TEACHING ABOUT RELIGION IN THE PUBLIC SCHOOLS

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ABSTRACT

The *Toledo Guiding Principles on Teaching about Religions and Beliefs in Public Schools* ("*Toledo Principles*") call for compulsory courses on comparative religion in European public schools. If a similar proposal were made in the United States, the Supreme Court would likely strike it down under the Establishment Clause of the First Amendment. Though accepting that conclusion, this Article will nonetheless challenge the Court's misreading of that Clause to prohibit any official preference for religion and will trace its wooden application in the context of American public education.

INTRODUCTION

With his usual eloquence, Justice Robert Jackson made the case for teaching about religion in the public schools sixty years ago:

> I should suppose it is a proper, if not an indispensable, part of preparation for a worldly life to know the roles that religion and religions have played in the tragic story of mankind. The fact is that, for good or for ill, nearly everything in our culture worth transmitting, everything which gives meaning to life, is saturated with religious influences, derived from paganism, Judaism, Christianity—both Catholic and Protestant—and other faiths accepted by a large part of the world's peoples. One can hardly respect a system of education that would leave the student wholly

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> ignorant of the currents of religious thought that move the world society for a part in which he is being prepared.[1]

Fifteen years later, the Supreme Court agreed. As the majority in *School District of Abington v. Schempp* stated in dictum, "study of the Bible or of religion, when presented objectively as part of a secular program of education, may . . . be effected consistently with the First Amendment."[2]

This Article explores whether public schools in the United States can—consistent with the Establishment Clause of the First Amendment[3]—require their students to attend such instruction. Notably, the *Toledo Principles*, published in 2007 by the Organization

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1. Illinois *ex rel.* McCollum v. Bd. of Educ., 333 U.S. 203, 236 (1948) (Jackson, J., concurring).

2. Sch. Dist. of Abington v. Schempp, 374 U.S. 203, 225 (1963). "The holding of the Court today plainly does not foreclose teaching about the Holy Scriptures or about the differences between religious sects in classes in literature or history." *Id.* at 300 (Brennan, J., concurring) (emphasis omitted). *See also* Edwards v. Aguillard, 482 U.S. 578, 594 (1987) ("[T]eaching a variety of scientific theories about the origins of humankind to [public] schoolchildren might be validly done with the clear secular intent of enhancing the effectiveness of science instruction."); *id.* at 608 (Powell, J., concurring) ("The Establishment Clause is properly understood to prohibit the use of the Bible and other religious documents in public school education only when the purpose of the use is to advance a particular religious belief."); Stone v. Graham, 449 U.S. 39, 42 (1980) (suggesting that "the Bible may constitutionally be used [by public schools] in an appropriate study of history, civilization, ethics, comparative religion, or the like."); Epperson v. Arkansas, 393 U.S. 97, 106 (1968) ("[S]tudy of religions and of the Bible from a literary and historic viewpoint, presented objectively as part of a secular program of education, need not collide with the First Amendment's prohibition . . . .").

3. U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof[.]"). A Free Exercise challenge to mandatory instruction about religion would ultimately hinge on resolution of the Establishment Clause issue. To warrant application of strict scrutiny, case law requires that parents combine with their Free Exercise challenge a claim that such instruction would impair their right to direct the education of their children. *See* Emp't Div., Dept. of Human Res. of Oregon v. Smith, 494 U.S. 872, 881 (1990).

> The only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as . . . the right of parents . . . to direct the education of their children.

Id. (citations omitted). *See also* Wisconsin v. Yoder, 406 U.S. 205 (1972) (applying heightened scrutiny to invalidate compulsory attendance laws that required Amish parents, over their religious objections, to send their children to school). Even if the aims of the *Toledo Principles* were found compelling, strict scrutiny would still require government to demonstrate that mandatory instruction, as a means for their promotion, was at least legitimate, thus raising conformity with the Establishment Clause as the real issue in judging whether such instruction was constitutional. Consequently, we will focus the attention of this Article on the Establishment Clause.

for Security and Co-operation in Europe, recommend that member states adopt this practice, concluding that, "[w]here compulsory courses involving teaching about religions and beliefs are sufficiently neutral and objective, requiring participation in such courses as such does not violate the freedom of religion and belief . . . ."[4] To the extent the authors of these principles thought the United States Supreme Court would agree,[5] they were mistaken. Because compelled instruction about religion would prove divisive and threaten parental control over their children's religious training, the Court would likely hold the practice unconstitutional.[6] Furthermore, by making instruction compulsory, the Court could strike down the practice as an impermissible preference for religion.

We will begin by identifying the first principle of the Court's modern Establishment Clause jurisprudence and briefly critique the demonstrably flawed foundation on which it rests. We will then examine its scrupulous application in the public school context. The effect of that application has been to acclimate today's Americans to a public arena where religion is out-of-place. After describing the *Toledo Principles*, we will conclude by showing why, even adopting a less rigid understanding of the Establishment Clause, the Court would still reject them on their own terms.

NEITHER PREFERENCE NOR AID FOR RELIGION

The First Amendment to the United States Constitution provides in part that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof[.]"[7] Like the other provisions of the Bill of Rights, the Establishment and Free Exercise

4. OFF. FOR DEMOCRATIC INSTS. AND HUM. RTS., ORG. FOR SEC. AND CO-OPERATION IN EUR., TOLEDO GUIDING PRINCIPLES ON TEACHING ABOUT RELIGIONS AND BELIEFS IN PUBLIC SCHOOLS 14 (2007) [hereinafter TOLEDO PRINCIPLES], *available at* http://www.osce.org/odihr/29154. The OSCE is the world's largest regional security organization, with fifty-six member states from Europe, Central Asia, and North America. *See Who We Are*, ORG. FOR SECURITY AND CO-OPERATION IN EUROPE, http://www.osce.org/who (last visited Oct. 15, 2012).

5. TOLEDO PRINCIPLES, *supra* note 4, at 70.

6. The Vatican has also objected to the *Toledo Principles*, fearing they could impair the rights of parents over the religious education of their children. *See Why did the Vatican Veto the OSCE's Guidelines on Teaching Religion?*, NEW EUROPE POST (July 25, 2009, 11:18 PM), http://www.neurope.eu/blog/why-did-vatican-veto-osce-s-guidelines-teaching-religion (interviewing Msgr. Michael W. Banach, permanent representative of the Holy See to the OSCE).

7. U.S. CONST. amend. I.

Clauses were originally intended to limit federal and not state power.[8] It was not until 1940 that the Court first applied the Religion Clauses against the states.[9]

Seven years later, in *Everson v. Board of Education*,[10] the Court began fashioning the principles that would govern the Establishment Clause's future application. Though four justices dissented from the actual holding,[11] the Court was of one mind[12] that "the clause against

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8. *See* Barron v. Mayor of Baltimore, 32 U.S. 243 (1833). The text of the First Amendment obviously reflects this intent in directing its prohibitions specifically against Congress.

9. *See* Cantwell v. Connecticut, 310 U.S. 296, 303 (1940) ("The First Amendment declares that Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. The Fourteenth Amendment has rendered the legislatures of the states as incompetent as Congress to enact such laws."). The vehicle the Court employed for incorporating Bill of Rights' provisions against the states was the liberty component of the Fourteenth Amendment Due Process Clause. *See id.* ("The fundamental concept of liberty embodied in [the Due Process Clause of the Fourteenth] Amendment embraces the liberties guaranteed by the First Amendment.").

The Court has observed that the "'first and most immediate purpose [of the Establishment Clause] rested on the belief that a union of government and religion tends to destroy government and to degrade religion.'" Sch. Dist. of Abington v. Schempp, 374 U.S. 203, 221 (1963) (quoting Engel v. Vitale, 370 U.S. 421, 431 (1962)). It is not readily apparent how a provision meant to safeguard government and religion can serve to define what constitutes personal liberty for purposes of the Fourteenth Amendment. "The fallacy in this contention," according to Justice Brennan, "is that it underestimates the role of the Establishment Clause as a coguarantor, with the Free Exercise Clause, of religious liberty." *Id.* at 256 (Brennan, J., concurring). If this response were correct, the Establishment Clause—like the Free Exercise Clause—should focus on government coercion, the principle threat to religious freedom. This is an interpretation, however, that the Court has repeatedly rejected. *See id.* at 221 ("The Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce non-observing individuals or not." (quoting *Engel*, 370 U.S. at 430)).

10. Everson v. Bd. of Educ., 330 U.S. 1 (1947).

11. The majority held that using public funds to reimburse parents for costs incurred in transporting their children to parochial schools did not violate the Establishment Clause. The dissenters considered the holding discordant with the very principles the majority had embraced. "The case which irresistibly comes to mind as the most fitting precedent," quipped Justice Jackson in dissent, "is that of Julia who, according to Byron's reports, 'whispering "I will ne'er consent,"—consented.'" *Id.* at 19 (Jackson, J., dissenting). In fact, the majority's approach was consistent with *Cochran v. Louisiana*, the only prior case in which the Court had addressed the constitutionality of public aid to parochial education. *See* Cochran v. Louisiana, 281 U.S. 370 (1930).

12. *See* Illinois *ex rel.* McCollum v. Bd. of Educ., 333 U.S. 203, 211 (1948).

> The majority in the Everson case, and the minority . . . agreed that the First Amendment's language, properly interpreted, had erected a wall of separation between Church and State. They disagreed as to the facts shown by the record and as to the proper application of the First Amendment's language to those facts.

Id.

establishment of religion by law was intended to erect 'a wall of separation between Church and State.'"[13] That wall prohibited both state and federal governments from "pass[ing] laws which aid one religion, aid all religions, or prefer one religion over another."[14] It excluded any contention that "historically the First Amendment was intended to forbid only government preference of one religion over another, not an impartial governmental assistance of all religions."[15] And it precluded any government from "pass[ing] laws or impos[ing] requirements which aid all religions as against non-believers."[16]

Both Justice Black for the majority in *Everson* and Justice Rutledge for the dissent derived these principles from a common historical root. They emphasized the Assessment Controversy in Virginia during the mid-1780s as indicative of the views then prevalent in the country against established religion.[17] A bill taxing citizens for the

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13. *Everson*, 330 U.S. at 16 (quoting Thomas Jefferson); *see id.* at 60 (Rutledge, J., dissenting) ("The Constitution requires, not comprehensive identification of state with religion, but complete separation.").

14. *Id.* at 15; *see id.* at 60 (Rutledge, J., dissenting) ("[Unconstitutionality under the Establishment Clause is] not removed by multiplying to all-inclusiveness the sects for which support is exacted."). The full quotation from the majority opinion in *Everson* follows:

> The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa.

Id. at 15–16. This Article focuses on the language quoted in the text because it has tainted the Court's Establishment Clause jurisprudence ever since.

15. *McCollum*, 333 U.S. at 211.

16. Torcaso v. Watkins, 367 U.S. 488, 495 (1961) (footnote omitted).

17. *See Everson*, 330 U.S. at 13.

> This Court has previously recognized that the provisions of the First Amendment, in the drafting and adoption of which Madison and Jefferson played such leading roles, had the same objective and were intended to provide the same protection against governmental intrusion on religious liberty as the Virginia [Act for Religious Freedom].

Id.

> No provision of the Constitution is more closely tied to or given content by its generating history than the religious clause of the First Amendment. It is at once the refined product and the terse summation of that history. The history includes . . . the

support of their ministers[18] was defeated through Madison's efforts,[19] and Jefferson's Bill for Religious Freedom was enacted instead. Thus, the strict separationism of Madison's *Memorial and Remonstrance*[20] and of Jefferson's Bill for Religious Freedom, captured in his "wall" metaphor,[21] reflected the mood in Congress when the Religion Clauses were adopted.[22] More importantly, the views of Madison during the Assessment Controversy undoubtedly animated the Religion Clauses which he authored and should receive definitive weight in their interpretation. As Justice Rutledge observed:

> All the great instruments of the Virginia struggle for religious liberty thus became warp and woof of our constitutional tradition, not simply by the course of history, but by the common unifying force of Madison's life, thought and sponsorship. He epitomized the whole

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> long and intensive struggle for religious freedom in America, more especially in Virginia, of which the Amendment was the direct culmination.

Id. at 33–34 (Rutledge, J., dissenting) (footnote omitted).

18. "A Bill Establishing a Provision for Teachers of the Christian Religion," popularly known as "The Assessment Bill," was introduced in the Virginia General Assembly by Governor Patrick Henry in 1784. Had it passed, the bill would have taxed citizens for the support of the Christian ministers or places of worship they designated or, in default, for the support of education. *See* MCCONNELL ET AL., RELIGION AND THE CONSTITUTION 60–62 (2002).

19. *See Everson*, 330 U.S. at 12; *see also id.* at 37–38 (Rutledge, J., dissenting).

20. The *Memorial and Remonstrance* was the challenge Madison circulated against the *Assessment Bill*. *See* James Madison, *A Memorial and Remonstrance Against Religious Assessments*, *reprinted in* SELECTED WRITINGS OF JAMES MADISON (Ralph Ketcham ed., 2006). "As the Remonstrance discloses throughout," Justice Rutledge observed, "Madison opposed every form and degree of official relation between religion and civil authority." *Everson*, 330 U.S. at 39 (Rutledge, J., dissenting).

21. *See supra* note 13 and accompanying text. The metaphor appeared in a brief note of courtesy Jefferson sent to a committee of the Danbury Baptist Association:

> Believing with you that religion is a matter which lies solely between man and his God, that he owes account to none other for his faith or his worship, that the legislative powers of government reach actions only, and not opinions, I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should "make no law respecting an establishment of religion, or prohibiting the free exercise thereof," thus building a wall of separation between Church and State.

MCCONNELL ET AL., *supra* note 18, at 54–55. Ironically, this emblem of President Jefferson's strict separationism closed with a prayer "for the protection and blessing of the common Father and Creator of man." *Id.* at 55.

22. *See supra* note 17.

> of that tradition in the Amendment's compact, but nonetheless comprehensive, phrasing.[23]

Neither Black nor Rutledge, however, explained why, in concentrating on the controversy in Virginia over the Assessment Bill, they ignored such states as Massachusetts[24] and New Hampshire[25] that had maintained systems of tax support for religion.[26] Further challenges to their use of history have recently emerged on the Court.[27] Then-Justice Rehnquist pointed out, for example, that Jefferson was in France during the consideration of the First Amendment and that the letter that included his "wall" metaphor was written fourteen years after that amendment was passed by Congress: "He would seem to any detached observer as a less than ideal source of contemporary history as to the meaning of the Religion Clauses of the First Amendment."[28]

Further, the language Madison proposed to Congress, "nor shall any national religion be established,"[29] and his explanation on the House floor, that it was meant to quell fears that "one sect might obtain a pre-eminence, or two combine together, and establish a religion to which they would compel others to conform,"[30] clearly was not aimed to prevent all preferences for religion.[31] More importantly,

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23. *Everson*, 330 U.S. at 39 (Rutledge, J., dissenting). *See also* Sch. Dist. of Abington v. Schempp, 374 U.S. 203, 214 (1963) ("[T]he views of Madison and Jefferson [on church and state], preceded by Roger Williams, came to be incorporated not only in the Federal Constitution but likewise in those of most of our States." (footnote omitted)).

24. *See* MASS. CONST. of 1780, pt. 1, art. III.

25. *See* N.H. CONST. of 1784, pt. 1, art. VI.

26. Black cited three prior cases to justify his focus on the Virginia Act for Religious Freedom in interpreting the Establishment Clause. *See supra* note 17. Two cases—*Davis v. Beason* and *Watson v. Jones*—mentioned nothing about that Act or the Assessment Controversy. *See* Davis v. Beason, 133 U.S. 333 (1890); Watson v. Jones, 80 U.S. 679 (1872). (In fact, neither mentioned Madison or Jefferson by name.). The third case, *Reynolds v. United States*, discussed both but in the course of interpreting, not the Establishment, but rather the Free Exercise Clause of the First Amendment. *See* Reynolds v. United States, 98 U.S. 145, 162–64 (1879).

27. *See* McCreary County v. ACLU, 545 U.S. 844, 885–94 (2005) (Scalia, J., dissenting); Wallace v. Jaffree, 472 U.S. 38, 91–106 (1985) (Rehnquist, J., dissenting). *Cf.* Zellman v. Simmons-Harris, 536 U.S. 639, 678–80 (2002) (Thomas, J., concurring) (suggesting a less rigid application of the Establishment Clause when state—rather than federal—action is challenged).

28. *Wallace*, 472 U.S. at 92 (Rehnquist, J., dissenting).

29. *Id.* at 94 (Rehnquist, J., dissenting).

30. 1 ANNALS OF CONG. 758 (1789) (Joseph Gales ed., 1834).

31. As Justice Rehnquist stated:

the House did not adopt Madison's language;[32] thus, Black and Rutledge were not warranted in attributing to him definitive weight in the interpretation of the text that was ultimately approved.

Concerning that text, the debates in Congress unfortunately shed little light on what was meant by a "law respecting an establishment of religion." The Senate's deliberations were secret; and, the entire debate in the House was "contained in two full columns of the 'Annals,' and does not seem particularly illuminating."[33] One thing seems clear, however: If Congress had intended to prohibit all preferences for religion, it had the vehicle to do just that in an amendment proposed by Representative Livermore, that "Congress shall make no laws touching religion."[34] Though the House initially

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> It seems indisputable from these glimpses of Madison's thinking, as reflected by actions on the floor of the House in 1789, that he saw the Amendment as designed to prohibit the establishment of a national religion, and perhaps to prevent discrimination among sects. He did not see it as requiring neutrality on the part of government between religion and irreligion.

Wallace, 472 U.S. at 98 (Rehnquist, J., dissenting). Madison feared that amending the Constitution through the convention process—rather than through proposals submitted to the states by Congress—could, given the times, endanger its very structure:

> The Congress, who will be appointed to execute as well as to amend the Government, will probably be careful not to destroy or endanger [the framework of the Constitution]. A convention, on the other hand, meeting in the present ferment of parties, and containing perhaps insidious characters from different parts of America, would at least spread a general alarm, and be but too likely to turn every thing into confusion and uncertainty.

Letter from James Madison to George Eve (Jan. 2, 1789), *available at* http://presspubs.uchicago.edu/founders/documents/v1ch14s48.html. This may explain the limited aim of Madison's proposal, to better secure its passage through Congress by avoiding any controversial matter.

32. Madison's language was referred to a select committee of the House that removed the word "national." *See* 1 ANNALS OF CONG., *supra* note 30, at 759; *see also Wallace*, 472 U.S. at 95 (Rehnquist, J., dissenting). Madison unsuccessfully attempted to reinstate the term in a proposal on the House floor. *See* 1 ANNALS OF CONG., *supra* note 30, at 731; *see also Wallace*, 472 U.S. at 96–97 (Rehnquist, J., dissenting). Ultimately, neither Madison's language nor that of the Select Committee was adopted by the House. *See id.*

33. *Id.* at 95.

34. 1 ANNALS OF CONG., *supra* note 30, at 759. *See Wallace*, 472 U.S. at 96 (Rehnquist, J., dissenting). Reviewing the House drafts and the final Senate proposal, Justice Souter concluded that "[t]he Framers repeatedly considered and deliberately rejected . . . language" directed to "'a religion,' 'a national religion,' 'one religious sect,' or specific 'articles of faith,'" extending the prohibition against establishments instead to "'religion' in general." Lee v. Weisman, 505 U.S. 577, 614–15 (1992) (Souter, J., concurring) (footnote omitted). When it came to determining what the First Amendment meant by "an establishment of religion" in general or a "law respecting" such, however, he merely resorted to Madison, Jefferson, and the Virginia Act for

adopted that proposal,[35] it was replaced five days later without any apparent debate.[36] Ultimately, to understand the text of the Establishment Clause, we must rely on the actions of the first Congress that approved it.

Justice Scalia ably summarized those actions in a recent dissenting opinion:

> The First Congress instituted the practice of beginning its legislative sessions with a prayer. The same week that Congress submitted the

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Religious Freedom for the conclusion that the Framers intended to prohibit all support or preferential aid. *See id.* at 615–16 (Souter, J., concurring).

Souter further contended that, "[i]f the early Congress's political actions were determinative, and not merely relevant, evidence of constitutional meaning, we would have to gut our current First Amendment doctrine to make room for political censorship [as sanctioned by the 1798 Sedition Act]." *Id.* at 626. Yet, unlike the furor unleashed by passage of that Act, there is no record of similar popular opposition to the first Congress's support for religion, reflecting acquiescence by the People in their representatives' understanding of the Establishment Clause. *See* N.Y. Times v. Sullivan, 376 U.S. 254, 273–76 (1964); *see also* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). There is no record of similar popular opposition to the first Congress's support for religion, reflecting acquiescence by the people in their representatives' understanding of the Establishment Clause.

Finally, Souter discounted the actions of the first Congress by implying its members were hypocrites, who, "like other politicians, could raise constitutional ideals one day and turn their backs on them the next." *Lee*, 505 U.S. at 626 (Souter, J., concurring). Suffice it to say that:

> The interpretation of the Establishment Clause by Congress in 1789 takes on special significance in light of the Court's emphasis that the First Congress "was a Congress whose constitutional decisions have always been regarded, as they should be regarded, as of the greatest weight in the interpretation of that fundamental instrument."

Lynch v. Donnelly, 465 U.S. 668, 674 (1984) (quoting Myers v. United States, 272 U.S. 52, 174–75 (1926)).

35. *See* 1 ANNALS OF CONG., *supra* note 30, at 759; *see also Wallace*, 472 U.S. at 97 (Rehnquist, J., dissenting).

36. *See* 1 ANNALS OF CONG., *supra* note 30, at 796. The substitute, introduced by Fisher Ames of Massachusetts, read: "Congress shall make no law establishing religion . . . ." *Id.* It retained the active tense of Livermore's language, that shadowed the form of the Necessary and Proper Clause, *see* U.S. CONST., art. I, § 8, cl. 18 ("The Congress shall have power . . . [t]o make all Laws which shall be necessary and proper for carrying into Execution the . . . powers . . . vested in the government of the United States."), that some state ratifying conventions feared could enable Congress to establish a national religion. *See* 1 ANNALS OF CONG., *supra* note 30, at 758–59 (Madison); *see also Wallace*, 472 U.S. at 95–97 (Rehnquist, J., dissenting). The breadth of the prohibition Livermore proposed paralleled modern interpretations of Congress's power under the Necessary and Proper Clause. *See, e.g.*, Katzenbach v. Morgan, 384 U.S. 641, 653 (1966) (construing Congress' power under Section 5 of the Fourteenth Amendment *in pari materia* with that under the Necessary and Proper Clause: "It is not for us to review the congressional resolution . . . . It is enough that we be able to perceive a basis upon which the Congress might resolve the conflict as it did."). By focusing specifically on establishment, however, Ames' substitute was far more limited in scope than the approach Livermore had proposed.

> Establishment Clause as part of the Bill of Rights for ratification by the States, it enacted legislation providing for paid chaplains in the House and Senate. The day after the First Amendment was proposed, the same Congress that had proposed it requested the President to proclaim "a day of public thanksgiving and prayer, to be observed, by acknowledging, with grateful hearts, the many and signal favours of Almighty God." President Washington offered the first Thanksgiving Proclamation shortly thereafter, devoting November 26, 1789, on behalf of the American people "'to the service of that great and glorious Being who is the beneficent author of all the good that was, that is, or that will be,'" thus beginning a tradition of offering gratitude to God that continues today. The same Congress also reenacted the Northwest Territory Ordinance of 1787, 1 Stat. 50, Article III of which provided: "Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged." And of course the First Amendment itself accords religion (and no other manner of belief) special constitutional protection.[37]

It seems indisputable from these measures Congress enacted contemporaneously with its sponsorship of the First Amendment that Black and Rutledge were simply wrong in their factual assertion that the Establishment Clause was meant to prohibit all governmental preference for religion. "[*S*]*tare decisis* may bind courts as to matters of law, but it cannot bind them as to matters of history."[38] Regrettably, however, court majorities still feel bound to the skewed historical narrative in *Everson*, and to the flawed interpretation of the Establishment Clause on which it rests, all to the detriment of the country and, as we will next explore, to its public schools and their students.

EVERSON IN THE PUBLIC SCHOOLS

The Court scrupulously adheres to *Everson*'s ban on preference or aid for religion when public school programs are involved. For example, of the six cases invalidating government action because of a purpose to benefit religion,[39] five arose in the public school context.[40]

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37. McCreary County v. ACLU, 545 U.S. 844, 886–87 (2005) (Scalia, J., dissenting) (citations omitted). *See also Wallace*, 472 U.S. at 100–03 (Rehnquist, J., dissenting).

38. *Wallance*, 472 U.S. at 99 (Rehnquist J., dissenting).

39. *See McCreary County*, 545 U.S. 844; Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000); Edwards v. Aguillard, 482 U.S. 578 (1987); *Wallace*, 472 U.S. 38; Stone v. Graham, 449

We will briefly canvas the Court's public school decisions and discuss some reasons why the Court demands such strict compliance with *Everson's* principles.

U.S. 39 (1980); Epperson v. Arkansas, 393 U.S. 97 (1968). All but *Epperson* were decided after the Court's decision in *Lemon v. Kurtzman*, in which the Court developed the following test for determining whether government action complied with the Establishment Clause: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.'" Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971) (citations omitted).

We need not catalog here the failings of the *Lemon* test. Suffice it to say that the test implements *Everson* and its flawed historical principles. *See Wallace*, 472 U.S. at 108 (Rehnquist, J., dissenting) ("[T]he purpose and effect prongs [of the *Lemon* test] have the same historical deficiencies as the wall concept itself . . . ."). Justice Rehnquist concluded:

> [T]he *Lemon* test has no more grounding in the history of the First Amendment than does the wall theory upon which it rests. The three-part test represents a determined effort to craft a workable rule from a historically faulty doctrine; but the rule can only be as sound as the doctrine it attempts to service.

Id. at 110.

Several justices have severely criticized the test. *See McCreary County*, 545 U.S. at 890 (Scalia, J., dissenting) (collecting criticism of *Lemon*); Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384, 398–99 (1993) (Scalia, J., concurring in judgment) (collecting criticism). The test is applied sporadically—*see Lynch*, 465 U.S. at 679 ("[W]e have repeatedly emphasized our unwillingness to be confined to any single test or criterion in this sensitive area."); *see also Lamb's Chapel*, 508 U.S. at 398–99 (Scalia, J., concurring in judgment)—and arguably in a result-oriented fashion, *see id.* at 399 (Scalia, J., concurring in judgment) ("When we wish to strike down a practice . . . [the *Lemon* test] forbids, we invoke it; when we wish to uphold a practice it forbids, we ignore it entirely. Sometimes, we take a middle course, calling its three prongs 'no more than helpful signposts[.]'" (citations and internal quotation marks omitted)). *Cf. McCreary County*, 545 U.S. at 891 (Scalia, J., dissenting).

The fact that—in *Edwards*, *Wallace*, and *Stone*—the Court used the first prong of the *Lemon* test to invalidate practices in public schools is clear evidence of its rigidity in that setting since, elsewhere, the Court has typically required that government's secular purpose only be plausible and not merely a sham. As Justice Rehnquist stated:

> Under our prior decisions, governmental assistance programs have consistently survived [the *Lemon* test's purpose prong] even when they have run afoul of other aspects of [its] framework. This reflects, at least in part, our reluctance to attribute unconstitutional motives to the States, particularly when a plausible secular purpose for the State's program may be discerned from the face of the statute.

Mueller v. Allen, 463 U.S. 388, 394–95 (1983) (citations omitted). *See also McCreary County*, 545 U.S. at 902 n.9 (Scalia, J., dissenting). *But see id.* at 864 (opinion for the Court by Souter, J.) (stating that to satisfy *Lemon*, "the secular purpose required has to be [not only] genuine, not a sham, [but also] not merely secondary to a religious objective.").

40. The exception was *McCreary County* which involved a challenge to the posting of the Ten Commandments in a county courthouse.

The Court reaffirmed those principles one year after *Everson* in *McCollum*.[41] An Illinois program releasing public school students from their secular classes for weekly religious instruction provided by local clergy in public school classrooms was challenged under the Establishment Clause. Justice Black wrote for the Court that the principles of *Everson* were not satisfied just because government aid was given impartially to all religions.[42] He struck down the program because public school property was used to propagate religion and because, even though students enrolled voluntarily at the choice of their parents, the state's compulsory education laws were employed as an aid to promote religious instruction by insuring students' actual attendance.[43]

In contrast, acknowledging that, "[w]hen the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions[,]"[44] the Court seemed to repudiate *McCollum* only four years later. In *Zorach v. Klauson*, a divided Court upheld New York's release-time program in which students received religious instruction during the school day but off public school grounds.[45] The Court held the program a permissible accommodation of religion under the Establishment Clause.[46] It claimed to "follow the McCollum case" since the public schools did "no more than accommodate their schedules to a program of outside religious instruction," while, in *McCollum*, "the classrooms were used for religious instruction and the force of the public school was used to promote that instruction."[47]

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41. Illinois *ex rel.* McCollum v. Bd. of Educ., 333 U.S. 203, 236 (1948).

42. *See id.* at 211–12.

43. *See id.* at 212 ("Here not only are the state's tax-supported public school buildings used for the dissemination of religious doctrines. The State also affords sectarian groups an invaluable aid in that it helps to provide pupils for their religious classes through use of the state's compulsory public school machinery.").

44. Zorach v. Klauson, 343 U.S. 306, 313–14 (1952).

45. *Id.* at 315. Justices Jackson, Frankfurter, and Black filed separate dissents, in contrast with *McCollum*, where only Justice Reed dissented, and *Everson*, where, at least on basic principles, there was unanimity. *See id.* at 315–25; *McCollum*, 333 U.S. at 238–56; Everson v. Bd. of Educ., 330 U.S. 1 (1947).

46. *Zorach*, 343 U.S. at 313–14 ("When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs.").

47. *Id.* at 315.

The dissent pointed out, however, that, in both cases, the states' compulsory education laws were used to insure attendance at religious classes.[48] Nevertheless, unlike *McCollum*, the religious instruction in *Zorach* was in no way sponsored by public officials nor was it lent the weight of state authority through integration into the public school curriculum, a distinction that would prove significant in later cases.[49]

For example, in *Engel v. Vitale*, Justice Black—again writing for the Court, and without citation of a single case—invalidated the use of a non-denominational prayer, composed by the New York Board of Regents, to begin the classroom day in the state's public schools.[50] Even though students could choose not to participate, he suggested that use of the Regents' Prayer was nonetheless indirectly coercive.[51] But he rested the holding on what he considered a more essential ground—as an officially composed prayer used as part of a public school program to further religious belief—the Regents' Prayer fostered that union between church and state that the Establishment Clause forbade.[52]

The Court extended *Engel* two years later in *School District of Abington v. Schempp*, prohibiting Bible readings and recitation of the

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48. *See id.* at 316–18 (Black, J., dissenting); *id.* at 318 ("New York is manipulating its compulsory education laws to help religious sects get pupils."). Justice Jackson similarly charged that "[t]he distinction attempted between [the *McCollum*] case and this is trivial, almost to the point of cynicism, magnifying its nonessential details and disparaging compulsion which was the underlying reason for invalidity." *Id.* at 325 (Jackson, J., dissenting).

49. *See, e.g.*, Sch. Dist. of Abington v. Schempp, 374 U.S. 203, 262–63 (1963) (Brennan, J., concurring).

> The deeper difference was that the McCollum program placed the religious instructor in the public school classroom in precisely the position of authority held by the regular teachers of secular subjects, while the Zorach program did not. The McCollum program, in lending to the support of sectarian instruction all the authority of the governmentally operated public school system, brought government and religion into that proximity which the Establishment Clause forbids.

Id. (footnote omitted).

50. Engel v. Vitale, 370 U.S. 421, 424 (1962).

51. *See id.* at 431 ("When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain.").

52. *See id.* at 431–32. Justice Black stated more broadly that "it is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by government." *Id.* at 425. Taken literally, this could invalidate a host of government practices outside the public schools—presidential inaugural invocations, Thanksgiving Day proclamations, "In God We Trust" as the national motto, and the like—that the Court has never yet questioned.

Lord's Prayer in Pennsylvania and Baltimore public schools.[53] Even though no officially composed prayers were said, the Court held the practice invalid under the Establishment Clause. Such practices—"prescribed as part of the curricular activities of students" at the opening of the school day, "held in the [public] school buildings," and supervised by "teachers employed in those schools"[54]—constituted governmentally sponsored religious exercises; the fact that attendance was voluntary furnished no defense.[55]

The Court in *Stone v. Graham* next prohibited Kentucky from posting the Ten Commandments on the walls of its public school classrooms, even though, unlike the exercises in *Engel* and *Schempp*, the display was passive.[56] The per curium opinion rejected the secular purpose the Commonwealth had proffered,[57] defining the legislature's real motive instead as "induc[ing] the schoolchildren to read, meditate upon, perhaps to venerate and obey, the Commandments."[58] Thus, *Stone* is among the few cases where the Court rigidly required that government have "a secular legislative purpose,"[59] finding Kentucky's aim was to further religion in spite of a plausible secular objective.

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53. *See Schempp*, 374 U.S. 203. Justice Clark, writing for the Court, opined that continued criticism of *Everson*, "in the light of the consistent interpretation in cases of this Court, seem[ed] entirely untenable and of value only as academic exercises." *Id.* at 217. Given the recent attacks on *Everson*, however, Clark was presumptive in this claim. *See supra* note 27 and accompanying text.

54. *Schempp*, 374 U.S. at 223.

55. *Id.* at 224–25. The standard the *Schempp* Court fashioned to implement *Everson's* principles, that was later incorporated as part of the *Lemon* test, read:

> If either [the purpose or primary effect of the enactment] is the advancement or inhibition of religion then [it] exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion.

Id. at 222.

56. Stone v. Graham, 449 U.S. 39, 42 (1980) ("[It is not] significant that the Bible verses involved in this case are merely posted on the wall, rather than read aloud as in *Schempp* and *Engel* . . . .").

57. The Kentucky General Assembly required the following explanation at the bottom of each display: "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." *Id.* at 41 (quoting 1978 Ky. Acts, ch. 436, § 1) (internal quotation marks omitted). By concluding that the General Assembly "had no secular legislative purpose" for posting the Ten Commandments, *id.*, the Court must have considered the Commonwealth's explanation pretextual.

58. *Id.* at 42.

59. *See supra* note 39.

Another such case was *Wallace v. Jaffree* where the Court struck down a 1981 amendment to an Alabama statute, authorizing a moment of silence in public schools for the purpose of meditation, which provided that students could also use the time for voluntary prayer.[60] The majority found that the amendment had no other purpose than "to characterize prayer as a favored practice,"[61] thus failing the secular Purpose requirement of the Court's Establishment Clause test.[62]

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60. Wallace v. Jaffree, 472 U.S. 38, 40 (1985). The original statute, enacted in 1978, authorized one minute of silence in all Alabama public schools for meditation; the amendment added the phrase "or voluntary prayer." *Id.* (citing ALA. CODE § 16-1-20 (1978) and ALA. CODE § 16-1-20.1 (1981)). The Court apparently assumed that some "moment of silence" statutes could be constitutional. *Id.* at 62 (Powell, J., concurring); *id.* at 84 (O'Connor, J., concurring in judgment); *cf. id.* at 90–91 (White, J., dissenting) ("As I read the filed opinions, a majority of the Court would approve statutes that provided for a moment of silence but did not mention prayer.").

61. *Id.* at 60; *see also id.* at 56 ("[E]ven though a statute that is motivated in part by a religious purpose may satisfy [*Lemon's*] first criterion, the First Amendment requires that a statute must be invalidated if it is entirely motivated by a purpose to advance religion.") (citation omitted). Notably, though the amendment's sponsor testified that his aim was "to return voluntary prayer to our public schools," *id.* at 43 (internal quotation marks omitted), he further stated that his amendment was also meant "to clear up a widespread misunderstanding that a schoolchild is legally prohibited from engaging in silent, individual prayer once he steps inside a public school building," *id.* at 87 (Burger, C.J., dissenting) (emphasis omitted).

62. The *Wallace* majority adopted the "clarification" of *Lemon* that Justice O'Connor had advanced in *Lynch*. *See id.* at 56 ("In applying [*Lemon's*] purpose test, it is appropriate to ask 'whether government's actual purpose is to endorse or disapprove of religion.'" (quoting Lynch v. Donnelly, 465 U.S. 668, 690 (1984) (O'Connor, J., concurring)); *supra* note 39. As she explained her approach in *Lynch*:

> The Establishment Clause prohibits government from making adherence to a religion relevant in any way to a person's standing in the political community. . . . The . . . more direct infringement [of that prohibition] is government endorsement or disapproval of religion. Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community. Disapproval sends the opposite message. . . . It has never been entirely clear, however, how the three parts of the [*Lemon*] test relate to the principles enshrined in the Establishment Clause. Focusing on . . . endorsement or disapproval of religion clarifies the *Lemon* test as an analytical device. . . .
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> . . . .
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> The purpose prong of the *Lemon* test asks whether government's actual purpose is to endorse or disapprove of religion. The effect prong asks whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval. An affirmative answer to either question should render the challenged practice invalid.

Lynch, 465 U.S. at 687–89, 690 (O'Connor, J., concurring). It is unnecessary to repeat the many criticisms of O'Connor's Endorsement test, *see, e.g.,* County of Allegheny v. ACLU, 492 U.S. 573,

The Court extended its strict analysis beyond the classroom in *Lee v. Weisman*.[63] The majority struck down a practice in Providence public schools of inviting clergy to offer invocations and benedictions at graduation ceremonies.[64] Because school officials elected to include prayer, chose which clergy to invite, and advised them to keep their prayers non-sectarian,[65] the Court held that government had sponsored and directed a formal religious observance in the public schools, contrary to the Establishment Clause.[66] It distinguished *Marsh v. Chambers*, upholding Nebraska's practice of hiring chaplains to begin legislative sessions with prayer.[67] Unlike such proceedings "where adults are free to enter and leave with little comment and for any number of reasons,"[68] students, whose attendance at their graduation is voluntary in name only,[69] are under the control of school officials during the ceremony and subject to peer pressure.[70] In the Court's view, dissenters were thus "left with no alternative but to submit" and participate in the prayers.[71]

The Court has even held that prayer at public high school football games is unconstitutional. In *Santa Fe Independent School District v. Doe*, a Texas school district had authorized students at its public high

642–43 (1989) (Brennan, J., concurring in part & dissenting in part); *id.* at 668–77 (Kennedy, J., concurring in the judgment in part & dissenting in part); *Wallace*, 472 U.S. at 113–14 (Rehnquist, J., dissenting), except to note that an approach to the First Amendment that interprets the Establishment Clause as prohibiting government from endorsing religion, while reading the Free Exercise Clause as permitting—and, at times, requiring—it to accommodate religious (and only religious) conduct, is incoherent, not a surprising outcome given the approach's foundation in the flawed historical principles of *Everson*. *See supra* note 39.

63. Lee v. Weisman, 505 U.S. 577 (1992).

64. *Id.* at 586–87. The Court declined to reconsider the vitality of the *Lemon* test, deciding instead to rely on the following standard: "[A]t a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which 'establishes a [state] religion or religious faith, or tends to do so.'" *Id.* at 587 (quoting *Lynch*, 465 U.S. at 678) (alteration in original). *See also County of Allegheny*, 492 U.S. at 659 (Kennedy, J., concurring in the judgment in part & dissenting in part).

65. *See Lee*, 505 U.S. at 587–89.

66. *Id.* at 586 (comparing the practice of advising clergy that their prayers should be nonsectarian with the officially composed prayer in Engel v. Vitale, 370 U.S. 421, 588 (1962)). *But see id.* at 640 (Scalia, J., dissenting) ("The Court identifies nothing in the record remotely suggesting that school officials have ever drafted, edited, screened, or censored graduation prayers, or that [clergy were] a mouthpiece of the school officials.").

67. Marsh v. Chambers, 463 U.S. 783, 792–95 (1983).

68. *Lee*, 505 U.S. at 597.

69. *See id.* at 595 ("Law reaches past formalism. And to say a teenage student has a real choice not to attend her high school graduation is formalistic in the extreme.").

70. *Id.* at 592–94.

71. *Id.* at 597.

school to vote on whether varsity football games should begin with a "brief invocation and/or message" to "solemnize the event" and to elect the student speaker if the practice were approved.[72] The Court held the practice invalid because the school district's actual purpose was to endorse offering prayer at a high school event[73] and because students would perceive any prayer offered as governmentally endorsed.[74] It further suggested that, by authorizing student elections over whether to offer prayers at varsity games, the school district had injected religious division into its public schools,[75] and (in a particularly unconvincing passage) that high school students were

72. Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 298 n.6 (2000).

73. *See id.* at 316–17. In deciding that a facial challenge to the practice was successful, the Court applied the *Lemon* test, as modified by Justice O'Connor's "endorsement clarification." *Id.* at 314–16. The Court concluded that the student elections were a pretext for insulating "the District's long-established tradition of sanctioning student-led prayer at varsity football games" from constitutional attack. *Id.* at 315.

74. *Id.* at 307–08 (listing factors that would lead an objective observer to "perceive the pregame message as a public expression of the views of the majority of the student body delivered with the approval of the school administration.").

75. *Id.* at 311 ("The mechanism encourages divisiveness along religious lines in a public school setting, a result at odds with the Establishment Clause."). Notably, the Court has relied far less on divisiveness as an invalidating factor in Establishment Clause challenges outside the public school context. *See* Lynch v. Donnelly, 465 U.S. 668, 684 (1984) ("[Where direct public subsidy of church-sponsored institutions is not involved,] no inquiry into potential political divisiveness is even called for.") (challenge to the public display of a city-owned nativity scene). *See also* Mitchell v. Helms, 530 U.S. 793, 825 (2000) (plurality opinion) ("The dissent resurrects the concern for political divisiveness that once occupied the Court but that [recent] cases have rightly disregarded.") (challenge to the loan by Louisiana of books and equipment to parochial schools); Agostini v. Felton, 521 U.S. 203, 233–34 (1997) ("Under our current understanding of the Establishment Clause, [political divisiveness is] insufficient by [itself] to create an 'excessive' entanglement [under the *Lemon* test].") (challenge to the placement of publically-employed remedial instructors in parochial school classrooms); Wolman v. Walter, 433 U.S. 229, 263 (1977) (Powell, J., concurring in part & dissenting in part), *quoted in* Mueller v. Allen, 463 U.S. 388, 400 (1983) ("The risk of significant religious or denominational control over our democratic processes—or even of deep political division along religious lines—is remote, and when viewed against the positive contributions of sectarian schools, any such risk seems entirely tolerable in light of the continuing oversight of this Court.") (challenge to state tax deduction for educational expenses available to parents of students attending parochial schools).

Justice O'Connor has aptly explained why the Court has loosened its embrace of political divisiveness as an invalidating factor under the Establishment Clause: "It is curious indeed to base our interpretation of the Constitution on speculation as to the likelihood of a phenomenon which the parties may create merely by prosecuting a lawsuit." Aguilar v. Felton, 473 U.S. 402, 429 (1985) (O'Connor, J., dissenting), *quoted in Mitchell*, 530 U.S. at 825–26 (plurality opinion). *See Lynch*, 465 U.S. at 684–85 ("A litigant cannot, by the very act of commencing a lawsuit, however, create the appearance of divisiveness and then exploit it as evidence of entanglement."). That the prospect of divisiveness, however, remains an Establishment Clause concern in the public school context is additional evidence of the Court's rigorous application of *Everson* and its principles there.

coerced to attend such games[76] and to remain respectful during any prayers offered.[77]

Yet, when the activity at issue was not government-sponsored, the Court was more willing to find even prayer on public school premises constitutional. School officials in New York had opened their classrooms after hours to community groups offering students instruction in "moral and character development."[78] When a religious group sought to conduct such instruction through Bible reading and prayer, the Court in *Good News Club v. Milford Central School District*[79] held that allowing it access to an otherwise neutral community use program would not violate the Establishment Clause, provided the meetings "were held after school hours, not sponsored by the school, and open to any student who obtained parental

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76. *See Santa Fe Indep. Sch. Dist.*, 530 U.S. at 311 ("To assert that high school students do not feel immense social pressure, or have a truly genuine desire, to be involved in the extracurricular event that is American high school football is formalistic in the extreme.") (internal quotation marks omitted). To accept such pressure as "coercive," however, would empty the notion of all meaning, and was more likely a feeble attempt by the majority at analogizing the case to *Lee*. Notably, students, such as players, cheerleaders, or band members, required to attend the games, could easily have their scruples accommodated by timing the prayers before they gained the field.

77. *See id.* at 313. Like the legislators in *Marsh*, *see supra* note 71 and accompanying text, and unlike the graduates in Lee v. Weisman, 505 U.S. 577, 595 (1992), students attending high school football games "are free to enter and leave with little comment and for any number of reasons." *Id.* at 597.

78. Good News Club v. Milford Cent. Sch. Dist., 533 U.S. 98, 108 (2001). *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.* dealt with a similar challenge. Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384 (1993). Since no students were involved, however, that case is not strictly pertinent to our discussion. Suffice it to say that, as in *Good News Club*, the religious activity in *Lamb's Chapel* would not have been offered during school hours, would not have been sponsored by public officials, and would have been part of a classroom-use program open to a variety of community groups. *Id.* at 395.

79. The club alleged that its exclusion from the community use program violated the Speech Clause of the First Amendment. *See Good News Club,* 533 U.S. at 104. *Cf.* Capital Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 760 (1995) ("[I]n Anglo-American history, . . . government suppression of speech has so commonly been directed precisely at religious speech that a free-speech clause without religion would be Hamlet without the prince.") (emphasis omitted). School officials vainly responded that the restriction was required to avoid violating the Establishment Clause. *See Good News Club*, 533 U.S. at 112. *Cf.* Rosenberger v. Rector, 515 U.S. 819, 837–46 (1995) (permitting student group access to a university activity fund for purpose of paying expenses of a newspaper published from a religious perspective would not have violated the Establishment Clause); *Lamb's Chapel*, 508 U.S. at 395 (permitting church access to a public school community use program for purpose of showing a movie about family values from a religious perspective would not have violated the Establishment Clause); Widmar v. Vincent, 454 U.S. 263, 270–76 (1981) (permitting student group access to a university classroom use program for purpose of holding meetings that involved religious discussion and worship would not have violated the Establishment Clause).

consent."[80] In contrast to cases involving religious programs sponsored by public school officials, the Court was not persuaded that "[young] children will perceive that the school is endorsing the Club and will feel coercive pressure to participate."[81]

Finally, the Court has insisted that states not use the public school curriculum to aid religious doctrine. For example, in *Epperson v. Arkansas*, it held unconstitutional a state prohibition against teaching the theory of evolution in public schools.[82] The Court understood the Establishment Clause as "mandat[ing] governmental neutrality between religion and religion, and between religion and nonreligion"[83] and thus as "forbid[ing] alike the preference of a religious doctrine or the prohibition of theory which is deemed antagonistic to a particular dogma."[84] Arkansas had not acted neutrally by excising from the curriculum all discussions of the origins of Man; rather, the Court had "no doubt" that the state's motive was "to suppress the teaching of a theory which, it was thought, 'denied' the divine creation of man."[85]

Yet, when Louisiana attempted to provide public school students with a balanced treatment of the scientific evidence supporting creationism and evolution, the Court held the effort unconstitutional. According to the majority in *Edwards v. Aguillard*, the state had endorsed religion by favoring creation science over evolution,[86]

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80. *Good News Club*, 533 U.S. at 113.

81. *Id.* The Court explained that "[w]e cannot operate, as Milford would have us do, under the assumption that any risk that small children would perceive endorsement should counsel in favor of excluding the Club's religious activity." *Id.* at 119. Further, because the club met after school hours, when attendance was no longer required, and students could participate only with parental consent, the Court dismissed the school officials' claim of coercion. *Id.* at 115.

82. Epperson v. Arkansas, 393 U.S. 97, 109 (1968).

83. *Id.* at 104.

84. *Id.* at 106 – 07.

85. *Id.* at 109.

> The overriding fact is that Arkansas' law selects from the body of knowledge a particular segment which it proscribes for the sole reason that it is deemed to conflict with a particular religious doctrine; that is, with a particular interpretation of the Book of Genesis by a particular religious group.

Id. at 103.

86. Edwards v. Aguillard, 482 U.S. 578, 593 (1987).

> [T]he Creationism Act is designed *either* to promote the theory of creation science which embodies a particular religious tenet by requiring that creation science be taught whenever evolution is taught *or* to prohibit the teaching of a scientific theory disfavored by certain religious sects by forbidding the teaching of evolution when creation science is not also taught.

ignoring the fact, however, that Louisiana had treated both the same by "forbid[ing] instruction in either . . . without instruction in the other."[87] Ultimately, the Court held the state had violated the secular purpose requirement of the Establishment Clause test by attempting to introduce into the public school curriculum a theory premised on the divine creation of Man.[88]

The Court in *Edwards* candidly admitted that it had applied *Everson* more strictly when public school programs were involved.[89] Summarizing the reasons for such heightened concern, it observed that:

> Families entrust public schools with the education of their children, but condition their trust on the understanding that the classroom will not purposely be used to advance religious views that may conflict with the private beliefs of the student and his or her family. Students in such institutions are impressionable and their attendance is involuntary. The State exerts great authority and coercive power through mandatory attendance requirements, and because of the students' emulation of teachers as role models and the children's susceptibility to peer pressure. Furthermore, "[t]he public school is at once the symbol of our democracy and the most pervasive means

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Id.

87. *Id.* at 611 (Scalia, J., dissenting).

> [The Act] requires that, whenever the subject of origins is covered, evolution be "taught as a theory, rather than as proven scientific fact" and that scientific evidence inconsistent with the theory of evolution (viz., "creation science") be taught as well. . . . [I]t treats the teaching of creation the same way. It does not mandate instruction in creation science, forbids teachers to present creation science "as proven scientific fact," and bans the teaching of creation science unless the theory is (to use the Court's terminology) "discredit[ed] '. . . at every turn'" with the teaching of evolution.

Id. at 629 (Scalia, J., dissenting) (alteration in original) (emphasis omitted) (citations omitted). The Court further listed what it claimed were other preferences the Act had afforded creation science, *see id.* at 588, ignoring the fact that, given the pervasive bias against such teaching in scientific and education circles, they were necessary to provide a level playing field with evolution. *See id.* at 630–31 (Scalia, J., dissenting).

88. *See id.* at 593.

89. *See id.* at 583–84 ("The Court has been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools."). *See also* Van Orden v. Perry, 545 U.S. 677, 691 (2005) (plurality opinion); *Epperson*, 393 U.S. at 104 ("[T]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." (internal quotation marks omitted) (citation omitted)).

> for promoting our common destiny. In no activity of the State is it more vital to keep out divisive forces than in its schools."[90]

That summary, however, neither accurately nor comprehensively described the holdings of cases decided before *Edwards*.[91] First, the Court did not rely on the potential for divisiveness,[92] even though the issue was raised[93] and even though it was a factor the Court addressed in other Establishment Clause contexts.[94] Second, though the Court considered the issue in dictum,[95] no case before *Edwards* invalidated public school action because students were coerced, directly or otherwise,[96] to participate in religious programs contrary

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90. *Edwards*, 482 U.S. at 584 (footnote omitted) (citations omitted) (quoting Illinois *ex rel.* McCollum v. Bd. of Educ., 333 U.S. 203, 231 (1948)).

91. In *Santa Fe Indep. Sch. Dist.* and *Lee*—both decided after *Edwards*—divisiveness was a determinative factor, though the Court implied it was not necessarily decisive outside the public school context. *See* Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 311 (2000); Lee v. Weisman, 505 U.S. 577, 587–88 (1992). Additionally, in both *Santa Fe Indep. Sch. Dist.* and *Lee*, subtle official and peer pressure were factors the Court relied on to invalidate government action. *Santa Fe Indep. Sch. Dist.*, 530 U.S. at 311–12; *Lee*, 505 U.S. at 592–96. To contend, as did the Court in *Santa Fe Indep. Sch. Dist.*, however, that students at high school football games are in effect compelled to remain in the bleachers while an opening prayer is offered "requires nothing short of a titanic surrender to the implausible." City of Erie v. Pap's A.M., 529 U.S. 277, 323 (2000) (Stevens, J., dissenting).

92. Several cases were prosecuted by single families or a sole individual. *See Lee*, 505 U.S. at 584 (father and his minor daughter); Wallace v. Jaffree, 472 U.S. 38, 42 (1985) (father and his three minor children); *Epperson*, 393 U.S. at 100 (public school biology teacher); Sch. Dist. of Abington Twp., Pa. v. Schempp, 374 U.S. 203, 205 (1963) (husband and wife and their two minor children); Murray v. Curlett, 374 U.S. 203, 211 (1963) (mother and her minor son); *McCollum*, 333 U.S. at 205 (mother and her minor son). Such cases underscore Justice O'Connor's complaint about divisiveness as a ground for invalidation under the Establishment Clause: "It is curious indeed to base our interpretation of the Constitution on speculation as to the likelihood of a phenomenon which the parties may create merely by prosecuting a lawsuit." Aguilar v. Felton, 473 U.S. 402, 429 (1985) (O'Connor, J., dissenting).

93. *See Schempp*, 374 U.S. at 209.

94. *See, e.g.*, Comm'r v. Nyquist, 413 U.S. 756, 795–98 (1973) (political divisiveness considered one factor, though not itself decisive, in striking down a program of public aid to parochial education); Lemon v. Kurtzman, 403 U.S. 602, 622–24 (1971) (political divisiveness considered one factor in striking down a school-aid program). The potential for political divisiveness, however, was disregarded in later funding cases. *See* Mitchell v. Helms, 530 U.S. 793, 825–26 (2000) (plurality opinion); Agostini v. Felton, 521 U.S. 203, 233–34 (1997).

95. *See, e.g., Schempp*, 374 U.S. at 224–25 (acknowledging that student participation in the religious program was voluntary); Engel v. Vitale, 370 U.S. 421, 430 (1962) (acknowledging the same).

96. *See Wallace*, 472 U.S. at 42 (the Court did not pass on appellee's claim that his minor children were exposed to religious indoctrination and peer pressure to participate in teacher-led prayers); *McCollum*, 333 U.S. at 209 n.1 (the Court did not pass on appellant's claim that subtle pressures were brought to bear on students to attend religious instruction).

to their parents' wishes.[97] At bottom, the cases stood for the simple proposition that, however a public school program is constituted—whether classroom instruction, commencement exercise, or other sponsored event—the Court would scrupulously apply *Everson* to strike down any preference shown by public officials for religion. *Edwards*, therefore, may represent some welcome thawing in the Court's rigid approach to the Establishment Clause where public schools are involved. In either event, however, the Court would reject the *Toledo Principles* if proposed for adoption in American public schools.

TOLEDO PRINCIPLES

The aim of the *Toledo Principles* is "to promote the study and knowledge about religions and beliefs in [European public] schools, particularly as a tool to enhance religious freedom."[98] Such knowledge, it is believed, "can reinforce . . . respect for . . . freedom of religion or belief, foster democratic citizenship, promote understanding of societal diversity, . . . enhance social cohesion[,] . . . [and] reduc[e] conflicts . . . based on lack of understanding for others' beliefs[.]"[99] It is not these ends, laudable in themselves, but the compulsory means for their achievement[100] that would come in conflict with the Court's construction of the Constitution.

Acknowledging that "no course—whether on religion or on any other subject—is absolutely neutral or objective,"[101] the *Toledo Principles* assume that "there are likely to be some cases" where "[t]he content of the curriculum . . . may be offensive or misleading in ways that only believers in a particular tradition would recognize."[102]

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97. In contrast, the official coercion the *McCollum* Court enjoined was used to compel attendance by students at religious instruction their parents desired. *See McCollum*, 333 U.S. at 209–10.

98. TOLEDO PRINCIPLES, *supra* note 4, at 19.

99. *Id.* at 13–14.

100. *See id.* at 14.

101. *Id.* at 69. *See id.* at 72 ("[I]t is often difficult for administrators to determine in advance and in the abstract whether a course or other teaching about religions and beliefs is sufficiently impartial and objective.").

102. *Id.* at 70. The *Toledo Principles* themselves may exacerbate this problem. For example, they propose that teachers should

> include in curricula reference to sources drawn from various religious and belief traditions that reinforce the significance of tolerance, respect and caring for others[,] . . . provid[ing] believers with supplemental grounds for respecting the rights of others that may be more persuasive to them than purely secular modes of reasoning.

Allowing that, "[i]n this situation, an opt-out right . . . should be available as a safety valve,"[103] the principles nonetheless concede that school officials still retain the ultimate power to decide whether such content is sufficiently objective to require that all students attend.[104] "In other words," the *Toledo Principles* empower officials to act as if "some religious adherents misunderstand their own religious beliefs."[105]

Likewise, even though parents may "perceiv[e such instruction] as indoctrination in relativism or secularism,"[106] states can require students to participate where the curriculum is considered sufficiently balanced and impartial.[107] Though acknowledging that "conscientious objection to particular instances of teaching about religions and beliefs is precisely what the right to freedom of religion or belief . . . is intended to protect[,]"[108] the *Toledo Principles* nonetheless conclude that such objections should be treated the same "as objections to any other school subject."[109]

The Court's "[particular vigilance] in monitoring compliance with the Establishment Clause in . . . [public] schools,"[110] however, would dictate against treating conscientious objection to courses about religion and secular subjects the same. Relying on *Edwards*, the Court could easily find that compulsory attendance would violate the

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Id. at 41. Though well-intended, such emphasis may skew the importance these sources have in their respective religious traditions.

103. *Id.* at 70. In contrast, the Court has expressed concern in dictum about opt-out provisions for religious programs in American public schools. *See supra* note 51 and accompanying text.

104. *See* TOLEDO PRINCIPLES, *supra* note 4, at 14 ("Where compulsory courses involving teaching about religions and beliefs are sufficiently neutral and objective, requiring participation in such courses as such does not violate the freedom of religion and belief (although states are free to allow partial or total opt-outs in these settings).").

105. Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 457–58 (1988). *See* TOLEDO PRINCIPLES, *supra* note 4, at 64–65 ("A fundamental consideration is that teaching about religion should be based on sound scholarship, and not merely on what religious communities want said about themselves and others.").

106. *Id.* at 71. TOLEDO PRINCIPLES, *supra* note 4, at 71.

107. *Id.* at 72. Contrary to the *Toledo Principles'* contention that, "[i]f there are only a relatively small number [of objectors], the programme is more likely to be sound," *id.*, and thus compelled instruction more justifiable, the Court would likely assume that more protection is warranted where the group is more insular. As it recognized in a related context, the fact that objectors to involuntary attendance at school religious programs are few merely "[i]ncreases their sense of isolation and affront." Lee v. Weisman, 505 U.S. 577, 594 (1992) (citation omitted).

108. TOLEDO PRINCIPLES, *supra* note 4, at 71.

109. *Id.* at 72.

110. Edwards v. Aguillard, 482 U.S. 578, 583–84 (1987).

trust parents place in public schools, "that the classroom will not purposely be used to advance religious views that may conflict with the private beliefs of the student and his or her family[,]" and would undoubtedly introduce as a consequence "divisive forces" into public education.[111]

Furthermore, though the *Toledo Principles* address teaching about both religion and belief,[112] given that the former will likely predominate, the Court, if it continued to apply *Everson* scrupulously, could simply consider the pre-eminence given religion by mandating instruction as an unconstitutional preference.

CONCLUSION

In 1952, Justice Douglas could still claim that Americans were "a religious people whose institutions presuppose[d] a Supreme Being."[113] Since then, students have become acclimated to a public school devoid of religion. Not surprisingly, as adults, they expect the public arena to operate the same. Whether we remain religious as

111. *Id.* at 584. *See supra* note 90 and accompanying text. Where religious beliefs are sincerely held, the Court will not question their credibility. *See* Thomas v. Review Bd. of Ind. Emp't Sec. Div., 450 U.S. 707, 714 (1981) ("[R]eligious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection."); United States v. Ballard, 322 U.S. 78, 86 (1944) ("Heresy trials are foreign to our Constitution. Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs."). Neither will the Court arbitrate disputes over theology. *See* Emp't Div., Dept. of Human Res. of Or. v. Smith, 494 U.S. 872, 887 (1990) ("Judging the centrality of different religious practices is akin to the unacceptable business of evaluating the relative merits of differing religious claims." (internal quotations omitted) (citation omitted)); Hernandez v. Comm'r of Internal Revenue, 490 U.S. 680, 699 (1989) ("It is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds."); *Lyng*, 485 U.S. at 457–58. In *Lyng*, the Court stated:

> [H]olding that some sincerely held religious beliefs and practices are not "central" to certain religions, despite protestations to the contrary from the religious objectors who brought the lawsuit . . . would require us to rule that some religious adherents misunderstand their own religious beliefs. We think such an approach cannot be squared with the Constitution or with our precedents, and that it would cast the Judiciary in a role that we were never intended to play.

Id. See also Thomas, 450 U.S. at 716 ("Courts are not arbiters of scriptural interpretation."). *Cf.* Watson v. Jones, 80 U.S. 679, 728 (1871) ("The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect."). If not itself competent to settle such disputes, the Court is not likely to recognize a greater power in school administrators.

112. *See* TOLEDO PRINCIPLES, *supra* note 4, at 20 ("[I]t should be noted that the Principles address not only teaching about religions, but also teaching about beliefs, that is, non-religious conceptions of life and world.").

113. Zorach v. Klauson, 343 U.S. 306, 313 (1952).

individuals, Americans have increasingly become secular as a People. That this was *Everson's* aim, Justice Frankfurter candidly admitted in a passage only partially quoted in *Edwards*:

> The public school is at once the symbol of our democracy and the most pervasive means for promoting our common destiny. In no activity of the State is it more vital to keep out divisive forces than in its schools, to avoid confusing, not to say fusing, what the Constitution sought to keep strictly apart. "The great American principle of eternal separation" [between Church and State] . . . is one of the vital reliances of our Constitutional system for assuring unities among our people stronger than our diversities. It is the Court's duty to enforce this principle in its full integrity.[114]

As we became more secular, we began to question the moral values our institutions presupposed. Once, laws with deep religious roots forbidding, for example, "adultery, fornication, and homosexual practices . . . form[ed] a pattern so deeply pressed into the substance of our social life that any Constitutional doctrine in this area must build upon that basis."[115] Now, it is painfully clear that such pattern has all but dissolved. This too is part of the melancholy legacy of *Everson*.

114. Illinois *ex rel.* McCollum v. Bd. of Educ., 333 U.S. 203, 231 (1948) (Frankfurter, J., concurring).

115. Poe v. Ullman, 367 U.S. 497, 546 (1961) (Harlan, J., dissenting), *incorporated in* Griswold v. Connecticut, 381 U.S. 479, 500 (1965) (Harlan, J., concurring).