THE PLACE OF RELIGION IN PUBLIC SCHOOLS: A GEOGRAPHICAL ANALYSIS OF U.S. AND CANADIAN CASE LAW

by

Damian C. A. Collins
B.A., University of Auckland, 1997
M.A. (Hons.), University of Auckland, 1999

THESIS SUBMITTED IN PARTIAL FULFILLMENT OF
THE REQUIREMENTS FOR THE DEGREE OF
DOCTOR OF PHILOSOPHY

In the
Department
of
Geography

SIMON FRASER UNIVERSITY

June 2004

APPROVAL

Name:	Damian C.A. Collins
Degree:	Doctor of Philosophy
Title of Thesis:	THE PLACE OF RELIGION IN PUBLIC SCHOOLS: A GEOGRAPHICAL ANALYSIS OF U.S. AND CANADIAN CASE LAW
Examining Committee: Chair:	R.A. Clapp, Associate Professor

N.K. Blomley, Professor
Senior Supervisor

M.V. Hayes, Associate Professor
Committee Member

W.W. Pue, Professor
Faculty of Law, University of British Columbia
Committee Member

R.J. Menzies, Professor
School of Criminology, Simon Fraser University
Internal Examiner

S.K. Herbert, Associate Professor
Department of Geography, University of Washington
External Examiner

Date Approved: June 24, 2004

SIMON FRASER UNIVERSITY

Partial Copyright Licence

ABSTRACT

This thesis assesses the role that spatial distinctions and understandings of geographical context make to U.S. and Canadian case law concerning religion in public schools. It focuses on the ways in which three concepts – public/private, individual/collective, and place – influenced and informed judicial decision-making in 22 leading cases. In a series of rulings since 1962, the U.S. Supreme Court has determined that government-directed religious practices have no place in public schools, primarily on the grounds that religion is a uniquely private concern. In addition, a majority of the Court has determined that peer pressure and the disciplinary atmosphere of the school make religious exercises and instruction coercive, even when they are formally voluntary. Since the adoption of the *Charter* in 1982, Canadian courts have also struck down long-standing traditions of Christian religious exercises in public schools. Their main concern has been to safeguard the individual against collective pressures, emanating from within the community and the school, to conform to majoritarian beliefs. While some religious parents object to secular public education, this has been framed as a matter of uncoerced private conviction, for which the state has no responsibility. Canadian and U.S. courts have also considered whether religious concerns may influence public school curricula. In general, they have determined that government is required to advance secular knowledge through its education system, as opposed to the faith-based perspectives. Such rulings remain deeply controversial, reflecting a broader cultural schism over the role of religion in public life, and the scale at which decisions about education policy should be made. Court rulings are as much concerned with this conflict as they are with strictly legal principles, and often focus on mapping out social spaces, and the boundaries that distinguish them. The law respecting the place of religion in public schools is, then, a fundamentally geographical project, which has not only restructured the spaces of state education, but has relied upon spatial concepts and distinctions to make sense of the issues at stake.

'When *I* use a word,' Humpty Dumpty said in rather a scornful tone, 'it means just what I choose it to mean – neither more nor less.'

'The question is,' said Alice, 'whether you *can* make words mean so many different things.'

'The question is,' said Humpty Dumpty, 'which is to be master – that's all.'

Lewis Carroll
Through the Looking-Glass.

As to freedom of conscience, I meddle with no man's conscience; but if you mean by that, liberty to celebrate the Mass, I would have you understand that in no place where the power of the Parliament of England prevails shall that be permitted.

Oliver Cromwell
Letter for the Undeceiving of the Deluded People of Ireland.

ACKNOWLEDGEMENTS

Special thanks is owed to Nick Blomley, who guided me expertly through this research, and my degree, with a deft blend of support, suggestions, and questions. It was Nick's scholarship on law and geography that drew me to Simon Fraser University, and I continue to be impressed by its originality and clarity of vision. I am also appreciative of the freedom that Nick gave me to pursue this project.

My committee members, Michael Hayes and Wes Pue, offered thoughtful advice and encouragement at many points along the way. Wes helped me to think critically about the law, while Michael asked questions that were simultaneously supportive and thought-provoking. In another capacity, Michael also taught me a great deal about the inequalities that divide our societies.

This research would likely not have been possible without the funding I received in my first year, courtesy of the Bert Henry Memorial Scholarship.

Finally, I wish to acknowledge the assistance of the front-office staff, especially Marcia Crease, and the wonderful support I received from family and friends.

TABLE OF CONTENTS

LIST OF TABLES

CHAPTER ONE:
INTRODUCTION

This thesis examines the interconnection of law and space in the context of debates over the place of religion in public schools. It does so by analysing leading court decisions from Canada and the United States issued between 1962 and 2000. Insights from the legal-geographic literature are brought to bear on jurisprudence which, despite its constitutional, political and cultural prominence, has received little attention from geographers. In short, the thesis assesses the difference that space makes to judicial reasoning in an area of considerable social importance. Specifically, it considers the role of local context ('place'), liberal-legal distinctions, and spatio-legal boundaries in case law. In so doing, the thesis evaluates the central claim of a growing body of critical scholarship on legal geographies: that law and space are fundamentally and indelibly interconnected – perhaps to the point of synthesis.

The study draws upon the experiences of two countries which, for over 150 years, have witnessed often bitter disagreement over the role of religion in public education. Issues such as Bible-reading, religious instruction, and prayer in school have been matters of enduring controversy. In debates over such activities, the principle of church/state separation has frequently been invoked. While seldom rejected outright in either the United States or Canada, this foundational liberal premise is subject to multiple interpretations with widely divergent consequences for law and public policy. At one extreme ('strict separation') it is seen to forbid almost all forms of state aid to religion, as well as special accommodations of religious belief on the part of the state (e.g., granting believers exemptions from laws of general application). At the other end of the spectrum ('accommodation'), it is thought to forbid only the formal establishment of a state church.

The relationship between religion, education and the state has changed considerably over the last four to five decades. Historically, most public school systems in Canada and the United States incorporated Christian prayers and Scripture readings into their daily

routines, and offered classes in religious instruction. Such arrangements always attracted a degree of opposition – typically connected to a broader tension between Protestants and Catholics – and from the late nineteenth century they were increasingly subject to challenge. However, it was not until the 1960s that legal and pedagogical arguments against the incorporation of majoritarian religious beliefs in public education achieved broad success. This change was connected to a number of factors, including increasing cultural diversity, growing concern for minority rights, and changing understandings of the proper relationship between church and state.

A marked shift in attitudes is evident in two reports on religion and public education in Ontario: that of the Royal Commission on Education ('the Hope Commission'), issued in 1950, and that of the Committee on Religious Education in the Public Schools of Ontario ('the Mackay Committee'), released in 1969. The former approved of the traditional system of prayers, Bible-reading and religious instruction, and reaffirmed that 'nonsectarian' religion (in practice, generic Protestantism) had a place in public education. It proclaimed that 'Christian ideals' were the foundation of Western civilization, that they appealed to all persons of good will, and that they provided 'the surest common ground' for programs of comprehensive education (Hope Commission, 1950: 36). Moreover, the attitude and example of Jesus was held to form 'a perfect model for a true democracy in the classroom, the community, and the nation' (Hope Commission, 1950: 36). Nineteen years later, the Mackay Committee argued that public schools should not promote any form of religious commitment, even when parents who objected could request exemptions for their children. Indeed, it contended that such exemption provisions constituted a form of discrimination against those who could not accept Protestant indoctrination, and that this was 'not the problem of those who are discriminated against, but of the "smug majority" who permit the practice, and who alone have the power to end it' (Mackay Committee, 1969: 24). Such suspicion of majoritarianism, combined with an appreciation of the increasingly pluralistic nature of society, have subsequently exerted considerable influence over judicial reasoning in the area of religion and public education.

Law and Geography

This research proceeds by identifying representations of space and place within Canadian and U.S. case law, and considering the difference these make to judicial reasoning. The current law and geography literature stresses the difficulty inherent in maintaining analytical distinctions between space and law, as social categories and landscapes invoke, and depend upon, both. Moreover, these simultaneously legal and spatial orderings have *social* significance – they structure everyday life in a fundamental sense.

In a recent review of legal-geographic scholarship, Delaney (2002) observes that many studies have equated 'law' with words and textuality, and 'geography' with landscapes and materiality. Such thinking is exemplified by studies of 'Law-in-Space', which examine the manner in which the words of law are imposed on the material world, in part through the social power of legal actors. This approach emphasizes the role of legal texts in shaping spatialities – from the home, workplace, and school to the municipality and the nation state. However, it does not suggest that spatialities are 'fixed': while the social world is saturated with legal meanings, 'these meanings are complex, ambiguous, and potentially unstable' (Delaney, 2002: 69). Particular arrangements of spatial and legal power are open, to varying degrees, to both interpretive restructuring and more direct forms of challenge.

A second mode of legal-geographic inquiry acknowledges the discursive qualities of space. Research into 'Space-in-Law' centres on the spatiality of legal rhetoric: 'liberal legal discourse is an embarrassingly rich source of spatial tropes and metaphors. And these, it can be argued, are not incidental to how law is present and perceived but are foundationally constitutive of liberal legality as such' (Delaney, 2002: 69). By way of example, liberal legalism relies upon, and invokes, spatial boundaries – such as that separating the public and private spheres – to define and delimit individual rights (Blomley & Pratt, 2001). Thus, in Canada and the U.S., the legal subject enjoys considerably more rights as a 'citizen' in 'public space' than as a 'worker' in the 'private workplace' (Blomley & Bakan, 1992).

Delaney (2002: 68) suggests that Space-in-Law and Law-in-Space 'are not so much divergent approaches but are more accurately seen as distinct and complementary moments of analysis.' In the first type of inquiry, law is discursive and space material, while in the second both are discursive, and space is intrinsic to legal language. For his part, Delaney (2002: 81) seeks to emphasize the materiality of law – through reference to such examples as the prison – and in so doing to complete 'the analytic circle through which we may apprehend the mutual constitutivity of law and geography – word and world.'[1]

This study is centrally concerned with representations of space in judicial discourse. Accordingly, it is situated – first and foremost – within the Space-in-Law tradition. This said, both the thesis and the jurisprudence it examines necessarily engage with the material context in which conflicts over religion in public arise – that is, the public school. The school is, quite evidently, a simultaneously legal and spatial entity. It is a distinctive environment, with generally well-defined and clearly-communicated spatial boundaries, and a site of concretized legal power. The school is not necessarily more or less 'legal' than any other space, but the fact of statutorily-compelled attendance, combined with public regulation of its curriculum, reading materials, and day-to-day operation, makes its 'legality' highly visible.[2] It is subject to education statutes, and the regulations issued under them, as well as to an array of legal codes and rules formulated at various spatial scales, from the local to the global (e.g., from municipal bylaws to the United Nations Convention on the Rights of the Child).

This observation underscores the claim made within research into legal pluralism that diverse legal orders co-exist in social landscapes. As Twining (2000: 1) has noted, law takes many forms, and appears to be *everywhere*:

> One way of introducing students to the study of law is to ask them to read every word in a daily newspaper and to mark all the passages that they

---

[1] See also Blomley's (2003) analysis of the violences of property law.

[2] One could suggest that this point is seldom lost on pupils and teachers, who witness first hand the workings of truancy law, as well as schools' preoccupations with the micro-management of space and time, the appearance and deportment of bodies, and the power of examination (Kearns & Collins, 2003: 195).

> think deal with law or are 'law-related'. ... Even those who adopt a narrow conception of law find it on every page.... On the arts pages pornography, copyright, defamation, and other issues relating to freedom of expression arise along with licensing, charities law, taxation, and the ubiquitous contract. The advertisements are permeated with legal words and phrases. And so on through the paper.

Thus one potential understanding of 'law' refers to the various sets of rules that govern social interaction. These standards are not necessarily created by, or coextensive with, the nation state. For example, the student sitting in the university lecture hall is subject, at least potentially, to laws formulated at the international level (e.g., treaties on intellectual property), the national level (e.g., criminal law and constitutional provisions), the municipal level (e.g., bylaws regulating behaviour within city limits), and the institutional level (e.g., University statutes), and to a host of other written and unwritten norms (Twining, 2000: 231-232).

This said, law can also appear to be 'a magisterial, remote, and transcendent force governing human affairs from some high and distant plane' (Ewick & Silbey, 1998: 15).[3] As much critical legal scholarship has emphasized, representations of law as a higher rationality have often inhibited efforts to analyze law as an instrument of social control, or as a tool for reproducing inequality. A contrasting interpretation grounded in liberal thought understands law not as an oppressive mechanism, but as a vital institution for protecting individuals from hostile majorities and pervasive state power. In short, then, 'law' may refer to an array of texts, institutions, traditions and acts, and may be viewed in radically opposed ways.

In this study 'law' is, inevitably, used in different senses. A preliminary list would include law as statute, law as jurisprudence, and law as tradition, as well as common law, constitutional law, education law, and criminal law. In addition, the term is used to refer to an academic discipline, and to the foundation of the modern liberal state (in these instances, it is 'Law'). However, outside of Chapter 2, the focus is on *case law* –

[3] This description invites a comparison between law and revealed religion.

specifically, on leading cases concerning religion in public education (see 'Methods', below).

Academic considerations of this case law can be found elsewhere, most notably in law review articles tracing the development of constitutional jurisprudence on religious freedoms and the church/state relationship. These reviews have taken various forms, from broad historical summaries, to studies focussing on particular doctrines and interpretive struggles, to ideological critiques of judicial decision-making. A number have concentrated on cases concerning education, although no single review has considered the same set of 22 cases examined here. While some studies have examined the historical, social and/or political contexts in which decisions are made, none has focussed specifically on the spatial categories at stake, and the difference these make to judicial reasoning. In addition, existing legal reviews focus almost exclusively on one national context, and little is known about the similarities and differences between U.S. and Canadian jurisprudence.

More generally, a geographical examination of case law is both viable and valuable 'because legal documents are a unique kind of text' (Forest, 2000: 8). Reflecting on the nature and significance of these texts, Forest (2000: 9) observes:

> Political power is redistributed; contracts are enforced or voided; fines are levied or rescinded; a person is jailed or freed; and property rights are retained, transferred, or forfeited. In short, legal decisions are 'speech acts' because simply making a legal statement is an activity and practice with extremely practical consequences. Furthermore, the full weight and coercive power of the state stands ready to enforce the will of the court system.... What courts command and what then results may not always be the same, but the decisions handed down by courts affect lives in a tangible and direct fashion. Most importantly for geographers, the legal system often exercises its influence by changing the nature of places.

From a legal-geographic perspective, court rulings are important not only because they incorporate and rely upon spatial images and metaphors, but also because they have tangible consequences for social spatialities. These consequences stem in large part from law's connection to the authority and power of the state. In Canada and the U.S., the

courts exercise considerable authority over what occurs in public school classrooms, *particularly* when issues of religious belief and practice are at stake.

Research Question and Rationale

This thesis asks how understandings of space inform and underpin judicial rulings on the constitutional place of religion in the public schools of Canada and the United States. 'Space', like 'law', is a very broad term, and accordingly the study is oriented around three specific concerns:

1. In what ways does the legal discourse around religion in public education operationalize, and reply upon, the distinction between public and private?
2. What is the significance of the individual/collective dualism to legal debates over religion in public schools?
3. How, and to what effect, is place represented in legal debates regarding religion in public education?

The terms used in these questions – public/private, individual/collective, and place – raise definitional issues of their own, which are considered below. At this point, however, it is appropriate to consider the rationale of the study.[4] At one level, the academic motivation may be simply stated: a growing body of legal-geographic literature emphasizes the interconnection of law and space, and the centrality of spatial categories to legal discourse, and this thesis examines the extent to which this holds true with respect to a prominent area of jurisprudence. In so doing, it connects with key themes from within the literature on law and geography, including the spatiality of the public/private distinction, the legal production of boundaries and spatiality, and the geopolitics of scale.

Beyond this relatively narrow concern, the thesis seeks to bring a geographical analysis to bear on an issue of ongoing social, legal and political significance. The content, purpose and methods of public education are matters of widespread interest. Public schools, in particular, have been widely characterized as 'the primary institutional means of reproducing community and national identity for succeeding generations' (Hunter, 1991:

[4] As Dawkins (1995: 97) has observed: 'The mere fact that it is possible to frame a question does not make it legitimate or sensible to do so.'

198), in part because they are places in which most children 'are compelled undergo a decade and more of group socialization' (Bocking, 1995: 227). Since at least the mid-nineteenth century, they have been seen as vital tools for instilling shared values, and a common identity, in children from diverse backgrounds. Small wonder, then, that the place of religion within these institutions has been bitterly contested.

In the U.S., for example, the firestorm of debate that followed the Ninth Circuit's recent decision to strike down school-sponsored recitals of the Pledge of Allegiance, on the basis that the words 'One nation under God' offended the Establishment Clause,[5] is only the latest incident in a long struggle over religious activities in public schools. The Pledge – like the short prayers and brief Scripture readings struck down before it – is not a deeply meaningful theological exercise; nor does it represent an apex of church/state entanglement. The significance of such activities is linked to other factors, including conflicting notions of individual rights, divergent understandings of national identity, anxieties about the moral status of children, and incompatible visions of the appropriate role of religion in public life.

Guiding Themes

The analysis of case law in this thesis is guided by themes which connect, in various ways, with the broad project of liberalism. Berger (2002: 42) notes that while there are many strands of liberal ideology, all value the use of 'reason' in public discourse, all are concerned with the question of individual freedom, and all understand law as 'the tool with which to limit the state's interference in the lives of the individual.' This prompts at least two further observations. First, liberalism is closely connected with law: legal processes have played a critical role in translating liberal categories into on-the-ground distinctions, and in legitimating these arrangements by presenting them as moral, natural, and apolitical (Frug, 1980: 1077). Secondly, liberalism is concerned with drawing and enforcing boundaries, such as those between the individual and the state, between public and private life, and between reason and faith. Indeed, Walzer (1984: 315) characterizes

[5] *Newdow v. U.S. Congress*, No. 00-16423 (9th Cir. 2002) [hereinafter *Newdow*].

liberalism as an 'art of separation' that entails drawing lines between different realms of socio-political activity. Liberalism, then, is perhaps best understood not as 'a single formula for interpreting the world,' but as a way of 'seeing the world as a series of complex dualities' (Frug, 1980: 1075).

The geographical dimensions of several of these dichotomies are considered by Bakan and Blomley (1992) in an article addressing occupational health and safety law in the U.S. and Canada. The authors contend that the 'intelligibility and ideological power' of judicial decisions declaring workplaces to be outside the jurisdiction of local prosecutors depend upon 'the ideological conjunction of discursive (in this case, legal) and spatial distinctions ... citizen/employee, local community/workplace, and public/private' (Bakan & Blomley, 1992: 633). A spatial referent – the 'workplace' – assists in the reproduction of the discursive category of 'employee', and both are represented as 'private.' Accordingly, when a citizen crosses the boundary from the public domain into the private workplace, he/she becomes an employee, and is 'reclassified as being outside the scope of their local community's legitimate concern for one of its members' (Bakan & Blomley, 1992: 636).

Such an approach is illustrative of a wider commitment within Critical Legal Studies (CLS) to analyzing and critiquing the dualities that pervade liberal-legal thought. A central claim is that these dichotomies 'constitute the liberal way of thinking about the world,' and that they are so closely interconnected it is difficult to define one without reference to others – while not synonymous, 'they are all in a sense "the same"' (Kennedy, 1982: 1349). These interlinked dualities are also politically meaningful: they structure 'our beliefs about the experiences and capacities of the human species, our conceptions of justice, freedom and fulfillment, and our visions of the future' (Klare, 1982: 1358). In this respect, liberal legalism shares many of the characteristics of other forms of language. Legal discourse is distinguished, however, by its peculiar ability 'to constrain the political imagination and to induce belief that our evolving social arrangements and institutions are just and rational, or at least inevitable, and therefore legitimate' (Klare, 1982: 1358).

Public/Private

Debates over the place of religion in public schools have consistently been structured around the distinction between public and private. In his review of this dichotomy, Weintraub (1997: 2) emphasizes that it 'is not unitary, but protean. It comprises, not a single paired opposition, but a complex family of them, neither mutually reducible nor wholly unrelated.' While alternative conceptions diverge in significant ways, all consist of an opposition that divides the world into two mutually-exclusive categories which together purport to account for all elements of human life and experience. It follows that the extension of one 'sphere' inevitably reduces the scope and/or power of the other – irrespective of which definitional framework one adopts. Weintraub's (1997) analysis suggests that there are at least four dimensions along which public and private may be distinguished:

1. What is non-political versus what is political;
2. What is personal versus what is societal;
3. What is hidden or withdrawn versus what is open, revealed or accessible; and
4. What is individual, or pertains only to a group of private persons, versus what is collective, or is of concern to the whole community.

All of these definitions are pertinent to the analysis of debates regarding the place of religion in public schools. On the one hand, there is broad agreement that ensuring the adequate education of all children is a legitimate 'public' function: that the provision of schooling should concern the polity, that society's well-being depends upon the education of all its members, that public schools should be open and accessible to all children, and that communities share a stake in – and responsibility for – local schools. On the other hand, the liberal political tradition holds that religion is quintessentially private: that it is non-political, that it is a personal interest which is limited in the demands it can place upon society, that it is primarily a matter for the individual conscience, and that it is a legitimate concern of private associations such as families and churches. *Prima facie*, liberal thought suggests that state education and religion should occupy separate spheres. In practice, interconnection has been the norm.

Until the late twentieth century, religious perspectives were seldom excluded from classrooms in the United States and Canada: sacred texts were read, prayers recited, lessons in religious instruction delivered, and curricula structured so as to reinforce theological perspectives. Such arrangements were, and continue to be, justified by two main arguments that relate to the public/private distinction. The first identifies a public interest in advancing religion through state education. It contends that schools must be able to instil religious beliefs, lest pupils remain ignorant of national heritage and basic moral precepts, and asserts that locally-constituted publics ('communities') want schools to acknowledge and reflect their beliefs. The second represents school-based religious activities as, first and foremost, accommodations of private belief. From this view, pupils 'choose' to exercise their rights by participating in prayer on school property, educators provide classes in religious instruction in response to parental demand, and curricula are designed such that families' privately-held religious views are supported, not undermined by competing doctrines. Such designations are potentially consequential: 'when, for example, a particular activity is defined or coded as *private* – as separate from government – then the constitutional constraints imposed upon state actors are rendered irrelevant' (Feldman, 2000: 266).

In debates over the place of religion in state schools, notions of 'publicness' are frequently contested. In the liberal vision, the notion of the public school as an open, accessible and socially unifying institution is threatened by the divisive, exclusive, and destabilizing influences of religion. If schools are to accommodate children irrespective of their particularistic ties, they must refrain from imparting religious views (but not arguments or theories based on reason, which are seen as accessible to all). Such claims resonate with the more general liberal notion that religious views may guide the development of the private self, but must not form the basis for organization of the public realm.

A very different vision is espoused by those who advocate governmental accommodation of religious beliefs and practices. They locate state schools within a public realm, often constituted at the local level, which encompasses religious believers – most notably religious parents, who are said to have an inherent right to bring their faith to bear when

directing the education of their children, and contributing to the rules that govern school space. From this perspective it is the *exclusion* of religious viewpoints that threatens the openness and inclusiveness of the public school. Indeed, accommodationists assert that religious claims should not be barred from any aspect of governmental decision-making or public affairs: such exclusion discriminates against the religious conscience, and allows secular values and knowledge to monopolize government institutions and the public sphere.

The terms public and private are open to multiple, and often incompatible understandings, yet the public/private distinction remains socially meaningful. It is an enduring preoccupation of Western thought, and 'has long served as a point of entry into many of the key issues of social and political analysis, of moral and political debate, and of the ordering of everyday life' (Weintraub, 1997: 1). For the purposes of this thesis, it refers primarily to the distinction between the formal apparatus of the state (including government services), and the interests of individuals (including those groups, such as the family, to which individuals belong). However, other understandings are sometimes evident: references to the 'public sphere', for example, point to a realm of collective discussion, deliberation and decision-making. This realm is still 'political', but it refers to the 'public life' of active citizens, rather than to the administrative state.[6]

A distinction frequently subsumed within the public/private dualism is that between faith and reason. The notion that individuals are free to adopt such faiths as they see fit, and to use them as guides for personal conduct, is a central tenet of liberalism. However, some faith-based perspectives challenge the liberal-legal approach to civic ordering. Hunter (1991: 121) notes that conservative or 'orthodox' religious communities share a belief in a supernatural authority 'that is independent of, prior to, and more powerful than human experience.' This authority transcends social values and distinctions, including those associated with liberalism, such as tolerance and public/private. For believers, it is utterly

---

[6] Habermas (1989) characterizes the bourgeois public sphere of early modern Europe as a site of rational debate, intended for the communication of common concerns, distinct from both the state and personal interests. Individual differences were bracketed or ignored so that discussion could proceed without regard to the varied subject positions of participants.

compelling in every circumstance and context. Berger (2002: 47) notes that liberal democracies struggle to accommodate such 'profoundly ajurisdictional' religious views. A key question concerns how these opinions differ from those majoritarian religious perspectives that 'liberal' states have historically been able and willing to endorse and advance through such mechanisms as school prayer, Sunday closing laws, government recognition of religious holidays, and criminal prohibitions on 'sinful' behaviour. Arguably, the former pose a more direct challenge to liberalism, by insisting upon the relevance of divine authority 'to all decisions, actions, times, and places' (Berger, 2002: 47),[7] thereby refuting entirely the privatization of religion, and by rejecting (or deeming unimportant) such foundational liberal principles as individualism, rationality, and equality.

Individual/Collective

A second, and related, distinction is that between the individual and the collective. Liberal theory holds that rights secure the freedom and autonomy of the individual by creating boundaries to collective action. They permit the individual to pursue his or her own ends in the absence of coercion or compulsion. Typically, this individual is coded as 'private', with 'personal' interests that are threatened by 'public' interference stemming from either the administrative state, or social collectives. Nedelsky (1990: 166-167) suggests that the rights guaranteed by American constitutionalism, for example, 'are those [deemed] necessary to protect a bounded or "separative" self' from the threats posed by democratic decision-making. This emphasis is highly pertinent for present purposes: participation in school-mandated religious activities may be represented as the outcome of free choice on the part of private individuals (whether parents or pupils), or as something that is directly or indirectly compelled by the state to the detriment of individual liberty. The former view implies that mere exposure to religious views and practices poses no inherent threat to individual autonomy (e.g., dissenters and non-believers who must listen to invocations

[7] Berger (2002) suggests that *all* believers adopt this view, and that there is a tension between the secular state and religion *per se*. This overlooks the diversity of theological views, the prominent role of some religious groups in promoting church/state separation and other liberal values, and the close historical connection between liberalism and some forms of Protestantism.

and benedictions at graduation ceremonies are not coerced), while the latter stresses that pupils enjoy very little autonomy within the boundaries of the school (e.g., their attendance is compelled by statute, and their behaviour subject to constant surveillance and correction by governmental actors).

At this point, it is useful to consider who or what constitutes the 'threatening collective' of the liberal imagination. The answer to this question is somewhat ambiguous. Most frequently, the term refers to the state and its coercive power. Rights are envisaged, in the first instance, as tools for restricting the ability of government to inhibit individual autonomy. Religious and conscientious freedom, for example, is deemed to require a boundary between church and state that insulates the individual conscience from intrusions by any state actor, or branch of government, even where these may be licensed by majorities. This archetypal liberal freedom is understood to ensure that '[b]elievers are set free from every sort of official or legal coercion. They can find their own way to salvation ... or they can fail to find their way; or they can refuse to look for a way. The decision is entirely their own...' (Walzer, 1984: 315). It is concerned, in the first instance, with limiting 'public' power, rather than the potentially coercive actions of 'private' individuals and groups.

At the same time, liberal thinkers have long looked to a strong, unified state to defend individual rights against the assertions of communities, locally-constituted majorities, and organizations such as cities, churches, and trades unions, which lay claim to the loyalties of individuals, mediate their relationship with sovereign power, and bind them to collective decision-making. In the U.S. context, Clark (1981) links the liberal suspicion of group/corporate power to the 'spatial integration' of the nation state. Local government has been stripped of its law-making powers in order to protect the rights of the individual (Clark, 1981: 1198). However, critical legal scholarship asserts that this individual is an abstraction: a rational economic maximizer detached from both place and culture (Pue, 1990: 566), whose freedom derives not from interconnection with others but from isolation (Nedelsky, 1990: 169). Work in CLS paints an alternative picture of the social world, in which 'freedom is in part the development of the capacity for communal self-

governance' and '[h]uman fulfillment is impossible outside of and apart from communal life' (Klare, 1982: 1419).

It is interesting, in light of such claims, that Clark (1985: 158) elsewhere identifies a 'doctrine of local matters' which, although 'incredibly fragile,' moderates liberal individualism with 'an idealized image of community life.' It holds that courts should respect local decisions on matters of primarily local concern, acknowledge the right of communities to protect their character, and value geographic diversity. Such thinking was evident in *Wisconsin v. Yoder*, in which the U.S. Supreme Court granted the Amish a free exercise exemption from Wisconsin's compulsory education law.[8] The majority extolled the imagined virtues of Amish communities, including their devotion 'to a life in harmony with nature and the soil,' their 'productive and very law-abiding members,' and their rejection of 'public welfare in any of its usual modern forms.'[9] In dissent, Justice Douglas asserted a liberal vision in which the Court's duty was to protect individuals (including children) from all-enveloping community values.[10] Commenting on this type of tension, Frug (1980: 1122, 1124) observes:

> [I]t is a paradox that while liberalism can be understood as an attempt to eradicate group power in favor of that of the individual and the state, most liberal thinkers seem convinced that the creation of a world without any intermediate bodies – a world in which the state is the only power wielder other than individuals themselves – would leave individuals powerless to prevent a centralized state from threatening their liberty. ...
>
> The exercise of state power infringes individual rights protected by independent corporations, yet the exercise of corporate power infringes individual rights protected by the state.

---

[8] *Wisconsin v. Yoder*, 406 U.S. 205 (1972) [hereinafter *Yoder*].

[9] *Yoder* at 210, 222. Feldman (2000: 263) observes:

> ...the Court seemed especially receptive to the Amish's claim for a free exercise exemption from a state compulsory-education law because they were able to appeal to the justices' romantic nostalgia for a mythological past – for a simple Christian America. This national past – however mythological it might be – was one that most of the justices (as Protestants) could readily understand; its meaning resonated with the religious and cultural horizons of the justices themselves.

[10] *Yoder* at 241 (Douglas J., dissenting).

Conflict between individual rights and community sentiment has been central to debates over religion in public education. In the United States, in particular, state-sanctioned religious activities in public schools have been found in breach of the federal constitution, but continue to be greatly valued by many local majorities, and numerous religious groups. Interestingly, the dynamics of this national-local tension may be reversed, as occurred in the United Kingdom when the Conservative government of Margaret Thatcher made daily acts of Christian worship in schools a statutory requirement (Cooper, 1998: 68). This initiative encountered fierce opposition from many local education authorities, and teachers refused *en masse* to abide by the law. The locality/nation dichotomy does not map simply onto that between collective power and individual autonomy. The state does not always champion individual freedoms against the claims of community (which may, after all, be constituted at the national scale), and actors operating at the local level do not always seek to subjugate individual rights to collective demands.

Place

Liberal dualisms are often linked to social and legal understandings of what types of people, behaviours and policies are appropriate in what types of places. The public/private distinction is a pertinent example. As Waldron (1991: 296) notes, the dividing up of land in parcels of public and private property gives us 'a way of determining, in the case of each place, who is allowed to be in that place and who is not.' Moreover, notions of public and private have frequently been invoked in discourses around gender, including those that have located women within the private sphere of the family home. Women who transgress this norm have often been targets for social sanction, as Cresswell (1996: 97-122) illustrates with reference to the women's peace camp established at Greenham Common, England, in the mid-1980s. He argues that the widespread vilification of participants was linked to the perception that they were 'out of place': they were women who had left their homes (imagined to be sites of cleanliness and domestic harmony), occupied a public space (represented as unclean and chaotic), and sought to contribute to political debate (frequently through theatrical gestures rather than conventional appeals to reason). In short, they had 'transgressed the public/private,

male/female boundary' (Cresswell, 1996: 119), and the response of the media – in particular – was to portray them as hysterical, irresponsible, and dirty. Such representations can be understood as an attempt to reinforce hegemonic understandings of socio-spatial order.

Creswell employs the 'in place/out of place' metaphor in examining the relationship between the nature of space, and dominant understandings of social order and hierarchy. His thesis is that ideas about what is 'right, just, and appropriate are transmitted through space and place. Something may be appropriate here but not there' (Cresswell, 1996: 14). This thinking is founded upon a rejection of any analytical distinction between the social and the spatial: 'social power and social resistance are always already spatial' (Cresswell, 1996: 11). Acts of transgression (literally, 'crossing a boundary') challenge established socio-spatial norms – and sustained or continuous 'out of place' behaviour may create or unsettle shared understandings of what (or who) is appropriate within a particular context.

Applying Cresswell's thinking to this research, the U.S. Supreme Court's rulings against school prayer in the 1960s represented a 'heretical geography' for many Americans, some of whom then campaigned to put Christianity 'back in its place'. This place was both metaphorical (i.e., a position of social dominance) and material (i.e., the physical and institutional environment of the public school). However, the Court had developed its own imaginative geography, in which the society was increasingly diverse, and the public school was a setting where officially-mandated prayer coerced minorities. From the latter perspective, the proper place for expressions of religious belief was the *private* sphere, understood to encompass home, church and individual conscience. Arguments about the place of religion in public schools possess both normative and material dimensions. At one level, they invoke questions of church/state separation and the appropriate role of religion in public life; at another they concern the content of classroom materials, and the everyday practices of teachers and pupils.

In addition, the school is a place in the vernacular sense – a bounded portion of geographical space within which certain rules apply, and particular activities occur. As noted above, there is frequently intense public interest in what occurs within this

environment. The school also has 'a place' within broader socio-cultural and legal landscapes. For example, it is often represented as part of a community – typically, a community that is coextensive with neighbourhood or school board boundaries, although it may also be constituted at the regional or national scales. This is significant, because debates over religion in public education frequently take the form of struggles over the appropriate site or scale at which decisions about classroom content and curricula should be made. There are recurring tensions between 'local' and 'central' control, and between majoritarian or representative decision-making and judicial review (the latter tension part of broader debate over 'judicial activism'). Consequently, this thesis engages with at least three dimensions of place – place as locale (e.g., the school); place as location (e.g., the neighbourhood or region); and place as normative assessment (e.g., the place of religion in the classroom).

Comparisons

Canada and the United States share broadly similar histories of struggle over religion in public education, and over the larger question of the constitutional relationship between church and state. In both nations, definitive answers have been sought from the courts, and the resulting rulings have been subject to debate, contestation and – in some instances – rejection. However, this thesis is not, in the first instance, a comparative study. Rather, it is a consideration of the geographical dimensions of two significant bodies of jurisprudence. Implicit in the analysis is an acknowledgement that while Canada and the U.S. have much in common when it comes to religion and public education (as they do with other liberal democracies),[11] they also differ in significant ways.

Thus, on the one hand, both nations have experienced social tension and political division when constitutional restrictions on state advancement or endorsement of religion have conflicted with the religiosity of communities, families, voters, and office-holders. On the other hand, this tension is considerably more prominent in the United States, where

[11] The current debate in France over a proposed ban on religious clothing and imagery in public schools is a case in point. While this precise issue has not surfaced in the U.S. or Canada, it goes to the wider question of the extent to which public schools can accommodate student (or parental) religious belief while remaining secular.

establishment is constitutionally prohibited, but religious beliefs frequently shape public policy debates, and holders of public office routinely invoke God, as well as the idea that their nation has been divinely selected to play a special role in world history. The U.S. is distinguished from other Western states – including Canada – by significantly higher rates of church attendance,[12] by the political influence exerted by conservatively-aligned evangelical Protestants, and by the prominence of religious references and appeals in political discourse.[13]

In Canada, church/state tension is generally less heated, although similar issues certainly arise. Government funding of religious schools is an enduring 'national question', closely linked to broader struggles over language and minority rights. Historically, Catholic schools were largely Francophone, and perceived as central to the maintenance of French Canadian language and culture. Conversely, most Protestant schools were Anglophone, and seen as vital for reinforcing a 'British' national identity. Elements of this issue periodically resurface, although a more prominent debate in the contemporary context concerns the place (i.e., legitimacy) of religion and religious expression in public life and discourse. Overall, Canada's recent experience of episodic arguments over the church/state relationship, which have been only loosely associated with electoral politics, places it closer to Australia, New Zealand and the U.K. than to the United States.

Methods

This thesis examines a body of jurisprudence concerned with the constitutionality of religious influences and practices within public schools – that is, primary and secondary educational institutions funded primarily by the state, open to all local children, and subject to control by government bodies. The relevant case law considers, *inter alia*, the

---

[12] Most surveys suggest that around 40% of Americans attend church at least once per month, compared with approximately 20% of Canadians, and 5-8% of people in the United Kingdom. Conkin (1998: 170) observes that, in the U.S., religious belief and affiliation remains high even among 'affluent, well-educated, highly professional people, or the very classes of people who have largely deserted the Church in most European countries.'

[13] For example, presidential prayer proclamations have become an annual ritual. These routinely contain an appeal for divine intervention in the life of the nation, and on occasion have adopted 'the ringing cadences of the revivalists' (Drakeman, 1991: vii).

devotional reading of sacred texts, school-sponsorship of invocations and observances containing spiritual dimensions, efforts to impart theological 'truth' and/or moral absolutes based primarily upon religious belief, and campaigns to shape curricula so as to minimize conflict with the claims of revealed religion. Twenty-two leading cases form the major data set – thirteen from the United States, and nine from Canada (see Table 1).

The temporal focus is 1962-2000, beginning with the U.S. Supreme Court's ruling in *Engel*, which signalled an end to the generic Protestantism of the 'common school' era, paved the way for the formal secularization of U.S. public education, and helped to ignite the 'culture war' between conservative and progressive interests. The timing of events in Canada is somewhat different: the legal landscape was transformed by the patriation of the Constitution in 1982, and it was not until 1988 that a Court struck down religious practices in public schools relying on the guarantee of freedom of conscience and religion in the *Canadian Charter of Rights and Freedoms*.[14]

Of the many cases that have dealt with the broad issue of religion in schools, it is possible to identify a number which have had particular influence on educational practices, political discourse, and constitutional jurisprudence. In the United States, these are first and foremost decisions handed down by the nation's highest court. In *Leading Supreme Court Cases on Church and State*, Alley (1999) identifies 33 landmark Establishment Clause cases, grouping them under three headings: 'religious schools' (n=13), 'public schools' (n=11), and 'other' (n=9). School issues appear somewhat less frequently on the docket of the Supreme Court of Canada, although it too has considered the relationship between religion, education and the state in the context of both public and private schools. The issue has been more extensively debated within the Provincial courts, particularly in Ontario and British Columbia.

---

[14] Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*].

Table 1: List of Cases Examined (Study Data Set)

Case Citation	Abbreviation	Issue
U.S. Cases		
Engel v. Vitale, 370 U.S. 421 (1962)	*Engel*	Prayer
Abington v. Schempp, 374 U.S. 203 (1963)	*Schempp*	Prayer & Bible-reading
Epperson v. Arkansas, 393 U.S. 97 (1968)	*Epperson*	Evolution/creationism
Stone v. Graham, 449 U.S. 39 (1980)	*Stone*	Ten Commandments
Wallace v. Jaffree, 472 U.S. 38 (1985)	*Wallace*	Moment of silence
Smith v. Mobile County, 827 F.2d 684 (11th Cir. 1987)	*Mobile County*	Secularism & books
Edwards v. Aguillard, 482 U.S. 578 (1987)	*Edwards*	Evolution/creationism
Mozert v. Hawkins County Public Schools, 827 F.2d 1058 (6th Cir. 1987)	*Mozert*	Secularism & books
Westside Community Bd. of Ed. v. Mergens, 496 U.S. 226 (1990)	*Westside*	Student clubs
Lee v. Weisman, 505 U.S. 577 (1992)	*Lee*	Prayer
Jones v. Clear Creek Ind. Sch. Dist., 977 F.2d 963 (5th Cir. 1992)	*Jones II*	Prayer
Peloza v. Capistrano Unified Sch. Dist., 37 F.3d 517 (9th Cir. 1994)	*Peloza*	Evolution/creationism
Santa Fe Ind. Sch. Dist. v. Doe, 530 U.S. 290 (2000)	*Santa Fe*	Prayer
Canadian Cases		
Re Zylberberg and Dir. of Ed. (1986), 55 O.R. (2d) 749 (Ont. Div. Ct.)	*Zylberberg I*	Prayer & Bible-reading
Zylberberg v. Sudbury Bd. of Ed. (Dir.) (1988), 65 O.R. (2d) 641 (C.A.)	*Zylberberg II*	Prayer & Bible-reading
Russow v. B.C. (A.G.) (1989), 35 B.C.L.R. 29 (B.C.S.C.)	*Russow*	Prayer & Bible-reading
CCLA v. Ontario (Minister of Ed.) (1990), 71 O.R. (2d) 341 (C.A.)	*Elgin County*	Religious instruction
Assn. for Rights & Liberties v. Manitoba (1992), 94 D.L.R. (4th) 678 (Ct. Q.B.)	*Manitoba Rights & Liberties*	Prayer & Bible-reading
Bal v. Ontario (A.G.) (1994), 21 O.R. (3d) 681 (Ont. Ct., Gen. Div.)	*Bal*	Secularism & funding
Adler v. Ontario, [1996] 3 S.C.R. 609	*Adler II*	Secularism & funding
Chamberlain v. Surrey Sch. Dist. #36 (1998), 60 B.C.L.R. (3d) 311 (B.C.S.C.)	*Chamberlain I*	Secularism & books
Chamberlain v. Surrey Sch. Dist. #36 (2000), 60 B.C.L.R. (3d) 181 (B.C.C.A)	*Chamberlain II*	Secularism & books

The data set incorporates nine U.S. Supreme Court cases, all but one of which was identified as a 'landmark case' by Alley (the exception being *Santa Fe*, which had yet to be decided at the time Alley's work was published). Four significant cases from the level of U.S. Federal Courts of Appeal are also included to facilitate investigation of particular issues: religious objections to secular texts in public schools (*Mobile County*; *Mozert*), the evolution-creationism debate (*Peloza*), and the constitutionality of student-led prayers (*Jones II*). Of the nine Canadian decisions, one is drawn from the Supreme Court of Canada, three from Provincial Courts of Appeal, and the remainder from lower Provincial courts. This includes *all* the cases to have dealt with school prayer and Bible-reading, and the sole case to have considered state-mandated religious instruction. In two instances (*Chamberlain* and *Zylberberg*), both lower and higher court rulings on the same issue are considered. This expands the Canadian data set, and enables detailed examination of diverse jurisprudential positions.

A broadly similar conceptual and methodological framework was adopted in Delaney's (1998) *Race, Place and the Law, 1836-1948.* It focused on legal practices that have contributed to shaping and reshaping geographies of race, including interpretations of constitutional provisions, assertions and denials of rights, representations of space, demarcations of material and conceptual boundaries, and deployments of notions of property and contract. The study entailed detailed examinations of legal doctrine, constitutional and statutory law, and landmark court decisions. This thesis employs an analogous approach, albeit one that places greater emphasis on case law.

Data collection and analysis proceeded as follows. First, leading case law was identified from a review of the relevant literature, especially law review articles and recent volumes on church/state jurisprudence. Secondly, these decisions were downloaded from the Lexis-Nexis and Findlaw databases. The third step involved importing these data into Microsoft Word, and formatting the text – including opinions, concurrences, and dissents – for ease of analysis. The resulting 725-page data set was then critically reviewed. This involved the development and implementation of a colour-coding system that enabled two main levels of analysis: one relating to the *prima facie* subject matter of the text (e.g., school prayer, Bible-reading, religious instruction, evolution/creationism, secular

humanism, jurisdictional issues, historical issues); the other relating to the research's organizing themes: the public/private distinction, the tension between the individual and the collective, and representations of place. Accordingly, each word, line, sentence and paragraph was treated in one of the following four ways: not coded; assigned a 'subject matter' code; assigned an 'organizing theme' code; assigned both a 'subject matter' and an 'organizing theme' code. The goal was to identify, in a systematic fashion, those sections of the text most pertinent to the research. The perceived advantages of this system included ease of operation, monetary cost (none), flexibility in determining the size of data units, and retention of the original formatting of judicial decisions.

While the thesis focuses on the 22 selected cases, a variety of additional primary and secondary data sources were drawn upon to assist analysis and provide context, including constitutional documents, official reports, academic publications, position papers, institutional websites, and media reports. At various points, it is useful to step outside the courtroom and the language of law. For example, while U.S. courts have addressed the controversy surrounding the teaching of evolutionary theory, and calls for creationism to be included in science curricula, much additional insight into this issue can be gained from academic commentaries (see Chapter 6). The thesis draws exclusively on information already in the public domain, but not hitherto compiled in a manner described above, nor analyzed from a legal-geographic perspective. Indeed, geographers have generally had little to say about the issue of religion in schools (but see Merrett, 1999), while legal scholars interested in the associated case law have not considered the ways in which place, and the public/private and individual/collective dichotomies, are acknowledged, imagined, critiqued, and weighed in judicial decision-making.

Organization

This thesis is organized into seven chapters. Chapter 2 reviews a growing body of critical scholarship on the interconnection of law and space. It begins with the observation that hegemonic representations of law as a rational, autonomous, and acontextual system of social ordering historically impeded such analysis. However, the development of critical perspectives on law, especially since the 1970s, entailed a rejection of these claims, and a

critique of their ideological function. As part of this critical turn, a number of geographers began to investigate the spatiality of law, and the legality of space, at both theoretical and empirical levels. A broad overview of this research is followed by a consideration of boundaries – spatio-legal distinctions that are constitutive of everyday geographies – and a discussion of the different conceptual and methodological approaches employed in legal-geographic analysis. The chapter's final section follows recent review articles in considering the political and epistemological value of legal geography.

Chapter 3 provides a broad context for the study, beginning with the constitutional arrangements that frame contemporary jurisprudence on religion and public education in the United States and Canada. Key interpretive and social struggles over these texts are outlined. The next section considers the historical role of religion in public education. The belief that schooling without religion is incomplete is a recurring theme in Canadian and U.S. educational history, and it had a particular influence on the 'common schools' movement of the nineteenth century. This early model of public schooling was strongly influenced by the notion that Protestant Christianity provided the very foundation for learning, law, and civilization, and incorporated Bible-reading into daily routines. It was vehemently opposed by the Catholic Church, which established school systems of its own. This commitment to parochial education generated demands for state funding, typically based on the argument that Catholic parents were entitled to share in the state's provision for the common welfare.

The second half of the chapter considers contemporary struggles over religion and public education, with particular reference to the 'culture war' concept. This term, as developed by James Davison Hunter (1991), refers to a fundamental cultural schism between progressive and orthodox moral visions. The culture war not only extends to, but is in large part centred on, the realm of education. While progressive stakeholders have supported the secularization of public education, orthodox opinion has maintained that public schools must accommodate religious belief, protect religious expression, and uphold the morality many religious parents wish to instil in their children. These opposing viewpoints have underpinned hallmark conflicts over school prayer, Bible-reading, religious instruction, secular humanism, and the teaching of evolution. Indeed, early court

rulings against school prayer in the United States contributed, in large part, to the formation of an orthodox alliance of evangelical Christians and other conservative groups.

The analysis of case law begins in Chapter 4, with a consideration of eight leading U.S. decisions on the constitutionality of religious activities in public schools. It is argued that these rulings are centrally concerned with spatialized understandings of both the public school (an environment in which state control is said to be pervasive, and peer pressure rife) and religion (represented as a uniquely private concern within an increasingly pluralist society). In striking down religious activities endorsed by the state, and/or coercive of minorities, U.S. courts have contributed significantly to the secularization of public education. However, this process has not gone uncontested: conservative Justices have issued vigorous dissents, court orders have been ignored and disregarded, and many legislators and members of the public have campaigned to restore some form of prayer to the public school classroom.

Chapter 5 reviews Canadian jurisprudence, including five cases concerning religious activities in public schools, and two addressing the question of whether strictly secular systems of public education breach the rights of parents who favour religious education. On the first issue, religious exercises and instruction have been struck down on the grounds that they coerce minorities and non-believers. To safeguard minority rights and individual autonomy from state-mandated coercion, the courts have required public schools to respect a boundary between 'indoctrination in' and 'education about' religion. On the second issue, courts have ruled that Provinces have no obligation to fund independent religious schools, and invoked the public/private distinction in declaring that parental preferences for religious education are the product of private choices, not government action.

Two case studies are presented in Chapter 6, both linked closely to culture war politics, and conservative religious objections to the secularization of public education. First, it considers the influential claim that schools are promoting 'secular humanism' and thereby undermining 'traditional' religious beliefs and values. This contention, advanced most

frequently by evangelical Protestants, has led to political and legal struggles over school curricula and pedagogical methods. This chapter considers two cases in which Federal Courts of Appeal in the U.S. were asked to determine whether it is unconstitutional for public schools to use textbooks containing viewpoints that some religious parents deem offensive and threatening. It also considers two decisions handed down in a prominent Canadian case concerning a school board's refusal to approve three books as resource materials, based primarily on religious objections to their content. The chapter then moves to consider the evolution/creationism controversy. It examines three cases from the U.S., where the place of evolutionary science in the public school classroom has long been contested by Protestant denominations committed to a literalist interpretation of the Bible.

Chapter 7 concludes the thesis, and is organized into two parts. First, it revisits the research question, and asks what can be learnt from the case study about the public-private distinction, the individual/collective dualism, and understandings of place. Secondly, it considers the thesis' contribution to legal geography.

While the separation of church and state may be simply stated – 'Render therefore to Caesar the things that are Caesar's: and to God the things that are God's' (Luke, 20: 25) – in practice it is contested and fraught with difficulty, and no where is this more apparent than in the field of public education. This thesis examines two significant bodies of jurisprudence that address questions of church/state separation and religious liberty in the context of public schools.

CHAPTER TWO:
CRITICAL LEGAL GEOGRAPHIES

This thesis is centrally concerned with elucidating the law-space nexus. It draws upon, and seeks to extend, scholarship that contests the analytical separation of law and space, as well as a larger critical project that critiques law's claims to autonomy, self-sufficiency, and rationality. It follows research that refuses to take these self-representations at face value – emphasising instead the mutually-conditioning interplay of law, space and society – and seeks to apply its insights to a subject with heretofore unacknowledged geographical dimensions.

In broad terms, the significance of critical legal geography originates in the challenge it presents to conventional understandings of law and space, and to the gulf that has traditionally separated the academic disciplines devoted to the study of these concepts. Historically, significant barriers have inhibited inter-disciplinary connections: 'Viewed from geography, law appears as an immensely self-confident field that is sure of its importance, history and its disciplinary identity' (Blomley, 2002: 21). In each of these dimensions, it seems to stand in marked contradistinction to geography – 'maybe, a discipline in name only' (Blomley, 1994: 5). As Blomley (2002: 21) observes:

> [L]aw vigorously polices knowledge, with a suspicion to that deemed outside. External influences, such as geography are thus admitted - if they are admitted at all - on law's terms. Geography, conversely, tends to buy into this view of law. Law is something that only Lawyers do. It is an arcane, complicated, forbidding pursuit. It's also something that happens somewhere else. To that extent, not only are geographers not qualified to 'do' law, there's not much point.

Much of the value of legal geography lies in the challenge it presents to such 'institutionalized academic segregation and myopia' (Delaney *et al.*, 2001: xviii), together with its capacity to identify and fill gaps in existing theoretical and empirical knowledge. Recent reviews, however, not only reiterate the point that consequential connections exist between law and space (something that is increasingly well-established), but ask the

question: 'so what?' (Blomley, 2002; Delaney *et al.*, 2001). Does it *matter* that a number of geographers and legal scholars have begun to appreciate the close inter-connection of law and space, and the potential implications of this relationship for their respective disciplines? Does legal geography possess any particular *meaning* beyond the challenges it presents to academic definitions and distinctions? This chapter follows these assessments in seeking not only to review the development of critical legal-geographic research over the last 10-15 years, but also to reflect upon its political potential and implications for our understanding of social life. At the same time it signals the relevance of this work to the topic at hand.

The chapter proceeds as follows. The first section considers orthodox representations of law, and the challenges posed to them by critical perspectives. It then reviews the key claims of the legal-geographic literature, considering the spatial qualities of law and the legal nature of space, before proceeding to emphasize the intermeshing of these concepts, both analytically and experientially. This interconnection is then illustrated with reference to boundaries – spatio-legal phenomena that serve to distinguish places, regimes, and jurisdictions. The next section reviews trends within legal-geographic thinking, and in particular recent efforts to reconcile a concern for legal texts and discourse analysis with a recognition of the materiality and practical effects of law. This is followed by a reflection upon the political and conceptual *consequentiality* of critical research into law and space, and a brief conclusion.

Legal Closure & Geographical Critique

'Law' and 'space' have traditionally been viewed as distinct concepts that are independent of a more broadly-constituted social whole. Such thinking, combined with a tendency for legal and geographical scholarship to proceed along separate paths, has meant that legal geographies have traditionally been 'both poorly documented and inadequately theorised' (Blomley, 1994: vii). Recent research into the law-space nexus has sought to redress this, although the proposition that there is a geography to law continues to be met with scepticism (Blomley, 2002: 19-21).

At one level, the surfeit of legal-geographic research is surprising. Both Law and Geography have been open to hybridization and the development of sub-disciplines (Blomley, 2002: 19).[1] Geography in particular has a 'long-standing propensity to transgress intellectual boundaries,' which – combined with a more recent 'sensitivity to issues of power and politics' – would suggest a keen interest in legal matters (Blomley, 1994: 27). At another level, however, the absence of a well-developed legal geography literature is understandable. As noted above, both conceptual and disciplinary boundaries have been actively policed by orthodox legal scholars and practitioners. Their accounts portray law as rational and autonomous, and in so doing 'close' it to external and critical analyses.

Conventional Western legal scholarship has contributed to legal closure in two principal ways. First, it has presented law as rational, orderly and readily distinguishable from political and ideological disputes. From this view, law is an 'autonomous instrument' that is separate from social and spatial arrangements, but can be 'brought to bear' upon them in a determinative fashion (Blomley, 2002: 20). Secondly, it has portrayed law as a defensible, intelligent and essential basis for human association; indeed, as all that stands between civil society and barbarism. Both strands of thought are central to the 'rule of law': the notion that, in a properly-ordered and ethical society, legal rules and principles must be applied consistently – without regard to the particularities of time, place or political circumstance. This idea is not without appeal. Prevailing (liberal) notions of equality, fairness and justice may lead us to agree that while individuals will face different judges in different parts of the land, they should face the same law. These values also support the notion that individuals' differential power, wealth and political influence should be irrelevant to legal proceedings and the administration of justice (indeed, we may consider such impartiality to be the very essence of justice).

The critique developed by the Critical Legal Studies movement since the 1970s casts a long shadow over idealized notions of a principled and objective rule of law. CLS

[1] Hence law and economics, law and society, and legal history on the one hand; economic geography, social geography, and historical geography on the other.

contends that law is inherently political in terms of both its origins and its effects. It is an instrument of power (and the powerful) that may inflict tremendous pain and sanctioned violence (Blomley, 2000a; Delaney, 2000), determine the allocation of resources (Horowitz, 1982), reproduce key social categories, such as adult and minor (Olsen, 1983), and tell us how to behave in certain roles, such as owner and employee (MacKlem, 1990). In light of this multi-faceted critique, Pue (1998: 126) observes: 'The "rule of law," once widely considered a resilient notion which offered the hope of a rational governance capable of transcending difference is, in current fashion, more frequently considered as an empty rhetorical device cynically employed to obscure sectional interest.' Like other liberal institutions (e.g., the state and individual rights), it has come to be seen as representing the interests of a select group – privileged, property-owning men – as universal concerns (Nedelsky, 1990; Young, 1990).

In light of such claims, Western law appears inherently ideological: it is animated by a negative variant of liberalism premised upon individual rights, the protection of private property, and a suspicion of the public realm as an inherent threat to the freedom of the individual (Blomley, 1994: 12-13; Frug, 1980). Given such foundations, law has traditionally deemed the exercise of coercive power in 'private' settings (in particular the home and the workplace) to be unproblematic. In so doing, it has helped to reproduce oppressive social and economic relationships. This hegemonic function depends in part on the capacity of law to distinguish, in a convincing fashion, 'a set of harms that we must accept as the hand of fate or our own fault – such as poverty – from those actions that we may legitimately contest – such as libel or assault in a public place' (Blomley, 1994: 12). Critical perspectives on law emphasize that such conceptualizations are historically contingent, intensely political, and bound up with prevailing social structures.

Within CLS, law has been examined as something that is deeply *contextual*, and not merely determinative of context (Blomley, 1994; Holder & Harrison, 2002). However, its focus has been on the political and historical dimensions of law, as opposed to the spatial. Accordingly, legal geography has sought not only to draw upon this work, but also to extend it by taking seriously the spatiality of law. In arguing that law has a spatial context, it challenges the hegemonic conception of law as something which is

quintessentially aspatial – interpreted according to utopian principles, and applied uniformly within jurisdictions. The dominant view of law presents the world as 'one vast isotropic surface – its peoples sovereign (Anglo-Saxon) individuals, subjects of Law,' and as such it is actually an '*anti-geography*' (Pue, 1990: 568; original emphasis). In light of such interpretations, it is interesting to note that the silence of geographical scholarship on legal matters has never been absolute. Indeed, Blomley (1994: 28) observes that 'sparse and unsystematicised' attempts to consider legal issues have a long history within geography.

One approach, first emerging in the 1920s, recognized regional variations in legal systems, and sought to explain them in terms of underlying physical and socio-cultural differences. Thus the influences of climate, soil quality, vegetation and topography upon law were considered alongside those of culture, religion and 'race' (Blomley, 1994; Blacksell *et al.*, 1986). This work reflected the environmental determinism that was characteristic of much geographical scholarship in the early-to-mid twentieth century. A second body of work inverted this relationship, and sought to trace the effects of law on economic, social and physical landscapes. As late as the 1980s, such impact analysis was 'standard' among those (relatively few) geographers concerned with law (Blomley, 1994). While it implicitly acknowledged that the efficacy of law depends upon its ability to shape and reshape spatial arrangements, this analysis was atheoretical and reproduced the notion that there was a unidirectional relationship at work. Like the preceding regional studies, it maintained a sharp distinction between law and space, and considered them in isolation from social issues and political conflict.

In developing a more critical perspective on the relationship between law and space, Blomley (1989a: 516) problematicized these earlier understandings, highlighting 'the very implausibility of knowledge (and thus law) which is acontextual,' as well as the politically regressive consequences of locating law in a sphere beyond the world of lived relations and social struggles. Accounts that represented law as neither spatial nor social implied that it was uniquely rational and normative. Moreover, they cast progressive and revolutionary struggles against 'Law's Empire' (Dworkin, 1986) as irrational and

illegitimate attacks on timeless, placeless truths. For Blomley (1989a: 516-517), this was not only politically troubling, but empirically inaccurate:

> By placing law within some higher or separate realm we are denying the necessary constitution of law as a social and political construct, formed and interpreted by contextually situated agents. Once we see law in this light it takes on an added dimension for us as geographers. Law itself acquires complexity and subtlety, becoming intrinsically geographical.

Such thinking has been central to an emergent literature which, since the late 1980s, has recognized a reciprocal relationship between law and space, and sought to situate it within a larger social context. As Blomley and Clark (1990: 434) argued in one early discussion, a central goal for any theoretically-informed legal geography must be to comprehend 'how the institution of law structures and affects the geography of social life, and how the geography of social life in turn affects law.' In seeking to do just that, critical scholars have contested not only prior geographical approaches, but also legal closure, for '[a]n assertion of legal closure constitutes not only a rejection of the historicity of social life but also its spatiality' (Blomley & Bakan, 1992: 669). By insisting that law operates in and through spatial context, critical legal geographers refute a fundamental precept of liberal-legal thought. Indeed, Pue (1990: 566) suggests that this is a potentially 'insurrectionary' activity given that '[c]ontexts of all sorts – gender, class, religious, cultural, political, historical or spatial – are the enemies of Law.'

But how was such 'insurrectionary' legal geography possible in the first instance? What were its conceptual foundations? Theoretical developments within the disciplines of both law and geography since the late 1960s were important precursors. Just as many CLS theorists refuted the construction of law as a higher rationality, so some geographers came to challenge orthodoxies which represented space as an 'empty container' or mere backdrop for social activity, arguing 'that *social life is materially constituted in its spatiality*' (Soja, 1985: 94; original emphasis). Critical scholars in both fields, then, advanced critiques of their respective disciplinary building blocks – that is, space and law – and contested the reified representation of these categories 'as fixed, natural, objective, and thus asocial and apolitical' (Bakan & Blomley, 1992: 631).

While these arguments tended to be made in parallel, with relatively little overlap (Bakan & Blomley, 1992), they possessed a common concern for political power, oppressive social structures, and recursive and mutually constituting relationships. In combination, they made the gap between law and geography less tenable, and established a broad intellectual foundation for critical considerations of the law-space nexus. From the late 1980s, scholars began to make connections between the two literatures, and thereby instituted what Delaney *et al.* (2001: xvi) refer to as an 'inchoate convergence' of critical legal and geographical thought:

> [Within the] literature are a number of works which examine, with varying degrees of self-consciousness, how law, space and society might be related. The number may be small as a proportion of the total socio-legal output, but larger than one may have expected, notwithstanding the fact that very few scholars would identify themselves as taking part in the larger collective project of legal geography.

This scholarship has sought to extend geography's encounter with law beyond impact analysis and studies of regional variation, and to examine 'the relation between the places and spaces of social life, and the enactment, interpretation and contestation of law, both formal and informal' (Blomley, 2000b: 435). The next section reviews the key conceptual claims of this work, considering first the spatial dimensions of law, and secondly the legal qualities of space.

The Spatiality of Law

The project of liberal-legalism has consisted, in large part, of attempts to replace 'fragmenting and destructive centrifugal forces' with 'a truly transcendental secular rationality' (Pue, 1999: 84). Particularistic ties and local traditions have been disregarded, excluded and suppressed as highly variegated legal spaces have been reorganized 'around two main forms of recognition: the equality of independent, self-governing nation states and the equality of individual citizens' (Tully, 1995: 15). While such qualities may appear to be the very antithesis of geography – in that they seek to deny local difference and erase spatial specificity – recent critical scholarship has claimed otherwise. It has contended that law helps to make possible the notion of *national territory* at the same time as it is constituted in and through *place*. Both claims merit careful attention,

particularly in light of the centrality of jurisdictional issues and understandings of place within recent debates over religion in public schools.

A strong, unified legal system is a defining characteristic of the modern nation state. It plays a key role in defining state identity and reinforcing state borders (Darian-Smith, 1999). In England, for example, '[t]he birth of English jurisdiction went hand in glove with the consolidation of the English common law' (Ford, 1999: 880). This began in the early seventeenth century, when the jurist Edward Coke set out to rationalize legal decision-making. Coke sought to supplant a 'bricolage of local customs, autonomous courts, independent legal practices and foreign imports' with a 'comprehensive, consistent and conclusive common law' (Ford, 1999: 884). His goal was to meld a unitary legal knowledge from diverse and localized legal systems, such that 'all the Judges and Justices in the several parts of the realm ... with one mouth in all cases, pronounce one and the same sentence' (cited in Blomley, 2001: 9). The resultant common law became a defining characteristic of England, and helped to reinforce a sense of national territory (Blomley, 1994; Ford, 1999), in part by contrasting it with 'Other' places. These included Continental Europe, with its alternative legal codes and supposed propensity for illiberalism (Darian-Smith, 1999), and native North America, with its imagined wildness and lawlessness (Blomley, 2000a; Pue, 1999; Fitzpatrick, 1992). As Blomley (1994: 82) observes:

> Rooted in a past beyond history, and in an 'utopic' site beyond geography, the common law is, nevertheless, coeval with 'our' history and coterminous with 'our' nation. ... On the one hand, law appears universal, or *common* to all. Law is a total and unitary presence, divorced from the social diversity and spatial contingencies of social life. ... On the other hand, the common law is presented as somehow *communal*, rooted in the life worlds of the English experience. The common law is presented both as a constitutive part of the national condition ... yet as somehow divorced from the contingencies of social life.

The synthesis of law and the nation is further complicated by the existence of legal orders that operate at different scales and/or are derived from non-state sources. These include customary law (e.g., that of Aboriginal peoples), the law of sub-national jurisdictions (e.g., council bylaws, the civil codes of Louisiana and Quebec), the regulations of non-

governmental entities (e.g., religious law, World Trade Organization rules), the legal dimensions of multi-national associations (e.g., the European Union, with its own legislative, judicial and executive branches), and international law (e.g., United Nations Conventions, the *lex mercatoria* that regulates transnational commercial activity). Such legal pluralism is fundamental to the organization of contemporary social and economic life, and challenges conventional 'black box' theories of law predicated upon the notion of unitary, self-contained sovereign states. Indeed, in a recent commentary Twining (2000: 51) calls for a critical retheorization of law that is able to 'deal with a much more complex picture involving established, resurgent, developing, nascent, and potential forms of legal ordering.'

This claim points to the growing prominence of legalisms that are not coterminous with state borders. Notwithstanding the close historical interconnection of common law jurisdiction and national territory, state-level law represents just one of many overlapping layers in contemporary legal landscapes. Indeed, these landscapes may be understood as being 'constituted by different legal spaces operating simultaneously on different scales and from different interpretive standpoints' (Santos, 1987: 298). Alternative legal orders are not independent, but interact and intersect with each other in complex and particular ways at different sites. For this reason, Santos (1987: 288) contends, 'one cannot speak of law and legality but rather of interlaw and interlegality.' Such thinking refutes any notion that 'law' and 'nation' map onto each other in a straight-forward fashion, while adding empirical and conceptual support to the critical claim that law is inescapably spatial.

Notions of legal 'detachment' are further problematicized by a second argument made within the legal-geographic literature: namely, that law is fundamentally bound up with place. The contention is not only that law is centrally concerned with what occurs at particular sites (e.g., schools, city streets, polling booths), but also that it is implemented and challenged by locally-situated actors (e.g., school administrators, city councils, voter registration boards). As the following quotations demonstrate, law and place interact along multiple axes:

> Law is place-bound. This legal place is not only the 'West' ... it's also the multiple sites within which law is formed, acquires meaning, and is contested. The link between locale and law is nowhere more evident than in the complex interpretive practices of local legal officials, such as police officers or planning officials (Blomley, 1993: 5).
>
> [L]aw can ... deeply influence the nature of place and can define the kinds of activities that are appropriate in particular places. Indeed, far from being a self-contained, logical system driven by the dictates of legal rationality, the law is a highly reflexive set of rules, practices, and institutions that are constrained by geographic contexts and yet which can also alter those same contexts (Forest, 2000: 9).

Such comments point to the fact that while law plays a role in defining and structuring places, it is not simply imposed upon them from above. Indeed, this is one of the central claims of critical legal geography: law does not emanate from some idealized nowhere only to be 'inscribed' unproblematically on space (Delaney *et al.*, 2001: xix). Rather, it is 'always already' geographical – not only by virtue of the spatial representations it contains (e.g., those associated with such foundational concepts as jurisdiction and the state), but also because law is *necessarily* enacted in and through place. This connection is consequential, for as Blomley (1989a: 517) notes: 'although law will "shape" place, the enforcement of law with reference to place will simultaneously shape law.' Whatever its proclaimed authority, majesty and placelessness, law's efficacy depends upon the interpretative strategies and enforcement decisions of locally-situated actors. As several case studies have illustrated, these actors do not merely 'apply' rules received from 'higher' and supposedly authoritative spatial scales (Greenhouse *et al.*, 1994; Blomley, 1988, 1989b). Interpretation and enforcement have been shown to be processes of conciliation and compromise that take into account local cultural norms and community expectations. This research does not idealize 'the local' – which may just as readily be a site of reactionary values as of progressive ones – but rather points to the ways in which 'law engages systems of local meaning' (Greenhouse *et al.*, 1994: 10).

The recognition of a fundamental interconnection between law and place is of particular relevance to the present study. It is concerned with the development of constitutional doctrines which, in addition to having dramatic and deeply-felt consequences in communities throughout Canada and the U.S., have been subject to variable, place-bound

interpretation and a plethora of locally-based challenges. In the United States, court rulings that school-mandated religious practices are unconstitutional have been met with resistance organized at multiple scales – from individual classrooms and schools, to school districts and their associated communities, to larger jurisdictions such as cities and States. U.S. Supreme Court judgements, such as the 1962-63 rulings against organized school prayer and Bible-reading, have met with outright and sustained rejection in certain locations – particularly, but not exclusively, in the South. Its more recent decisions striking down 'voluntary' prayers in classrooms and at school events have met with acts of rebellion on the part of some students, teachers, and school administrators, and have been simply ignored by many others (Berry, 2000; Brown, 1999; Ravitch, 1999). These actions appear to put the lie to representations of law as 'some sort of "higher" morality or rationality, imbued with "taken for granted" truths of the social collectively, beyond the world of factional and local struggle' (Blomley, 1989a: 517).

It is possible to take this critique a step further and suggest that law is *a geography* (Blomley, 1993: 5-6). Support for this claim stems from the myriad ways in which law is fundamentally concerned with spatial issues and dynamics. For example, courts are routinely called upon to construct and deconstruct the spatial boundaries that demarcate jurisdictions, distinguish public from private, and separate the individual from the collective. In federal systems such as Canada and the United States, constitutional jurisprudence revolves to a considerable degree around the allocation of power and responsibility among governmental bodies operating at alternative spatial scales. Law also plays a critical and often taken-for-granted role in determining *who*, and *what*, are allowed to be *where* (Forest, 2000; Waldron, 1991). As Blomley (2002: 27) notes, 'law appears to be spatial in all sorts of consequential and complicated ways.' However, only one side of the equation has thus far been considered. To appreciate more fully the nature of the law-space nexus it is necessary to examine a second major idea: the fundamentally and inescapably legal nature of spatial relations and arrangements.

The Legality of Space

Critical legal geography points to the central role of law in actively producing space. Recent scholarship has focussed on the ways in which social spatialities are saturated with legalized – and often deeply problematic – power relations. It has also observed that many of the key categories of liberal legalism – property, public and private, the individual – have inherent spatial referents (Delaney, 2002). This underscores the potential utility of a 'legal-geographic' approach to the study of everyday social and political geographies:

> If we are interested in power and social life, as many geographers are, we are obliged to take law seriously. Social life is legally saturated. Our sense of self and our relations with others are unintelligible without an attention to their legalities. But the implications for geography are stronger. Geographers would argue that the spaces of social life are not preformed but actively produced, and that such spaces are themselves consequential for the production of identities, and our relations with others. A critical legal geography reveals the important role of law in the production of those spaces (Blomley, 2002: 27-28).

It is perhaps easiest to appreciate the influence of law on the production of space with reference to real property. Property law is fundamentally concerned with the categorization and organization of space, and with establishing the norms – such as exclusive control – that govern its use. It is constitutive of socio-spatial life in an essential sense; the division of material space according to property rules has significant consequences. Indeed, human freedom can appear to be constrained by the 'prohibitions of place' that property law creates and sustains. At one end of the socio-economic spectrum, Waldron (1991: 311) suggests, the 'well-paid professor' finds 'there are only a couple of private places where I am allowed to sleep or wash (without having someone's specific permission): my home, my office, and whatever restaurant I am patronizing.' At the other end is the homeless person, for whom 'there is no place governed by a private property rule where he is allowed to be whenever he chooses' (Waldron, 1991: 299). From a conventional liberal-legal perspective, such restrictions are not deemed problematic. On the contrary, property-ownership is extolled as the essence of freedom, and individualistic claims to the use of land interpreted as the foundation of human

autonomy. Moreover, the absence of a clearly-demarcated, settled property system founded upon an authoritative cadastral grid has often been presented in liberal thought as compelling evidence of lawlessness and unfreedom (Blomley, 2000a; Pue, 1999).

The spaces of the liberal capitalist state are structured in important ways by understandings of private property. For example, the processes of gentrification and spatial revalorization are facilitated by a reified conception of private property as 'an unmediated relation between an individual and a thing' as opposed to 'a bundle of state-sanctioned power relations,' the exercise of which may be legitimately constrained in the public interest (Blomley, 1997: 291, 290). Such a view enables property owners to propose and undertake developments with little or no regard for their likely externality effects. Indeed, they may be spurred on in this regard by influential understandings of the 'proper' use of private property based upon 'the language of "highest and best use" and neighborhood succession' (Blomley, 1997: 287). This said, it is important to acknowledge that dominant conceptions of property are not simply and unproblematically imposed on space in cookie-cutter fashion. Local communities may resist hegemonic orderings of property, envisioning alternative landscapes and undertaking 'counter-mapping,' as has been shown in the context of Vancouver's Downtown Eastside (Blomley, 1998; Blomley & Sommers, 1999).

Property law also serves to divide space into public and private domains. With respect to the former, critical scholarship has contended that control over public space is both a manifestation of, and a prerequisite for, social and political power (Mitchell, 1995). The role of law in maintaining the 'good order' of public space has been identified as an inherently ideological process that is inextricably bound up with particular political projects. Thus, Mitchell (1997: 305), commenting on the proliferation of anti-homeless legislation in North America, states:

> In city after city concerned with 'livability,' with, in other words, making urban centers attractive to both footloose capital and to the footloose middle classes, politicians and managers of the new economy ... have turned to what could be called 'the annihilation of space by law.' That is, they have turned to a legal remedy that seeks to cleanse the streets of those left behind by globalization and other secular changes in the economy by

> simply erasing the spaces in which they must live – by creating a legal fiction in which the rights of the wealthy, of the successful in the global economy, are sufficient for all the rest.

Law, then, may function as an instrument of socio-spatial control that protects and advances hegemonic interests. This quality is particularly apparent when public space is being policed: when the movements of picketing coalminers are criminalized and restricted through a massive deployment of state force (Blomley, 1994); when homeless people are rounded up *en masse* for the 'crime' of occupying public space (Simon, 1996); and when curfews are implemented to control unruly youth or anti-globalization protesters (Collins & Kearns, 2001).

Law also structures private space in socially significant ways, as critical examinations of the workplace have shown. Assumptions about the sanctity of private property have inhibited the ability of workers to organize within the workplace. Labour law has often deferred to employer claims that on-site union activity constitutes an unjustifiable infringement of proprietary and managerial rights (Mitchell, 1996; MacKlem, 1990). Moreover, the diminished set of legal rights that is attendant on 'going to work' has extended to reduced health and safety protection for U.S. and Canadian workers (Bakan & Blomley, 1992).

Such examples highlight the role of law in producing the spaces in which social and political life unfolds, and in which inequalities are reproduced. However, the legal meanings that shape lived relations are not set in stone: they may be complex, ambiguous, and unstable, and as such 'spatialities are vulnerable to interpretive restructuring' (Delaney, 2002: 69). Moreover, as Blomley (2002: 28) observes, it is not that 'law exhausts the meanings and norms associated with social spaces' but rather that it 'provide[s] a consequential vocabulary' for structuring them.

Connections

Critical legal geography challenges dominant conceptualizations of 'law' and 'space' as 'discrete factors that shape some third, pre-legal, aspatial entity called society' (Delaney *et al.*, 2001: xviii). It contends that 'the legal and the spatial are, in significant ways,

aspects of each other and as such, they are fundamental and irreducible aspects of a more holistically conceived social-material reality' (Delaney *et al.*, 2001: xviii). Indeed, legal geographers have argued that the relationship between law and space is one of 'irreducible interpenetration' which is 'indicative of what might better be seen as a fusion or even, in some cases, an identity' (Delaney *et al.*, 2001: xviii). If one adopts a critical perspective it is difficult to maintain an intelligible distinction between the legal and the spatial: social categories and landscapes appear to be both. Accordingly, Blomley (2002: 29-30) suggests: 'The challenge is to find a conceptual language that allows us to think beyond binary categories such as "space" and "law". ... [We can] literally run the words together, and refer to the conjunction as a "splice".'

The value of thinking in terms of splices is evident when one seeks to unpack key social categories. For example, the term 'pupil' has an important legal meaning: education statutes mandate compulsory school attendance and convey considerable authority and responsibility on educators. It also implies a set of spatial behaviours, such as 'going to' and 'remaining in' school. A child who does not undertake these behaviours in the consistent, timely manner that is both socially expected and legally required is in most instances a 'truant.'[2] Truancy is not only illegal, but may also be interpreted as posing a challenge to adult spatial hegemony, particularly when truant children are visible in public space during the working day (Collins & Kearns, 2001).

Young people moving between home and school undertake not only a spatial journey but also a socio-legal transition from 'child' to 'pupil' that entails a transfer of wardship and supervision. If this journey is undertaken without adult supervision, it may represent an alarming gap or fissure in an ideally continuous process (Kearns & Collins, 2003: 200). The concept (and reality) of unaccompanied children travelling between home and school has long been legally problematic. Schools have typically asserted disciplinary power over such children, while denying any responsibility for their safety (Mackay, 1984). They have done so through a highly selective assertion of the common law principle of *in loco parentis* (literally, 'in the place of the parent'). Incomplete or interrupted journeys

[2] There are exceptions, of course, such as children who are home-schooled.

create further complications, as they indicate that children may remain in the liminal space of the street, with its attendant dangers and excitements. Thus, 'pupils' are those who remain on the right side of the school fence, at the right time, and therefore on the right side of the law.

More generally, terms such as citizen, employee, refugee, wife and prisoner refer not only to legal abstractions, but also to material environments – to the nation state, the workplace, the internment camp, the private home, and the prison, among others. Such environments are themselves both legal and spatial entities – they have legally-entrenched spatial borders, and spatial functions that are defined in part by legal meanings. In short, 'many spatial orderings are simultaneously legal orderings, and vice versa' (Blomley, 2002: 29; see also Delaney *et al.*, 2001: xix).

This claim can be further illustrated with reference to an example from the contemporary U.S. debate over prayer at public school events, such as high school football games. From one perspective, the school football field is a setting in which autonomous citizens interact in a voluntary fashion and are constitutionally entitled to express their privately-held religious beliefs. From an opposing standpoint, it is an environment in which students and others may be unconstitutionally coerced into participating in publicly-sponsored religious activity. Such views appear to rest as much on conflicting understandings of social space as they do on divergent interpretations of the constitutional provisions governing religious speech. Moreover, the sports field is already thoroughly saturated with legal meaning. It is structured by legalized understandings of property, rights, liability, privacy, contract, and so on. The propensity for conflicts over the social organization of space (including that surrounding prayers on school property) to be 'translated into disputes about legal meaning and how authoritative determinations of this meaning are ... (provisionally) inscribed on material landscapes' further underscores the fundamental interconnection of law and social spatiality (Delaney, 2001: 55).

The concept of splices has considerable purchase of many aspects of contemporary life. In addition, splices have a propensity to 'appear inert and pregiven' (Blomley, 2002: 30). Legal and spatial arrangements 'have an air of neutrality and objectivity,' and in

combination they can effect 'a very consequential "freezing" of social arrangements' (Blomley, 2002: 30). Property arrangements, for example, can seem fixed, timeless and non-negotiable. In North America, it is difficult to conceive of a future in which material space is not structured by capitalist property relations or, for that matter, in which children are not compelled to be pupils in full-time attendance at a recognized place of learning.

Splices, then, function in part to support the status quo, and to naturalize and reinforce hegemonic relations and structures. Thus most adults, in negotiating routine spaces, respect the 'rules' of private property, no matter how inequitable these may be, just as most pupils do not challenge (at least not consciously) the strict proscription of their legal rights within school boundaries.[3] From a critical perspective, however, it is evident that fusions of legal meaning and spatial structures are never a function of necessity. Rather, they are highly contingent, inherently ideological, and 'most definitely political in every sense of the term' (Delaney *et al.*, 2001: xx).

Contrary to appearances, splices are not fixed. For example, the concept of property requires sustained enactments to maintain its purchase on the world, 'whether through formal legal channels, such as the courtroom; technologies, such as cadastral mapping; internalised everyday practices, such as the building of fences by homeowners; [or] subtle discourses, such as the historically embedded link between property and liberty' (Blomley, 2002: 31). To this list may be added physical expulsions, forced dispossession, and episodic use of deadly force. The cadastral grid's hold on the landscape, and the associated geographies of inclusion and exclusion, are facilitated and maintained by such (usually legalized) violences (Blomley, 2000a, 2002).

While splices such as property are certainly hegemonic, they are not beyond challenge; there is the potential for 'dominant splicings [to] unravel, or become *respliced*' (Blomley, 2002: 32; original emphasis). This is evident when one considers 'transgressive'

[3] On those relatively rare occasions when pupils undertake 'political' acts – such as staging mass walkouts in support of a particular cause, or working cooperatively to ensure that prayer continues to have a formal place in school life – they cast themselves as active subjects as opposed to mere 'objects' within a legal-educational edifice.

behaviours: for example, private property may be occupied by squatters, or picketed by union members, or used by members of the public in ways its owners do not intend. One could also consider the ways in which more formal law reform movements have highlighted the negotiability of splices: for example, campaigns for greater state intervention and criminal law enforcement in domestic abuse cases have reformed, if not revolutionalized, dominant understandings of the home as a zone of absolute privacy.

Consideration of the means by which dominant renderings of law and space can be 'respliced' points to the political potential of the critical legal-geographic perspective. It highlights the ideological and often oppressive nature of prevailing splices, at the same time as it considers the possibility for them to be reworked by progressive and counter-hegemonic forces. Indeed, critical legal geography has sought actively to contribute to such reworking (Delaney *et al.*, 2001: xx).

Separations

Recent legal-geographic scholarship has highlighted the significance of boundaries to lived relations and political organization, emphasising that they are seldom neutral features of the landscape. Boundaries serve to separate and distinguish spaces, regimes, and jurisdictions – and by virtue of their legal and spatial meanings may themselves be considered splices. The following quotation signals the practical importance of boundaries, as well as their relevance to critical considerations of power, inequality, and the law-space nexus:

> Boundaries *mean*. They signify, they differentiate, they unify the insides of the spaces that they mark. *What* they mean refers to constellations of social relational power. And the form that this meaning often takes – the meaning that social actors confer on lines and space – is *legal* meaning. How they mean is through the authoritative inscription of legal categories, or the projection of legal images and stories on to the material world of things. The trespasser and the undocumented alien, no less than the owner and the citizen, are figures who are located within circuits of legally defined power by reference to physical location vis-à-vis bounded spaces. Moreover, as the African-American Civil Rights Movement demonstrated, legal spaces may be rhetorically or strategically connected in such a way that seating assignments on a municipal bus or at a lunch counter may be seen to

> implicate the spatial distribution of power signified by doctrines of federalism (Delaney *et al.*, 2001: xviii).

Boundaries, then, underscore the ultimately inseparable nature of legal and geographical issues. This claim can be illustrated with reference to the geopolitics of 'race': Delaney (1998) contends that in both the *antebellum* and *postbellum* eras, boundaries were central to the organization of racist geographies. Before the Civil War, for example, courts were frequently called upon to address what it meant for slaves to cross borders:

> ...if a state prohibited holding other humans in bondage, how much room did a slaveholder have to maneuver? ... Upon crossing a state line into a state that had abolished slavery, was a black person still a slave? ... Could the alleged slave be compelled to leave the state? If in crossing into a free state the relation was severed, could this be construed as a denial of the slaveholder's freedom of movement? (Delaney, 1998: 59).

Such questions reflected the fact that two essentially incompatible legal orders existed within the same nation – at least until 'slaveholders made the ultimate geopolitical move of inventing an *international* boundary embracing the Confederate States of America' (Delaney, 1998: 44; original emphasis). After the Civil War, the Thirteenth and Fourteenth Amendments abolished slavery and guaranteed all citizens due process and the equal protection of laws – thereby creating a national regime of civil rights, and laying the foundations for a less fragmented, more consistent national legal space (Delaney, 1998: 81). While the boundary between slavery and freedom was formally erased, new legal lines were inscribed on the landscape to reinforce racialized power relations. As Delaney (1998: 96) observes, the 'hyperterritoriality of Jim Crow,' was created and validated through the promulgation of laws which drew lines, assigned meanings to space, and detailed the consequences for illicit boundary crossings. The purpose of such laws was not, in the first instance, to control territory, but rather to partition it in such a way that existing social hierarchies were maintained (see Ford, 1999: 915).

Boundaries are a powerful governmental tool because, like splices more generally, they can appear objective and natural – even 'primordial' (Ford, 2001: 95). Commenting on such reification, Ford (1999: 856) observes:

> Of course [boundaries] are real, but they are real because they are constantly being made real, by county assessors levying property taxes, by police pounding the beat (and stopping at the city limits)....
>
> Of course each of these practices can be described as 'responding' to the lines or working within the lines rather than making them. [But such descriptions] imagine that jurisdiction is the space drawn on the map, rather than a collection of rules that can be represented graphically as a map.

Ford (1999: 850) adds that the lines which separate and define jurisdictions 'are both absolutely compelling and hopelessly arbitrary.' On the one hand, they appear indispensable 'for the purposes of nation-building, for the coordination of governmental projects in geographically disparate areas, for the collection and organization of data, and for the legitimation of public policy' (Ford, 1999: 898-899). On the other hand, they are subject to negotiation, and often bear little relationship to pre-existing patterns of social and economic activity (sometimes cutting across them).[4] This paradox holds true for boundaries understood to be 'synthetic' lines serving strictly instrumental purposes (as is the case for most municipal and electoral district boundaries) as well as for those 'organic' borders which are deemed authentic, inviolate and reflective of social identities (as is the case for most international boundaries).

A powerful example of the way in which legal and spatial boundaries may be invoked in politically- and socially-consequential ways is provided by the U.S. Supreme Court's judgment in *Milliken v. Bradley*.[5] This decision nullified the practical effect of the Court's earlier desegregation ruling in *Brown v. Board of Education*,[6] by construing the borders of school districts within the greater Detroit region as barriers to redistricting and pupil movement. The predominantly black public schools within the City of Detroit itself had earlier been found to be racially segregated, and thus in breach of the Fourteenth Amendment. It was recognized that desegregation could not be achieved within the

---

[4] The U.S-Mexico border is an illustrative example (Nevins, 2000).

[5] *Milliken v. Bradley*, 418 U.S. 717 (1974) [hereinafter *Milliken*].

[6] *Brown v. Board of Education*, 349 U.S. 294 (1954) [hereinafter *Brown*]. Ford (1999: 918) contends: 'It is no exaggeration to say that *Brown*'s contemporary relevance is largely symbolic. The cultural meaning of the *Brown* decision is so profound as to prevent the Court from directly overturning it, but as effective legal precedent it has been reduced to irrelevance.'

geographical limits of that municipality; a metropolitan-wide spatial reconfiguration would be required. However, the Supreme Court ruled out such a resolution, determining that largely white suburban school districts (which had not been found in violation of the Constitution) could not be required to remedy the situation in Detroit. As Delaney (2001: 65) has contended: 'In this geography of power, propinquity and contiguity counted for next to nothing: Detroit and an adjacent suburb, such as Grosse Pointe, were no more or less integral parts of some greater whole than were Detroit and, say, Honolulu.'

In response to this decision, critics contended that the Court had denied the fundamental reality of political subdivisions such as school districts. Adopting a positivist perspective, they contended that local jurisdictions exercised delegated authority, possessed synthetic borders, and could be created, modified, and abolished by the States at any time. Moreover, the Court's decision had the effect of preserving existing geographies of race and inequity. As Marshall, J. argued in dissent, the majority had allowed the State of Michigan 'to hide behind its delegation and compartmentalization of school districts to avoid its constitutional obligation to its children.'[7] In Justice Marshall's view, the appropriate geopolitical strategy was one which recognized 'the underlying unity of the social space in question' – that is, of Detroit and its surrounding suburbs (Delaney, 2001: 65). As it was, the majority's reasoning prevented 'the forging of real connections between black city dwellers and white suburban residents' by asserting 'a rather inviolate boundary – a barrier, really – between the two' (Delaney, 2001: 64).

The majority's construction of school district boundaries was supported by another type of distinction: that between public and private. Justice Stewart argued in concurrence that 'the mere fact of different racial compositions in contiguous districts does not itself imply or constitute a violation ... in the absence of a showing that such disparity was imposed, fostered, or encouraged by the State or its political subdivisions.'[8] While constitutional jurisprudence is typically limited to reviewing state action, nowhere in the dominant narrative was it 'acknowledged that the state is responsible for creating local

---

[7] *Brown* at 808 (Marshall, J., dissenting).

[8] *Brown* at 756 (Stewart, J., concurring).

governments, that local jurisdictional formation is ... "a governmental technique", [or that the state's] creation of autonomous suburbs ... makes white flight possible and attractive' (Ford, 1999: 920). *Milliken*, then, turned on legal understandings of local spatial boundaries which the majority interpreted as autonomous and sacrosanct, even when this 'prevent[ed] an equitable distribution of public resources for *state* purposes or interfere[d] with the constitutionally mandated desegregation of *state* schools' (Ford, 2001: 98; original emphasis). The case highlights the centrality of boundaries to the spatial and legal organization of society, as well as the potential for conflicting interpretations with divergent implications for the distribution of political power and opportunity.

Legal-Geographic Thinking

In the foregoing sections, a concern for the words of law – for legal texts and associated interpretive struggles – has been linked, at least implicitly, to an interest in the materiality and practical effects of law. This approach reflects both the methodological paradigm currently prevailing within the critical legal-geographic literature, and its conceptualization of law as something that is simultaneously textual/discursive and practical/material. Its origins can be traced in part to the criticism made by Chouinard in 1994 that legal geography had been overly focussed on textual interpretation and deconstruction.

Influenced by the postmodern and hermeneutic turns within the social sciences, the literature of the late 1980s and early 1990s emphasized the role of language, discourse, and (spatial) imagery in the construction of legal meaning (Forest, 2000: 8). In so doing, it tended to reduce social structures to discursive conflicts, and to separate law from questions of power and inequality in an effort to eschew 'anything that might be seen as a "metanarrative" or "totalizing explanation"' (Chouinard, 1994: 424). For Chouinard, such analyses (see, e.g., Blomley & Clark, 1990) were insufficient for the purposes of effecting legal change and political action. In particular, they failed to acknowledge that law is 'a material *and* conceptual medium through which people *fight for the control and use of space itself*' (Chouinard, 1994: 430; emphasis added). Such claims helped to prompt a

reconsideration of how *critical* legal research should proceed. In a recent examination of the connections between law, property and violence, Blomley (2000a: 87) notes:

> Thinking about the ways in which law inscribes powerful meanings, combined with the explication of oppositional legal meanings, is a central device among critical geographers interested in law, in keeping with a wider interest in narrative in sociolegal studies. ... However, I take seriously Vera Chouinard's argument that 'texts are not enough' for the critical geographic study of law, but must be supplemented by careful attention to the material grounding of those 'texts' in lived relations of power, oppression, and resistance.

Blomley (2000a: 102) proceeds to observe that while discursive conflicts over the meaning of property are significant, people are not 'dispossessed through words alone.' Property is not simply a 'language game' – it is something that is performed and reproduced through 'violent acts, such as physical expulsions, imprisonments, shootings, and dispossessions.' Such thinking challenges a long-standing academic reluctance to examine the material dimensions of property (out of fear of reification), as well as the apolitical detachment that often characterizes legal studies focussed on textual strategies.

Law, then, possesses discursive *and* material dimensions, and both are pertinent to geographic inquiry. In the introductory chapter of *Race, Place & the Law, 1836-1948*, Delaney (1998: 24) identifies 'two legal landscapes – or two aspects of a singular landscape.' The first of these is 'the physical, visible legal landscape composed of a mosaic of territorial units such as property lots, public and private spaces, jurisdictions, and other legal spaces, as well as the lines and boundaries and borders that define the spaces.' It is constitutive of the spatial grid in which everyday life unfolds, and is made concrete by such landscape features as fences, doors, gates, gardens, signs and border guards. The second 'is the conceptual, abstract – indeed metaphysical – spatiality that is integral to legal discourse itself' (Delaney, 1998: 24-25). The incorporation of spatial metaphors and images of place into legal texts has been interpreted as 'supporting the intelligibility of basic legal concepts, and so the "reach" of legal power' (Delaney *et al.*, 2001: xix). The challenge for critical legal geography is to acknowledge both dimensions of law, and their interconnection, and in so doing to combine textual interpretation with analyses of power and materiality.

Law's capacity to shape such places as schools, homes, parks and offices is evidence not only of the legal production of space, but also of the inherent *physicality* of law. Law is about actions as much as it is about words: it 'does not stop at the utterance' (Delaney, 2001: 37-38). This realization has been central to the emergence of legal geography as a disciplinary subfield concerned with power, control and authority, *as well as* questions of language and representation.

Discussion

Having surveyed the key themes and theoretical foundations of legal geography, it is appropriate to ask whether or how this emergent literature is consequential. What is to be gained from research into the relationship between law and space? What difference does it make to our analyses and understandings of social life? What significance, if any, does it possess further afield (e.g., within social science more generally, or beyond the academy)? Recent reviews of legal-geographic scholarship signal two possible responses to such questions – one broadly political, the other conceptual and epistemological (Delaney *et al.*, 2001).

First, critical legal geography has drawn attention to the manner in which social inequality is reproduced in spaces that are actively formed by law. It has demonstrated that law-space connections are neither politically innocent nor objective; rather, they tend to structure the world in ways that systematically favour the powerful and sustain the status quo. For example, the recent proliferation of bylaws in North America prohibiting begging and sleeping in public space has reinforced the marginalization of homeless populations (Collins & Blomley, 2003). More generally, arrangements of law and space are consequential for the distribution of social status and influence. Thus, many evangelical and conservative Christians in the United States and Canada have interpreted the court-mandated secularization of public schools as an assault on their (once publicly-respected) values, and as evidence of the state's growing acceptance of immorality and hostility to religious views.

The political importance of splices stems in part from the fact that 'one significant mode of giving power material form is through the processes of spatialization: "Keep Out",

"Authorized Personnel", "Whites Only", "Men"...' (Delaney *et al.*, 2001: xix). While relatively privileged individuals and groups may find such spatio-legal rules reasonably easy to negotiate – they form part of the generally taken-for-granted matrix that structures and enables everyday activity – others experience them as oppressive. A critical legal geography highlights and problematicizes this inequity, and stresses that – contrary to appearances – currently prevailing combinations of law and space are not immutable. Whereas 'a space without social (and legal) meaning is simply a location,' the spatial arrangements described and analyzed by critical legal geography represent the materialization of legalized power (Delaney *et al.*, 2001: xx).

In addition to its political potential, critical legal-geographic research challenges conventional understandings of the social world, contests aspects of orthodox Western thought, and reworks key academic concepts. To read the spatial in terms of the legal, and vice versa, is to transcend a conceptual and disciplinary divide. It is an approach which has led not only to the identification of splices, but also to insights into their potential fragility. By way of example, much legal doctrine (including that concerning religion in Canadian and U.S. public schools) turns on spatialized understandings of the public/private distinction. These understandings frequently depoliticize inequalities located in purportedly 'private' places, and obscure the foundation of private power in political choices made by the state (see, e.g., Delaney, 1998; Horowitz, 1982).[9] Recognition of this ideological function may undermine supposedly authoritative legal understandings. Legal geography may open up a variety of questions about how, and in relation to which social and political projects, space is produced, maintained and transformed (Delaney *et al.*, 2001: xvii-xviii)

Conclusion

The legal-geographic literature that has emerged over the last 15 years has been organized around theoretical reconsiderations of the notions of space and law, and has exhibited a sensitivity to questions of power, politics and ideology. It conceives of space as neither

[9] This is an argument from positive law. If one adopts a natural law perspective, it is possible to argue that private power is founded on certain inalienable rights derived from the pre-governmental state of nature.

the determinant of law, nor the passive surface upon which law is inscribed. Rather, it identifies a dialectical relationship between law and space that is situated within broader social and political processes. Contemporary scholarship frequently acknowledges that this relationship is simultaneously textual and material. Spatial representations underpin 'all aspects of legal life, including property, constitutional law, contract, crime, and inter-governmental law' (Blomley, 2002: 27), at the same time as law helps to formulate 'both geographies of power and geographies of experience' (Delaney, 1998: 10). Thus, as Delaney *et al.* (2001: xx) assert, in a succinct summary of prevailing thought: 'What we call law is no less a physical, sometimes violent, phenomenon than it is a discursive or textual one; what we call geography is no less concerned with images, representations and metaphors of space, place or landscape than it is with material locations and distributions.'

Through both discursive and practical means, law and space 'order' the world in a fundamental sense. They create the boundaries that structure experience and distinguish spaces, and encode bounded environments with rules and signs regarding appropriate identities and comportment. Behaviours and people that challenge these classifications, such as organized prayers in public school classrooms, and homeless people begging in public space, are deemed not only illegal, but also 'out of place' (Cresswell, 1996). Legal-spatial orderings offer powerful 'maps' of the social world, replete with borders, codes and categorizations (Blomley, 2002: 29). In so doing, they not only contribute to the constitution of a particular reality, but help to legitimate it.

This said, conjunctions of law and space (splices) are not reproduced automatically, but instead need to be continuously (re)enacted. It follows that dominant orderings are not beyond contestation, and in this respect it is useful to recall one of the key arguments of critical legal geography: that law is subject to place-bound interpretation and contestation in accordance with local knowledges, priorities, and beliefs. This claim possesses both academic and political significance. It refutes the conceptual separation of law and place at the same time as it identifies an avenue for potential resistance and counter-hegemonic action. Legal geographic analysis contests the apparent fixity of splices, and challenges representations of law as a higher rationality detached from space, place, and ideology.

CHAPTER THREE:
CONSTITUTIONAL, HISTORICAL & POLITICAL CONTEXTS

This chapter examines the constitutional, historical, and political contexts in which debates over the place of religion in Canadian and U.S. public schools have occurred. In so doing it elucidates the positions of stakeholder groups that have sought to influence classroom practices by appealing to public opinion, politicians, and the courts. The concerns of these actors are linked to a number of factors, including the enduring perception that public schools are central to the formation of political and religious subjectivities.

The first section considers the provisions for religious liberty contained in the U.S. and Canadian Constitutions. Leading judicial interpretations of key clauses are outlined, as are several landmark constitutional conflicts over the state's role in funding education. The second section provides further information on historical struggles around education and religion, focussing on the development of 'common schools' in the nineteenth century. In both the United States and Canada, these institutions were intended to forge 'common citizens' from polyglot populations through standardized instruction that incorporated generalized Protestant beliefs and practices. This approach was supported by most Protestants, but opposed by the Catholic Church, which founded its own parochial schools. This opposition, combined with growing religious pluralism, and an increasingly individualistic conception of religious liberty, paved the way for the gradual secularization of public schools from the late nineteenth century.

The final section analyzes the contemporary cultural politics surrounding religion and education. The 'culture war' hypothesis is employed to consider the positions of prominent stakeholders. Two broad groupings are identified: first, an alliance of progressive interests committed to the ideal of a comprehensive and strictly secular public education; secondly, a coalition of conservative opinion that seeks a greater role for religion in public schools, as well as state aid for parochial institutions. Both sides have

been prominent in public debate, and have sought to mould education policy (and constitutional jurisprudence) according to particular visions of the public/private distinction, the appropriate balance between individual rights and collective decision-making, and the school as a social environment. In so doing, they have contributed to making the relationship between education, religion and the state a touchstone cultural issue.

Constitutional Settings

School systems in the United States and Canada have developed in constitutional milieux that share a commitment to religious liberty, but treat the relationship between church and state differently. The U.S. Constitution was adopted in 1787, but the original text focussed on the powers of the new federal government, and said little about individual rights, including religious freedom. Indeed, it contained only one provision concerning religion: Article VI provided that 'no religious Test shall ever be required as a Qualification to any Office or public trust under the United States.' Many commentators contended that the new Constitution should proclaim certain liberties – not only to protect the rights of individuals, but also to safeguard the existing powers of the States from federal interference (Drakeman, 1991: 58-65). The First Congress responded to such concerns by proposing 12 amendments to the Constitution. In December 1791, 10 of these amendments – known collectively as the Bill of Rights – were ratified.

The First Amendment provides that 'Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof.' The Fourteenth Amendment has been understood as extending these principles to the States.[1] However, the former principle (the Establishment Clause) potentially conflicts with the latter (the Free Exercise Clause). First, governmental *accommodation* of religion – something that is

---

[1] *Everson v. Board of Education*, 300 U.S. 1 (1947) [Establishment Clause] [hereinafter *Everson*]; *Cantwell v. Connecticut*, 310 U.S. 296 (1940) [Free Exercise Clause]. Section 1 of the Fourteenth Amendment reads:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

permitted, or perhaps required, to facilitate free exercise – may, beyond a certain point, become state *encouragement* – something that the Establishment Clause arguably forbids (Thiemann, 2000: 356; see also Conkle, 2000). For example, various churches and pressure groups have contended that state funding of parochial education is required in order for families to exercise religious freedom. Opponents of this position have argued that such funding constitutes state promulgation of religious dogma. Secondly, efforts to delimit the influence of religion in the governmental sphere, in order to guard against establishment, may curtail the right to free exercise. For example, the prohibition on organized prayer in public schools can be seen as something that is necessary to prevent governmental *coercion* or *entanglement* in matters of faith – or, alternatively, as something that unconstitutionally inhibits religious expression. Negotiating such claims and counter-claims is a difficult task; indeed, the U.S. Supreme Court 'has struggled to find a neutral course between the two Religion Clauses, both of which are cast in absolute terms, and either of which, if expanded to a logical extreme would tend to clash with the other.'[2]

While the Free Exercise Clause has been seen to protect religious belief (and to a lesser extent, religiously-motivated conduct) from governmental interference, the Establishment Clause has been seen to prevent government from advancing religious causes, and perhaps to require a 'wall of separation' between church and state. The 'wall' metaphor first entered Supreme Court jurisprudence in *Everson*, which was only the third case in over 150 years to be decided under the Establishment Clause.[3] Until this time, the provision had been largely ignored: it was perceived to limit only the actions of Congress, and the great majority of church/state issues – including the existence of established churches in various States – were framed as matters of local concern (Drakeman, 1991: 83; Mott, 1983: 113). *Everson*, however, determined that the Establishment Clause was

---

[2] *Walz v. Tax Commission of the City of New York*, 397 U.S. 664 (1970) at 668-669 [hereinafter *Walz*].

[3] The two earlier cases were *Bradfield v. Roberts*, 175 U.S. 291 (1899) (upholding federal appropriations for construction of new hospital wards, notwithstanding the religious affiliation of a recipient hospital) and *Quick Bear v. Leupp*, 210 U.S. 50 (1908) (upholding federal administration of a trust fund that supported education of Native Americans at sectarian schools).

binding on the States, and that any governmental action which allowed public funds to flow to religious institutions was subject to judicial scrutiny.

Everson was also significant because it articulated a 'strict separationist' position. In the majority's view, the Establishment Clause meant that '[n]o 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.'[4] Speaking for a four-justice minority, Rutledge, J. affirmed that 'the Amendment forbids any appropriation, large or small, from public funds to aid or support any and all religious exercises.'[5] Given this consensus, the only question was whether a statute that provided public subsidies for the transport of parochial school pupils constituted aid to religion. It was on this point that the Court divided, with a majority voting to sustain the law on the grounds that children, and public safety, were its primary beneficiaries.

Notwithstanding the *prima facie* contradiction between the *Everson* Court's vision of strict separation, and its acceptance of a practice that subsidized the choice of some parents to send their children to parochial schools, it popularized the phrase 'separation of church and state.' Church/state concerns were subsequently referred to the federal courts with increasing frequency, *particularly when they concerned education.*[6] Within one year, the Supreme Court held that the actions of a school board could be held unconstitutional under the Establishment Clause.

In *McCollum v. Board of Education,*[7] the Court struck down an Illinois board policy permitting local clergy to enter schools for the purposes of weekly religious instruction. A similar issue arose four years later, in *Zorach v. Clauson,*[8] when the Court reviewed a New York 'released time' program allowing students to be dismissed from public schools

---

[4] *Everson* at 16.

[5] *Everson* at 41 (Rutledge, J., joined by Frankfurter, Jackson and Burton, JJ., dissenting).

[6] For example, of the 52 cases the U.S. Supreme Court decided under the Establishment Clause between 1947 and 1996, 32 centred on education, and 26 of these were concerned with elementary and secondary schooling (Jeffries & Ryan, 2001: 287).

[7] *McCollum v. Board of Education*, 333 U.S. 203 (1948) [hereinafter *McCollum*].

[8] *Zorach v. Clauson*, 343 U.S. 306 (1952) [hereinafter *Zorach*].

in order to attend religious instruction off school grounds, in accordance with their parents' wishes. However, in this case it adopted a strongly accommodationist stance, and upheld the policy, declaring '[w]e are a religious people whose institutions presuppose a Supreme Being.'[9] While this decision affirmed that the actions of public school authorities were subject to the Establishment Clause, it generated confusion about what this meant in practice.

Three tests have since been proposed by members of the Supreme Court for determining whether a breach of the Establishment Clause has occurred. The leading candidate was articulated in *Lemon v. Kurtzman*, which concerned a Rhode Island program that subsidized parochial school teachers' salaries: '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."'[10] In articulating these criteria, Burger CJ. acknowledged that '[s]ome relationship between government and religious organizations is inevitable,' and that as such 'total separation is not possible.' Indeed, he suggested that the boundary between church and state, 'far from being a "wall", is a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship.'[11] Such difficulties notwithstanding, the *Lemon* test, with its separationist emphasis, came to be employed in many subsequent Establishment Clause cases, particularly in those 'involving the sensitive relationship between government and religion in the education of our children.'[12]

---

[9] *Zorach* at 313. Possible explanations for the apparent break with *McCollum* include fierce public criticism and a growing desire to combat 'atheistic communism' (Klarman, 1996).

[10] *Lemon v. Kurtzman*, 403 U.S. 602 (1971) at 612-613 [hereinafter *Lemon*] (quoting *Walz* at 674). 'Excessive entanglement' referred primarily to ongoing interaction between church and state that could compromise the autonomy of these institutions. In Rhode Island, the government had attached an array of restrictions to its subsidy program to ensure that parochial school teachers receiving public monies did not inculcate religion. Ironically, this effort to avoid a breach of the Establishment Clause produced another constitutional offence – excessive entanglement in the form of 'comprehensive, discriminating, and continuing state surveillance' of a religious institution (*Lemon* at 619).

[11] *Lemon* at 614.

[12] *Grand Rapids v. Ball*, 473 U.S. 373 (1985) at 383.

In *Lynch v. Donnelly*,[13] a majority of the Court applied the *Lemon* test to uphold the display of a nativity scene by a city government on public property as part of a larger Christmas exhibition. However, in an influential concurrence Justice O'Connor advocated the adoption of a two-part test centred on 'endorsement' and 'entanglement'. The first prong provided that neither the purpose nor the effect of a governmental action could be to communicate a message of state 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.'[14] The second prong originated in the *Lemon* test, and prohibited interactions between church and state 'which may interfere with the independence of the institutions, give the institutions access to government or governmental powers not fully shared by nonadherents of the religion, and foster the creation of political constituencies defined along religious lines.'[15]

In *County of Allegheny* v. *American Civil Liberties Union*,[16] another case involving government-sponsored displays of religious symbols in public space, the majority articulated both the *Lemon* and the endorsement tests. However, a four-justice minority opinion authored by Justice Kennedy rejected the notion that the Establishment Clause was intended to erect a 'wall of separation' between church and state at all, and claimed that the Framers sought only to prevent governmental *coercion* in matters of faith. Accordingly, a two-part coercion test was proposed: 'government may not coerce anyone to support or participate in any religion or its exercise; and it may not, in the guise of avoiding hostility or callous indifference, give direct benefits to religion in such a degree that it in fact "establishes a [state] religion or religious faith, or tends to do so."'[17] In a

---

[13] *Lynch v. Donnelly*, 464 U.S. 668 (1984) [hereinafter *Lynch*].

[14] *Lynch* at 688 (O'Connor J., concurring).

[15] *Lynch* at 688 (O'Connor, J., concurring).

[16] *County of Allegheny* v. *American Civil Liberties Union*, 492 U.S. 573 (1989) [hereinafter *Allegheny*].

[17] *Allegheny* at 659 (Kennedy J., concurring and dissenting); citing *Lynch* at 678.

subsequent case concerning graduation prayer (*Lee*), the Court employed a coercion test without rejecting either of the alternatives.

There is no directly comparable jurisprudence in Canada. Section 2(a) of the *Canadian Charter of Rights and Freedoms* guarantees 'freedom of conscience and religion,' but does not expressly prohibit Establishment. Moreover, the Preamble to the *Charter* is overtly theological in character: 'Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law....'[18] In *R. v. Big M Drug Mart*,[19] a seminal *Charter* case on religious liberty, Chief Justice Dickson stressed the importance of individual freedom from coercion in matters of faith and conscience:

> The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest belief by worship and practice or by teaching and dissemination. But the concept means more than that.
>
> Freedom can primarily be characterized by the absence of coercion or constraint. If a person is compelled by the State or the will of another to a course of action or inaction which he would not otherwise have chosen, he is not acting of his own volition and he cannot be said to be truly free.[20]

The federal *Lord's Day Act*[21] was subsequently deemed unconstitutional because it compelled adherence to the Christian Sabbath on the part of retailers, in violation of the principle that 'no one is to be forced to act in a way contrary to his beliefs or his conscience.'[22] In reaching this decision, the Court addressed the differences between U.S. and Canadian constitutional provisions, and suggested that recourse to categories drawn from U.S. jurisprudence, specifically 'free exercise' and 'establishment,' was 'not particularly helpful in defining the meaning of freedom of conscience and religion under

---

[18] Serious doubt exists as to the interpretive value of the Preamble, and both jurists and academics have referred to it as a 'dead letter' (Brown, 2000: 561-562).

[19] *R. v. Big M Drug Mart* (1985), 18 D.L.R. (4th) 321 (S.C.C.) [hereinafter *Big M*].

[20] *Big M* at 353-354.

[21] *Lord's Day Act*, R.S.C. 1970, c. L-13.

[22] *Big M* at 354.

the *Charter*.'[23] What was deemed critical, in the Canadian context, was 'the inherent dignity and the inviolable rights of the human person.'[24] This principle – held to be core tenet of a free society, and the normative basis for the *Charter*'s protection of 'fundamental freedoms'[25] – forbade governmental actions that had the purpose and/or the effect of constraining or coercing the individual conscience.[26]

Canada's approach to the church/state relationship, and the issue of religious freedom, has been characterized as more pragmatic, practical and permissive – and as less precise – than that of the United States (Christiano, 2000: 75-77). Indeed, the Constitution specifically 'contemplates a bridge between church and state' in the realm of education.[27] Section 93 of the *Constitution Act 1867* made education in Canada the exclusive responsibility of the Provinces, but guaranteed denominational schools the rights and privileges they held at law prior to Confederation.[28] This initially provided for ongoing public support of 'separate and dissentient' schools in Quebec and Ontario, although it was subsequently applied to other Provinces with the expansion of the Union.

Because of s. 93, a patchwork of state-aided separate schools developed across Canada that reflected varying historical approaches. Catholic schools, for example, became *constitutionally entitled* to full public funding in Ontario, Quebec, Alberta, Saskatchewan, Manitoba and Newfoundland, but not in Nova Scotia, New Brunswick, Prince Edward Island, or British Columbia (Smith & Foster, 2000: 401-407).[29] The patriation of the

---

[23] *Big M* at 356.

[24] *Big M* at 353.

[25] *Charter* s. 2(a-d); see also Berger, 2002: 56.

[26] *Big M* at 350.

[27] *Zylberberg II* at 674 (Lacourciere J.A., dissenting).

[28] *Constitution Act*, 1867, 30-31 Vict., c. 3 (U.K.) [hereinafter *Constitution Act*].

[29] Manitoba (1896), Newfoundland (1997) and Quebec (1997) later removed protections for denominational schools. The details of the Manitoba decision are discussed below. In Newfoundland, public referenda supported the introduction of a constitutional amendment amalgamating the Province's seven denominational school systems into a single public system. It allows for non-denominational religious instruction, and – interestingly – for religious observances requested by parents. In Quebec, the National Assembly voted unanimously for a constitutional amendment that reformed its denominational school system along linguistic lines (schools were henceforth French or English, not Catholic or Protestant).

Constitution in 1982 did not affect these arrangements; indeed, s. 29 of the *Charter* protected 'any rights or privileges guaranteed by or under the Constitution of Canada in respect of denominational, separate or dissentient schools.'

By safeguarding the educational interests of minorities (or, at least, appearing to do so), s. 93 of the *Constitution Act* was 'a historical compromise crucial to Confederation.'[30] These minorities were formally defined by religion, but in practice they were also linguistically distinct: within Quebec, the Protestant minority was largely Anglophone; outside of Quebec, Catholic minorities were generally Francophone (Dickinson & Mackay, 1989; Gregor & Wilson, 1983; Lupel, 1974). In subsequent debates over the rights of separate schools, issues of religion and language frequently become entangled. Although the language of instruction in separate schools was not mentioned in s. 93, it was widely assumed at the time of Confederation that if denominational rights were protected, so too would be the right to use a minority language (Foucher, 1985: 95). However, this was not to be the case, as various Provinces sought to stipulate a single language of instruction, and courts found that it was within their power to do so (Magnet, 1982: 93).

The judiciary tended to interpret the s. 93 'guarantee' narrowly, declaring that it protected only minority denominational schools' right to exist. Extensive public regulation of these institutions, short of their abolition, was consistently upheld. This point is well illustrated with reference to Manitoba. When the Province entered the Union, a version of s. 93 was adopted, as s. 22 of the *Manitoba Act 1870*,[31] to provide for ongoing public maintenance of Catholic schools. By 1890, however, Manitoba's increasingly large Anglo-Protestant majority was agitating against this overwhelmingly Francophone separate school system,

---

Today, constitutionally entrenched rights to minority denominational schools exist only in Alberta, Ontario and Saskatchewan. However, in most Provinces where Catholic schools exist independent of the public system, they receive some level of discretionary public funding. In the territories (Yukon, Northwest Territories and Nunavut), Catholic and Protestant minorities have statutory, but not constitutional, rights to establish separate schools, and receive public funding.

[30] *Adler II* at 609.

[31] *Manitoba Act,* 1870, 22 Vict., c. 3 (Can.) [hereinafter *Manitoba Act*].

declaring it divisive and expensive. They supported the development of a 'national' system of public schools in which English was the sole language of instruction, and the course of study was Protestant and 'British' in emphasis (Lupel, 1974: 156).[32] This was seen as necessary for the purposes of nation-building: separate schools stood in the way of assimilation and the development of a unitary national identity. This goal was perceived to be particularly pressing at a time when new immigrant groups with different linguistic and religious traditions (e.g., Ukrainians, Icelanders, Mennonites) were beginning to settle the prairies.[33] In combination with considerable anti-Catholic prejudice (Sweet, 1997; Gregor & Wilson, 1983), such sentiment led the Provincial legislature in 1890 to abolish the official use of French and remove public support for Catholic schools.[34]

This action provoked the 'Manitoba School Crisis,' a five-year constitutional struggle that remains the single most dramatic example of Federal-Provincial conflict over education in Canadian history. It entailed a series of cases taken as far as the Privy Council, appeals to the Federal Cabinet, and proposals for the Parliament of Canada to exercise its right under s. 93(4) of the *Constitution Act* to enact remedial legislation to protect denominational schools' rights. It also precipitated a marked deterioration in inter-Provincial relations, with Quebec opposing the action taken in Manitoba, and Ontario supporting it. The crisis was resolved in 1896 when a compromise was agreed to by Prime Minister Wilfred Laurier and Premier Thomas Greenway of Manitoba. The constitutional right to separate, publicly-funded schools was repealed, but Manitoba's Francophone Catholics were offered three concessions 'where their numbers warranted':

---

[32] References to 'Britishness' were somewhat ironic, as there was ample public provision for denominational schools in the U.K. Moreover, the principle of church/state separation, to which the supporters of common schools frequently appealed, was clearly drawn from the United States, not Britain. Clark (1968: 7) suggests that 'the Protestant majority of Manitoba appealed to the constitution of the United States and ignored the one they had.'

[33] The increasing diversity of immigrants to the West was seen to strengthen the argument that no (minority) group could be allowed to receive special linguistic or educational consideration (Lupel, 1974; Clark, 1968). What was often overlooked was that s. 22 of the *Manitoba Act* expressly conferred separate school rights on Roman Catholics, and not on other minorities.

[34] Commenting on this historical episode, Gregor and Wilson (1983: 94) note 'the difficulty of distinguishing ethnic from religious considerations in view of the close identification of the terms "French" and "Catholic."'

daily religious education led by their own clergy, the right to hire teachers of their own faith, and bilingual instruction.[35] In the *Charter* era, aspects of the Manitoba dispute reappear in periodic conflicts over access to, and governance of, the schools of French and English-speaking minorities.

The status of denominational schools and their eligibility for public funding was also at the centre of late nineteenth century constitutional debate in the United States. Prevailing Protestant opinion held 'that public schools must be "nonsectarian" (which was usually understood to allow Bible-reading and other Protestant observances) and public money must not support "sectarian" schools (which in practical terms meant Catholic)' (Jeffries & Ryan, 2001: 301). This approach was encapsulated in the Blaine Amendment, which in 1876 passed the House, but narrowly failed to obtain the required two-thirds majority in the Senate. The elaborately-worded proposal sought to close every conceivable loophole through which public money might flow to religious schools, but specifically provided for Bible-reading in public institutions. The Amendment was championed by the Republican Party, which sought to demonstrate its support for public education, and opposition to any form of government aid for Catholic institutions, in keeping with most Protestant opinion. It was opposed by the Democratic Party, which was closely allied with the Catholic position that the Blaine Amendment was an attempt to secure a constitutional monopoly on state educational funds for schools that were coded as public and non-sectarian, but were in fact Protestant. These debates, like those over the rights of denominational schools in Canada, went to the heart of the church/state relationship, and the nature of public schooling.

Historical Struggles Over Religion in Public Education

The Blaine Amendment and the Manitoba School Crisis represent two dramatic episodes in the enduring conflict over the place of religion in public schools, and the relationship between church and state with respect to education. The history of this conflict helps to contextualize the court decisions reviewed in subsequent chapters, as well as the broader

---

[35] *Terms Of Agreement Between The Government Of Canada And The Government Of Manitoba For The Settlement Of The School Question* (November 16, 1896) ('The Laurier-Greenway Compromise').

contemporary debate over religion in public education. Moreover, legal actors frequently invoke elements of this history in support of particular jurisprudential stances. Thus, some argue that separationist principles must be applied to classrooms in order to right long-standing wrongs (e.g., coercion of minorities), while others contend that the 'tradition' of accommodationist practices (e.g., school prayer) is determinative of constitutional meanings.

In both Canada and the United States, public school systems developed against geographically uneven networks of parochial schools devoted to teaching religious literacy and providing instruction from avowedly denominational perspectives. In the early-to-mid nineteenth century, formal religious instruction was generally deemed integral to any genuine educational enterprise, and to children's moral development. Education without religion was, for many, a contradiction in terms (Thayer, 1947: 100). Policy-makers and commentators routinely expressed the view that religion was the cornerstone of human knowledge, social order, and moral well-being. In Ontario, for example, the Anglican Bishop of Toronto claimed in 1840 that 'knowledge if not founded on religion is a positive evil,' while the Superintendent of Education asserted in an 1847 lecture: 'I do not regard any instruction, discipline, or attainments, as Education, which does not include Christianity. ... It is the cultivation and exercise of man's moral powers and feelings which forms the basis of social order and the vital fluid of social happiness; and the cultivation of these is the province of Christianity' (cited in Sussel, 1995: 136).

Given the widespread and deeply-held nature of these views, nineteenth century public schools in both countries sought to reflect and impart prevailing religious beliefs. The key challenge, as Jeffries and Ryan (2001: 298) note, was 'to find a way to keep religion in the public schools but keep controversy out.' In predominantly Protestant milieux, the preferred solution was a 'least-common-denominator Protestantism' that eschewed the doctrines of any particular sect, while promoting shared beliefs in the importance of the Bible, individual faith, and patriotism (Jeffries & Ryan, 2001: 297-298). This approach characterized the 'common schools' movement, which grounded public education in broadly Protestant values and practices. Such education was acceptable to most Protestant denominations, but not to Catholics, who objected on conscientious grounds (see below).

Questions grew as religious diversity, and the number of dissentient voices, increased over time.

Education & Liberty

From the mid-nineteenth century to the present day, disputes over the appropriate place of religion in public education, both within and beyond the courtroom, have turned in large part upon interpretations of freedom of conscience and religion. The dominant meaning of this liberty has undergone a metamorphosis over time. The original conception was theologically-charged, drawing upon a strand of Christian thought which held 'that individuals must undertake their religious duties voluntarily, not under legal compulsion' (Conkle, 2000: 4). This emphasis on uncoerced belief corresponded in particular with the Protestant notion 'that salvation depends largely on faith or belief in the truth of Jesus Christ and not on works or conduct in the world' (Feldman, 2000: 264). Subsequently, and unsurprisingly, First Amendment jurisprudence tended to protect religious belief from governmental interference, but to allow extensive public regulations of religiously-motivated conduct – particularly that associated with small non-Protestant minorities (Feldman, 2000: 261-264; Drakeman, 1991: 3-4). Due to its theological origins and motivation, freedom of conscience and religion was not initially perceived to be inconsistent with notions of 'Christian nationhood,' or with ongoing state support and encouragement of Christianity (Conkle, 2000: 4-5).

This view came under increasing challenge from the late nineteenth century, however, as the emphasis placed on fulfilling religious duty was largely superseded by notions of the individual's right to choose between alternative religious (and non-religious) belief systems (Ahdar, 2000: 8).[36] This second understanding has been reflected in both U.S. and Canadian case law mandating the secularization of public education. In breaking the historical synthesis of Protestant Christianity and state schooling, courts have claimed to be safeguarding the conscientious freedom of individuals 'to select any religious faith or

[36] This freedom has come to be understood in terms of the absence of public constraints, as opposed to the something that is realized by obeying God.

none at all.'[37] This freedom is said to evince 'equal respect for the conscience of the infidel, the atheist, or the adherent of a non-Christian faith such as Islam or Judaism.'[38]

Religious freedom is greatly valued by liberals, in part because, historically, it secured the first real sphere of private autonomy. As early as 1651, Thomas Hobbes argued that in order to end religious civil war, religion should be made a purely private matter of no concern to the state (Habermas, 1989: 90). Two centuries later, John Stuart Mill (1859/1975: 9) observed that religious liberty, while difficult to realize in practice, had achieved broad acceptance:

> It is [in the area of religious belief], almost solely, that the rights of the individual against society have been asserted on broad grounds of principle, and the claim of society to exercise authority over dissentients openly controverted. The great writers to whom the world owes what religious liberty it possesses, have mostly asserted freedom of conscience as an indefeasible right, and denied absolutely that a human being is accountable to others for his religious belief.

The challenge for public school systems in the nineteenth century was to reconcile such liberal thinking with the perceived necessity of religious instruction, the impulse towards majoritarianism, and the widely-held view that Christianity provided the basis for both morality and the authority of the state. This tension was particularly evident in debates over the place of the Bible in public education.

Common Schools & Bible-Reading

In the United States, the dominant model of public education was that of common schools, initially developed by Horace Mann during his time as Secretary of the Massachusetts Board of Education (1836-1848) (Fraser, 1999: 25). Central to the 'common wisdom of the common school' was a 'generalized Protestantism' centred on daily Bible-reading (Moore, 2000: 1581). To minimize objections and sectarian divisions, the Bible was to be read 'without note or comment.' This was intended to ensure that the common schools had a Christian foundation, while at the same time no child was forced

---

[37] *Wallace* at 53.

[38] *Wallace* at 52.

to understand the Bible in a manner contrary to his or her parents' beliefs. Interpretation would be left to the private realm of homes, pulpits and Sunday schools (Jeffries & Ryan, 2001: 299; Fraser 1999: 26).

The development of public schooling followed a broadly similar approach in many other predominantly English-speaking, Protestant jurisdictions. In Ontario, Dr. Egerton Ryerson – a Methodist minister, and the Superintendent of Education from 1846 to 1876 – argued that public schools should instil certain religious principles 'upon which everyone could agree: that there is a God to whom we are all responsible; that the human soul is immortal; that God revealed himself to humans through the Bible; that forgiveness for sins is available through belief in Jesus Christ' (cited in Sweet, 1997: 26). In actuality, neither Catholics nor Anglicans agreed with this set of purportedly universal principles, and both maintained denominational school systems (Sweet, 1997: 26).

Ryerson's common schools were underpinned by legislation which stipulated that the duty of the teacher was to inculcate 'respect for religion and the principles of Judeo-Christian morality' (cited in Sweet, 1997: 19). It also required daily prayer and Bible-reading, as well as weekly recitation of the Ten Commandments. From 1859, clergy were also allowed into the classroom outside of regular school hours to teach pupils belonging to their denominations (Sweet, 1997: 31). Similar arrangements characterized public schooling in Australia (Partington, 1990), New Zealand (Mackey, 1967) and the United Kingdom (Bocking, 1995).

Common schools supporters insisted that Bible-reading without note or comment was both non-sectarian and essential, and this view came to receive near universal acceptance within Protestantism. Interestingly, in light of late twentieth century cultural politics, many denominations with conservative and literalist tendencies championed the emergent public school system. First, they agreed on the religious importance of Bible-reading. Secondly, they were assured that schools would not subvert their teachings by advancing the dogma, doctrine or confessional teaching of any other group (Moore, 2000: 1588). Instead, the Bible would be read in an environment that reflected a generalized Protestant

ethos (Fraser, 1999: 54).[39] Thirdly, their tax dollars would not be used to support 'sectarian' schools propagating what they believed to be theological error. 'Sectarian' was in most instances a code-word for 'Catholic', and conservative Protestant denominations were united in their opposition to public funding of Catholic schools.[40]

Moore's recent reconsideration of the U.S. educational history emphasises that Bible-reading was never universal. Complaints that the Bible was neglected, dealt with indifferently, or excluded from the classroom altogether were commonplace in the nineteenth century (Moore, 2000: 1584-1585). Surveys of school administrators revealed a diversity of approaches and regulations, and produced 'statistics [that] cloud any portrait of uniformly pious schoolrooms' (Moore, 2000: 1587). Nevertheless, explicit moves to prohibit Bible-reading could provoke outrage, particularly in areas with strong nativist sentiment. In Philadelphia, for example, a proposal to remove the Bible from schools in response to Catholic objections prompted the Bible Riots of 1844. This unrest, which was part of a broader reaction to Catholic immigration, led to the deaths of at least 58 people, and the wounding of 140 others (Ravitch, 2000: 298). This episode highlights the extent to which nineteenth century conflict over religion in public education, while connected to broader cultural tensions, was focused on Bible-reading rather than prayer.

Throughout the common schools era, religion in general tended to be equated with Protestantism in particular, and the term 'non-sectarian' encompassed what was common to Protestant sects (Thayer, 1947: 36). As Moore (2000: 1588) observes: 'There wasn't really any perception of what non-sectarianism might mean when non-Protestants and non-Christians entered the common schools.' However, with growing religious pluralism in the United States in the second half of the nineteenth century, the prevailing definition

---

[39] Textbooks, particularly in the field of history, were infused with broadly Protestant interpretations and values. In the Canadian context, the Catholic *Northwest Review* claimed in the late 1880s that it was 'practically impossible' to teach history to a mixed class of Protestants and Catholics (cited in Lupel, 1974: 50).

[40] Catholic Schools were characterized as 'sectarian' or 'pervasively sectarian,' in contrast to 'non-denominational' public schools. Such labelling helped to legitimate opposition to extending public funding to Catholic schools, and was widely adopted in U.S. jurisprudence. Clark (1968: 6) suggests that '[t]he notion that there is such a thing as Christianity apart from a particular denominational expression of it ... seems to indicate a great doctrinal poverty in late nineteenth century Protestantism. ... even the Ten Commandments cannot be taught without a denominational colouring.'

of 'non-sectarian' (and the associated practice of Bible-reading) was increasingly subject to challenge. Paradoxically, this pluralism and the immigration that underpinned it also provided an ongoing rationale for the common schools movement: assimilation.

In both Canada and the United States common schools were important nation-building institutions that sought to mould 'common citizens' from ethnically, linguistically, and religiously diverse populations. They served, in large part, to induct pupils into Anglo-Protestant nationhood. This function was linked in part to the increasingly compulsory nature of education – public schools were being attended by a growing number of children from all social backgrounds.[41]

Thus, in the U.S., 'evangelical clergymen spread the gospel of the common school in their united battle against Romanism, barbarism, and scepticism' (Fraser, 1999: 34), and public education was promoted as an instrument of assimilation and nation-building. In English Canada, parochial institutions outside of the common schools system (the great majority of which were French Catholic) were criticised for undermining national unity and perpetuating the particularistic ties that inhibited the emergence of a common 'British' subjecthood (Sweet, 1997; Gregor & Wilson, 1984; Lupel, 1974).[42] From the outset, then, public schools were perceived as a technology of government with the potential to shape political and religious subjectivities.

---

[41] In Canada, the number of children attending public elementary and secondary schools climbed from 768,000 in 1870, to 1,055,000 in 1900, and to 2,099,000 in 1930. Average daily attendance rates as a percentage of all children enrolled also increased: from 45.2% in 1870, to 61.2% in 1900, and to 86% in 1930 (Leacy, 1983). In the United States, the number of children attending public elementary and secondary schools grew from 6,872,000 in 1870, to 15,503,000 in 1900, to 25,678,000 in 1930. School enrolment rates as a percentage of the population aged 5 to 19 years also increased: from 48.4% in 1870, to 50.5% in 1990, to 69.9% in 1930 (United States Bureau of the Census, 1976).

[42] Pue (1999: 92) highlights the degree to which the colonization of Canada, and Western Canada in particular, was driven by a desire to extend the geographical and moral reach of 'Britain, British commerce, British technology, British government, British law and British Empire.' This 'Britishness' – understood as the epitome of human progress – was simultaneously the foundation for and the legitimation of the expanding Canadian state. It also evinced 'a preference for Protestantism over Catholicism, and *certainly* [for] Christianity over other religions – hence, a judgment *against* Confucianism (and, Confuscians), Judaism (and Jews), Hinduism (and Hindus), First Nations spirituality (and unassimilated First Nations people), etc.' (Pue, 1999: 92-93; original emphasis).

Criticisms & Responses

Notwithstanding the influential rhetoric of national unity, Bible-reading and 'non-denominational' Christian instruction in the common schools remained politically, legally and theologically contentious. As Mackey (1967: 190) notes, '[t]he ideal of an education that would be neither secular nor sectarian ... satisfied neither Catholics, because it was essentially Protestant, nor secularists, because it was essentially religious, nor Jews, because it was essentially Christian....' Pedagogic objections were also raised. Critics questioned what reading the Bible 'without note or comment' actually achieved: no other instructional text was used in this way, and children potentially remained unaware of the meaning of many passages (although Protestant notions of biblical inspiration held that the Gospel 'spoke for itself') (Moore, 2000: 1590-1593).

One response to such criticism was to justify Bible-reading on secular as well as religious grounds. Thus advocates promoted the Bible as a great work of literature (to be read alongside Homer and Shakespeare), as a prerequisite for any meaningful study of law and 'civilization,' as an instrument for reinforcing the Christian character of the nation, and as an essential tool for promoting morality and good behaviour in children. Moore (2000) notes that this last rationale assumed particular importance in the United States in the late nineteenth century as the Bible increasingly came to be seen as sectarian, and legislatures and courts gradually came to view *secular* education as advancing both national unity and individual liberty. Drawing on long-standing fears about the potential for children to be immoral, inadequately socialized 'devils' (Valentine, 1996), proponents of Bible-reading 'said less and less about its usefulness in implanting the divine truths of general Christianity and more about its purported ability to improve the moral behavior of children and prepare them for citizenship' (Moore, 2000: 1595).

Another response to criticisms of the religious dimensions of public education was to limit formal religious activities to times when schools were closed in law, but open to pupils and teachers alike in practice. Such compromises were relatively common throughout the United States into the late twentieth century (Moore, 2000: 1583), and formed the basis for religious education in New Zealand primary schools from 1896 to

1962 (Breward, 1967: 37-46). Critically, these arrangements were represented as both voluntary and private. However, 'out of hours' instruction typically involved school buildings (including the classroom with is attendant socio-spatial hierarchies), school officials (if only as facilitators and supervisors), and an element of coercion. As Thayer (1947: 89) notes with respect to 'released time' programs in the United States:

> In theory, it is not the function of the public school to bring about the child's initial registration in the church school nor to discipline him for failure to attend these classes. In practice, however, ... many teachers and principals of conviction violate these instructions, in part because of loyalty to the church of their own affiliation, and in part because, as conscientious officials, they cannot countenance carelessness and irregularity in attendance on the part of children.

This comment serves as a useful reminder of the disciplinary nature and regulatory function of education. Since its inception, the public school has sought to inculcate the young with dominant values and beliefs (Hill & Tisdall, 1997), while subjecting their attitudes, progress and deportment to ongoing surveillance and examination (Foucault, 1977: 184-189). It has set children apart, in both time and space, in order to prepare them for adult roles and citizenship. Initially, 'non-denominational' Protestant observances were deemed an essential part of this preparation. Over time, however, many educators and policy-makers came to view such religious dimensions – which always attracted a measure of controversy – as unnecessary: schools could, instead, socialize and moralize the young by imparting the essentially secular values of patriotism, punctuality, order, obedience, industry, courtesy and respect (Jeffries & Ryan, 2001; Schnell, 1979).[43] Commenting on such thinking in U.S. education, Moore (2000: 1597) observes:

> Courage, the defiance of convention, selfless generosity, a passionate concern for the weak and powerless – these virtues figured nowhere in the rhetoric urging moral instruction in the schools. Indeed, moral soundness appeared to be composed of nothing more than docility and a willingness

[43] The generalized moral/behavioural code of the public school was critiqued by the Catholic Church precisely because it was secular, and paid little attention to questions of God and faith. In the words of Father Leduc of Montreal: 'This moral education, paves the way to all kinds of errors; it allows one to be an atheist, a materialist, an infidele, a rationalist, and even a pagan, so long as he assumes the cloak of honesty according to the world' (cited in Lupel, 1974: 143).

> to bend with the majority. Bible reading lived on in slightly better than half the nation's schools as a subsidiary means to inculcate good conduct.

A close comparison may be drawn between secular legitimations for Bible-reading in the nineteenth century, and claims made in recent decades for greater recognition of religious values, beliefs and practices in public schools. In 1988, Britain's Conservative Government sought to strengthen the place of Christianity in schools (and, by extension, society) by requiring daily acts of collective worship (Poulter, 1996: 509). In so doing, it employed the reactionary but essentially secular argument that devotional exercises would combat 'crises' occurring at three spatial scales: the nation (multiculturalism was fragmenting a distinct 'British' identity), the education system (schools had been captured by a progressive agenda that preferred moral relativism and child-centred teaching to academic standards and discipline), and the child (the young were increasingly disrespectful, immoral and rebellious) (Cooper, 1998: 58-59). In the United States, proponents of school prayer have invoked a secular language of rights, democracy, community, respect and history – while at the same time developing a thorough-going critique of the 'secular humanism' that is said to imbue the public school (see Chapter 6). More generally, advocates of 'returning' religion to the schools of Western nations have developed a discourse of parental choice which, although occasionally encompassing the notion that parents have a 'God-given' right to determine their child's education, is not logically dependent upon any religious belief.

The Catholic Critique of Common Schools

The Catholic Church is the only large religious organization to have consistently and forcefully voiced opposition to systems of public education since the early-to-mid nineteenth century. Catholic objections initially focussed on the use of Protestant textbooks, morality, prayers and practices. Bible-reading was deemed particularly objectionable, as Catholics were forbidden by canon law to read the King James Bible – the version normally authorized for use in public school systems (Ravitch, 2000: 298). For Catholics, it was the Douay Bible that provided 'not only the officially approved English translation of the Scriptures, but also authoritative annotation and comment'

(Jeffries & Ryan, 2001: 300).[44] Moreover, acceptance of the practice of reading the Bible independently of the teaching office of the Church required tacit approval of the Protestant theology of Biblical inspiration and authority.

In the Catholic view it was the Church – not the Bible – that was primary and essential to faith and salvation: reading the text without note or comment invited the error of private interpretation (Jeffries & Ryan, 2001: 300). From this perspective, 'every practice and instruction which suppressed the fact of the Church in favour of the Bible was for the Catholic merely another form of ubiquitous Protestantism against which he was called in conscience to defend himself and particularly his children' (Mackey, 1967: 160). As Archbishop John Ireland of St. Paul, Minnesota put it in an 1890 address: 'To Catholics, what does not bear on its face the stamp of Catholicity is Protestant in form and in implication' (cited in Fraser, 1999: 61). It followed from such thinking that Catholics could not make use of public schools without prejudice to their consciences. In practice, Catholic children in the U.S. were periodically whipped for refusing to participate in religious activities (Ravitch, 2000: 298), while withdrawing from the classroom – where opt out provisions were available – 'had the disadvantage of obviously pointing the finger of deviation at them and resulted often in unfortunate incidents' (Thayer, 1947: 38).

Over time, most public schools were reformed – whether voluntarily, or by legislative enactment, executive fiat, or judicial ruling – such that anti-Catholic bias was removed, and less emphasis placed on imparting 'common' Christianity (Jeffries & Ryan, 2001: 282; Moore, 2000: 1588; Fraser, 1999: 56, 113; Doerr & Menendez, 1991: 23-24). Such reforms stripped public schools of their Protestant identification, and made them more acceptable to many Catholic families. Accordingly, enrolment in Catholic schools

[44] The King James Bible was first published in London in 1611. The Douay Bible had been produced in France: the New Testament at Rheims in 1582, and the Old Testament at Douay in 1609. The Douay version contained six complete books, and parts of other books, which did not appear in the King James version.

decreased dramatically, particularly in the United States following the Supreme Court's decisions striking down organized prayer and Bible-reading in 1962/63.[45]

The creation of a secular system of public schooling was not the ultimate goal of the Catholic Church, however. The Catholic view was that religion was indispensable to education. By the late nineteenth century Catholic leaders in the United States were expressing alarm that the public school system sought 'to eliminate religion from the minds and hearts of the youth of the country' and that the rivalry between Catholics and Protestants had enabled 'unbelievers and secularists' to gain control of 'the nursery of thought' (cited in Fraser, 1999: 61). This sentiment hardened in the twentieth century: the U.S. Catholic hierarchy opposed the *Engel* decision, and supported the Reagan school prayer amendment (Flast, 1992: 171). Moreover, Catholic pressure groups in both the US and Canada have become notable advocates of organized religiosity in public schools, and have argued for the inclusion of religious perspectives in school governance.

The long-term focus of Catholic educational lobbying has been on securing state support for Catholic schools. The Church has held that 'Catholic children' require a 'Catholic education' in an environment where religion infuses the entire curriculum, and spiritual interests are the foremost concern. From the early nineteenth century, Catholic parents were instructed to send their children to Catholic schools wherever possible. In the United States, the Third Plenary Council of Baltimore in 1884 announced that a national network of Catholic schools was to be formed within two years, and that Catholic parents were required to make use of it (Burns, 1908). In Canada, an Encyclical Letter from Pope Leo XIII in 1897, written in response to the Manitoba Schools Crisis, prohibited the instruction of Catholic children in schools that ignored or repudiated Catholicism, or regarded all beliefs as equals – 'as if, in what regards God or divine things, it makes no difference whether one believes rightly or wrongly, and takes up with truth or error' (cited in Lupel, 1974: 147).

---

[45] The number of pupils at Catholic schools in the U.S. fell from 5.6 million in 1965 to 3 million in 1983 (Jeffries & Ryan, 2001: 337-338).

This commitment to parochial schooling fuelled campaigns for state funding ('parochiaid'), many of which are still ongoing. The Catholic Church has held that as long as the state requires children to be educated, and levies taxes for this purpose, it should distribute funds so that all parents receive assistance, including those who are required by conscience to choose religious schools. Denial of public funding to such schools is said to undermine religious freedom, as well as the natural right of parents to determine the type of education their children receive. Today, such arguments are made by, and on behalf of, other parents who object to public education on religious grounds – most notably a growing number of evangelical Protestants. This convergence of Catholic and evangelical opinion is a feature of the new cultural politics surrounding education.

Contemporary Debates: The Cultural Politics of Religion in Schools

Conflict over the place of religion in public schools is by no means a phenomenon of the past. On the contrary, the contemporary secularization of public education in the U.S. and Canada (see Chapters 4 and 5) has provoked intense public debate, particularly among organized stakeholder groups. In this section, the views of these organizations are considered in light of broader cultural trends. The goal is not only to provide further context for the analysis in subsequent chapters, but also to highlight the understandings of space and place that underpin different understandings of the proper relationship between the state, religion, and education.

The concept of the 'culture war,' developed by John Davison Hunter (1991), is a useful framework for considering the relationship between civil society and the case law considered in this thesis (see also Merrett, 1999; Yamane, 1996). Hunter's (1991: 42) concern is to understand the development of cultural conflict in the United States, a conflict he defines as 'political and social hostility rooted in different systems of moral understanding.' Historically, this hostility was frequently theological in nature. However, since the late 1960s, ecclesiastical and doctrinal tensions have been largely superseded by a new division oriented around 'the impulse toward orthodoxy and the impulse toward progressivism' (Hunter, 1991: 43). This cleavage is central to the culture war, and characterizes a broad range of debates, including those concerning schooling and

pedagogy, popular culture and the arts, affirmative action and multiculturalism, and reproductive and sexual rights.

Hunter emphasizes that religion remains highly relevant to this new divide. Indeed, most major religious groupings contain both 'orthodox-conservative' and 'liberal-progressive' elements that contribute to public debate on social and moral issues. As these divisions cut through denominations, they have prompted significant new avenues of cooperation:

> *At the heart of the new cultural realignment are pragmatic alliances being formed across faith traditions.* Because of common points of vision and concern, the orthodox wings of Protestantism, Catholicism, and Judaism are forming associations with each other, as are the progressive wings of each faith community – and each set of alliances takes form in opposition to the influence the other seeks to exert in public culture (Hunter, 1991: 47; original emphasis).

Such allegiances lead Hunter to claim that the fundamental cultural schism in the contemporary United States is based not on denominational ties, nor even on belief/non-belief, but rather on competing moral visions.[46] One of these visions emphasizes rationalism, progressivism, and moral subjectivism; the other stresses transcendent authority, traditionalism, and moral absolutism. These world views relate in various, and sometimes complicated, ways to the key themes of this thesis. Both invoke particular conceptions of the public/private distinction, with the former contesting the privatization of religious belief in contemporary society, and the latter upholding the ideal of a strictly secular state. They also contain implicit understandings of the individual/collective dualism: from the orthodox perspective, 'liberty' is to be realized within the private sphere of the family home, *and* through the right of families and individuals to bring their moral and religious views to bear on matters of collective concern.[47] In the progressive

---

[46] This divide encompasses not only politically-active religious citizens, but also many non-believers. Most of the latter are committed to progressive values, although a conservative minority is drawn towards the orthodox impulse.

[47] In orthodox accounts, the term 'family' is typically used in a narrow sense to refer to heterosexual, married couples with children, and is sometimes qualified with the adjective 'traditional'. Hunter (1991: 180) observes that this family is 'traditional' only in a limited sense: 'What is in fact at stake is a certain idealized form of the nineteenth-century middle-class family: a male-dominated nuclear family that both sentimentalized childhood and motherhood and, at the same time, celebrated domestic life as a utopian retreat from the harsh realities of industrial society.'

view, 'liberty' is more typically centred on *individual* autonomy (at least for adults), and encompasses the right of each person to 'freedom from' the particularistic religious and moral views of others.

The parties to the conflict appreciate that more is at stake than the future of particular social institutions, and frequently assert that they are fighting for nothing less than the future of 'the nation'. While this claim serves a useful rhetorical purpose, it is also accurate in the sense that 'what seems to be a myriad of self-contained cultural disputes actually amounts to a fairly comprehensive and momentous struggle to define the meaning of America' (Hunter, 1991: 51). Hunter (1991: 49) notes that understandings of place and law are central to this struggle, as opposing sides consistently frame their arguments in terms of the nation ('what America is about,' 'American values') and its constitutional history ('the founding fathers,' 'our legacy of liberty'). In addition, they characterize their opponents as extremists seeking to undermine the United States, and its laws, with an aggressive program of social, political, and religious intolerance (Hunter, 1991: 148).

Schools are a key battleground in the culture war. Progressive and conservative activists struggle over how, what and where American children will learn, and at whose expense. With respect to public schools, progressive interests have championed secularization, claiming that it is not only mandated by the Establishment Clause, but also consistent with protection of individual rights in an increasingly pluralistic society. Conversely, the forces of orthodoxy have interpreted the same process as discriminating against religious expression, privileging secular humanism over other faiths, and contributing to social problems and supposed increases in immorality.

The latter position is illustrative of the broader conservative view that the exclusion of religious practices and viewpoints from the public sphere is inequitable, hostile to religion, and socially deleterious. It underpins arguments for the 'reintroduction' of religious values and practices to public life in general, and public schools in particular. A related line of critique holds that it is discriminatory to exclude private religious schools from the state's provision for the common welfare, and that government financial support

should be available to those parents who enrol their children in such institutions. For liberals, such proposals represent a worrying attempt to employ the mechanisms of the state to advance religious beliefs: something that poses a fundamental threat to individual freedom, the autonomy of both church and state, and the viability of public schools as institutions open to all children.

Orthodox stakeholders, then, have adopted a two-pronged strategy for reasserting conservative values in education: first, they advocate a greater role for avowedly religious values and perspectives in public schools; secondly, they promote vouchers and school choice programs that reduce the costs encountered by parents who send their children to private schools (Merrett, 1999: 604). Both arguments are underpinned by notions of community empowerment and parental rights: conservative lobbyists portray themselves as champions of local control and devolved decision-making. By contrast, progressive interests emphasize the need for a degree of centralized control and state oversight, in order to combat discrimination, uphold academic standards, and safeguard the fundamental rights of individual parents and pupils from the intrusions of local majorities. As Merrett (1999: 599) suggests, contemporary disputes over U.S. education can be characterized as 'a culture war where the politics of scale are used by the contending sides to determine the appropriate scale for social reproduction.'

A critical question, at this point, concerns the applicability of the culture war thesis beyond the United States, particularly in light of the unique power and influence of conservative religious groups in that country. While conflict between orthodox and progressive opinion occurs in Canada (with same-sex marriages and drug liberalization representing two current debates), it frequently appears more muted than in the United States, and less connected to mainstream electoral politics. Nevertheless, a productive comparison with U.S. cultural politics can certainly be made in the field of education.

The recent case concerning a British Columbia public school board's refusal to approve books which portrayed same sex parents (see Chapter 6) is instructive in this regard. Not only did it capture headlines in local and national media over the course of several years, it also pitted two fundamentally opposed schools of thought against each other. On the

one hand, the board's decision was supported by a conservative alliance of Catholics and evangelical Protestants, which advocated a key role for religion in school governance, and public decision-making more generally.[48] On the other hand, the ruling was opposed by progressive groups,[49] who contended that religious arguments and values were out of place in public discourse, especially within a public school system catering for a socially and religiously diverse population, and required by statute to operate on strictly secular and non-sectarian principles.

The positions of these stakeholders can be elucidated with reference to their submissions to the courts. Progressive opinion emphasized the themes of pluralism, tolerance, and individualism – contending that these values formed the appropriate basis for public morality in a multicultural society, in contradistinction to private and particularistic religious beliefs. For example, the British Columbia Civil Liberties Association (BCCLA, 2002: para. 14) stated that a 'separation of church and state in the public school system' was necessary in order 'to respect and enhance the dignity of the individual.' In its view, the legislation governing public schools did just this by 'clearly [drawing] a bright line between the secular education that every citizen requires to be a fully contributing member of society and the individual religious beliefs that every member of society should be free to develop and practice according to his/her own conscience' (BCCLA, 2002: para. 19). This interpretation underpinned the argument that 'only those values which have become part of the moral fabric of our civil society' had a place in public schools, whereas values associated with particular religious traditions were properly confined to the private sphere (BCCLA, 2002: para. 19). For this group 'respect and tolerance for the personal characteristics of all individuals who make up our multi-cultural, pluralistic society' fell into the first category, in large part because they were

[48] Core members of this group were the Evangelical Fellowship of Canada and the (Catholic) Archdiocese of Vancouver.

[49] This public secularist position was advanced by the British Columbia Civil Liberties Association and EGALE Canada Inc. (a gay and lesbian rights group).

thought to stem from the *Charter*, while 'moral approbation of same sex parents' fell into the second (BCCLA, 2002: paras. 36, 60).[50]

The exclusion of particularistic values and moral positions from public schools required the delimitation of local democracy. In the progressive view, the religious opinions of some parents could not be allowed to shape the instruction of *all* pupils attending a public school, and basic standards of education could not be permitted 'to vary from district to district based on the perception of elected trustees concerning the religious preferences of their electorate' (BCCLA, 1999: para. 4; see also EGALE, 1999: para. 38). Accordingly, the BCCLA acknowledged the right of parents to participate in school governance, but emphasized that it was properly subject to legislative and constitutional provisions. Any consequent 'dissonance' between the values instilled in public education, and those promoted in various homes and churches, was classified as a private concern best addressed by parents (BCCLA, 1999: para. 57).

A markedly different vision was articulated by the orthodox intervener. First, the Evangelical Fellowship and Archdiocese of Vancouver (2000) contended that religious arguments were entitled to a place in public deliberation: the notion that a public body should countenance *only* those moral views founded on (purportedly) non-religious grounds was considered fundamentally undemocratic. It followed from this claim that religious persons had the right to make their views on education and morality known, provided only that they did not seek to make religious instruction or denominational exercises central to the operation of public schools (Evangelical Fellowship and Archdiocese of Vancouver, 2000: paras. 16, 30). In this vision the public school was an integral part of a local political community that included religious believers, and did not confine religious perspectives to a purely private sphere of individual concern. Such thinking is characteristic of conservative contributions to debates over the place in religion in public schools in both Canada and the United States.

---

[50] Hunter (1991: 154) notes that progressive concern for individual autonomy frequently generates opposition towards positions deemed 'choice-restrictive' and thus 'intolerant'.

Stakeholder Groups

The court-mandated secularization of public education may be understood as simultaneously a response to changing social conditions (e.g., the increasing diversity of religious and conscientious viewpoints; the growing influence of a non-theological conception of religious liberty), and as a catalyst for socio-cultural change. In combination with other factors, both secular and religious, it has brought about a significant realignment of cultural forces. This process, and specifically the emergence of key institutional alliances in the culture war over education, is the focus of this section.

Writing in the U.S. context, Jeffries and Ryan (2001) discuss the emergence in the nineteenth century of an influential coalition of stakeholders that supported the concept of public education and vigorously opposed governmental aid to parochial institutions. This group included almost all Protestants (for the reasons noted above), as well as Jews (the great majority of whom viewed the separation of church and state as a prerequisite for their liberty in an overwhelmingly Christian nation), and 'public secularists' (who were identified primarily by their commitment to a secular state). All three groups valued public schools as instruments of social cohesion, and professed their support for the principle of church/state separation, although they disagreed on whether or not it was consistent with the organized prayer and Bible-reading that characterized the common schools movement. The only sustained opposition to this alliance came from Catholics. However, it was not Catholic objections that ultimately broke the coalition, but rather the issue of secularization.

The U.S. Supreme Court's decisions in *Engel* and *Schempp* splintered Protestant opinion on education. On the one hand, the rulings were supported by most mainline Protestant leaders, for whom the removal of official prayer and Bible-reading was mandated by the principle of church/state separation, to which they were committed. They were joined by Jews and public secularists, for whom the decisions were also an overdue recognition of religious pluralism – a pluralism which meant that *any* religious exercise in schools, no matter how purportedly non-denominational, invariably offended someone (Jeffries & Ryan, 2001: 321-322). On the other hand, a significant majority of Americans opposed

the decisions, revealing a significant gap between elite and popular opinion (Jeffries & Ryan, 2001: 325). The removal of religious observances from public schools was widely regarded as, *inter alia*, contrary to historical practice, anti-religious, and an invitation to immorality. Critically, this position attracted many evangelical Protestants, as well as the Catholic Church, which had reversed its historical opposition to devotional activities in public education.[51]

Evangelical opposition to secularization was to prove particularly significant. This was partly due to the fact that evangelical Protestants, characterized by their belief in Biblical inerrancy and justification by faith alone, were becoming more numerous and better organized (Jeffries & Ryan, 2001: 323; Conkin, 1998: 51, 170). At a range of scales, they entered the political sphere to promote a conservative cultural agenda – activism that sometimes extended to asserting the direct relevance of the Gospel to the organization of public life (see, e.g., Baer & Carper, 2000). Moreover, they viewed public schools without organized prayer and Bible-reading as godless and ill-disciplined places that threatened their children's faith and intellectual development. Evangelicals abandoned their traditional support for public education, and increasingly sought to enrol their children in private religious alternatives. This move into private education led to campaigns for parochiaid:

> [A]s Christian academies proliferated and the need for financial assistance increased, conservative evangelicals reassessed their earlier opposition to state aid. Additionally, the enemy changed. The historic Protestant hostility to school aid sprang, at least in part, from antipathy toward Roman Catholics. ... Beginning with the school-prayer decisions, conservative evangelicals came to see secularists as their real enemies. Catholics joined evangelicals in opposition to the increasing secularization of American public life, seeking the reintroduction of prayer in schools, aid to religious education, and an end to abortion. Thus, the enemy became the friend, and

[51] By the mid-twentieth century, the Catholic Church had come to view secularism as a greater threat to faith than 'non-denominational' Christian exercises in public schools. The latter appeared less hostile than they once had, given the decline of anti-Catholic prejudice, and the 'increasingly secure position [of Catholics] in American society' (Klarman, 1996: 57).

much of the emotional energy for opposing school aid evaporated (Jeffries & Ryan, 2001: 348-349).[52]

Evangelical calls for public funding of private religious schools were not merely pragmatic, however. Central to critique of public schools, and indeed that of many other religious objectors, was the idea that secular education was coercive 'in that it undermined the religious values which [parents] were attempting to instil in their children' (Brown, 2000: 591-592). Children attending public schools were not only *exposed* to ideas and principles contrary to Christian thinking, but had their beliefs actively and continuously *subverted.* Critically, it was believed that *the detrimental effects of secular education on children's faith could not be reversed in the private sphere of home and church.* In this context, it was argued, parents were *compelled* to send their children to religious schools.

This argument was advanced in *Bal* (see Chapter 5), when several families questioned the constitutionality of Ontario's secular public education system. Christian parents contended that it was essential that their children attend Christian schools because they could not 'fulfil their religious obligations ... by simply teaching their children about their religious faith in their home and at their place of worship and by sending them to a secular school during the week.'[53] Analogous arguments were advanced by Hindu and Muslim parents.[54] The applicants' preferred solution was state accommodation of their need for schools in which religious perspectives imbued every aspect of instruction, and children's faith was continuously encouraged and affirmed (a position that the Catholic Church had advocated for over 150 years).

The convergence of conservative religious opinion in *Bal* points to a broader orthodox consensus in favour of church/state accommodation in the area of education. Since the

---

[52] For example, in *Agostini v. Felton*, 521 U.S. 203 (1997), the Catholic League for Religious and Civil Rights joined the *amicus* brief of the Christian Legal Society, along with the Southern Baptist Christian Life Commission, and the National Association of Evangelicals, in supporting an initiative that allowed public employees to enter parochial schools to teach disadvantaged pupils.

[53] *Bal* at 701.

[54] *Bal* at 699-701.

1980s, evangelicals have been the leading proponents of this view in both Canada and the United States, calling for both state aid to parochial schools, and the restoration of religious influences (most notably organized prayer) to public education. Joining them in this position are many Roman Catholics, Orthodox Jews and conservative secularists. This alliance has frequently set the political and legal agenda for debates over the relationship between religion and education, especially in the United States, where it has developed close ties with the Republican Party (Jeffries & Ryan, 2001: 341-343; Merrett, 1999: 604-606; Ravitch, 1999: 69-70; Alley, 1994: 187-205). It is occasionally referred to as the 'Religious Right', although this term is more commonly used to describe only politically-organized conservative evangelicals.

Opposition to the conservative educational agenda has been led by groups committed to secular public education, typically as part of a broader dedication to the separation of church and state. The American Civil Liberties Union (ACLU) and the Canadian Civil Liberties Association (CCLA), together with their affiliates, have been leading exponents of this position. These institutions share a liberal vision of the world in which a clear and inviolable boundary separates the secular public sphere of government and politics (including state schools), from the private realm of conscientious belief and religious organizations (including parochial schools).

In the civil libertarian model religion is thoroughly privatized so as to preserve religious liberty (the state does not coerce its citizens with respect to belief; it neither prefers one religion to another, nor religion generally to irreligion) and the independence of the state from religion (its laws are based on secular premises that neither advance nor inhibit religious belief; its programs are secular in nature and may be enjoyed by all reasonable citizens without prejudice to their consciences) (McConnell, 2000: 64). It follows from these precepts that public school authorities must refrain from sponsoring religious practices and advancing religious beliefs. In the words of the ACLU (1996a: para. 4):

> In our society, government is not permitted to instruct a child in religion, because it is not the government's job to promote a religious form of truth. No provision of the Constitution so firmly assures the essential freedom of the individual as does the Establishment Clause. The provision recognizes that choices about the ultimate meaning of life must be made in the private

> recesses of the conscience and not in the earthly controversies of political power.

Although such accounts prioritize church/state separation, they do so in part because of the civil libertarian belief that religious freedom can only be *exercised* when it is thoroughly privatized (i.e., free from state oversight or intervention). This freedom may be located in the 'private mind' of the individual (as in the quotation above), or in the 'private home' of the family. Indeed, civil liberties groups frequently represent religious influences over public education as an affront to the rights of families, or more specifically parents, to control their children's religious upbringing. The BCCLA (1999: para. 29) has contended that these rights are infringed by 'attempts to impose the religious or conscience-based convictions of a segment of the ... electorate on all those who seek the benefits of citizenry through the education system.' Similarly, the ACLU (1996b: n.p.) has argued that organized school prayer 'usurps the right of parents to determine if, how, when, where and to whom their children should pray.'[55]

In such accounts, religious belief (or non-belief) is portrayed not only as a uniquely private concern (no other topic is similarly 'out of bounds' for public school teachers and administrators), but also as something that only adult family members are competent to address. While these claims allow civil liberties groups to represent themselves as the champions of familial privacy, they are silent on children's rights and the potential tension between individual liberty and familial authority. What is central to the civil libertarian position is a spatialized regime of rights in which *parents* are free to impart religious and conscientious beliefs in the home, but are prohibited from advancing those same views in or through the public schools – in large part to ensure the autonomy and privacy of other families. This distinction points to one way in which the division of the social world into public and private places can provide a compelling framework for

---

[55] Poulter (1996: 516) employed the same reasoning in his critique of required collective worship in the state schools of England and Wales:

> It is quite wrong that pupils of one faith should be required by law to attend acts of worship indicating any sort of commitment to another faith against their own or their parents' wishes and equally erroneous to assume that such situations can be satisfactorily prevented simply by use of the right of withdrawal. Such withdrawals are both embarrassing and divisive and have therefore been rare. The notions of worship and compulsion are fundamentally incompatible....

adjudicating rights claims, and evokes Blomley and Pratt's (2001: 155) claim that 'one is seen to be right and to be able to claim rights ... only in particular places.'

Civil libertarian objections to religion in public schools do not rely solely upon the notion of parents' rights. At least four additional arguments are made, each of which depends on a particular understanding of the public school as a social, political and pedagogical space. First, religious instruction and observances are said to undermine the role of the public school as a truly *common* environment that accepts all pupils, and transcends sectarian differences. They do so by creating divisions and tensions among the student body, 'even in the most homogeneous of communities' (ACLU, 1999a: n.p.). Secondly, civil liberties groups warn that children can be ostracized and ridiculed for opting out of prayers and religious instruction. Thirdly, they note that exemptions and opt out provisions require de facto public declarations of (dis)belief on the part of pupils and their parents that jeopardize privacy. Fourthly, they express concern that the disciplinary environment of the school and the authority of the teacher may lead many pupils to experience coercion to participate in religious activities (a notion discussed in Chapters 4 and 5). The overriding concern, in each case, is to safeguard the ideal of comprehensive public education, and prevent coercion in matters of conscience: a stance that also underpins opposition to parochiaid.[56]

In addressing the place religion should have in public schools, civil liberties groups draw a distinction between 'instruction in religion' and 'education about religion'. The former approach is criticized for introducing denominational differences and theological strife into the classroom; the latter is accepted on the grounds that it allows pupils to appreciate the influence of religion on history, culture and values (Bergstrom, 1992: 30). In 1995, the ACLU joined 34 other organizations in endorsing *Religion in the Public Schools: A Joint Statement of Current Law*, which noted at s. 5:

> Students may be taught about religion, but public schools may not teach religion. ... It would be difficult to teach art, music, literature and most

[56] State subsidization of parochial schools is seen to divert much needed funding and political support from public education at the same time as it coerces taxpayers into supporting 'religious beliefs and practices with which they may strongly disagree' (ACLU, 1999b: para. 4).

> social studies without considering religious influences. ... It is both permissible and desirable to teach objectively about the role of religion in the history of the United States and other countries.

Such education is seen to pose no threat to the consciences of parents, pupils, and teachers – in contradistinction to exercises that are devotional (as opposed to academic) in nature, or which promote acceptance (as opposed to awareness) of religious claims. Unlike 'religious instruction,' its goal is not to encourage conformity to particular beliefs, but rather to promote awareness of a broad range of faiths. It is an approach that appeals not only to civil libertarians, but also to those Protestants who have retained a commitment to church/state separation,[57] and to many religious minorities. For example, it has attracted the support of many Jewish groups,[58] consistent with the long history of Jewish opposition to Christian domination in public education.

Indeed, organizations representing the views of (non-Orthodox) Jews have been leading advocates of a strict separation of church and state, especially in the United States (Jeffries & Ryan, 2001; Klarman, 1996; Blumoff, 1994; Davis, 1993). Both within and beyond the courtroom, they have aligned with civil libertarians in supporting secular public education, and opposing state aid to parochial schools.[59] The separationist stance of most politically-active Jews has been linked to their status as a small, and sometimes isolated, minority (Jeffries & Ryan, 2001: 307; Davis, 1993: 109-110). Moreover, the 'privatization' of religious belief has been interpreted as offering protection from anti-Semitism – a viewpoint that acquired particular salience after the Holocaust:

---

[57] The National Council of Churches, which represents many mainline U.S. Protestants, is strongly separationist, and continues to support public education 'as a major cohesive force in our pluralistic society' (Jeffries & Ryan, 2001: 356).

[58] Eight Jewish organizations endorsed *Religion in the Public Schools: A Joint Statement of Current Law.*

[59] By way of example, in *Mitchell* v. *Helms*, 530 U.S. 793 (2000), a single brief opposing parochiaid was submitted by three civil liberties groups (the ACLU, Americans United for Separation of Church and State, and People for the American Way), and four Jewish organizations (the American Jewish Committee, the American Jewish Congress, the Anti-Defamation League, and the Jewish Council for Public Affairs), together with the American Federation of Teachers (see Jeffries & Ryan, 2001: 361). In the Canadian context, the CCLA, the Canadian Jewish Congress, and the League for Human Rights of B'Nai Brith Canada advanced similar positions as interveners in *Zylberberg II* and *Elgin County*.

> The fear of identifying one's religion in public discourse is the Holocaust's bequest to many American Jews. We were identified as Jews and died for that reason alone. And for some of us this fear is compounded by the potential exclusivity of a national conversation dominated by Christian – and some times very *intolerant* Christian – voices. It remains a sad fact of our national history that we have not travelled very far in time from the periodic, mean-spirited rejection of foreigners and foreign religion by 'Know-Nothing'-types (Blumoff, 1994: 596; original emphasis).

Memories of persecution have arguably led many Jews 'to rebel viscerally at the notion of public religiosity' (Blumoff, 1994: 592), at the same time as they have given Jewish views on religious liberty a 'special resonance' within society (Jeffries & Ryan, 2001: 308).[60] The high profile of these views is also due in part to the legal efforts of institutions such as the American Jewish Congress and the American Jewish Committee, which have consistently filed *amicus* briefs advancing separationist positions. This said, Jewish opinion on the church/state relationship is not monolithic, and Orthodox Jews are increasingly asserting views consistent with those of evangelical Protestants and conservative Catholics (Jeffries & Ryan, 2001: 360; Davis, 1993: 116).[61] Legal struggles over the relationship between religion, education and the state have not only attracted the attention of existing lobby groups and institutions, but have also contributed to the development of new organizations and alliances *across* faith traditions.

Conclusion

The place of religion in public schools has been contested since state education systems were first established in Canada and the United States. Debates over this issue have frequently attained a high public profile and constitutional significance, in part because of their connections to broader social and political tensions. These tensions have included the fundamental division between Protestants and Catholics in the common schools era, as well as the more recent divide between orthodox and progressive cultural forces.

---

[60] It has been suggested that the Holocaust provoked 'a fundamental ideological reevaluation of the place of minority religions in American life' that led to greater acceptance of religious pluralism (Klarman, 1996: 47).

[61] The accommodationist perspective of Orthodox Jews is advanced by the National Jewish Commission on Law and Public Affairs.

Today, progressive stakeholders articulate a liberal vision in which each person (or, rather, each *adult* person) is empowered to 'pursue his or her individual comprehensive conception of the good life' (BCCLA, 2002: para. 35). This autonomy, which encompasses the right to choose freely between alternative religious and non-religious belief systems, is dependent upon the notion of limited government: state authority may not be used 'to promote or favour one set of permissible comprehensive ideals of the good or metaphysical doctrines over others' (BCCLA, 2002: para. 34). It follows from this position that public schools cannot sponsor religious activities, or promote the beliefs of any faith.

For conservatives, such an approach is not neutral, but rather anti-religious. In their view, religious beliefs and values are entitled to a place in the public sphere; indeed, the ideals of democracy and religious liberty are said to necessitate such an accommodation. Accordingly, they have argued that public schools must facilitate religious expression, and uphold the morality religious parents wish to instil in their children. In addition, many conservatives have contended that genuine state neutrality towards religion, together with respect for parental rights, requires state funding to be made available to both public schools and private parochial institutions.

This second argument is closely related to the first, in that the secularization of public schools has led many evangelical Protestants to abandon their historical support for public education, and move to private schools that reflect and reinforce their religious and moral views. Over time, they have come to join Catholics, and Orthodox Jews, in advocating parochiaid. In addition to facilitating influential alliances among theological and political conservatives, the growing diversity of private religious schools has made calls for vouchers and other forms of parochiaid appear more religiously neutral, as the potential beneficiaries are no longer almost exclusively Catholic (Jeffries & Ryan, 2001: 338).

The contemporary culture war over education has a two-fold significance for the present thesis. First, both progressive and conservative forces have contributed to the legal discourse around the place of religion in public schools. They have done so not only by articulating certain interpretations of constitutional provisions, but also by advancing

particular understandings of the public/private distinction, of the relationship between the individual and the collective, and of the school as a place with particular legal and social meanings. Indeed, the language of stakeholders on both sides of the argument is thoroughly 'legalized' – that is, saturated with the language of rights, constitutions, precedents, original intent, and so on. This is not surprising, given the social persuasiveness of legal language, but more particularly the extent to which the question of religion's place in public schools has become a *constitutional question* – and thus a matter for the courts.

Secondly, stakeholder positions *matter* in a jurisprudential sense. Klarman contends that the *Engel* and *Schempp* decisions would not have been possible if it were not for Jewish and liberal Protestant opposition to mandatory Bible-reading and school prayer, and the historical lobbying efforts of Catholics, which had already led to the removal of these practices from many public schools outside of the South (Klarman, 1996: 15, 46-59). In the current context, Jeffries and Ryan (2001: 283, 365) predict that 'the constitutional barrier against financial support of religious schools will not long stand,' as the alignment of evangelical Protestants, Catholics, Orthodox Jews, and conservative non-believers 'is producing a new political majority in favor of school aid.' They do not forsee an end to secularism in public education, however, given the enduring opposition of civil liberties groups, Jewish organizations, and mainline Protestants, together with a growing religious diversity that 'makes it more and more difficult to envision any religious exercise that would not favor some faiths and offend others' (Jeffries & Ryan, 2001: 283-284). The issue of religious activities in public schools is the subject of the next two chapters.

CHAPTER FOUR:
RELIGIOUS ACTIVITIES IN U.S. PUBLIC SCHOOLS

This chapter considers the ways in which understandings of space have informed and underpinned judicial reasoning in eight leading U.S. cases on the place of religious activities in public schools. Seven of these decisions were handed down by the U.S. Supreme Court, beginning with the 1962 decision to strike down school prayer in New York. While the Court later addressed the place of the Bible and the Ten Commandments in public education, school prayer has received the greatest ongoing attention. This reflects not only its socio-cultural importance – school prayer has been closely connected to issues of national identity, public morality, and the well-being of children – but also its chameleon-like qualities. There are many types of prayer that may be said in a public school, and each potentially raises slightly different constitutional questions. Moreover, the advocates of school prayer – and there are many in the United States – have championed a variety of observances, doggedly insisting that the issue is not dead.

Following initial attempts to overturn U.S. Supreme Court decisions striking down prescribed, teacher-led prayer through a constitutional amendment, school prayer supporters began to champion religious rituals characterized as non-sectarian and voluntary. Unable to win sufficient support for these devotionals amongst federal legislators and the judiciary, they turned to 'moments of silence,' and later to student-led and student-initiated 'messages' at school events. At each stage of this struggle, legal challenges alleging breaches of the Establishment Clause were initiated – a number progressing to the Supreme Court. These cases contributed to determining the meaning of church/state separation vis-à-vis public education, and several have proved highly consequential in the development of First Amendment jurisprudence (Alley, 1999: 165-279).

It is notable that the controversies surrounding school prayer have been primarily socio-cultural and legal in nature, as opposed to theological. Many of the prayers at issue

possess only a generalized religious content (typically in the form of a brief appeal, or expression of gratitude, to a recognizably Christian or Judeo-Christian God), and the absence of an overtly sectarian or proselytizing purpose is especially pronounced in the most recent cases concerning prayer at school events (e.g., graduation ceremonies, football games). While these observances can appear trivial, they have proved to be important battlegrounds in struggles around church/state separation, the public/private distinction, and the boundary between individual rights and collective interests.

(Dis)placing Religion in U.S. Public Schools

Striking Down Prayer: *Engel & Schempp*

The issue of school prayer burst onto the U.S. national stage in 1962-63 with two controversial Supreme Court decisions. *Engel v. Vitale* and *Abington v. Schempp* cut 'to the core of the debate about the religious culture of the nation' and 'clearly announce[d] the end of the Protestant ascendancy' in public education (Fraser, 1999: 146). Further, they provoked a conservative backlash that helped to lay the foundations for the contemporary culture war.

In *Engel*,[1] the Court struck down a short prayer composed by the New York State Board of Regents in 1958 for daily, teacher-led recitation in schools ('Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country').[2] This observance served primarily social and political goals: it was intended to be 'a continuing acknowledgement that the United States and the state of New York were still religious in a fast-changing world,' and it reinforced 'Horace Mann's old commitment that the schools would, of course, be religious places' (Fraser, 1999: 146). In addition, the prayer was intended to ensure 'that New York's increasingly diverse population was reminded daily of what the nation's dominant culture believed'

[1] Data set case – see Table 1.

[2] *Engel* at 422.

(Fraser, 1999: 146). This said, no child was compelled to join in the prayer if his or her parent objected.[3]

Continuing the 'strict separationist' line of reasoning developed in earlier cases such as *Everson* and *McCollum* (see Chapter 3), the six justice majority ruled that state-mandated religious practices were out of place in public education: 'by using its public school system to encourage recitation of the Regents' Prayer, the State of New York has adopted a practice wholly inconsistent with the Establishment Clause.'[4] The Court determined that 'the constitutional prohibition against laws respecting an establishment of religion must at least mean that in this country 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.'[5] This reasoning depended not only on the notion of a 'constitutional wall of separation between Church and State,'[6] but also on a particular understanding of national identity.

The Court contended that it was governmentally-mandated prayer, and associated persecution, which had led early colonists 'to leave England and its established church and seek freedom in America.'[7] That some of these dissenters had proceeded to pass laws 'making their own religion the official religion of their respective colonies' was acknowledged as an 'unfortunate fact,'[8] and portrayed as a temporary deviation from the deep-seated national principle of religious liberty. Critically, this principle was reaffirmed by the Founders, who 'brought into being our Nation, our Constitution, and our Bill of Rights with its prohibition against governmental establishment of religion.'[9] The Establishment Clause was said to be based on an awareness 'that one of the greatest dangers to the freedom of the individual to worship in his own way lay in the

---

[3] *Engel* at 423.

[4] *Engel* at 424.

[5] *Engel* at 425.

[6] *Engel* at 425.

[7] *Engel* at 427.

[8] *Engel* at 427.

[9] *Engel* at 433.

Government's placing its official stamp of approval upon one particular kind of prayer or one particular form of religious services.'[10]

On the basis of such original intent analysis, the Court ruled that government sponsorship of religious activity was prohibited, and the New York policy unconstitutional. It dismissed the argument that the Regents' prayer posed no danger to religious liberty because it was 'non-denominational' and pupils could be excused from participation. First, governmental endorsement of even a brief and general prayer was portrayed as the thin edge of the wedge permitting state intrusion into religion matters. Quoting James Madison (a leading advocate of religious liberty during the Founding period, and drafter of the Bill of Rights), it suggested that to accept state sponsorship of prayer was to accept an authority that could later be used to enact an official establishment.[11] Secondly, the Court denied that the excusal provision made the prayer acceptable, as 'indirect coercive pressure' to conform existed '[w]hen the power, prestige and financial support of government is placed behind a particular religious belief.'[12] It rejected the argument (later accepted by conservative Justices favouring greater church/state accommodation), that formal state coercion was required to trigger an Establishment Clause violation:

> 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 nonobserving individuals or not. ... the purposes underlying the Establishment Clause go much further than [prohibiting coercion]. Its first and most immediate purpose rested on the belief that a union of government and religion tends to destroy government and to degrade religion.[13]

The Court's analysis, then, depended not only on the notion that church and state *should* be separate spheres of human life and endeavour, but that they *were* separate in a

---

[10] *Engel* at 429.

[11] *Engel* at 436. In concurrence, Justice Douglas suggested that the prayer was a step towards establishment because it was *funded* by the state: 'the person praying is a public official on the public payroll, performing a religious exercise in a governmental institution' (at 441). According to this logic, the Supreme Court's opening prayer ('God save the United States and this Honorable Court') was also unconstitutional.

[12] *Engel* at 431.

[13] *Engel* at 430-431.

fundamental sense. Indeed, it was contended that the Founders had adopted the Establishment Clause in part because 'religion is too personal, too sacred, too holy, to permit its "unhallowed perversion" by a civil magistrate.'[14] It followed that religion required protection from public interference: 'government in this country should stay out of the business of writing or sanctioning official prayers and leave that purely religious function to the people themselves.'[15] This was but one side of the coin, however. The Court also held that the integrity of the state depended on its autonomy from religion: government involvement in religious matters was a recipe for civil strife.

The Court emphasized that its ruling was hostile to neither religion nor prayer, but protective of their uniquely private character. The decision was said to affirm the historical role of the United States as 'a place in which [people] could pray when they pleased to the God of their faith in the language they chose.'[16] Privacy of religion and individual freedom from coercion not only went hand-in-hand – they were also distinctly 'American' values.

The sole dissenter in *Engel* was Justice Stewart, who contended that the prayer policy was not a law respecting an establishment of religion, but rather one allowing for its free exercise. From this perspective, the effect of the majority's decision was 'to deny the wish of these school children to join in reciting this prayer.'[17] On the central issue of whether or not government could prescribe or endorse such an activity, Justice Stewart suggested that the Establishment Clause was intended only to forbid an official state church,[18] and that the prayer policy was consistent with long-standing practices in which government institutions and officials recognized religious beliefs and traditions. These practices – which ranged from the prayers recited by legislative chaplains, to appeals for divine assistance in Presidential Inauguration speeches, to the motto 'In God We Trust'

---

[14] *Engel* at 432; citing James Madison.

[15] *Engel* at 435.

[16] *Engel* at 434.

[17] *Engel* at 445 (Stewart, J., dissenting).

[18] *Engel* at 445, 450 (Stewart, J., dissenting).

being inscribed on coins – were said 'to recognize and to follow the deeply entrenched and highly cherished spiritual traditions of our Nation.'[19]

The idea that such practices are determinative of the meaning of the Establishment Clause has subsequently become a standard claim for accommodationists. By contrast, advocates of strict separation typically appeal to ringing declarations of religious liberty on the part of the Founders. *Engel* also demonstrated the potential tension between the two religion clauses of the First Amendment: the majority emphasized the need to delimit governmental involvement in matters of faith, consistent with the Establishment Clause, while the dissent stressed the need for government to accommodate expressions of religious belief, in accordance with the Free Exercise Clause.

The *Engel* decision met with considerable public opposition. Critics of the decision declared, *inter alia*, that children were being prevented from praying (in breach of the Free Exercise Clause), and that God had been 'kicked out of the schools.' Such claims were useful rhetorical devices, but were fundamentally misleading: the decision to strike down a state-composed prayer did not preclude academic study of religion, private prayer on the part of pupils, or even mandated Bible-reading.[20]

One year later, the Court issued a wider-ranging ruling. Its decision in *Schempp* proscribed all government-sponsored prayer (not just that which was state-written) and Bible-reading in schools.[21] At issue was the policy of the Abington School District in Pennsylvania to open each day with a student reading a passage from the Bible over the public address system, and then leading recitations of the Lord's Prayer and the Pledge of Allegiance. The Bible-reading was carried out pursuant to State statute, and in the 'common schools' tradition was conducted without note or comment.[22] The schools

---

[19] *Engel* at 450 (Stewart, J., dissenting).

[20] It has been argued that 'to hold the notion ... that God's could be "tossed out" of the public schools by the action of a court is to entertain a cramped and paltry concept of God. Whatever God may be, He or She is not subject to the legislative or judicial tempers of the age' (Schulz, 1992: 110).

[21] Data set case – see Table 1.

[22] *Schempp* at 205: Pennsylvania law required that 'At least ten verses from the Holy Bible shall be read, without comment, at the opening of each public school on each school day. Any child shall be excused from such Bible reading, or attending such Bible reading, upon the written request of his parent or guardian.'

provided the King James Bible, although students could bring and make use of other versions.[23] Under the title of this case, the Court also ruled on *Murray v. Curlett*, which concerned an analogous requirement for prayer and Bible-reading in Maryland.

In many respects, the majority's reasoning in *Schempp* reiterated themes developed in *Engel*. First, it emphasized that individual freedom of conscience was a fundamentally American value, anchored in national history.[24] Secondly, the claim that the exercises were constitutional by virtue of their 'non-denominational' nature was dismissed. Quoting at length from earlier cases that ascribed strict separationist intent to the Establishment Clause, the Court reaffirmed that neither Federal nor State governments could enact laws that aided any particular religious belief, or religion in general over non-belief.[25] A third point followed from this thinking: the unconstitutionality of the prayer and Bible-reading policies was not 'mitigated by the fact that the individual students may absent themselves upon parental request.'[26] Clark, J., writing for the majority, argued that while 'a violation of the Free Exercise Clause is predicated on coercion ... [an] Establishment Clause violation need not be so attended.'[27] Finally, the Court once again represented religion as a fundamentally individual concern, properly beyond the reach of the state. It employed a military metaphor to reify and reinforce the boundary between 'private religion' and legitimate public concerns:

> The place of religion in our society is an exalted one, achieved through a long tradition of reliance on the home, the church and the inviolable citadel of the individual heart and mind. We have come to recognize through bitter experience that it is not within the power of government to invade that citadel, whether its purpose or effect be to aid or oppose, to advance or retard. In the relationship between man and religion, the State is firmly committed to a position of neutrality.[28]

---

[23] *Schempp* at 207.

[24] *Schempp* at 214.

[25] *Schempp* at 216-222; citing *Engel, Torcaso v. Watkins*, 367 U.S. 488 (1961), *McGowan v. Maryland*, 366 U.S. 420 (1961), and *Everson*.

[26] *Schempp* at 225.

[27] *Schempp* at 223.

[28] *Schempp* at 226.

The Court emphasized that this neutrality in no way infringed upon the right to free exercise of religion, precisely because it concerned only state action in the public sphere. It did not inhibit the activities of private institutions (at least in so far as they remained in the private sphere, and did not intrude into the realm of government), or seek to influence the individual conscience. Moreover, the Court noted, the Free Exercise Clause 'has never meant that a majority could use the machinery of the State to practice its beliefs.'[29] From this perspective, removing state-sponsored religious activities from public schools could not reasonably be interpreted as an anti-religious message. Rather, it insulated the public sphere from majoritarian impulses, and ensured that questions of faith remained as private as possible.

This reasoning, like much separationist thought, represented the private sphere as a site of individual freedom that not only required protection from the state, but was *inherently* separate from it. As suggested in Chapter 2, such thinking can work to depoliticize – if not render invisible – forms of inequality and coercion associated with the exercise of 'private' power in 'private' places. It tends to assume that only state action can inhibit individual freedom, at the same time as it denies the ongoing role of the state in creating and sustaining a bounded private sphere (including the 'inviolable citadel' of individual conscience). Contrary to suggestions that the public/private distinction is pre-political and immutable, positivist understandings of law emphasize that the state grants private individuals particular rights *it* is willing to uphold, and insist that a governmental decision *not* to intervene in a sphere of social life is as much 'state action' as a decision to regulate (see Hutchinson & Petter, 1988; Horowitz, 1982).

While *Schempp* unambiguously reinforced the public/private distinction constructed in earlier cases, it also advanced several new jurisprudential themes. One was a more detailed consideration of the socio-spatial context in which school prayer and Bible-reading took place. The majority quoted approvingly from a dissenting opinion in *Everson* which insisted that education *could* be isolated from religion. Organized devotional activities – which had a primarily religious purpose and effect – were not a

---

[29] *Schempp* at 226.

necessary feature of any meaningful public education; it was possible for schools to maintain 'a strict and lofty neutrality as to religion.'[30]

In concurrence, Brennan, J. addressed the tension between the public religiosity that was a feature of life in the United States ('undoubtedly we are "a religious people whose institutions presuppose a Supreme Being"'),[31] and the widespread view that public schools were intended to induct children from diverse backgrounds into common citizenship. Ultimately, schools' unique democratic function was held to require 'the training of American citizens in an atmosphere free of parochial, divisive, or separatist influences of any sort – an atmosphere in which children may assimilate a heritage common to all American groups and religions.'[32] Critically, while generalized Protestant practices had been considered a unifying force in the common schools era, Justice Brennan considered them to be incompatible with the ideal of the public school as the 'great uniter,' open to all children irrespective of particularistic ties. In striking down such practices, he argued, the Court ensured that parents had a choice between a religiously-neutral 'civic and patriotic' public education, and 'some form of private sectarian education, which offers values of its own.'[33]

Schempp was also significant for the way in which it considered *coercion* in the context of the classroom. Specifically, the Court found that excusal procedures did not necessarily remove the element of coercion from school prayer and Bible-reading, because *indirect pressures to participate* still existed. The majority noted that the complainant parent, Edward Schempp, had considered asking for his children to be excused from religious exercises, but decided against it on the basis 'that the children's relationship with their teachers and classmates would be adversely affected.'[34] Schempp had earlier testified that a refusal to participate would likely lead to his children being labelled 'un-American' and

---

[30] *Schempp* at 218; citing *Everson* at 23-24 (Jackson, J., dissenting).

[31] *Schempp* at 230 (Brennan, J., concurring); citing *Zorach* at 313.

[32] *Schempp* at 242 (Brennan, J., concurring).

[33] *Schempp* at 242 (Brennan, J., concurring).

[34] *Schempp* at 208.

'atheistic.'[35] While this claim was not commented on specifically, the majority acknowledged that the religious activities were located 'in school buildings under the supervision and with the participation of teachers,' and were 'part of the curricular activities of students who are required by law to attend school.'[36]

Additional attention was given to classroom-based coercion in the concurring and dissenting opinions. Justice Brennan provided the most detailed account, contending that many objecting students would be deterred from invoking the excusal procedure because refusal to participate in the religious activities was 'tantamount in the eyes of teachers and schoolmates to a profession of disbelief, or at least nonconformity.'[37] Accordingly, objectors were subjected to a 'cruel dilemma': either they requested an exemption and risked stigmatization, or they 'continue[d] to participate in exercises distasteful to them.'[38] Outlining a concept that was to become deeply controversial in later school prayer cases (namely *Lee* and *Santa Fe*), Justice Brennan suggested that peer pressure could further undermine the 'voluntary' nature of the devotional practices: 'reluctance to seek exemption seems all the more likely in view of the fact that children are disinclined at this age to step out of line or to flout "peer-group norms."'[39] This reasoning suggested that formal pressure from state actors (e.g., school teachers and administrators) was not necessary to reach a finding that pupils were coerced into participating in religious activities: it was sufficient for the state to *facilitate* coercion.

In a separate concurrence, Justice Goldberg affirmed that the pupils involved were 'young impressionable children,' but focussed on the more direct forms of coercion underpinning school prayer and Bible-reading: school attendance was compelled by statute, and the religious activities were only possible because of 'the prestige, power, and influence of school administration, staff, and authority.'[40] For Justice Douglas, the activities were

---

[35] *Schempp* at 208-209 n. 3.

[36] *Schempp* at 223.

[37] *Schempp* at 289 (Brennan, J., concurring).

[38] *Schempp* at 290, 289 (Brennan, J., concurring).

[39] *Schempp* at 290 (Brennan, J., concurring).

[40] *Schempp* at 307 (Goldberg, J., joined by Harlan, J., concurring).

coercive in the sense that taxpayers were being compelled to finance a religious activity, and not because of the mere possibility that 'the nonconformist student may be induced to participate for fear of being called an "oddball."'[41] In dissent, Justice Stewart acknowledged 'the likelihood that children might be under at least some psychological compulsion to participate,' but noted that evidence to this effect had not been presented.[42]

At least two other developments were to prove important in later jurisprudence. First, the Court exhibited a concern for conscientious minorities, including the Unitarian objectors in *Schempp*, and the 'professed atheists' who sought relief in *Murray*.[43] This was particularly evident in Justice Brennan's concurring opinion, in which it was noted that the U.S. was a 'vastly more diverse' place in 1962 than it had been in the late eighteenth century.[44] While the Founders 'knew differences chiefly among Protestant sects,' the contemporary United States was 'far more heterogeneous religiously, including as it does substantial minorities not only of Catholics and Jews but as well of those who worship according to no version of the Bible and those who worship no God at all.'[45]

Secondly, the Court sought to articulate specific criteria for assessing whether or not a government action was in violation of the Establishment Clause. The majority argued that a two-part test could be derived from the Court's accumulated jurisprudence:

> The test may be stated as follows: what are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment 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.[46]

---

[41] *Schempp* at 228 (Douglas, J., concurring).

[42] *Schempp* at 318 (Stewart, J., dissenting).

[43] *Schempp* at 211.

[44] *Schempp* at 240 (Brennan, J., concurring).

[45] *Schempp* at 240 (Brennan, J., concurring).

[46] *Schempp* at 222.

Essentially identical criteria were subsequently adopted as the first two prongs of the *Lemon* test (see Chapter 3). A very different understanding was advanced by Justice Stewart, again the lone dissenter. He rejected the notion that the Establishment Clause mandated a separation of church and state, and contested the majority's claim that its decision did not infringe on free exercise rights: 'there is involved in these cases a substantial free exercise claim on the part of those who affirmatively desire to have their children's school day open with the reading of passages from the Bible.'[47] Such thinking led Stewart, J. to espouse what later became a central claim in the conservative critique of the Supreme Court's school prayer jurisprudence: that preventing the government from mandating religious activities in public schools constituted opposition to religion. Indeed, he claimed that the only support for religion the challenged policies had provided was 'the withholding of state hostility – a simple acknowledgment on the part of secular authorities that the Constitution does not require extirpation of all expression of religious belief.'[48]

Justice Stewart's thinking in this regard rested on understandings of the public/private distinction, and of the proper relationship between the individual and the collective, very different from those informing the majority's decision. First, he contended that the free exercise of religion in the private sphere (e.g., homes, places of worship) was inadequate to uphold parental rights, and – by implication – the religiosity of children:

> It might ... be argued that parents who want their children exposed to religious influences can adequately fulfill that wish off school property and outside school time. With all its surface persuasiveness, however, this argument seriously misconceives the basic constitutional justification for permitting the exercises at issue in these cases. For a compulsory state educational system so structures a child's life that if religious exercises are held to be an impermissible activity in schools, religion is placed at an artificial and state-created disadvantage.[49]

---

[47] *Schempp* at 312 (Stewart, J., dissenting).

[48] *Schempp* at 316 (Stewart, J., dissenting).

[49] *Schempp* at 313 (Stewart. J., dissenting).

This line of argument ignored (or at least dismissed) the fact that both private prayer among pupils, and genuinely academic considerations of religion, were constitutionally permissible in the classroom.[50] Secondly, Justice Stewart contested the secularization of public education with reference to the theme of 'community rights.' In his view, the school prayer and Bible-reading policies had empowered 'each local school community' to reach a 'consensus' about 'the variety and content of the exercises.'[51] Discounting the understanding of rights as a tool for protecting the interests of the individual from majoritarian pressures, Stewart, J. declared that it was appropriate for school boards to mandate devotional activities that reflected the religious beliefs prevailing in the areas they served.[52] That this involved the (local) state sanctioning particular religious viewpoints was deemed constitutionally irrelevant, so long as an excusal procedure was available.[53]

While such thinking has much in common with conservative culture war discourse, in *Schempp* it was an aberration. The majority and concurring opinions in that case overwhelmingly endorsed the view that the private nature of religion, combined with the need to protect individuals (including pupils) from government coercion in matters of faith, made formal, state-sponsored religious activities in public schools impermissible. While this reasoning set the scene for many later decisions, public reaction was again hostile.

---

[50] There is evidence that some educators over-reacted to *Engel* and *Schempp*, and sought to delimit forms of student religious expression in which schools played no significant role. Arguably, this was linked to conservative rhetoric that (mis)represented the effect of the decisions as 'banning' religion in schools. The majority opinion in *Schempp* clearly envisaged an ongoing academic role for religion in public schools:

> [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 (at 225).

[51] *Schempp* at 316 (Stewart, J., dissenting).

[52] *Schempp* at 317-318 (Stewart, J., dissenting): 'The choice involved ... is one for each local community and its school board, and not for this Court. For, as I have said, religious exercises are not constitutionally invalid if they simply reflect differences which exist in the [local] society from which the school draws its pupils.'

[53] *Schempp* at 318 (Stewart, J., dissenting).

In one sense, the response to *Schempp* was surprising, as the practices of school prayer and Bible-reading were generally in decline, and had already been banned in many jurisdictions (Fraser, 1999: 146; Klarman, 1996: 15-16). In another sense it was an understandable reaction to a decision which *directly* challenged the popular notion that the United States was founded on religious ('Christian' or 'Biblical') principles. Indeed, opponents tended to interpret the ruling as a threat to *children* and *the nation* (concerns that could not readily be separated, given the social construction of children as 'the nation's future'), rather than to specific churches or religion in general. Many considered it incomprehensible that the highest court in the *United States* could ban organized religious practices in public schools, especially at a time when the nation was locked in an ideological and military struggle with 'godless communism.' As Drakeman (1991: 112) contends, 'the Supreme Court's enforcement of the Establishment Clause's strictures seem[ed] ironically unpatriotic because it threaten[ed] the religious underpinnings of our national self-esteem.'

In an essay challenging the notion the U.S. Supreme Court has been a heroic defender of civil liberties against the weight of public opinion, Klarman (1996: 18) suggests that these decisions 'were not nearly so countermajoritarian as they are generally portrayed.' Specifically, he notes that they were in keeping with a changing social context that included increasing religious diversity, incorporation of minorities (especially Catholics and Jews) into the national mainstream, and local trends towards removing overt displays of Protestant Christianity from public schools. It did not follow from this, however, that a majority of the public agreed: on the contrary, many grassroots members of mainline Protestant denominations opposed the decision, as did 'conservative evangelicals – who were less numerous, less well organized, and far less influential than today – and Roman Catholics' (Jeffries & Ryan, 2001: 323).

While pupils remained free to pray in U.S. schools, either individually or in groups, such voluntary and unorganized religiosity was widely regarded as inadequate. Private prayer could not address the perceived need for *all* children to be formally instructed in Biblical morality and the Christian heritage of the United States. As Rabinove (1992: 21) notes, in

seeking to understand the 'virtual obsession' of some individuals and groups with promoting school-sanctioned prayer:

> Few adults ... expect to be able to engage in organized prayer at their places of work during the work day. Parents for whom it is important that their children pray while in school are free to instruct them accordingly. What is really sought here by the school-prayer zealots is induced prayer by *other* people's children, whether or not this is desired by *other* parents (original emphasis).

This argument meshes closely with Valentine's (1996: 581-582) suggestion that in the discourse concerning the moral status of children, many parents 'perceive their own children to be innocent and vulnerable (angels), whilst simultaneously representing other people's children as out of control in public space and a threat to the moral order of society (devils).' Indeed, one of the arguments long made in support of formal religious instruction in public schools is that too many children are otherwise permitted to grow up ignorant of religion as a consequence of parental indifference or failure. Moreover, it has been contended that Christian teachings and the Bible provide the very basis for law, civilization, and ethical behaviour, and that as such it is in the national interest for them to be taught to children.[54] As Representative Wyman of New Hampshire contended during a 1962 debate on a proposed amendment to the U.S. Constitution that would have allowed school prayer: 'To leave prayer exercises solely in the home or in the church is to mean that for many children there will be no prayers at all and no exposure to prayer, for, unfortunately, too many parents are too busy, too disinterested, or outright disinclined. It is important in this world that we in the United States should be on God's side' (cited in Alley 1994: 138).

In light of such thinking, it is useful to distinguish between 'school prayer' and 'pupil prayer.' The former is organized at least in part by the school, and occurs in settings

---

[54] Such claims are by no means restricted to the United States. In Canada, the *Zylberberg I* court essentially accepted the claim that Biblical Christianity was the foundation of both morality and the nation state (see Chapter 5). In the United Kingdom, former Prime Minister Margaret Thatcher claimed in 1988: 'The Christian religion – which, of course, embodies many of the great spiritual and moral truths of Judaism – is a fundamental part of our national heritage. ... For centuries it has been our very lifeblood. Indeed, we are a nation founded on the Bible' (cited in Tamney, 1994: 198-199).

controlled by teachers or administrators (e.g., classrooms, graduation ceremonies, sports fields). The latter involves children praying, either alone or in groups, while at school, but without the input or sponsorship of school authorities.[55] While 'pupil prayer' occurs on public property, and may be indirectly facilitated by mandatory attendance laws, it occurs independently of the state. Arguably, it is precisely this *lack* of active school involvement that has led many conservative critics to ignore or dismiss pupil prayer: 'they *want* the schools to endorse religion and the important values it represents' (Tanford, 1995: 432; original emphasis).

Campaigns for a School Prayer Amendment

Between 1964 and 1966 the U.S. Congress held a series of hearings into a constitutional amendment that would have reversed the *Engel* and *Schempp* decisions by specifically exempting 'non-denominational' school prayer from the Establishment Clause. The House Judiciary Committee produced a three-volume, 2774-page publication of testimony, much of it focused on the question of whether any prayer could be truly non-denominational (Alley, 1994: 138).[56] If a non-denominational prayer could be found, claims that government was acting coercively in a matter of conscience, and endorsing a particular religion, might be deflected. However, the existence of significant denominational differences regarding the proper form, content and purpose of prayer seemed to preclude such a possibility.[57]

---

[55] *Religion in the Public Schools: A Joint Statement of Current Law* at s. 1:

> Students have the right to pray individually or in groups or to discuss their religious views with their peers so long as they are not disruptive. Because the Establishment Clause does not apply to purely private speech, students enjoy the right to read their Bibles or other scriptures, say grace before meals, pray before tests, and discuss religion with other willing student listeners. In the classroom students have the right to pray quietly except when required to be actively engaged in school activities (e.g., students may not decide to pray just as a teacher calls on them). In informal settings, such as the cafeteria or in the halls, students may pray either audibly or silently, subject to the same rules of order as apply to other speech in these locations. However, the right to engage in voluntary prayer does not include, for example, the right to have a captive audience listen or to compel other students to participate.

[56] Legislators also failed to agree on whether or not the Bible was a sectarian text, and struggled to make sense of the fact that Catholics and Protestants did not share a common version (Alley, 1994: 131).

[57] Alley (1994: 149) contends that 'a truly nonsectarian prayer is an impossibility in a pluralistic democracy. Since the atheist has no target for prayer, prayer is simply not possible.'

While devising a school-prayer amendment proved exceptionally difficult – no fewer than 35 different versions were proposed (Alley, 1994: 170) – the campaign was consistent with other steps undertaken at the federal level to affirm in law the religiosity of the United States. This trend was in large part a response to the Cold War: legislators frequently asserted that greater public recognition of religion was an appropriate response to 'atheistic communism,' and that it would strengthen the moral fibre of the nation, and particularly its youth. In 1954, for example, Congress amended the Pledge of Allegiance, adding 'under God' after the words 'one Nation.'[58] The House Report recommending the addition of these words declared that their purpose was to recognize 'the guidance of God in our national affairs,' while Senator Ferguson, a sponsor of the measure, linked it to national survival:

> I have felt that the Pledge of Allegiance to the Flag which stands for the United States of America should recognize the Creator who we really believe is in control of the destinies of this great Republic.
>
> ... We know that America cannot be defended by guns, planes, and ships alone. Appropriations and expenditures for defense will be of value only if the God under whom we live believes that we are in the right. We should at all times recognize God's province over the lives of our people and over this great Nation.[59]

Notwithstanding such rhetoric, initial attempts to enshrine a constitutional right to organized prayer in public schools were unsuccessful. However, the association of atheism with communism, and the widespread desire to affirm the role of religion in the public life of the United States, ensured that the struggle for a school prayer amendment continued. Thus in 1971, the House of Representatives debated an amendment drafted by Representative Wylie of Ohio: 'Nothing contained in this Constitution shall abridge the right of persons lawfully assembled, in any public building which is supported in whole or in part through the expenditure of public funds, to participate in non-denominational prayer' (cited in Alley, 1994: 169). Once again, concerns were raised about the term

---

[58] In 1955, Congress required 'In God We Trust' to be imprinted on all currency, and in 1956 it declared this phrase to be the national motto of the United States. See *Engel* at 440 n. 5 (Douglas, J., concurring).

[59] Cited in *Engel* at 440 n. 5 (Douglas, J., concurring).

'non-denominational.' For one critic, it seemed to require the government to create a composite 'religious practice' devoid of actual religious meaning:

> The Wylie amendment states that the public schools, while outlawing all real religious exercises now engaged in by Americans, must invent, import, and establish some novel religious exercise not taken from any one individual denomination but gathered from all religions into a composite prayer unacceptable to the members of all denominations but acceptable to Government which has sanctioned the practice (Representative Drinan of Massachusetts; cited in Alley, 1994: 174).[60]

When the Wylie proposal failed to attract the required two-thirds majority, school prayer advocates turned to a House Resolution affirming the individual's right to pray in a public building (Alley, 1994: 170-171). This right had never been denied by the Supreme Court, leading one legislator to suggest that '[s]ince force of law is totally unnecessary to cause voluntary prayers to be said, the resolution must be intended to cause some people to pray who really do not want to pray' (Representative McCulloch of Ohio; cited in Alley, 1994: 171). The uncertain meaning of the term 'voluntary' led Representative Reid of New York to question whether the effect of the resolution would be to facilitate governmental endorsement of religion: 'Would not even voluntary prayer involve the state in the sponsoring of a religious exercise by its providing classroom space and designating a period during official school hours for prayer?' (cited in Alley, 1994: 172).

In spite of such questions, the House Resolution passed, in part because its supporters deployed '[t]he full force of the delinquency argument' (Alley, 1994: 175). This entailed equating organized school prayer with the obedient and well-disciplined children of an imagined past, and its absence with the supposed moral degradation and misbehaviour of contemporary children.[61] School prayer advocates thus sought to create a moral panic by

---

[60] This phenomenon has also been observed in England. Bocking (1995: 231) suggests that the *Education Act 1988*, which required religious observances in public schools, promoted 'Christianity with none of the features of Christianity; it had no believers, no clergy, no community, no ethics, no congregations and no creeds.'

[61] Such claims exhibit a remarkable disregard for the realities of organized school prayer: first, it was never a universal practice; secondly, the statutory provision for State-wide religious exercises was largely an invention of the twentieth century; and thirdly, it continued in many locations long after the Supreme Court's rulings in 1962-63.

counterposing nostalgic visions of the pre-*Engel* era with an apocalyptic present. Critically, the idea that the school prayer rulings were creating an unruly and disrespectful generation of young people lent support to the notion that the federal government should intervene to restore public order: the moral panic is a classical strategy for resisting social change, and reasserting hegemonic beliefs and values (McRobbie, 1994; Cohen, 1980). As one law-maker argued:

> If we look back on the moral attitude of the students before the Supreme Court decision, which had the effect of outlawing prayer, and compare it with the attitude as it exists today, we can only conclude that with the Court-ordered removal of the student's right to pray to God in school that drugs, crime, and filthy books have all increased on the school campuses. In short, the moral fiber of our school students has been eroded. We need to put God back into the lives of students and this amendment will help to do that (Representative Thompson of Georgia; cited in Alley, 1994: 175).

A House Resolution in support of 'voluntary prayer', while perhaps useful as a signal to educators and the public generally, was ultimately inadequate to address such concerns. More useful, in terms of *guaranteeing* that God had a *constitutional* place in students' lives (and in the classroom) was the amendment proposed by Senator Helms of North Carolina and debated in Congress in 1980:

> The Supreme Court shall not have jurisdiction to review, by appeal, writ of certiorari, or otherwise, any case arising out of any State statute, ordinance, rule, regulation, or any part thereof, or arising out of any Act interpreting, applying, or enforcing a State statute, ordinance, rule, or regulation, which relates to voluntary prayers in public schools and public buildings (cited in Alley, 1994: 188-189).

This amendment was notable not only because it abandoned the adjective 'non-denominational' in favour of 'voluntary', but also because it sought to place school prayer out of reach of the nation's highest judicial authority. It attracted considerable opposition from civil liberties groups, teachers, and mainstream Protestant denominations, and ultimately failed to attract sufficient support outside of the Senate (Alley, 1994: 187-190).

Further proposals were to follow, however. In 1982, President Reagan suggested an amendment reading 'Nothing in this Constitution shall be construed to prohibit individual

or group prayer in public schools or other public institutions. No person shall be required by the United States or by any State to participate in Prayer' (cited in Alley, 1994: 197). The purpose of this amendment, the President explained, was to 'allow communities to determine for themselves whether prayer should be permitted in their public schools and to allow individuals to decide for themselves whether they wish to participate in prayer' (cited in Alley, 1994: 199).[62] Although no mention of 'community' was made in the text itself, Reagan's interpretation was consistent with neoliberal rhetoric regarding the need to devolve responsibility for the delivery of public services to the local level.

The potential for conflict between community desires and individual rights was, presumably, to be addressed by the clause prohibiting required participation. Opponents questioned how this would work in practice, and contended that the amendment was a recipe for majoritarianism: assigning 'communities' the power to prescribe school prayer 'was merely a national religion writ small' (cited in Alley, 1994: 200). In response to such concerns, several Republican Senators sought to alter the amendment to ensure that any mandated prayer would be 'non-denominational' or 'silent', and later appended the line: 'Neither the United States nor any State shall compose the words of any prayer to be said in public school' (cited in Alley, 1994: 202). This last provision appeared, remarkably, to signal acceptance of the Supreme Court's *Engel* decision – the very ruling that had prompted the campaign for a constitutional amendment. Irrespective of this concession to church/state separation, the Reagan amendment was unsuccessful.

By the early 1980s, a new tactic was being employed by advocates of organized religiosity in public schools. Specifically, they sought to represent accommodations of religion in the classroom as *private* initiatives – a framing intended to downplay establishment concerns by denying the imprimatur of the state, and to strengthen appeals to free exercise protection. Between 1980 and 1992, four U.S. Supreme Court decisions addressed such accommodations.

---

[62] The Justice Department added: 'If school authorities choose to lead a group prayer, the selection of the particular prayer – subject of course to the right of those not wishing to participate not to do so – would be left to the judgment of local communities, based on a consideration of such factors as the desires of parents, students and teachers and other community interests consistent with the applicable state law' (cited in Alley, 1994: 199-200).

Accommodating Religious Belief in Schools

In 1980, in the case of *Stone v. Graham*,[63] the Court considered a Kentucky statute that required a copy of the Ten Commandments to be placed on the wall of every public school classroom in the State. Each copy was to be purchased with *private* contributions, and accompanied by the notation: '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.'[64] In a short *per curium* decision, the Court determined that the statute failed the first prong of the *Lemon* test:

> The pre-eminent purpose for posting the Ten Commandments on schoolroom walls is plainly religious in nature. The Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths, and no legislative recitation of a supposed secular purpose can blind us to that fact. The Commandments do not confine themselves to arguably secular matters, such as honoring one's parents, killing or murder, adultery, stealing, false witness, and covetousness. ... Rather, the first part of the Commandments concerns the religious duties of believers: worshipping the Lord God alone, avoiding idolatry, not using the Lord's name in vain, and observing the Sabbath Day.[65]

In striking down the law, the Court exhibited a willingness to distinguish a sham secular purpose from a genuine one. The religious content and meanings of the Ten Commandments could not plausibly be denied: four of the Commandments were concerned solely with issues of religious practice and observance, and the text as a whole was 'sacred.'[66] In addition, the Court determined that an element of private involvement (in this case, private financing) did not make an otherwise unconstitutional government act constitutional. The legislation could not stand, as it provided official governmental support for religion, and placed a religious text in classrooms for devotional, rather than educational, reasons.

---

[63] Data set case – see Table 1.

[64] *Stone* at 41.

[65] *Stone* at 41-42 (citations omitted).

[66] This point is underscored when one considers that denominations disagree on the proper order, wording, and interpretation of the Ten Commandments. Indeed, three different versions have been expounded: one by Jews, one by Protestant and Orthodox Christian denominations, and one by Catholics and Lutherans.

Four justices dissented in *Stone*, although only Justice Rehnquist signed an opinion. The essence of his argument was that the Supreme Court should have deferred to the Kentucky legislature and courts, and their determination that the Ten Commandments legislation possessed a secular purpose. Moreover, he contended that 'the State was permitted to conclude that a document with such secular significance should be placed before its students.'[67] Whereas the majority declared that sacred texts could not be placed in public schools, except for genuine academic purposes, Justice Rehnquist articulated an accommodationist position: 'The Establishment Clause does not require that the public sector be insulated from all things which may have a religious significance or origin.'[68] These conflicting visions of the Establishment Clause, and its implications for the regulation of public education, were to be defining features of subsequent Supreme Court jurisprudence.

Five years later, in *Wallace v. Jaffree*,[69] the Supreme Court considered the constitutionality of a 1981 Alabama statute authorizing a one minute period of silence at the start of each school day 'for meditation or voluntary prayer.[70] The only significant difference between this law and earlier legislation providing for a 'moment of silence' were the words 'or voluntary prayer.'[71] The appellant in this case – Ishmael Jaffree – complained that his three children had been subjected to ongoing, teacher-led religious indoctrination in a public elementary school since the enactment of the statute. A five-justice majority struck down the law on the grounds that it failed the purpose prong of the *Lemon* test: its sole aim was 'to convey a message of state endorsement and promotion of prayer.'[72] The majority's opinion was narrowly focussed on the question of legislative purpose, and did not directly address issues of coercion (e.g., how voluntary was prayer likely to be in a State where teacher-led prayer remained a widespread practice?), or the

---

[67] *Stone* at 45 (Rehnquist, J., dissenting).

[68] *Stone* at 45-46 (Rehnquist, J., dissenting).

[69] Data set case – see Table 1.

[70] *Wallace* at 38.

[71] *Wallace* at 59.

[72] *Wallace* at 56, 59.

public/private distinction (e.g., to what extent could public schools accommodate pupils' wishes to engage in private prayer?).

Justice O'Connor, concurring in the judgement, focussed almost exclusively on applying the endorsement test, first proposed one year earlier.[73] A review of the enactment's wording and history led her to find that its purpose was to endorse voluntary prayer in public schools. However, this conclusion was tempered with the finding that moment of silence laws more generally – which were favoured by many school prayer advocates, and had been adopted in 25 States – did not manifest the same infirmity. O'Connor, J. argued that they were constitutional so long as the state and its employees refrained from conveying 'the message that children should use the moment of silence for prayer.'[74] What was required, in this instance, was attentiveness to the constitutional boundary that separated permissible accommodations of religion from impermissible endorsements: that fine line 'between creating a quiet moment during which those so inclined may pray, and affirmatively endorsing the particular religious practice of prayer.'[75]

In dissent, Chief Justice Burger adopted a strongly accommodationist position, contending that the Court's ruling was hostile to religious belief, and out of keeping with other governmental practices (e.g., the provision of taxpayer-funded legislative chaplains). Moreover, he contended that the Alabama law respected both the autonomy of the individual conscience and the privacy of religion:

> Without pressuring those who do not wish to pray, the statute simply creates an opportunity to think, to plan, or to pray if one wishes.... It accommodates the purely private, voluntary religious choices of the individual pupils who wish to pray while at the same time creating a time for nonreligious reflection for those who do not choose to pray.[76]

---

[73] See *Lynch* at 687-689 (O'Connor J., concurring).

[74] *Wallace* at 73 (O'Connor, J., concurring in the judgment): '[A] message of endorsement would seem inescapable if the teacher exhorts children to use the designated time to pray.'

[75] *Wallace* at 84 (O'Connor, J., concurring in the judgment).

[76] *Wallace* at 89 (Burger, CJ., dissenting).

From this perspective, it was almost 'ridiculous' to suggest that the law was 'a step toward creating an established church.'[77] Indeed, what the statute provided was an opportunity for school pupils to engage in the free exercise of religion. It also served the useful (and eminently constitutional) purpose of clearing up the widespread misunderstanding that pupils could not pray once they entered public school grounds.[78]

The opinion least concerned with relatively narrow, technical questions was Justice Rehnquist's dissent. His objections to the Court's ruling were founded on a particular reading of the original intent behind the Establishment Clause:

> It would come as much of a shock to those who drafted the Bill of Rights ... to learn that the Constitution, as construed by the majority, prohibits the Alabama Legislature from 'endorsing' prayer. George Washington himself, at the request of the very Congress which passed the Bill of Rights, proclaimed a day of 'public thanksgiving and prayer, to be observed by acknowledging with grateful hearts the many and signal favors of Almighty God.'[79]

Declaring that it was 'impossible to build sound constitutional doctrine upon a mistaken understanding of constitutional history,'[80] Rehnquist devoted 16 pages to providing historical support for the notion that the Framers did not intend to create a wall of separation between church and state. Indeed, the 'wall' metaphor was declared to be a 'mischievous diversion of judges from the actual intentions of the drafters of the Bill of Rights.'[81] These intentions were held to transcend the specifics of time and place, and to be forever binding on those who sought to interpret and apply the Constitution. Moreover,

---

[77] *Wallace* at 89 (Burger, CJ., dissenting).

[78] *Wallace* at 87 (Burger, CJ., dissenting).

[79] *Wallace* at 113 (Rehnquist, J., dissenting). The notion that the First Amendment should be interpreted in light of late eighteenth century practices rests on the (generally unspoken) assumption that the Founders could not have acted in a manner inconsistent with their own principles. As one commentator has noted, those who advance this view 'are seeking to resuscitate the same method of constitutional interpretation that was employed in the *Dred Scott* decision to legitimize human slavery' (Gunn, 1992: 78; see *Scott v. Sanford*, 60 U.S. 393 (1857)).

[80] *Wallace* at 91 (Rehnquist, J., dissenting).

[81] *Wallace* at 107 (Rehnquist, J., dissenting).

the historical accounts from which they were derived were portrayed as complete, unitary and utterly determinative of the issue at hand.

In Justice Rehnquist's view, the sole purpose of the Establishment Clause was to 'prevent the establishment of a national religion or the governmental preference of one religious sect over another.'[82] In no way was it intended to require 'neutrality on the part of government between religion and irreligion.'[83] The latter interpretation was said to be inconsistent with both the Founders' opinions and their actions.

This approach portrayed the Founding era as a privileged, even exclusive, source of normative values – something that effectively erased two centuries of intervening history. Such thinking was not without its difficulties. As O'Connor, J. noted, public education was essentially non-existent at the time the First Amendment was adopted, and for this reason it was extremely unlikely that its drafters had 'anticipated the problems of interaction of church and state in the public schools.'[84] Nevertheless, anchoring legal interpretation in the supposedly determinative values of 'our forefathers' remained a useful rhetorical device for bestowing authority and immutability on particular rules and norms (see Blomley, 1994: 17). While the majority in *Wallace* accepted that constitutional interpretation should evolve in light of changing social circumstances,[85] Justice Rehnquist contended that constitutional principles (or, at least, those he had identified) were properly beyond the influences of time, place and ideology.[86]

Legislation providing for moments of silence was but one reaction to *Engel* and *Schempp*, and the failure of the school prayer amendment campaign to reverse those decisions.

---

[82] *Wallace* at 100 (Rehnquist, J., dissenting). Both Laycock (1986) and Drakeman (1991) cast doubt on this interpretation. First, while the first draft of the Establishment Clause forbade only the establishment of a 'national religion', the word 'national' was omitted from the final version. Secondly, Congress rejected no fewer than three proposed amendments that would have permitted non-preferential aid to religion.

[83] *Wallace* at 98 (Rehnquist, J., dissenting).

[84] *Wallace* at 80 (O'Connor, J., concurring in the judgement). These problems were held to include the coercive context of the classroom, and children's unique susceptibility to religious indoctrination.

[85] *Wallace* at 52-55.

[86] *Wallace* at 113 (Rehnquist, J., dissenting): 'The true meaning of the Establishment Clause can only be seen in its history. As drafters of our Bill of Rights, the Framers inscribed the principles that control today. Any deviation from their intentions frustrates the permanence of that Charter....' (citations omitted).

Another response focussed on ensuring that student religious groups were permitted to meet and organize on public school property. In 1984, the year the Reagan school prayer amendment was defeated, Congress passed the *Equal Access Act* (*EAA*).[87] It stipulated that if a federally-assisted public high school allowed any noncurricular student group to make use of its facilities, it could not deny access to another group on the basis of the religious, political, or philosophical content of speech at its meetings. The Act reinforced the point, made earlier in *Tinker v. Des Moines Independent School District*,[88] that young people's constitutional rights were not suspended when they stepped foot on school grounds. More specifically, it extended to high schools the logic of another Supreme Court case, *Widmar v. Vincent*,[89] which upheld the right of student religious groups to make use of fora provided for student expression at public colleges and universities.

In 1990, the U.S. Supreme Court considered the *EAA* in *Westside Community Board of Education v. Mergens*.[90] First, a six-justice majority determined that a number of the student groups which had been permitted to meet at Westside High School – a public school in Omaha, Nebraska – were noncurricular in character. It followed that the school was required under the *EAA* to grant 'equal access' to other student groups, including the Christian club proposed by the respondents. Secondly, a four-justice plurality held that the Act did not violate the Establishment Clause. In so doing, it affirmed that pupils have the right to express their religious views in limited open fora created on public school grounds: 'there is a crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect.'[91]

Much of the Court's decision was concerned with interpreting the provisions of the *EAA*, and determining whether or not 'noncurricular' student clubs were meeting regularly at

---

[87] *Equal Access Act*, 20 U.S.C 4071 (1984).

[88] *Tinker v. Des Moines Independent School District*, 393 U.S. 503 (1969) [hereinafter *Tinker*].

[89] *Widmar v. Vincent*, 454 U.S. 263 (1981).

[90] Data set case – see Table 1.

[91] *Westside* at 250.

Westside High School. The majority insisted on a broad interpretation of the term 'noncurriculum related student group,' so that schools could not describe all existing student clubs as 'curriculum related' – in the sense that they were 'remotely related to abstract educational goals'[92] – and thereby evade the provisions of the Act. In the course of its Establishment Clause analysis, the Court situated the meetings of these groups within a particular socio-spatial milieu.

The activities of student *religious* clubs were deemed to be located within statutorily-created enclaves of privacy. While the school environment was otherwise 'public', the *EAA* was held to have formed effective boundaries to state power. Under the Act, teachers, administrators and other school employees could attend the meetings of religious clubs only in a 'nonparticipatory capacity' (e.g., to maintain order and discipline), and could not promote or direct their activities.[93] The majority declared that '[a]lthough the possibility of student peer pressure remains, there is little if any risk of government endorsement or coercion where no formal classroom activities are involved and no school officials actively participate.'[94] In addition, the *EAA* provided club meetings would also be spaces of individual autonomy: schools were required to ensure that that both student and employee attendance at the meetings of religious clubs was voluntary. In combination, these provisions were held to minimize the potential for undue collective influence over the individual conscience.

This conclusion was reinforced by a third key consideration: high school students were considered sufficiently mature to appreciate that a school which allowed religious groups to meet was not necessarily sponsoring religion. Indeed, for a student to think otherwise was deemed unreasonable, as '[t]he proposition that schools do not endorse everything they fail to censor is not complicated,' and 'Congress [had] specifically rejected the argument that high school students are likely to confuse an equal access policy with state

---

[92] *Westside* at 243.

[93] *Westside* at 236.

[94] *Westside* at 228.

sponsorship of religion.'[95] However, students were represented differently by other Justices, who relied upon an alternative understanding of the public school as a social space.

Marshall, J. concurred on the grounds that the *EAA* codified a principle that was already constitutionally mandated: namely, nondiscriminatory access to open fora in public schools. However, he criticized the majority for downplaying peer pressure. In his view, it was more than a 'private' form of coercion occurring in the supposedly 'private' context of a student club meeting: peer pressure in schools was facilitated by the state, and for this reason it was properly subject to judicial scrutiny. Anticipating the Court's reasoning in *Lee*, he argued that the pervasive governmental presence in public schools complicated any attempt to draw a clear distinction between state action and private activities:

> When the government, through mandatory attendance laws, brings students together in a highly controlled environment every day for the better part of their waking hours and regulates virtually every aspect of their existence during that time, we should not be so quick to dismiss the problem of peer pressure as if the school environment had nothing to do with creating and fostering it. The State has structured an environment in which students holding mainstream views may be able to coerce adherents of minority religions to attend club meetings or adhere to club beliefs. Thus, the State cannot disclaim its responsibility for those resulting pressures.[96]

Such pressures were potentially acute in the context of Westside High School, as the school lacked a 'truly robust forum' of political, philosophical and religious debate.[97] Historically, Westside's student clubs were not 'advocacy-oriented', but pursued routine sporting, cultural, and academic interests. They were, as Justice Stevens put it, in a memorable turn of phrase, 'no more controversial than a grilled cheese sandwich.'[98] The

---

[95] *Westside* at 250.

[96] *Westside* at 269 (Marshall, J., joined by Brennan, J., concurring). Similar claims were advanced by Justice Stevens, in dissent, who claimed that 'student-initiated religious groups may exert a considerable degree of pressure even without official school sponsorship,' and that compulsory attendance laws were 'of special constitutional importance in this context' (at 287).

[97] *Westside* at 268 (Marshall, J., joined by Brennan, J., concurring).

[98] *Westside* at 276 (Stevens, J., dissenting).

proposed Christian club would be the first, and possibly only, student group to advance a sensitive or controversial perspective at the school. Such circumstances, Marshall, J. suggested, provided a potentially 'fertile ground for peer pressure, especially if the club commanded support from a substantial portion of the student body.'[99]

Justice Marshall also raised the point that Westside students might reasonably perceive that their school supported the Christian club's message. The school had not sought to dissociate itself from student groups in the past, but rather had endorsed their activities 'as a vital part of the total education program [and] as a means of developing citizenship.'[100] Accordingly, he emphasized the need for Westside to dissociate itself from the activities of student groups in order to avoid the appearance that it was sponsoring religious speech.

While Justice Marshall's concurrence raised a series of detailed, context-specific concerns about the operation of the *EAA* at Westside, he agreed that the law could withstand Establishment Clause scrutiny. The plurality had found that the *EAA* would pass the *Lemon* test, as it had a secular purpose ('to prevent discrimination against religious and other types of speech'),[101] a secular effect (a 'broad spectrum' of student groups could be initiated and organized),[102] and did not result in excessive government entanglement with religion (teachers and other school officials could not be involved 'in the day-to-day surveillance or administration of religious activities').[103] In addition, it had determined that the Act passed the endorsement test, reasoning that 'a school does not endorse or support student speech that it merely permits on a nondiscriminatory basis.'[104]

---

[99] *Westside* at 268 (Marshall, J., joined by Brennan, J., concurring).

[100] *Westside* at 267 (Marshall, J., joined by Brennan, J., concurring).

[101] *Westside* at 249.

[102] *Westside* at 252.

[103] *Westside* at 253.

[104] *Westside* at 251.

While the plurality declined to rule on whether or not 'equal access' was required by the Free Exercise or Free Speech Clauses,[105] it declared that the *EAA* withstood Establishment Clause scrutiny because its message was 'one of neutrality rather than endorsement: if a State refused to let religious groups use facilities open to others, then it would demonstrate not neutrality but hostility toward religion.'[106] The Act was interpreted as an entirely appropriate measure for ensuring that religious speech had a place within public fora open to the discussion of noncurricular issues more generally. Taken to its logical extent, the 'formal neutrality' mandated by this reasoning requires the state to treat religion 'on a par with nonreligion in the provision of funding and other public benefits' (Conkle, 2000: 21). In the educational context, this could prevent the state from 'discriminating' against religion by excluding faith-based perspectives from the curriculum, or by preventing parochial schools from accessing public funds.

In a concurring opinion, Justice Kennedy rejected the endorsement test ('[t]he word endorsement has insufficient content to be dispositive'), and instead applied the two-part coercion test he had developed in *Allegheny*.[107] First, it was determined that any benefits that flowed to religion as a consequence of official recognition of a religious club were 'incidental' and insufficient to constitute a step towards establishment.[108] Secondly, it was argued that, even taking into account 'the special circumstances that exist in a secondary school where the line between voluntary and coerced participation may be difficult to draw,' there was no evidence to suggest that student involvement in any religious club recognized under the *EAA* would be coerced.[109] Thus both concurring opinions in *Westside* affirmed the majority's finding that student religious groups had a place in public schools alongside other noncurricular clubs.

---

[105] *Westside* at 253.

[106] *Westside* at 247.

[107] *Westside* at 261 (Kennedy, J., joined by Scalia, J., concurring in part and concurring in the judgment). No information was provided to explain how or why the word 'endorsement' had less content than the word 'coercion'.

[108] *Westside* at 260 (Kennedy, J., joined by Scalia, J., concurring in part and concurring in the judgment).

[109] *Westside* at 261-262 (Kennedy, J., joined by Scalia, J., concurring in part and concurring in the judgment).

As Justice Stevens noted in dissent, the Court defined the key statutory phrase 'noncurriculum related student group' very broadly, to encompass any group whose subject matter was not taught in a regularly offered course. As such, it potentially required *every* public high school with a chess club, football team, or cheer squad to 'open [its] doors to every religious, political, or social organization.'[110] Under this interpretation, he argued, the *EAA* came 'perilously close to an outright command to allow organized prayer, and perhaps ... religious ceremonies ... on school premises.'[111] To the extent that public schools provide funds or facilities to any student group whose activities are not directly related to the curriculum, they are required to provide them to religious clubs. Because speech in such fora is deemed private, Establishment Clause concerns are dismissed, and the state is said to have no legitimate interest in discriminating against religious perspectives, even those which are 'heavily proselytizing' (Schragger, 2004: 1884).

Two years later, and almost 30 years to the day since the *Engel* ruling, the Court addressed a policy that specifically mandated organized prayer at school events. *Lee v. Weisman* concerned the constitutionality of a policy under which public school principals in Providence, Rhode Island invited members of the clergy to give invocations and benedictions at graduation ceremonies.[112] The school board argued that such prayers were a reasonable accommodation of private belief, as many students and parents attending the ceremonies wished to respect and acknowledge divine guidance. In an opinion authored by Justice Kennedy, a five-justice majority struck down the policy, arguing that it coerced individuals to participate in a publicly-sponsored religious exercise.

As a first step, the majority determined that the policy entailed government involvement with religion that was 'pervasive, to the point of creating a state-sponsored and state-directed religious exercise in a public school.'[113] Specifically at issue in this case was the

---

[110] *Westside* at 271 (Stevens, J., dissenting).

[111] *Westside* at 287 (Stevens, J., dissenting).

[112] Data set case – see Table 1.

[113] *Lee* at 587.

decision of a middle school principal, Robert E. Lee, to invite a rabbi to give an invocation and benediction at graduation, and to issue him with advice on the preferred content of the prayers (they were to be 'nonsectarian'). These actions, the majority determined, were attributable to the state, and equivalent to a statutory declaration that prayer must occur. Thus they offended the 'cornerstone principle' of Establishment Clause jurisprudence articulated in *Engel*: government had no legitimate role composing official prayers for public recitation.[114]

The *Lee* Court's decision also rested on an understanding of prayer as something that was inherently private, and of the First Amendment as something that ensured privacy:

> The First Amendment's Religion Clauses mean that religious beliefs and religious expression are too precious to be either proscribed or prescribed by the State. The design of the Constitution is that preservation and transmission of religious beliefs and worship is a responsibility and a choice committed to the private sphere, which itself is promised freedom to pursue that mission.[115]

In light of this strict public/private distinction – simultaneously normative and spatial – it was clear that accommodations of religious belief in governmental contexts were deeply problematic. For all that some attendees might desire a graduation prayer, or view it as a spiritual imperative, it was unconstitutional for the state to direct and endorse such an activity. This prohibition was necessary, because 'in the hands of government, what might begin as a tolerant expression of religious views may end in a policy to indoctrinate and coerce.'[116] Such thinking was in keeping with the original theological (Protestant) purpose behind the constitutional guarantee of religious freedom – ensuring that individual faith was 'real' and 'not imposed' (see Chapter 3).[117]

For the majority in *Lee*, the distinction between the religious and the secular mapped on to a distinction between a private sphere of individual conscience and a public sphere of

---

[114] *Lee* at 588; citing *Engel* at 425.

[115] *Lee* at 589.

[116] *Lee* at 591, 592.

[117] *Lee* at 592.

governmental affairs. This was not only conceptual, but also material. As in *Westside*, the Court drew an 'on-the-ground' distinction between public spaces in which religious expression was subject to close scrutiny for evidence of coercion and state control, and private spaces in which religious expression was constitutionally protected and assumed to be voluntary. As Justice Souter noted in concurrence, students who desired prayers at graduation, or who wished to invest the ceremony with spiritual significance, could do so in private settings: for example, in 'a privately sponsored baccalaureate if they desire the company of like-minded students.'[118] It followed from this observation that students had 'no need for the machinery of the State to affirm their beliefs,' and accordingly the prayer policy was best understood not as a reasonable accommodation, but rather as 'an official endorsement of religion.'[119]

In examining the tension between the 'privateness' of religion, and the 'publicness' of school graduation ceremonies, the Court also observed that individual participation in invocations and benedictions could be coerced by both direct state action, and by collective or majoritarian pressures facilitated by the state. This was problematic because, in the Court's analysis, it was 'beyond dispute that, at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise....'[120] Three types of unconstitutional compulsion were identified in the case at hand.

First, attendance at the graduation ceremony was, for all practical purposes, mandatory. The Court specifically rejected the argument advanced by the school district and the U.S. government (as *amicus curiae*) that attendance at the graduation was optional, and that those who objected to the religious exercises could simply excuse themselves. Declaring '[l]aw reaches past formalism,'[121] it argued that students had no real choice but to attend their graduation – an event invested with great personal and social significance. While

---

[118] *Lee* at 629 (Souter, J., joined by Stevens and O'Connor, JJ., concurring).

[119] *Lee* at 629-630 (Souter, J., joined by Stevens and O'Connor, JJ., concurring).

[120] *Lee* at 587.

[121] *Lee* at 595.

attendance was not formally required for receipt of a diploma, nor was it 'in any real sense of the term "voluntary," for absence would require forfeiture of those intangible benefits which have motivated the student through youth and all her high school years.'[122] The Court emphasized that this was not merely a pragmatic issue, but also one of principle: '[t]he Constitution forbids the State to exact religious conformity from a student as the price of attending her own high school graduation.'[123]

The notion that objecting students could not be forced to choose between compliance with a state-sponsored religious exercise, and forfeiture of a state-provided benefit, related to a second concern. The Court contended that students attending the ceremony 'had no real alternative which would have allowed [them] to avoid the fact or appearance of participation' in the prayers.[124] In the presence of their peers and school authorities, students had little choice but to stand, or at least maintain a respectful silence, during the invocation and benediction. These acts could be deemed to signify participation or approval, and as such the objector could reasonable perceive 'that she is being forced by the State to pray in a manner her conscience will not allow.'[125]

The Court's attentiveness to the coercive milieu in which graduation prayer occurred extended to a third key issue: peer pressure. Elaborating on the notion that religious exercises in public schools carried a particular risk of indirect coercion – something that had been alluded to in *Engel*, *Schempp*, and *Westside* – the majority found that peer pressure could compel students to participate in prayer. In the school context, this subtle yet effective form of compulsion was enabled by state actors. This contributed to the finding of unconstitutionality, as the Court declared that 'government may no more use social pressure to enforce orthodoxy than it may use more direct means.'[126] This

---

[122] *Lee* at 595.

[123] *Lee* at 596.

[124] *Lee* at 588.

[125] *Lee* at 593.

[126] *Lee* at 594.

argument relied upon, and reinforced, understandings of public schools as pervasively coercive environments, and of young people as especially susceptible to coercion.

A very different vision was articulated in a vitriolic four-justice dissenting opinion authored by Justice Scalia. What was determinative of this case, in the minority's view, was the 'general tradition of prayer at public ceremonies' in the United States, together with the 'more specific tradition of invocations and benedictions at public school graduation exercises.'[127] This criticism was accompanied by an attempt to refute each step of the Court's analysis. First, the minority stated – without comment – that attendance at graduation was voluntary.[128] Secondly, it rejected the finding that students were effectively compelled to participate in the invocation and benediction. It noted that the majority had not claimed that students might be psychologically coerced to bow their heads, clasp their hands together, pay attention, *or in fact pray* – all that had been found was that they might feel obliged to stand and remain a respectful silence. In the dissenters' view, such acts symbolized neither involvement nor approval, but rather respect for the religious beliefs of others – 'a fundamental civic virtue that government (including the public schools) can and should cultivate.'[129]

Thirdly, the minority denied that the graduation ceremony was an inherently coercive setting. Many high school seniors, for example, were old enough to vote – and did not need to be insulated from informal pressures 'as though they were first-graders.'[130] The dissenters likened the Court's consideration of peer pressure to 'psychology practiced by amateurs,' and accused it of going 'beyond the realm where judges know what they are doing.'[131] In addition, there was 'nothing in the record to indicate that failure of attending students to take part in the invocation or benediction was subject to any penalty or discipline.'[132] The invocation and benediction were deemed to take place in 'an

---

[127] *Lee* at 635 (Scalia, J., joined by Rehnquist, CJ., and White and Thomas, JJ., dissenting).

[128] *Lee* at 642 (Scalia, J., joined by Rehnquist, CJ., and White and Thomas, JJ., dissenting).

[129] *Lee* at 638 (Scalia, J., joined by Rehnquist, CJ., and White and Thomas, JJ., dissenting).

[130] *Lee* at 639 (Scalia, J., joined by Rehnquist, CJ., and White and Thomas, JJ., dissenting).

[131] *Lee* at 636 (Scalia, J., joined by Rehnquist, CJ., and White and Thomas, JJ., dissenting).

[132] *Lee* at 642 (Scalia, J., joined by Rehnquist, CJ., and White and Thomas, JJ., dissenting).

environment utterly devoid of legal compulsion,'[133] unlike the prayers struck down in *Engel* and *Schempp*, which occurred in an instructional context and against 'the ultimate backdrop' of compulsory attendance laws.[134]

The essence of the minority opinion was not that 'coercion' was an inappropriate standard of analysis,[135] but rather that the Establishment Clause was intended to prohibit only that kind of coercion known to the Founders: namely, 'coercion of religious orthodoxy and of financial support by force of law and threat of penalty.'[136] The dissenters applauded the Court for 'demonstrat[ing] the irrelevance of *Lemon* by essentially ignoring it,' at the same time as they critiqued the development of a 'psycho-coercion test, which suffers the double disability of having no roots whatever in our people's historic practice and being as infinitely expandable as the reasons for psychotherapy itself.'[137] In their view, the bar for an Establishment Clause violation needed to be set high, so as to protect a national tradition of public ceremonies replete with prayers of thanksgiving and petition. Moreover, the spatial privatization of religion in the majority's decision was strongly criticized: 'religion [is not], as the Court apparently thinks it to be, some purely personal avocation that can be indulged entirely in secret, like pornography, in the privacy of one's room.'[138] At various points in the dissent, concern for individual rights was lost amid glowing accounts of collective religiosity and majoritarian prayer:

> The narrow context of the present case involves *a community's celebration* of one of the milestones in *its* young citizens' lives, and it is a bold step for this Court to seek to banish from that occasion, and from thousands of

---

[133] *Lee* at 643 (Scalia, J., joined by Rehnquist, CJ., and White and Thomas, JJ., dissenting).

[134] *Lee* at 643 (Scalia, J., joined by Rehnquist, CJ., and White and Thomas, JJ., dissenting).

[135] Indeed, three of the dissenting justices in *Lee* – Rehnquist, CJ., Scalia, J., and White, J., – had earlier argued for the adoption of a 'coercion test' in *Allegheny*. By contrast, the concurring opinions in *Lee* emphasized that the Establishment Clause ensured more than freedom from coercion. They contended that religious liberty could be threatened even when no one was forced to participate, such as when the government endorsed religion, thereby conveying 'a message of exclusion to all those who do not adhere to the favored beliefs' (*Lee* at 606 (Blackmun, J., joined by Stevens and O'Connor, JJ., dissenting)).

[136] *Lee* at 640 (Scalia, J., joined by Rehnquist, CJ., and White and Thomas, JJ., dissenting).

[137] *Lee* at 644 (Scalia, J., joined by Rehnquist, CJ., and White and Thomas, JJ., dissenting).

[138] *Lee* at 645 (Scalia, J., joined by Rehnquist, CJ., and White and Thomas, JJ., dissenting).

> similar celebrations throughout this land, *the expression of gratitude to God that a majority of the community wishes to make. ...*
>
> [T]he Founders of our Republic ... knew that nothing, absolutely nothing, is so inclined to foster among religious believers of various faiths a toleration – no, an affection – for one another than voluntarily joining in prayer together, to the God whom they all worship and seek. ... To deprive our society of that *important unifying mechanism* in order to spare the nonbeliever what seems to me the minimal inconvenience of standing, or even sitting in respectful nonparticipation, is as senseless in policy as it is unsupported in law.[139]

The minority's stance, then, was underpinned by an appeal to original intent, and in particular to the accommodationist practices of the Founders. Contending that the Court's opinion was 'conspicuously bereft of any reference to history,'[140] it proceeded to list a series of occasions on which the Founders had tolerated, supported, or indeed *led* prayer in a governmental context, beginning with the inaugural address of President Washington, which included 'fervent supplications to that Almighty Being who rules over the universe.'[141] This history – represented as singularly authoritative, and closed to alternative interpretations – was said to establish beyond doubt the constitutionality of the challenged practice.

The concurring opinion authored by Justice Souter illustrated that 'history' could just as readily be used to attribute separationist intent to the Establishment Clause. This account emphasized the First Congress' repeated rejection of draft constitutional amendments that would have permitted 'non-preferential' state promotion of religion, President Jefferson's refusal to issue Thanksgiving Proclamations, and the strongly separationist written statements of both Jefferson and Madison. No particular significance was attached to the fact that 'the leaders of the young Republic engaged in some of the practices that separationists like Jefferson and Madison criticized' – all this proved was 'at best, that the Framers simply did not share a common understanding of the Establishment Clause, and,

---

[139] *Lee* at 645-646 (Scalia, J., joined by Rehnquist, CJ., and White and Thomas, JJ., dissenting); emphasis added.

[140] *Lee* at 631 (Scalia, J., joined by Rehnquist, CJ., and White and Thomas, JJ., dissenting).

[141] *Lee* at 633 (Scalia, J., joined by Rehnquist, CJ., and White and Thomas, JJ., dissenting).

at worst, that they, like other politicians, could raise constitutional ideals one day and turn their backs of them the next.'[142]

While the disjuncture between Justice Souter's concurrence and Justice Scalia's dissent would appear to point to the fundamental indeterminacy of Establishment Clause history, appeals to the words and deeds of the Founders clearly tap into the notion that legal principles are – at least properly – *timeless*. Indeed, this notion was specifically invoked in the introduction to the dissent, in which it was proclaimed that 'our Nation's protection, that fortress which is our Constitution, cannot possibly rest upon the changeable philosophical predilections of the Justices of this Court, but must have deep foundations in the historic practices of our people.'[143] What such reasoning failed to acknowledge was that the late twentieth century United States was a very different *place* from the late eighteenth century United States, in part because of the development of public education – the very context in which *Lee* had arisen. As Justice Brennan had noted in his concurring opinion in *Schempp*, '[a] too literal quest for the advice of the Founding Fathers' on school prayer was futile, not only because 'the historical record is at best ambiguous, and statements can readily be found to support either side,' but also because the Founders never explicitly considered the issue.[144]

The *Lee* decision affirmed that official prayer had no place in the public schools of the late twentieth century, which were subject to pervasive government control. Such reasoning reinforced the privacy of prayer, and the need to safeguard the individual conscience against collective pressures. The involvement of the U.S. government in this case was also significant. In argument before the Court, then Solicitor General Kenneth Starr conceded that the United States did not seek to overturn *Engel*, 'because the government opposed coercion.' When asked to distinguish prayer in the classroom from that at a graduation ceremony, Starr argued that a 'powerful, subtle, indirect' pressure

---

[142] *Lee* at 626 (Souter, J., joined by Stevens and O'Connor, JJ., concurring).

[143] *Lee* at 632 (Scalia, J., joined by Rehnquist, CJ., and White and Thomas, JJ., dissenting).

[144] *Schempp* at 237 (Brennan, J., concurring).

inhered in the classroom as a consequence of mandatory attendance and teacher oversight (cited in Alley, 1994: 212). As Alley notes, this was a remarkable concession:

> After all the bitter denunciations of *Engel*, the comparison of the justices to communists, the claim that deity had been kicked out of public schools, after all that and much more, the nation's highest-ranking attorney, speaking for the Reagan/Bush agenda, which included a school prayer amendment to correct *Engel* as a top priority, set it all aside by agreeing fully with the decision in *Engel*.

Lee, then, appeared to mark the closure of one chapter in the controversy over school prayer: it was widely accepted that formal classroom prayer was unconstitutional. However, this did not spell an end to debate. The attention of prayer advocates became keenly focussed on school events, and on the notion that at least partial responsibility for invocations and benedictions could be devolved to students. The prayers could then be represented as 'private student speech' – something that had been distinguished from government speech in *Westside*, and was potentially entitled to protection under the Free Exercise Clause.

School Prayer 2.0: Student-Initiated, Student-Led

In response to the Supreme Court's ruling in *Lee*, many school boards turned *prima facie* responsibility for the issue of prayer over to the student body. While observances could no longer be led by ministers or rabbis, they could perhaps be recited by students, including students elected to the task by their peers. In this way, public prayer would continue to have a place at events such as graduation. Anticipating likely constitutional challenges to such approaches, schools sought to distance themselves from student devotionals by characterizing them as private speech, the content of which school officials neither controlled nor endorsed. In addition, they advanced secular explanations for the inclusion of student prayers in school life: they were said to solemnize graduation ceremonies, to encourage fair play and team unity at sporting fixtures, and to offer a valuable opportunity for the exercise of free speech. This section considers two prominent cases addressing the constitutionality of such prayers.

In 1991, the Fifth Circuit decided *Jones v. Clear Creek Independent School District.*[145] It sustained a Texas school district's policy allowing public high school seniors to vote on whether or not student volunteers would deliver 'nonsectarian' and 'nonproselytizing' invocations at graduation ceremonies. One year later, the Supreme Court granted certiorari in this case, vacated the judgement, and remanded it back to the Fifth Circuit for additional consideration in light of *Lee.*[146] In *Jones II,*[147] the Appeals Court again ruled in Clear Creek's favour, reiterating that the invocation policy did not violate the *Lemon* test, and that it also withstood scrutiny under the endorsement test, and the coercion-centred standard articulated in *Lee.*

The Court's ruling in *Jones II* began with the assertion that nothing in *Lee* called into question its earlier finding that the resolution had a secular purpose – namely, the 'solemnization' of graduation ceremonies. It did not explain why a religious observance (or, at least, the option of one) was necessary to solemnize graduation, or consider whether the ceremony would be less solemn in years when students voted not to have a prayer.[148] The Court also determined that the primary effect of the policy was 'to impress upon graduation attendees the profound social significance of the occasion rather than endorse or advance religion.'[149] Endorsement and advancement, it claimed, depended on the prayer 'increasing religious conviction among graduation attendees' – something that was precluded by the 'requirement that any invocation be nonsectarian and nonproselytizing.'[150] In making this claim, it clearly departed from the ruling in *Lee* that efforts to reduce the sectarian content of prayer, including good faith attempts to make

---

[145] *Jones v. Clear Creek Independent School Dist.*, 930 F.2d 416 (5th Cir. 1991) [hereinafter *Jones I*].

[146] *Jones v. Clear Creek Independent School Dist.*, 505 U.S. 1215 (1992).

[147] Data set case – see Table 1.

[148] In his concurrence in *Schempp*, Justice Brennan suggested that the Establishment Clause was breached when, *inter alia*, public institutions 'use essentially religious means to serve governmental ends where secular means would suffice' (at 231). As one commentator has noted, it is readily apparent that graduation ceremonies can be solemnized through secular means: 'the school band may play "Pomp and Circumstance," the faculty may march in wearing academic robes, the mayor may read a proclamation honouring graduating seniors, or the school song may be sung' (Tanford, 1995: 443).

[149] *Jones II* at 965.

[150] *Jones II* at 967.

observances acceptable to a wide range of listeners, had no bearing on the constitutional question of whether or not a public school could sponsor a formal religious exercise.[151] Moreover, it did not address the school district's apparent preference for religion in general over nonreligion (the policy allowed for student-led prayer, but no other form of student expression, at graduation).

With respect to the third prong of the *Lemon* test, the Court ruled that the school district '[did] not excessively entangle itself with religion by proscribing sectarianism and proselytization without prescribing any form of invocation.'[152] Indeed, it suggested that an entanglement analysis was essentially irrelevant to this case, because – unlike the policy at issue in *Lee* – the resolution did not lead public schools to interact with religious institutions. The Court summarily dismissed the Establishment Clause problems inherent in a public school official reviewing a prayer for 'sectarian' and 'proselytizing' content,[153] and the potential for entanglement in school control over both the student voting procedure, and the graduation ceremony.

In its endorsement analysis, Fifth Circuit distinguished the Clear Creek resolution from the policy struck down in *Lee* on the basis that the former did not require a prayer, but merely allowed the senior students to determine if they wanted one. In so doing, it likened the case at hand to *Westside*, in which the Supreme Court had recognized a distinction between government and student expression, and held that secondary school students were sufficiently mature to appreciate that schools might tolerate speech they did not support or endorse. As several critics have noted, this was a disingenuous line of argument: *Lee* actually involved prayer at a school-controlled graduation ceremony, while *Westside* was concerned with voluntary, extracurricular clubs in which school officials could not participate (Ravitch, 1999: 54-55; Tanford, 1995: 449). Moreover, the *Lee*

---

[151] *Lee* at 588-589.

[152] *Jones II* at 965; citing *Jones I* at 419-23.

[153] Justice Souter had argued in *Lee* that making a 'distinction between "sectarian" religious practices and those that would be, by some measure, ecumenical enough to pass Establishment Clause muster' was an act of 'comparative theology' beyond the competence of the judiciary (*Lee* at 616 (Souter, J., joined by Stevens and O'Connor, JJ., concurring).

Court had specifically distinguished the issue of graduation prayer from the question addressed in *Westside*, and stated that its sole concern was 'whether a religious exercise may be conducted at a graduation ceremony in circumstances where ... young graduates who object are induced to conform.'[154]

Such pressure to conform was the central issue the *Jones II* court was required to address. Reviewing *Lee*, it determined that unconstitutional coercion consisted of three necessary elements: (1) the government must direct; (2) a formal religious exercise; (3) in a way that obliges the participation of objectors.[155] The court proceeded to hold that, under the Clear Creek resolution, no school official could 'direct' a prayer. The graduating students alone determined whether or not a prayer would occur, and if so which volunteer from their class would conduct it. It was said to follow from this that any prayer recited at a graduation ceremony was the result of private initiative on the part of students, and not state action.[156] In addition, the court found that the policy did not mandate a formal religious exercise, but simply tolerated student-led prayer without requiring or favouring it (although, as noted above, no other form of student expression was provided for). Finally, it ruled that the policy did not coerce objectors to participate, because 'students, after having participated in the decision of whether prayers will be given, will be aware that any prayers represent the will of their peers, who are less able to coerce participation than an authority figure from the state or clergy.'[157] At no point in this analysis did the Fifth Circuit give serious consideration to the coercive potential of peer pressure: instead, it emphasized the relative maturity of high school students, and declared that *Lee* was relevant only to 'state initiated clergy prayers.'[158]

The *Jones II* decision lent considerable encouragement to advocates of student-led prayer. Indeed, the Court openly acknowledged that '[t]he practical result of our decision, viewed

---

[154] *Lee* at 599.

[155] *Jones II* at 970.

[156] *Jones II* at 971.

[157] *Jones II* at 971.

[158] *Jones II* at 971.

in light of *Lee*, is that a majority of students can do what the State acting on its own cannot do to incorporate prayer in public high school graduation ceremonies.'[159] Elsewhere, it implied that devotionals were legitimate if a majority within a given *community* desired them: '[b]y attending graduation to experience and participate in the community's display of support for the graduates, people should not be surprised to find the event affected by community standards.'[160]

This reasoning was out of keeping with Supreme Court jurisprudence, which was distinctly hostile to the notion that collective desires for prayer could take precedence over the principle of church/state separation. In *Lee*, it had declared that '[w]hile in some societies the wishes of the majority might prevail, the Establishment Clause ... [prohibits] this contingency.'[161] In *Schempp*, it had found that a State may not 'require a religious exercise even with the consent of the majority.'[162] In *West Virginia State Board of Education v. Barnette* – a case concerning mandatory student recitation of the Pledge of Allegiance – it had proclaimed that individual rights to religious freedom 'may not be submitted to vote; they depend on the outcome of no election.'[163] Such statements appeared to foreclose the option of deferring decisions on school prayer to any subset of the body politic, including senior students, but were not countenanced by the Fifth Circuit.

The *Jones II* decision has also been criticized for representing student-led graduation prayer as private expression. The challenged policy clearly subjected the speech of participants to ongoing school (and thus state) oversight: all prayers were to be reviewed for sectarian and proselytizing content. More generally, the speech of pupils, employees and guests alike is subject to limitation within the hierarchical space of the public school. At one level such regulation is self-evident: '[s]chools do not permit anyone to wander in

---

[159] *Jones II* at 972.

[160] *Jones II* at 972.

[161] *Lee* at 596.

[162] *Schempp* at 225.

[163] *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943) at 628 [hereinafter *Barnette*].

at any time and start addressing students on any topic' (Tanford, 1995: 444). At another, delimiting the free speech rights of students in school has been an ongoing jurisprudential project.[164]

In an article questioning the constitutionality of student-initiated prayer, Tanford (1995: 430) identified *Jones II* as an aberration: 'among all the more than 100 federal appellate cases on the application of the Establishment Clause to public schools decided in the last 50 years, only [this] one permitted a religious exercise in connection with an official school activity.' Since *Engel*, federal courts have consistently struck down policies that implicated the state in the advancement of religion within public school bounds. Clear Creek's graduation prayer was conducted on school property, with school officials present, and pursuant to a school policy. The hand of the state was inescapably present when the school board passed its resolution, empowered students to vote, and agreed to uphold their decision.

The *Jones II* decision rejected such thinking at the same time as it significant ways from Supreme Court jurisprudence (although not from strongly accommodationist dissents, such as that of Justice Scalia in *Lee*). It has not been followed outside of the Fifth Circuit,[165] but meshed closely with ongoing campaigns for a school prayer amendment. In 1997-98, Congress debated the so-called 'Religious Freedom Amendment,' which would have granted constitutional protection to student-initiated prayer, and other school-based observances in which participation was formally voluntary:

---

[164] In *Tinker*, the Supreme Court identified a free speech right to wear armbands in school in protest at the Vietnam War, but articulated it as a narrow exception to the authority of school officials. Clothing and hair-length were specifically exempted from the scope of the recognized right (*Tinker* at 507-508), and even expression protected by the decision was subject to suppression should it constitute a 'material and substantial interference with school work or discipline' (*Tinker* at 511). For Gabel and Harris (1982/83: 387), '[t]he liberal message that a student may wear an armband [was] thus accompanied by a conservative meta-message that firmly reinstitute[d] the essential authoritarian structure of the high school.' Such an interpretation was supported by subsequent Supreme Court rulings in *Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986) (schools may censor student speech at assemblies) and *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988) (schools may censor articles in student publications).

[165] In *Doe v. Duncanville Independent School Dist.*, 70 F.3d 402 (5th Cir. 1995), the same court declared that the *Jones II* ruling applied only in the context of a high school graduation ('a significant, once-in-a-lifetime event'), and that school-facilitated, student-led prayer was impermissible on the sports field ('a setting that is far less solemn and extraordinary') (at 406-407).

> To secure the people's right to acknowledge God according to the dictates of conscience: Neither the United States nor any State shall establish any official religion, but the people's right to pray and recognize their religious beliefs, heritage, or traditions on public property, including schools, shall not be infringed. Neither the United States nor any State shall require any person to join in prayer or other religious activity, prescribe school prayers, discriminate against religion, or deny equal access to a benefit on account of religion.[166]

This proposal was supported by a majority in the House of Representatives, but failed to receive the two-thirds support required to proceed. Ravitch (1999: 70) suggests that even this level of support was noteworthy, given that the amendment sought to 'eviscerate the Establishment Clause' for the purpose of facilitating organized prayer in public schools and other government facilities. Moreover, it did not necessarily restrict such organized prayer to particular times and places: the amendment potentially empowered students to express their individual and collective beliefs in any school-controlled context, including classrooms and assemblies. Such an outcome was entirely consistent with the precedent of *Jones II*: 'if it is not state action to have graduation prayer delivered by a student pursuant to a majority vote..., what is to keep a majority of students from voting for prayer or other religious exercises at other school events?' (Ravitch, 1999: 67-68).

The Supreme Court addressed the issue of student-led prayer in *Santa Fe Independent School District v. Doe*,[167] in which it struck down a Texas school board's policy allowing student invocations prior to football games. In 1995, two students (one Catholic, the other Mormon) and their respective mothers had sought an injunction against the long-standing practice of student council chaplains delivering Christian prayers over the public address system before home games. The complainants were granted anonymity to protect them from possible harassment.[168] In response, the school board instituted a policy whereby the student council would conduct an election each spring to determine whether a statement or invocation would form part of pre-game ceremonies, and if so which student, from a list of volunteers, would deliver it. It also indicated that should this policy be 'enjoined by

---

[166] Cited in Ravitch, 1999: 69-70.

[167] Data set case – see Table 1.

[168] *Santa Fe* at 294.

a court order' an alternative version containing a non-sectarian, non-proselytizing content limitation would take effect immediately.[169] In short, the board provided a means whereby the student body could ensure the continuation of distinctly Christian prayers until such time as the judiciary intervened. In 2000, a six-justice majority of the Supreme Court found such arrangements to be in violation of the Establishment Clause, explicitly rejecting arguments that student-led prayer was private and non-coercive.

First, the Court found that a message delivered at a school event – 'over the school's public address system, by a speaker representing the student body, under the supervision of school faculty, and pursuant to a school policy that ... encourage[d] public prayer' – was not genuinely private speech.[170] In so doing, it dismissed the claim that the board had created an open forum in which individual speech could not reasonably be attributed to the state. The school district had not opened the pre-game ceremony to the discussion of a broad range of topics, but had enacted a policy that allowed *one* speaker to give an invocation, subject to official direction and oversight. Such selective access did not transform a public high school field into a limited public forum for student expression.

Moreover, the board had not distanced itself from pre-game prayer: its policy candidly declared that voting would take place only because the district had 'chosen to permit' a student-led 'invocation.'[171] This text, combined with the *context* in which invocations would be delivered ('a regularly scheduled school-sponsored function conducted on school property'),[172] constituted state endorsement of religious speech. Such endorsement was not abrogated by the dual-election mechanism, which had the potential to encourage 'divisiveness along religious lines in a public school setting.'[173] By undermining the privacy of religion in this way, the election procedure actually contributed to the

---

[169] *Santa Fe* at 297.

[170] *Santa Fe* at 310.

[171] *Santa Fe* at 306. The term 'invocation,' the Court explained, 'primarily describes an appeal for divine assistance and, as used in the past at Santa Fe High School, has always entailed a focused religious message' (at 306-307).

[172] *Santa Fe* at 307.

[173] *Santa Fe* at 311.

constitutional offence: '[o]ne of the purposes served by the Establishment Clause is to remove debate over this kind of issue from governmental supervision or control.'[174]

Secondly, the Court found clear evidence of governmental coercion. The district's contention that attendance at the football games was strictly voluntary was deemed extremely formalistic, as some students were effectively required to attend (e.g., players, cheerleaders, band members), while others felt 'immense social pressure' or 'a truly genuine desire' to be involved.[175] The Court also reiterated the point made in *Lee* that objecting students could not be compelled to choose between absenting themselves from a school event, or attending and being coerced to participate in 'a personally offensive religious ritual.'[176] This was the choice forced upon them by the student election process, which guaranteed 'that minority candidates will never prevail and that their views will be effectively silenced,'[177] and by the social pressures existing in the stands.

Three justices dissented from the Court's finding in *Santa Fe*. They argued that the majority's opinion 'bristle[d] with hostility to all things religious in public life,'[178] and declared that the school's policy was an entirely constitutional facilitation of private student expression.[179] While there was some jurisprudential support for the notion that it would be constitutional for a student to choose, on his or her own accord, to deliver a religious message at a public school event,[180] the minority failed to acknowledge that the Santa Fe policy specifically mandated prayer, and directed public officials to regulate its content. Moreover, even if the desire to 'solemnize' pre-game ceremonies was a genuine secular purpose for the policy – as the school contended, and the dissenters accepted – it

---

[174] *Santa Fe* at 310.

[175] *Santa Fe* at 311.

[176] *Santa Fe* at 312.

[177] *Santa Fe* at 304.

[178] *Santa Fe* at 318 (Rehnquist, CJ., joined by Scalia and Thomas, JJ., dissenting).

[179] *Santa Fe* at 321 (Rehnquist, CJ., joined by Scalia and Thomas, JJ., dissenting): '...any speech that may occur as the result of the election process here would be private, not government, speech. The elected student, not the government, would choose what to say.'

[180] *Lee* at 630 n. 8 (Souter, J., concurring): 'If the State had chosen its graduation day speakers according to wholly secular criteria, and if one of those speakers (not a state actor) had individually chosen to deliver a religious message, it would be harder to attribute an endorsement of religion to the State.'

was evident that the district would *only* accept a prayer prior to the games, and not solemn, non-religious messages.[181] In short, the dissenting Justices appeared to accept what the majority characterized as a request 'to pretend that we do not recognize what every Santa Fe High School student understands very clearly – that this policy is about prayer.'[182]

The constitutional line between church and state was held to require a distinction between school space – within which public prayer was prohibited, at least when subject to state sponsorship and oversight – and other contexts in which religious expression was legitimate. Unsurprisingly, conservative stakeholders characterized the decision as an unjustified federal intrusion into a long-standing local tradition, and as an affront to the 'rights' of those students who wished to pray. Equally predictably, liberal commentators lauded the ruling for upholding the privacy of prayer, protecting minorities from coercion, and respecting the difference between the sacred and profane.[183]

These well-rehearsed and seemingly implacable positions were underscored, at least in part, by the fact that the exclusion of public prayer from school events was at least as offensive to some (in this case, the majority), as its inclusion was to others (in this case, the minority). Such 'offence', stemming from religious and cultural values, may appear to be of dubious constitutional relevance in the first instance. As was noted in one recent case, the U.S. Constitution 'is not primarily a feel-good prescription.'[184] Yet offence can acquire considerable salience when translated into the language of rights, public/private, and autonomy/compulsion. Prayer advocates, for example, frequently give voice to their frustration by arguing that the rights of 'Christians' (a term that is often used to refer only to conservative, evangelical Christians) are being infringed when public prayer is prohibited in schools (Ravitch, 1999: 96). Such claims suggest a breach of constitutional provisions, and understandably attract judicial attention, even though they frequently refer

---

[181] *Santa Fe* at 306. The policy was originally entitled 'Prayer at Football Games' (*Santa Fe* at 297).

[182] *Santa Fe* at 315.

[183] One liberal religious commentator contended that '[p]rayer in the locker room is as ludicrous as aerobics in worship' (cited in Berry, 2000: 7).

[184] *Newdow* at 2816 (Fernandez, J., concurring and dissenting).

to 'incidents in which the First Amendment was appropriately applied given current constitutional norms' (Ravitch, 1999: 99).

These debates go to the wider issue of the place of religion in public life, and whether restrictions on expressions of religious belief in governmental contexts are 'neutral' (in the sense that they neither advance nor oppose religion) or 'hostile' (in the sense that the inhibit the free expression of religion, or constitute viewpoint discrimination). From a separationist perspective, prohibiting organized prayer in school (for example) does not send an anti-religious message, but simply affirms that the state cannot sponsor religion through its education system. Equally, citizens cannot employ an instrument of the state to advance their religious views. Religion is properly subject to unique restrictions in the public realm in order to ensure conscientious freedom and prevent establishment. From an accommodationist perspective, a rather different 'liberty' is at issue: the free exercise of religion in all aspects of human life and endeavour. The notion that religion does not have a full place in the public sphere is deemed discriminatory. In this view, belief is unjustly marginalized (culturally, but also spatially) when it is confined to a narrowly-defined private sphere.

Discussion

In determining the place of religion in public education, U.S. courts have come to rely upon a particular understanding of the public school as a socio-spatial environment – one in which peer pressure is writ large. In the judicial imagination, it is peer pressure, together with the disciplinary atmosphere of the school, and shared expectations regarding student compliance, that makes school-sponsored religious practices and instruction coercive, even when they are formally voluntary. In drawing extensively on lay and expert understandings of children's impressionability and susceptibility to peer pressure, courts have helped to reinforce understandings of young people as 'incomplete' individuals, whose competence and autonomy is deeply suspect.[185] This has enabled a distinction to be made between religious observances in public schools, and state-

[185] See, e.g., *Schempp* at 291-292: 'The law of imitation operates [within school boundaries], and non-conformity is not an outstanding characteristic of children'(Brennan, J., concurring).

sanctioned religion in adult public institutions (e.g., legislative chambers, prisons, military bases).[186]

It is evident that courts have an understanding of the social and geographic specificity of the school, and applied otherwise abstract constitutional principles (e.g., church/state separation, religious liberty) in light of it – potentially undermining the vision of law as 'one vast isotropic surface' (Pue, 1990: 567). In so doing, they have acknowledged the risk that pupils may be coerced into participation in, or at least passive acceptance of, school-sponsored religious activities by their peers, as well as by teachers and administrators. Thus, '[w]hat to most believers may seem nothing more than a reasonable request that the nonbeliever respect their religious practices, *in a school context* may appear to the nonbeliever or dissenter to be an attempt to employ the machinery of the State to enforce a religious orthodoxy.'[187]

In some instances, judicial concern for understanding this context has entailed nuanced considerations of place. In *Santa Fe*, for example, the majority declared that school support for student-led prayer was 'established by factors beyond just the text of the policy,' including use of the school's public address system, the presence of school officials, and the display of the school name and colours on the field and on the clothing of participants and fans.[188] 'In this context,' the Court declared, 'the members of the listening audience must perceive ... the approval of the school administration.'[189] It was therefore deemed appropriate, and indeed necessary, to distinguish the school sports field (like the classroom and graduation ceremony) not only from private spaces in which religious activity was protected, but from other public environments in which expressions

---

[186] Such activities have withstood Establishment Clause challenge, for the reason that adults are perceived to have a greater capacity to resist state-sponsored prayer than children. As Justice Brennan stated in his concurrence in *Schempp* (at 299-300): 'The saying of invocational prayers in legislative chambers, state or federal, and the appointment of legislative chaplains, might well represent no involvements of the kind prohibited by the Establishment Clause. Legislators, federal and state, are mature adults who may presumably absent themselves from such public and ceremonial exercises without incurring any penalty, direct or indirect.'

[187] *Lee* at 592; emphasis added.

[188] *Santa Fe* at 307.

[189] *Santa Fe* at 308.

of faith were at least sometimes legitimate, including legislatures, public parks, and municipal buildings. Through such decisions, the legal landscape of religious activity has become increasingly complex and variegated.

The judicial understanding of the school environment may also erase difference, in the sense that all public schools are treated as 'like places'. At least for a majority of the Supreme Court, the fact that schools may be situated differently by virtue of varying community norms and localized religiosity is deemed irrelevant. For constitutional purposes, a school in diverse, metropolitan New York is no different from one in a relatively homogeneous, small town Texas. Such 'equal treatment' is deemed necessary, as the Court is charged with upholding the rights and autonomy of *all* individuals, and with enforcing uniform constitutional rules (*no* public school may advance religion). Given these twin foci, it is unsurprising that rulings against school-sponsored religious practices have been met with protests alleging judicial disregard for community norms and local control over education.

Such objections echo a widespread belief that the community values, sense of place, and locally-produced social order may be undermined by appeals to constitutional law and the assertion of individual rights. As one study put it, '[a]lthough it is generally acknowledged that law is a vital part of culture and of the social order, there are times when the invocation of formal law is viewed as an *anti*social act and as a contravention of established cultural norms' (Greenhouse *et al.*, 1994: 27; original emphasis). This distinction tends to rest in part on *who* is perceived to be making appeals to the law: 'insiders' seeking to uphold community standards, or 'outsiders' appealing to extra-local sources of authority in order to advance their own interests and claims (Greenhouse *et al.*, 1994: 11-12). Conservative stakeholders have come to champion the rights of 'insiders' to control public schools – not out of any deep commitment to the principle of local democracy (e.g., if a school community 'chose' to promote a non-Christian religion, or to discourage private prayer by pupils, there is little doubt that conservative Christians would appeal to federal authority) – but because they believe that it will be an effective tactic in the culture war, and a way of reinstituting school prayer.

This said, it is important to appreciate that localized opposition to the secularization of public education has sometimes prevented the full (or even partial) implementation of court rulings. Notions of the unique authority of law would suggest that classrooms, assembly halls and sports fields have been transformed (perhaps after an initial period of resistance) into formally secular places, in keeping with jurisprudential developments. In reality, such changes have frequently been inhibited by vehement opposition, especially in Southern States. Thus, a full three decades after *Engel* and *Schempp*, federal courts were still being called upon to issue injunctions against school policies that required devotional Bible-reading and daily prayers conducted over public address systems (Ravitch, 2000: 300). Some school districts appear to operate almost completely outside Establishment Clause restrictions. In *Santa Fe*, for example, the original complaint alleged not only that prayers were delivered before football games, but that school authorities had sought to proselytize students by, *inter alia*, 'promoting attendance at a Baptist revival meeting, encouraging membership in religious clubs, chastising children who held minority religious beliefs, and distributing Gideon Bibles on school premises.'[190] As Ravitch (2000: 299) notes, in schools where Court rulings are disregarded or ignored in this way, there is considerable potential for harassment of those who object or dissent.

The debates prompted by the Court rulings on religious activities in public schools, and the variability of their practical effects, evoke Forest's (2000: 9) observation that '[w]hat courts command and what then results may not always be the same, but the decisions handed down by courts affect lives in a tangible and direct fashion.' However, it is possible to go further than this, and to suggest that, for all that law *can* be employed as an instrument of socio-spatial control, its ability to reshape social landscapes is partial and open to contestation. Its efficacy is ultimately contingent on human agency, and in some contexts there may be little desire to uphold or enforce unpopular rulings, or a tendency to interpret them narrowly so as to minimize their impact on local values and practices.

---

[190] *Santa Fe* at 295.

Opposition to the secularization of public education has also taken the form of efforts to *reverse* court rulings. Initially, the goal was to restore teacher-led, school-sponsored prayer to public schools through a constitutional amendment. This campaign was greatly inhibited by the difficulties inherent in devising a 'non-denominational' prayer that would avoid the impression of governmental preference for a particular faith. It was ultimately a futile task. First, as Laycock (1986: 920) notes, '[n]o prayer is neutral among all faiths, even if one makes the mistake of excluding atheists and agnostics from consideration.' Secondly, as Justice Brennan observed in *Schempp*, some groups object to public prayer on theological grounds: 'Many deeply devout persons have always regarded prayer as a necessarily private experience.'[191] Thirdly, the notion of state actors drafting and approving a 'composite' or 'compromise' prayer for recitation in schools was contrary to the Supreme Court's declaration in *Barnette* that '[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.'[192]

In response to such difficulties, the arguments of school prayer advocates evolved into support for 'voluntary' prayer, 'moment of silence' legislation, and (most recently) student-led and student-initiated prayer. Campaigners now proclaim that they do not wish schools to tell pupils how or what to pray, but merely to respect students' rights to free exercise and free expression. Given the long-standing hostility of many conservative religious groups to the notion of children's rights, and their emphasis on parental authority in child-raising, it seems reasonable to suggest that they are not genuine champions of student free speech, but simply advocates of school prayer. The fact that

---

[191] *Schempp* at 684 (Brennan, J., concurring). An example of this type of thinking is provided by Bergstrom (1992: 30):

> [Lutherans] believe that the purpose of prayer is to praise and petition God, not to serve the secular purpose of creating a moral or ethical atmosphere for public school children. We resist any attempt by legislators or by school authorities to inject religion into the public classroom in an effort to create a 'wholesome milieu' for public school learning or to overcome 'immorality'. Lutherans are offended by untheological calls to 'put God back in school', or claims that such efforts are 'evangelical'. They are political....

[192] *Barnette* at 642.

these groups campaigned for various forms of *state-mandated* prayer for three decades, before turning to support student-led prayer in the early 1990s, lends support to this interpretation. Moreover, it is clear that prayer is the only form of student expression they advocate: they desire 'benedictions' and 'invocations' at school events, not political pronouncements, social commentary, or even an open discussion of matters of religion and faith.

Conclusion

Over the last four decades, the U.S. Supreme Court has sought to secularize public schools in the United States by striking down several forms of school prayer, together with Bible-reading, and requirements that copies of the Ten Commandments be posted on classroom walls. It has also upheld legislation allowing high school students to attend voluntarily the meetings of religious clubs on school grounds. At the forefront of the Court's reasoning has been a desire to protect the privacy of religion from public (i.e., governmental) intrusion and, conversely, to protect the public (i.e., open) nature of state schooling from sectarian influence and theological strife. From a separationist perspective, *any* school-sponsored religious activity raises *fundamentally inter-related* concerns about privacy and coercion, for reasons that were outlined as early as Justice Douglas' concurring opinion in *Schempp*:

> [The Establishment Clause] forbids the State to employ its facilities or funds in a way that gives any church, or all churches, greater strength in our society than it would have by relying on its members alone. Thus, the present regimes must fall under that clause for the additional reason that public funds, though small in amount, are being used to promote a religious exercise. Through the mechanism of the State, all of the people are being required to finance a religious exercise that only some of the people want and that violates the sensibilities of others.[193]

Such thinking arguably made cases such as *Engel*, *Schempp* and *Stone* – in which state involvement was pervasive – relatively easy to decide. It was more difficult to apply in circumstances where non-state actors had at least a degree of influence over religious

---

[193] *Schempp* at 229 (Douglas, J., concurring).

activities in public schools, and the tension between the Establishment Clause and the right of Free Exercise was more acute. In *Westside*, the Court determined that student religious clubs could meet on campus, as they existed in zones of privacy and individual autonomy. However, as Justice Stevens noted in dissent this ruling came close to *commanding* schools to permit organized religious activities on their grounds.

Had the Court emphasized the element of *private* involvement in the religious activities reviewed in later cases – for example, by accepting that clergy are private individuals when functioning within public schools (in *Lee*), or by agreeing that student-led devotionals are simply expressions of students' private beliefs (in *Santa Fe*) – then a broad range of religious practices would have been permitted within school boundaries. While the 'private actor' rationale was accepted by the Fifth Circuit in *Jones II*, it has not been adopted by a majority of the Supreme Court in any case concerning religion in public schools.[194] The Court has recognized that speeches at graduation ceremonies and football games are not truly private, but subject to school oversight and control, and that such events are not open to a wide range of speech and speakers. As Ravitch (1999: 185) has noted, 'it is somewhat ridiculous to assume that the schools in these cases would really maintain these events as public forums, even if only for students, thus allowing a gay or lesbian student, a socialist, or a satanist to share equal time with students delivering a prayer....' Moreover, in instances where students are permitted to vote on whether or not a prayer will be delivered, such as *Jones II* and *Santa Fe*, it is clear that viewpoint neutrality is abandoned in favour of constitutionally problematic majoritarianism.

The rise of student-initiated, student-led prayer in the United States was actively supported by conservative religious groups. They advanced a narrow reading of *Lee*, contending that observances with a slightly different form – e.g., prayers recited by students, supported by a majority of the student body, declared to be 'voluntary', and/or accompanied by a formal disclaimer from 'neutral' school authorities – remained

[194] However, the Supreme Court has upheld a number of parochiaid schemes on the grounds that any governmental aid flowing to religious schools under them does so only because of the private decisions of parents to select parochial education, from a range of alternatives.

constitutional. Such claims highlighted, and arguably exacerbated, the difficulties inherent in maintaining a distinct line between private action subject to Free Exercise protection, and state action prohibited under the Establishment Clause. While *Jones II* provided solace for these arguments, they were ultimately dismissed in *Santa Fe*, which reiterated that school-endorsed religious activities were 'out of bounds'.

As noted in Chapter 2, the *boundaries* created and sustained by law play a vital role in structuring lived relations and the spatial organization of society. They are a powerful system of ordering that can reify existing patterns of social and political activity, or actively cut across them. With respect to the jurisprudence reviewed above, it is clear that the secularization of public education has entailed drawing boundaries around public schools so as to insulate them (at least in theory) from certain types of religious influence, including the desires of many parents for formal acknowledgement and reinforcement of Christian beliefs. At the same time, lines have been drawn that seek to protect the individual conscience from collective and governmental coercion. However, there has been considerable resistance to this judicial line-drawing, in part because it has been seen to create *artificial* distinctions between public schools and the religious homes and communities that surround them, as well as the often very public religiosity of the nation in which they are situated. This tension was captured in Justice Brennan's concurrence in *Schempp*:

> The fact is that the line which separates the secular from the sectarian in American life is elusive. The difficulty of defining the boundary with precision inheres in a paradox central to our scheme of liberty. While our institutions reflect a firm conviction that we are a religious people, those institutions by solemn constitutional injunction may not officially involve religion in such a way as to prefer, discriminate against, or oppress, a particular sect or religion.[195]

Judicial considerations of religious activities in public schools have often been overtly focussed on line-drawing, reinforcing the claim of the legal geography literature that this is, in large part, the work of law. Moreover, the courts have invoked spatial metaphors

---

[195] *Schempp* at 231 (Brennan, J., concurring).

when creating and reinforcing particular boundaries, referring frequently to the 'wall of separation', and to the need to construct 'just bounds' and 'sensible lines.' As the Court acknowledge in *Lee*, '[o]ur jurisprudence in this area is of necessity one of line-drawing.'[196]

[196] *Lee* at 598.

CHAPTER FIVE:
RELIGIOUS ACTIVITIES IN CANADIAN PUBLIC SCHOOLS

Since the adoption of the *Charter* in 1982, Canadian courts have consistently upheld constitutional challenges to Provincial statutes and regulations requiring organized prayer, Bible-reading and religious instruction in public schools. These decisions curtailed long traditions of state-mandated majoritarian religious activities which reflected and reinforced the notion that Canada was a Christian society. They applied to public schools the liberal-separationist principles that had been articulated by Prime Minister Pierre Trudeau some two decades earlier:

> We are now living in a social climate in which people are beginning to realize, perhaps for the first time in the history of this country, that we are not entitled to impose the concepts which belong to a sacred society upon a civil or profane society. The concepts of the civil society in which we live are pluralistic, and I think this parliament realizes that it would be a mistake for us to try to legislate into this society concepts which belong to a theological or sacred order (cited in Egerton, 2000: 95).

Trudeau's comments, made in the context of a debate over divorce law, followed the influential 1957 Wolfenden Report in the U.K. It had recommended that criminal law be disengaged from theological notions of sin, and prohibit only those activities manifestly harmful to society, thereby enlarging the sphere of personal choice. Such thinking helped to set the stage for the secularization of many aspects of Canadian society, including public education.

In 1969, the Mackey Committee criticized the Ontario system of religious education on the grounds that it had the purpose and effect of indoctrination: its content was exclusively Protestant, it promoted religious commitment rather than knowledge of religion, and it gave children the erroneous impression that 'all of the high principles of morals and ethics on which our society is founded are exclusive to Christianity' (Mackay Committee, 1969: 22). Such religious instruction was not saved by the existence of an exemption provision – this only discriminated against objectors, and undermined the ideal

of a public education in which instruction was 'acceptable to all reasonable persons' (Mackay Committee, 1969: 24). However, the report stopped short of recommending the removal of teacher-led prayer from opening exercises – something which, it feared, would 'suggest that religion is not an integral part of the life of the people of this province' (Mackay Committee, 1969: 35). Nevertheless, it met with considerable opposition from conservative Christians, and it was not until the mid-1970s that Ontario reformed its regulations in partial compliance with the Committee's recommendations.

Since the adoption of the *Charter*, the Mackey Committee report has frequently been cited in jurisprudence (e.g., in five of the seven cases considered below), although its distinction between opening prayers and other religious activities in public schools was arguably unconvincing. Indeed, in one leading case, the Ontario Court of Appeal declared that the Commission's objections to religious education programs (i.e., they were indoctrinating and discriminatory) applied equally to opening prayers and Bible-reading.[1] Accordingly, these practices were struck down under the *Charter*.

As noted in Chapter 3, the *Charter* does not expressly prohibit establishment, but rather defines 'freedom of conscience and religion' as a 'fundamental freedom.' In *Big M*, the Supreme Court of Canada declared that this provision served primarily to prohibit coercion in matters of faith, including both 'direct commands to act or refrain from acting on pain of sanction' and 'indirect forms of control which determine or limit alternative courses of conduct available to others.'[2] The Court was particularly wary of the potential for the state to impose prevailing views of what was good and right on dissenters – contrary to the notion that 'no one is to be forced to act in a way contrary to his beliefs or his conscience.'[3] Accordingly, it stated that '[t]he *Charter* safeguards religious minorities from the threat of "the tyranny of the majority".'[4]

---

[1] *Zylberberg II* at 656.

[2] *Big M* at 354.

[3] *Big M* at 354.

[4] *Big M* at 354.

Lower courts in Canada subsequently extended this thinking to religious practices in public education, when challenges were brought in Ontario, British Columbia, and Manitoba. This chapter examines a total of seven cases: all four cases to have addressed state-mandated prayer and Bible-reading, the sole case to have considered religious instruction in public schools, and two leading cases on the issue of whether a strictly secular system of public education breaches the rights of those parents who feel compelled to enrol their children in religious education. While this jurisprudence has much in common with separationist decisions from the United States, some 'school rules' are unique to Canada (and vary between Provinces). These rules stem in large part from s. 93 of the *Constitution Act*, which safeguarded denominational schools' rights to Provincial funding, where these existed prior to Confederation. This protection has been removed in Manitoba, Quebec, and Newfoundland & Labrador, but continues to apply in Alberta, Saskatchewan, and Ontario (see Chapter 3).

In *Reference Re Bill 30*,[5] the Supreme Court of Canada considered the relationship between s. 93 rights, and those set out in the *Charter*. It upheld Ontario legislation extending full funding to Catholic schools in the Province on the grounds that this recognized a right enjoyed at the time of Confederation (i.e., Bill 30 righted an historical wrong), and was a valid exercise of the plenary power granted to the Provinces by s. 93. Because this funding was not available to other religious schools, it arguably sat uncomfortably with the concept of equality embodied in the *Charter*. Nonetheless, it was immune from *Charter* review: 'It was never intended ... that the *Charter* could be used to invalidate other provisions of the Constitution, particularly a provision such as s. 93 which represented a fundamental part of the Confederation compromise.'[6] This compromise provides an important context for debates about the relationship between education and religion in Canada.

---

[5] *Reference Re Bill 30, An Act to amend the Education Act (Ont.)*, [1987] 1 S.C.R. 1148 [hereinafter *Reference Re Bill 30*].

[6] *Reference Re Bill 30* at para. 62.

Prayers, Bible-Reading & Religious Instruction in the *Charter* Era

The first significant *Charter* case addressing the place of religion in public schools concerned prayer and Bible-reading in Ontario. Since its inception, public education in Ontario had incorporated Christian practices and teachings. The Province's *Education Act 1980* allowed for the continuation of this tradition, by requiring schools to provide religious instruction in accordance with 'parental desires.'[7] A section of Regulation 262, issued under this statute, required daily religious exercises 'consisting of the reading of the Scriptures or other suitable readings and the repeating of the Lord's Prayer or other suitable prayers.' Exemptions were available to those pupils whose parents applied to the principal for their child to be excused from attendance or participation. In Sudbury, a group of parents sought a declaration that the regulation was of no force and effect, on the grounds that it violated ss. 2(a) and 15 of the *Charter*, which protect freedom of conscience and religion, and equality rights, respectively.[8] In 1986, the Ontario Divisional Court dismissed the petition ('*Zylberberg I*'),[9] but in 1988 the Court of Appeal allowed it ('*Zylberberg II*').[10]

The case turned primarily on the issue of whether participation in the mandated observances was truly 'voluntary' and – as a corollary – whether the necessity of requesting an exemption represented a form of coercion for objectors. A majority in the lower Court ruled that the regulation did not require participation in religious exercises. The notion that 'a right to refuse' somehow produced 'a compulsion to accept' was deemed contrary to 'logic and common sense.'[11] While two complainant parents had declined to seek an exemption because they did not want their children 'singled out from

---

[7] *Education Act*, R.S.O. 1980, c. 129, s. 50(1): 'Subject to the regulations, a pupil shall be allowed to receive such religious instruction as his parent or guardian desires or, where the pupil is an adult, as he desires.'

[8] Section 15(1) reads: 'Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.'

[9] Data set case – see Table 1.

[10] Data set case – see Table 1.

[11] *Zylberberg I* at 780 (Anderson, J., concurring).

their peers on the basis of their beliefs,'[12] this was said to point to the existence of social pressure to conform, not legal compulsion. Justice O'Leary, writing for the Court, acknowledged that the exemption provision required objectors to disclose that they held different views from those of the majority, but considered it a matter of little account. Specifically, he held that s. 2(a) of the *Charter* did not guarantee the privacy of religious views in Canada – a multicultural society where '[d]ifference is to be worn with pride not hidden.'[13] Moreover, religious exercises were determined to be 'the most effective and least offensive way' for schools to meet their obligation of inculcating morality in the young.[14]

The lower Court also ruled that the regulation was not unconstitutionally discriminatory: it did not exhibit a preference for Christianity over other religions, but allowed for readings of Scripture 'or other suitable readings', and recitation of the Lord's Prayer 'or other suitable prayers.'[15] This meant that the religious exercises actually undertaken could be adapted to suit the makeup of any classroom.[16] It was said to follow that there was no discrimination 'so far as believers are concerned.'[17] While non-believers were not given the same opportunity to have their views acknowledged or reinforced, this was deemed unproblematic:

> Where a country is founded on the principle of the supremacy of God there is no obligation on the schools to spend the same effort reinforcing the belief of non-believers that God does not exist as in teaching believers about the nature of God. Religious exercises for those who wish to take part, in the absence of any attempt to support the proposition God does not

---

[12] *Zylberberg I* at 754.

[13] *Zylberberg I* at 759. As noted in Chapter 3, Jewish opinion has historically been suspicious of public religiosity, and opposed to any requirement that pupils or parents in public schools make a religious statement. As an intervener in this case, the Canadian Jewish Congress opposed the regulation on the grounds that, *inter alia*, 'exempting oneself or one's child from participating in religious activities is itself an outward manifestation of one's religious conviction' (*Zylberberg II* at 679 (Lacourciere, J.A. dissenting)).

[14] *Zylberberg I* at 750.

[15] *Zylberberg I* at 761.

[16] In 1980, the Toronto Board of Education had adopted a book of readings and prayers that drew upon a broad spectrum of religious and conscientious traditions (*Zylberberg I* at 761).

[17] *Zylberberg I* at 763.

> exist is no more than a reasonable limit, prescribed by law, reasonably justified in a free and democratic society, on the right of a non-believer to equal educational benefits.[18]

Thus, through reference to the Preamble and s. 1 of the *Charter*,[19] Justice O'Leary dismissed the proposition that the requirement for religious exercises breached the rights of those without religious belief. Indeed, he argued that the exercises were socially desirable precisely because faith was under threat: although Canadian society was founded on the supremacy of God, regular church attendance was 'the exception rather than the rule.'[20] It was said to follow that 'care must be taken not to put unnecessary obstacles in the way of the schools bringing our children into touch with God by prayer, reflection and meditation as a means of instilling in them the morality required for social order and individual happiness.'[21] Thus, public and private benefits were said to flow from school prayer: in its absence, too many children would grow up in an amoral and godless atmosphere, to the detriment of both themselves and society.

Such thinking was questioned by Justice Reid, in dissent, who noted that even if one accepted the proposition that religious exercises were indispensable to the teaching of morality, it did not follow that public schools were the proper or necessary instrument: 'What about the church (or synagogue or mosque) and the home?'[22] However, the notion that these private institutions are failing children – and by extension society – has considerable currency among school prayer advocates in both Canada and the United States. Indeed, close connections may be drawn between the *Zylberberg I* ruling, and accommodationist opinions in U.S. cases (see Chapter 4). The *Jones II* court, for example, determined that prayer was appropriate in public schools because, *inter alia*, religion was 'widely believed' to be central to the development of 'character and

---

[18] *Zylberberg I* at 763.

[19] Section 1 reads: '*The Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.'

[20] *Zylberberg I* at 760-761.

[21] *Zylberberg I* at 761.

[22] *Zylberberg I* at 771 (Reid, J., dissenting).

decisionmaking skills' in children, and these qualities might not otherwise be instilled 'in a society suffering from parental failure.'[23]

Justice Reid's dissenting opinion in *Zylberberg I* emphasized the coercive qualities of government-mandated prayer in public schools. Citing *Big M*, he argued that indirect coercion operated in Ontario classrooms: some parents felt unable to request an exemption, not because of threatened penal sanctions, but because they wished to avoid embarrassment, and the risk that their children would be stigmatized by their peers. Reid, J. suggested that while the majority might find this form of limitation difficult to appreciate, it was very real for affected minorities:

> In the extreme case, if all of the pupils in the class but one are Christians and willing to conform with the rule, might not the sole Mohammedan, or Hebrew, or non-believing child feel uncomfortable about the isolation involved in opting out? Or, in a probably commoner case, if most of the pupils willingly conform, might not a few whose family faith is Moslem, or Hebraic or Buddhist, feel awkward about seeking exemption? Peer pressures, and the desire to conform, are notoriously effective with children.[24]

For these reasons, Reid, J. deemed the regulation both coercive – contrary to s. 2(a) – and discriminatory – contrary to s. 15(1). In making this case, he characterized religion as a private concern, and rejected the majority's finding that it was acceptable for the state to require minorities to state publicly their beliefs:

> It does not seem to be the majority's function, or the government of Ontario's function, to shake a finger at some parents and say, you are too sensitive, you and your children must pay a price for your beliefs; you should expose your children to the embarrassment you fear because it is good for them, and you and they must learn to wear your difference with pride.[25]

The Ontario Court of Appeal subsequently adopted much of this reasoning in *Zylberberg II*, including the notion that any assessment of whether or not compulsion existed needed

---

[23] *Jones II* at 965.

[24] *Zylberberg I* at 769 (Reid, J., dissenting).

[25] *Zylberberg I* at 770 (Reid, J., dissenting).

to be conducted from the standpoint of objecting minorities. It observed that a critical re-appraisal of religious exercises in Ontario's public schools – which had existed in some form since 1816 – was timely in light of increasing cultural diversity, and the Supreme Court's ruling in *Big M* that religious belief was a matter of individual, not collective, concern.[26] Again, the central issue was whether or not the exemption provision eliminated any pressure or compulsion to participate in the exercises. A four-justice majority determined that it did not. First, the exercises were coercive *in the school context*: 'the peer pressure and the class-room norms to which children are acutely sensitive ... are real and pervasive and operate to compel members of religious minorities to conform with majority religious practices.'[27] This finding – seemingly based on the claims of the appellants, and on 'common knowledge' about children – predated the U.S. Supreme Court's ruling in *Lee* (see Chapter 4). Secondly, the exemption provision infringed on religious freedom by requiring objecting parents, and by extension their children, to make a public religious statement. This imposed a penalty upon religious minorities (and presumably the non-religious) by compelling them to identify as non-conformists.[28] The Court added that the exercises could not be considered a 'reasonable' and 'demonstrably justified' restriction on a *Charter* right under s. 1, and that their inconsistency with s. 2(a) was not altered by the Preamble.[29]

The sole dissenter in *Zylberberg II* followed the reasoning of the lower Court. Justice Lacourciere contended that while government could not compel students to participate in a religious exercise 'it is not prevented from creating a situation where a choice as to whether or not to participate must be made.'[30] This claim was underpinned with reference to the historical longevity of the practice, and the absence of a constitutional challenge in

---

[26] *Zylberberg II* at 653; citing *Big M* at 365: 'With the *Charter*, it has become the right of every Canadian to work out for himself or herself what his or her religious obligations, if any, should be and it is not for the State to dictate otherwise.'

[27] *Zylberberg II* at 655.

[28] *Zylberberg II* at 656.

[29] *Zylberberg II* at 657: 'Whatever meaning may be ascribed to the reference in the preamble to the "supremacy of God", it cannot detract from the freedom of conscience and religion guaranteed by s. 2(a) which is, it should be noted, a "rule of law" also recognized by the preamble.'

[30] *Zylberberg II* at 680 (Lacourciere, J.A. dissenting).

the time since Confederation.[31] The regulation's reference to Scriptures and the Lord's Prayer was deemed an appropriate illustration of the sort of exercises contemplated, 'in conformity with the Christian heritage of the majority.'[32] On these grounds it was argued that '[t]he appellants, who are not forced to participate in the exercises, should not succeed in prohibiting suitable prayers and readings which have traditionally been deemed to be in the best interests of public school children.'[33]

Lacourciere, J.A. also reiterated the view that public expressions of religious belief, including those facilitated or mandated by the state, were appropriate in a 'multicultural' society. The notion that religious exercises were out of place in the public (i.e., governmental) sphere was deemed a recipe for homogenization, inconsistent with the commitment to diversity in s. 27 of the *Charter*.[34] This claim was rejected by the majority, which asserted that the religious exercises and associated excusal procedure were 'insensitive' to the rights of religious minorities, and to 'the feelings of young children,' and were thus 'inconsistent with the multicultural nature of our society.'[35] Clearly, the term 'multicultural heritage' is open to competing interpretations. In the former view, it suggests that there is no cultural belief too 'private' or 'sensitive' for the public realm, even if the state plays a key role in its publicization. From the latter perspective, multiculturalism precludes state sponsorship of majority beliefs and other actions that can appear intolerant or hostile to minorities – precisely those sort of

---

[31] This rather overlooked the fact that the challenge was brought under the *Charter*, which had only been adopted in 1982. Nevertheless, the argument that school prayer and other accommodationist practices are constitutional because they are long-standing traditions is a common one. In the United States, a school of deeply conservative jurisprudence suggests that 'the history of past practices is determinative of the meaning of a constitutional clause' (*McCollum* at 256 (Reed, J., dissenting)).

[32] *Zylberberg II* at 687 (Lacourciere, J.A. dissenting). Expanding on this point, Justice Lacourciere proclaimed that the Lord's Prayer, while of Christian origin, 'was regarded by many as ecumenical and so acceptable to other religious groups as to make it universal.' He added: 'I find it difficult to see how its words could offend any religious group.'

[33] *Zylberberg II* at 684 (Lacourciere, J.A. dissenting).

[34] Section 27 reads: 'This *Charter* shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.'

[35] *Zylberberg II* at 656-657.

activities which, to paraphrase Justice O'Connor in *Lynch* (see Chapter 4), imply that nonadherents are outsiders and not full members of the political community.

A feature of the *Zylberberg II* decision was the degree to which the Justices engaged with U.S. case law. The majority acknowledged the Supreme Court of Canada's view that American jurisprudence was of limited usefulness in helping to define s. 2(a),[36] but referred frequently to the U.S. Supreme Court's rulings in *Engel*, *Schempp* and *Lemon*. Of particular relevance to this case, it suggested, was Justice Brennan's concurring opinion in *Schempp*, in which he critiqued excusal provisions on the grounds that children would be reluctant to invoke them, and argued that it was unconstitutional for the state to 'require a student to profess publicly his disbelief as the prerequisite to the exercise of his constitutional right of abstention.'[37] In dissent, Justice Lacourciere sought to cast doubt on the applicability of such reasoning in the Canadian context, where neither the *Constitution Act* nor the *Charter* appeared to mandate a strict separation of church and state.[38]

Zylberberg II had ramifications beyond Ontario. The Court had articulated a strongly anti-majoritarian stance, and a willingness to uphold minority rights, which called into question other Provincial measures mandating Bible-reading and prayer in schools. One year later, the Supreme Court of British Columbia struck down a statutory provision requiring daily Scripture-readings and recitation of the Lord's Prayer in public schools. At issue in *Russow v. B.C. (A.G.)*[39] was s. 164 of the *School Act 1979*, and in particular those words in italics below, which petitioners asked the Court to sever from the rest of the section, and declare *ultra vires* under the *Charter*:

> All public schools *shall be opened by the reading, without explanation or comment, of a passage of Scripture to be selected from readings prescribed or approved by the Lieutenant Governor in Council. The reading of the passage of Scripture shall be followed by the recitation of*

---

[36] *Zylberberg II* at 658; citing *Big M* at 356.

[37] *Zylberberg II* at 655; citing *Schempp* at 289 (Brennan, J., concurring).

[38] *Zylberberg II* at 674 (Lacourciere, J.A. dissenting).

[39] Data set case – see Table 1.

> *the Lord's Prayer, but otherwise the schools* shall be conducted on strictly secular and nonsectarian principles. The highest morality shall be inculcated, but no religious dogma or creed shall be taught.[40]

A regulation made pursuant to this section provided an exemption to any child whose parent objected to the religious exercises on conscientious grounds, producing a scheme that the Attorney General of B.C. conceded was 'indistinguishable' from that which had existed in Ontario.[41] As in Ontario, a number of parents submitted that seeking an exemption could lead to embarrassment and stigmatization of their children. In a short judgement, Hollinrake, J. rejected an invitation to adopt the argument advanced by Lacourciere, J.A. in *Zylberberg II*, and announced that he would follow 'without reservation' the reasoning of the majority in that case.[42] Following this declaration, his reasons focussed on the technical question of severability (i.e., whether the valid elements of the legislation could be upheld when the invalid provisions were struck down). He concluded that the words providing for prayer and Bible-reading in public schools were of no force or effect, and that they 'can and should be severed from the rest of the words in s. 164.'[43] The meaning of the resulting, abbreviated section – which provided for an *exclusively* secular and nonsectarian public school system in British Columbia – was considered some years later in the *Chamberlain* cases (see Chapter 6).

In 1990, a second case was decided in the wake of *Zylberberg II*. *Canadian Civil Liberties Assn. v. Ontario (Minister of Education)*, known as *Elgin County*,[44] concerned another provision of Ontario's Regulation 262, which mandated two half-hour classes in 'religious instruction' per week. This instruction could be provided by a teacher, lay person, or member of the clergy, but was to avoid issues of a controversial or sectarian nature. Following parental objections to exclusively Christian religious instruction offered

---

[40] *School Act*, R.S.B.C. 1979, c. 375, s. 164; emphasis added.

[41] *Russow* at 31.

[42] *Russow* at 32.

[43] *Russow* at 32.

[44] Data set case – see Table 1.

by evangelical volunteers in Elgin County, a five-justice bench of the Ontario Court of Appeal unanimously declared the provision to be unconstitutional.

First, the Court made the factual determination that the *purpose* of the instruction was Christian indoctrination of public school pupils. Historically, religious instruction in Ontario had served this goal. This remained the case in Elgin County into the late 1980s, where religious instruction was exclusively Protestant and fundamentalist in character. Since the commencement of litigation, the local school board had sought to broaden its curriculum to include other religious traditions. However, these were invariably presented in a matter-of-fact fashion, unlike Christianity, which was taught in a devotional and indoctrinal manner.[45] While the *Charter* did not prohibit genuinely academic considerations of religion, state action that had the purpose of indoctrination was contrary to s. 2(a).

Secondly, the Court ruled that the Provincial regulation, and the Elgin County curriculum, had the unconstitutional *effect* of imposing Christianity on minorities: 'teaching students Christian doctrine as if it were the exclusive means through which to develop moral thinking and behaviour amounts to religious coercion in the class-room. It creates a direct burden on [those] who do not adhere to majoritarian beliefs.'[46] For the reasons given in *Zylberberg II*, the Court determined that the exemption provision contained in the regulation did not eliminate this effect. Again, several appellant parents stated that they had chosen not to exempt their children, out of fear they would be embarrassed or ostracized. One testified that her daughter had subsequently received religious instruction in which she was taught that, as a non-Christian, she would 'go to hell.'[47] The views of the appellants accorded with the expert evidence of a psychologist, who deposed that children from minority backgrounds would experience great pressure to remain in the classroom, as well as 'stress and discomfort' when the opinions of their parents conflicted

---

[45] *Elgin County* at 371, 376. Pupils were taught that Jesus was 'the way, the truth, and the light', and not merely that this was what Christians believed. They were also encouraged to accept the Protestant notion of salvation through belief alone.

[46] *Elgin County* at 363.

[47] *Elgin County* at 365. An array of similar incidents has occurred in the United States (Ravitch, 2000).

with those of their teachers.[48] As the Mackay Committee had noted some two decades earlier, the incorporation of religious instruction into public education can produce a dissonance between home and school that is difficult for children to negotiate: 'The views expressed in their homes on religious matters may differ from those stated by the teacher. To the youthful mind, the authority of the teacher is usually beyond question. Where does this leave the authority of the parents? Confusion and distress is thus created in the minds of young children loyal to both teacher and parents.'[49] This said, analogous claims have been made regarding the effects of secular education on religious children (see Chapter 6).

In striking down both the Provincial requirement for religious instruction, and the religious studies curriculum of the Elgin County school board, the Court made a distinction between 'indoctrination in' and 'education about' religion. While the former was prohibited by s. 2(a) of the *Charter*, the latter was a legitimate subject for public schools. Acknowledging that 'the line between indoctrination and education, in some cases, can be difficult to draw,' the Court defined it in terms of a series of binary oppositions. It was said to entail distinctions between the *study* of religion and its *practice*; between *exposing* pupils to religious views and *imposing* beliefs; between *academic* investigation and *devotional* activity; between *awareness* of religion and *acceptance* of a particular faith; between *informing* pupils and pressuring them to *conform*.[50] Only by respecting these guidelines could schools introduce religion into the classroom, while still respecting religious freedom.

In 1992, in the case of *Manitoba Rights & Liberties*,[51] the Manitoba Court of Queen's Bench reviewed s. 84 of the *Public Schools Act 1987*,[52] which provided for religious exercises in the Province's otherwise 'non-sectarian' education system. Such activities

---

[48] *Elgin County* at 366.

[49] *Elgin County* at 357; citing Mackay Committee, 1969: 21-22.

[50] *Elgin County* at 367.

[51] Data set case – see Table 1.

[52] *Public Schools Act*, R.S.M. 1987, c. P250.

had been mandated since the creation of 'national' public schools in Manitoba in 1890 (see Chapter 3). Pursuant to regulations issued under s. 84, they took the form of a teacher or designated student opening each day with 'pre-approved readings or prayers, mostly from the Scriptures.'[53] As in Ontario and British Columbia, any child whose parents objected to the exercises was exempted from participation.

Justice Monnin's opinion began with the observation that, *prime facie*, the unconstitutionality of such arrangements had already been decided in Canada: *Zylberberg II* was an authoritative statement that government-mandated religious exercises in public schools infringed the *Charter*.[54] However, the defendants did not take issue with this jurisprudence. They argued that the provisions of the *Charter* were not applicable to the challenged legislation and regulations, as these were protected by the *Manitoba Act*. Section 22(1) of this legislation, under which Manitoba had entered Confederation, guaranteed rights to denominational education held 'by Law or practice' at the time of Union. Justice Monnin determined such rights were not at issue, as they had been 'effectively abolished in 1890 when the majority, in order to achieve its goal of making the West, and more particularly Manitoba in this case, British and Protestant replaced the guaranteed [i.e., denominational] school system with a non-sectarian or national school system....'[55] Put simply, the educational arrangements protected by the *Manitoba Act* no longer existed (see Chapter 3). Accordingly, the defendants' appeal to s. 22 was viewed 'with some cynicism ... as just a little over 100 years ago the Government of Manitoba trod over those same guarantees with very little hesitation.'[56]

Upon determining that the exercises were not exempt from *Charter* review, Justice Monnin adopted without comment the reasoning employed in *Zylberberg II*, and affirmed in *Russow*. He declared the public school system in Manitoba to be 'no different than the systems in Ontario and British Columbia,' and added that its students and teachers – like

---

[53] *Manitoba Rights & Liberties* at 680.

[54] *Manitoba Rights & Liberties* at 682.

[55] *Manitoba Rights & Liberties* at 685.

[56] *Manitoba Rights & Liberties* at 686.

those in other Provinces – 'came from wide and varied backgrounds and religious beliefs.'[57] He noted that 'morality and ethics have a place in the school system,' but refuted the view that this required the inculcation of Christianity: it was not for schools to give preference to one religion, but rather to promote a moral standard to which all could subscribe, irrespective of their individual beliefs.[58] In subsequent cases in British Columbia, it was suggested that such a moral standard could be found within the *Charter* itself.[59]

In summary, then, Courts in Ontario, British Columbia and Manitoba have ruled that public schools may teach a broad moral code, and offer genuine education *about* religion, but may not conduct religious exercises or seek to indoctrinate.[60] Instructing children in matters of religious belief and practice has been deemed the sole responsibility of *parents* (operating within the private sphere of the home and place of worship). In each case, the challenged provisions had permitted exemptions only for those pupils whose parents objected to the mandated religious activities or classes,[61] and judicial attention was focussed on whether such arrangements infringed *parents'* freedom of conscience and religion. The courts determined that they did, both directly (objecting parents were required to confess their beliefs to school employees) and indirectly (peer pressure and the disciplinary environment of the classroom could make pupils reluctant to exercise exemptions, or expose them to ridicule for following parental instruction).[62] In all this,

---

[57] *Manitoba Rights & Liberties* at 686.

[58] *Manitoba Rights & Liberties* at 686.

[59] See the discussion of the *Chamberlain* cases in Chapter 6.

[60] The only other ruling on school prayer in Canada was that of the Saskatchewan Human Rights Commission in *Fancy v. Saskatoon School Div. No. 13* (1999), 35 C.H.R.R. D/9 (Sask. Bd. of Inq). In this case, the Board of Inquiry instructed the Saskatoon School Board to end its policy of encouraging teachers to recite the Lord's Prayer in class, and suggested it adopt a religious education policy that was multicultural in orientation. Only Saskatoon schools were directly affected by this ruling, which followed the precedent set by *Zylberberg II*, but was primarily concerned with the particularities of Saskatchewan statutory law.

[61] Although Ontario made an exception in those (presumably rare) cases in which the pupil was an adult.

[62] E.g., *Russow* at 31: 'Another of the petitioners deposed that when she told her son that she was going to write a letter requesting that he be excused from the prescribed ceremonies, "he requested that I not do so because he would feel embarrassed and would be made fun of by his peers if they found out."'

children themselves were at best proxies for the religious views of their parents.[63] By contrast, U.S. case law has been rather more open to the notion that stated-mandated religious activities in schools infringe upon the constitutional rights of pupils (see *Lee* and *Santa Fe* for recent examples).

The present situation with respect to religious exercises and instruction in public schools in Canada is complex. There is considerable variation between Provinces, several of which have yet to modify their provisions in light of *Charter* jurisprudence, and scant information on actual practices (in part because decisions about whether or not prayer occurs are often left up to school boards, or even individual teachers). A useful review is provided by Smith and Foster (2001), who identify several broad approaches. First, there are three jurisdictions which preclude the provision of religious activities and instruction, either explicitly (British Columbia), or because the law does not authorize them (Prince Edward Island, Yukon). A second group of three requires public schools to provide for religion. In Manitoba, the provisions struck down in *Manitoba Rights & Liberties* have been neither repealed nor amended, but are presumably of no force or effect. In Newfoundland & Labrador, nondenominational religious instruction is allowed, and parents may request that a voluntary religious observance be held on school grounds. In Quebec, where secular public education is still being phased in, public schools are required to offer students moral and religious instruction that is either Catholic or Protestant in character.

In the remaining seven jurisdictions, a variety of provisions allow for the possibility of religious instruction or exercises, but do not create any entitlement thereto. Nova Scotia, the Northwest Territories, and Nunavut allow for opt in religious instruction in schools,

---

[63] This interpretation is supported by the Supreme Court of Canada's decision in *B.(R.) v. Children's Aid Society of Metropolitan Toronto,* [1995] 1 S.C.R. 315 [hereinafter *Children's Aid Society*]. At issue was a temporary wardship order granted to a Children's Aid Society when the parents of an infant ('Sheena') refused, on religious grounds, to consent to surgery that required blood transfusion. Both the majority and dissenting opinions defined freedom of religion as encompassing a parental prerogative to instruct children in matters of religion and raise them according to certain beliefs. As noted above, Canadian courts have argued that this parental prerogative may be undermined when schools sponsor religious activities, as children are likely to be 'confused' when an authority figure such as a teacher advances a religious perspective different from that of their parents.

but not for exercises. By contrast, New Brunswick does not provide for religious instruction, but teachers may recite passages of Scripture and the Lord's Prayer during daily opening and closing exercises at their discretion, providing objectors are excused. Given existing precedent, this provision would almost certainly be struck down if challenged under the *Charter*. In Saskatchewan, school boards are empowered to authorize religious instruction, and opening exercises that include the Lord's Prayer or Bible-reading without note or comment – an arrangement that may have a degree of constitutional protection unique to that Province (Smith & Foster, 2000: 402). In Alberta, schools may offer opt out religious instruction and exercises, the content of which is left for each board to determine. Finally, Ontario has amended its provisions in accordance with *Zylberberg II* and *Elgin County*: it allows only nondenominational, nonindoctrinal 'education about' religion, and requires that opening and closing exercises be representative of the Province's multicultural society.

Religious Freedom & Religious Education

As in the United States, Canadian rulings against religious practices and instruction in public schools have been met with conservative claims alleging judicial bias against religion, improper emphasis on social pressures in the absence of formal legal coercion, and misinterpretation of constitutional provisions. Particular criticism has been directed at the Ontario Court of Appeal, which is said to have 'effectively changed public schools from places where the religious wishes of parents had to be accommodated to places where religion has no place' (Brown, 2000: 585). It is accused of recasting the *Charter*'s guarantee of 'freedom of religion' as 'freedom from religion' – a development that is said to have contributed to the marginalization of religious values in public life more generally (see Chapter 6). While these claims have much in common with those made in the United States since *Engel*, it is notable that they stem from a small number of lobby groups and academic commentators, and not from enduring legislative campaigns or broad-based public opposition.

Conservative critics were especially alarmed by the *Elgin County* decision, and the declaration that the *Charter* prohibited religious indoctrination but not education about

religion.[64] It produced a situation whereby public schools could not offer instruction in religion, *even when consented to by parents*. This was deemed problematic on a number of grounds. First, the Ontario *Education Act* continued to provide for religious instruction in accordance with parental desires. Secondly, if parents wished their children to receive some form of religious instruction, the element of governmental coercion – hitherto deemed central to any s. 2(a) violation – was seemingly absent: 'One would have thought that indoctrination, freely consented to, represents an exercise of one's freedom of religion, not its contravention' (Brown, 2000: 590). Thirdly, while *Elgin County* – like *Zylberberg II* – was framed in terms of protection of minority rights, the secular education system it mandated did not accommodate those religious believers who desired something more than 'education about' religion for their children (i.e., an opt in system of religious instruction). Parents from a variety of minority faiths – Sikh, Hindu, Christian Reformed, Muslim, and Mennonite – raised this last point in *Bal v. Ontario (A.G.)*,[65] decided in 1994.

This case arose in the context of the Ontario government's response to *Zylberberg II* and *Elgin County*. In December of 1990, the Provincial Ministry of Education issued Policy Memorandum 112 (*Education about Religion in the Public Elementary and Secondary Schools*), which declared that schools could only offer religious education which avoided indoctrination, and did not give primacy to any faith. The *Elgin County* distinction between 'indoctrination in' and 'education about' religion was adopted verbatim. The former was deemed a purely private concern ('It is the prerogative of individual pupils and their families to decide which religious beliefs they should hold'), while the latter was a legitimate academic subject that would 'enable students to acquire knowledge and awareness of a variety of the religious traditions that have shaped and continue to shape our world.'[66] This policy was implemented through new regulations issued under the *Education Act*. The resulting, secularized education system was characterized by the government as a realization of the ideal of public schools 'as places where people of

[64] *Elgin County* at 367.

[65] Data set case – see Table 1.

[66] *Bal* at 693; citing Memorandum 112.

diverse backgrounds can learn and grow together' by virtue of their foundation upon 'positive societal values which ... transcend cultures and faiths.'[67]

However, not all Ontario residents considered the new system to be 'open and accessible to all on an equal basis.'[68] Under the policy, no public school could offer indoctrinating instruction or exercises. This included several alternative religious schools that had been voluntarily incorporated into the public system. The applicants in *Bal* argued that by precluding 'the establishment, funding, or continuation of alternative religious schools as part of a public school board,'[69] the Province had infringed upon the rights of religious minorities to express their beliefs, and communicate them to their children through the education system. The respondents countered that majoritarian influence had been removed from the public schools, and that the resulting secular system posed no conscientious offence to any reasonable-minded person. Parents, *including members of the majority*, who wanted their child to receive a denominational education remained free to opt out of the public system, but this was a private choice. Moreover, a recent Court of Appeal case,[70] had determined that it was a choice the provincial government had no constitutional obligation to fund.[71]

In argument before the General Division of the Ontario Court, the complainant parents in *Bal* specifically rejected the notion that religious freedom in the private sphere was sufficient to protect their beliefs. They asserted that when religious instruction was restricted to the home, and to the temple, mosque, or church, children did not receive adequate education in their faith. Moreover, they argued that the secular humanist values and principles advanced in the public school system had a detrimental influence on their

---

[67] *Bal* at 694; citing Memorandum 112.

[68] *Bal* at 694; citing Memorandum 112.

[69] *Bal* at 685.

[70] *Adler v. Ontario* (1994), 19 O.R. (3d) 1 [hereinafter *Adler I*].

[71] Roman Catholic schools, specifically provided for in s. 93 of the *Constitution Act*, represented the sole exception to this rule. The special status of Roman Catholic schools was not at issue in this case, but had been affirmed in *Reference re Bill 30*.

children's moral and spiritual development.[72] For these reasons, the parents felt *compelled* to seek a religious education for their children. However, this alternative was denied public funding, and some families could not afford to exercise their right to opt out. Thus, the appellants' contended that their *Charter* rights were infringed in three ways: they were denied freedom of religion on economic grounds; they were discriminated against, relative to those who could accept secular schooling; and they were unable to express their religious views within the public system.

The case was heard by Justice Winkler, who determined that the trilogy of religious education cases in Ontario – *Zylberberg II*, *Elgin County*, and *Adler I* – required the applicants' claims to be dismissed.[73] With respect to the claim that the parents' s. 2(a) rights were infringed because they had to pay to secure a religious education, *Adler I* was deemed determinative. The majority in that case had determined that the appellants' preference for religious education was due entirely to their private beliefs, and that what was being complained of was not coercive government action, but rather government *inaction* (i.e., failure to fund) – something that could not produce a breach of s. 2(a). In opting out of secular education in favour of a religious alternative, parents were understood to be exercising their freedom of religion – not responding to governmental compulsion. However, such reasoning did not consider the notion that the state may have a duty to accommodate conduct motivated (or compelled) by religious belief, up to the point of undue hardship (Benson, 2000: 545).

The *Bal* Court did review the claim that the state-mandated secularization of public education represented a form of coercion for some believers. It declared that public schools had been made secular in order to *eliminate* the collective pressures associated with majoritarian religious exercises and instruction. The resulting system was not coercive, but *neutral*: neither minorities nor the majority could have their religious views reinforced in the public schools, or taught as 'truth.' Winkler, J. added that it was illogical to suggest that a policy which was a response to *Charter* infringements, and which

---

[72] *Bal* at 699.

[73] *Bal* at 685.

removed coercive religious indoctrination from public schools in accordance with judicial direction, somehow produced a further breach of the *Charter*.[74]

The Court also dismissed the applicants' ss. 2(b) and 15 claims, in both instances invoking a distinction between public and private. Justice Winkler determined that Memorandum 112 and the associated regulations had the purpose and effect of secularizing public education, and did not limit the ability of individuals to express their religious views. Students remained free to speak about their beliefs, and teachers could express their religious opinions outside of the school curriculum.[75] The only restriction was that public schools were not to indoctrinate or give primacy to any religion – something that *Zylberberg II* and *Elgin County* had determined was necessary to protect the rights of minorities. The applicants' views could no longer be reinforced or favoured by the public school system – but in this respect they were treated no differently from members of other religious groups. If they wished to provide their children with a denominational education, they would endure a cost. All parents who opted out of the public system – for religious reasons, or any reason at all – were required to pay, as the *Education Act* did not provide funding for any private schools, religious or otherwise.[76]

The *Bal* Court accepted that the changes introduced by Memorandum 112 created a universally-accessible and religiously-neutral school system. It emphatically rejected suggestions that secular education was coercive, and that religious parents who found secular public education unacceptable or unconscionable were discriminated against. The decision affirmed the liberal-separationist notion that prohibiting state involvement in religious practices and indoctrination does not send an anti-religious signal, but rather a message that issues of religious belief are properly private. It also suggested that public

---

[74] *Bal* at 709.

[75] *Bal* at 711. This implied that teachers have both a public and a private capacity within the classroom: when teaching the curriculum, they perform a public role; when commenting on extra-curricular matters (perhaps as an aside, or in response to a student question) they have rights as private individuals. In practice, this boundary may be difficult to maintain. Interestingly, there is a long history in Canada of attempts to discipline and dismiss teachers for 'inappropriate' comments made outside of the school environment (see, e.g., *R. v. Keegstra*, [1990] 3 S.C.R. 697).

[76] *Bal* at 697.

concern for religion and its exercise should stretch only so far as ensuring individuals are not subject to state coercion or collective pressures.

Not surprisingly, this reasoning was criticized by conservative stakeholders. The essence of their complaint was that the absence of religion in public schools was at least as offensive to some minorities as its inclusion was to others – if not more so, because when religious perspectives had been included, they were formally optional (Benson, 2000; Brown, 2000). After Memorandum 112, religious parents had no ability to opt out of secular education without incurring significant costs. The strict privatization of religion mandated by *Bal* was deemed to undermine, rather than uphold, s. 2(a): 'A *Charter* freedom designed to protect individuals from the coercive action of the state has been transformed by the courts into a tool to drive any vestige of religious belief or practice, however voluntary or consensual, from the public schools of the country' (Brown, 2000: 593).[77]

Conservative opinion is strongly resistant to the notion that freedom of conscience and religion requires religious activities to be subject to restrictions in the public sphere which do not apply to other forms of expression and conduct. Such restraints are perceived to discriminate against religion (vis-à-vis the implicit 'faith positions' of secular humanism, for example), and to limit unjustly the ability of believers to have their views and values heard and respected. These objections highlight the tension between the principle of free exercise of religion (which has an expansionary logic, and does not in itself suggest diminished rights in the public sphere) and the notion that governmental involvement in, or advancement of, religion threatens the autonomy, and equality, of dissenters and non-believers. This tension has a unique nomenclature in the United States (where the First Amendment guarantees 'free exercise', and prohibits 'establishment'), but is expressed more generally in terms of a conflict between 'freedom of' and 'freedom from' religion. For conservative critics, courts in both Canada and the United States have placed a premium on 'freedom from' when considering the place of religious exercises and

[77] Brown (2000: 593) proceeds to make the hyperbolic claim that 'a religious parent's only option is to withdraw his child from the public schools and pay for a private religious education.'

instruction in public schools. As Brown contends, in reviewing Canadian jurisprudence from *Zylberberg II* to *Bal*: 'A whiff of suggestion that religion might occupy some space in a public school seems to elicit a reaction from the judiciary that they must save the country from creeping theocracy' (Brown, 2000: 593).

In 1996, the Supreme Court of Canada assessed the constitutionality of Ontario's education system in *Adler II*.[78] A group of Christian and Jewish parents sought to overturn *Adler I*, in which the Ontario Court of Appeal ruled that non-funding of alternative religious schools within the newly secularized public education system was constitutional (see above). The *Adler II* appellants advanced two *Charter* arguments before the Supreme Court. First, they claimed that s. 2(a) required the province of Ontario to provide public support for independent religious schools. Secondly, they contended that in funding public and Roman Catholic schools – pursuant to s. 93 of the *Constitution Act* (see Chapter 3) – but not independent religious schools, the Province was acting in a discriminatory manner, contrary to s. 15(1) of the *Charter*.

In an eight-to-one decision, the Court determined that the government of Ontario had no constitutional obligation to support independent religious schools. All of the Justices agreed that the appellants had no valid claim under s. 2(a), although their reasoning on this point varied. Justice Iacobucci, writing for a five-justice majority, determined that s. 93 of the *Constitution Act* was a 'comprehensive code' of denominational rights which s. 2(a) of the *Charter* could not be used to enlarge.[79] The former provision guaranteed public funding only to those denominational systems which were entitled to it by law at the time of Confederation. In the Ontario context, this meant Catholic schools, but not those of the appellants. The Court could not rule that the latter nonetheless had a *right* to government funds under s. 2(a), as this 'would be to hold one section of the Constitution violative of another' – something *Reference Re Bill 30* specifically precluded.[80]

---

[78] Data set case – see Table 1.

[79] *Adler II* at para. 27.

[80] *Adler II* at para. 35.

In concurrence, Justice Sopinka added that the appellants had not been compelled to act in any way that infringed their freedom of religion. The *Education Act* did not require parents to send their children to secular public schools, but allowed for the provision of education within a religious school or at home.[81] The appellants were free to make private choices about education. From this perspective, freedom of religion did not entail any entitlement to state support, but was a strictly negative liberty, guaranteeing only the right to be left alone. This was necessary to protect the integrity of public services, and the state itself:

> As submitted by the intervener, the Canadian Civil Liberties Association, there are many spheres of government action which hold religious significance for religious believers. It does not follow that the government must pay for [them]. If this flowed from s. 2(a), then religious marriages, religious corporations, and other religious community institutions such as churches and hospitals would all have a *Charter* claim to public funding. The same could also be said of the existing judicial system which is necessarily secular. The appellants' argument would lead to an obligation by the state to fund parallel religious justice systems founded on canon law or Talmudic law, for example.[82]

Justice Sopinka concluded that the cost of sending children to religious schools was not a product of coercive state action, but a 'natural cost of the appellants' religion.'[83] McLachlin, J. agreed, observing that '[a]bsence of state funding for private religious practices, as distinct from prohibitions on such practices, has never been seen as religious persecution.'[84] Justice L'Heureux-Dubé, dissenting on other grounds (see below), was of the same opinion.[85]

The appellants also claimed that they were subject to discrimination on religious grounds – in the sense that they could not, in good conscience, access the public benefit of fully-

---

[81] *Adler II* at para. 171 (Sopinka, J., joined by Major, J., concurring). There was no suggestion in this case that the complainant parents did not want their children to be educated, or that they objected to the compulsory nature of education per se.

[82] *Adler II* at para. 171 (Sopinka, J., joined by Major, J., concurring).

[83] *Adler II* at para. 176 (Sopinka, J., joined by Major, J., concurring).

[84] *Adler II* at para. 200 (McLachlin, J., dissenting in part).

[85] *Adler II* at para. 58 (L'Heureux-Dubé, J., dissenting).

funded education – contrary to s. 15(1). The Court decided without reservation that government funding of Catholic schools, but not other religious schools, did not produce a breach of s. 15(1). Section 93 of the *Constitution Act* specifically provided for public funding of Catholic schools in Ontario, and s. 29 of the *Charter* exempted this guarantee – and others like it – from challenge. Together, these provisions authorized a distinction between Catholic schools, and those of other denominations, which would otherwise have produced a *prima facie* breach of the *Charter.* The rather more complex issue was whether the government's decision to fund secular public schools, but not independent religious schools, constituted discrimination. On this point, the majority again found s. 93 of the *Constitution Act* determinative: 'the public school system is an integral part of the Confederation compromise and, consequently, receives a protection against constitutional or *Charter* attack.'[86] Put simply, it was within the Province's plenary power to create, support and regulate a system of public schools 'open to all members of society, without distinction.'[87]

In concurrence, Justice Sopinka argued that the proper grounds for dismissing the appellants' claim was that there was 'no government action ... involved to which s. 15 can attach.'[88] While the appellants felt compelled to send their children to denominational schools, this was due solely to 'a personal characteristic, namely their religion.'[89] The court-ordered secularization of the public school system, which had generated the complaint, did not count as state action, as it was mandated by the *Charter*, as opposed to legislation.[90] In addition, Sopinka, J. contended that the applicants' schools were not denied public funding because of their religious affiliations, but because they were *private*. The *Education Act* drew a distinction between public institutions, which received full funding, and private institutions, which received none. This distinction was not

---

[86] *Adler II* at para. 46.

[87] *Adler II* at para. 47.

[88] *Adler II* at para. 186 (Sopinka, J., joined by Major, J., concurring).

[89] *Adler II* at para. 181 (Sopinka, J., joined by Major, J., concurring).

[90] This reasoning is not entirely convincing: given that the Province had the *option* of funding independent religious schools (see below), one could argue that its decision not to do so was as much a state action as a decision to extend funding would have been.

prohibited by s. 15(1), nor did it discriminate against the appellants, relative to others who did not wish their children to be educated within the public system.[91]

In separate opinions, Justices L'Heureux-Dubé and McLachlin held that the claimants' rights to equal treatment were being infringed. The Province had created a system whereby most parents were able to access publicly-funded schooling, but some could not. Both Justices rejected the notion that the appellants' decisions to enrol children in religious schools stemmed from purely private, individual preferences: their faith *required* them to provide their children with a denominational education. For L'Heureux-Dubé, J., such religiously-motivated conduct was protected by s. 15, which safeguarded 'the inherent dignity and consideration which are due all human persons.'[92] The denial of any public support represented 'a complete non-recognition of their children's educational needs and the children's and parents' fundamental interest in the continuation of their faith.'[93] Justice McLachlin agreed that the appellants were *unable* to make use of state-funded schools, and added that '[i]f a charge of religious discrimination could be rebutted by the allegation that the person discriminated against chose the religion and hence must accept the adverse consequences of its dictates, there would be no such thing as discrimination.'[94]

The key question for these Justices was whether the non-funding of independent religious schools was a reasonable and demonstrably justifiable limitation on a *Charter* freedom, pursuant to s. 1. Both agreed that there was a rational basis for the Ontario policy – extending public funding to dissentient schools could prompt an exodus from the public system, threatening the viability of a universal, pluralist and tolerant system of public education. However, in Justice L'Heureux-Dubé's view, complete denial of funding did

---

[91] *Adler II* at paras. 179, 188 (Sopinka, J., joined by Major, J., concurring). Arguably, there is a degree of circularity in this reasoning: the appellants' schools did not receive any public funding because they were 'private'; they were 'private' because they did not receive any public funding. Indeed, one could interpret the appellants' complaint as an objection to the 'private' designation (and concomitant denial of access to public monies) being forced upon religious schools.

[92] *Adler II* at para. 72 (L'Heureux-Dubé, J., dissenting).

[93] *Adler II* at para. 83 (L'Heureux-Dubé, J., dissenting).

[94] *Adler II* at para. 208 (McLachlin, J., dissenting in part).

not minimally impair the appellants' rights: Ontario could follow the lead of five other Provinces in extended partial funding to independent religious schools without undermining its public system.[95] By contrast, Justice McLachlin accepted that fostering 'a strong public secular school system attended by students of all cultural and religious groups' would encourage tolerance and respect for diversity in a multicultural society, and that this constituted 'a pressing and substantial objective capable ... of justifying the infringement of s. 15.'[96] Accordingly, she joined the majority in concluding that the Ontario policy withstood *Charter* challenge.

Significantly, none of the Justices in *Adler II* suggested that it was unconstitutional for a government to extend public funding to religious schools if it so decided. Section 93 of the *Constitution Act* granted Provinces significant discretion in this area, provided they did not infringe upon the legal rights enjoyed by dissentient schools at Confederation. As Justice Sopinka observed, s. 93(3) 'specifically contemplates the exercise of the plenary power to create a "System of Separate or Dissentient Schools" were one does not exist.'[97] The ability to act in this way was distinct from an obligation to do so, however: Ontario was not required to fund alternative religious schools. The Supreme Court of Canada's ruling on this issue stands in contrast to the situation in the United States, where the Establishment Clause has been interpreted as prohibiting direct public aid to parochial schools. Nonetheless, not all claims for support have been unsuccessful: courts have on occasion upheld government programs perceived to benefit *children* attending parochial schools (as opposed to the schools themselves), as well as 'religiously neutral legislation

---

[95] *Adler II* at para. 106 (L'Heureux-Dubé, J., dissenting).

[96] *Adler II* at paras. 212, 215 (McLachlin, J., dissenting in part).

[97] *Adler II* at para. 136 (Sopinka, J., joined by Major, J., concurring).

that allows state-aid to religious schools only through parental – not governmental – choices' (McCarthy, 2000: 156).[98]

Conclusion

Canadian courts addressing the constitutionality of religious practices in public schools have emphasized the need to safeguard the individual against collective pressures in matters of religious faith and observance. They have focussed on the question of whether state-mandated religious activities are coercive *in the school context*, and not on the broader issue of whether it is legitimate for the State to advance or sponsor religion per se (a level of analysis frequently adopted in the United States). In the most influential Canadian ruling, *Zylberberg II*, the Ontario Court of Appeal determined that any assessment of whether or not coercion existed needed to be conducted from the standpoint of religious minorities. It proceeded to argue that the social pressures existing 'in the sensitive setting of a public school,'[99] combined with children's susceptibility to peer pressure, could compel pupils from minority backgrounds to participate in daily prayer and Scripture reading.

Growing cultural diversity also formed part of the context for the *Zylberberg II* ruling. The Court acknowledged that 'it [could] no longer be assumed that Christian practices are acceptable to the whole community,'[100] and that classrooms were increasingly likely to contain children whose parents objected to Christian exercises. These parents were entitled to request an exemption, but the Court accepted that many were unwilling to do so, in part because of the classroom pressures to which their children could be exposed in

---

[98] U.S. jurisprudence in this area is widely regarded as being in disarray. The distinction between 'aid to children' and 'aid to schools' – often referred to as the 'child benefit theory' – is particularly tenuous. It has proven exceptionally difficult to implement, and has led the U.S. Supreme Court, among others, to become 'almost comical in their confusion' (McConnell, 2000: 72). Thus, public authorities may provide textbooks for children attending religious schools, but not library books, globes or maps. Strange spatial distinctions have also resulted: States may supply free transportation for parochial school pupils travelling between home and school, but not between school and the site of a 'secular' field trip. For many years, governments could provide speech, hearing and other diagnostic services in parochial school buildings, but not remedial services: the latter might, however, be offered in portable classrooms parked in public space (specifically, on the curb) immediately outside school grounds (Tushnet, 1998: 247; Gaddy *et al.*, 1996: 185).

[99] *Zylberberg II* at 654.

[100] *Zylberberg II* at 653.

as a result. Whether or not minority children would benefit from 'confronting the fact of their difference from the majority' was a point of contention.[101] The four-justice majority contended that the necessity of requesting an exemption denied minorities equal respect, and was thus inconsistent with the *Charter*'s commitment to multiculturalism. The sole dissenter claimed that the 'publicization' of religious difference was a normal and unproblematic part of life in a multicultural society: 'The American concept of a "melting pot" of cultures does not form part of the Canadian tradition.'[102] The reasoning of the majority was adopted without reservation in later cases in British Columbia (*Russow*), Manitoba (*Manitoba Rights & Liberties*), and Ontario (*Elgin County*). In this sense, *Zylberberg II* was the definitive case on the issue of religious practices in Canadian public schools. It has no close parallel in the United States, where the Supreme Court has generally considered each new example of a religious activity in a public school as relatively distinct.[103]

Henceforth, public schools in these Provinces could provide classes on comparative religion or religion in literature, but could not mandate devotional practices, provide instruction in a single faith, or proselytize students. The former approach was considered consistent with the *Charter* and the legitimate aims of public education because it sought to advance knowledge and analytical skills. By contrast, the latter entailed the promotion of Christianity over all other beliefs, and imposed a coercive burden on religious minorities that was not mitigated by the availability of exemptions.

However, the secularized system of education mandated by these cases produced a second, and somewhat more complex, legal question: given the courts' professed concern for minority rights, and for equality, did minority parents who objected to secular schooling on religious grounds have a *Charter* right to funded religious education? *Bal* and *Adler II* determined they did not. The appellants were unable to convince the courts that their preference for religious education was a product of state action (something that

---

[101] *Zylberberg II* at 647.

[102] *Zylberberg II* at 676 (Lacourciere, J.A. dissenting).

[103] One exception is *Stone*, in which the Court simply applied *Schempp* (see Chapter 4).

is necessary to trigger a *Charter* violation), as opposed to personal conviction. In addition, they could not establish that the exclusion of independent religious schools from public funding, and the prohibition on religious indoctrination in public schools, constituted coercion. Majorities in both cases emphasized that all of those who opted out of state-funded schools on religious grounds incurred an economic cost, *and* that this cost 'flow[ed] exclusively from their religious tenets.'[104] Moreover, secular public schooling was mandated by the *Charter*, and majoritarian religious influence had been removed specifically to protect minorities from compulsion. The courts did not consider it coercive for schools to promote 'public knowledge' – including knowledge of world religions, as appropriate – while refraining from indoctrinating pupils in matters of 'private belief.' However, as the next chapter illustrates, the place of religious values and perspectives in the curricula and operation of public schools in Canada has remained a contentious issue.

[104] *Adler II* at para. 174 (Sopinka, J., joined by Major, J., concurring).

CHAPTER SIX:
CONTESTING CURRICULA: TWO CASE STUDIES

In debates over the place of religion in Canadian and U.S. public schools, the most prominent critics of secularization are conservative Christians. Their objections to contemporary schooling are numerous and wide-ranging, but often centre on the claim that Christian ethics, beliefs and practices are excluded from the classroom, while secular and humanist ideas pervade every aspect of instruction. The alleged hegemony of what they term 'secular humanism' is said to subvert the rights of parents to instil Biblical morality, lead children away from God, and constitute state sponsorship of religion. This criticism extends to the teaching of evolution – a scientific theory that a vocal minority of Christians has interpreted as anti-religious and an affront to belief in divine creation. In the United States, where the Religious Right forms a particularly influential and vocal political lobby (see Chapter 3), campaigns have been organized to remove the theory from science curricula, or counter-balance it with instruction in creationism.

Such campaigns go to the heart of contemporary debates about the place of religion in public education, and raise a series of seemingly intractable questions about school governance, which are frequently fought out in the courtroom. To what extent may schools accommodate parents' spiritual beliefs and religiously-motivated concerns? Do such accommodations represent a problematic state endorsement of religion, or do they merely bring balance to the curriculum? Should communities exercise control over teaching methods and school resources in accordance with prevailing moral and theological views, or are such matters properly exempt from local democracy? How might schools avoid coercing pupils in matters of religion and conscience, and does 'mere exposure' to alternative belief systems and ethical principles constitute coercion?

The first half of this chapter reviews the debate surrounding secular humanism. It notes that higher courts, particularly in the U.S., have been unwilling to accept the notion that the secularization of public education has been an anti-religious process. The second half

outlines the evolution/creationism conflict, highlighting its spatialized politics, and connection to broader debates over the place of religion in public schools. Both sections centre on the tension between the civic ordering of the liberal-secular state, and transcendent claims of some religious perspectives, particularly literalist branches of Christianity.

The chapter moves beyond the issue of the acceptability of religious practices in public schools to the broader and in some ways more complicated matter of whether religious belief can influence the structure and delivery of public school curricula. Whereas there is a growing social acceptance of the notion that 'traditional' state-sponsored religious exercises are both unconstitutional and out of place in public schools (see Chapters 4 and 5), the legitimacy of religious values in shaping pedagogy, lesson content, classroom resources, and school governance remains deeply controversial. In both Canada and the U.S., this controversy is connected to a debate over the place of religious belief and the religiously-informed conscience in public life and government affairs more generally.

Establishing Secular Humanism

While 'secular humanism' has been denounced by many orthodox stakeholders – ranging from concerned parents to the leaders of national lobby groups – the term itself lacks clear definition. One critic notes that it frequently appears to be a catchall concept, encompassing everything taught in public education that does not reinforce the religious biases and beliefs of fundamentalist and evangelical Christianity (Wood, 1992: 122). This includes perceived endorsements of individualism, moral relativism, New Age religion, native spiritualism, mysticism, witchcraft and the occult,[1] as well as a focus on 'liberal values' (e.g., tolerance, pluralism, and personal fulfillment) as opposed to 'Biblical virtues' (e.g., justice, obedience, and temperance). Related criticisms focus on contemporary pedagogical methods (e.g., the 'whole language' approach to reading,

[1] While many critics have described (and decried) secular humanism as atheistic, some have also argued that it encompasses religious perspectives from outside the Judeo-Christian tradition. In the Canadian context, for example, it has been claimed that there is a '[g]rowing recognition of native spirituality' within public school classrooms, while the 'the beliefs of the synagogue, church, or temple' remain off-limits (Benson, 2000: 520).

'thinking skills' techniques, and 'values clarification' exercises),[2] and the incorporation into classroom instruction of perspectives critical of patriarchy, capitalism, and nationalism (Benson, 2000: 519; Keller, 2000: 576; Gaddy *et al.*, 1996: 101, 108; Wood, 1992: 120).

For many conservative Christians, contemporary public education constitutes government indoctrination of a 'captive group of students ... in beliefs and values that will lead them to defect from the teachings of their church and parents' (Baer, 1998: 110). This situation is deemed to be objectionable for several reasons. First, it is seen as coercive because, in order for Christian children to receive the public education to which they are entitled, they are not only confronted with ideas contrary to their beliefs, but are placed in an environment that is totally hostile to them. Secondly, it is seen as an inappropriate intrusion by public authorities into the private realm of faith, since state education inculcates values that undermine Christianity and its moral teachings. Conservative Christians do not abandon the language of the public/private distinction altogether, but argue that in order for the (religious) home and the parent-child relationship to be accorded proper respect and protection, the state may not advance hostile or contrary viewpoints in the public realm. Finally, a host of social ills is attributed to children's indoctrination in secular humanist thought, including supposed increases in immorality, disrespect for authority, promiscuity, and drug use (Wood, 1992: 120).[3] This critique may be contrasted with longer-standing left/critical 'social control' analyses of public education that have stressed the role of schools in producing obedient workers, orderly

---

[2] 'Values clarification' exercises are often employed in decision-making, home economics, social studies and life-skills classes when ethical questions are being addressed. Pupils are asked to reveal their thoughts on the issue at hand, and to examine the values that underlie them. There is a focus on personal values rather than morality *per se*: pupils are told that *they must choose their own values* based upon their own feelings and needs. There is seldom any suggestion that values are right or wrong according to some over-arching standard, such as religious or legal norms. Somewhat confusingly, conservative critiques of public education sometimes allege that schools are *failing* to teach values. It appears that what is often being complained about, in this instance, is not that schools are truly bereft of values, but that they are teaching about equality, tolerance, inclusiveness, and diversity (etc.) in a child-centred manner, without reference to religious authority (Burke, 2004).

[3] Causal connections between secular instruction and alleged social problems are not established in any rigorous sense, but are asserted in an atmosphere of moral panic that reflects a generalized distaste for, and suspicion of, secular public culture.

citizens and well-disciplined subjects (Kearns & Collins, 2003; Baker, 1998; Hunter, 1996).

The perception that secular humanist ideas and values dominate public education, to the detriment of Christianity, has prompted claims that constitutional rights are being infringed. It has been contended that the state is promulgating a 'faith' through secular curricula and texts – a faith usually described as religious, but occasionally characterized as *anti*-religious. These claims have been used to place pressure on teachers, schools, and administrators to withdraw 'offensive' textbooks (e.g., those depicting same-sex parents) from classrooms and libraries, and to modify 'inappropriate' lessons and curricula (e.g., those suggesting that moral values are matters of personal opinion and choice).

Christian commentators also claim that genuine education *cannot* be neutral with respect to religion. It is argued that any comprehensive program of instruction, as opposed to mere technical training, 'inevitably rests on particular religious or metaphysical views regarding the nature of the good life and the good society' (Baer, 1998: 105). Public educators and policy-makers are said to be reluctant to acknowledge these qualities, preferring instead to portray secular schooling as uniquely rational, and non-coercive vis-à-vis religion. Such (mis)representations are seen to have deeply troubling and inherently ideological effects:

> What can advertise itself as neutral is often anything but, and 'implicit faith' positions, because they fail entirely to acknowledge their grounding as faith, can all too easily establish a hegemony against explicit faith traditions.... Until the necessarily 'implicit faiths' are acknowledged, explicit faiths are at a marked disadvantage in finding any place in the public sphere, including: politics, public education, and law itself (Benson, 2000: 521).

These comments highlight the view that the secularization of public life, and the concomitant 'confinement' of religious belief to the private realm, have handicapped Christianity and marginalized its believers. In this context, 'public life' encompasses aspects of civil society (e.g., the media and entertainment industries, which are perceived to be hostile to Christian values and families), as well as 'public services' provided by the state. Public schooling is a particular target for criticism, and in the more hyperbolic

arguments advanced by elements within the Religious Right, 'the plight of Christians who are not allowed to engage in organized religious exercises during instructional time or at school-sponsored events is equated with persecution inflicted by Hitler and Stalin' (Ravitch, 1999: 34).

Such claims reflect, in part, an underlying assumption that the moral world is a zero-sum game: that the state's refusal to endorse Christianity necessarily constitutes an affirmation of other faiths. In the Canadian context, Benson (2000: 531) writes of 'the exclusion of the most articulate, historically significant, and widely accepted traditions (the religions)' from governmental affairs, and the increasing dominance of a secular metaphysic. Similarly, critics in the United States have argued that the secular state is not religiously neutral, but rather promotes viewpoints that directly compete with and undermine traditional religion (Baer & Carper, 2000; see also Alley, 1992). Such thinking is reinforced by the notion that secularism is 'a reservoir of ultimate beliefs about ultimate things which stands in a continuum with conventional religious faiths' (McClay, 2000: n.p.).

These understandings break with the mainstream liberal view, advanced by such theorists as Robert Audi and John Rawls, that religious beliefs differ from secular ones (e.g., in the efficacy of free markets, or in the importance of personal fulfillment) because they are based upon *faith* in non-worldly authority, as opposed to *reason* (Feldman, 2000: 233; see also Berger, 2002; Chaplin, 2000). While secular humanist thinking includes a moral posture and expresses normative values, it differs from conventional religions in that it does not ground them in faith in the divine, spiritual or supernatural.[4] This distinction rests on a crucial liberal dualism: faith (i.e., religious belief) is understood to be private and a matter for personal conscience; reason is seen as the basis for public life and the conduct of public affairs. For example, the early liberal public sphere described by Habermas was a site of reasoned discourse from which particularistic concerns, including religion, were barred in order to facilitate consensus on common questions of truth and

[4] To this one could add that secular humanism is not associated with the types of practices and rituals (e.g., worship, adoration, confession, thanksgiving, and supplication) that characterize many organized religions.

justice. Part of what made this sphere historically unique, in Habermas' (1989: 20) analysis, was 'people's public use of their reason.' The exclusion of religious concerns was in keeping with liberal formulations which declared religion to be a matter of strictly private concern (Habermas, 1989: 90; see also Pateman, 1989: 101).

At first glance it may seem surprising that devout Christians would seek to deny or downplay this disjuncture between religious and secular belief systems. However, it may be precisely *because* religion is so central to their lives – to the extent that every human action and situation is viewed from a theological perspective – that many see religious perspectives having every right to occupy the public sphere. Their beliefs transcend all experiences, actions, times and places, without regard to the jurisdictional distinctions that are integral to liberal-legal orderings (e.g., public/private, state/non-state). In both Canada and the United States, courts have been called upon to address this tension, and in so doing to determine the constitutional place of both religious and secular perspectives in public education.

Secular Humanism in the Courts

Religiously-motivated concerns about secular humanist influences in North American public education arose in the late 1970s, and quickly came to be expressed in legal and constitutional terms. The purpose of this section is to examine the ways in which courts have responded to claims brought against secular schooling and the specific issues these cases have raised. Particular attention is paid to the *geographical* categories at stake, and their significance to judicial reasoning in four leading cases.

The U.S. Supreme Court has never heard a case in which secular humanism in public education has been the central issue. This said, it considered a number of pertinent themes in *Schempp*, which struck down organized prayer and Bible-reading in public schools (see Chapter 4). The majority pre-empted the charge that its ruling would effectively establish a 'religion of secularism' by claiming that it neither exhibited hostility towards religion, nor preferred 'those who believe in no religion over those who do believe.'[5] Instead, it

[5] *Schempp* at 225.

insisted the decision promoted governmental neutrality in matters of faith. In concurrence, Goldberg, J. was more equivocal. He claimed that an 'untutored devotion to the concept of neutrality can lead to ... a brooding and pervasive devotion to the secular and a passive, or even active, hostility to the religious.'[6] In dissent, Stewart, J. gave credence to the view that refusal to permit (Christian) religious exercises in schools constituted 'at the least ... government support of the beliefs of those who think that religious exercises should be conducted only in private.'[7]

The latter contention highlights the tendency, noted above, for the absence of governmental backing for Christianity to be equated with active state endorsement of an alternative creed.[8] It also serves as a reminder of one of the issues at stake in debates about religion in schools: the 'right' to have particular faith positions affirmed and respected in a key *public* forum. The Religious Right seeks to restructure the public sphere (and in particular, the activities and spaces of the state) so as to make it more supportive of the teachings of the conservative religious home. In seeking such change, conservative activists aim to restore Christianity to the pre-eminent place they claim it once had as the foundation for nation, law, and public morality. This thinking is particularly prominent in the United States – where there is a long history of belief, especially among evangelical Protestants, that the nation was ordained by God, and founded on Christian (or 'Biblical') principles – although similar claims are occasionally made in Canada.

Constitutional challenges to secular education in the United States have reached the Federal Courts of Appeal on several occasions, and at this level the claims of the Religious Right have invariably been rebutted. These decisions have turned in part on a

---

[6] *Schempp* at 306 (Goldberg, J., joined by Harlan, J., concurring).

[7] *Schempp* at 313 (Stewart, J., dissenting).

[8] A similar concern was raised five years later in *Epperson*. Black, J., concurring, contended that if the Establishment Clause required the state to be neutral vis-à-vis religion, then governmental bodies could not favour 'one religious or anti-religious view over another.' Yet the majority appeared to permit just this in allowing evolutionary theory – widely regarded as an 'anti-religious' doctrine – to be advocated in schools, especially when 'there [was] no indication that the literal Biblical doctrine of the origin of man [was] included in the curriculum...' (at 113).

refusal to accept the claim that secular humanism is a religion for the purposes of the First Amendment.[9] They have also depended on particular understandings of public and private space, and of the need to safeguard individual freedom of conscience from collective claims grounded in religious belief.

In *Smith v. Mobile County Board of School Commissioners*,[10] the 11th Circuit determined that it was not unconstitutional for schools to adopt textbooks that a group of religious parents and teachers claimed advanced secular humanist perspectives. It overturned an Alabama District Court ruling that enjoined use of books on the basis that they taught 'the student [to] determine right and wrong based only on his own experience, feelings and [internal] values.'[11] The Appeals Court determined that use of the contentious textbooks neither undermined conventional religious belief nor unconstitutionally promoted another faith. Instead it found that they had the legitimate purpose of advancing a secular curriculum, and the 'entirely appropriate secular effect' of promoting 'such values as independent thought, tolerance of diverse views, self-respect, maturity, self-reliance and logical decision-making.'[12] Furthermore, the texts were deemed to be religiously neutral: they did not convey 'a message of governmental approval of secular humanism or governmental disapproval of theism.'[13]

Underlying this reasoning was a particular conception of the public school as a legal, institutional, and pedagogical environment. The Court asserted that the school was properly organized 'on the premise that secular education can be isolated from all religious teaching' – a premise that enabled it to 'inculcate all needed temporal knowledge and also maintain a strict and lofty neutrality as to religion.'[14] The logical

---

[9] This key issue is somewhat complicated by the fact that the Supreme Court has never articulated 'a comprehensive test for determining the "delicate question" of what constitutes a religious belief for the purposes of the first amendment....' (*Mobile County* at 689).

[10] Data set case – see Table 1.

[11] *Smith v. Board of School Commissioners*, 655 F. Supp. 939 (S.D. Ala. 1987) at 986.

[12] *Mobile County* at 692.

[13] *Mobile County* at 690.

[14] *Mobile County* at 695.

corollary of this claim was that the advancement of religion properly occurred *elsewhere*: most obviously, within private homes and churches.

These notions of public and private space, and of the need to protect the individual from collective coercion, were given more detailed and explicit treatment in *Mozert v. Hawkins County Board of Education.*[15] In this Tennessee case, a group of public school pupils and their parents maintained that use of the *Holt* reader series in Grades 1-8 violated their right to Free Exercise. The plaintiffs, all of whom described themselves as born-again Christians, claimed that the texts sought to instil values and ideas contrary to their faith, including telepathy, pacifism, magic, feminism, and evolution. This situation was represented as coercive, since children were denied permission to opt out of reading the series, and as an intrusion into the privacy of family life, given the dissonance between the series' content and home teaching.

These arguments carried little weight with the Sixth Circuit Court of Appeals. It found that there was insufficient evidential or jurisprudential support for the notion that 'mere exposure to materials that offend one's religious beliefs creates an unconstitutional burden on the free exercise of religion.'[16] The plaintiffs testified that elements of the series '*could* be interpreted in a manner repugnant to their religious beliefs,'[17] but were unable to demonstrate that the assigned texts were themselves religious, or that that reading them involved the performance of a religious practice. Also missing from their argument was the critical element of *compulsion.* Contrary to the school prayer cases *Engel* and *Schempp*, there was no evidence that an objecting child was required 'to affirm or deny a religious belief or to engage or refrain from engaging in a practice forbidden or

---

[15] Data set case – see Table 1.

[16] *Mozert* at 1066.

[17] *Mozert* at 1062; original emphasis. This sentiment was sometimes expressed in anti-intellectual terms: parents objected to passages which required their children to contemplate moral issues, or exposed them 'to the feelings, attitudes and values of other students ... without a statement that the other views are incorrect and the plaintiffs' views are the correct ones' (*Mozert* at 1062). This led the Court to rule: 'It is clear that to the plaintiffs there is but one acceptable view – the Biblical view, as they interpret the Bible' (*Mozert* at 1064).

required in the exercise of a plaintiff's religion.'[18] The act of reading a text which discussed a broad range of values, social trends, and scientific and political concepts – absent any intention to indoctrinate, or to oppose or promote a religious viewpoint – was deemed constitutionally unproblematic. This situation was clearly distinguishable from the example of a Catholic, Jewish or atheist pupil being required (or otherwise pressured) to engage in devotional reading of the King James Bible – a form of state-compelled engagement in a religious exercise, contrary to personal belief.

The Court held that while some of the stories may have caused affront, this did not constitute an 'actual burden on the profession or exercise of religion.'[19] In concurrence, Boggs, J. suggested this logic also applied to non-devotional reading of the Bible.[20] Education by its very nature appears to require individuals to consider unfamiliar and challenging concepts. As one commentator has noted: 'exposure to disturbing ideas is strongly entrenched in First Amendment rhetoric as one of the shopping hazards in the marketplace of ideas, and to oppose this is an uphill battle' (cited in Keller, 2000: 574). From this view, it is inevitable that in the course of public education, pupils will encounter some texts and lessons that are consistent with humanist thinking, and others that are consistent with theistic religion.

Higher courts in the United States have held that public school lessons and materials are not rendered unconstitutional merely because they contain metaphysical viewpoints which some religious parents deem offensive or threatening. Schools are places in which a civil tolerance for the multitude of ideas and practices that characterize a pluralistic society must prevail.[21] Moreover, while the judiciary has elsewhere upheld the right of pupils to be exempted from certain public school activities on religious grounds, 'it has not been inclined to allow restrictions on the secular curriculum to satisfy parents' religious preferences' (McCarthy, 2001: n.p.). Indeed, the U.S. Supreme Court has held

---

[18] *Mozert* at 1069.

[19] *Mozert* at 1068.

[20] *Mozert* at 1080 (Boggs, J., concurring).

[21] *Mozert* at 1068-1069.

that 'it violates the Establishment Clause to tailor a public school's curriculum to satisfy the principles or prohibitions of any religion.'[22]

This reasoning is consistent with the notion that, both constitutionally and epistemologically, secular and religious thought are distinct. It upholds the liberal view that the state and its services are properly based on secular, and not religious, principles. Religious citizens may not use public schools to promote or reinforce their faith. In this context, the constitutional right to Free Exercise is a negative freedom that does not entitle individuals to place positive demands on government resources.

In Canada, the most high-profile cases concerning the nature of secular schooling centred on the decision of the public school board in Surrey, B.C. not to approve three books portraying same-sex parenting as resource materials for Kindergarten and Grade One classrooms. In *Chamberlain I*,[23] a Chambers judge of the British Columbia Supreme Court ordered the Board to reconsider the decision on the grounds that it contradicted s.76 of the *School Act 1996*.[24] This provision required public schools to 'be conducted on strictly secular and non-sectarian principles' and to inculcate 'the highest morality', while refraining from teaching any 'religious dogma or creed'. Justice Saunders found that those trustees who declined to approve the books did so because of religiously-motivated complaints from parents.[25] Furthermore, at least one trustee's decision 'was significantly influenced by personal religious considerations.'[26] For these reasons, she declared that the board had failed to operate in a strictly secular manner.

The board argued that it had received a large number of submissions from parents outlining their religious objections to same-sex relationships, and that it was obliged to take them into account, as its authority was delegated by parents,[27] and could only be

---

[22] *Epperson* at 106.

[23] Data set case – see Table 1.

[24] *School Act*, R.S.B.C 1996, c. 412, s. 76(1).

[25] *Chamberlain I* at para. 93.

[26] *Chamberlain I* at para. 94.

[27] *Chamberlain I* at para. 48.

exercised with their agreement (or at least majority consent).[28] The decision was also consistent with board members' views that public schools should be places which respect the pre-eminent role of family in developing children's attitudes and values. Ethical and religious issues, including same-sex parenting, were deemed topics best left 'for parents to deal with at home.'[29] By confining such issues to the private sphere, the board sought to affirm parental religious freedom and minimize the dissonance between home and school.[30]

Saunders, J. dismissed the board's claims. Section 2(a) of the *Charter* was deemed to provide no defence to a decision based on religious belief, since freedom *of* religion included freedom *from* religion for non-believers and dissenters. While it was important for school boards to consult with their communities, this could not lead to the coercive imposition of particular religious values upon the public education system. It followed that the public school was required to be 'a place independent of religious considerations.'[31] Moreover, schools were required by statute to inculcate 'the highest morality.' For Saunders, J. this meant considering the pluralistic values embodied in the *Charter* (particularly the s. 15 right to equal treatment irrespective of sexual orientation), and importing them into the moral standard to be applied.[32]

In addition to emphasising *Charter* values, the decision stressed the provincial context for educational decision-making. This was held to include 'the history of schools in British Columbia as being beyond overt church or religious intervention or influence' as well as 'the increasingly pluralistic nature of modern British Columbia.'[33] The former helped to

---

[28] *Chamberlain I* at para. 86: '...one of the four trustees who voted in favour of the motion, deposed that prior to the April 24, 1997 School Board meeting she had received hundreds of calls from members of the Surrey community, the vast majority of whom supported the ... resolution [not to approve the books].'

[29] *Chamberlain I* at para. 46.

[30] *Chamberlain I* at para. 79: The board submitted that 'the books in issue here, presenting families with same-sex parents as normal and same-sex parents as not "bad", are morally contentious, may tend to confuse children and may interfere with parental education on religious and moral matters.'

[31] *Chamberlain I* at para. 102.

[32] *Chamberlain I* at para. 81.

[33] *Chamberlain I* at para. 78.

establish the meaning of the term 'strictly secular', while the latter suggested that a provincial consensus on religious claims was increasingly improbable. Accordingly, governmental decisions grounded in religious reasoning were likely to fracture public opinion, coerce dissenters, and create an insider/outsider dynamic.

Justice Saunders' ruling alarmed conservative commentators. The decision was seen to infringe on the rights of religious parents to direct their children's upbringing, and to send a more general message that government institutions required to operate on secular grounds could not countenance arguments motivated by religious belief. Yet, Benson and Miller (2000: n.p.) argued, '[n]othing in the *Charter*, democratic theory or principled pluralism requires that atheism be preferred to religiously informed moral positions in matters of public policy.'

The British Columbia Court of Appeal essentially adopted such reasoning in its unanimous decision to overturn the original ruling. In *Chamberlain II*,[34] it ruled that while s. 76 'precludes any religious establishment or indoctrination associated with any particular religion in the public schools ... it cannot make religious unbelief a condition of participation in the setting of the moral agenda.'[35] Justice Saunders' interpretation, which made school boundaries impermeable to religious influence, was also deemed to be inconsistent with the *Charter*.

Chamberlain II turned on an understanding of the public/private distinction different from that underpinning the earlier decision. The Court acknowledged the practical difficulties inherent in maintaining a 'strict separation' of religious values and public life. Noting that moral positions are derived from multiple sources, it asserted: '[t]here is no bright line between a religious and a non-religious conscience. Law may be concerned with morality but the sources of morality in conscience are outside the law's range and should be acknowledged from a respectful distance.'[36] Given this limitation, a clear boundary between religious belief and public schools could not be sustained. Henceforth, moral

---

[34] Data set case – see Table 1.

[35] *Chamberlain II* at para. 31.

[36] *Chamberlain II* at para. 20.

positions were to be 'accorded equal access to the public square without regard to religious influence. A religiously informed conscience should not be accorded any privilege, but neither should it be placed under a disability.'[37]

Chamberlain II suggested that religious and non-religious arguments were equivalent, for constitutional purposes, and that no free society could permit the former to be banished from the public sphere. Indeed, it specifically stated that '[s]uch a disqualification would be contrary to the fundamental freedom of conscience and religion set forth in s. 2 of the *Charter*, and the right to equality in s. 15. It would negate the right of all citizens to participate democratically in the education of their children....'[38] Moreover, the Court held that a pluralistic tolerance for religious perspectives was consistent with statutory requirement of 'strictly secular' schooling. These words were interpreted as 'intended to reinforce the non-denominational character of the public schools,' rather than as 'requir[ing] religious unbelief.'[39]

The Court also addressed the imperative for schools to teach 'the highest morality.' It surmised that while this code could 'originate in religious reflection,' it was required to 'stand independently of its origins to maintain the allegiance of the whole of society including the plurality of religious adherents and those who are not religious.'[40] The Court was in no doubt that an ethic of such broad appeal existed: 'the highest morality' referred to 'the idea of the inherent worth and dignity of each individual human person.'[41] This was held to be an insight of Christianity, as well as the first principle underlying the *Charter* and Canadian public life.[42] Such thinking extending the reasoning of *Big M*, in which the Supreme Court of Canada held that *Charter* rights were to be interpreted in light of the 'political and philosophic traditions' underpinning them.[43] Within public

---

[37] *Chamberlain II* at para. 28.

[38] *Chamberlain II* at para. 31.

[39] *Chamberlain II* at para. 26.

[40] *Chamberlain II* at para. 35.

[41] *Chamberlain II* at para. 13.

[42] *Chamberlain II* at paras. 13, 35.

[43] *Big M* at 361.

schools, it meant that religious indoctrination, and discrimination on the grounds of sexual orientation, were impermissible,[44] but community members seeking input into decision-making could not be treated differently on the basis of whether their views emanated from a religious or non-religious conscience.[45]

Thus, the notion that individuals need not 'check' their religious beliefs at the door to the *polis* is not necessarily as inclusive as it first appears. First, views that derogate from the basic human dignity of others cannot be countenanced. Secondly, *Chamberlain II* suggested that the freedom to contribute to the decisions of the collective was intended for adults only. The Court was primary concerned with advancing the right of *parents* to participate in public debate and in the education of their children.[46] It emphasized that under Article 18(4) of the *International Covenant on Civil and Political Rights*, to which Canada is a party, parents have the right 'to ensure the religious and moral education of their children in conformity with their own convictions.'[47] This reference to international law reinforced the finding, based upon federal and provincial standards, that no blanket prohibition could be placed on religious parents entering the public realm in order to advance or safeguard the moral education of their children.

---

[44] *Chamberlain II* at 36: 'It is clear on the authorities that human dignity and *Charter* principles prohibit discrimination on grounds of sexual orientation. Any doubts on that question have been laid to rest by the decisions of the Supreme Court of Canada in *Egan v. Canada*, [1995] 2 S.C.R. 513 and *Vriend v. Alberta*, [1998] 1 S.C.R. 493.'

[45] *Chamberlain II* at para. 40. The case for countenancing religious arguments in debates over public education has also been made in the United States. In Edwards, Justice Scalia accepted that a Louisiana law mandating the teaching of creationism was primarily motivated by religious concerns, but proceeded to argue that religious thought had a place within the legislative process:

> Our cases in no way imply that the Establishment Clause forbids legislators merely to act upon their religious conviction. We surely would not strike down a law providing money to feed the hungry or shelter the homeless if it could be demonstrated that, but for the religious beliefs of the legislators, the funds would not have been approved. ... To do so would deprive religious men and women of their right to participate in the political process (Edwards at 615 (Scalia, J., joined by Rehnquist, CJ., dissenting)).

[46] *Chamberlain II* at para. 58: The Court opined (without citing any authority) that 'K-1 children for the most part are too young to form critical normative judgments. They simply accept the variety around them as fact and welcome all the love and care they receive.' See also paras. 59-61.

[47] *International Covenant on Civil and Political Rights*, 999 U.N.T.S. 171 (entered into force March 23, 1976); cited in *Chamberlain II* at para. 60.

The exclusive focus on the rights of parents may be explained in part by the fact that the books were proposed for use in kindergarten and grade one classes. Given their legal and social construction as dependents, and limited cognitive and expressive abilities, it is difficult to separate the rights of five- and six-year olds from those of their guardians. This appears particularly true with respect to religion. First, there is a widespread social tendency to affix familial religious affiliations to even very young children. Such labelling arguably 'presuppose[s] the success of parental influence' (Dawkins, 2001: n.p.),[48] and implies that the young have no independent interest in being educated in a diversity of religious ideas and conscientious viewpoints. Secondly, the courts have defined freedom of religion as encompassing the right of parents to rear their children according to their religious beliefs.[49] The decision in *Chamberlain II* lent support to the view that the only liberty at stake in the case was that of parents to control their children's upbringing.

Chamberlain II presents challenges for secular education. If religious views are legitimate in debates over school policy, it follows that sometimes they will carry the day (as indeed originally occurred in Surrey). Accordingly, the public school environment will be structured to some degree by religious views that not all parents and educators share. Some commentators would herald this situation as an affirmation of the equality of religious and non-religious faith claims, and as a long-overdue refutation of the view that liberal democracy must be 'protected' from religious beliefs through 'the two-fold strategy of secularizing politics and privatizing religion' (Chaplin, 2000: 625-626). Others would insist that it introduces a divisive and destabilizing influence into school

---

[48] Dawkins adds: 'To slap a label on a child at birth – to announce, in advance, as a matter of hereditary presumption if not determinate certainty, an infant's opinions on the cosmos and creation, on life and afterlives, on sexual ethics, abortion and euthanasia – is a form of mental child abuse.'

[49] See, e.g., *Children's Aid Society*. While the majority in this case espoused an extensive notion of parental rights, Iacobucci and Major, JJ., (concurring) sought to place them within certain boundaries. They agreed that s. 2(a) of the *Charter* offered parents broad rights to 'educate and rear their child in the tenets of their faith,' but insisted that these could not extend to 'practices which threaten the safety, health or life of the child' (at 435). This was in part because children, too, had a right to freedom of conscience 'which arguably includes the right to live long enough to make one's own reasoned choice about the religion one wishes to follow as well as the right not to hold a religious belief' (at 437).

governance which inevitably leads to coercion of non-believers and state endorsement of majoritarian religious beliefs.

Such disagreement underscores the lack of societal consensus on the rightful place of religion in public education, and in public life more generally. Indeed, the Surrey dispute provoked considerable controversy in British Columbia when what was at stake was the *refusal* of a single school board to *recommend* three books – albeit books whose content represented a cultural touchstone. Should religious views, whatever their relationship to the 'inherent dignity of the individual,' come to play a major role in determining the content of an entire school library, or the nature of the provincial science curriculum, it seems reasonable to predict that the conflict will be still more intense.

In summary, constitutional objections to secular public education have achieved little formal success. Higher courts – which earlier played leading roles in *mandating* the secularization of public schooling – have been unwilling to countenance the idea that instruction which does not advance religious themes and views infringes upon the liberties of believers. The dominant judicial view is that secular instruction is religiously neutral and non-coercive. The corollary of such thinking is that faith has been increasingly confined to a private sphere centred on the home. Dissonance between the religious and moral teachings of the home, and the values promoted in the public school, has been deemed constitutionally unproblematic.

Secular education has also been interpreted socially *necessary* – not only to protect pupils from coercive inculcation or indoctrination in religious precepts, but also to ensure that they receive an academically rigorous education, as opposed to one that merely reinforces parental thinking. Such reasoning evinces a level of trust in centralized and professionalized educational policy making, and has the effect of delimiting local democracy and parents' roles in shaping schooling.[50] In this respect it is noteworthy that *Chamberlain II*, the only leading case in which the claims of conservative religionists

[50] In the United States, abolition of the federal Department of Education – in the name of 'returning educational control to the local level' – has been a leading goal of the Religious Right (Jeffries & Ryan, 2001: 346).

were accepted, was also a victory for local control. More commonly, court decisions in this area have upheld the trends of centralization and secularization.

Science and Schooling: Evolution in the Classroom

Of the many debates at the interface of religion and public education, one of the longest-running and most bitterly-fought centres on evolution. The inclusion of evolution in school curricula in the late nineteenth century was the first issue to disturb the Protestant consensus around state education (Fraser, 1999: 121; Partington, 1990: 183), and a vocal subset of fundamentalists continues to oppose it vigorously.[51] Whereas most Christians have adopted liberal and allegorical readings of Genesis, this group maintains a literal interpretation that is inconsistent with the evolution of species, and the existence of an Old Earth. In a recent *Nature* article, Lerner (2000: 288-289) outlines their three primary objections:

- The scientific consensus that the evolutionary process has unfolded over several billion years conflicts with the biblical genealogy which suggests that the Earth is only several thousand years old.
- The premise that all life on Earth evolved from a common ancestor is seen to countermand the biblical message that God created humankind separately, and 'in His image.' The notion that humans have evolved from other species under competitive conditions is also thought to condone self-interested and animalistic behaviour.[52]
- The notion that evolution is a natural process, which by definition does not require divine intervention, contradicts biblical accounts of the suspension of natural law and the creation by miracle, or fiat, of new forms of life.

Inconsistencies between evolutionary science and the literal message of the Bible have led many fundamentalists to contend that the former 'leads children away from God and towards a life with no morals, ethical precepts, or divine guidance' (Scott, 1992: 139).

---

[51] The term 'fundamentalism' is derived from *The Fundamentals*, a multi-volume text published between 1910 and 1915. Interestingly, it included several essays which argued that evolution did not conflict with theism, as God's intelligence and purpose could be assumed to be immanent in the evolutionary process (Fraser, 1999: 117).

[52] The historical (mis)application of the notions of natural selection and 'survival of the fittest' to human social organization (e.g., in the doctrines of Social Darwinism and eugenics) is seen to provide support for this view.

They have asserted that the promotion of evolution in schools is inequitable, hostile to religion, and socially deleterious. Such claims reflect not only a belief in biblical inerrancy, but also the view that Christian faith and acceptance of evolution are mutually exclusive – 'that one must either accept the literal interpretation of Genesis or else believe in the godless system of evolution.'[53]

These arguments have had a degree of influence over public policy, particularly in the United States. In the 1920s, for example, coordinated campaigns to remove evolution from public schools saw legislation to this effect introduced in 20 States (Bjorklun, 1988: 192). In Tennessee, a 1925 law made it unlawful 'to teach any theory that denies the story of the Divine Creation of man, as taught in the Bible, and to teach instead that man has descended from a lower order of animals.'[54] This led to the celebrated trial of John Scopes, a high school teacher who had taught from a biology textbook that included a section on Darwin and natural selection.[55] It resulted in a conviction that was subsequently over-turned on a technicality, thereby denying the newly-formed American Civil Liberties Union (ACLU) the opportunity to seek a finding of unconstitutionality.

Part of what made *Scopes* so dramatic was that it entailed a clash of ideologies underpinned by a fundamental socio-cultural and geographical schism: the defendant was backed by the New York-based ACLU, and many leading scientists from Northern colleges; the prosecution was led by prominent Southern fundamentalists. Thus, the trial pitted two points of view against each other: 'one urban, cosmopolitan, heterogeneous ... the other rural, homogeneous, fundamentalist, and traditional' (Church, 1976: 352; cited in Bjorklun, 1988: 192). Unsurprisingly, it also provoked accusations of 'Yankee meddling' in the affairs of Tennessee – a State where there was strong support for the

---

[53] *McLean v. Arkansas Board of Education*, 529 F.Supp. 1255 (E.D. Ark., 1982) at 1266 [hereinafter *McLean*].

[54] The notion that *Homo sapiens* and other primates share a common ancestor in the relatively recent evolutionary past has consistently been distorted by anti-evolutionists to say that humans descended from modern monkeys (hence the use of the term 'monkey law' to describe legislation such as Tennessee's).

[55] *Scopes v. State*, 154 Tenn. 105 (1927) [hereinafter *Scopes*].

view that schools supported at taxpayers' expense should not teach a doctrine contrary to the Bible (Larson, 1997: 221; Ginger, 1958: 133).

In the almost 80 years since *Scopes*, debate over the teaching of evolution in the United States has continued, particularly in the South, where fundamentalism is particularly influential. While the issue has periodically emerged in other countries,[56] only in the United States has it been the subject of continuous, mainstream debate. In Gould's (1999: 129-130) somewhat acerbic words:

> This controversy is as locally and distinctively American as apple pie and Uncle Sam. No other Western nation faces such an incubus as a serious political movement (rather than a few powerless cranks at the fringes). The movement to impose creationism upon public school curricula arises from a set of distinctively American contrasts, or generalities expressed in a peculiarly American context: North versus South, urban versus rural, rich versus poor, local or state control versus federal standards.

Gould (1999: 130) goes on to note that this situation is, in part, a product of the United States' unique religious milieu, which encompasses many large Protestant denominations committed to literal interpretation of the Bible. Only in such an environment, he suggests, could the creation-evolution debate have achieved such political, cultural and legal significance.[57]

Evolution & Creationism in the Courts

This section reviews three leading U.S. cases that addressed the evolution/creationism controversy in the context of public school instruction, and raised a series of questions within the broad rubric of the public/private divide. What is the proper relationship between personal religious belief and public education? Can citizens bring religious beliefs to bear in public policy making? On what basis should distinctions be made

---

[56] For example, in 1995 a complaint was brought against the school board in Abbotsford, British Columbia for allowing creationism to be taught in science class (Sweet, 1997: 208-209). More recently, controversy erupted in the U.K. when a publicly-funded Christian high school was found to be to teaching Young Earth Creationism (consistent with the literal Biblical account) as a scientific principle, and presenting it as the best explanation of planetary and biological origins (Dawkins, 2002).

[57] In Catholic, Jewish and liberal-Protestant settings, in which literalist Biblical interpretation is generally eschewed, the issue is of little significance.

between secular ('rational/scientific') and religious ('faith-based') thought be made? *Prima facie* the cases turned on the issue of whether governmental bodies could act upon particular religious beliefs about planetary and biological origins, or make decisions that had the purpose or effect of advancing them. In addition, two of the cases were centrally concerned with the inherently geographical question of *where* (i.e., in what place) decisions about evolution and creationism in schools should be made.

In 1968, the U.S. Supreme Court handed down its decision in *Epperson v. Arkansas*,[58] ruling that an anti-evolution law adopted in Arkansas 40 years earlier was unconstitutional. The statute in question made it unlawful for a teacher in any State-supported school or university to teach evolutionary theory, or to use a text that incorporated it. When the school board in Little Rock adopted a biology textbook that included a chapter on evolution, teachers (including the plaintiff, Susan Epperson) found themselves required by their employer to commit a criminal act. No prosecution was actually brought in this case; rather, Epperson – with the support of the ACLU – brought suit alleging a breach of the First Amendment.

The majority decision written by Fortas, J. found that the statute 'was a product of the upsurge of "fundamentalist" religious fervor of the twenties.'[59] In the absence of evidence that it could be justified on any grounds other than the religious views of some citizens, it was struck down under the Establishment Clause. What the statute lacked was a legitimate secular purpose: '[it] 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.'[60] In the Court's view, this made the issue one of federal concern, and not merely local interest:

> By and large, public education in our Nation is committed to the control of state and local authorities. Courts do not and cannot intervene in the

---

[58] Data set case – see Table 1.

[59] *Epperson* at 98.

[60] *Epperson* at 103.

> resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values. On the other hand, '[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools,' *Shelton v. Tucker*, 364 U.S. 479, 487 (1960). As this Court said in *Keyishian v. Board of Regents*, the First Amendment 'does not tolerate laws that cast a pall of orthodoxy over the classroom.' 385 U.S. 589, 603 (1967).[61]

For the majority, there was no doubt that constitutional rights extended into public school classrooms, or that intervention by the federal Courts was appropriate when these rights were threatened – for example, by the local majorities of which classical liberalism is so suspicious. In concurrence, Black, J. criticized the majority for 'leap[ing] headlong into the middle of the very broad problems involved in federal intrusion into state powers' and sought a role for the federal government that was more respectful of localized decision-making and States' rights. He also suggested that a secular purpose for the Arkansas legislation could be divined: 'there is no reason I can imagine why a State is without power to withdraw from its curriculum any subject deemed too emotional and controversial for its public schools.'[62] The 'emotional' and 'controversial' qualities of evolution were said to stem from its 'anti-religious' nature and 'uncertain' scientific status.[63] Nevertheless, he suggested that the statute should be struck down, as it was unconstitutionally vague: 'a teacher cannot know whether he is forbidden to mention Darwin's theory at all or only free to discuss it as long as he refrains from contending that it is true.'[64]

The Court's decision in *Epperson* represented a major step in the secularization of U.S. public education. Extending the logic of *Engel* and *Schempp*, which forbade school-organized religious *practices*, it ruled that religious concerns could not structure *curricula*: '[T]he State may not adopt programs or practices in its public schools or

---

[61] *Epperson* at 104-105.

[62] *Epperson* at 113 (Black, J., concurring).

[63] *Epperson* at 113 (Black, J., concurring). In a statement underscoring his failure to comprehend the contingency of all scientific knowledge, Black, J. contended that 'perhaps no scientist would be willing to take an oath and swear that everything announced in the Darwinian theory is unquestionably true' (at 114).

[64] *Epperson* at 112 (Black, J., concurring).

colleges which "aid or oppose" any religion. ... [The First Amendment] forbids alike the preference of a religious doctrine or the prohibition of theory which is deemed antagonistic to a particular dogma.'[65] *Prima facie*, the decision transformed public schools into places that offered secular instruction independent of religious concerns.

In response to *Epperson*, religious critics of evolution reworked their arguments. Opposition that had hitherto been explicitly theological sought to attain scientific status. It was contended that strong empirical evidence could be found for the intelligent design of species and their sudden emergence in the relatively recent past: 'a factual world that just happens to correlate perfectly with the literal pronouncements of the Book of Genesis' (Gould, 1999: 140). These claims, developed almost entirely by lay fundamentalists, as opposed to professional scientists,[66] formed the basis of 'creation science'. Proponents of this explanation for life's origins proceeded to argue that it should be taught in public schools alongside evolutionary theory.

Subsequently, Arkansas and Louisiana adopted 'equal time' laws that required schools to counterbalance lessons on evolution with instruction in 'creation science'. Arkansas' *Balanced Treatment for Creation-Science and Evolution-Science Act 1981*[67] was the first to be challenged under the Establishment Clause. In *McLean*, the Federal District Court found that the Act lacked a secular purpose: it was 'simply and purely an effort to introduce the Biblical version of creation into the public school curricula.'[68] At numerous points in the ruling (subsequently published verbatim in *Science*), the Court refuted the claim that creationism was rational and scientific: it depended upon supernatural intervention, could not be explained by reference to natural law, was not testable, and was

---

[65] *Epperson* at 106-107; citing *McCollum* at 225.

[66] For scientists such as Gould (1999: 142-143) '"creation science" is nothing but a smoke screen, a meaningless and oxymoronic phrase invented as sheep's clothing for the old wolf of Genesis literalism, already identified in the *Epperson* case as a partisan theological doctrine, not a scientific concept at all....'

[67] *Balanced Treatment for Creation-Science and Evolution-Science Act*, Ark. Stat. Ann. @ 80-1663 et seq. (1981).

[68] *McLean* at 1264.

not falsifiable.[69] This decision envisioned a clear boundary between secular and religious thought that mapped onto the public/private distinction: evolution was a reasoned scientific principle that could be taught in public schools; creationism was a faith-based perspective properly confined to the private sphere of home, church, and individual conscience.

In *Edwards v. Aguillard*,[70] the U.S. Supreme Court struck down a Louisiana statute nearly identical to that at issue in *McLean*.[71] The majority determined that the true goal of the legislation was 'to provide persuasive advantage to a particular religious doctrine that rejects the factual basis of evolution in its entirety,'[72] and dismissed as a 'sham' the stated purpose of protecting academic freedom.[73] The Act further violated the Establishment Clause by endorsing the religious viewpoint that a supernatural being created humankind.[74]

This decision was based on an understanding of public schools as places in which First Amendment rights not only applied, but required special protection – an idea that had earlier been invoked in *Epperson*.[75] This requirement was due to both the private nature of religion and the coercive qualities of compulsory public education:

> The Court has been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools. 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

---

[69] *McLean* at 1268-1269: 'The creationists' methods do not take data, weigh it against the opposing scientific data, and thereafter reach ... conclusions.... Instead, they take the literal wording of the Book of Genesis and attempt to find scientific support for it.'

[70] Data set case – see Table 1.

[71] *Balanced Treatment for Creation-Science and Evolution-Science in Public School Instruction Act (Creationism Act)*, La. Rev. Stat. Ann. 17:286.1-17:286.7 (West 1982).

[72] *Edwards* at 592.

[73] *Edwards* at 587.

[74] *Edwards* at 591-597.

[75] *Epperson* at 104-105.

> of the student and his or her family. Students in such institutions are impressionable and their attendance is involuntary.[76]

Such reasoning provided Supreme Court support for the view that public schools are required to advance secular knowledge, irrespective of its perceived consistency, or lack thereof, with religious viewpoints. The concerns of religious objectors were trumped by the First Amendment: under the Establishment Clause, government had no legitimate interest 'in protecting particular religions from scientific views "distasteful to them."'[77] Indeed, public schools that had modified secular curricula or lessons in response to religious objections were portrayed as *intruding* into the private sphere of familial belief and individual conscience (not as protecting it, as some opponents of evolution argue). The Court's decision reinforced the view that the First Amendment singles out religion for special disadvantage vis-à-vis non-religious thought and practices in public (governmental) contexts, as well as the liberal notion that religion's claims on the public sphere must be circumscribed in order to protect individual liberty. Such thinking stands opposed to the notion of 'formal neutrality' – as adopted in *Chamberlain II* – which holds that 'religion and nonreligion should be treated equally under the law – that religion should receive neither preference nor disadvantage' (Conkle, 2000: 2).

The concurring and dissenting opinions in *Edwards* turned on different understandings of the appropriate place in which decisions about evolution and creation, and public school curricula more generally, should be made. Powell, J. sought to narrow the implications of the majority's ruling in a concurring opinion that affirmed 'the traditionally broad discretion accorded state and local school officials in the selection of the public school curriculum.'[78] This suggested that judicial intervention to uphold constitutional rights in public schools was to be the exception, restricted to the most flagrant breaches, rather than the norm. Remedial action was appropriate in this case, however, because it involved

---

[76] *Edwards* at 583-584; emphasis added.

[77] *Edwards* at 591; citing *Epperson* at 107.

[78] *Edwards* at 597 (Powell, J., joined by O'Connor, J., concurring).

a State legislature 'structur[ing] the public school curriculum in order to advance a particular religious belief.'[79]

The dissent written by Scalia, J. was still more deferential towards localized decision-making: it made the case for respecting the deliberations of State legislators, and warned against 'impugning' their motives.[80] In addition, it held that any governmental decision for which *a* secular position could be divined should survive the purpose prong of the *Lemon* test.[81] The Louisiana Legislature's adoption of balanced-time legislation was deemed to be one such decision: on the basis of evidence presented by 'creation scientists,' the law-makers 'wanted to ensure that students would be free to decide for themselves how life began, based upon a fair and balanced presentation of the scientific evidence.'[82] The dissent concluded that the people of Louisiana were 'quite entitled, as a secular matter, to have whatever scientific evidence there may be against evolution presented in their schools.'[83]

Such minority reasoning aside, *Edwards* appeared to be a decisive victory for critics of 'creation science' and its intrusions into public education. However, the decision did not translate into great advances for evolution 'at the chalk face'. Unable to employ legislative means to prohibit the teaching of evolution, or to insist that it be 'balanced' at every turn with creationism, opponents began to place considerable pressure on educators and policy makers to de-emphasize the importance of evolution to the natural sciences, to present it as 'just a theory' (i.e., as a tentative hypothesis),[84] and/or to omit the topic from

---

[79] *Edwards* at 599 (Powell, J., joined by O'Connor, J., concurring). As the concurrence explained at 605: 'In the context of a challenge under the Establishment Clause, interference with the decisions of these authorities is warranted only when the purpose for their decisions is clearly religious.'

[80] *Edwards* at 627, 611 (Scalia, J., joined by Rehnquist, C.J., dissenting).

[81] *Edwards* at 626-627 (Scalia, J., joined by Rehnquist, C.J., dissenting).

[82] *Edwards* at 627-628 (Scalia, J., joined by Rehnquist, C.J., dissenting). No opposing viewpoints were heard: ironically, Louisiana legislators made no attempt to give the issue 'balanced treatment.'

[83] *Edwards* at 634 (Scalia, J., joined by Rehnquist, C.J., dissenting).

[84] The claim that evolution is 'a theory' and not 'a fact' confuses the common and scientific meanings of these terms. The National Academy of Sciences (1998: 127) states: 'In science, a theory is not a guess or an approximation but an extensive explanation developed from well-documented, reproducible sets of experimentally-derived data from repeated observations of natural processes'. A scientific 'fact' is not a theory proven beyond doubt, but rather 'an observation that has been confirmed over and over' (1998: 6).

classroom discussion altogether. These campaigns achieved considerable success. For example, in August 1999 the Kansas School Board of Education voted to remove evolution (and the 'big bang' theory) from State-wide testing.[85]

More generally, State-wide science standards – which form the basis for lesson plans, public examinations, and textbooks – have been modified in response to anti-evolution pressures. A recent survey found that only 10 State standards do an 'excellent' or 'very good' job of presenting evolution, while 21 are 'good' or 'satisfactory', and 19 are 'unsatisfactory' or worse, and 'essentially useless for the purposes of teaching evolution' (Lerner, 2000: 287).[86] The author proceeded to argue that these standards should reflect the consensus of expert opinion, and be insulated in large measure from local democracy.[87] This was due not only to the specialized skills and knowledge of experts, but also to the vital social role of schools in conveying scientific knowledge:

> ...a school district or a state cannot argue that it is a simple matter of democracy to advocate a scientifically unacceptable opinion because a majority or vocal minority of citizens holds that opinion. One can understand the desire of parents to raise their children to think as they do. But if the parents have a poor understanding of the content and methods of science, [the school] will provide the means to expose their children to expertise beyond their own (Lerner, 2000: 290).

In this vision, the public school has a mandate to advance secular knowledge, irrespective of community and familial beliefs. It mirrors arguments made by defenders of state education in debates over secular humanism, and lends support to the liberal notion that children have an independent interest in receiving a thorough education. It also implies trust in the rationality and objectivity of contemporary scientific endeavour. By contrast,

---

[85] This decision generated international publicity and was ultimately reversed in February 2001 following a Board election.

[86] The grades were determined by the extent to which the standards conceded to anti-evolution pressures by ignoring biological evolution in general (or human evolution in particular), omitting the word 'evolution' from discussion, deleting references to an Old Earth, and/or incorporating disclaimers that pronounced evolution to be 'a theory and not a fact'.

[87] Gould (1999: 129) observes persistent campaigns on the part of creationists for 'the setting of curricula by local sensibilities or beliefs (or just by those who make the most noise or gain territorial power), whatever the state of natural knowledge, or the expertise of teachers.'

many anti-evolutionists suggest that evolution is not 'scientific' at all, but rather is best characterized as myth, faith or religion.

The view that evolution is a religious perspective, and should be excluded from public schools on this basis, was advanced before the Ninth Circuit Court of Appeals in *Peloza v. Capistrano Unified School District.*[88] John E. Peloza, a high school biology teacher, brought a suit against his employer for forcing him 'to proselytize his students to a belief in evolutionism under the guise of [its being] a valid scientific theory [as opposed to] an historical, philosophical and religious belief system....'[89] Peloza was of the view that evolution was one of 'two world views on the subject of the origins of life and of the universe' – the other being creationism, which was also a religious belief system – and claimed that he did not wish to promote either in his biology classes.[90]

In a per curium decision, the Court dismissed as 'patently frivolous' the claim that the school district, in mandating instruction in evolution, had established a religion.[91] It noted that neither the Supreme Court nor the Ninth Circuit had ever ruled that evolution or secular humanism were religions. Indeed, *Edwards* was deemed to have 'held unequivocally that while the belief in a divine creator of the universe is a religious belief, the scientific theory that higher forms of life evolved from lower forms is not.'[92]

In *Peloza*, as in *Epperson* and *Edwards*, the dominant judicial vision of the public school was of an environment that advanced *secular* knowledge as a *public good.* All three cases sought to insulate the school, and the science curriculum in particular, from religious beliefs, including those that were advanced through democratic mechanisms. Religion

---

[88] Data set case – see Table 1.

[89] *Peloza* at 519; internal quotation marks omitted.

[90] *Peloza* at 519. The claim that there are 'two models' for explaining the origins of life is frequently advanced by creationists, and arguably implies that evolution and creationism have roughly equivalent explanatory power. Evolution and creationism have been identified as 'equally religious' (as argued in *Peloza)* and as 'equally scientific' (as claimed in *McLean* and *Edwards*). This dual-model approach overlooks the existence of more than one religious account of creation (National Academy of Sciences, 1998: 9).

[91] *Peloza* at 520.

[92] *Peloza* at 521. The Court also noted that '[a]dding "ism" does not change the meaning nor magically metamorphose "evolution" into a religion.'

was seen as private, particularistic, and out of place in a public education system that was necessarily open to pupils from diverse backgrounds. For supporters, such decisions were victories for individual liberty, scientific integrity, and governmental neutrality in matters of religion. For opponents, they inhibited the free exercise of religion and exemplified governmental hostility towards Christianity.

Conclusion

The case studies examined in this chapter are matters of ongoing public debate and controversy. In both instances, the stakes are high: battles fought out over secular humanism and evolution/creationism are also disputes over intellectual freedom, the spatial allocation of political power, the rights of parents, the role of religion in public life, and the future of public education. Also at issue, in a very fundamental sense, is the type of place the public school should be. The courts, for their part, have generally articulated a vision of the school as a bounded environment, ideologically and spatially separate from the world of religious belief. In so doing, they have contributed to both the privatization of religion and the secularization of public education.

In evolution/creation and secular humanism cases, courts have ruled that religious speech is distinct from other forms of expression. They have affirmed a secular vision in which religion is entitled to special protection in the private realm (in order to accommodate free exercise), but subject to special disadvantage in the public sphere (in order to safeguard the individual conscience against governmental and majoritarian coercion). State action with the purpose or effect of promoting religious views – whether undertaken by a legislature or a school board – has been prohibited.

Leading cases have also upheld the notion of a broad-based, 'liberal' public education that exposes pupils to an array of secular subjects, communicates expert knowledge, and advances public goals (e.g., scientific literacy, critical thought) as opposed to the particularistic concerns of families or religious groups. Such thinking has delimited local democracy, while reinforcing the classical liberal distinction between a private sphere of faith and a public world of reason. With one exception (*Chamberlain II*), the courts have upheld a vision of the public school as a place independent of religious considerations.

CHAPTER SEVEN:
CONCLUSIONS

This thesis has assessed the difference that space makes to U.S. and Canadian case law concerning religion in public schools. Specifically, it has considered the ways in which judicial understandings of three concepts – public/private, individual/collective, and place – influenced and informed decision-making in 22 leading cases. Thus the thesis is not, in the first instance, an analysis of the church/state relationship, or of education policy. Rather, it is an evaluation of the importance of space in a significant area of jurisprudence. This chapter reviews the key findings, and situates them within the broader project of legal geography.

Earlier studies within the law and geography literature emphasized the close interconnection of law and place, and the importance of spatialized understandings of liberal rights and dualisms to legal decision-making. These claims, combined with a preliminary reading of historical and contemporary struggles over religion's role in public education, suggested that the concepts of public/private, individual/collective and place *would* feature prominently in the selected case law. The ensuing analysis found they were core organizing principles, used to frame and debate a range of issues, from questions of original intent and statutory interpretation, to struggles over 'creation science' and the significance of peer pressure at school events.

This is not to suggest that alternative analyses of the case law are necessarily inappropriate or misguided. Indeed, this thesis benefited from the insights offered by conventional reviews of constitutional jurisprudence and the church/state relationship. Rather, the point is that attentiveness to the spatiality of judicial reasoning can reveal much about what is at stake in particular cases, and how they are decided. Thus, not only do geographers interested in social life and power relations have an obligation to take law seriously (Blomley, 2002), but legal scholars and others interested in case law and legal doctrine have a corresponding duty to take space seriously.

Key Findings

The place of religion in the public schools of Canada and the United States has been, and continues to be, highly contested. Diverse stakeholders have varying understandings of what is appropriate in public schools, and what constitutional provisions regarding religion and religious freedom mean in the school context. All have sought, at various times, to 'change the rules' – that is, to reshape the institutional and normative landscapes of public education through an array of mechanisms, including court rulings, proposed constitutional amendments, changes to statutory law, and school board resolutions. The focus of this thesis has been on the first of these interventions.

Notwithstanding significant differences in constitutional provisions, political cultures, and levels of religious identification, courts in Canada and the United States have issued strongly similar rulings, beginning with decisions against school prayer and Bible-reading. State actors may neither sponsor devotional practices, nor create an environment in which pupils experience coercion to participate in such observances. This holds true regardless of the scale at which the state actor functions – legislature, school board, or administrator's office – and irrespective of any provision allowing children to be excused upon parental request. The courts have also found that public school curricula cannot be structured so as to advance religious interests, but have emphasized that genuine education about religion, absent any intent to indoctrinate, remains constitutional. The geographical categories underpinning this jurisprudence are the subject of this section.

Public/Private

As Elshtain (1981: 4) observes, 'to tell the full story of the public and the private would be the work of a lifetime.' This complexity notwithstanding, it is evident that understandings of the public/private distinction are critical to the case law concerning religion in public schools, particularly in the United States (see below). Indeed, it would be difficult to gain an appreciation of what the cases are about without giving serious attention to notions of public and private. These categories are central to constitutional interpretation, and to the wider progressive/orthodox divide that underpins many arguments over the relationship between the state, religion and education.

In broad terms, progressive or liberal opinion within Canada and the United States holds that respect for the individual conscience, and for the diversity of conscientious beliefs present within society, necessitates the *privatization* of religion. It follows that neither the state in general, nor public schools in particular, can sponsor religious activities, promote the beliefs of any faith, or prefer religion to irreligion. This stance is characterized as one of neutrality, and is said to ensure individual freedom from coercion in matters of faith. By contrast, orthodox or conservative opinion holds that the exclusion of religion from public life is not neutral, but discriminatory. It is seen to infringe on the rights of believers to express religiously-informed views on government policy, engage in religious exercises in public places, and have their views respected by the state, not undermined by a pernicious secularism. Accordingly, conservative stakeholders have contended that public schools must accommodate religious expression, and support the morality religious parents wish to instil in their children.

The public/private distinction is one of the defining characteristics of liberal-legal thought, and within this tradition, religious belief has long been deemed an archetypal private concern – something that is uniquely personal and non-political. However, the notion that individuals should not be coerced by public authorities in matters of conscience was initially motivated by theological (especially Protestant) concerns about the voluntary fulfilment of religious duty. As such, the privatization of religious belief was not always perceived to be inconsistent with notions of 'Christian nationhood' or with ongoing state support and encouragement of Christianity (Conkle, 2000: 4-5).

With the advent of public schooling, respect for individual freedom in matters of conscience needed to be balanced against the widespread view that religion was essential to education, and that the Bible provided the foundation for law, morality and civilization. In most parts of Canada and the United States, the common schools model was adopted: instruction was imbued with a generalized Protestantism centred on Bible-reading, but interpretation of the Bible and more specific religious instruction was left to the private realm of home and church. This approach to balancing public and private interests was acceptable to most Protestants, but not to Catholics, Jews, or non-believers. It remained

influential into the twentieth century, but was rejected by the U.S. Supreme Court in its 1962-63 decisions striking down school prayer and Bible-reading.

Engel and *Schempp* signalled that government-directed religious practices had no place in public schools, primarily on the grounds that religious belief (or non-belief) was a *wholly* private concern. The majority in *Engel* declared that, at a minimum, the constitutional prohibition on laws respecting establishment prevented the state from composing official prayers for public recitation. Such prayers were utterly inconsistent with the notion that 'religion is too personal, too sacred, too holy, to permit its "unhallowed perversion" by a civil magistrate.'[1] Moreover, this intrusion into the private sphere led to coercion of the individual conscience: pressure to conform existed '[w]hen the power, prestige and financial support of government is placed behind a particular religious belief.'[2] Accordingly, the Court struck down the New York Regents' Prayer.

The privatization of religion and concomitant secularization of public education was further advanced in *Schempp*. In prohibiting official school prayer and Bible-reading, the Court located religion within a private sphere consisting of 'the home, the church and the inviolable citadel of the individual heart and mind,' and committed the state (and public schools) to a 'position of neutrality' on religious issues.[3] Again, a concern for the relationship between the individual and the collective was evident within a broader discussion of public and private jurisdictions: state sponsorship of religious practices in public schools was problematic in part because dissenters (i.e., the children of dissenting families) could be pressured to participate by their teachers and peers.

Thus, in both *Engel* and *Schempp*, the majority found that school prayer was an unconstitutional intrusion into private matters of conscience. This intrusion was not mitigated by the supposedly 'non-denominational' content of the prayers in question, nor by the existence of opt out provisions. The Establishment Clause was deemed to prohibit all governmental promotion of religious practices, irrespective of their theological

---

[1] *Engel* at 432; citing James Madison.

[2] *Engel* at 431.

[3] *Schempp* at 226.

orientation and the presence or absence of formal compulsion to participate. As the majority noted in *Schempp*: while 'a violation of the Free Exercise Clause is predicated on coercion ... [an] Establishment Clause violation need not be so attended.'[4] The decisions emphasized that the prohibition on state sponsorship of religious practices was not hostile to religion, but protective of its uniquely private character. It was a restriction which was necessary to ensure that individuals were free to follow the dictates of conscience, and – as the Court put it in *Engel* – to pray 'when they pleased to the God of their faith in the language they chose.'[5] In addition, it insulated the state from parochial influences which could foster political division and social exclusion, and thereby undermine the ideal of public schools as institutions open to all children, irrespective of their particularistic ties.[6]

However, private and voluntary student prayer was deemed inadequate by the Court's critics, including Justice Stewart, the sole dissenter in *Engel* and *Schempp*. He interpreted the Establishment Clause narrowly, arguing that it was intended only to forbid an official state church, and not governmental recognition of the people's beliefs. Moreover, he suggested that religious freedom was compromised when government was prohibited from accommodating religion. Public schools, for example, exerted such an influence over children's lives that the exclusion of religious exercises constituted hostility to religion, or at the least 'government support of the beliefs of those who think that religious exercises should be conducted only in private.'[7] Justice Stewart illustrated that there was no single understanding of the public/private distinction, or of the related notion of state neutrality, which could be invoked to resolve the questions raised by these cases. Rather, the terms were open to multiple interpretations with radically different consequences for educational policy and practice.

---

[4] *Schempp* at 223.

[5] *Engel* at 434.

[6] There is a certain irony in this, as court rulings against religious practices in public schools were a major contributor to the political divisions associated with the culture war. Indeed, Schragger (2004: 1881) suggests that 'the judicial imposition of secular expressive norms across communities ... created a religious politics that is far more polarized than the one that existed prior to those decisions.'

[7] *Schempp* at 313 (Stewart, J., dissenting).

In response to *Engel* and *Schempp*, and the failure of initial attempts to reverse these rulings through a constitutional amendment, many of the Court's opponents sought to frame organized religiosity in public schools as accommodations of *private* belief that were permissible even under a separationist reading of the Establishment Clause. Between 1980 and 1992, the U.S. Supreme Court addressed this claim on four occasions. In *Stone* and *Wallace,* the Court employed the *Lemon* test, focussing in particular on the requirement that state action have a secular purpose. Notions of public and private were not considered directly in these decisions. Rather, they underpinned the analysis of legislative purpose: state action was required to be motivated by genuine public (i.e., societal) goals, and not by a desire to promote or endorse private beliefs.

In *Stone*, the Court declared that the purpose of a Kentucky statute requiring the Ten Commandments to be posted on classroom walls was 'to induce the schoolchildren to read, meditate upon, perhaps to venerate and obey, the Commandments.'[8] It noted that while this might be desirable 'as a matter of private devotion,' it was not permissible as a state objective.[9] In *Wallace*, a five-justice majority determined that the purpose of an Alabama statute setting aside one minute of each school day for mediation or voluntary prayer was 'to characterize prayer as a favored practice,' and ruled that this was 'not consistent with the established principle that the government must pursue a course of complete neutrality towards religion.'[10] However, Chief Justice Burger, in dissent, maintained that the law neither violated the privacy of religion, nor placed collective pressure on the individual: 'the statute simply creates an opportunity to think, to plan, or to pray if one wishes....'[11] Again, Justices on opposing sides of the case were operating with different understandings of what privacy meant, and how it delimited state action.

In *Westside*, the Court considered the constitutionality of the federal *Equal Access Act*, which prevented publicly-funded high schools from discriminating on religious, political

---

[8] *Stone* at 42.

[9] *Stone* at 42.

[10] *Wallace* at 60.

[11] *Wallace* at 89 (Burger, CJ., dissenting).

or philosophical grounds when granting 'noncurriculum related' student clubs access to their facilities. The Act was upheld, primarily on the basis that the activities of student religious clubs, and the speech occurring at their meetings, were private. As the plurality noted: 'there is a crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect.'[12] Moreover, when a school opened its doors to student religious clubs, along with other groups, it was said to be demonstrating the neutrality mandated by the Constitution. In concurrence, Justice Marshall agreed with this interpretation, but noted that participation in student religious clubs was not necessarily voluntary, given the possibility of peer pressure. Critically, he argued that peer pressure could not be dismissed as a private form of coercion, for which public authorities had no responsibility. Public schools were creations of government; it was the state that had 'structured an environment in which students holding mainstream views may be able to coerce adherents of minority religions to attend club meetings or adhere to club beliefs.'[13]

Issues of privacy and individual freedom from coercion also featured in *Lee*, which considered a Providence, Rhode Island policy allowing clergy to lead prayers at public school graduation ceremonies. In striking down the policy, the five-justice majority maintained that public authorities could not sponsor and direct religious exercises in schools. In the majority's view, the First Amendment meant 'that religious beliefs and religious expression are too precious to be either proscribed or prescribed by the State,' and that 'worship is a responsibility and a choice committed to the private sphere.'[14] It drew a line between state-controlled public spaces in which religious expression was subject to close scrutiny for evidence of governmental direction, and private spaces in which religious expression was constitutionally protected and assumed to be voluntary. In the majority's view, one corollary of the extensive public involvement in the Rhode Island graduation prayers was that individual students could be coerced to participate by state action, and by collective pressures facilitated by the state (see next section). In

---

[12] *Westside* at 250.

[13] *Westside* at 269 (Marshall, J., joined by Brennan, J., concurring).

[14] *Lee* at 589.

dissent, four Justices argued that the Establishment Clause did not forbid governmental accommodation of individual and collective desires for prayer. Indeed, a national history 'replete with public ceremonies featuring prayers of thanksgiving and petition' demonstrated that religion was not required to be 'some purely personal avocation.'[15]

The decision in *Lee* did not end debate over prayer at school events. While observances could no longer be led by ministers or rabbis, a number of school districts devolved responsibility for invocations and benedictions to students. These prayers were represented as private student speech, neither controlled nor endorsed by public actors. In *Jones II* the Fifth Circuit Court of Appeals accepted this argument. It determined that a Texas school district's policy allowing students to vote on whether or not to have student prayers at graduation served a legitimate public purpose ('solemnization'), did not produce an entanglement of church and state, and did not involve public direction of a formal religious exercise. The Court declared that the issue of prayer at graduation was left to the private initiative of pupils, and that the school district tolerated student-led prayer without requiring or favouring it. It was said to follow from student control of the issue that there was little possibility of coerced participation.

In 2000, a six-justice majority of the Supreme Court found a similar policy authorizing student prayer prior to high school football games to be unconstitutional. In *Santa Fe*, it determined that a student prayer delivered at a school event, pursuant to a school policy, and under the supervision of school staff, was not genuinely private speech. The school district had chosen to permit an 'invocation', but no other form of student expression, and in so doing had mandated a religious exercise. In dissent, three justices characterized the policy as a legitimate accommodation of private student expression, and suggested that the Court's opinion 'bristle[d] with hostility to all things religious in public life.'[16]

Indeed, the decision did discriminate against expressions of religious belief: it found that schools could not authorize a religious statement at an official function, but did not suggest that a policy permitting a speech on any other issue would be similarly invalid.

---

[15] *Lee* at 633, 645 (Scalia, J., joined by Rehnquist, CJ., and White and Thomas, JJ., dissenting).

[16] *Santa Fe* at 318 (Rehnquist, CJ., joined by Scalia and Thomas, JJ., dissenting).

The basis for this distinction was not that a minority could take offence to a religious statement – the Court had earlier acknowledged in *Lee* that '[p]eople may take offense at all manner of religious as well as nonreligious messages,' and suggested that listening and responding to an array of ideas was 'part of learning how to live in a pluralistic society'[17] – but that religion was constitutionally distinct from secular thought. Specifically, government was prohibited from advancing or endorsing religious beliefs – a restriction that was necessary to ensure conscientious freedom and state neutrality in matters of faith. Equally, citizens could not employ an instrument of the state to advance their religious views. From a separationist perspective, prohibiting school-sanctioned prayer did not send an anti-religious message, but merely affirmed that the state could not sponsor religion through its education system.

In summary, the public/private distinction has been a primary organizing device in U.S. jurisprudence on religious exercises in public schools. In each of the seven Supreme Court cases reviewed, the majority framed its decision in large part around the notion that the privacy of religion needed to be protected from public intrusion – that is, from state action emanating from the local (e.g., school board), State or Federal levels. In some instances this concern was explicit, while in others it was implicit within applications of the *Lemon* test. In six cases a state action was struck down, while in *Westside* the Court determined that legislation allowing religious clubs to meet on school campuses was constitutional, as the meetings were private and attendance was voluntary. Minority opinions, particularly in later cases in which non-state actors had a degree of influence over the challenged religious exercises, also invoked the language of public and private, but emphasized the historical acceptance of prayer in governmental contexts, and sought to refute the view that the Establishment Clause required the strict privatization of expressions of religious belief. In both majority and dissenting opinions, concern for the public and private dimensions of religious activities frequently led to a consideration of whether or not 'private individuals' were directly or indirectly coerced by public authorities to participate (see below).

---

[17] *Lee* at 597, 590.

A second set of cases in which notions of public and private were especially prominent concerned the legitimacy of religious influences in public school curricula (see Chapter 6). For many conservative Christians in both the U.S. and Canada, the process of secularization has not only involved the discriminatory exclusion of religious perspectives from public schools, but has allowed secular and humanist viewpoints hostile to Christianity to be advanced in the classroom. Public promotion of these perspectives is said to have socially deleterious impacts, and to undermine efforts to instil Christian beliefs in the private sphere.

Defenders of secular public education, and of a secular public sphere more generally, have countered these claims by making a critical distinction between reason and faith. Faith is understood to be a matter for personal conscience and private debate; reason is seen to be the basis for public life, public knowledge, and the conduct of governmental affairs. As Benhabib (1992: 91) observes, this distinction stems from the Enlightenment, and from an historical compromise between church and state in Western societies which held that 'matters of ultimate faith concerning the meaning of life' were 'rationally irresolvable' and best left to individuals to resolve 'according to the dictates of their own consciences and worldviews.' While arguments grounded in reason may incorporate moral positions and express normative values, they are admitted to the public sphere on the basis that they are universally accessible, in contradistinction to views that depend upon faith in the divine, spiritual, or supernatural. Such notions evoke Habermas' description of the early liberal public sphere as a site of reasoned discourse from which particularistic concerns, including religion, were barred in order to facilitate consensus on common questions of truth and justice.

Ultimately, one's view on the secularization of public education, and on the admissibility of religious arguments in debates over curricula and school governance, depends in large part on whether one accepts this distinction between (private) faith and (public) reason. The Courts, for their part, have generally maintained that a clear boundary can and should be drawn between religious and secular thought, and that constitutional guarantees of religious freedom require public schools to 'inculcate all needed temporal knowledge and

also maintain a strict and lofty neutrality as to religion.'[18] By contrast, many conservative religious communities share a belief in a supernatural authority 'that is independent of, prior to, and more powerful than human experience' (Hunter, 1991: 121). This authority transcends social distinctions – including that between faith and reason – and for many believers it is valid in every circumstance and context.

In *Mozert*, for example, a group of Christian parents in Tennessee contended that it was unconstitutional to require their children to read secular texts inconsistent with a fundamentalist reading of the *Bible*. The complaint was based solely on religious objections, and made little attempt to appeal to broader societal values, or ideas that resonated beyond a particular group of believers. In asserting the direct relevance of their beliefs to the organization of public life, the parents rejected not only the faith/reason distinction, but also the principle of church/state separation. This argument was representative of broader efforts among conservative evangelicals to return the Bible (or, rather, their reading of it) to a pre-eminent role as the cultural and legal foundation of the state. However, as the Sixth Circuit Court of Appeals noted, such thinking was inconsistent with a liberal approach to social order, which valued tolerance for diverse viewpoints, and viewed exposure to unfamiliar and challenging ideas not as coercive but as part of living in a pluralistic society. Accordingly, it dismissed the complaint, ruling that no group of parents could exercise a religious veto over the secular curriculum.

Given the courts' hostility to attempts to structure the public school environment around faith claims, many contemporary religious critics of public education seek to frame their objections in secular terms. This is particularly apparent in debates over the teaching of evolution in public schools. For most of the twentieth century, opposition to evolution was avowedly theological in nature: a subset of fundamentalist Protestants sought to remove the subject from schools because it conflicted with their reading of the Book of Genesis. In 1968, the U.S. Supreme Court issued its ruling in *Epperson*, striking down an Arkansas law prohibiting the teaching of evolution in public schools on the grounds that it was motivated solely by fundamentalist objections, and lacked a secular purpose. The

---

[18] *Mobile County* at 690.

majority determined that, just as the state could not sponsor religious practices in public schools, nor could it structure the public school curriculum around religious concerns. Public schools were required to advance secular knowledge, irrespective of its perceived consistency, or lack thereof, with religious viewpoints.

In response to this ruling, religious critics of evolution reworked their arguments, and contended that strong empirical evidence supported a creationist explanation of life's origins. It followed from this claim that, in order to bring balance and objectivity to the curriculum, public schools should teach 'creation science' alongside evolution. Subsequently, Arkansas and Louisiana adopted 'equal time' laws requiring schools to do just that. However, the courts were unconvinced that 'creation science' was based upon reason as opposed to faith, and determined that equal time legislation lacked a genuine secular purpose. In *Edwards*, the U.S. Supreme Court ruled that the motivation for the Louisiana statute was not to advance public knowledge of science, but 'to provide persuasive advantage to a particular religious doctrine.'[19] This ruling reinforced the idea that faith-based views could legitimately be singled out for special disadvantage in the public (governmental) sphere.

Similar thinking has also been influential in Canadian jurisprudence, most notably in the *Chamberlain* decisions. These cases addressed the question of whether a school board required to operate on strictly secular and non-sectarian principles could make a decision based largely on religious concerns. In *Chamberlain I*, Justice Saunders determined that the public school was required to be 'a place independent of religious considerations.'[20] In a pluralistic society, she suggested, governmental decisions drawing on faith claims were likely to fracture public opinion, coerce dissenters, and create an insider/outsider dynamic. As critics of the ruling pointed out, denying religion a place in the public sphere in this way appeared to conflict with notions of equality, respect for diversity, and individual entitlement to participate in democratic decision-making.

---

[19] *Edwards* at 592.

[20] *Chamberlain I* at para. 102.

These points were picked up by the British Columbia Court of Appeal in *Chamberlain II*. It ruled that while public schools could not indoctrinate pupils in matters of faith, the state could not 'make religious unbelief a condition of participation in the setting of the moral agenda.'[21] On the contrary, the *Charter*'s guarantees of religious freedom and equality required moral viewpoints to be 'accorded equal access to the public square,'[22] irrespective of whether they originated in a religious or non-religious conscience – something that was, in any case, often difficult to determine. The only views that could not be countenanced, the Court found, were those inconsistent with 'the inherent worth and dignity of each individual human person.'[23]

The vision of the public sphere appealed to notions of inclusiveness, equality, and tolerance, and suggested that the faith/reason distinction was both tenuous and irrelevant to democratic decision-making. The finding that the state must treat religion on a par with nonreligion has significant consequences for public education, and for the practice of government more generally. If religious views have a place in public policy-making, it follows that decisions may be made on the basis of those views. Religious opposition to the teaching of evolution, for example, could no longer be dismissed as immaterial to public planning of the science curriculum, and would be highly influential in some jurisdictions. The distinction between secular public education and private religious education would be blurred, and the state could also be called upon to fund religious schools in the name of neutrality. As noted in Chapter 6, some commentators would welcome this situation as a victory for religious freedom and parental rights, while others would view it as highly divisive and destructive of 'common' public institutions. Liberal societies clearly face a stark, and difficult, choice: *either* they treat religion as distinct, and insist that religious perspectives cannot form the basis for public choices, despite the affront such discrimination poses to notions of equality and tolerance; *or* they can treat religious and non-religious viewpoints in a formally equal fashion, abandon the liberal

---

[21] *Chamberlain II* at para. 31.

[22] *Chamberlain II* at para. 28.

[23] *Chamberlain II* at para. 13.

notion of a purely rational public sphere, and accept that public decisions may be made on the basis of a faith position which is not universally accessible.

Individual/Collective

A second tension with which liberal democratic societies grapple is that between individual liberty and collective decision-making. As noted in the foregoing summary of U.S. jurisprudence, this tension can be expressed as one dimension of a broader concern for the public/private distinction: religious activities mandated by state agencies may compromise the privacy of religion, and in so doing the rights of individuals to be free from coercion in matters of conscience. However, the nature of the relationship between the individual and the collective may also be a starting point in the analysis of state action, as in the Canadian cases analyzed in Chapter 5.

In addressing the question of whether activities such as school prayer and Bible-reading represent an impermissible intrusion into the sphere of individual conscience, a central issue concerns the nature of the public school itself. Is it a place characterized by collective pressures and the coercion of individuals, or is it an environment in which individuals are free to exercise their rights, including the right to religious expression? A comparison may be drawn here with Frug's (1980: 1076) analysis of early modern cities: is the city best understood as a vehicle for the exercise of coercive state power, or as a place in which individuals 'control their own lives free of state domination?'

While public schools are clearly creations of government, they also possess a degree of autonomy, in part so that they can accommodate the values and concerns of local communities. When the state perceives that this autonomy is being used in a way that delimits individual freedom, it may step in (e.g., through court enforcement of a constitutional norm) in a way that is represented as 'simultaneously advancing both state and individual interests' (Frug, 1980: 1089). Just as some early liberal thinkers viewed 'the eradication of the power of the towns as a step forward in the progress of freedom' (Frug, 1980: 1089), some courts perceive delimiting the autonomy of public schools as necessary for the protection of individual liberty. Such thinking is, of course, most applicable when collective pressure on the individual results from a school board

decision, and less relevant in cases where a religious exercise is mandated by a higher level of government, such as a State or Province.

In the Canadian case law addressing religious exercises in public schools, coerced participation was the primary concern. This focus was mandated by the Supreme Court of Canada's declaration in *Big M* that the *Charter* guarantee of freedom of conscience and religion was intended to prevent individuals from being coerced – by direct or indirect state action – in matters of faith. In *Zylberberg I*, the Ontario Divisional Court determined that involvement in school prayer and Bible-reading was voluntary, as the provincial regulation under which they were conducted allowed for pupils to be exempted upon parental request. However, in the highly influential *Zylberberg II* decision, the Ontario Court of Appeal ruled that exemption provision did not eliminate the possibility of coercion. First, the dynamics of the classroom – and in particular peer pressure – could compel children to conform with majority religious practices. Secondly, objecting parents, and by extension their children, were forced to make a public religious statement and identify as non-conformists in order to receive an exemption from a state-directed religious practice. Accordingly, the requirement for prayer and Bible-reading was struck down under s. 2(a) of the *Charter*. Analogous provisions in British Columbia and Manitoba were subsequently ruled unconstitutional on the same grounds.

In *Elgin County*, the Ontario Court of Appeal considered the constitutionality of provincially-mandated religious instruction in public schools – instruction which, at least in some contexts, had taken the form of Protestant indoctrination. It determined that this policy manifested the same constitutional infirmity as prayer and Bible-reading: minorities and dissenters were compelled to participate. In addition, it ruled that state action could have neither the purpose nor the effect of indoctrination – a long-standing principle of U.S. jurisprudence. Schools could advance understanding of religion in genuinely academic courses of study, but could not promote private acceptance of any faith, or pressure individuals to conform. This distinction between 'indoctrination in' and 'education about' drew upon both the individual/collective and public/private divides, and suggested that public schools could not offer courses promoting religion, even when these were desired by parents.

In two subsequent cases – *Bal* and *Adler II* – groups of religious parents submitted that they could not, in good conscience, enrol their children in Ontario's secularized public schools, and sought a finding that they had a constitutional right to public funding of a religious education consistent with their beliefs. In *Bal*, Justice Winkler dismissed the complaint on the basis that the parents' preference for religious education was private and voluntary, and not the product of state-mandated compulsion. Indeed, public schools had been made secular in order to *eliminate* the collective pressures associated with majoritarian religious exercises and instruction. The result was a religiously-neutral and non-coercive education system in which religious views could be discussed in an academic manner, but no group could have its beliefs reinforced as 'truth.' Parents who wanted their children to receive a denominational education remained free to opt out of the public system, but the state had no obligation to fund this choice. When a similar issue was raised in *Adler II*, a five-justice majority of the Supreme Court affirmed that parental preferences for religious education were not coerced, but flowed solely from private conviction. The absence of public funding for such preferences was deemed neither an infringement on religious liberty, nor an unconstitutional discrimination against religion.

In Canadian jurisprudence on religion and public education, then, leading decisions have been framed in terms of the need to protect individuals from direct and indirect state coercion in matters of faith. In particular, the courts have envisaged the *parent* as the individual rights-holder, whose interest in instructing children in matters of conscience is threatened by efforts to inculcate *religious* viewpoints (as opposed to secular knowledge and values) in the coercive environment of the public school. A concern for protecting the privacy of religion has frequently emerged as a related, although secondary concern. As noted above, these themes also appear in the U.S. jurisprudence, but typically in the reverse order. One notable point of convergence is peer pressure: in both countries, courts have held that social pressures among children may compel participation in school-sponsored religious practices. In advancing this idea, courts have not only invoked notions of children's impressionability and lack of autonomy, but also a particular understanding of the public school.

Place

The jurisprudence reviewed in this thesis is organized not only around the public/private and individual/collective dualisms, but also around concepts of place. Particular interest has been exhibited in the nature of the public school environment, and in the relationship between the school and communities of interest constituted at the local and national levels. At a basic level, both separationist and accommodationist perspectives are informed by the view that the public school is a consequential place – a key site for the socialization of children, the reproduction of identity, and the exercise (or denial) of constitutional rights. Beyond this, they operate with fundamentally incompatible understandings of the public school, and its appropriate role in society.

Within separationist reasoning, and the opinions of progressive stakeholders, three key claims are made about public schools. First, they are represented as coercive environments, in which no religious exercise sponsored or directed by school authorities, or by any other level of government, can be truly voluntary. School attendance is compelled by statute, and within school boundaries, children are subject to peer pressure as well as more formal expectations of compliance. In both Canada and the United States, courts have found that these factors make pupils reluctant to exercise exemptions, and lead to coerced participation in religious exercises.

Secondly, public schools are understood to be diverse places, within which a broad spectrum of religious and conscientious beliefs is always present. It follows that there is no religious exercise in which all pupils can participate, and no religious perspective shared by everyone within the school community. In order to remain common institutions, open to all, public schools must eschew 'parochial, divisive or separatist influences of any sort,'[24] and instead promote shared values and reason-based knowledge. This has been a particularly prominent theme in Canadian jurisprudence, which has extolled the ideal of public schools 'as places where people of diverse backgrounds can learn and grow together' by virtue of their foundation upon 'positive societal values

---

[24] *Schempp* at 242 (Brennan, J., concurring).

which ... transcend cultures and faiths.'[25] The *Chamberlain* cases identified the *Charter* as the principal source of such transcendent, universally-accessible values, suggesting that this document had replaced the Bible as the moral foundation of public education.

Thirdly, separationist and progressive opinion portrays all public schools as 'like places'. Not only are *all* schools coercive environments in which a range of conscientious viewpoints is present, but *all* schools within a given jurisdiction are properly subject to the same constitutional rules. Schools must respect these rules, and the individual rights they safeguard, irrespective of the religious views prevailing in their community. By contrast, conservative commentators frequently emphasize deference to community norms, and the need for schools to acknowledge and accommodate the beliefs of parents and pupils.

For many orthodox stakeholders, the process of secularization has transformed public schools into places that undermine parents' efforts to instill religious belief and morality in their children. Thus, the contemporary public school is not neutral in matters of faith, but hostile to religion and the religiously-informed conscience. This situation is deemed coercive in a way that formally-voluntary school prayer never was: if parents are to benefit from the state's collective provision for education, they must enroll their children in an institution that actively and continuously subverts their beliefs. For many evangelical Christian commentators, in particular, public schools have become godless and ill-disciplined places, with dire effects on children's intellectual and spiritual development that cannot be reversed in the private sphere of home and church.

The conservative view that religious exercises and religious influences have a (normative) place in public schools is informed by an understanding of the school environment markedly different from that of liberal and separationist thinkers. First, the internal dynamics of the school environment are not perceived to be so coercive as to make every accommodation or recognition of religious belief constitutionally problematic. Student-initiated prayer at school events, for example, is portrayed as the outcome of genuine

---

[25] *Bal* at 694; citing Memorandum 112.

private initiative, and in the absence of any state action requiring participation 'by force of law and threat of penalty,'[26] involvement is deemed voluntary. Secondly, the legitimacy of such activities is said to be determined in part by local factors. Thus, the dissenting justices in *Lee* framed the issue of graduation prayer in terms 'a community's celebration of one of the milestones in its young citizens' lives' and contended that the judiciary should defer to 'the expression of gratitude to God that a majority of the community wishes to make.'[27]

Within such discourse, there is little acknowledgement of diversity, or of the tendency for accommodations of religious belief to reinforce majoritarian views, and silence conscientious minorities. The presence within public schools of those who object to religious activities endorsed by local majorities is considered non-problematic, provided participation is voluntary. Whereas progressive stakeholders emphasize that the rights of religious believers are not infringed by exposure to *secular* ideas in public schools, conservative commentators contend that it not unconstitutional for schools to expose dissenters and non-believers to the *religious* viewpoints prevailing in their community.

While the public school environment is a contested territory in debates over religion and public education, a second geographical context is also key: the nation. The history and values of the nation are frequently invoked in constitutional interpretation, while the socio-cultural significance of the public school derives in part from the notion that it is a key site for the reproduction of national identity. Conflicts over school prayer, for example, have frequently centred upon questions of nationhood. Was the nation's past founded on theological principles and the Bible, or on separationist thought and the privatization of religious belief? Is the nation's future best secured by a policy of secularism and state neutrality in the face of diverse religious views, or by governmental acknowledgement of, and identification with, the majority's faith in God? The perceived importance of a brief, relatively non-sectarian prayer at the start of the school day has more to do with these questions than it does with issues of theology or pedagogy. Indeed,

---

[26] *Lee* at 640 (Scalia, J., joined by Rehnquist, CJ., and White and Thomas, JJ., dissenting).

[27] *Lee* at 646 (Scalia, J., joined by Rehnquist, CJ., and White and Thomas, JJ., dissenting).

both progressive and orthodox contributors to debates over public education frequently assert that they are fighting for nothing less than the future of their nation.

Understandings of nation have also featured prominently in jurisprudence. In *Engel*, for example, the Court held that it was governmentally-mandated prayer which had led early colonists 'to leave England and its established church and seek freedom in America.'[28] It followed that school prayer offended the deep-seated national principle of freedom from state interference in the exercise of religion. National history was debated at length in subsequent U.S. cases, which frequently centred on the traditional role of religion in public life, and on the intent behind the First Amendment. In broad terms, conservative Justices claimed that the accommodationist actions of the Founders, combined with the long-standing acceptance of prayer in governmental settings, established the legitimacy of religious activities in public schools. Separationist justices also appealed to aspects of national history, such as the Founders' ringing declarations of religious freedom, but were more likely to emphasize that the nation had changed since the late eighteenth century, with increasing religious diversity and the progress of public education being two particularly salient developments.

In the Canadian context, extensive reference has been made to the multicultural and pluralistic nature of society, and the way in which this is mirrored in the classroom. Decisions to strike down formal religious activities in public schools, for example, were framed in terms of 'an awareness of a changing societal fabric and Charter protection for minority rights to freedom of religion.'[29] This said, *Chamberlain II* suggested that social diversity could not, in itself, explain why public decisions could be influenced by secular philosophies, ideologies, and opinions, but not by religiously-informed moral positions. Ultimately, the notion that religion is properly excluded from the governmental sphere depends upon the distinction between public reason and private faith.

---

[28] *Engel* at 427.

[29] *Bal* at 684.

Law and Geography

Recent research into law and geography has been marked by increasing theoretical and methodological diversity (Delaney, 2002: 67). This thesis has focussed on the spatial categories that inform and underpin case law addressing the place of religious activities and influences in the public schools of Canada and the United States. It has argued that a geographical lens can advance our understanding of this jurisprudence (and thus of the rules that help to constitute educational landscapes), as concepts of space and place are central to judicial decision-making, and to associated interpretational and representational struggles. In so doing, it has engaged with an issue that, despite its cultural and constitutional prominence, has previously received very little attention from geographers.

The emphasis on case law is justified, in part, by the frequency with which issues concerning religion and public education have been referred to the courts. As Smith and Foster (2000: 396) observe, the history of education cannot be considered without reference to religion, and the contested place of religion in public schools cannot be considered without reference to law: 'Although much of the debate [on this issue] has been normative in nature – assertions based on belief – much of it has been waged on the basis of law, both constitutional and statutory.' It is the judiciary that has been charged with resolving complex competing claims, and as Justice Brennan observed in *Schempp*, '[t]he Court's historic duty to expound the meaning of the Constitution has encountered few issues more intricate or more demanding than that of the relationship between religion and the public schools.'[30] The issue has not become any easier to resolve over time, as the roles of public and private actors have blurred, and coercion of the individual has stemmed increasingly from informal collective pressures rather than direct state action. More generally, Western societies have continued to struggle with settling what John Locke referred to as 'the just bounds' that 'distinguish exactly the business of civil government from that of religion.'[31]

---

[30] *Schempp* at 230 (Brennan, J., concurring).

[31] *Schempp* at 231 (Brennan, J., concurring); citing John Locke.

With respect to the jurisprudence reviewed in this thesis, it is clear that the secularization of public education has entailed drawing boundaries around public schools so as to insulate them the desires of many parents and communities for formal acknowledgement and reinforcement of religious beliefs. At the same time, lines have been drawn that seek to protect the individual conscience from coercion. In both Canada and the United States, the courts have deemed religious activities directed or sponsored by public authorities to be coercive in the school context. However, there has been considerable resistance to this judicial line-drawing, in part because it has been seen to create *artificial* distinctions between public schools and the religious homes and communities that surround them.

Indeed, a key claim in conservative arguments concerning religion and public education is that the courts should defer to localized decision-making, and to the authority of communities to determine what is appropriate in 'their' classrooms. Whereas liberal thought is traditionally suspicious of local majorities and their ability to infringe on individual rights, orthodox stakeholders have come to champion local control of education, viewing it as a way of reinstituting religious values in public schools in the face of hostile federal courts and secular national elites. Many conservative Justices, especially in the United States, have been receptive to such claims, and have framed accommodations of religious belief as matters best left to local discretion. By contrast, separationist Justices have emphasized that all public schools are 'like places', properly subject to the same set of constitutional rules (see above). Thus, debates over the place of religion in public schools have frequently become arguments about the proper location of decision-making authority, and 'the adoption of one scale of (p)reference [over] others' (Delaney *et al.*, 2001: xx).

More generally, the extent to which judicial reasoning in this area invokes, and relies upon, spatial distinctions and concepts evokes Delaney's (2002: 69) contention that 'liberal legal discourse is [a] rich source of spatial tropes and metaphors [which] are not incidental to how law is presented and perceived but are foundationally constitutive of liberal legality as such.' While several of the cases reviewed in this thesis – most notably *Stone* (Chapter 4) and *Russow* (Chapter 5) – centred on narrow legalistic matters, such as precedent and severability, most devoted considerable attention to issues of spatial

context and jurisdiction. This has implications for how we understand legal reasoning, and what we consider 'law' to be. As the socio-legal scholar Selznick (2003: 178) observes, a realm of positive law centred on black-letter principles, unambiguous statutes, and clear judicial precedents does exist, but it is 'only part of a larger, more inchoate unity which we call the "legal order."' A legal-geographic analysis emphasizes the significance of space to this legal order, and underlines that there is no bright line separating legal norms from socio-spatial concerns.

The case law examined in this thesis not only contains representations of space but, by virtue of its connection with the power of the state (Delaney *et al.*, 2000: xix), has significantly reshaped landscapes of public education. By articulating a vision of the public school as a bounded environment, conceptually and spatially separate from the private sphere of religious concerns, courts in Canada and the United States have sought to secularize public schools. As Blomley (2002: 28) observes, law does not exhaust the meanings and norms associated with social spaces, but it does provide a 'consequential vocabulary' for structuring them. The courts advance powerful 'maps' of the social world, replete with borders and categorizations, which not only contribute to the constitution of a particular reality, but help to justify it. This said, fusions of law and space (e.g., 'the constitution requires the public school to be a strictly secular place') are never functions of necessity. With respect to the case law reviewed in this thesis, the contingent nature of judicial proclamations has been emphasized by conservative stakeholders, for whom separationist rulings are by no means the outcome of natural, apolitical, and deductive reasoning, but rather the product of an ideological bias against religion.

It follows from the intense politicization of this issue, and the ongoing contestation of court rulings, that efforts to legitimate the secularization of public education through reference to liberal dualities and understandings of place have not been entirely successful. While liberal-legal thought may, in some contexts, have a unique ability to 'repress aspirations for alternative political arrangements' (Klare, 1982: 1358), in the context of debates over religion in public schools, there is no single understanding of the

public/private distinction, or of the individual/collective dualism, to which decision-makers can appeal. Public opinion is deeply fractured, and few points of consensus exist.

To the extent that common perspectives can be identified, they centre around a broad acceptance that traditional school-mandated prayer and Bible-reading are coercive and inappropriate in contemporary public schools, and an unwillingness on all sides of the debate to countenance the view that children may have an interest in matters of religious belief and practice separate from that of their parents. With respect to the first point, few in either Canada or the United States would now contest the notion that '[t]he pervasive religiosity and direct governmental involvement inhering in the prescription of prayer and Bible-reading in the public schools, during and as part of the curricular day, involving young impressionable children whose school attendance is statutorily compelled,'[32] is constitutionally problematic. With respect to the second point, orthodox and progressive stakeholders disagree primarily on what *respect* for the parental role in the religious education of their children means for the public sphere, and not whether it is appropriate to assume that this 'private' instruction in matters of faith is necessarily consistent with notions of individual autonomy and conscientious freedom. Even the civil libertarian position, which might be expected to be sympathetic to children's rights, is primarily concerned with protecting the rights of parents to impart their beliefs in the home, free from outside interference. Yet the private family home is, like other 'splices', a contingent structure, open to contestation, and a strong argument could be made that children have an *independent interest* in learning about a broad spectrum of religious and conscientious views. By offering rigorous 'education about' religion, public schools may advance the cause of individual liberty.

---

[32] *Schempp* at 307 (Goldberg, J., joined by Harlan, J., concurring).

BIBLIOGRAPHY

Jurisprudence

Abington v. Schempp, 374 U.S. 203 (1963).

Adler v. Ontario (1994), 19 O.R. (3d) 1.

Adler v. Ontario, [1996] 3 S.C.R. 609.

Agostini v. Felton, 521 U.S. 203 (1997).

Association for Rights & Liberties v. Manitoba (1992), 94 D.L.R. (4th) 678 (Ct. Q.B.).

B.(R.) v. Children's Aid Society of Metropolitan Toronto, [1995] 1 S.C.R. 315.

Bal v. Ontario (A.G.) (1994), 21 O.R. (3d) 681 (Ont. Ct., Gen. Div.).

Bradfield v. Roberts, 175 U.S. 291 (1899).

Brown v. Board of Education, 349 U.S. 294 (1954).

Cantwell v. Connecticut, 310 U.S. 296 (1940).

CCLA v. Ontario (Minister of Ed.) (1990), 71 O.R. (2d) 341 (C.A.).

Chamberlain v. Surrey School Dist. #36 (1998), 60 B.C.L.R. (3d) 311 (B.C.S.C.).

Chamberlain v. Surrey School Dist. #36 (2000), 60 B.C.L.R. (3d) 181 (B.C.C.A).

County of Allegheny v. American Civil Liberties Union, 492 U.S. 573 (1989).

Doe v. Duncanville Independent School Dist., 70 F.3d 402 (5th Cir. 1995).

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

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

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

Everson v. Board of Education, 300 U.S. 1 (1947).

Fancy v. Saskatoon School Div. No. 13 (1999), 35 C.H.R.R. D/9 (Sask. Bd. of Inq).

Grand Rapids v. Ball, 473 U.S. 373 (1985).

Jones v. Clear Creek Independent School Dist., 505 U.S. 1215 (1992).

Jones v. Clear Creek Independent School Dist., 930 F.2d 416 (5th Cir. 1991).

Jones v. Clear Creek Independent School Dist., 977 F.2d 963 (5th Cir. 1992).

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

Lemon v. Kurtzman, 403 U.S. 602 (1971).

Lynch v. Donnelly, 464 U.S. 668 (1984).

McCollum v. Board of Education, 333 U.S. 203 (1948).

McGowan v. Maryland, 366 U.S. 420 (1961).

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

Milliken v. Bradley, 418 U.S. 717 (1974).

Mitchell v. Helms, 530 U.S. 793 (2000).

Mozert v. Hawkins County Public Schools, 827 F.2d 1058 (6th Cir. 1987).

Newdow v. U.S. Congress, No. 00-16423 (9th Cir. 2002).

Peloza v. Capistrano Unified School Dist., 37 F.3d 517 (9th Cir. 1994).

Quick Bear v. Leupp, 210 U.S. 50 (1908).

R. v. Big M Drug Mart (1985), 18 D.L.R. (4th) 321 (S.C.C.).

R. v. Keegstra, [1990] 3 S.C.R. 697.

Re Zylberberg and Director of Education (1986), 55 O.R. (2d) 749 (Ont. Div. Ct.).

Reference Re Bill 30, An Act to amend the Education Act (Ont.), [1987] 1 S.C.R. 1148.

Russow v. B.C. (A.G.) (1989), 35 B.C.L.R. 29 (B.C.S.C.).

Santa Fe Independent School Dist. v. Doe, 530 U.S. 290 (2000).

Scopes v. State, 154 Tenn. 105 (1927).

Scott v. Sanford, 60 U.S. 393 (1857).

Smith v. Board of School Commissioners, 655 F. Supp. 939 (S.D. Ala. 1987).

Smith v. Mobile County, 827 F.2d 684 (11th Cir. 1987).

Stone v. Graham, 449 U.S. 39 (1980).

Tinker v. Des Moines Independent School Dist., 393 U.S. 503 (1969).

Torcaso v. Watkins, 367 U.S. 488 (1961).

Wallace v. Jaffree, 472 U.S. 38 (1985).

Walz v. Tax Commission of the City of New York, 397 U.S. 664 (1970).

West Virginia State Board of Education v. Barnette, 319 U.S. 624, 628 (1943).

Westside Community Board of Education v. Mergens, 496 U.S. 226 (1990).

Widmar v. Vincent, 454 U.S. 263 (1981).

Wisconsin v. Yoder, 406 U.S. 205 (1972).

Zorach v. Clauson, 343 U.S. 306 (1952).

Zylberberg v. Sudbury Board of Education (Dir.) (1988), 65 O.R. (2d) 641 (C.A.).

Legislation

Balanced Treatment for Creation-Science and Evolution-Science Act, Ark. Stat. Ann. @ 80-1663 et seq. (1981).

Balanced Treatment for Creation-Science and Evolution-Science in Public School Instruction Act (Creationism Act), La. Rev. Stat. Ann. 17:286.1-17:286.7 (West 1982).

Canadian Charter of Rights and Freedoms, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

Constitution Act, 1867, 30-31 Vict., c. 3 (U.K.).

Education Act, R.S.O. 1980, c. 129.

Equal Access Act, 20 U.S.C. 4071 (1984).

Lord's Day Act, R.S.C. 1970, c. L-13.

Manitoba Act, 1870, 22 Vict., c.3 (Can.).

Public Schools Act, R.S.M. 1987, c. P250.

School Act, R.S.B.C. 1979, c.375.

School Act, R.S.B.C 1996, c. 412.

Legal Briefs

BCCLA (British Columbia Civil Liberties Association) (1999). *Factum of the Intervener British Columbia Civil Liberties Association in the British Columbia Court of Appeal (on Appeal from the Supreme Court of British Columbia) in* Chamberlain v. Surrey School District No. 36. Court of Appeal File No. CA025465.

BCCLA (2002). *Factum of the Intervener British Columbia Civil Liberties Association in the Supreme Court of Canada (on Appeal from the Court of Appeal for the Province of British Columbia) in* Chamberlain v. Surrey School District No. 36. Court File No. 28654.

EGALE (Equality for Gays and Lesbians Everywhere) (1999). *Factum of the Intervener EGALE Canada Inc. in the British Columbia Court of Appeal (on Appeal from the Supreme Court of British Columbia) in* Chamberlain v. Surrey School District No. 36. Court of Appeal File No. CA025465.

Evangelical Fellowship of Canada & Archdiocese of Vancouver (2000). *Factum of the Intervener The Evangelical Fellowship of Canada and The Archdiocese of Vancouver in the British Columbia Court of Appeal (on Appeal from the Supreme Court of British Columbia) in* Chamberlain v. Surrey School District No. 36. Court of Appeal File No. CA0254656.

Agreements, Policies & Treaties

International Covenant on Civil and Political Rights, 999 U.N.T.S. 171 (entered into force March 23, 1976).

Policy Memorandum 112: *Education about Religion in the Public Elementary and Secondary Schools* (1990). Ontario Ministry of Education.

Religion in the Public Schools: A Joint Statement of Current Law (1995). Statement endorsed by 35 U.S. interest groups.

Terms Of Agreement Between The Government Of Canada And The Government Of Manitoba For The Settlement Of The School Question (November 16, 1896). ('The Laurier-Greenway Compromise').

Articles, Books & Commentaries

ACLU (American Civil Liberties Union) (1996a). *ACLU Position Statement on "Creation-science"*. Retrieved 10 October 2001, from http://www.aclu.org/issues/religion/relig2.html

ACLU (1996b). *Church and State: Briefing Paper #3.* Retrieved 1 November 1999, from http://www.aclu.org/library/pbp3.html

ACLU (1999a). *ACLU Launches High-Profile Ad Campaign.* Retrieved 11 October 2001 from http://www.aclu.org/features/f112499a.html

ACLU (1999b). *Taxpayer Subsidies for Religious Schools.* Retrieved 1 November 1999, from http://www.aclu.org/action/vouchers106.html

Ahdar, R. J. (2000). The Inevitability of Law and Religion: An Introduction. In R. J. Ahdar (Ed.), *Law and Religion* (pp. 1-15). Dartmouth: Ashgate Publishing.

Alley, R. S. (1992). Nonpreferentialists: Modern Advocates of Court-Mandated Second-Class Consciences. In A. Must (Ed.), *Why We Still Need Public Schools: Church/State Relations, and Visions of Democracy* (pp. 45-69). New York: Prometheus Books.

Alley, R. S. (1994). *School Prayer: The Court, the Congress, and the First Amendment.* Buffalo: Prometheus Books.

Alley, R. S. (Ed.). (1999). *The Constitution of Religion: Leading Supreme Court Cases on Church and State.* Amherst, NY: Prometheus Books.

Baer, R. A. (1998). Why a Functional Definition of Religion is Necessary if Justice is to be Achieved in Public Education. In J. T. Sears with J. C. Carper (Eds.), *Curriculum, Religion, and Public Education: Conversations for an Enlarging Public Square* (pp. 105-125). New York: Teachers College Press.

Baer, R. A., & Carper, J. C. (2000). 'To the advantage of infidelity,' or how not to deal with religion in America's public schools. *Education Policy, 14*(5), 600-621.

Bakan, J. C., & Blomley, N. K. (1992). Spatial Categories, Legal Boundaries, and the Judicial Mapping of the Worker. *Environment and Planning A, 24*, 629-644.

Baker, B. (1998). 'Childhood' in the Emergence and Spread of U.S. Public Schools. In T.S. Popkewitz & M. Brennan (Eds.), *Foucault's Challenge: Discourse, Knowledge, and Power in Education* (pp. 117-145). New York: Teachers College Press.

Benhabib, S. (1992). Models of Public Space: Hannah Arendt, the Liberal Tradition, and Jürgen Habermas. In C. Calhoun (Ed.), *Habermas and the Public Sphere* (pp. 73-98). Cambridge, MA: MIT Press.

Benson, I. T. (2000). Notes Towards a (Re)Definition of the 'Secular'. *University of British Columbia Law Review, 33*(3), 519-549.

Benson, I. T., & Miller, B. (2000). *Court misunderstands the meaning of 'secular'.* Ottawa: Centre for Cultural Renewal (Lex View).

Berger, B. (2002). The Limits of Belief: Freedom of Religion, Secularism, and the Liberal State. *Canadian Journal of Law and Society, 17*(1), 39-68.

Bergstrom, C. V. (1992). The Need For Separation: A Lutheran's View. In A. Must (Ed.), *Why We Still Need Public Schools: Church/State Relations, and Visions of Democracy* (pp. 27-33). New York: Prometheus Books.

Berry, L. (2000). God & Football. *Sports Jones*, 1-12. Retrieved 3 November 2000, from http://www.sportsjones.com/sj/198.shtml

Bjorklun, E. C. (1988). Evolution and Creationism: The Real 'Scopes II' Case. *Religion & Public Education, 15*(2), 191-99.

Blacksell, M., Watkins, C., & Economides, K. (1986). Human geography and law: a case of separate development in social science. *Progress in Human Geography, 10*(3), 371-396.

Blomley, N. K. (1988). Law and the local state: enforcement in action. *Transactions of the Institute of British Geographers, 13*, 199-210.

Blomley, N. K. (1989a). Text and context: rethinking the law-space nexus. *Progress in Human Geography, 13*(4), 512-534.

Blomley, N. K. (1989b). Interpretive practices, the state and the locale. In J. Wolch & M. Dear (Eds.), *The Power of Geography* (pp. 175-196). Boston: Unwin Hyman.

Blomley, N. K. (1993). Editorial: Making Space for Law. *Urban Geography, 14*(1), 3-6.

Blomley, N. K. (1994). *Law, Space and the Geographies of Power.* London: Guilford Press.

Blomley, N. K. (1997). The Properties of Space: History, Geography, and Gentrification. *Urban Geography, 18*(4), 286-295.

Blomley, N. K. (1998). Landscapes of Property. *Law & Society Review, 32*(3), 567-612.

Blomley, N. K. (2000a). 'Acts,' 'Deeds,' and the Violences of Property. *Historical Geography, 28*, 86-107.

Blomley, N. K. (2000b). Law, Geography of. In R. J. Johnston, D. Gregory, G. Pratt, & M. Watts (Eds.), *Dictionary of Human Geography* (4th ed., pp. 435-438). Oxford: Blackwell.

Blomley, N. K. (2001, July 2-3). *From 'What?' to 'So What?': Law and Geography in Retrospect (Keynote Presentation).* Paper presented at the Law and Geography Colloquium, University College London.

Blomley, N. K. (2002). From 'What?' to 'So What?': Law and Geography in Retrospect. In J. Holder & C. Harrison (Eds.), *Current Legal Issues Vol. 5: Law and Geography* (pp. 17-33). Oxford: Oxford University Press.

Blomley, N. K. (2003). Law, Property, and the Geography of Violence: The Frontier, the Survey, and the Grid. *Annals of the Association of American Geographers, 93*(1), 121-141.

Blomley, N. K., & Bakan, J. C. (1992). Spacing Out: Towards a Critical Geography of Law. *Osgoode Hall Law Journal, 30*(3), 661-690.

Blomley, N. K., & Clark, G. L. (1990). Law, Theory, and Geography. *Urban Geography, 11*(5), 433-446.

Blomley, N. K., & Pratt, G. (2001). Canada and the political geographies of rights. *The Canadian Geographer, 45*(1), 151-166.

Blomley, N. K., & Sommers, J. (1999). Mapping Urban Space: Governmentality and Cartographic Struggles in Inner City Vancouver. In R. Smandych (Ed.), *Governing Places: Readings on Governmentality and Crime Control* (pp. 261-286). Dartmouth: Ashgate.

Blumoff, T. Y. (1994). The Holocaust and Public Discourse. Journal of Law and Religion. *Journal of Law and Religion, 11*, 591-636.

Bocking, B. (1995). Fundamental Rites? Religion, State, Education and the Invention of Sacred Heritage in post-Christian Britain and pre-War Japan. *Religion, 25*, 227-247.

Breward, I. (1967). *Godless Schools? A Study in Protestant Reactions to the Education Act of 1877*. Christchurch: Presbyterian Bookroom.

Brown, D. M. (2000). Freedom From or Freedom For?: Religion as a Case Study in Defining the Content of Charter Rights. *University of British Columbia Law Review, 33*, 551-615.

Brown, M. W. (1999). Christmas Trees, Carols and Santa Claus: the Dichotomy of the First Amendment in the Public Schools and How the Implementation of a Religion Policy Affected a Community. *Journal of Law and Education, 28*(2), 145-92.

Burke, K. (2004, 21 January). Howard's extra value spiel unpalatable for some. *Sydney Morning Herald*. Retrieved 21 January 2004 from http://www.smh.com.au/articles/ 2004/ 01/20/1074360766187.html

Burns, J. A. (1908). Schools. In C. G. Herbermann [and others] (Eds.), *The Catholic Encyclopedia (1907-1912)* (n.p.). New York: R. Appleton.

Chaplin, J. (2000). Beyond Liberal Restraint: Defending Religiously-Based Arguments in Law and Public Policy. *University of British Columbia Law Review, 33*, 617-646.

Chouinard, V. (1994). Geography, law and legal struggles: which ways ahead? *Progress in Human Geography, 18*(4), 415-440.

Christiano, K. J. (2000). Church and State in Institutional Flux: Canada and the United States. In D. Lyon & M. V. Die (Eds.), *Rethinking Church, State, and Modernity: Canada Between Europe and America* (pp. 69-89). Toronto: University of Toronto Press.

Church, R. L. (1976). *Education in the United States*. New York: Free Press.

Clark, G. L. (1981). Law, the State, and the Spatial Integration of the United States. *Environment and Planning A, 13*, 1197-1232.

Clark, G. L. (1985). *Judges and the Cities: Interpreting Local Autonomy*. Chicago: University of Chicago Press.

Clark, L. (Ed.). (1968). *The Manitoba School Question: Majority Rule or Minority Rights?* Toronto: Copp Clark.

Cohen, S. (1980). *Folk Devils & Moral Panics: The Creation of the Mods and Rockers*. Oxford: Basil Blackwell.

Collins, D. C. A. & Blomley, N. K. (2003). Private Needs and Public Space: Politics, Poverty, and Anti-Panhandling By-Laws in Canadian Cities. In Law Commission of Canada (Ed.), *New Perspectives on the Public-Private Divide* (pp. 40-67). Vancouver: UBC Press.

Collins, D. C. A. & Kearns, R. A. (2001). Under Curfew and Under Siege? Legal Geographies of Young People. *Geoforum, 32*, 389-403.

Conkin, P. K. (1998). *When All the Gods Trembled: Darwinism, Scopes, and American Intellectuals*. Lanham, MD: Rowman & Littlefied Publishers.

Conkle, D. O. (2000). The Path of American Religious Liberty: From the Original Theology to Formal Neutrality and an Uncertain Future. *Indiana Law Journal, 75*, 1-36.

Cooper, D. (1998). *Governing Out of Order: Space Law and the Politics of Belonging*. London: Rivers Oram Press.

Cresswell, T. (1996). *In Place/Out of Place: Geography, Ideology, and Transgression*. Minnesota: University of Minnesota Press.

Darian-Smith, E. (1999). *Bridging Divides: The Channel Tunnel and English Legal Identity in the New Europe*. Berkeley: University of California Press.

Davis, D. S. (1993). Ironic Encounter: African Americans, Jews, and the Church-State Relationship. *Catholic University Law Review, 43*, 109-141.

Dawkins, R. (1995). *River Out of Eden: A Darwinian View of Life*. New York: Basic Books.

Dawkins, R. (2001, 30 December). *Children Must Choose Their Own Beliefs: An Open Letter to the Secretary of State [U.K.]*. Retrieved 30 December 2001, from http://observer.guardian.co.uk/comment/story/0,6903,625743,00.html

Dawkins, R. (2002, March 18). Young Earth Creationists teach bad science and worse religion. *Daily Telegraph*. Retrieved 2 April 2002, from http://www.world-of-dawkins.com/Media/2002-03-18badscience.shtml

Delaney, D. (1998). *Race, Place & the Law, 1836-1948*. Austin: University of Texas Press.

Delaney, D. (2000). Of Minds and Bodies and the Legal-Spatial Constitution of Sanctuary. *Historical Geography, 28*, 25-40.

Delaney, D. (2001). The Boundaries of Responsibility: Interpretations of Geography in the School Desegregation Cases. In N. Blomley, D. Delaney, & R. T. Ford (Eds.), *The Legal Geographies Reader: Law, Power and Space* (pp. 54-68). Oxford: Blackwell Publishers.

Delaney, D. (2002). Beyond the Word: Law as a Thing of this World. In J. Holder & C. Harrison (Eds.), *Current Legal Issues Vol. 5: Law and Geography* (pp. 67-83). Oxford: Oxford University Press.

Delaney, D., Ford, R. T., & Blomley, N. (2001). Preface: Where is Law? In N. Blomley, D. Delaney, & R. T. Ford (Eds.), *The Legal Geographies Reader: Law, Power and Space* (pp. xiii-xxii). Oxford: Blackwell Publishers.

Dickinson, G. M., & Mackay, A. W. (Eds.). (1989). *Rights, Freedoms and the Education System in Canada: Cases and Materials*. Toronto: Emond Montgomery Publications.

Doerr, E., & Menendez, A. J. (1991). *Church Schools & Public Money: The Politics of Parochiaid*. Buffalo, NY: Prometheus Books.

Drakeman, D. L. (1991). *Church-State Constitutional Issues: Making Sense of the Establishment Clause*. New York: Greenwood Press.

Dworkin, R. (1986). *Law's Empire*. Cambridge, MA: Belknap Press.

Egerton, G. (2000). Trudeau, God, and the Canadian Constitution: Religion, Human Rights, and Government Authority in the Making of the 1982 Constitution. In D. Lyon & M. V. Die (Eds.), *Rethinking Church, State, and Modernity: Canada Between Europe and America* (pp. 90-112). Toronto: University of Toronto Press.

Elshtain, J. B. (1981). *Public Man, Private Woman*. Princeton: Princeton University Press.

Ewick, P., & Silbey, S. S. (1998). *The Common Place of Law: Stories from Everyday Life*. Chicago: Chicago University Press.

Feldman, S. M. (2000). A Christian America and the Separation of Church and State. In S. M. Feldman (Ed.), *Law and Religion: A Critical Anthology* (pp. 261-277). New York: New York University Press.

Fitzpatrick, P. (1992). *The Mythology of Modern Law*. London: Routledge.

Flast, F. (1992). Theocracy versus Democracy in the Empire State: Three Decades of Church-State Entanglement in the Schools of New York. In A. Must (Ed.), *Why We Still Need Public Schools: Church/State Relations, and Visions of Democracy* (pp. 163-186). New York: Prometheus Books.

Ford, R. T. (1999). Law's Territory (A History of Jurisdiction). *Michigan Law Review, 97*, 843-930.

Ford, R. T. (2001). The Boundaries of Race: Political Geography in Legal Analysis. In N. Blomley, D. Delaney, & R. T. Ford (Eds.), *The Legal Geographies Reader: Law, Power and Space* (pp. 87-104). Oxford: Blackwell Publishers.

Forest, B. (2000). Placing the Law in Geography. *Historical Geography, 28*, 5-12.

Foucault, M. (1977). *Discipline and Punish: The Birth of the Prison.* New York: Pantheon Books.

Foucher, P. (1985). Constitutional Language Rights of Official-Language Minorities in Canada. In G. M. Dickinson & A. W. Mackay (Eds.) (1989), *Rights, Freedoms and the Education System in Canada: Cases and Materials* (pp. 95-108). Toronto: Emond Montgomery Publications.

Fraser, J. W. (1999). *Between Church and State: Religion and Public Education in a Multicultural America*. New York: St. Martin's Press.

Frug, G. E. (1980). The City as a Legal Concept. *Harvard Law Review, 93*(6), 1057-154.

Gabel, P., & Harris, P. (1982/83). Building Power and Breaking Images: Critical Legal Theory and the Practice of Law. *Review of Law and Social Change, XI*, 369-411.

Gaddy, B. B., Robert, T. W. H., & Marzano, J. (1996). *School Wars: Resolving Our Conflicts Over Religion and Values*. San Francisco: Jossey-Bass Publishers.

Ginger, R. (1958). *Six Days or Forever? Tennessee v. John Thomas Scopes*. London: Oxford University Press.

Gould, S. J. (1999). *Rocks of Ages: Science and Religion in the Fullness of Life*. New York: Ballantine Publishing Group.

Greenhouse, C. J., Yngvesson, B., & Engel, D. M. (1994). *Law and Community in Three American Towns*. Ithaca: Cornell University Press.

Gregor, A., & Wilson, K. (1983). *History of Education in Manitoba I: Red River to 1897*. Winnipeg: University of Manitoba.

Gunn, T. J. (1992). Applying Coercion: The Latest Test of Establishment. In A. Must (Ed.), *Why We Still Need Public Schools: Church/State Relations, and Visions of Democracy* (pp. 70-92). New York: Prometheus Books.

Habermas, J. (1989). *The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society* (T. Burger with F. Lawrence, Trans.). Cambridge, MA: MIT Press.

Hill, M. & Tisdall, K. (1997). *Children and Society*. London: Longman.

Holder, J., & Harrison, C. (2002). Connecting Law and Geography. In J. Holder & C. Harrison (Eds.), *Current Legal Issues Vol. 5: Law and Geography* (pp. 3-16). Oxford: Oxford University Press.

Hope Commission (1950). *Report of the Royal Commission on Education in Ontario*. Toronto: Johnston.

Horowitz, M. J. (1982). Comments: The History of the Public/Private Distinction. *University of Pennsylvania Law Review, 130*(6), 1423-1428.

Hunter, I. (1996). Assembling the School. In A. Barry, T. Osborne, & N. Rose (Eds.), *Foucault and Political Reason: Liberalism, Neoliberalism and Rationalities of Government* (pp. 143-166). Chicago: University of Chicago Press.

Hunter, J. D. (1991). *Culture Wars: The Struggle to Define America*. New York: Basic Books.

Hutchinson, A. C., & Petter, A. (1988). Private Rights/Public Wrongs: The Liberal Lie of the Charter. *University of Toronto Law Journal, 38*, 278-297.

Jeffries, J. C., & Ryan, J. E. (2001). A Political History of the Establishment Clause. *Michigan Law Review, 100*, 279-370.

Kearns, R. A. & Collins, D. C. A. (2003). Crossing Roads, Crossing Boundaries: Autonomy, Authority and Risk in a Child Pedestrian Safety Initiative. *Space and Polity, 7*(2), 193-212.

Keller, S. (2000). Religion and Normative Education in the Light of Current Law. *Educational Policy, 14*(5), 564-581.

Kennedy, D. (1982). The Stages of the Decline of the Public/Private Distinction. *University of Pennsylvania Law Review, 130*(6), 1349-1357.

Klare, K. E. (1982). The Public/Private Distinction in Labor Law. *University of Pennsylvania Law Review, 130*(6), 1358-1422.

Klarman, M. J. (1996). Rethinking the Civil Rights and Civil Liberties Revolutions. *Virginia Law Review, 82*, 1-67.

Larson, E. J. (1997). *Summer for the Gods: The Scopes Trial and America's Continuing Debate Over Science and Religion.* New York: Basic Books.

Laycock, D. (1986). 'Nonpreferential' Aid to Religion: A False Claim About Original Intent. *William & Mary Law Review, 27*, 875-923.

Leacy, F. H. (Ed.). (1983). *Historical Statistics of Canada.* Ottawa: Statistics Canada & Social Science Federation of Canada.

Lerner, L. S. (2000). Good and Bad Science in US Schools. *Nature, 407*, 287-290.

Lupel, M. R. (1974). *The Roman Catholic Church and the North-West School Question: A Study in Church-State Relations in Western Canada, 1875-1905.* Toronto: University of Toronto Press.

Mackay Committee (1969). *Religious Information and Moral Development: The Report of the Committee on Religious Education in the Public Schools of the Province of Ontario.* Toronto: Ontario Ministry of Education.

Mackay, A. W. (1984). *Education Law in Canada.* Toronto: Emond Montgomery Publications.

Mackey, J. (1967). *The Making of a State Education System: The Passing of the New Zealand Education Act, 1877.* London: Geoffrey Chapman.

MacKlem, P. (1990). Property, Status and Workplace Organizing. *University of Toronto Law Journal, 40*, 74-108.

Magnet, J. (1982). Minority-Language Educational Rights. In G. M. Dickinson & A. W. Mackay (Eds.) (1989), *Rights, Freedoms and the Education System in Canada: Cases and Materials* (pp. 92-94). Toronto: Emond Montgomery Publications.

McCarthy, M. (2000). Religion and Education: Whither the Establishment Clause? *Indiana Law Journal, 75*, 123-165.

McCarthy, M. (2001). Religious Influences in Public Education: Political and Judicial Developments. *The Educational Forum, 65*(3), 244-52.

McClay, W. M. (2000). Two Concepts of Secularism. *Wilson Quarterly, 24*(3), 54-71.

McConnell, M. W. (2000). Neutrality, Separation and Accommodation: Tensions in American First Amendment Doctrine. In R. J. Ahdar (Ed.), *Law and Religion* (pp. 63-79). Dartmouth: Ashgate Publishing.

McRobbie, A. (1994). The Moral Panic in the Age of the Postmodern Mass Media. In A. McRobbie (Ed.), *Postmodernism and Popular Culture* (pp. 198-219). London: Routledge.

Merrett, C. D. (1999). Culture Wars and National Education Standards: Scale and the Struggle over Social Reproduction. *Professional Geographer, 51*(4), 598-609.

Mill, J. S. (1859/1975). *On Liberty*. New York: W.W. Norton.

Mitchell, D. (1995). The End of Public Space? People's Park, Definitions of Public, and Democracy. *Annals of the Association of American Geographers, 85*(1), 108-133.

Mitchell, D. (1996). Political Violence, Order, and the Legal Construction of Public Space: Power and the Public Forum Doctrine. *Urban Geography, 17*(2), 152-178.

Mitchell, D. (1997). The Annihilation of Space by Law: The Roots and Implications of Anti-Homeless Laws in the United States. *Antipode, 29*(3), 303-335.

Moore, R. L. (2000). Bible Reading and Nonsectarian Schooling: The Failure of Nineteenth-Century Public Education. *The Journal of American History, 86*(4), 1581-1599.

Mott, K. F. (1983). The Supreme Court and the Establishment Clause: From Separation to Accommodation and Beyond. *Journal of Law & Education, 14*(2), 111-145.

National Academy of Sciences, Working Group on Working Group on Teaching Evolution. (1998). *Teaching about Evolution and the Nature of Science*. Washington, D.C.: National Academy Press.

Nedelsky, J. (1990). Law, Boundaries and the Bounded Self. *Representations, 30*, 162-189.

Nevins, J. (2000). The Law of the Land: Local-National Dialectic and the Making of the United States-Mexico Boundary in Southern California. *Historical Geography, 28*, 41-60.

Olsen, F. E. (1983). The Family and the Market: A Study of Ideology and Legal Reform. *Harvard Law Review, 96*(7), 1497-1578.

Partington, G. (1990). Moral Education in Some English-Speaking Societies: Antinomian and Fundamentalist Challenges. *Journal of Moral Education, 19*(3), 182-191.

Pateman, C. (1989). *The Disorder of Women: Democracy, Feminism and Political Theory*. Cambridge U.K.: Polity Press.

Poulter, S. (1996). The Religious Education Provisions of England's Education Reform Act 1988. *Journal of Law and Education, 19*(4), 499-519.

Pue, W. W. (1990). Wrestling with Law: (Geographical) Specificity vs. (Legal) Abstraction. *Urban Geography, 11*(6), 566-585.

Pue, W. W. (1998). Lawyering for a fragmented world: professionalism after God (Editorial). *International Journal of the Legal Profession, 5*(2/3), 125-140.

Pue, W. W. (1999). British masculinities, Canadian Lawyers: Canadian Legal Education, 1900-1930. *Law in Context, 16*(1), 80-122.

Rabinove, S. (1992). Religious Liberty and Church-State Separation: Why Should We Care? In A. Must (Ed.), *Why We Still Need Public Schools: Church/State Relations, and Visions of Democracy* (pp. 19-26). New York: Prometheus Books.

Ravitch, F. S. (1999). *School Prayer and Discrimination: The Civil Rights of Religious Minorities and Dissenters*. Boston: Northeastern University Press.

Ravitch, F. S. (2000). A Crack in the Wall: Pluralism, Prayer, and Pain in the Public Schools. In S. M. Feldman (Ed.), *Law and Religion: A Critical Anthology* (pp. 296-314). New York: New York University Press.

Santos, B. de Sousa. (1987). Law: A Map of Misreading. Toward a Postmodern Conception of Law. *Journal of Law and Society, 14*(3), 279-302.

Selznick, P. (2003). 'Law in Context' Revisited. *Journal of Law and Society, 30*(2), 177-86.

Schnell, R. L. (1979). Childhood as Ideology: A Reinterpretation of the Common School. *Journal of Educational Studies, 27*, 7-23.

Schragger, R. C. (2004). The Role of the Local in the Doctrine and Discourse of Religious Liberty. *Harvard Law Review*, 117, 1810-1892.

Schulz, W. F. (1992). Prayer in School: Why it Does Religion No Favor. In A. Must (Ed.), *Why We Still Need Public Schools: Church/State Relations, and Visions of Democracy* (pp. 106-113). New York: Prometheus Books.

Scott, E. C. (1992). The Evolution of Creationism. In A. Must (Ed.), ***Why We Still Need Public Schools: Church/State Relations, and Visions of Democracy*** (pp. 139-155). New York: Prometheus Books.

Simon, H. (1996). Municipal Regulation of the Homeless in Public Space. In J. Baumohl (Ed.), *Homelessness in America* (pp. 149-159). Phoenix: Oryx Press.

Smith, W. J., & Foster, W. F. (2000). Religion and Education in Canada Part I: The Traditional Framework. *Education & Law Journal, 10*, 393-447.

Smith, W. J., & Foster, W. F. (2001). Religion and Education in Canada Part III: An Analysis of Provincial Legislation. *Education & Law Journal, 11*, 203-261.

Soja, E. W. (1985). The Spatiality of Social Life: Towards a Transformative Retheorisation. In D. Gregory & J. Urry (Eds.), *Social Relations and Spatial Structures* (pp. 90-127). Hampshire: MacMillan.

Sussel, T. A. (1995). *Canada's Legal Revolution: Public Education, the Charter, and Human Rights*. Toronto: Emond Montgomery Publications.

Sweet, L. (1997). *The Controversial Issue of Religion in Canada's Schools*. Toronto: McClelland & Stewart.

Tamney, J. B. (1994). Conservative government and support for the religious institution: religious education in English schools. *British Journal of Sociology, 45*(2), 195-210.

Tanford, J. A. (1995). The Death of Graduation Prayer: The Parrot Sketch Redux. *Journal of Law & Education, 24*(3), 423-455.

Thayer, V. T. (1947). *Religion in Public Education*. New York: Viking Press.

Thiemann, R. F. (2000). The Constitutional Tradition: A Perplexing Legacy. In S. M. Feldman (Ed.), *Law and Religion: A Critical Anthology* (pp. 345-372). New York and London: New York University Press.

Tully, J. (1995). *Strange Multiplicity: Constitutionalism in an Age of Diversity*. Cambridge, U.K.: Cambridge University Press.

Tushnet, M. (1988). *Red, White and Blue: A Critical Analysis of Constitutional Law*. Cambridge, MA: Harvard University Press.

Twining, W. (2000). *Globalisation and Legal Theory*. London: Butterworths.

United States Bureau of the Census (1976). *The Statistical History of the United States*. New York: Basic Books.

Valentine, G. (1996). Angels and devils: Moral landscapes of childhood. *Environment and Planning D: Society and Space, 14*, 581-599.

Waldron, J. (1991). Homelessness and the Issue of Freedom. *UCLA Law Review, 39*, 295-324.

Walzer, M. (1984). Liberalism and the Art of Separation. *Political Theory, 12*(3), 315-330.

Weintraub, J. (1997). The Theory and Politics of the Public/Private Distinction. In J. Weintraub & K. Kumar (Eds.), *Public and Private in Thought and Practice* (pp. 1-42). Chicago: University of Chicago Press.

Wood, J. E. (1992). The Battle over 'Secular Humanism' in the Public Schools. In A. Must (Ed.), *Why We Still Need Public Schools: Church/State Relations, and Visions of Democracy* (pp. 119-138). New York: Prometheus Books.

Yamane, D. (1996). The Battle of the Books at Berkeley: In Search of the Culture Wars in Debates Over Multiculturalism. In J. L. Nolan (Ed.), *The American Culture Wars: Current Contests and Future Prospects* (pp. 3-34). Charlottesville: University Press of Virginia.

Young, I. M. (1990). *Justice and the Politics of Difference*. Princeton, NJ: Princeton University Press.