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ARTICLE

Faith in school: balancing no establishment and free exercise of religion guarantees in American education

John Witte Jr

Robert W Woodruff University Professor of Law, McDonald Distinguished Professor of Religion and Director of the Center for the Study of Law and Religion, at Emory University, USA
Email: john.witte@emory.edu

Abstract

American schools are governed by a complex lattice work of federal, state, and local laws and regulations, many of them tailored specifically to primary, secondary, or higher education. But all schools are subject to the same First Amendment guarantee that 'Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof'. This constitutional guarantee of religious freedom has produced a substantial body of case law. Nearly one-third of the United States Supreme Court's cases on religious freedom – 74 out of its 247 cases reported from 1815 to 2023[1] – have addressed issues of religion and education. All but six of these cases were decided after 1940, the year the Court first began to apply these guarantees to state and local governments alongside 'Congress';[2] and for each Supreme Court case, there are scores of lower federal court and sometimes state court cases that add further nuance and amplification. This article summarises, and critically analyses, this ever-evolving jurisprudence.

Keywords: education; freedom of religion and belief; Supreme Court; United States of America

Introduction

The Supreme Court's cases on religious freedom and education address three main questions: (1) what role may religion play in public (that is, state-run) education?;

[1] See tabular summary of all these Supreme Court cases in J Witte Jr, J A Nichols and R W Garnett, *Religion And The American Constitutional Experiment*, 5th edn (Oxford, 2022), Appendix 2, 365–417 and updated here: <https://scotusreligioncases.org/>, accessed, 30 May 2024.

[2] See *Cantwell v Connecticut*, 310 US 296 (1940) and *Everson v Board of Education*, 330 US 1 (1947), which incorporated the Free Exercise and Establishment Clauses of the First Amendment into the due process clause of the Fourteenth Amendment, and applied these guarantees for the first time against state and local government.

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

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

Religion and public education

Separation of church and state

The Supreme Court's most famous First Amendment teaching is that the constitution has 'erected a wall of separation between church and state'.[3] This teaching was part and product of a series of cases from 1948 to 1987 that limited the place of religious teachers, prayers, texts, symbols, and teachings in public grade schools and high schools.

The common logic of these early cases ran like this. The public school is a government entity, often one of the most visible and well-known arms of the government in any community. The public school is furthermore a model of constitutional democracy and designed to communicate and facilitate core

[3] *McCollum v Board of Education*, 333 US 203, 209–211 (1948).

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democratic norms and constitutional practices to students. The state mandates that all able students attend schools, at least until the age of 16. These students are young and impressionable. Given all these factors, the Court continued, the public school must cling closely to core constitutional and democratic values, including the core value of separation of church and state. Some relaxation of constitutional values is possible in other public contexts, where adults can make informed assessments of the values being transmitted. But no such relaxation can occur in public schools with their impressionable youths who are compelled to be there. In public schools, if nowhere else in public life, strict separation of church and state must be the norm.

The case that opened this series was *McCollum v Board of Education* (1948). At issue was a 'release time' program, adopted by a local public-school board for fourth to ninth grade students. Once a week, students were released from their regular classes to be able to participate in a religious class taught on the school campus. Three religious classes were on offer – Protestant, Catholic, or Jewish – reflecting the religious makeup of the local community. These classes were voluntarily taught by qualified outside teachers, approved by the principal. Students whose parents did not consent continued their 'secular studies' during this release-time period. The *McCollum* Court held that this program violated the First Amendment Establishment Clause, for it constituted the use of 'tax-supported property for religious instruction and the close cooperation between school authorities and the religious council in promoting religious education'.[4]

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

> It is no part of the business of government to compose official prayers for any group of the American people to recite as part of a religious program carried on by government ... When the power, prestige, and financial support of government [are] placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain.[5]

This prohibition on prayer in public schools was controversial in its day, but the Court has maintained and extended it. *Wallace v Jaffree* (1985) struck down a state statute that authorised a moment of silence at the beginning of each school day for 'meditation or voluntary prayer', because the legislature had betrayed its 'intent to return prayer to the public schools'.[6] *Lee v Weisman* (1992) outlawed a local rabbi's prayer at a one-time public middle school graduation on school premises, arguing that such prayers effectively coerced graduating students to participate in

[4] Ibid.
[5] 370 US 421, 430–32 (1962).
[6] 472 US 38, 57–60 (1985).

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religion.[7] *Santa Fe Independent School District v Doe* (2000) outlawed elected student invocations at public high school football games, arguing that this policy not only coerced players, cheerleaders, and band members to participate in prayer, but constituted governmental endorsement of religion.[8]

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

> [I]t might well be said that one's education is not complete without a study of comparative religion or the history of religion and its relationship to the advancement of civilization. It certainly may be said that the Bible is worthy of study for its literary and historic qualities. Nothing we have said here indicates that such study of the Bible or of religion, when presented objectively as part of a secular program of education, may not be effected consistently with the First Amendment.[9]

While *Schempp* permitted objective instruction of religious topics in appropriate public-school classes, *Edwards v Aguillard* (1987) struck down a state law that required equal time for 'evolution-science' and 'creation-science' in science classrooms. This statute, the Court held, betrayed a 'discriminatory preference … to advance the religious viewpoint that a supernatural being created humankind' and 'to restructure the science curriculum to conform with a particular religious viewpoint'. This was not a proper objective teaching of religion à la *Schempp*. Creation might be a good topic for a course in cosmology or ancient literature, but not for a science course. Separation of church and state also entailed separation of religion and science.[10] Lower courts have used this precedent to outlaw 'intelligent design' teachings from public school curricula as well.

In *Stone v Graham* (1980), the Court struck down a state statute that authorised the posting of a plaque bearing the Ten Commandments on the wall of each public-school classroom. The plaques were donated and hung by private groups in the community. There was no public reading of the commandments or any

[7] 505 US 577 (1992).
[8] 530 US 290 (2000).
[9] 374 US 203, 221, 226 (1963).
[10] 482 US 578, 591–593 (1987).

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evident mention or endorsement of them by teachers or school officials. Each plaque also bore a small inscription that sought to immunise it from charges of religious establishment: 'The secular application of the Ten Commandments is clearly seen in its adoption as the fundamental legal code of Western Civilization and the Common Law of the United States'. The Court struck down these displays as violations of the Establishment Clause. These displays were 'plainly religious', in the Court's view. The Ten Commandments are sacred in Jewish and Christian circles, and they command 'the religious duties of believers'. It made no constitutional difference that they were passively displayed, rather than formally read aloud, or that they were privately donated rather than purchased with state money. The very display of the Decalogue in the public-school classroom served only a religious purpose and was thus inherently unconstitutional.[11]

These early Supreme Court separationist cases were focused on the place of religion in public grade schools and high schools, and they were predicated on the reality that these students were mandated to be there until the age of 16 and were young and impressionable. From 1940 to 1980, however, many state universities adopted comparable policies that limited the place of sectarian religion on the university campus, curriculum, and activities – even though their students were voluntary matriculants and more mature. Some of these university policies were adopted as self-protective measures against expensive lawsuits brought under the First Amendment, especially as some lower courts began to order state universities to follow the religion policies of state high schools. Universities in some states were also subject to local state constitutions that mandated the separation of religion and education. But legal considerations were only part of these decisions. Even more influential were the growing anti-religious movements and counter-cultural sentiments of the American academy in the mid-20th century, including the 'God is dead' movement, Marxist, feminist, and other critical theories attacking religion, the rise of secularization theories of education, and much more.

Equal access cases

These early Supreme Court Establishment Clause cases limiting religion in public school classes and at official school events remain good law today. But they are now balanced by more recent Free Speech cases that give voluntary religious students equal access to public school forums, facilities, and funds made available to their non-religious peers during non-instructional time. In a series of cases from 1981 to 2002, the Court gradually extended this equal access logic first from the state university, then to the public high school, then to the public grade school. Initially, the focus was on access to public school facilities, but then more controversially it went to state funding as well, although a 2010 case has put some limits on this equal access logic.

Widmar v Vincent (1981) was the opening case in this series. The state University of Missouri at Kansas City had a policy of opening its facilities to voluntary student

[11] 449 US 39, 40–41 (1980) (*per curiam*).

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groups to use outside of formal instructional time. More than 100 student groups organised themselves in the year at issue, each paying $41 per semester. One such voluntary student group, called Cornerstone, met for private religious devotions and local charitable activities. They sought permission to use the university facilities, but were denied access, given the university's written policy that the campus could not be used 'for purposes of religious worship or religious teaching'. Cornerstone appealed, arguing that this policy violated their First Amendment free exercise and free speech rights as well as their Fourteenth Amendment equal protection rights. The university countered that it had a compelling state interest to maintain a 'strict separation of church and state' per their state constitution, especially in its state schools.[12]

The *Widmar* Court found for the religious student group. When a state university creates a limited public forum open to voluntary student groups, the Court opined, religious groups must be given 'equal access' to that forum. Here the university 'has discriminated against student groups and speakers based on their desire to use a generally open forum to engage in religious worship and discussion'. Religious speech and association are protected by the First Amendment and can be excluded only if the university can demonstrate that its prohibition serves a 'compelling state interest and that it is narrowly drawn to achieve that end'. But a general desire to keep a strict separation of church and state was not a sufficiently compelling state interest. The values of 'equal treatment and access' outweighed the hypothetical dangers of a religious establishment.[13]

The *Widmar* Court explicitly limited its holding to the public university, arguing that university students, unlike public high school and grade school students, were more mature and discerning and, after the age of 16, were not required by compulsory school attendance laws to be there. The following week, the Court let stand a federal circuit court opinion that refused to extend the *Widmar* holding into public high schools.[14] In response, Congress passed the Equal Access Act of 1984, which extended *Widmar*'s principle to public high schools that received federal funding. Any such high school that opened its facilities to some students for voluntary after-school activities would have to give religious students equal access to these facilities as well, the Act provided. The religious students' activities, however, had to be completely voluntary and free from school endorsement or participation. In *Westside Community Schools v Mergens* (1990), the Court upheld the Equal Access Act against an Establishment Clause challenge, holding that Congress had legitimately protected the rights of religious students to 'equal treatment' and 'equal protection'.[15]

In subsequent cases involving lower schools, the Court rooted this equal access right more clearly in the First Amendment Free Speech Clause. *Lamb's Chapel v*

[12] 454 US 263, 270, 273 (1981). The Court later upheld the constitutionality of charging these flat fees, even to religious groups, finding no prior restraint on free exercise of religion. See *Board of Regents of University of Wisconsin System v Southworth*, 529 US 217 (2000).

[13] Ibid.

[14] *Brandon v Bd of Educ of Guilderland Central School Dist*, 635 F2d 971 (2d Cir 1980), *cert denied*, 454 US 1123 (1981).

[15] 496 US 226, 248–250 (1990).

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Center Moriches Union Free School District (1993) involved a public school that opened its facilities to various 'social, civic, recreational, and political uses' organised by voluntary groups in the community and held after hours without student involvement. The school banned an otherwise qualified Evangelical group because they wanted to show a film series on traditional family values. Citing *Widmar*, the *Lamb's Chapel* Court held that it was viewpoint discrimination to deny this group equal access to the facilities just because their film had a religious inspiration.[16] Similarly, *Good News Club v Milford Central School* (2001) held that a public grade school that opened its facilities to licensed private groups to run after-school programs for students with parental permission could not exclude a group whose instruction came 'from a religious viewpoint'.[17]

In *Rosenberger v Rector and Visitors of the University of Virginia* (1995), a sharply divided Court extended this equal access principle to state funds. The University of Virginia encouraged student groups to organise themselves for extracurricular activities. Student groups were required to petition for the right to be recognised as such a registered group. Once registered, they could apply for monies from a general student activity fund to help defray the printing and other costs for their activities. In the year in question, 343 student groups were registered; 118 of them applied for and received funds. Fifteen student groups were denied funding, including a Christian group that sought reimbursement for the costs to print an overtly religious newspaper called 'Wide Awake: A Christian Perspective at the University of Virginia'. The university argued that this request violated its clear rules that prohibited funding for 'any activity "that primarily promotes or manifests a particular belief in or about a deity or an ultimate reality"'. The 'Wide Awake' group appealed, claiming that this discriminatory treatment violated their free speech rights.[18]

The *Rosenberger* Court held for the students. The state university policy improperly 'selects for disfavored treatment those student journalistic efforts with religious editorial viewpoints', Justice Kennedy wrote for the Court. Denying funding to this otherwise qualified student group 'is based upon viewpoint discrimination not unlike the discrimination the school district relied upon in *Lamb's Chapel* and that we found invalid'. The constitutional principle of equal access applies as much to state university funding as to state university facilities, the Court held:

> Vital First Amendment speech principles are at stake here. The first danger to liberty lies in granting the State the power to examine publications to determine whether or not they are based on some ultimate idea and if so for the State to classify them [as religious]. The second, and corollary, danger is to speech from the chilling of individual thought and expression. That danger is especially real in the University setting, where the State acts against a background and tradition of thought and experiment that is at the center of our intellectual and philosophic tradition ... For the

[16] 508 US 384, 387, 394 (1993).
[17] 533 US 98, 112–14 (2001).
[18] 515 US 819 (1995).

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> University, by regulation, to cast disapproval on particular viewpoints of its students risks the suppression of free speech and creative inquiry in one of the vital centers for the nation's intellectual life, its college and university campuses.[19]

In *Christian Legal Society v Martinez* (2010), however, the Court made clear that this equal access logic has limits, even on university campuses. Hastings College of Law, a state law school in California, officially recognises all voluntary student groups through a formal 'Registered Student Organization' (RSO) program. Officially recognised student groups receive access to school funds, and certain facilities and communication channels that are foreclosed to non-registered groups. To qualify for RSO recognition, however, a group must comply with the school's Nondiscrimination Policy, based on state civil rights laws, which bars discrimination on the basis of religious and sexual orientation, among other grounds. A group of law students sought to form a chapter of the Christian Legal Society (CLS) at the law school. Like all CLS groups in the country, this group required its members to sign a 'Statement of Faith' and to live in accordance with prescribed principles; the group excluded anyone with religious beliefs contrary to the Statement of Faith and anyone who engaged in 'unrepentant homosexual conduct'. Hastings regarded this CLS policy as discrimination based on religion and sexual orientation and thus denied the group's application for official RSO status. CLS filed suit, claiming violations of their rights to free speech, expressive association, and the free exercise of religion.[20]

A 5-4 *Martinez* Court, led by Justice Ginsburg, held for Hastings College of Law. The Court combined the Christian Legal Society's free speech and free association claims into one and subjected them to 'a less restrictive limited-public-forum analysis' than the stricter scrutiny regime of *Widmar* and its progeny. Here, the Court said, the law school was only 'dangling the carrot of subsidy, not wielding the stick of prohibition'. Unlike the *Widmar* students, the CLS students could certainly meet on the Hastings campus and could use the school's chalk boards and bulletin boards, as well as their own social media to communicate. Unlike the *Rosenberger* students, the CLS students were not singled out for special prohibitions because of their Christian perspective. They were denied RSO status, and its attendant special funds and other benefits, simply because they violated Hasting's general non-discrimination policy. It is 'hard to imagine a more viewpoint-neutral policy than one requiring *all* student groups to accept *all* comers'.

The *Martinez* Court rejected CLS's arguments that this regulation would systematically burden groups whose viewpoints are out of favour at the law school. A regulation is neutral if it is unrelated to the content of expression, the Court held, even if it adversely affects some speakers but not others. The Court also rejected CLS's argument that this policy would 'facilitate hostile takeovers' from students who would infiltrate the group and 'subvert its mission and

[19] 515 US at 831–32, 836–37.
[20] 561 US 661 (2010).

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message'. This was a hypothetical danger, which Hastings would no doubt redress if it occurred, said the Court; the Court rejected CLS's request for an exemption from this policy based on the First Amendment Free Exercise Clause. In *Employment Division v Smith* (1990),[21] which was the controlling precedent at the time, the Court had made clear that neutral and generally applicable laws are constitutional and require no free exercise exemptions even if they substantially burden the freedom to exercise religion. The state's 'all comers' policy met this neutrality standard easily.[22]

Government and religious education

The place of religion in public, state-run schools is one major set of issues the Court has addressed under the First Amendment Establishment Clause. The role of government in private religious schools is the other set of issues. These latter issues, particularly questions of government funding and support for religious schools, were hotly contested in the states long before the Supreme Court got actively involved. By 1921, 35 of the then-48 states had passed state constitutional amendments that barred state funding of religious schools.[23] Moreover, in some states, various anti-Catholic and self-professed 'secularist' groups pushed hard to eliminate religious schools altogether and to give public schools a monopoly on education.

In response, the Court developed a general argument about the place of private religious schools in modern American society, and the role that government could play in them. Private schools of all sorts, the Court repeatedly held, are viable and valuable alternatives to public schools. Private *religious* schools, moreover, allow parents to educate their students in their own religious tradition, a right which they must enjoy without discrimination or prejudice. Given that public education must be secular under the Establishment Clause, private education may be religious under the Free Exercise Clause. To be accredited, all private schools must meet minimum educational standards. They must teach reading, writing, and arithmetic, history, geography, social studies, and the like so that their graduates are not culturally or intellectually handicapped. Free Exercise objections to these baseline requirements by schools or parents are of little avail. But these private schools may teach these subjects from a religious perspective and add religious instruction and activities beyond them. They may favour teachers and students who share their faith; and these religious schools are presumptively entitled to the same government services that are made available to their counterparts in public schools – as long as those services are not used for core religious activities.

The Supreme Court developed and applied this accommodationist logic from 1925 to 1971, abruptly reversed course in favour of strict separationism from

[21] 494 US 872 (1990).

[22] 561 US at 683, 692, 697.

[23] See a tabular summary in J Witte Jr and J A Nichols, *Religion and the American Constitutional Experiment*, 4th edn (Oxford, 2016), Appendix 2 and summary of the issues and literature at ibid, 103–107.

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1971 to 1985, and since then has returned to a new variant of this accommodationist logic framed in 'equal access' and 'equal treatment' terms which it recently grounded in the First Amendment Free Exercise Clause.

Accommodation of religious education

The most important early religious school case was *Pierce v Society of Sisters* (1925). Oregon had passed a law mandating that all eligible students must attend public schools. The law sought to eliminate Catholic and other private religious schools and to give new impetus to the development of the state's public schools. Local private Catholic schools challenged this as a violation of the educational rights of the parents, children, schools, and teachers alike. The *Pierce* Court agreed and struck down the Oregon law. 'The fundamental theory of liberty', the Court opined, 'excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only'. It also forecloses 'unwarranted compulsion' of 'present and future patrons' of the religious schools.[24] Extending the *Pierce* holding, *Farrington v Tokushige* (1927) held that states could not impose unduly intrusive and stringent accreditation and regulatory requirements on religious private schools.[25] *Cochran v Board of Education* (1930) upheld a state policy of supplying basic textbooks to all students, including religious school students.[26]

This accommodation of religious schools and students continued into the early 1970s. *Everson v Board of Education* (1947), although offering sweeping dicta on the wall of separation between church and state, still held that states could provide school bus transportation to religious and public-school children alike or reimburse the parents for the costs of using school bus transportation. '[C]utting off church schools [and their students] from these services, so separate and indisputably marked off from the religious function, would make it far more difficult for the schools to operate', Justice Black wrote for the *Everson* Court; 'But such obviously is not the purpose of the First Amendment. The Amendment requires the State to be neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary'.[27]

The Court struck a similar tone in *Board of Education v Allen* (1968). The State of New York had a policy of lending prescribed textbooks in science, mathematics, and other 'secular subjects' to all students in the state, whether attending public or private schools. Many of the private school recipients of the textbooks were religious schools. A taxpayer challenged the policy as a violation of the Establishment Clause. Citing the 1930 *Cochran* case, the *Allen* Court rejected this claim, emphasising that it was the students and parents, not the religious schools, who directly benefited.[28]

The Court continued this accommodationist tone in a trio of cases upholding government funding for construction of buildings at religious colleges and

[24] 268 US 510 (1925).
[25] 273 US 284 (1927).
[26] 281 US 370 (1930).
[27] 330 US at 16, 18.
[28] 392 US 236, 243–244 (1968).

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universities. In *Tilton v Richardson* (1971), the Court rebuffed a challenge to a federal grant program that supported construction of library, science, and arts buildings at four church-related colleges. The grants were made as part of the federal Higher Education Facilities Act (1963), which sponsored all manner of new buildings at public and private colleges and universities throughout the nation. Chief Justice Burger wrote for the plurality: 'The Act itself was carefully drafted to ensure that the federally-subsidized facilities would be devoted to the secular and not the religious functions of the recipient institution'. This feature, together with the reality that most funding was directed to state, not religious, universities and colleges, was sufficient to ensure the Act's constitutionality.[29] In *Hunt v McNair* (1973), the Court upheld a state program of funding the construction of similar 'secular' buildings at various universities within the state, including a religiously charted college.[30] Again in *Roemer v Board of Public Works* (1977), the Court upheld a state construction grant program that included five church-related schools among its 17 grant recipients. The *Roemer* Court counselled against too-zealous an application of the principle of separation of church and state, given the reality and reach of the modern welfare state:

> A system of government that makes itself felt as pervasively as ours could hardly be expected never to cross paths with the church. In fact, our State and Federal Governments impose certain burdens upon, and impart certain benefits to, virtually all our activities, and religious activity is no exception. The Court has enforced a scrupulous neutrality by the State, as among religions, and also as between religious and other activities, but a hermetic separation of the two is an impossibility [and] it has never been required ... [R]eligious institutions need not be quarantined from public benefits that are neutrally available to all ... Just as *Bradfield* [*v Roberts* (1899)] dispels any notion that a religious person can never be in the State's pay for a secular purpose, so *Everson* and *Allen* put to rest any argument that the State may never act in such a way that has the incidental effect of facilitating religious activity.[31]

The Court stretched it furthest in accommodating religious education in *Wisconsin v Yoder* (1972). Wisconsin, like all states, mandated that all able children attend school until the age of 16. A community of Old Order Amish, who were dedicated to a simple agrarian lifestyle based on biblical principles, agreed to send their children to grade school – to teach them the basics of reading, writing, and arithmetic that they would need to function in society as adults. But they refused to send their children to high school, lest these children be tempted by worldly concerns and distracted from learning the values and skills they would need to maintain the Amish lifestyle. After they were fined for disobeying school attendance laws, the parents and community

[29] 403 US 672, 679–682 (1971).
[30] 413 US 734 (1973).
[31] 426 US 736, 746 (1977).

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leaders filed suit, arguing that the State had violated their free exercise and parental rights.[32]

The *Yoder* Court agreed and ordered that the Amish parents and students be exempted from full compliance with these mandatory school attendance laws. The Court was impressed that the Amish 'lifestyle' was centuries old and 'not merely a matter of personal preference, but one of deep religious conviction, shared by an organized group, and intimately related to daily living'. In the Court's view, compliance with the compulsory school attendance law would pose 'a very real threat of undermining the Amish community and religious practice as they exist today; they must either abandon belief and be assimilated into society at large, or be forced to migrate to some other and more tolerant region'. To exempt them was not to 'establish the Amish religion' but to 'accommodate their free exercise rights'.[33] This case became a *locus classicus* for the home schooling options now on offer in most states – likely to remain even more prevalent since the COVID-19 crisis of 2020–22 that required home schooling for tens of millions of students.

Separation of church and state

In *Lemon v Kurtzman* (1971), the Supreme Court abruptly reversed course. Drawing on the strict separationist logic of its earlier public-school cases, the *Lemon* Court crafted a three-part test to be used in all future cases arising under the First Amendment Establishment Clause, including those dealing with religious schools. To meet constitutional objections, the Court held, any challenged government law must: (1) have a secular purpose; (2) have a primary effect that neither advances nor inhibits religion; and (3) not foster an excessive entanglement between church and state.[34]

The *Lemon* Court used this three-part test to strike down a state policy that reimbursed Catholic and religious schools for some of the costs of teaching secular subjects that the state prescribed. The state policy was restricted to religious schools that served students from lower-income families and the reimbursements were limited to 15 per cent of the costs. The *Lemon* Court held that this policy fostered an 'excessive entanglement between church and state'. The Catholic schools in question were notably religious, the Court held – closely allied with nearby parish churches, filled with religious symbols, and staffed primarily by nuns who were under 'religious control and discipline': '[A] dedicated religious person, teaching at a school affiliated with his or her faith and operated to inculcate its tenets, will inevitably experience great difficulty in remaining religiously neutral'. She will be tempted to teach secular subjects with a religious orientation in violation of state policy; 'A comprehensive, discriminating, and continuing state surveillance will inevitably be required to ensure that these restrictions are obeyed, and the First Amendment otherwise obeyed'. This is precisely the kind of excessive

[32] 406 US 205 (1972).
[33] 406 US at 216–18.
[34] 403 US 602 (1971).

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entanglement between church and state that the First Amendment Establishment Clause outlaws.[35]

Lemon left open the question whether the state could give aid directly to religious students or to their parents – as the Court had allowed in earlier cases. Two years later, the Court closed this door tightly. In *Committee for Public Education v Nyquist* (1973)[36] and *Sloan v Lemon* (1973),[37] the Court struck down state policies that allowed low-income parents to seek reimbursements from the state for some of the costs of religious school tuition. *Nyquist* further struck down a state policy that allowed low-income parents to take tax deductions for the costs of sending their children to private schools. In *Nyquist*, Justice Powell characterised such policies as just another 'of the ingenious plans of channeling state aid to sectarian schools'. Responding to the state argument that 'grants to parents, unlike grants to [religious] institutions, respect the "wall of separation" required by the Constitution', the Court declared that 'the [primary] effect of the aid is unmistakably to provide desired financial support for non-public, sectarian institutions'.[38]

Lemon also left open the question of whether the state could give textbooks, educational materials, or other aid to religious schools for the teaching of mandatory secular subjects, or the administration of state-mandated tests and other programs. The Court struck down most such policies in a long series of cases culminating in *Grand Rapids School District v Ball* (1985)[39] and *Aguilar v Felton* (1985).[40] These cases, and their ample extension by lower courts, were all designed to create a high wall of separation of between church and state, and between public and private school facilities, funds, teachers, students, and programs.

Equal treatment, freedom of choice, and state aid to religion

This strict separation principle, however alluring in theory, ultimately proved unworkable in practice. It also raised questions of fairness to religious parents who had to pay both state school taxes and religious school tuition if they wished to educate their children in their own faith. Accordingly, the Supreme Court gradually moved back towards greater accommodation and state support for religious education, eventually over-riding strong state constitutional prohibitions on funding religious education.

The first case in this new series was *Mueller v Allen* (1983). There the Court upheld a Minnesota law that allowed parents of private school children to claim tax deductions from state income tax for the costs of 'tuition, transportation, and textbooks'. Ninety-five per cent of the private school children in the state attended religious schools. Most of their parents availed themselves of this tax deduction. A taxpayer in the state challenged the law as an establishment of

[35] 403 US at 619–22.
[36] 413 US 756 (1973).
[37] 413 US 825 (1973).
[38] 413 US at 783, 785.
[39] 473 US 373 (1985).
[40] 473 US 402, overruled by *Agostoni v Felton*, 521 US 203 (1997).

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religion. The *Mueller* Court disagreed. The tax deduction policy had a secular purpose of supporting quality education, fostered no entanglement between church and state, and had the primary effect of enhancing the educational choices of parents and students. The state aid to sectarian schools 'becomes available only as a result of numerous, private choices of individual parents of school-age children'. This saves it from constitutional infirmity.[41]

In *Witters v Washington Department of Services for the Blind* (1986), the Court upheld a state program that furnished aid to a student attending a Christian college. The program provided funds 'for special education and/or training in the professions, business or trades' for the visually impaired. Money was to be paid directly to eligible recipients, who were entitled to use the funds to pursue education in the professional schools of their choice. Mr Witters's condition qualified him for the funds. His profession of choice was the Christian ministry. He sought funds to attend a Christian college in preparation. The state agency denied funding on grounds that this was direct funding of religious education in violation of the Establishment Clause. The *Witters* Court disagreed. The policy served a secular purpose of fostering educational and professional choice for all, including the handicapped. It involved no entanglement of church and state. Its primary effect was to facilitate this student's professional education, which happened to be religious. This 'is not one of "the ingenious plans for channeling state aid to sectarian schools"', Justice Marshall wrote for the Court; 'It creates no financial incentive for students to undertake sectarian education. It does not provide greater or broader benefits for recipients who apply their aid to religious education ... In this case, the fact that aid goes to individuals means that the decision to support religious education is made by the individual not by the State'.[42]

In *Zobrest v Catalina Foothills School District* (1993), the Court extended this logic from a college student to a high school student. Both federal and state disability acts required that a hearing-impaired student be furnished with a sign-language interpreter to accompany him or her to classes. The state paid for the interpreter. Mr Zobrest's hearing impairment qualified him for an interpreter's services. But after going to a public grade school, he enrolled at a Catholic high school. The state refused to furnish him with an interpreter, on grounds that this would violate the *Lemon* rule prohibiting direct aid to a religious school; moreover, the presence of a state-employed interpreter in a Catholic high school would foster an excessive entanglement between church and state. Following *Mueller* and *Witters*, the *Zobrest* Court upheld the act as 'a neutral government program dispensing aid not to schools but to handicapped children'.[43]

In *Mitchell v Helms* (2000), the Court upheld the constitutionality of direct government aid to the secular functions of religious schools. The Education Consolidation and Improvement Act (1981) channelled federal funds to state and local education agencies for the purchase of various educational materials and equipment to be distributed to all local schools for 'secular, neutral, and

[41] 463 US 388, 394–99 (1983).
[42] 474 US 481, 488 (1986).
[43] 509 US 1, 13–14 (1993).

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nonideological' programs. Louisiana distributed materials and equipment to public and private schools in the state, including Catholic private schools, following statutory procedures and formulae. Local taxpayers sued, arguing that 'direct aid' to such 'pervasively sectarian' schools constituted an establishment of religion. The *Mitchell* Court upheld the program. The law did not advance religion; indeed, it was overtly 'secular, neutral, and nonideological'. Nor did it define its recipients by reference to religion; all accredited public and private schools and students were eligible; and there was no excessive entanglement between religious and governmental officials in the administration of the program. This was no establishment of religion, but a neutral program on its face and as applied, designed to enhance all the nation's schools.[44]

In *Zelman v Simmons-Harris* (2002), the Court further upheld a school voucher program that the State of Ohio had adopted to address a 'crisis of magnitude' in its Cleveland public school system. The program gave parents a choice to leave their children in the local Cleveland public school district or to enrol them in another public or private school that participated in the school voucher program. For those parents who chose to send their children to a participating private school, the program provided them with a voucher to help defray tuition costs, but parents had to make co-payments according to their means. Some 82% of the private schools participating in the voucher program were religiously affiliated; 96% of the students who used vouchers enrolled in these private religious schools.[45] Local taxpayers challenged this as a form of direct state aid to religious schools, including their religious education.

The *Zelman* Court upheld the voucher program. It was enacted for a 'valid secular purpose of providing educational assistance to poor children in a demonstrably failing public school system', Chief Justice Rehnquist wrote for a sharply divided Court. The primary effect of the program was not to advance religion but to enhance educational choice for poor students and parents: 'Where a government aid program is *neutral* with respect to religion, and provides assistance directly to a *broad class of citizens*, who, in turn, direct government aid to religious schools wholly as a result of their own genuine and independent *private choice*', there is no establishment of religion. 'The incidental advancement of a religious mission, or the perceived endorsement of a religious message is reasonably attributable to the individual, not the government, whose role ends with the disbursement of the funds.'[46]

Free exercise and equal access

These last five cases – *Mueller*, *Witters*, *Zobrest*, *Mitchell*, and *Zelman* – were all Establishment Clause cases. Each held that it was no establishment of religion to allow religious parties to avail themselves of the same statutory rights and benefits made available to everyone else. This was a narrower constitutional logic than the four equal access cases on the place of religion in public schools

[44] 530 US 793, 810 (2000).
[45] 536 US 639 (2002).
[46] 536 US at 652.

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that we analysed earlier – *Widmar*, *Lamb's Chapel*, *Rosenberger*, and *Good News Club*. In those latter cases, the Court held that the equal access of religious parties to public school forums and funds was not only permissible under the Establishment Clause but was also mandated by the Free Speech Clause. The results of these two lines of cases are largely the same: religious and non-religious parties get equality under the law. But the constitutional logic is different. Religious parties claiming equal access rights in public schools are constitutionally entitled to this equal treatment under the Free Speech clause. Religious parties claiming equal treatment in religious schools are only statutorily entitled to this equal treatment under applicable federal or state statutes. But what the legislature gives by statute, it can also take back by statute.

That distinction in logic became clear in *Locke v Davey* (2004). *Locke* involved a successor Washington state scholarship program to the one that the Court had addressed in the 1986 *Witters* case. The new scholarship rules in *Locke* provided that state scholarship recipients could attend any accredited college in the state, including a religious college, but they could not major in 'devotional theology'. Davey went to a religious college and then declared a double major in business and theology. He thus lost his state scholarship. He argued that the state had thereby violated the First Amendment Free Exercise Clause. The state countered that paying for his scholarship would violate the state's constitutional prohibition on funding religious education. Davey further argued that the payment made to the Christian college was entirely by his private choice, just like the payments in *Zelman* and *Witters.* The state countered that it should not have to *pay* Davey for the *free* exercise of his religion.

A 7-2 *Locke* Court held for the state, characterising this as a case that fell 'in the joints' between the First Amendment clauses. The Free Exercise Clause does not require the state to pay for Davey's scholarship, any more than the Establishment Clause prevents the state from doing so, Chief Justice Rehnquist wrote for the Court. It was up to the state legislature, not the courts, to decide whether to give, condition, or withhold its funding to religious students. Here, the legislature had applied its own state constitutional prohibition on funding of religious education as narrowly as possible – allowing students to spend their state scholarship funds at religious colleges and to take religion courses, but just not to become theology majors. This was a sensible and well-tailored application of state constitutional law, the Court concluded. It was certainly permissible under the First Amendment and further encouraged by the Tenth Amendment protection of federalism.[47]

In its three most recent cases, however, the Court explicitly anchored the equal access rights of religious schools, parents, and students in the Free Exercise Clause, effectively limiting *Locke* to its facts. In *Trinity Lutheran Church v Comer* (2017), the state excluded a church school from a state progam that reimbursed schools for the costs of resurfacing its playgrounds with a new rubber surface supplied by the state's recyclers. The school had applied on time and easily met all the conditions and criteria to receive the funds. But the state denied their application because of the state constitutional prohibition on funding religious

[47] 540 US 712 (2004).

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education. The *Trinity Lutheran* court held this to be a violation of the Free Exercise clause. Chief Justice Roberts distinguised the *Locke* case carefully; 'Davey was not denied a scholarship because of who he was; he was denied a scholarship because of what he proposed to do. Here there is no question that Trinity Lutheran was denied a grant simply because of what it is – a church'. State laws imposing 'special disabilities on the basis of ... religious status' alone are permissible only if the state has a 'compelling interest' for doing so. The state's general concern about establishing religion contrary to its state constitution was not compelling enough.[48]

A footnote in *Trinity Lutheran* limited this holding to its facts. In *Espinoza v Montana Department of Revenue* (2020), however, the Court widened this reading of the free exercise right to equal access for religious and non-religious parties. In this case, the State of Montana offered its citizens state tax credits if they made donations to non-profit organisations that awarded scholarships for private school tuition. However, the state program would not allow scholarships to go to religious school students, as the state constitution prohibited all state aid to religious education. Three mothers whose children could not get scholarships to attend a Christian school filed suit under the Free Exercise Clause, claiming that this exclusion constituted discrimination against them and the religious schools. The *Espinoza* Court agreed. The state's 'interest in creating greater separation of church and State than the Federal Constitution requires "cannot qualify as compelling" in the face of the infringement of free exercise here'.[49]

The Court repeated this ruling in *Carson v Makin* (2022). The state of Maine had a longstanding tuition assistance program that allowed parents who lived in thinly populated rural school districts without their own public high school to use public funds to attend a public or private school of their choice, including schools outside Maine. But the state would provide assistance only if the chosen school was not 'sectarian' – based on the state's review of the school's curriculum, practices, character, and mission. Citing *Trinity Lutheran* and *Espinoza*, the Court struck down this policy as a violation of the free exercise clause. These private schools are disqualified from state public funds 'solely because they are religious', the Court determined, and that is unconstitutional discrimination against religion. The state may 'not exclude some members of the community from an otherwise generally available public benefit because of their religious exercise'.[50]

Labour and employment in religious schools

The First Amendment requires that religious organisations, including religious schools, be given room to carry out their unique missions and functions. This is partly because religious organisations are places where many individuals

[48] 137 S Ct 2012, 2017–18, 2021–24 (2017).

[49] Ibid. See also *Arizona Christian School Tuition Organization v Winn*, 563 US 125 (2011) (holding that taxpayers lacked standing to bring an Establishment Clause challenge to a state law that provided tax credits to other state residents who contributed to 'student tuition organizations' which organisations would then provide scholarships to students attending private schools, including religious schools).

[50] *Carson v Makin,* 142 S Ct 142 S Ct 1987, 1993–94, 1997–98, 2000–02 (2022).

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manifest their free exercise rights. But the First Amendment 'gives special solicitude to the rights of religious organizations' as such, the Court noted recently, protecting a 'religious group's right to shape its own faith and mission', and 'bar[ring] the government from interfering' with its internal decisions over membership and leadership.[51]

Reflecting this basic teaching of 'religious autonomy', as it is called, legislatures often exempt religious employers from various labour, employment, and civil rights laws. The best-known example is Section 702 of Title VII of the Civil Rights Act of 1964, an Act which generally prohibits employment discrimination based on 'race, color, religion, sex, or national origin'. Known as the 'ministerial exception' provision, Section 702 provides that the federal prohibition on religious discrimination does not apply to 'any religious corporation, association, educational institution, or society' that hires employees of a particular religion to perform work connected with the activities of that religious group.[52]

The core cases where Section 702 applies are easy. A synagogue does not have to hire a Baptist minister to serve as its rabbi or read the Torah. The Catholic Church does not have to hire a Lutheran pastor to serve as its bishop, abbot, or school principal. A denominational Christian seminary can dismiss a dean or professor who converts to Islam. The marginal cases raise harder questions. Does the *ministerial* exception apply to non-clerical or non-ordained employees of the religious organization, such as teachers, secretaries, groundskeepers, suppliers, or janitors? What if the religious line-drawing by the religious employer adversely affects a party who is part of an otherwise protected class under the Civil Rights Act? Do women, say, who are denied ordination or religious leadership positions because the church teaches male-only apostolic succession have a sex discrimination claim under the Civil Rights Act? How about African Americans who are excluded from attending predominantly white schools because of a biblical understanding that the races be separate? Or what of same-sex parties who are denied employment or membership because a religious group teaches that homosexuality is sinful? And, more generally, is this special protection for religious autonomy over employment issues constitutional – let along wise – given some of the recent financial and sexual scandals of religious organisations and their leaders?

The Supreme Court has provided only limited guidance to address these hard questions, although it has strongly affirmed the constitutionality of the ministerial exception. In *National Labor Relations Board v Catholic Bishop* (1979), the Court held that the National Labor Relations Act (NLRA) did not grant the National Labor Relations Board (NLRB) power to certify unions for lay teachers in religious schools. Siding with the religious schools, and sidestepping the constitutional questions raised, the Court resolved this case statutorily, finding no 'clear expression of Congress' intent to bring teachers in church-operated schools within the jurisdiction of the NLRB'.[53]

[51] *Hosanna-Tabor Evangelical Lutheran Church and School v EEOC*, 132 S Ct 694, 706 (2012).
[52] Civil Rights Act of 1964, § 702(a), 42 USC § 2000e-1(a) (2012).
[53] 440 US 490, 507 (1979).

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In *Presiding Bishop v Amos* (1987), the Court upheld Section 702 against an Establishment Clause challenge, and further allowed its application to a non-clerical employee. Amos was a 'building engineer' for a gymnasium open to the public and owned and operated by the local Latter-Day Saints Church. He was dismissed from his position because he was no longer a member in good standing of that church. He sued, claiming religious discrimination against him. The church defended its decision by invoking the ministerial exception. Amos argued that he was not a minister, but an engineer, and thus the 'ministerial' exception did not apply. Moreover, he argued, Section 702 violated the Establishment Clause because it unduly favoured religious employers and employment over all others. Why should a publicly open gym run by a church be able to religiously discriminate against an engineer when an identical publicly open gym run by a local corporation cannot do so? The *Amos* Court held for the church. The Establishment Clause does not forbid Congress from allowing religious organisations to hire members only of their own faith for both secular and religious jobs, the Court concluded. It was no establishment of religion for Congress to give more protection to religious employers than might otherwise be required by the Constitution. Such 'benevolent neutrality' is not an 'unlawful fostering of religion'.[54]

These early precedents led several lower courts to give ample deference to religious schools, colleges, and universities to set their own standards of admission, employment, and discipline. In *Hosanna-Tabor Evangelical Lutheran Church and School v EEOC* (2012), the Court reinforced this deference by grounding the ministerial exception 'in the Religion Clauses of the First Amendment'. Hosanna-Tabor was a church that operated a small school for students in kindergarten through to eighth grade. Cheryl Perich was a 'called' teacher in the school. To be a 'called' rather than 'lay' teacher, she had completed theological studies at a religious college, been endorsed by a local church district, passed an oral examination, and performed various spiritual functions in the school, including leading chapel and teaching Bible. In her fifth year of teaching, Perich became ill and took disability leave. The school filled her position with a lay teacher. Perich recovered and notified the school of her intent to return. The school did not want her back. At a congregational meeting, the church voted to release her from her 'called teacher' status and pay a portion of her health insurance premiums in exchange for her resignation. Perich refused to resign. Instead, she produced a doctor's note saying she was healthy, and then showed up for work. School administrators refused to allow her back. Perich then threatened to sue. In response, the school board and congregation revoked her 'call' and fired her on grounds of 'insubordination and disruptive behavior' and breach of the church's commitment to internal dispute resolution. Perich filed a claim with the Equal Employment Opportunity Commission (EEOC), alleging that she had been wrongly terminated in violation of the non-retaliation provisions of the Americans with Disabilities Act.

[54] 483 US 327, 330, 334 (1987) (quoting *Walz*, 397 US at 669, and *Hobbie v Unemployment Commission*, 480 US 136, 145 (1987)).

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A unanimous Court held for Hosanna-Tabor. 'The Establishment Clause prevents the Government from appointing ministers, and the Free Exercise Clause prevents it from interfering with the freedom of religious groups to select their own', Chief Justice Roberts wrote for the Court. To force a church to 'accept or retain an unwanted minister, or punish [...] a church for failing to do so' would 'interfere with the internal governance of the church'. This would violate the Free Exercise Clause, 'which protects a religious group's right to shape its faith and mission through its appointments'. Furthermore, it would violate the Establishment Clause by involving the government in 'ecclesiastical decisions' over the polity, property, membership, and leadership of the church, all of which were forbidden to courts. The Court accepted Hosanna-Tabor's characterisation of Perich as a 'called teacher' who fitted into the ministerial exception. The Court also refused to second-guess the church's stated religious reason for firing Perich – that she violated its commitment to internal dispute resolution. 'Such "a pretext inquiry"', Justice Alito wrote in concurrence, stood in tension with "principles of religious autonomy"'. Moreover, the church could exercise its autonomy both 'for religious reasons' and attendant secular reasons.[55]

The Court held similarly in its most recent case, *Our Lady of Guadalupe School v Morrissey-Berru* (2020). This case involved two private Catholic schools under the Archbishopric of Los Angeles. Each school was committed to 'religious instruction, worship, and personal modeling of the faith' and held its teachers to those Catholic standards. Agnes Morrissey-Berru and Kristin Beil were both lay teachers on annual contracts. Both had some religious training and taught religion courses at their schools. They worshipped and prayed with their students each day, and they counselled and catechised them in the Catholic faith. Both were discharged for under-performance. Both sued. Morrissey-Berru claimed age discrimination because she had been replaced by a younger teacher. Biel claimed retaliatory firing because she had requested a leave of absence to undergo breast cancer treatment. The schools claimed the 'ministerial exception'. The teachers countered that they were not 'ministers'. They were lay people, with only modest religious training. They did not hold themselves out as ministers, and indeed could not be ministers as the Catholic Church ordained only males as ministers. The Supreme Court held for the schools, citing *Hosanna-Tabor* as dispositive. These two teachers performed even more 'ministerial' functions in their schools than Cheryl Perich had performed at Hosanna-Tabor, the Court found. That left their employment status within the jurisdiction of the schools and diocese.[56]

Limits on religious autonomy

This right of religious schools and other religious organisations to engage in such religious line-drawing is not unlimited, however. *Bob Jones University v United States* (1983) was an early case in point. This case involved a conservative Christian university that challenged the revocation of its federal tax-exempt status. Until

[55] 565 US 171 (2012).
[56] 140 S Ct 2049 (2020).

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1971, the university completely excluded African Americans from its student body; from 1971 to 1975, it accepted married African American applicants only if they were married to another African American. This stemmed from the university's religious beliefs that inter-racial dating and marriage were unbiblical; in their view, God created 'separate races', who must remain separate. In 1970, the Internal Revenue Service (IRS) concluded that it could no longer legally justify granting tax-exempt status to any private religious schools that practised such blatant racial discrimination. The IRS notified Bob Jones University of its change in policy and its intent to remove the university's tax-exempt status unless the school changed its policies. When the university persisted in its racial line-drawing, the IRS removed its tax-exempt status – thus exposing it to hefty new income tax liability and shutting it off from tax-deductible donations. The university sued the IRS, arguing violations of the Free Exercise Clause.[57]

The Court held for the IRS. Chief Justice Burger made clear that tax exemption was a privilege, not a right, and that the IRS had the authority to revoke the university's tax-exempt status: '[A] declaration that a given institution is not "charitable"' and therefore not tax-exempt can be made when there is 'no doubt that the activity involved is contrary to a fundamental public policy'. Given the long series of statutes and cases that have sought to remove the badges of slavery and the ravages of prejudice against Blacks in American history, the Court concluded, 'there can no longer be any doubt that racial discrimination in education violates deeply and widely accepted views of elementary justice'.[58]

This old precedent has come back into conversation since the Supreme Court's cases of *Obergefell v Hodges* (2015) declared the constitutional right to same-sex marriage and *Bostock v Clayton County* (2020) found that discrimination against gay or transgender workers constituted 'sex discrimination' under Title VII of the Civil Rights Act. Some religious schools and seminaries are theologically opposed to same-sex or trans-sex parties, activities, and couples. The question is whether exclusion of those parties from admission, membership, employment, leadership, or other benefits at the religious school, worship centre, or comparable religious institution is a form of protected 'religious line-drawing' or unprotected 'sex discrimination'. Even if it is viewed as protected 'religious discrimination', could a local, state, or even national government revoke that school's tax-exempt status or other government benefits or funding as a result – à la *Bob Jones University* or *Christian Legal Society v Martinez*? These issues are now being tested in legislatures and courts.

Conclusions

The Supreme Court's First Amendment cases on religion and education have not always followed clean logical lines. The Court has sometimes digressed and occasionally reversed itself. Several of its religion and education cases have

[57] 461 US 574 (1983).

[58] 461 US at 592, 595–596, 604.

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featured brilliant rhetorical and judicial fireworks in majority and dissenting opinions as the Court has occasionally shifted into a new understanding of the demands of the First Amendment. Part of this back-and-forth is typical of any constitutional law in action. 'Constitutions work like clocks', American founder John Adams once put it. To function properly, their pendulums must swing back and forth, and their mechanisms and operators must get 'wound up from time to time'.[59] Given the centrality and controversiality of both religion and education in American life, it is inevitable that such pendular swings in the Court's cases on religion and education will continue.

Two decades ago, after completing a long run of cases, the Supreme Court seemed content to leave many religious freedom and education questions to statutes and to states, reflecting its appetite at the time for separation of powers and federalism. Federal statutes, like Section 702 of the Civil Rights Act, the Equal Access Act, the Religious Freedom Restoration Act, and many others provided ample religious freedom protection, including in the education field. With softened standards of review under both the First Amendment Free Exercise and Establishment Clauses, state and local governments were able to engage in greater local experimentation in their schools, following the logic of federalism.

Many states, however, building on 19th century state constitutional restrictions on religious educational funding, and 21st century attacks on religious freedom altogether, began to provide far less protection for religious freedom in education. In response, the Supreme Court of late has again weighed in heavily in favour of religious freedom, including on many issues of religion and education. These cases have strengthened constitutional and statutory protections for religion in education and relaxed limits on government actions and funding for religious schools, parents, and students. Compared with a generation ago, religious parents and students now have more educational choice, and religious schools have more equal access to general governmental support and more autonomy to make their own internal employment decisions. But these are only very recent Supreme Court precedents, and they remain constantly contested in public debates and will continue to be tested in courts and legislatures.

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[59] Letter from the Earl of Clarendon to William Pym (27 January 1766), reprinted in G W Carey (ed), *The Political Writings of John Adams* (Indiana, 2000), 644, 647.

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