



RELIGION IN THE PUBLIC SCHOOLS

MAY 2007

Nearly a half-century after the Supreme Court issued its landmark ruling striking down school-sponsored prayer, Americans continue to fight over the place of religion in public schools. Indeed, the classroom has become one of the most important battlegrounds in the broader conflict over religion's role in public life.

Some Americans are troubled by what they see as an effort on the part of federal courts and civil liberties advocates to exclude God and religious sentiment from public schools. Such an effort, these Americans believe, infringes upon the First Amendment right to the free exercise of religion.

Civil libertarians and others, meanwhile, voice concern that conservative Christians are trying to impose their values on students of all religious stripes. Federal courts, the civil libertarians point out, have consistently interpreted the First Amendment's prohibition on the establishment of religion to forbid state sponsorship of prayer and most other religious activities in public schools.

Despite that long series of court decisions, polls show that large numbers of Americans favor looser, not tighter, limits on religion in public schools. According to an August 2006 survey by the Pew Research Center, more than two-thirds of Americans (69%) agree with the notion that "liberals have gone too far in trying to keep religion out of the schools and the government." And a clear majority (58%) favor teaching biblical creationism along with evolution in public schools.

Conflicts over religion in school are hardly new. In the 19th century, Protestants and Catholics frequently fought over Bible reading and prayer in public schools. The disputes then were over *which* Bible and *which* prayers were appropriate to use in the classroom. Some Catholics were troubled that the schools' reading materials included the King James version of the Bible, which



TABLE OF CONTENTS

Prayer and the Pledge	3
School Prayer	3
The Pledge of Allegiance	4
School Officials and Student Speech	6
Religion in the Curriculum	7
Creationism and Evolution	7
Study of the Bible	8
Holiday Programs	9
Multiculturalism	9
Rights in and out of the Classroom	9
Rights of Students	10
Rights of Parents	11
Rights of Teachers and Administrators	13
Religious Activities and the Principle of Equal Access	14

was favored by Protestants. In 1844, fighting broke out between Protestants and Catholics in Philadelphia; a number of people died in the violence and several Catholic churches were burned. Similar conflicts erupted during the 1850s in Boston and other parts of New England. In the early 20th century, liberal Protestants and their secular allies battled religious conservatives over whether students in biology classes should be taught Charles Darwin’s theory of evolution.

The Supreme Court stepped into those controversies when it determined, in *Cantwell v. Connecticut* (1940) and *Everson v. Board of Education of Ewing Township* (1947), that the First Amendment’s Free Exercise Clause and Establishment Clause applied to the states. The two clauses say, “Congress shall

make no law respecting an establishment of religion, or prohibiting the free exercise thereof.” Before those two court decisions, courts had applied the religion clauses only to actions of the federal government.

Soon after the *Everson* decision, the Supreme Court began specifically applying the religion clauses to activities in public schools. In its first such case, *McCollum v. Board of Education* (1948), the high court invalidated the practice of having religious instructors from different denominations enter public schools to offer religious lessons during the school day to students whose parents requested them. A key factor in the court’s decision was that the lessons took place in the schools. Four years later, in *Zorach v. Clauson*, the court upheld an arrangement by which public schools excused students during the school day so they could attend religious classes away from school property.

Beginning in the 1960s, the court handed religious conservatives a series of major defeats. It began with the landmark 1962 ruling, in *Engel v. Vitale*, that school-sponsored prayer, even if it were non-sectarian, violated the Establishment Clause. Since then, the Supreme Court has pushed forward, from banning organized Bible reading for religious and moral instruction in 1963 to prohibiting prayers at high school football games in 2000.

In these and other decisions, the court has repeatedly stressed that the Constitution prohibits public schools from indoctrinating children in religion. But it is not always easy to determine exactly what constitutes indoctrination or school sponsorship of religious activities. For example, can a class on the Bible as literature be taught without a bias for or against the idea that the Bible is religious truth? Can students be compelled to participate in a Christmas-themed music program? Sometimes students themselves, rather than teachers, adminis-

trators or coaches, bring their faith into school activities. For instance, when a student invokes gratitude to God in a valedictory address, or a high school football player offers a prayer in a huddle, is the school legally responsible for their religious expression?

The issues are complicated by other constitutional guarantees. For instance, the First Amendment also protects freedom of speech and freedom of association. Religious groups have cited those guarantees in support of student religious speech and in efforts to obtain school sponsorship and resources for student religious clubs.

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The right of a student or student club to engage in religious speech or activities on school property may, however, conflict with other protections, such as the right of students to avoid harassment. In one recent case, for example, a federal appeals court approved a high school's decision to prohibit a student from wearing a T-shirt containing a biblical passage condemning homosexuality. Because the student had graduated by the time the Supreme Court granted his appeal, the Supreme Court ordered the lower court to vacate its ruling and dismiss the case.

In another instance of conflicting rights, some student religious groups want the right to exclude students who do not share the groups' beliefs, specifically on questions of sexuality. For example, the Christian Legal Society, which has chapters in many law schools, is embroiled in litigation over its policy that only students who believe that sex outside of heterosexual marriage is a sin can serve in leadership positions.

As these more recent conflicts show, public schools remain a battlefield where the religious interests of parents, students, administrators and teachers often clash. The conflicts affect classroom curricula, high school football games, student clubs, graduation ceremonies – and the lives of everyone with an interest in public education.

PRAYER AND THE PLEDGE

SCHOOL PRAYER

The most enduring and controversial issue related to school-sponsored religious activities is classroom prayer. In *Engel v. Vitale* (1962), the Supreme Court held that the Establishment Clause prohibited the recitation of a school-sponsored prayer in public schools. *Engel* involved a simple and seemingly nonsectarian prayer composed especially for use in New York's public schools. In banning the prayer exercise entirely, the court did not rest its opinion on the grounds that unwilling students were coerced to pray; that would come much later. Rather, the court emphasized what it saw as the wrongs of having the government create and sponsor a religious activity.

The following year, the high court extended the principle outlined in *Engel* to a program of daily

Bible reading. In *Abington School District v. Schempp*, the court ruled broadly that school sponsorship of religious exercises violates the Constitution.

Schempp became the source of the enduring constitutional doctrine that all government action must have a predominantly secular purpose – a requirement that, according to the court, the Bible-reading exercise clearly could not satisfy. By insisting that religious expression be excluded from the formal curriculum, the Supreme Court was assuring parents that public schools would be officially secular and would not compete with parents in their children’s religious upbringing.

With *Engel* and *Schempp*, the court outlined the constitutional standard for prohibiting school-sponsored religious expression, a doctrine the court has firmly maintained. In *Stone v. Graham* (1980), for instance, it found unconstitutional a Kentucky law requiring all public schools to post a copy of the Ten Commandments. And in *Wallace v. Jaffree* (1985), it overturned an Alabama law requiring public schools to set aside a moment each day for silent prayer or meditation.

School sponsorship of student-led prayer has fared no better. In 2000, the Supreme Court ruled in *Santa Fe Independent School District v. Doe* that schools may not sponsor student-recited prayer at high school football games.

More sweeping in its consequences is *Lee v. Weisman* (1992), which invalidated a school-sponsored prayer led by an invited clergyman at a public school commencement in Providence, R.I. The court’s 5–4 decision rested explicitly on the argument that graduating students were being forced to participate in a religious ceremony. The case effectively outlawed a practice that was customary in many communities across the country, thus fueling the conservative critique that the Supreme Court was inhospitable to public expressions of faith.

SUPREME COURT CASE

LEE V. WEISMAN (1992)

MAJORITY:

KENNEDY
SOUTER
O’CONNOR
STEVENS
BLACKMUN

MINORITY:

REHNQUIST
WHITE
SCALIA
THOMAS

So far, lower appellate courts have not extended the principles of the school prayer decisions to university commencements (*Chaudhuri v. Tennessee*, 6th U.S. Circuit Court of Appeals, 1997; *Tanford v. Brand*, 7th Circuit, 1997). The 4th Circuit, however, found unconstitutional the practice of daily prayer at supper at the Virginia Military Institute. In that case, *Mellen v. Bunting* (2003), the appellate court reasoned that VMI’s military-like environment tended to coerce participation by cadets. The decision was similar to an earlier ruling by the U.S. Circuit Court of Appeals for the District of Columbia, which found unconstitutional a policy of the U.S. service academies that all cadets and midshipmen attend Protestant, Catholic or Jewish chapel services on Sunday (*Anderson v. Laird*, 1972). For the court, the key element was the service academies’ coercion of students to attend the religious activity.

THE PLEDGE OF ALLEGIANCE

In 1954, Congress revised the Pledge of Allegiance to refer to the nation as “under God,” a phrase that has since been recited by generations of schoolchildren. In 2000, Michael Newdow filed suit challenging the phrase on behalf of his daughter, a public school student in California. Newdow argued that the words “under God” violated the Establishment Clause because they transformed the pledge into a religious exercise.

RELIGION IN THE PUBLIC SCHOOLS: SIGNIFICANT SUPREME COURT RULINGS

Pierce v. Society of Sisters (1925)

Guaranteed parents the right to enroll their children in private schools, whether religious or secular.

West Virginia State Board of Education v. Barnette (1943)

Upheld right of students who were Jehovah's Witnesses to refuse to salute the American flag, affirming right of students to resist compulsory recitation of official orthodoxy.

McCullum v. Board of Education (1948)

Prohibited use of public schools for voluntary, privately funded religious classes as violation of the Establishment Clause.

Zorach v. Clauson (1952)

Allowed public schools to excuse students to attend religious classes away from school property.

Engel v. Vitale (1962)

Prohibited recitation of a school-sponsored, nonsectarian prayer as violation of Establishment Clause ban on government creating and sponsoring a religious activity.

Abington School District v. Schempp (1963)

In prohibiting a program of daily Bible reading in public schools, ruled that government action must have a predominantly secular purpose.

Epperson v. Arkansas (1968)

Overtaken statute prohibiting the teaching of evolution, on basis that government sought to ban material objectionable to a particular religion.

Tinker v. Des Moines School District (1969)

Upholding students' right to wear armbands protesting the Vietnam War, ruled that school authorities cannot suppress expression unless it causes material disruption or violates the rights of others.

Wisconsin v. Yoder (1972)

In case involving Old Order Amish, ruled that the Free Exercise Clause limited the state's power to require children to attend school.

Widmar v. Vincent (1981)

Ruled that a state university could not exclude a student group from using school buildings on the basis of the group's religious viewpoint.

Edwards v. Aguillard (1987)

Overtaken statute requiring teaching of both evolution and creationism, concluding that the law impermissibly promoted a particular religious belief.

Board of Education v. Mergens (1990)

Upholding the Equal Access Act, ruled that high schools, like universities, had an obligation to provide equal access to public facilities to all groups, including religious organizations.

Lee v. Weisman (1992)

Prohibited school-sponsored prayer delivered by invited clergy at a school commencement, on the grounds that graduating students were being forced to participate in a religious ceremony.

Rosenberger v. University of Virginia (1995)

Ruled that the Free Speech Clause required the state university to provide the same financial subsidy for a student Christian publication as for all other publications.

Santa Fe Independent School District v. Doe (2000)

Ruled that public schools may not sponsor student-recited prayer at athletic contests or other school events.

Good News Club v. Milford Central School District (2001)

Held that the Free Speech Clause prohibited an elementary school from excluding an evangelical Christian program from a list of approved after-school activities.

The case, *Elk Grove Unified School District v. Newdow*, reached the Supreme Court in 2004, but the justices did not ultimately decide whether the phrase was acceptable. Instead, the court ruled that Newdow lacked standing to bring the suit because he did not have legal custody of his daughter. In concurring opinions, however, four justices expressed the view that the Constitution permitted recitation of the pledge – with the phrase “under God” – in public schools.

Since then, the issue has not again reached the Supreme Court but is still being litigated in the lower courts. In *Myers v. Loudoun County Public Schools* (2005), the 4th U.S. Circuit Court of Appeals upheld the reciting of the pledge in Virginia, but a U.S. district court in California ruled the other way in a new suit involving Michael Newdow and other parents. The court ruling in California, *Newdow v. Congress of the United States* (2005), is on appeal in the 9th U.S. Circuit Court of Appeals.

SCHOOL OFFICIALS AND STUDENT SPEECH

The courts have drawn a sharp distinction between officially sponsored religious speech, such as a benediction by an invited clergyman at a commencement ceremony, and private religious speech by students. The Supreme Court made clear in *Lee v. Weisman* (1992) that a clergyman’s benediction at a public school event would violate the separation of church and state. Judges usually reach that same conclusion when school officials cooperate with students to produce student-delivered religious messages. But federal courts are more divided in

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cases involving students acting on their own to include a religious sentiment or prayer at a school commencement or a similar activity.

Some courts, particularly in the South, have upheld the constitutionality of student-initiated religious speech, emphasizing the private origins of this kind of religious expression. As long as school officials did not encourage or explicitly approve the contents, those courts have upheld religious content in student commencement speeches.

In *Adler v. Duval County School Board* (1996), for example, the 11th U.S. Circuit Court of Appeals approved a system at a Florida high school in which the senior class, acting independently of school officials, selected a class member to deliver a commencement address. School officials neither influenced the choice of speaker nor screened the speech. Under those circumstances, the appeals court ruled that the school was not responsible for the religious content of the address.

Other courts, however, have invalidated school policies that permit student speakers to include religious sentiments in graduation addresses. One leading case is *ACLU v. Black Horse Pike Regional*

Board of Education (1996), in which the senior class of a New Jersey public high school selected the student speaker by a vote without knowing in advance the contents of the student's remarks. The 3rd U.S. Circuit Court of Appeals nevertheless ruled that the high school could not permit religious content in the commencement speech. The court reasoned that students attending the graduation ceremony were as coerced to acquiesce in a student-led prayer as they would be if the prayer were offered by a member of the clergy, the practice forbidden by *Weisman* in 1992. (Supreme Court Justice Samuel Alito, who was then a member of the appeals court, joined a dissenting opinion in the case, arguing that the graduating students' rights to religious and expressive freedom should prevail over the Establishment Clause concerns.)

Similarly, in *Bannon v. School District of Palm Beach County* (2004), the 11th U.S. Circuit Court of Appeals ruled that Florida school officials were right to order the removal of student-created religious messages and symbols from a school beautification project. The court reasoned that the project was not intended as a forum for the expression of students' private views but rather as a school activity for which school officials would be held responsible.

RELIGION IN THE CURRICULUM

The Supreme Court's decisions about officially sponsored religious expression in schools consistently draw a distinction between religious activities such as worship or Bible reading, which are designed to inculcate religious sentiments and values, and "teaching about religion," which is both constitutionally permissible and educationally appropriate. On several occasions, members of the

court have suggested that public schools may teach "the Bible as literature," include lessons about the role of religion and religious institutions in history or offer courses on comparative religion.

CREATIONISM AND EVOLUTION

Courts have long grappled with attempts by school boards and other official bodies to change the curriculum in ways that directly promote or denigrate a particular religious tradition. Best known among these curriculum disputes are those involving the conflict between proponents and opponents of Darwin's theory of evolution, which explains the origin of species through evolution by means of natural selection. Opponents favor teaching some form of creationism, the idea that life came about as described in the biblical book of Genesis or evolved under the guidance of a Supreme Being. A recent alternative to Darwinism, intelligent design, asserts that life is too complex to have arisen without divine intervention.

The Supreme Court entered the evolution debate in 1968, when it ruled, in *Epperson v. Arkansas*, that Arkansas could not eliminate from the high school biology curriculum the teaching of "the theory that mankind descended from a lower order of animals." Arkansas' exclusion of that aspect of evolutionary theory, the court reasoned, was based on a preference for the account of creation in the book of Genesis and thus violated the state's constitutional obligation of religious neutrality. Almost 20 years later, in *Edwards v. Aguillard* (1987), the Supreme Court struck down a Louisiana law that required "balanced treatment" of evolution science and "Creation science," so that any biology teacher who taught one also had to teach the other. The court said the law's purpose was to single out a particular religious belief – in this case, biblical creationism – and promote it as an alternative to accepted scientific theory. The court also pointed to evidence that the legislation's sponsor hoped that the balanced

SUPREME COURT CASE

EDWARDS V. AGUILLARD (1987)

MAJORITY:	BLACKMUN	MINORITY:
BRENNAN	POWELL	REHNQUIST
WHITE	STEVENS	SCALIA
MARSHALL	O'CONNOR	

treatment requirement would lead science teachers to abandon the teaching of evolution.

Lower courts have consistently followed the lead of *Epperson* and *Edwards*. As a result, school boards have lost virtually every fight over curriculum changes designed to challenge evolution, including disclaimers in biology textbooks. One of the most recent and notable of these cases, *Kitzmiller v. Dover Area School District* (2005), involved a challenge to a Pennsylvania school district's policy of informing high school science students about intelligent design as an alternative to evolution. After lengthy testimony from both proponents and opponents of intelligent design, a federal district court in Pennsylvania concluded that the policy violates the Establishment Clause because intelligent design is a religious, rather than scientific, theory.

The *Kitzmiller* ruling has received an unusually large amount of attention, in part because it is the first decision to address the constitutionality of teaching intelligent design. But *Kitzmiller* also has been noted for its forceful analysis, and the ruling is likely to be highly influential if and when courts hear other cases involving alternatives to Darwinian evolution.

STUDY OF THE BIBLE

Courts have also expended significant time and energy considering public school programs involv-

ing Bible study. Although the Supreme Court has occasionally referred to the permissibility of teaching the Bible as literature, some school districts have instituted Bible study programs that courts have found unconstitutional. Frequently, judges have concluded that these courses are thinly disguised efforts to teach a particular understanding of the New Testament.

In a number of these cases, school districts have brought in outside groups to run the Bible study program. The groups, in turn, hired their own teachers, in some cases Bible college students or members of the clergy who did not meet state accreditation standards.

For a public school class to study the Bible without violating constitutional limits, the class would have to include critical rather than devotional readings and allow open inquiry into the history and content of biblical passages.

Such Bible study programs have generally been held unconstitutional because, the courts conclude, they teach the Bible as religious truth or are designed to inculcate particular religious sentiments. For a public school class to study the Bible without violating constitutional limits, the class would have to include critical rather than devotional readings and allow open inquiry into the history and content of biblical passages.

HOLIDAY PROGRAMS

Christmas-themed music programs also have raised constitutional concerns. For a holiday music program to be constitutionally sound, the courts maintain, school officials must ensure the predominance of secular considerations, such as the program's educational value or the musical qualities of the pieces. The schools also must be sensitive to the possibility that some students will feel coerced to participate in the program (*Bauchman v. West High School*, 10th U.S. Circuit Court of Appeals, 1997; *Doe v. Duncanville Independent School District*, 5th Circuit, 1995). Moreover, the courts have said, no student should be forced to sing or play music that offends his religious sensibilities. Therefore, schools must allow students to choose not to participate.

MULTICULTURALISM

Not all the cases involving religion in the curriculum concern the promotion of the beliefs of the majority. In a number of recent cases, challenges have come from Christian groups arguing that school policies discriminate against Christianity by promoting cultural pluralism.

In a recent example, the 2nd U.S. Circuit Court of Appeals considered a New York City Department of Education policy regulating the types of symbols displayed during the holiday seasons of various religions. The department allows the display of a menorah as a symbol of Hanukkah and a star and crescent as a symbol of Ramadan but permits the display of only secular symbols of Christmas, such as a Christmas tree; it explicitly forbids the display of a Christmas nativity scene in public schools.

Upholding the city's policy, the Court of Appeals reasoned in *Skoros v. Klein* (2006) that city officials intended to promote cultural pluralism in the highly diverse setting of the New York City public schools. The court concluded that a "reasonable observer" would understand that the menorah and

star/crescent combination had secular as well as religious meanings. The judicial panel ruled that the policy, therefore, did not promote Judaism or Islam and did not denigrate Christianity.

In another high-profile case, *Citizens for a Responsible Curriculum v. Montgomery County Public Schools* (2005), a Maryland citizens' group successfully challenged a health education curriculum that included discussion of sexual orientation. Ordinarily, opponents of homosexuality could not confidently cite the Establishment Clause as the basis for a complaint, because the curriculum typically would not advance a particular religious perspective. However, the Montgomery County curriculum included materials in teacher guides that disparaged some religious teachings on homosexuality as theologically flawed, and contrasted those teachings with what the guide portrayed as the more acceptable and tolerant views of some other faiths. The district court concluded that the curriculum had both the purpose and effect of advancing certain faiths while denigrating the beliefs of others. The county has now rewritten these materials to exclude any reference to the views of particular faiths. These new materials will be more difficult to challenge successfully in court because the lessons do not condemn or praise any faith tradition.

RIGHTS IN AND OUT OF THE CLASSROOM

At the time of its school prayer decisions in the early 1960s, the Supreme Court had never ruled on whether students have the right of free speech inside public schools. By the end of that decade, however, the court began to consider the ques-

tion. And the results have made the rules for religious expression far more complex.

RIGHTS OF STUDENTS

The leading Supreme Court decision on freedom of student speech is *Tinker v. Des Moines School District* (1969), which upheld the right of students to wear armbands protesting the Vietnam War. The court ruled that school authorities may not suppress expression by students unless the expression significantly disrupts school discipline or invades the rights of others.

This endorsement of students' freedom of speech did not entirely clarify things for school officials trying to determine students' rights. *Tinker* supported student expression, but it did not attempt to reconcile that right of expression with the Supreme Court's earlier decisions forbidding student participation in school-sponsored prayer and Bible reading. Some school officials responded to the mix of student liberties and restraints by forbidding certain forms of student-initiated religious expression such as the saying of grace before lunch in the school cafeteria, student-sponsored gatherings for prayer at designated spots on school property or student proselytizing aimed at other students.

After years of uncertainty about these matters, several interest groups devoted to religious freedom and civil liberties drafted a set of guidelines, "Religious Expression in Public Schools," which the U.S. Department of Education sent to every public school superintendent in 1995. The department revised the guidelines in 2003, placing somewhat greater emphasis on the rights of students to speak or associate for religious purposes. The guidelines highlight these four general principles:

- Students, acting on their own, have the same right to engage in religious activity and discussion as they do to engage in comparable secular activities.

- Students may offer a prayer or blessing before meals in school or assemble on school grounds for religious purposes to the same extent as other students who wish to express their personal views or assemble with others.
- Students may not engage in religious harassment of others or compel other students to participate in religious expression, and schools may control aggressive and unwanted proselytizing.
- Schools may neither favor nor disfavor students or groups on the basis of their religious identities.

The leading Supreme Court decision on freedom of student speech is Tinker v. Des Moines School District (1969), which upheld the right of students to wear armbands protesting the Vietnam War.

A case recently decided by the 9th U.S. Circuit Court of Appeals underscores the difficulties that school officials still can face when students exercise their right to religious expression on school property. In this case, gay and lesbian students in a California high school organized a Day of Silence, in which students promoting tolerance of differences in sexual orientation refrained from speaking in school. The following day, Tyler Harper, a student at the school, wore a T-shirt that on the front read, "Be Ashamed, Our School Has Embraced What God Has Condemned," and on the back, "Homosexuality Is Shameful, Romans

1:27.” School officials asked him to remove the shirt and took him out of class while they attempted to persuade him to do so.

The Court of Appeals, in *Harper v. Poway Unified School District* (2006), rejected Harper’s claim that the school officials violated his First Amendment rights. Judge Stephen Reinhardt, writing for a 2-1 majority and citing *Tinker*, argued that students’ constitutional rights may be limited to prevent harming the rights of other students. He concluded that the T-shirt could be seen as violating school policies against harassment based on sexual orientation.

The Supreme Court eventually may clarify school officials’ power to suppress speech as a means of protecting the rights of other students.

Writing in dissent, Judge Alex Kozinski asserted that the school’s sexual harassment policy was far too vague and sweeping to support a restriction on all anti-gay speech. He also argued that the school district had unlawfully discriminated against Harper’s freedom of speech. By permitting the Gay and Lesbian Alliance to conduct the Day of Silence, Kozinski said, the district was choosing sides on a controversial social issue and stifling religiously motivated speech on one side of the issue.

Harper petitioned the Supreme Court to review the appeals court decision. But Harper graduated from high school, and the case took a different turn. The Supreme Court, in early 2007, ordered

the lower court to vacate its ruling and dismiss the case on the grounds that it had become moot.

Although the case appears to be over, it highlights a conflict – one likely to recur – between the rights of students to engage in religious expression and the rights of other students to be educated in a nonhostile environment. Indeed, Tyler Harper’s sister, Kelsie Harper, filed suit in a federal district court arguing that the school district’s “anti-hate behavior” policies violate the First Amendment as well as California law. The district court rejected Kelsie Harper’s argument, and her case is now being appealed to the U.S. 9th Circuit Court of Appeals. The Supreme Court eventually may clarify school officials’ power to suppress speech as a means of protecting the rights of other students. For now, cases like *Harper* illustrate the difficulties for school officials in regulating student expression.

RIGHTS OF PARENTS

Parents sometimes complain that secular practices at school inhibit their right to direct the religious upbringing of their children. These complaints typically rest on both the Free Exercise Clause of the First Amendment and the 14th Amendment’s Due Process Clause, which forbids the state to deprive any person of “life, liberty or property without due process of law.” The Supreme Court has interpreted them as protecting the right of parents to shape and control the education of their children. When they object to certain school practices, the parents often seek permission for their children to skip the offending lesson or class – to opt out – rather than try to end the practice schoolwide.

The first decision by the Supreme Court on parents’ rights to control their children’s education came in *Pierce v. Society of Sisters* (1925), which guarantees to parents the right to enroll their

children in private rather than public schools, whether the private schools are religious or secular. In *West Virginia State Board of Education v. Barnette* (1943), the court upheld the right of public school students who were Jehovah’s Witnesses to refuse to salute the American flag. The students said the flag represented a graven image and that their religion forbade them from recognizing it. The court’s decision rested on the right of *all* students, not just those who are religiously motivated, to resist compulsory recitation of official orthodoxy, political or otherwise.

Of all the Supreme Court rulings supporting religious opt-outs, perhaps the most significant came in *Wisconsin v. Yoder* (1972), which upheld the right of members of the Old Order Amish to withdraw their children from formal education at the age of 14. The court determined that a state law requiring children to attend school until the age of 16 burdened the free exercise of their families’ religion. The Amish community had a well-established record as hardworking and law-abiding, the court noted, and Amish teens would receive home-based training. The worldly influences present in the school experience of teenagers, the court said, would undercut the continuity of agrarian life in the Amish community.

In later decisions, lower courts recognized religious opt-outs in other relatively narrow circumstances. Parents successfully cited religious grounds

to win the right to remove their children from otherwise compulsory military training (*Spence v. Bailey*, 1972) and from a coeducational physical education class in which students had to dress in “immodest apparel” (*Moody v. Cronin*, 1979). In *Menora v. Illinois High School Association* (1982), the 7th U.S. Circuit Court of Appeals ruled that the Illinois High School Association was constitutionally obliged to accommodate Orthodox Jewish basketball players who wanted to wear a head covering, despite an association rule forbidding headgear. The *Menora* case involves a narrow exception from the dress code, rather than a broader right to opt-out of a curriculum requirement.

A great many school districts, meanwhile, have recognized the force of parents’ religious or moral concerns on issues of sexuality and reproduction and have voluntarily provided opt-outs from classes devoted to those topics. Under these opt-out programs, parents do not have to explain their objection, religious or otherwise, to participation by their children. On other occasions, however, parental claims that the Constitution entitles them to remove their children from part or all of a public school curriculum have fared rather poorly.

The issue of home schooling is a good example. Before state legislatures passed laws allowing home schooling, parents seeking to educate their children at home were often unsuccessful in the courts. Many judges distinguished these home schooling cases from *Yoder* on the grounds that *Yoder* involved teenagers rather than young children. The judges also noted that *Yoder* was concerned with the survival of an entire religious community – the Old Order Amish – rather than the impact of education on a single family. Indeed, in virtually all of the cases decided over the past 25 years, courts have found that the challenged curriculum requirement did not unconstitutionally burden parents’ religious choices.

SUPREME COURT CASE

WISCONSIN V. YODER (1972)

MAJORITY:	WHITE	DID NOT
BURGER	MARSHALL	PARTICIPATE:
DOUGLAS	BLACKMUN	POWELL
BRENNAN		REHNQUIST
STEWART		

The most famous of the cases is *Mozert v. Hawkins County Board of Education* (1987), in which a group of Tennessee parents complained that references to mental telepathy, evolution, secular humanism, feminism, pacifism and magic in a series of books in the reading curriculum offended the families' Christian beliefs. The school board originally allowed children to choose alternative reading materials but then eliminated that option.

The 6th U.S. Circuit Court of Appeals ruled in the county's favor on the grounds that students were not being asked to do anything in conflict with their religious obligations. Furthermore, the court said, the school board had a strong interest in exposing children to a variety of ideas and images and in using a uniform series of books for all children. Because the books did not explicitly adopt or denigrate particular religious beliefs, the court concluded, the parents could insist neither on the removal of the books from the schools nor on their children opting out.

The 1st U.S. Circuit Court of Appeals reached a similar conclusion in a case involving a public high school in Massachusetts that held a mandatory assembly devoted to AIDS and sex education. In that case, *Brown v. Hot, Sexy, and Safer Productions* (1995), the court rejected a complaint brought by parents who alleged that exposure to sexually explicit material infringed on their rights to religious freedom and control of the upbringing of their children. The court concluded that this one-time exposure to the material would not substantially burden the parents' freedom to rear their children and that the school authorities had strong reasons to inform high school students about "safe sex."

RIGHTS OF TEACHERS AND ADMINISTRATORS

Without question, public school employees retain their rights of free exercise. When off

duty, school employees are free to engage in worship, proselytizing or any other lawful faith-based activity. When they are acting as representatives of a public school system, however, courts have said their rights are constrained by the Establishment Clause.

This limitation on religious expression raises difficult questions. The first is what limits school systems may impose on the ordinary and incidental expression of religious identity by teachers in the classroom. Most school systems permit teachers to wear religious clothing or jewelry. Similarly, teachers may disclose their religious identity; for instance, they need not refuse to answer when a student asks, "Do you celebrate Christmas or Hanukkah?" or "Did I see you at the Islamic center yesterday morning?"

At times, however, teachers act in an uninvited and overtly religious manner toward students and are asked by school administrators to refrain. When those requests have led to litigation, the administrators invariably have prevailed, on the grounds that they are obliged (for constitutional and pedagogical reasons) to be sensitive to a teacher's coercive potential.

In *Bishop v. Aronov* (1991), for example, the 11th U.S. Circuit Court of Appeals upheld a set of restrictions imposed by the University of Alabama on a professor of exercise physiology. Professor Phillip Bishop had been speaking regularly to his class about the role of his Christian beliefs in his work and had scheduled an optional class in which he offered a "Christian perspective" on human physiology. The court recognized the university's general authority to control the way in which instruction took place, noting that Bishop's academic freedom was not jeopardized since he retained the right to express his religious views in his published writing and elsewhere.

In *Roberts v. Madigan* (1990), a federal district court similarly upheld the authority of a public school principal in Colorado to order a fifth-grade teacher to take down a religious poster from the classroom wall and to remove books titled *The Bible in Pictures* and *The Life of Jesus* from the classroom library. The court also backed the principal's order that the teacher remove the Bible from his desktop and refrain from silently reading the Bible during instructional time. The court emphasized that school principals need such authority to prevent potential violations of the Establishment Clause and to protect students against a religiously coercive atmosphere.

That much is clear. What is less clear is how public school systems should draw the line between teachers' official duties and their own time. That was the key question in *Wigg v. Sioux Falls School District* (8th U.S. Circuit Court of Appeals, 2004), in which a teacher sued the South Dakota school district for refusing to allow her to serve as an instructor in the Good News Club (an evangelical Christian group) that met after school hours at various public elementary schools in the district.

A federal district court ruled that the teacher, Barbara Wigg, should be free to participate in the club but said the school district could insist that the teacher not participate at the school where she was employed. The appellate court affirmed the decision but went further in protecting the teacher's rights, concluding that the school district could not exclude her from the program at her own school. The court reasoned that once the school day ended, Wigg became a private citizen, leaving her free to be a Good News Club instructor at any school, including the one where she worked. The court ruled that no reasonable observer would perceive Wigg's after-school role as being carried out on behalf of the school district, even though the club met on school property.

In general, then, the courts have ruled that public schools have substantial discretion to regulate the religious expression of teachers during instructional hours, especially when students are required to be present. The courts have also ruled, however, that attempts by schools to extend that control into noninstructional hours constitute an overly broad intrusion on the teachers' religious freedom.

RELIGIOUS ACTIVITIES AND THE PRINCIPLE OF EQUAL ACCESS

Over the past 20 years, evangelical Christians and others have advanced the rights of religious organizations to have equal access to meeting space and other forms of recognition provided by public schools to students. These organizations have consistently succeeded in securing the same privileges provided by public schools to secular groups.

Their victories have not been based on a claim that religious groups have a right to official recognition simply because they want to practice or preach their religion; instead, these cases have been won on free-speech grounds.

Whenever public schools recognize student extracurricular activities (for example, a student Republican club or an animal rights group), the schools are deemed to have created a forum for student expression. The constitutional rules governing the forum concept are complicated, but one consistent theme is that the state may not discriminate against a person or group seeking access to the forum based on that person's or group's viewpoint. In a now lengthy line of decisions, the

Supreme Court has ruled consistently that religious groups represent a particular viewpoint on the subjects they address and that officials may not exclude that viewpoint from a government-created forum for expression or association.

The first major decision in this area was *Widmar v. Vincent* (1981), in which the Supreme Court ruled that the University of Missouri could not exclude from campus facilities a student group that wanted to use the school's buildings for worship and Bible study. The university had refused the group access, asserting that the Establishment Clause forbade the use of a public university's facilities for worship. The court rejected this defense, ruling that the university had allowed other student groups to use university property and that the complaining group could not be excluded on the basis of its religious viewpoint.

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The Supreme Court later extended *Widmar's* notion of equal access to nonstudent groups. They, too, should have access to public space, the court said. Despite the decision in *Widmar*, however, some public high schools continued to refuse access to student religious groups. Those schools

took the view that prayer and Bible reading in public schools were constitutionally impermissible, even if wholly student initiated. At least one Court of Appeals has upheld that argument.

Congress responded by enacting the Equal Access Act of 1984. As a condition for receiving federal financial aid, the law required public secondary schools to not discriminate on the basis of religion or political viewpoint in recognizing and supporting extracurricular activities. This law has benefited a variety of student organizations, from gay and lesbian groups to evangelical Christian clubs.

In 1985, a year after Congress passed the equal access law, school officials in Omaha, Neb., refused a student request for permission to form a Christian club at a public high school. The club's activities included reading and discussing the Bible and engaging in prayer. The students brought suit under the Equal Access Act, and the school officials responded that allowing such a club in a public school would violate the Establishment Clause.

In the court case, *Board of Education v. Mergens* (1990), the Supreme Court upheld the Equal Access Act. The 8-1 majority reasoned that high schools were indistinguishable from universities for purposes of equal access to public facilities. Because there were many student groups devoted to different and frequently opposing causes, the court determined that no reasonable observer would see the school's recognition of a religious group as an official endorsement of the group's religious views.

The limits of *Widmar* and *Mergens* were later put to the test in *Rosenberger v. University of Virginia* (1995) and *Good News Club v. Milford Central School District* (2001). In *Rosenberger*, the Supreme Court held (5-4) that the Free Speech Clause of the First Amendment required a state university to grant the

same printing subsidy to an evangelical journal that it made available to all other student journals. The dissenters argued, unsuccessfully, that state financial support for a proselytizing journal violated the Establishment Clause. In *Good News Club*, a 6-3 majority held that the Free Speech Clause prohibited an elementary school from excluding an evangelical Christian program for children from the list of accepted after-school activities.

These equal access decisions have led to new controversies in the lower courts. In *Child Evangelism Fellowship of Maryland v. Montgomery County Public Schools* (2006), for instance, a federal appellate court extended the equal access principle to fliers that schools distributed to students to take home for the purpose of informing parents about after-school activities. For years the county had distributed fliers for children's sports leagues and activities like the Boy Scouts. But it refused to distribute fliers for the after-school programs of the Child Evangelism Fellowship of Maryland, which are not held on school property. The litigation is not complete, but the fellowship has won several rounds in court. Most recently, the 4th U.S. Circuit Court of Appeals held that the county's flier distribution policy is unconstitutionally discriminatory.

The presence of student religious groups in public schools has raised one additional issue. At times these groups insist that their officers make specific religious commitments, such as accepting Jesus Christ as savior and maintaining sexual abstinence outside of heterosexual marriage. As a result, some students are excluded from joining the group or from its leadership ranks. In *Hsu v. Roslyn Union Free School District No. 3* (1996), the 2nd U.S. Circuit Court of Appeals held that the federal Equal Access Act gave students in an evangelical Christian group the right to maintain religious criteria for office. The court said the school's poli-

cy against religious discrimination by student groups was unenforceable in this instance.

Similar issues have arisen with respect to chapters of the Christian Legal Society (CLS) at state university law schools. Those chapters insist that their members and officers make certain commitments, including a renunciation of homosexual activity. When challenged by schools on the grounds that its policies discriminate based on religion and sexual orientation, CLS has responded that its policies are protected by freedom of religion and freedom of association.

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That argument is based on the Supreme Court's opinion in *Boy Scouts v. Dale* (2000), which upheld the Scouts' right to exclude an openly gay Eagle Scout leader. The CLS's position, however, differs from the Boy Scouts' position in *Dale*: The CLS is looking for affirmative support and recognition by state universities rather than just the right to be left alone in its associational choices.

The courts have remained split over the conflict between CLS and universities that are seeking to enforce anti-discriminatory policies. In *Christian Legal Society v. Kane* (2006), a federal district court in California emphasized that distinction in ruling that the Hastings College of the Law can insist

that its CLS chapter not exclude students who engaged in “unrepentant homosexual conduct.” The society remains free to exclude such students if it does not seek the benefits of official recognition, the court ruled.

In contrast to the *Kane* ruling, the 7th U.S. Circuit Court of Appeals ordered Southern Illinois University to continue to recognize the CLS chapter in *Christian Legal Society v. Walker* (2006).

A three-judge panel of the court ruled 2-1 that the organization’s right of association, coupled with its right to continue to participate in the school’s forum of ideas, made it likely to prevail against the university’s effort to end recognition of the society because of its policy concerning officer status and homosexual conduct. The conflict brewing among various courts on this question suggests that the matter may ultimately be headed to the Supreme Court.

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