schooling, taking a wide range of approaches to the place of religion in public schools and the role of government in religious schools. For the past century, however, the U.S. Supreme Court has been actively involved in shaping American education, devoting nearly a third of its First Amendment religious freedom cases to issues of religion and education. These cases have not always followed clean logical lines, but one holding has been consistent: religious teachers, prayers, texts, and symbols are not permitted in the public-school classroom and curriculum, or even at one-time public-school events like graduation ceremonies. Voluntary private religious expressions and associations may be allowed when there are equivalent voluntary private secular counterparts, and so long as no faculty participate. But even then, schools may place limits on these religious activities to protect other students from religious harm or coercion.

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[33] 561 U.S. at 683, 692, 697.

[34] See overview of current options in Stephen D. Sugarman, "Is It Unconstitutional to Prohibit Faith-Based Schools from Becoming Charter Schools," *Journal of Law and Religion* 32 (2017): 227–62.

This deprecation of religion in public school education has impoverished the moral values education and character formation of American students, and it has stunted some of the very democratic values and abilities that the country and Court are trying to instill and protect in each new generation. It has deprived students of their ability to develop healthy democratic habits of understanding and engaging a variety of forms of religious experience. It has fostered the false idea that religion and faith are only for the private and voluntary sphere, while value-free reason and morally neutral logic are the only valuable currency of public debate and political life. It has helped instil in students the secularist hypothesis that the spread of reason and science will slowly eclipse the sense of the sacred and restore the sensibilities of the superstitious.

The reality, however, is that religion—in both sectarian and secular forms—is a powerful and perennial force in society. Indeed, over the past three decades, another great awakening of religion has dawned—now global in its sweep, vast in its diversity, and sometimes frightening in its power. Even if North America and Western Europe now feature more “Nones” and “Neins” on organized religion than ever before, the Global Middle and Global South have seen powerful new upsurges of old and new religions. Globalized media, migration, marketing, and mission work have brought these religions, and their special needs and challenges, to the North and West, too. From kindergarten to graduate school, American students need to witness and study religions and the moral and value systems that they offer, for better or worse.

Not only democratic theory but the Court’s own equality jurisprudence would seem to dictate this result. A democracy should represent, in its core institutions like public schools, all beliefs and values, religious and secular alike. The logic of equal treatment should help decide not only which voluntary private groups may have access to public forums and funds, but also which subjects and activities should be allowed in the public-school classroom in the first place. To exclude religion and its attendant institutions and values from the classroom is not only to engage in bald viewpoint discrimination against religion, but also to defy the elementary demands of representative democracy. It is not only to undermine the classical religious foundations of morality and values, but also to also to enable secular prejudices and preferences to triumph under the guise of neutrality. Churches and states, schools and universities, students and teachers alike deserve better.